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INDIAN ENERGY AND ENERGY EFFICIENCY

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

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INDIAN ENERGY AND ENERGY EFFICIENCY

THURSDAY, OCTOBER 22, 2009

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 2:15 p.m. in room 628, Dirksen Senate Office Building, Hon. Byron L. Dorgan, Chairman of the Committee, presiding.

OPENING STATEMENT OF HON. BYRON L. DORGAN, U.S. SENATOR FROM NORTH DAKOTA

The CHAIRMAN. Let me thank my colleagues for dispensing of those two items of business. And let me say, as we begin this process once again, this Committee is not going to be in the business of trying to recognize what is an Indian tribe or who belongs to an Indian tribe or who doesn't, or who should we recognize as a tribe. That is not something I think we should routinely do. These two cases I think were unique.

And now I will close the business meeting formally, and we will open the hearing. Let me describe, if I might, the purpose of the hearing today.

This hearing is about Indian Energy and Indian Energy Efficiency. Today's hearing follows up on an Indian energy hearing that we held on May 1st, 2008. And at that hearing, the Committee received testimony on the obstacles that Indian tribes face in developing energy resources. We are now focused on trying to find solutions to those problems. Following the May 1st hearing, the Committee met with tribes from across Indian Country on energy issues, worked with the Administration to try to improve implementation of Indian programs, and now we are holding this hearing today.

Vice President Barrasso—excuse me, Vice Chairman——

[Laughter.]

The CHAIRMAN. I want to elevate my colleague here.

Vice Chairman Barrasso and I released an Indian Energy and Energy Efficiency concept paper. We also announced a series of Indian energy roundtables to discuss the concept paper. Our staff have conducted eight roundtables throughout Indian Country. We have done that because we believe consultation is the hallmark of this Committee in our work with the tribal governments around the Country.

The energy roundtables were designed to engage Indian leaders, tribal members and their energy partners to discuss the concept

paper. This hearing is another step. The concept paper identified three major obstacles: number one, antiquated laws and cumbersome regulations; number two, the lack of tribal access to the transmission grid; and number three, the lack of available financing and incentives for investment for Indian tribal energy projects.

As I said before, there is substantial energy available on Indian lands across this Country. Too little of it is being developed because there are cumbersome procedures and all kinds of roadblocks. We want to find a way to unlock the opportunity. Nowhere in this Country is there a greater need for the jobs that will come from substantial and robust economic development from these energy resources.

And yet, what we have discovered is, in our experience working with the Three Affiliated Tribes' Reservation in North Dakota, a 49-step process. You want to get a permit to drill an oil well on an Indian reservation, it is going to take you much, much, much, much longer than if you want to get a permit to drill anywhere else in my State. And I have shown the map previously of this circumstance. The circumstance has changed for the better, but that map shows all those little areas where wells have been dug, and that middle part is the Indian reservation. You will see there is much, much more activity north and south and west and much less activity on the Indian reservation.

Why? Because there is less oil on the reservation? No, not at all. It is much harder to drill there, because you have to go through a long process with the Interior Department, I believe four separate agencies in the Interior Department, to get a permit to drill for oil.

It ought to be as easy to get a permit to drill for oil on that Indian reservation as it is to the west of it, the north of it and the south of it. That is what we need to fix. Now, Chairman Levings is one of the witnesses today, and he very much, for his tribe, wants robust development, just as all of his neighbors do around him. That was almost blank at the first part of this year on the Indian reservation. We are making a little progress. But there is much more to do.

So let me say to my colleague, Senator Barrasso, I think the paper that we have put out, it is a working paper, it has been a good start. I look forward to the witnesses today at this hearing to talk about their view of this and what we should do to proceed to move forward.

Senator Barrasso, do you want to comment?

STATEMENT OF HON. JOHN BARRASSO, U.S. SENATOR FROM WYOMING

Senator BARRASSO. I would like to do that, Mr. Chairman, and I want to thank you for holding this very important hearing on one of really this Committee's highest priorities. Earlier this year, I met with the Joint Business Council of the Eastern Shoshone and Northern Arapaho Tribes in Fort Washakee, Wyoming. Tribal leaders emphasized to me and to our staff, our combined staff, how important energy development is to the economy of the Wind River Indian Reservation.

Wyoming, as is North Dakota, is very blessed with abundant resources, including energy resources, that this Country desperately needs. This Committee can address key issues that will improve the Northern Arapaho and the Eastern Shoshone Tribes' ability to develop their energy resources, just as you are dealing with in North Dakota and in places around the Country.

This will be win-win situation, improving economic development on the reservation and supplying important resources, Mr. Chairman, to the Nation. As you know, at this Committee's Indian energy round tables, tribes and individuals have made it clear that increasing Indian energy development is critical to improving the economies on our reservations.

During the roundtables, the subject of NEPA paperwork was discussed again and again. I am referring, of course, to the National Environmental Policy Act. It is my understanding that Congress intended NEPA to apply to decisions relating to use on Federal public lands. Since then, Federal courts have interpreted NEPA to apply to decisions by the Secretary regarding Indian lands. We have been hearing that NEPA impacts the tribes' goals to develop their trust resources, including their energy resources.

So it is my hope, Mr. Chairman, as it is yours, that we can address this, that we can address those many impediments that you have mentioned that prevents development on Indian lands. With that said, I want to thank our witnesses for being here. Many have traveled long distances. I look forward to the hearing today.

The CHAIRMAN. Senator Barrasso, thank you very much.

I want to recognize other Senators for brief comments. Senator Cantwell?

STATEMENT OF HON. MARIA CANTWELL, U.S. SENATOR FROM WASHINGTON

Senator CANTWELL. Thank you, Mr. Chairman. Thank you for calling this important hearing today.

It is important that Indian Country be part of the debate on the need for a greener energy economy. I appreciate your efforts to construct an Indian energy bill that will maximize the efforts of tribes across our Country.

I would also like to thank Chairman Ralph Sampson of the Yakama Nation for traveling all the way to Washington to give testimony here today. I would like to thank the rest of the witnesses.

The Yakama Nation Reservation covers 1.3 million aces and contains numerous possible sources for renewable energy. The tribe is exploring biomass, wind, hydro resources and considering the potential for various renewable energy projects. The nation has recently started its own public utility district, and in order to produce and sell power to the reservation, making this work for the Yakama Nation.

Indian Country has the potential to provide a huge amount of renewable resources. That potential needs to be tapped. At least 77 reservations have the potential for wind energy production, and many others utilize biomass and solar. Nationally, 14 percent of Indian households on reservations have no access to electricity. This clearly must change.

These renewable resources hold the potential to both raise the living standards and the quality of life for those Indian households currently without access to electricity and also to contribute to our broader national energy and climate policies. The development of renewable resources holds the key, I believe, to a green economy and sources of millions of jobs for Americans. I commend Chairman Sampson and the Yakama Nation for their leadership and foresight on this issue. I look forward to hearing his testimony and that of the other witnesses, and working with you, Mr. Chairman, on moving legislation from this Committee.

Thank you.

The CHAIRMAN. Thank you very much.

Senator Murkowski?

STATEMENT OF HON. LISA MURKOWSKI, U.S. SENATOR FROM ALASKA

Senator MURKOWSKI. Thank you, Mr. Chairman. I appreciate the opportunity to say a few comments today and for your leadership and yours, Senator Barrasso, on this issue. When we passed the Energy Policy Act back in 2005, I think we were all happy that it contained the provision in it that it did, Title V, which created the offices within Department of Interior and Energy that was designed to help Natives and energy development. The provisions that authorized up to $2 billion in loan guarantees for both fossil and renewable energy development on Native lands, these were for reservations both on the lower 48 and Alaska Native Corporation lands up in Alaska.

But I have been disappointed in how the Act has been implemented thus far. While Interior does have an Indian Energy and Economic Development Office, the Office hasn't encouraged tribes to enter into mineral leases and other energy development agreements. At Energy, the Office of Indian Energy Policy was established, but then wasn't funded for a period of years. While the Office did provide a few grants, DOE still has not implemented its Indian Loan Guaranty program.

We recognize, I think, that the aid to Indians and Natives nationwide to help them develop the likely, very huge energy resources that are on their land, whether it is oil or gas or coal, oil shale, you have the wind, solar, geothermal, it is just about everything can be very helpful. But the aid that has been made available has been not only underwhelming but almost non-existent. I certainly appreciate and support the efforts to try to remedy the deficiencies that we have discovered since that Energy Act in 2005, whether we do it as a standalone bill or as part of additions to an energy bill that has already been considered by the Energy Committee and is waiting consideration by the Floor.

There are some things that you have laid forth, Mr. Chairman, in the paper that you have put forth. I support many of them, such as the issue of transmitting siting, making sure that our tribes have more ability to influence these transmission siting decisions across the reservations. Many of the other provisions I certainly support.

I do want to make sure that the provisions extend aid to Natives and their Native corporation representatives in Alaska. I think

that should be easy to accomplish and we want to work with you on that.

I have more extended comments that I want to include in the record. I probably won't be able to stay for the whole hearing, because I am heading off to our largest convention of Alaska Natives, which is being held tomorrow morning. So if you see me leave early, it is not because of lack of interest in this subject. We want to work with you and support you.

Thank you, Mr. Chairman.

[The prepared statement of Senator Murkowski follows:]

PREPARED STATEMENT OF HON. LISA MURKOWSKI, U.S. SENATOR FROM ALASKA

In 2005 when we worked to pass the Energy Policy Act, I believe we were both happy that the bill contain in Title V, provisions that created offices inside the Departments of Interior and Energy intended to help Natives in energy development on Native lands—reservations in the Lower 48 and on Alaska Native corporation lands in Alaska.

I have been very disappointed with how the Act has been implemented so far. While Interior does not have an Indian Energy and Economic Development Office, the Office has not really encouraged tribes to enter into mineral leases and other energy development agreements.

At Energy, the Office of Indian Energy Policy was established, but not funded for several years. While the office did provide a few grants this past year, DoE still has not implemented its Indian loan guarantee program.

The aid to Indians and Natives nationwide to help them develop the likely huge energy resources on their lands: oil, gas, coal, and oil share, and wind, solar, geothermal, biomass and in some cases hydro, has been not only underwhelming, but almost non-existent.

I certainly support your efforts to try to remedy the deficiencies discovered since 2005, either in a standalone bill or as part of additions to an energy bill that has already been reported by the Energy Committee and is still awaiting floor consideration.

There are few complexities. Given that we have already moved in Energy to separate part of the loan guarantee programs from DoE and give them a new Clean Energy Development Administration, it is hard to know how exactly to mesh these changes until we see if CEDA is going to pass, or if the loan program is going to remain at DoE.

I personally would like to see more grant aid available for energy development on reservation and Native corporation lands. I agree that generating capital to finance and build energy projects is often hard on Indian lands since the tax incentives we generally provide to the private sector for energy development don't translate well in Indian Country and in Alaska.

Obviously finding the money to pay for those grants is the big program, since a template for the grants was approved in 2007 in the Energy Independence and Security Act when we created the Renewable Energy Deployment Grant program. We just haven't funded it, either through appropriations or in last winter's stimulus bill, or returned it to its intended national focus. Maybe the Renewable Electricity Standard that is pending approval in the energy bill may help slightly. But I don't think it will be the full answer.

I strongly support giving Indian tribes more abilities to influence transmission siting decisions across reservations. And I support many of the other suggestions in your' and Senator Barrasso's concept paper this summer. I do want to make sure that the provisions extend such aid to Natives and their Native corporation representatives in Alaska, but that should be easy to accomplish. I also want to make sure they do not create logistic problems for Indian allotees in the Lower 48 given the terms of the existing Indian Mineral Development Act.

I thank the Chairman and the Vice Chairman for your hard work on these issues. I will leave early to catch a flight to Alaska to address the annual Alaska Federation of Natives, our largest gathering of Alaska Natives. So if you see me leave early, it is not because of a lack of interest in this subject. I look forward to working with you on these important issues. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Senator Udall?

STATEMENT OF HON. TOM UDALL,
U.S. SENATOR FROM NEW MEXICO

Senator UDALL. Thank you very much, Mr. Chairman, and thanks for holding this important hearing.

Tribal lands comprise approximately 5 percent of the Nation's land base and contain 10 percent of the Nation's energy resources. They also provide tremendous promise to help the United States meet its renewable energy goals. According to DOE, tribal wind potential can provide 20 percent of the installed electric power that was generated in the United States in 2004. Tribal solar energy potential can provide 4.5 times the installed electric power that was generated in the United States in 2004.

In addition, the land of Indian tribes contain tremendous amounts of sustainable biomass material. But really, the point here is tribes need the assistance to do this and to move forward with development. We made an attempt, as Senator Murkowski has said, in Title V of the 2005 Energy Bill. But what we have done has been inadequate. A title was established at the Department of Interior and Department of Energy to assist tribes in energy development, but the mandate has only been partially implemented. DOI set up an Office of Indian Energy and Economic Development to provide technical assistance and loan guaranties to tribes. The loan guaranty program is greatly under-funded. The Department of Energy set up an Office of Indian Energy Policy and Programs to assist tribes, but the office was not funded for two years, and has only had a director with no staff.

Also, none of the Recovery Act money was dedicated to these types of tribal projects. So we need to do better by the tribes in terms of assisting them with the development of their energy resources.

Thank you, Mr. Chairman. I yield back.

The CHAIRMAN. Senator Udall, thank you.

Senator Johanns?

STATEMENT OF HON. MIKE JOHANNS,
U.S. SENATOR FROM NEBRASKA

Senator JOHANNS. Mr. Chairman, thank you very much. Let me just say, as that map was displayed, I think that tells the story. Obviously, something is not working here in a rather magnificent way. You have all of this development all around the Indian reservation, and yet there on the reservation, the development does not occur.

Bottom line is, we want development to occur. The tribes want development to occur. We are in agreement on that. I think we are also in agreement that it has to be the whole host of possibilities, not just drilling for fossil fuels, wind and solar, and maybe nuclear, a whole host of opportunities exist if we can somehow figure out the right combination here.

I must admit, I am becoming more and more convinced that it really is all about implementation and how we somehow overcome the roadblocks that exist, whether they are financial, whether they are just part of the culture of the process that you have to go through. So my hope is today that as you testify, and I thank the witnesses for being here, that maybe you give us a little bit of in-

sight on where are those speed bumps, where are the absolute roadblocks, where is it impossible to move forward, and see if there is something that we can do in a legislative way that will help with that implementation problem.

Let me just wrap up and say to the Chairman and the Ranking Member, I really do appreciate their leadership in bringing this forward. I think this is such a key economic opportunity. Those who know my background know that I am not a fan of gambling. It is too dependent on the economy. When things are going well, there is a financial stream there. When things aren't going well from an economic standpoint, people lose their jobs. They are out of work. At a time when they most need that employment, that employment is in jeopardy.

So I am hoping that this is an opportunity for us to try to improve economic circumstances on our reservations across the Country. Thank you.

The CHAIRMAN. Thank you very much.

The Senator from Minnesota?

STATEMENT OF HON. AL FRANKEN,
U.S. SENATOR FROM MINNESOTA

Senator FRANKEN. Thank you, Mr. Chairman, thank you, Vice Chair Barrasso, for holding this very important hearing.

I want to thank the witnesses for coming, and I want to apologize. I have to leave in 10 minutes for a meeting on health care.

Back at home, a number of our tribes have been implementing advanced energy strategies. I want to thank the Chairman, who has been very supportive of these initiatives in his other roles as Chairman of Energy and Water Appropriations, of that subcommittee. One example can be found on the White Earth Reservation. The White Earth Tribe has developed a local alternative energy initiative. They have worked out agreements with some of our rural electric cooperatives and farmers in the region. The result is a 20 kilowatt wind turbine at Waubun, Minnesota, and they have plans to expand production and feed energy into the grid.

Part of White Earth's integrated strategy includes reducing energy consumption through conservation and distributive energy projects. They have also started a solar training program on the reservation to train members in the use of solar power installations in their homes.

But this isn't just isolated in Minnesota to the White Earth Tribe. Across Minnesota, tribes are working with local municipalities to develop regional as well as tribal energy plans. I am sure the folks at White Earth and other Minnesota tribes would love to highlight their work and provide useful insights like you, maybe at a roundtable in Minnesota. But that is why we are here today, to figure out ways to assist tribes in developing and producing their own energy. This is critical for so many reasons. A few weeks ago I attended a tribal summit in Shakopee, Minnesota. Over 23 tribes came together to discuss ways in which Indian Country can finally realize self-determination. Most of the summit focused on ways to rebuild what attendees referred to as the infrastructure of nationhood. I think that is a very apt phrase, the infrastructure of nation-

hood. I think we can all agree that energy is one of the primary ingredients of infrastructure.

I look forward to hearing from the panelists. My staff will remain here and take notes. I hope to get back from this meeting. We look forward to hearing from you on how we can best promote tribal energy and how we can best remove barriers to the development of that energy.

In particular, I am interested in the panel's view on how to tweak our current energy laws to encourage more sustainable energy production, increase access to transmission lines, help tribes gain access to financing for clean energy projects. I look forward to working with both the Chair and the Vice Chair on this important legislation, and thank you again for calling the hearing, and thank you for your testimony.

The CHAIRMAN. Thank you very much.

We have four witnesses today. We appreciate your patience and appreciate very much your being here.

The first is the Honorable Marcus Levings, who is the Chairman of the Three Affiliated Tribes in North Dakota. He is also Secretary of the Council of Energy Resource Tribes Executive Board. The Council of Energy Resource Tribes was founded in 1975. They participated in the development of tribal provisions on the Indian Mineral Development Act of 1982 and the Energy Policy Act of 2005 and the Energy Independence and Security Act of 2007.

Chairman Levings has been deeply involved in energy production and a wide range of energy issues. He is a real leader on these issues and I appreciate his coming to Washington today. I was with Chairman Levings on Saturday on his reservation, where we did a groundbreaking for a health clinic that was promised to the tribe 60 years ago, when the Elbow Woods Hospital was submerged underwater as a result of the dams that were placed on the Missouri River. The Elbow Woods Hospital was gone, it was underwater. And it was promised that it would be replaced. Sixty years later, we had a groundbreaking for what will be a wonderful health care clinic. That is thanks to Chairman Levings' insistence and determination.

Mr. Chairman, thank you for being here. You may proceed.

STATEMENT OF HON. MARCUS LEVINGS, CHAIRMAN, THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION; SECRETARY, COUNCIL OF ENERGY RESOURCE TRIBES (CERT)

Mr. LEVINGS. Good afternoon, Chairman Dorgan, Vice Chairman Barrasso and members of the Committee on Indian Affairs. My name is Marcus Dominick Levings. My Hidatsa name is eh-Bah-Dah-Gish, White Headed Eagle. I am the elected tribal chairman of the Three Affiliated Tribes of the Fort Berthold Indian Reservation in North Dakota, with 11,000 duly enrolled members.

In June of 2009, I was elected Secretary of the Council of Energy Resource Tribes on behalf of the Three Affiliated Tribes and 57 member Indian tribes. I am pleased to submit for the Committee's consideration the following statement regarding energy development, environmental stewardship and job creation in Indian Country.

Today's hearing follows the May 2008 hearing entitled Indian Energy Development and no fewer than eight Indian energy roundtable to solicit the views and comments of Indian tribes on the committee's Indian energy concepts paper, formally issued in September. American Indian energy resources hold enormous potential to create tens of thousands of jobs, good-paying jobs, generate substantial revenue for the tribal owners and aid in development of tribal economies. The Three Affiliated Tribes and our mineral allottees reside on what is commonly known as the Bakken Shale clay. This mineral play has the potential to contribute vast amounts of crude oil and natural gas to the national economy, and will vastly improve the economic and quality of life to our enrolled members who have historically been one of the poorest populations in the state of North Dakota.

American Indian tribes in the lower 48 States, especially those in the Rocky Mountain West, own an enormous amount of energy resources. In addition to enormous amounts of non-renewable resources, primarily oil, natural gas, coal and coal-bed methane, Indian tribes have a significant development potential in renewable sources of energy, such as wind, solar, hydro, biomass, geothermal and others.

In September 2009, CERT submitted to the Committee its views and analysis of the May 2009 Indian Energy Concepts paper. Attached to this statement is a copy of those views and analysis. I would like to share a few of the issues that the Three Affiliated Tribes have with regard to the Indian Energy Concepts paper. In the interest of time, I will focus on just three of these issues.

First, the Three Affiliated Tribes have actively engaged our Federal energy industry partners to expedite the leasing and permitting practices that have thus far stymied efforts to fully develop the energy resources of the Fort Berthold Reservation. We are extremely grateful to Chairman Dorgan, along with Senator Conrad and Congressman Pomeroy, who have been instrumental in installing the virtual One Stop Shop to consolidate the current 49-step process it takes to develop mineral resources on Indian lands.

We have begun to see the benefits of this process. The regulatory and administrative burden upon mineral development on Fort Berthold caused considerable economic harm, as tribe and mineral allottees were unable to benefit fully from the period of high crude prices that we experienced not more than 12 months ago.

While we are grateful for the assistance of the Indian Affairs Committee, it is also imperative that such fixes to the leasing and permitting process on Indian lands also include all agencies that have a duty to the Indian trust beneficiaries. It is not just the Bureau of Indian Affairs that has a trust responsibility to our tribes and our enrolled members, but the entire Federal Government.

The Bureau of Land Management, the Environmental Protection Agency and others should also be placed in the one-stop shops, as they have a vital and important role in the development of trust minerals. It is not just t ability to drill an oil and gas well that is at issue, as Indian Country is subject to an enormous body of law and regulation that make it very difficult to develop without effective and timely interagency communication and cooperation. NEPA, the Clean Air Act, the Clean Water Act and other laws

make Indian energy development a costly and time-consuming endeavor that serves as the principal deterrent for much of the private industry to enter Indian Country.

Second, the lack of suitable infrastructure in Indian Country also has a tremendous negative impact on the ability to develop all our energy resources: oil, gas and renewable energy resources. The lack of suitable roads, electrical transmission lines and oil and gas gathering systems and pipelines creates an enormous economic barrier to our development.

It is imperative that the tribes, Congress and industry look to cost-effective solutions to allow the level of development that can only improve our overall natural energy resources. Too often, we have been forgotten when this Country's infrastructure is improved through existing Federal funding and are only encountered when Indian Country has a resource to offer the rest of the Nation. We are respectfully asking and reminding this Committee that Indian energy development must include as a base the improvement of the infrastructure in Indian Country that is so often taken for granted in the rest of the United States.

Finally, I would like to address the issue of adequate staffing in all agencies that have a role in development of Indian energy in Indian Country. It is too often the occurrence in Federal agencies that take a lead role, *i.e.,* the Bureau of Indian Affairs, to recruit, hire and promote individuals who do not have the education and/or experience in the area of energy development, particularly in the highly specialized area of Indian Country. Many of the bureaucratic delays and legal entanglements are caused by individuals who could not even fill a similar position in private industry. Yet we are forced to work with those individuals as the principal agents of our Federal trustee.

Often, our tribal members encounter those same individuals in training sessions where, given their title and responsibilities, should in fact be teaching the same courses. We cannot and should not be subject to the standard Federal merry-go-round where current and former Federal employees are merely promoted or transferred to important positions where their decisions impact the economic futures of Indian tribes and our allottees.

The Federal Government should have the same employment standards as the very industry which they are hired to regulate upon. The fiduciary duty of the Federal Government as our trustee demands no less.

Mr. Chairman, that concludes my prepared statement, and I again thank you for the opportunity to present the views of CERT. I would be happy to answer any questions you may have. [Phrase in native tongue.]

[The prepared statement of Mr. Levings follows:]

PREPARED STATEMENT OF HON. MARCUS LEVINGS, CHAIRMAN, THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION; SECRETARY, COUNCIL OF ENERGY RESOURCE TRIBES (CERT)

Good afternoon Chairman Dorgan, Vice Chairman Barrasso, and members of the Committee on Indian Affairs. Before addressing the issues of Indian Energy and Energy Efficiency, I want to thank you for your strong leadership in helping Indian tribes and their members meet the many challenges they face including health care, law enforcement, unemployment, and others.

Background on the Council of Energy Resource Tribes

I am Marcus Levings, Chairman of the Three Affiliated Tribes of the Fort Berthold Reservation in North Dakota. In June 2009 I was elected Secretary of the Council of Energy Resource Tribes (CERT). On behalf of the 57 member Indian tribes of CERT, I am pleased to submit for the Committee's consideration the following statement regarding energy development, environmental stewardship, and job creation in Indian Country.

CERT was founded in 1975 by tribal leaders when our country was in the midst of what was then known as the "Arab Oil Embargo," put in place by the Organization of Petroleum Exporting Countries in response to America's support for Israel in the 1973 Arab-Israeli War. The embargo caused higher prices for heating oil and gas and contributed to the economic recession that lasted for the ensuing 7 years.

Back then, our national leaders promised that we would "end our dependence on foreign oil" and return America to a position of unquestioned strength in the world. Nearly, 35 years later our dependence on foreign sources of energy has never been greater.

The core mission of CERT is to support member tribes enhance their management capabilities and prudent development of their energy resources to build sustainable economies and strong political institutions.

The Historic Role of the Committee in Energy Legislation

For many years, the Committee on Indian Affairs has recognized the important economic role of renewable and non-renewable energy resource development in Indian country.

Beginning in 1999, the Committee worked with the Indian Tribal Energy Network in conceptualizing and drafting what became *the Indian Tribal Energy Development and Self-Determination Act of 2005.* This comprehensive Indian energy law was included in the massive *Energy Policy Act of 2005.*

This was followed by the Committee's key role in fashioning Indian provisions in the *Energy Independence and Security Act of 2007,* as well as important Indian amendments that were included in energy legislation considered earlier this year by the Senate Energy and Natural Resources Committee. [1]

Today's hearing follows the May 2008 hearing entitled "Indian Energy Development," and no fewer than 8 Indian Energy Roundtables to solicit the views and comments of Indian tribes on the Committee's Indian Energy Concepts Paper formally issued in September.

The Economic Importance of Indian Energy Development

American Indian energy resources hold enormous potential to create tens of thousands of good-paying jobs, generate substantial revenue for the tribal owners, and aid in the development of tribal economies. An often-overlooked aspect of Indian energy is that it helps satisfy the American economy's need for a reliable energy supply. The Southern Ute Indian Tribe in southwest Colorado, for instance, produces 1 percent of the natural gas that is used by the American people and American business. In less than 20 years, the tribe's gas operations have evolved to be among the most sophisticated in the country and are managed by the various tribally-owned energy companies.

Based on information provided by the U.S. Department of the Interior's Office of Indian Energy and Economic Development (OIEED), in 2007 energy and mineral resources generated over $574 million in royalty revenue paid to individual Indians and tribes. Moreover, income from energy and minerals has increased 260 percent since 2002. The OIEED expects these trends to continue and so does CERT.

There are good reasons to be optimistic that Indian tribal energy development will continue to expand in other tribal communities. These reasons include the following:

1. Enormous tribal reserves of oil, gas, coal, wind, solar, geothermal and other resources;
2. The likely long-term pricing environment for energy products; and
3. The enactment by Congress pro-production energy policies.

The OIEED estimates that an additional 15 million acres of undeveloped traditional energy mineral resources and over 22 million acres of undeveloped renewable energy resources exist on individual Indian and tribal lands. If these estimates are correct, additional billions of dollars in revenue would likely be generated to the individual and tribal owners.

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[1] The *EPAct of 2005* (Pub.L. 109–58) and the *EISA 2007* (Pub.L. 110–240) both contain provisions favorable to Indian tribal energy development and environmental management.

More specifically, the OIEED's analysis finds that the potential remaining resources to be realized through new development on Indian lands reveal the following:

Commodity	Potential Resource
Oil	5.3 billion bbls
Gas	25 billion mcf
Coal	53.7 billion tons
Coalbed Methane	12.7 million mcf
Wind energy	535 billion kWh/year
Solar energy	17,600 billion kWh/year
Woody biomas	3 billion kWh/year
Hydroelectric	5.7 million kWh/year
Geothermal	21 million kWh/year

One merely witness the phenomenal success of the Southern Ute Indian Tribe, the Ute Tribe of the Uintah and Ouray Reservation in northeast Utah, and the Osage Nation in eastern Oklahoma to understand that American Indian energy resources, developed properly, can transform Indian economies and assist tribes in achieving real and lasting self-determination.

Tribal Energy Resources and the Pricing Environment

American Indian tribes in the lower 48 states—especially those in the Rocky Mountain West—own an enormous amount of energy resources. With the current Federal restrictions on exploring for energy in the Great Lakes, the eastern portion of the Gulf of Mexico, the California coastline, and the Alaska National Wildlife Refuge (ANWR), Indian tribal resources and lands in the Rocky Mountain West present one of the most significant opportunities for domestic production in the United States.

In what is now a dated analysis, in 2001 the U.S. Department of the Interior (DoI) estimated the total dollar value of energy produced from Indian tribal lands for the period 1934–2001 to be $34 billion. These revenues derived from 743 million tons of coal, 6.5 billion cubic feet of natural gas, and 1.6 million barrels of oil. In terms of undeveloped reserves and undiscovered resources, the DoI projected that Indian tribal lands could prospectively generate *$875 billion*, derived from 53 billion tons of coal, 37 billion cubic feet of natural gas, and 5.3 million barrels of oil.

These projections were made in 2001 and in the intervening 8 years, the price of energy products has increased significantly. Present-day revenue projections would be nearly *$1.5 trillion.*

Enactment of New Energy Laws in 2005 and 2007

On August 8, 2005, President Bush signed into law the *Energy Policy Act of 2005* (Pub.L. 109–58) which included as title V the *Indian Tribal Energy Development and Self-Determination Act.* The new law authorizes a variety of Federal technical and financial assistance to participating Indian tribes and seeks to reduce administrative obstacles at the Federal level to encourage greater levels of energy development on tribal lands.

This tribal energy law does not discriminate in terms of favoring renewable over non-renewable resources or vice versa. Instead, the law leaves the development decisions to the tribal owner and the market.

Similarly, in 2007, Congress enacted and the President signed the *Energy Independence and Security Act* ("EISA", Pub.L. 110–140) which contains significant opportunities for Indian tribes and tribal colleges to receive research, development, and production grants related to renewable and alternative energy development. The Act authorizes tens of billions of dollars for these purposes and represents the most significant energy research law to be enacted in years.

The American Recovery and Reinvestment Act of 2009

In February 2009, President Obama signed into law the *American Recovery and Reinvestment Act* (ARRA). The ARRA included $16.8 billion for "Energy Efficiency and Renewable Energy," a broad category that includes $3.2 billion for Energy Efficiency and Conservation Block Grants. The ARRA also provided $5 billion for the Weatherization Assistance Program, and $4.5 billion for Electricity Delivery and Energy Reliability. This latter program is related to expenses necessary to electricity delivery and energy reliability of the energy infrastructure energy storage research and development, demonstration and deployment, and facility recovery. In addition, $100 million is allocated for "worker training."

The ARRA also provided $6 billion for the Innovative Technology Loan Guarantee Program.

These funds are crucial because, in addition to enormous amounts of non-renewable resources, primarily oil, natural gas, coal, and coal bed methane, Indian tribes have significant development potential in renewable sources of energy such as wind, solar, hydro, biomass, geothermal, and others.

Reliable information suggests that the vast majority of potential renewable energy projects in Native communities are modest in size and more akin to the community development scale than the commercial utility scale. As a result, most of these projects might only require an environmental assessment and not a full-blown environmental impact statement under the National Environmental Policy Act (NEPA). More often than not, these projects require Federal support to fund the construction costs in order for them to proceed to construction.

Proposal for a "National Tribal Energy Efficiency Initiative"

With the support of this Committee and the congressional appropriators, a "National Tribal Energy Efficiency Initiative" would (1) generate an enormous number jobs in the short-run and long-run; (2) be reasonable in terms of cost; (3) have superior environmental impacts in Indian country; and (4) produce greater economic benefits for virtually every Indian tribe and have the greatest impact on the tribes with the largest number of poor and working poor families.

The initiative CERT has in mind would be something along the lines of a "National Tribal Energy Efficiency Initiative" that could fund virtually every Indian tribe. The initiative would be massive but, if properly structured, would maximize the use of local labor and local Indian contractors.

In addition to home weatherization, the initiative could include all tribal government buildings and Federal facilities located on tribal lands. The high cost of heating and cooling because of poorly-constructed and poorly-insulated buildings equipped with highly inefficient lighting and H–VAC systems erodes program budgets, reduces services and produces environments that are not healthy for workers or for people who use access the facilities. It would dramatically reduce the operating and maintenance costs for health clinics, hospitals, schools and tribal colleges, tribal administrative buildings, and other structures on tribal lands.

The initiative would also have an immediate impact on the utility bills for heating for the most vulnerable Indian populations in the Northern tier of the country from the Pacific Northwest to Maine, the Tribes of the Four Corners Area, and the poor families of the Oklahoma Indian Tribes. And for the desert southwest Tribes, their weather related issues come in the summer months. Regardless of their geography, all of the Tribes have vulnerable populations: the elderly, infants and the disabled.

In a relatively short period of years, the initiative would transform Indian Country from among the most energy *inefficient* to among the more energy *efficient* and would lead to better health, more efficient programs and more competitive tribal economies. The energy savings could be measured in real dollars because the good thing about energy efficiency is that the savings are not one-time occurrences but accrue year after year. Even a massive Federal expenditure in an initiative of this type would be repaid in savings in 3 to 5 years, and would continue for another 10 to 20 years, depending on building maintenance.

For this initiative to succeed, the funding would need to be administered through an agency that is able to direct the money very quickly to each interested Indian Tribe. One way to expedite the funding process would be to convene regional "pre-application workshops" so interested and eligible Indian tribes could respond appropriately to the agency distributing the funding. If the funds were routed through the Administration for Native Americans (ANA) in the Department of Health and Human Services, that agency would do a superb job of fund distribution with minimal red-tape because it has a demonstrated ability to move money very quickly into tribal programs. The ANA has a network of regional and national technical assistance contractors already in place to provide the workshops and hands-on technical assistance to ensure every interested and eligible Indian Tribe has the best chance to access the program.

In addition to CERT, there are other national Indian organizations that could be of assistance in mobilizing Indian contractors and the local pool of Indian labor such as the National Council on Tribal Employment Rights (NCTERO) which has a national network of local TERO offices that have data on the local workforce and the relationship with labor unions for training and apprenticeship programs, as well as data on local, Indian-owned companies. The National Center for American Indian Enterprise Development (NCAIED) has an excellent network of larger Indian and tribal construction companies as well as a network of major private sector compa-

nies, such as Home Depot, that might be included in such an initiative to supply the material needed for these activities.

Indian Energy Project Development

The new energy laws were signed into law in 2005 and 2007 and the regulations to implement them are now in effect. For the past five fiscal years, the Congress has appropriated funds for the Department of Interior's Office of Indian Energy and Economic Development and the Department of Energy's Office of Indian Policy and Programs, both of which are charged with administering the new laws.

Nonetheless, and as the Committee has identified in its Indian Energy Concepts Paper, many challenges to more vigorous energy development remain.

Responses to the Committee's Indian Energy Concepts Paper

In September 2009, CERT submitted to the Committee its views and analysis of the May 2009 Indian Energy Concepts Paper. Attached to this statement is a copy of those views and analysis.

Conclusion

Mr. Chairman, that concludes my prepared statement and I again thank you for the opportunity to present the views of CERT. I would be happy to answer any questions you may have.

Attachment

Response of the Ad Hoc Indian Tribal Energy Working Group to

The Senate Committee on Indian Affairs' Indian Energy Concept Paper

October 22, 2009

Genesis and Rationale for SCIA Indian Energy Concept Paper

In May 2009, the U.S. Senate Committee on Indian Affairs disseminated a "Draft Indian Energy Concepts Paper" ("SCIA Paper") after having convened formal oversight hearings to receive testimony regarding the efforts of many Indian tribes to unlock the potential of their energy resources, both renewable and non-renewable. Federal agencies and Indian tribes testified that, while recently-enacted laws have begun to support tribal energy development by encouraging tribes to take an active role in developing their resources, the implementation of the laws has lagged significantly.

The Committee was also informed that additional changes in Federal Indian law and policy are needed to overcome a century of bureaucratic and paternalistic Federal policies that continue to create uncertainty and an unlevel playing field for tribal energy development. The SCIA Paper identified three main challenges and contained specific proposals to address these challenges. The three main challenges contained in the SCIA Paper were the following:

(1) Inadequate Federal staffing and technical assistance;
(2) Lack of tribal access to the transmission grid; and
(3) Difficulty in obtaining financing for tribal energy projects.

An "Ad Hoc Indian Tribal Energy Working Group" ("Working Group") has been formed to consider the SCIA Paper and has identified a fourth challenge that it believes requires attention, namely:

(4) Systematic and unreasonable delays in obtaining required Federal agency approval of tribal energy projects.

Restructuring the SCIA Paper and Preparation for Legislative Language

The SCIA Paper proposed specific recommendations to address these challenges and originally included two Titles: "Title I, Promoting and Streamlining Indian Energy Development;" and "Title II, Programs to Support Indian Energy Development and Efficiency." With the addition of the fourth challenge noted above and additional sub-themes that could be addressed, the Working Group has proposed an expansion and re-organization of the SCIA Paper as follows:

- **"Title I, Promoting and Streamlining Indian Energy Development"** - Includes proposals to streamline administrative processes to encourage tribal energy development;

- **"Title II, Financing Indian Tribal Energy Projects and Related Infrastructure"** – Includes proposals to encourage tribal energy projects by financing of specific energy initiatives and greater tribal decision-making in the development process; and

- **"Title III, Technical and Conforming Amendments to Existing Indian Energy Laws"** – Includes technical and conforming amendments to existing energy laws.

Title I – Facilitating and Promoting Indian Energy Development

Section 1. Expanding the deployment of "One-Stop-Shops." The SCIA Paper proposed that a Demonstration Program be launched to direct the Department of the Interior's Office of Indian Energy and Economic Development to establish 3 to 5 "Indian Energy Development and Coordination Offices," in Regional and Agency Offices corresponding to geographical areas where there is or might be a high level of energy development potential.

Working Group Response: There is not a consensus within the Working Group as members have differing views of the effectiveness of the "One-Stop-Shop" concept.

One view within the Working Group is that combining BIA, BLM, MMS and OST functions into a single shop will dilute, not strengthen, the available expertise and attention of these agencies. Alternatively, an "Indian Energy Ombudsman" position with cross-agency authority, housed in the Office of the Secretary, could be established with the mission of troubleshooting among the agencies with actual authority to force responsive coordination and decision-making when complaints of bureaucratic delay are received.

Another view within the Working Group sees value in the consolidation of all Indian energy mineral functions within MMS, BLM and BIA into an "Indian Minerals Management Division" to be housed within the BIA. The rationale for such a consolidated office is that the federal duties owed to the management of public lands are distinctly different in kind and in scope from the duties the Trustee owes the Indian resource owner. Such a new Division would be located under the Assistant Secretary – Indian Affairs or the Office of Special Trustee for American Indians.

Section 2. Expand use of Indian Mineral Development Agreements. The SCIA Paper proposed the expansion of IMDA agreements to include allottee interests. Currently, tribes use IMDA agreements to be more active in the leasing of minerals on their lands and to have more control in the development of the terms of the agreements that are negotiated. The law could be amended to allow allottees to use the IMDA agreements in a manner similar to tribes. Allowing allottees to be more active in the leasing of their lands would eliminate some of the steps currently needed to process energy leases.

Working Group Response: There are also different perspectives on this item.

One view within the Working Group acknowledges that current law authorizes the inclusion of allotee lands in IMDAs negotiated by tribes with the result that allotted lands may be included under the "umbrella" tribal document. This view sees two major problems with extending

IMDA negotiating authority to individual allottees outside the scope of the umbrella document: (1) Potential lack of bargaining power due to isolated landholdings; and (2) Lack of knowledge or familiarity with industry practices and standards, which could create opportunities for exploitation. Under current law, the financial terms of a negotiated tribal agreement are confidential absent tribal consent, but there could be some mechanism to allow those terms to be used by the BIA for the benefit of allottees as a measuring stick for the reasonableness of proposed allottee terms. If the terms are no less than those in an approved or approvable tribal IMDA, they could be deemed sufficient for the individual allottees. A more cumbersome approach would involve the certification of allottee associations, which could receive technical assistance on a collective basis and could establish threshold terms for multiple allottee negotiated agreements.

Another view within the Working Group sees value in duly constituted Indian Allottee Associations to work for the interests of the individual Indian owners. Similar to how a TERDO is acknowledged, that there be created a set of standards of operation with appropriate approval or sanction from both the tribe whose jurisdiction these allotments fall within and the Secretary of Interior. Once such an organization is chartered and approved that it can, like the tribes, participate on behalf of the individual landowners in the production and royalty payment audits under applicable law.

Section 3. Bundle leases and right-of-ways on Indian Lands. The SCIA Paper proposes the "bundling" of lease agreements and relevant rights-of-way for purposes of energy development. Current law separates the processes for obtaining leases and right-of-ways on Indian lands. The law could be changed to provide Tribes and allottees the option to sign energy leases that include automatic approval for necessary and reasonable right-of-ways. Combining these steps would streamline the energy development process.

Working Group Response: The Working Group believes there is real value in pursuing this item. Current law permits this type of "bundling" and the practice is to include within IMDA agreements grants of ingress and egress to lessees / operators across tribal lands that are not within the description of the leased land. Where the "bundling" notion might be pursued is in the process of acquiring rights-of-way for installation of pipelines and other production facilities after a leased area has entered a productive stage. Notwithstanding prior approval of the IMDA by the BIA and specific tribal consent for subsequently needed rights-of-way, off-lease rights-of-way for pipelines or access to electricity to service central compression facilities, must undergo NEPA review, OST appraisals, BIA archeological review, and Endangered Species Act review. Given the underlying approval of the IMDA agreement, some expedited mechanism must be put in place that provides something akin to a categorical exclusion or a specific time frame for review prior to automatic approval; provided that tribal consent is clearly demonstrated.

Section 4. Clarification of TERA Scope and "Inherent Federal Functions." Articulated by the Working Group, this proposal has its genesis in the deliberations over Title V as well as the negotiations with the Department of Interior that led to Title V's implementing regulation in 2007. Throughout these debates and negotiations, one principal goal was to create an optional regime through which an Indian tribe with demonstrated capacity could contract to eliminate the

necessity of Federal agency approval for all aspects of tribal energy leasing, contracting and development, subject to the ultimate Federal authority to re-assume approval authority upon demonstrated tribal abuse or violation of applicable laws of general application. Though, not perfect, the TERA provisions of Title V appeared to provide that mechanism. The implementing regulations, however, excepted from the scope of TERAs those functions that are "inherent Federal functions." This undefined regulatory exception –not found in the TERA statutory language--potentially eviscerates the statutory intent of Title V, and requires serious examination. The regulatory imposition of the "inherent Federal function" exception, is one reason that more active pursuit of TERAs by some tribes has not been forthcoming.

Working Group Proposal: The Working Group believes that the issue of "inherently Federal function" in the context of energy development needs to be revisited and, if possible, re-defined in authorizing legislation or through a new administrative process.

Section 5. OST Appraisals. Articulated by the Working Group, this proposal deals with the current requirement that the Office of Special Trustee issue an appraisal to ensure that fair market value has been received for grants by tribes of rights of way and related leaseholds of surface lands for business or commercial purposes.

Working Group Response: The Working Group believes this requirement is unhelpful, unnecessary and leads to inordinate delays in processing the referenced grants. Particularly when the consideration to be received by the Tribe is something other than cash, i.e. fiber optic cable access in exchange for easement for fiber optic cable, the conventional appraisal methodologies used by OST are inadequate and inflexible. Tribes should be able to waive this requirement on a global or individual basis.

Section 6. NEPA Alternatives and Long-term Reservation-wide Planning. The SCIA Paper did not discuss the impacts of NEPA on Indian energy development, but the Working Group believes this to be a significant challenge requiring thoughtful consideration. The Federal government is required to conduct environmental reviews for most development on Indian lands. However, this process takes far too long in part because the Federal government conducts the environmental reviews on a project-by-project basis.

There are a number of approaches that could be used to ameliorate NEPA's impact on reservation energy development. Federal law could be changed to direct the Office of Indian Energy and Economic Development to prepare comprehensive environmental review documents for reservation-wide energy planning. This proposal, essentially a reservation-wide energy development Programmatic EIS, could also be used by the tribes themselves with the assistance of the NEPA Resource Center. This should decrease the amount of time needed to obtain permits for projects. (See NEPA Resource Center technical assistance in tiering Tribal Programmatic Energy EIS).

The Working Group put forward other NEPA-related options as follows:

a. Modifying NEPA to clarify that "Indian lands" are not "Public lands." While this "frontal approach" would undoubtedly garner opposition in and out of the Congress, the fact remains that too often Indian lands are lumped in with Federal lands which brings competitive disadvantages to tribes wishing to develop their resources and their economies. The National Environmental Policy Act requires an evaluation of potential impacts to the environment, including social and economic impacts, resulting from proposed Federal agency action. Almost all activities proposed on Indian lands related to energy development require Federal approval, including issuance of leases, rights-of-way, long-term contracts, and permits to drill. Unlike other Federal lands, the ultimate beneficiary is not intended to be the public; rather it is intended to be a tribe or individual allottee. The underlying rationale for securing public comment and a Federal evaluation of alternatives to proposed action and their relative impacts, while sensible in the context of using public assets, subjugates tribal decisions to a Federal statutory process that serves principally to delay and frustrate tribal decision-making.

b. Use of a "Tribal Environmental Process." To be sure, the Congress may want to ensure that tribal governments evaluate alternatives and consequences in making decisions affecting their lands. Such a policy, however, could be met by requiring use of a tribal process rather than a Federal process.

i. Such a substitute tribal environmental process is contemplated in the TERA provisions of Title V.

ii. The NAHASDA Model. Section 4115 of the NAHASDA (25 USC §4115) provides a NEPA-related process under which the HUD Secretary is authorized to certify a tribal environmental review and enforcement process and an Indian tribal officer would agree to have the status of a "responsible Federal officer under" NEPA.

c. The "Exhort the Agencies to Act Expeditiously" Model. The American Recovery and Reinvestment Act (the Stimulus Act) does not *per se* waive any required Federal environmental reviews. Section 1609 [1] of the Act provides in pertinent part the following:

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[1] SEC. 1609. (a) FINDINGS.—

(1) The National Environmental Policy Act protects public health, safety and environmental quality: by ensuring transparency, accountability and public involvement in federal actions and in the use of public funds;

(2) When President Nixon signed the National Environmental Policy Act into law on January 1, 1970, he said that the Act provided the ''direction'' for the country to ''regain a productive harmony between man and nature'';

(3) The National Environmental Policy Act helps to provide an orderly process for considering federal actions and funding decisions and prevents ligation and delay that would otherwise be inevitable and existed prior to the establishment of the National Environmental Policy Act.

> "(b) Adequate resources within this bill must be devoted to ensuring that applicable environmental reviews under the National Environmental Policy Act are completed on an expeditious basis and that the shortest existing applicable process under the National Environmental Policy Act shall be utilized.
>
> (c) The President shall report to the Senate Environment and Public Works Committee and the House Natural Resources Committee every 90 days following the date of enactment until September 30, 2011 on the status and progress of projects and activities funded by this Act with respect to compliance with National Environmental Policy Act requirements and documentation."

Section 7. Licensing Authority to Conduct Pre-Development Feasibility, Scientific, Etc. Activities. During the SCIA's Indian Energy Roundtable in Denver, CO, on September 18, 2009, an issue arose centered on the need for new legal authority in situations involving renewable resource development and the need to conduct pre-feasibility and related scientific activities outside the scope of the NEPA that would trigger Secretarial and Federal intervention into the project. If such pre-feasibility and related scientific activities provide the rationale to continue with the project, the NEPA process would be triggered.

Working Group Proposal. One suggestion that was made in Denver is to revise 25 U.SC. §81 dealing with contracts with Indian tribes that are reviewable by the Secretary. After amendments were made to this section in 2000 it reads in pertinent part:

> "(b) No agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years shall be valid unless that agreement or contract bears the approval of the Secretary of the Interior or a designee of the Secretary."

Subsection (c) goes on to state that subsection (b) does not apply to any agreement or contract that the "Secretary (or his designee) determines is not covered" under that subsection.

(Continued)

(b) Adequate resources within this bill must be devoted to ensuring that applicable environmental reviews under the National Environmental Policy Act are completed on an expeditious basis and that the shortest existing applicable process under the National Environmental Policy Act shall be utilized.

(c) The President shall report to the Senate Environment and Public Works Committee and the House Natural Resources Committee every 90 days following the date of enactment until September 30, 2011 on the status and progress of projects and activities funded by this Act with respect to compliance with National Environmental Policy Act requirements and documentation.

Title II – Financing Indian Tribal Energy Infrastructure and Projects

Section 1. Support expanded financing for tribal energy infrastructure. The SCIA Paper proposed amending Title V of the EPAct so that the DoE is required to launch and administer the $2 billion Indian Energy Loan Guarantee Program authorized, but never implemented, in 2005.

Working Group Response: The Working Group had numerous and varied responses to the need for additional financing and capital access for purposes of energy development.

One view within the Working Group was that Indian tribes have limited natural gas gathering pipeline infrastructure, most of which was developed in an earlier era on a project-by-project, or independent developer basis. The pattern of pipeline infrastructural development has resulted in numerous inefficiencies and has constricted access for new tribally produced natural gas to gas markets. Tribal governments are interested in a more integrated approach that would expand natural gas gathering pipeline infrastructure and improve the market environment for new tribal natural gas production. Although much focus has been placed on enhancing renewable energy, natural gas is a significant clean burning energy source. Many tribes lack the key financial resources and regulatory support to make the necessary changes in regional pipeline systems. BIA loan guarantees could be instrumental in assisting tribes in acquiring gas gathering pipelines and be instrumental in increasing Indian energy and economic development.

Section 2. Permanently Extend the Indian Wage Credit and Accelerated Depreciation Allowance. Articulated by the Working Group, this proposal would make permanent certain provisions in the Internal Revenue Code originally geared to reservation economic development in general. First enacted in 1993, these Indian economic development incentives are largely "activity neutral" and apply to any form of economic activity (except structures and activities related to gaming) that might take place on Indian lands. The U.S. Senate Finance Committee has routinely recognized that these incentives, especially the depreciation allowance, could be particularly helpful for the equipment- and infrastructure-intensive energy sector.

Working Group Response: The Working Group believes it should affirmatively support legislation that is now pending in the House side by Representative Dan Boren (H.R.474) and the Senate side by Senator Jim Inhofe (S.288) that would make these incentives permanent.

Section 3. Access to Commercial Capital - Creation and Perfection of Security Interests in Working Interests in Tribal Leases. Articulated by the Working Group, this proposal involves the legal mechanism(s) available to capital investors. A common theme among tribes who have attempted to develop tribal energy projects is the lack of commercial capital, particularly when the collateral for the capital would be a security interest in project assets related to trust lands. The Southern Ute Indian Tribe has experienced this frustrating condition in the context of working interests in historic tribal oil and gas leases acquired by the Tribe and operated by the Tribe's oil and gas company. Because there is no clear mechanism for recording and perfecting liens with regard to working interests obtained from tribal leases, tribes will be required to pay more for capital than their competitors assuming that such capital is even made available. For a conservative lending institution willing to lend money in Indian country, since no clear step is prescribed by statute or regulation, the following steps are arguably required:

(i) Obtain BIA approval of the security interest as an assignment under 25 CFR Parts 211 and 225. Does such BIA approval trigger NEPA review?

(ii) Record the approved assignment of the security interest with the Land Title and Records Office of the BIA. Such recording cannot be undertaken without recording instructions from the local BIA superintendent. Land Title and Records Office recording does not purport to serve as a perfection device. In fact, public access to recorded documents is generally denied based on the confidentiality of many tribal records.

(iii) File the approved security interest in the local county clerk and recorders' office as a real property filing. Because state law generally has limited application on tribal lands, the effectiveness of such recording to establish priority of liens is questionable.

(iv) File a financing statement under the UCC in the Colorado Secretary of State's office. Again, questions regarding applicability of state law raise concerns related to the effectiveness of the filing.

(v) Require the Tribe to establish its own governmental recording system that purports to control priority of liens related to all interests in tribal lands. Whether such a system would be recognized as controlling priority of liens by federal or state courts is not clear.

As reflected by the foregoing, even in a situation in which a tribe is willing to issue needed waivers of sovereign immunity and enter into binding contractual commitments needed to obtain capital, the absence of a clear mechanism for perfecting liens in working interests or contractual assets related to tribal lands seriously affects access to capital. One can just imagine the extreme difficulty encountered by tribes seeking to obtain capital for start-up ventures on their lands.

Working Group Response: The Working Group is supportive of pursuing the issue and to create clear procedural vehicles to perfect security interests as a way to encourage investment in Indian energy projects and Indian economies generally.

Section 4. Repeal the $4,000 Fee for APDs Filed for oil and gas drilling on Indian Lands. The SCIA Paper proposed the elimination of the so-called APD fee first authorized in the Consolidated Appropriations Act of 2009. This provision authorized the Bureau of Land Management to assess and collect a $4,000 processing charge for applications for permits to drill on "Federal lands," interpreted by the BLM to include Indian lands. Options to address this clear disincentive to development include defining "Federal lands" to exempt Indian lands in any future attempt by the congressional appropriators to extend the $4,000 fee. Note: The House and Senate Subcommittees on Interior Appropriations have proposed an increase in the APD fee to $6,500 in their respective FY2010 appropriations bills.

Working Group Response: The Working Group supports the elimination of the APD fee contained in the FY2009 and FY2010 appropriations law.

Section 5. "Indian Energy Integrated Funding Demonstration Project." Articulated by the Working Group, this proposal involves new authority either to a "lead" Federal agency or to

participating tribes themselves to eliminate agency and statutory barriers to the consolidation of funds from across Federal agencies in the service of an economic (energy) development project. Indian tribes are often confronted with a variety of programs and activities which are thematically related but administered by different agencies. One response by Congress could be to authorize tribes to reach across many different agencies to access energy-related programs and bring them to bear on a project with greater simultaneity.

The idea would be to launch a Demonstration Project to enable a small number of tribes to combine energy funding and other assistance --- with increased simultaneity --- all in service to planning, developing, launching, and then managing energy development projects on their lands. In 2001, the *Indian Tribal Development Funding Consolidation Act* (S.343) was introduced by Chairman Nighthorse Campbell and subject to hearings by the Committee on Indian Affairs but it was never enacted.

Working Group Response: The Working Group believes there could be real value in pursuing new authority (or effective administrative changes) to equip tribes with tools to fully access available Federal funds and programs in support of an economic development project.

Section 6. Authorize Federal Courts to Exercise Diversity Jurisdiction To Adjudicate Disputes in which Indian Tribes or Their Wholly Owned Subsidiaries Are Parties. Articulated by the Working Group, this proposal addresses a jurisdiction vacuum in contractual disputes between tribes and their contractual counterparties. Sophisticated parties with capital needed by tribes typically require that tribes waive their sovereign immunity from suit in order to resolve potential contractual disputes related to repayment obligations or other tribal performance obligations. Many tribes also recognize that this is a prerequisite to access to capital. Contracting parties are also extremely reluctant to rely upon or designate tribal courts as the forum for adjudicating such disputes. If tribal courts are not an acceptable forum, many tribes would be willing to rely upon federal courts to resolve such disputes. The jurisdiction of federal courts is, however, limited to two general types of controversies: (a) those involving federal questions; and (b) those in which the state citizenship of the parties is diverse. Generally, contractual disputes do not present a federal question, and, case law has long held that Indian tribes are not state citizens for purposes of diversity jurisdiction. Similarly, the state citizenship of limited liability companies and partnerships turns principally upon the state citizenship of the owners or members of those entities. Thus, in most situations, even though Indian tribes would be willing to consent to federal court jurisdiction to adjudicate potential contractual disputes, those courts are unavailable. By statutorily conferring jurisdiction upon federal courts to adjudicate potential disputes between tribes (and their subsidiaries) and contracting parties, tribes and contracting parties would have the contractual option of designating such courts to hear such disputes. Clear access to federal courts would eliminate one of the institutional obstacles to tribal access to capital for energy and other economic development projects in Indian country.

Working Group Proposal: The Working Group believes that the SCIA should evaluate the feasibility of conferring jurisdiction on federal courts to hear contractual disputes between tribes (and their subsidiaries) and contracting parties. Access to such courts would continue to be based upon waivers of tribal sovereign immunity in conformity with existing law.

Section 7. Ameliorate Negative Effects of Cotton Petroleum and Double Taxation. In 1989, the U.S. Supreme Court issued an opinion in *Cotton Petroleum Corporation v. New Mexico* (490 U.S. 161) and held that the State of New Mexico could validly impose severance taxes on the same on-reservation production of oil and gas by non-Indian lessees as was subject to the tribe's own severance tax. Tribes and their private, energy sector partners have long complained of the decision and the market-distorting economic effects it has had for 20 years.

Working Group Proposal: There are several legislative options open to the SCIA and Congress provided there is the political will to ameliorate the effects of the *Cotton Petroleum* decision.

- The most direct is for Congress to legislatively overturn the decision by pre-empting the imposition of state severance taxes on non-Indian operators on Indian tribal lands.

- A more nuanced approach would take advantage of the principle that absent clear congressional authority, tribally-owned entities are not subject to state taxes. Congress could amend the authority contained in the Indian Tribal Energy Development and Self Determination Act, under which an Indian tribe might join with one or more other entities, including non-Indian private sector partners, and form a "Tribal Energy Resource Development Organization" ("TERDO"). The clarification would make clear that, if they are made part of a TERDO, the non-Indian private sector partners would not be subject to state severance taxes.

Title III – Department of Energy-Related Proposals

Section 1. Enhance DoE's Office of Indian Energy Policy and Programs and the profile of DOE's Indian Energy Office. The SCIA Paper proposed a series of items related to the administration of Indian energy programs and activities by the Department of Energy.

Indian energy needs a home within DOE, but DOE has been slow to implement the Indian Energy Policy and Programs Office authorized by law in 2005. The law could be amended to require that the Office structure include staff and divisions for at least renewable and distributed energy, energy efficiency, transmission, carbon sequestration, and project financing. These new divisions within the Office would be responsible for implementing existing DOE Indian energy programs, including those authorized in 2005 but not implemented.

Working Group Response: The Working Group supports the re-invigoration of the Office of Indian Energy Policy and Programs within the DoE, as well as generous funding to make the office something more than a liaison between the department and Indian tribes.

Section 2. Include Indian tribes in Study of National and Regional Electrical Infrastructure Planning. The SCIA Paper proposed that a study be undertaken to ensure tribal participation in national and regional electrical infrastructure planning. Nationwide plans often overlook Indian lands and consequently tribes are not able to participate in development opportunities. DOE's Indian Energy Office could conduct a study, either alone or in concert with other planning

efforts, to identify Indian tribes interested in developing energy resources and the obstacles that need to be overcome to provide transmission to energy markets.

Working Group Response: The Working Group supports the study proposal.

Section 3. Include Indian Tribes in DOE's State Energy Program. This program provides funding to State governments for development and implementation of laws, policies, and programs to conserve and improve energy efficiency. A tribal set-aside would help build tribal governing capacity for energy efficiency programs and codes.

Working Group Response: The Working Group supports the inclusion of Indian tribes in the DoE's programs for state governments.

Section 4. Ensure that Tribes Benefit from DoE's Weatherization Assistance Program. DoE's current program requires that tribal funding pass through State programs, and is based on criteria not well suited for tribal communities. A tribal set-aside and restructuring of the program for tribes would help ensure that funding gets to reservation homes.

Working Group Response: The Working Group supports tribal access to DoE's well-funded Weatherization Assistance Program.

Section 5. Support increased Indian energy research and development. Increasingly, energy development on Indian lands is conducted by small and mid-level independent operators across all fields of development; renewable and non-renewable. Indian tribes and federal national laboratories should be encouraged to partner in developing science and technology demonstrations to enhance energy production, mitigate its impacts, explore new products and markets, and examine carbon sequestration opportunities.

Working Group Response: The Working Group supports more vigorous research and development efforts aimed at the numerous elements of energy production and consumption in Indian communities.

Title IV - Technical and Conforming Amendments to the Title V, EPAct

A series of technical and clarifying changes to the Department of Interior and Department of Energy portions in Title V of the EPAct have been identified and is included to this response document as "Addendum 1."

ADDENDUM 1

Department of the Interior Portion of Title V

Sec. 503 – Indian Energy, amends Energy Policy Act of 1992 (25 USC 3501)

§2601 Definitions.

"(10) Sequestration" – after "such as" insert "agricultural practices or" before the word "reforestation"

Rationale: other portions of EPAct and title V routinely use the tandem activities of "agriculture" and "reforestation" when describing carbon-related activities that are sought to be encouraged. This insertion makes the definition consistent with those other sections of the law.

§2602. Indian Tribal Energy Resource Development.

(a) Department of Interior Program.

Insert a new subsection "(2)(E) provide grants and technical assistance to a national tribal energy organization, as determined by the Secretary, to establish and operate a program of assistance to Indian tribes and tribal energy resource development organizations for the evaluation, planning, design, financing, production, transportation, and transmission functions related to tribal energy resource development."

Rationale: this is an attempt to use the existing expertise and experience of CERT for the benefit of the agency and the tribes. Situated like no other tribal organization, CERT could be the hub in Indian country for capacity and project expertise just as similar language just as section 2602(a)(2)(D) is an oblique reference to NTEC to be the hub for all things environmental.

In §2602(a)(3) strike "2006" and "2010" and insert "2016" and "2020" - Rationale: simple updates of the authorization dates.

In §2602(b)(6) strike "2006" and "2010" and insert "2016" and "2020" - Rationale: simple updates of the authorization dates.

In §2602(c)(1) [this deals with the Loan Guarantee Program that was never implemented]

- Strike "may" and insert "shall"

Rationale: Obviously if it is only suggested that the Secretary implement the program, he may not want to do it and there's little we can do about it. Hence "shall."

- Insert "or a tribal energy resource development organization" after "tribe" insert "or the integration of energy resources"

Rationale: To bring about inter-tribal synergies, tribes and tribes, or tribes and companies, or tribes and Alaska Native Corporations, or some blend of them should be encouraged to work together to undertake actual projects. This change makes clear that "tribal energy resource development organizations" (TERDO's) are in fact eligible for the guarantees.

In §2602(c)(3) redraft the sentence to be "Loans that are backed by loans guaranteed by the Secretary shall be made by –"

Rationale: this is simply to clean up the language which is confusing and ill-drafted.

In §2602(c)(7) strike "1 year after the date of enactment of this section" and insert "April 2010"

Rationale: the Secretary failed to deliver the required report by the due date and the date "April 2010" simply gives him more time to do it.

§2603. Indian Tribal Energy Resource Regulation.

In §2603(c)(2(B) insert "or a tribal energy resource development organization" after the word "tribe."

Rationale: To bring about inter-tribal synergies, tribes and tribes, or tribes and companies, or tribes and Alaska Native Corporations, or some blend of them should be encouraged to work together to undertake actual projects. This change makes clear that "tribal energy resource development organizations" (TERDO's) are a resource the Secretary might wish to tap when it comes to providing various kinds of information and expertise to the tribes.

In §2605(d)(2)(B) insert "or a tribal energy resource development organization" after the word "tribe"

Rationale: To bring about inter-tribal synergies, tribes and tribes, or tribes and companies, or tribes and Alaska Native Corporations, or some blend of them should be encouraged to work together to undertake actual projects. This change makes clear that "tribal energy resource development organizations" (TERDO's) are a resource for the Secretary to use.

In 2605(c) strike "2 years after the date of enactment" and insert "September 2010".

Rationale: the Secretary failed to deliver the required report by the due date and the date "September 2010" simply gives him more time to do it.

Sec. 506. Housing

Insert "and energy efficiency" after "conservation"

Rationale: this makes clear the kinds of housing-related activities that may be pursued under section 506.

Department of Energy Portion of Title V (42 USC 15801)

Sec. 502 amends DoE Organization Act (42 USC 7131) to create the "DoE Office of Indian Energy Policy and Programs (42 USC 7144e)"

a. "Sec. 217 (a) Establishment *and Location.*

Rationale: the insertion of "and Location" as well as the next amendment dealing with the office of the Secretary are to make clear Congress' intent that the OIEPP is to be a cross-cutting office with a very wide reach across the Department's many programs and policies. As you can see from the statutorily-mandated duties of the Director, it was Congress' intent that the office have quite a broad portfolio.

b. In §217 after the word "Office)." insert *"The Office shall be located in the Office of the Secretary."* Rationale: see above.

c. In §217(b) Duties of the Director.

- Insert the word "financing" after the word "education"

Rationale: the insertion of "financing" will make clear that the OIEPP is authorized and expected to manage the Indian Energy Guaranteed Loan elements of the Act.

- Insert the words "and policies" after the word "programs"

Rationale: again, this is meant to clarify the very broad authority of the OIEPP.

- In §217(b)(3) strike the second "and" and insert the words "and physical" after the word "economic"

Rationale: the words "and physical" will affirm that the Director's duties extend not only to "energy infrastructure" and "economic infrastructure" but to "physical infrastructure" which is important when we're attempting to encourage energy development (especially renewable energy development) on tribal lands.

- In §217(b)(4) strike "the homes of tribal members" and insert "homes"

Rationale: there are persons who live on Indian lands that are not "tribal members." For example, the *Native American Housing Assistance and Self Determination Act* recognizes the importance of the presence in Indian communities of law enforcement, physicians, and others who may not be tribal members or may not even be Indian but should be eligible for NAHASDA-funded homes. The same principle would apply here in terms of electrification.

end

The CHAIRMAN. Chairman Levings, thank you very much. We appreciate your being here.

Next, we will hear from the Honorable James Roan Gray. He's the Chairman of the Indian Country Renewable Energy Consortium Board of Directors and Chairman of the Osage Nation.

Mr. Roan Gray, we appreciate your coming to town to testify.

STATEMENT OF HON. JAMES ROAN GRAY, CHAIRMAN, INDIAN COUNTRY RENEWABLE ENERGY CONSORTIUM BOARD OF DIRECTORS; CHAIRMAN, OSAGE NATION

Mr. GRAY. Good afternoon, Chairman Dorgan, Vice Chairman Barrasso, members of the Committee. I am Jim Gray, of the Osage Nation, Principal Chief. I would like to thank you for inviting me to present as Chairman of the Indian Country Renewable Energy Consortium today.

Chairman Dorgan, I want to express special thanks to you and the Committee for the willingness to play a critical leadership role in developing a comprehensive concept paper setting forth important proposals to achieving our central, shared objective, making sure that we set an effective foundation for tribes and Native corporations to participated on a level playing field in this emerging green economy.

The Consortium has presented more detailed written remarks, and I respectfully request they be made part of the hearing record.

The CHAIRMAN. Without objection.

Mr. GRAY. Just generally speaking, I would just like to make some basic observations. I think the first is that unlocking the renewable energy potential throughout Indian Country is essential, and it is something that is not new. It is something that has been discussed for many years. Experts agree that somewhere between 10 to 15 percent of the wind potential resources are on Indian lands. And that percentage is doubled for solar.

It is simply not possible, as the Administration recognizes, for the Nation to achieve our renewable energy goals that the President has laid out without the serious development of those resources in Indian Country. This is a sober reality.

Second, there is a hunger for Indian Country to develop the renewable resources because it is consistent with our traditional values.

Third, there are presently impediments to effective and prompt development of renewable energy resources on tribal lands. As a result, tribes are severely disadvantaged through really no fault of their own. The Consortium's principal goal is to even the playing field, so that those opportunities can be laid out working within their own structure or with private industry.

Fourth, the Consortium recognizes that renewable energy development is a generational opportunity. We understand that, as I am sure you will agree, renewable energy development is no ordinary opportunity, but one that comes along every generation or so. It can be part of a solution to the grinding poverty that still exists on many tribal communities.

Fifth, now is the time to act. The energy provisions in the energy legislation will set a foundation for renewable energy development for at least the next few decades. If tribes are not effectively included, we will be locked out of this important generational opportunity.

There are solutions and impediments for development of renewable resources in Indian Country. The proposals of the Consortium are detailed in our written submission, but I should review a few. Finally, ICREC is not asking for special perks or treatment for tribes. Quite the opposite is true. Essentially what we want to do

is to streamline the policies so that the opportunities are consistent with what's going on as you demonstrated so effectively with your map. So our policy priorities in our written testimony will delineate a long list of proposals. We will not reiterate those here, but I would like to reiterate a few that we believe are key.

First is streamlining. The streamlining process at Interior and Energy, presently there are long delays in the federal approval and permitting process that make investments in tribal projects less attractive. It takes two to four years longer to build wind or solar resources in Indian Country because of the many bureaucratic steps that have to be taken. Development in Indian Country will greatly suffer. If we do not streamline the processes, we will not unlock this extraordinary potential.

And the Consortium fully supports your one-stop shop idea. As other tribes have indicated to you throughout the Country, the Three Affiliated Tribes is not unique in the sense that there are many bureaucratic steps that often delay development on Indian lands. So there needs to be a process to create a NEPA policy that is not a hindrance but more of a tool and a shield to protect those resources on tribal lands, as well as to not to hinder development. It is past time for Interior to provide a specific checklist for approval of right-of-way for leases.

Transmission. Inadequate transmission infrastructure and capacity on Indian lands, in addition to difficult access to transmission on and from Indian lands, is a huge obstacle. Even with the development of wind and solar power, without effective transmission capacity, those projects will stay on the Reservation, never to be a part of the grid. Further, permitting WAPA and BPA to give tribes priority in queuing is fair in light of the amount of WAPA and transmission lines on Indian lands.

We could also show a different map, one that shows the transmission grids that go around reservations. The very simple reason of the leasing process and the right-of-way process has just made it impossible for development to take place without a commitment from the United States to see that those transmission lines are effectively put in Indian Country.

Financing. Current financial incentives are ill-fitting instruments in much of Indian Country and thus act as a disincentive for tribes' capital investment in projects on their lands and with their own resources. What makes renewable projects feasible are tax credits, investment tax credits, production tax credits, new market tax credits. But tribes don't pay the relevant taxes where these issue become relevant. So they cannot use the principal means of the incentivized investment. We would like to be able to monetize those tax credits in a way that can give tribes a partnering investment opportunity throughout Indian Country in these renewable projects.

The final word, administrative changes. We need to fill those positions that are still left open. The Energy Policy Act has not been implemented. One example is the Department of Energy's Office of Indian Energy Policy and Programs, was authorized under the 2005 OEPA. This program was intended, among other things, to permit far greater interagency coordination to facilitate tribal access in DOE programs. But it was not implemented carefully or it

wasn't completely implemented at all. Actually, we do need to fill those positions that are still open. But the Administration has taken no action on the OEPA in nine months, no director, and it languishes in Intergovernmental Affairs, where it has no oversight of policies or programs.

In conclusion, renewable energy represents an unrivaled opportunity to break the cycle of poverty in many tribal communities. But we have to make sure there is a level playing field. Tribes can compete with private developers, so long as they are not disadvantaged. The time to act is now.

I thank you for the opportunity to speak and I would be happy to answer any questions.

[The prepared statement of Mr. Gray follows:]

PREPARED STATEMENT OF HON. JAMES ROAN GRAY, CHAIRMAN, INDIAN COUNTRY RENEWABLE ENERGY CONSORTIUM BOARD OF DIRECTORS; CHAIRMAN, OSAGE NATION

Introduction

Good afternoon, Chairman Dorgan, Vice-Chairman Barrasso and Members of the Committee, thank you for inviting me as Chairman of the Indian Country Renewable Energy Consortium ("ICREC" or "Consortium") here today to provide testimony to the Committee on this most critical of issues—unlocking the extraordinary clean energy development potential of Indian Country. I am Chief Jim Gray, I appear before you today as the Chairman of the Consortium.

I would be remiss Chairman Dorgan if I did not also express my deep gratitude to you for taking such a leadership role in developing concepts and a comprehensive concept paper setting forth commendable ideas to ensure that Indian Country will be included in the emerging green economy. The Consortium views the Concept Paper an important starting point. We are encouraged by this Committee's leadership and foresight in understanding that unlocking the renewable energy potential on tribal lands and throughout Native territory is key to meeting the general National objective of energy independence and reducing carbon emissions.

I want to start today by telling you a little bit about our coalition. ICREC is a not-for-profit entity established this year. Our Consortium has combined the extraordinary expertise of Indian Country and its allies along with a geographically-diverse group of tribal governments and tribal and Alaska Native Corporations, all of whom have a great interest in and are actively pursuing various aspects of renewable energy development. The Consortium is a unified voice and seeks to ensure that Indian Country will have a seat at the policy-making table in this extraordinary generational opportunity. The Consortium recognizes the hurdles that have inhibited development of our renewable resources to date. These impediments will continue to impede if unaddressed. But, taking great advantage of the enormous expertise and dedication from people throughout Indian Country, the Consortium has worked hard to find effective solutions—ways to overcome the impediments before us.

Chairman Dorgan, Consortium members understand the gravity of this present endeavor. We understand, as I'm sure you will agree, renewable energy development is no ordinary opportunity, but one that comes along every generation or so. Working together with your leadership and that of the President, we are confident that we can forge policies that will make certain that Indian Country is not left out as it has been in times past with other emerging development opportunities. There is much at stake in this effort, and the ICREC members are here to say in a loud, sober, unified and clear voice, we stand ready to work with you to set the proper foundation for this future.

We are cognizant that the future, if effective policy choices are made, may be bright indeed for many tribal communities. There is tremendous potential for renewable energy development in Indian Country. We also know the present reality: actual projects have been slow to materialize. This is due to a variety of obstacles ranging from overly complex and burdensome lease approval processes to difficult transmission access and ill-fitting financial incentives. In light of the national strategic importance of renewable energy resources and the vast undeveloped renewable resources in Indian Country, coupled with the potential significant benefits of working with tribal governments, the Consortium has identified a number of policy options that will remove these obstacles. Let us be clear on one critical point at the

outset—ICREC is not asking for special perks or treatment. Quite the opposite is true. Present policies, for a variety of reasons we will discuss in greater detail below, place our members and Indian Country generally in a distinctly disadvantageous position. The policy suggestions the Consortium is advocating are in furtherance of evening the playing field so that Indian Country can fairly compete in this emerging clean energy economy.

Under current law, Indian Country faces primary policy challenges in the renewable energy and infrastructure development in the following broadly defined categories:

I. LEASING & SITING—Indian lands lease review & approval processes can easily take as many as two to three years longer than the comparable processes for projects outside of reservations, even in comparison with projects on *Federal lands*; and there is a desperate need to streamline approval processes, clarify and coordinate renewable energy development and renewable transmission siting and leasing processes on Federal *and* Indian lands;

II. TRANSMISSION INFRASTRUCTURE—Inadequate transmission infrastructure and capacity on Indian lands, in addition to difficult access to transmission on and from Indian lands, and obstacles to access to public energy grids, present significant hurdles to renewable energy development in Indian country;

III. FINANCING—Current financial incentives are ill-fitting instruments in much of Indian Country and thus act as a disincentive to tribes' capital investment in projects on their own lands and with their own resources; and

IV. FEDERAL PROGRAMS—Indian energy programs are not effectively structured to support renewable energy deployment in Indian country.

In greater detail below, we discuss these challenges facing Tribes and Native Corporations in developing, investing in and owning renewable energy projects.* In addition we set forth specific legislative solutions and discuss some of the ideas outlined in the Committee's Concept Paper.

I. Leasing and Siting

CHALLENGES & CONCERNS: It is widely understood that the enhancement of the Nation's renewable energy development, will rely heavily on the private sector. Indeed, the vast majority of the proposals being considered are some combination of incentivizing the private sector, creating new opportunities for private-public partnerships and public dollar investment.

Attracting private capital, as always, will remain competitive. Development, in turn, which can move from concept to actual energy generation most promptly will have important competitive advantages. Put another way, in renewable development, as in so many other things, time is indeed money and to attract money, those who have built-in delays will be far less competitive.

Yet, tribal development presently, suffers from many delays not attributable to tribes themselves but because of inefficient federal policies and practices. Consequently, these delays must be addressed if tribes are going to compete on an even playing field. We understand, of course, renewable projects sited and financed in Indian Country are a new phenomenon. But we also believe it essential that to *not* hamper development, new rules and procedures must be put in place to make projects timely, and hence, economically viable. Older leasing rules and paradigms which were designed to protect the Indian public and environment from non-renewable energy development are often, in a word, obsolete. Such approaches are not always necessary nor the best-fit for renewable projects. And we are fighting time. These two challenges alone suggest we begin to look towards innovative ways to stimulate renewable development on Indian lands.

Investors, developers and Tribes who seek to invest capital on renewable projects are finding that the lack of clarity with respect to trust and Indian land lease reviews and permitting, and the often severe delays and extraordinary and unpredictable length of time involved in such federal reviews and the federal issuance of permits, serve as a great disincentive to capital deployment.

Developer commitments and capital flow along the paths of least resistance. As federal agencies and states make it easier to site and permit projects on federal and state lands, creating more transparent and predictable processes, it is not surprising that capital will be more attracted to those projects and *away* from Indian projects,

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*Because ICREC has focused its efforts at this juncture to support policies and priorities related to primarily commercial renewable and transmission projects, our recommendations also primarily reflect potential commercial solutions to the unique and important challenge that face Indian Country.

especially when under current systems, projects can take anywhere from 2–5 years longer on tribal and other trust lands. The challenge then is clear—to be competitive, there must be streamlining of the processes and greater transparency.

Recommendations & Solutions

A. *The One Stop Shop* is a concept whose time has come. We fully support the Committee's efforts and the Administration's establishment of "one-stop-shops." Specifically, we strongly support creation of a one shop for Tribal renewable energy and transmission development and the establishment of clear rules with strict timelines so that leasing and permitting can be both predictable and prompt.

B. *Streamline the Appraisal Process* and/or allow for third-party appraisals with Tribal consent, even if just for renewable and transmission projects to stimulate deployment.

C. *Authorize Long Term and Renewable Transmission Leases.* An amendment to 25 U.S.C. § 415 authorizing 25-year leases with an option to renew for an additional 25-years for renewable energy projects (projects defined as eligible for tax credits under IRS sections 45 and 48) and transmission projects substantially benefiting renewable projects without additional Secretarial approval.

D. *Extend the Allowable Length of Section 17 Corporations Lease Terms.* Extend current authorization by Tribal corporations chartered under the Indian Reorganization Act Section 17 to lease lands and to extend the current terms of leases up to at least 50 years for eligible renewable and renewable transmission projects.

II. Transmission

CHALLENGES & CONCERNS: It is no secret that one of the critical challenges facing our Nation generally in facilitating the growth of renewable development is transmission. It doesn't really matter how much energy you can generate if you cannot transmit that energy to viable markets. That is as true in Indian Country as anywhere.

Although a significant transmission and federal hydropower footprint run throughout Indian Country, ironically, in virtually every instance, tribal renewable projects experience great difficulty in securing access to the transmission infrastructure on their lands This presents one of the most significant impediments to Indian renewable development—securing connectivity between Tribal renewable energy projects and electric markets. Put another way, a necessary precondition to unlock the potential for renewable energy development in Indian Country is access to commercial markets.

Closer and more meaningful national collaborations with Indian Country and the Federal Government with respect to access, use and planning for future expansions of our critical national transmission system is essential. So far, tribal voices have not been adequately included in the national discourse on transmission build-out. It is essential that any clean energy statute ensure that tribes are on equal footing to states in making the critical transmission infrastructure decisions.

Recommendations & Solutions

A. *Authorize expansions of federal transmission* with specific authorization to enter into Power Marketing Administration "public"/private/tribal partnerships for new lines and expansions of lines within current corridors for the specific purpose of rapid deployment of renewable energy on Indian lands. Authorizing both the Western Area Power and Bonneville Power Administrators, as they are currently authorized, to allow other entities to participate in the financing, construction and ownership projects; but with new authority to provide priority to the participation of entities which have partial or full ownership by a Tribe, Native corporation or tribal enterprise. In addition, specific authorizations to allow tax-exempt bonding authority to Tribes as a financing tool to acquire equity and ownership positions in said public-private-tribal transmission projects would provide an additional tool to address this concern.

B. *Create a Tribal Preference for Transmission Capacity And Queuing For Transmission Projects.* Authorize queuing and capacity preference related to FERC-approved new transmission projects, for transmission rights and interconnections for Tribal and Alaskan Native renewable projects located in empowerment zones and HUB zones in Indian Country or authorize eligibility for any federal incentives by virtue of their status as Indian lands. Additionally, direct federal PMAs, as they undertake queue reform including cluster studies and similar assessments through the end of 2010, to advance applications for projects sited on Indian lands that have met the relevant criteria for interconnection requests.

III. Financing

CHALLENGES & CONCERNS: As tax-exempt entities, tribal governments have a very limited ability to employ current tax-based credits and other financial incentives for renewable energy development—the primary drivers for renewable investment in the United States. Tribes and native communities often want to own and control critical renewable energy infrastructure. However, if they cannot utilize the incentive tools of tax credits, ownership is generally not feasible and prohibitive. The answer is making the tax credits fungible or tradable otherwise tribes are at serious disadvantage and inability to use tax credits will remain a further hindrance to renewable project development in Indian Country.

The rationale behind the series of renewable energy tax incentives enacted over the years is fairly clear—to spur new investment in order to drive technology innovation, to incentivize investment into new generation cleaner energy development and to take advantage of economies of scale for manufacturing.

As with many policy objectives, the intended effects and the practical effects are not in all cases the same. Tribal governments are keenly aware of their differences from other governmental counterparts. Those differences, as these policies were initially contemplated and designed, are not adequately addressed by current policies and do not begin to address a rapidly emerging interest and priority for Tribes to diversify and invest in (and control) their own renewable energy projects.

The fundamental challenges for Tribes to compete with other governmental entities not to mention investor counterparts are unfortunately not solved with a single fix. Rather, there are targeted approaches that can significantly level the playing field in the near term. The complexity of the answers is better understood when understanding the practical effect of the current situation as well as and surveying some attempts to 'fix' the situation in the past, namely two specific impediments:

Third-Party Non-Tribal Investment and Ownership of Renewable Projects

To economically develop a renewable project, efficiently utilizing the investment tax credit (or production tax credit or other very important financial incentives) is essential. So essential in fact that it is causing most Tribes, looking to develop and invest into these projects, to bring on tax partners who can utilize these credits. But this is a Catch–22 of sorts for the tribes—they need the partner to take advantage of the tax credit, but for an extraordinary long period of time the Tribal governments is, in essence, losing significant control over their own critical infrastructure. Under present law, because the tax credits follow the capital investment and ownership on a *pro rata* basis throughout the term of the tax credits, the ownership and control of the project must be in the taxable owner partner. Simply put, Tribes can not monetize tax credits efficiently to offset any tax liabilities. This presents a disincentive for Tribes to own a project, much less invest in it, and presents a confounding and exasperating challenge.

Rather than wait for all of the natural resources to be developed around them, Tribes are being faced with the question of whether to (1) wait until the law changes so they can control and invest in their own projects, and watch renewable development happen without them (and ostensibly saturate the market) or (2) accept third party tax investment, development and ownership—once again taking a passive position. Although some are choosing the latter and innovating creative compensation strategies to attempt to offset the inequities, it does not change the essential fact that third parties once again own critical infrastructure on Indian lands.

Tribal-Specific Hurdles to Issue Clean Renewable Energy Bonds (CREBs)

The creation and authorization of the Clean Renewable Energy Bonds (CREBs), a financial incentive created in the *Energy Policy Act of 2005*, and its inclusion of Tribes as eligible entities was a positive step forward in attempting to level the competitive playing field between consumer-owned utilities and other eligible entities (e.g., municipals, electric cooperatives, and Tribal governments) and tax investors whose benefits from these provisions is straightforward. The purpose of the CREBs program was to provide an incentive specifically for these entities to invest in new renewable electricity generation facilities.

However, there are a few inaccurate assumptions made about Tribes in comparison to other governmental or non-profit entities authorized to issue CREBs which make the issuance of CREBs by Tribes for renewable projects very difficult, a fact which accounts for the few Tribal applications for the initial allocations. Municipal entities and electric cooperatives can effectively make the most of CREBs because both have tax-based governmental subsidies and/or rate-based entities, either of which can provide the securitizations necessary for pre-project capital flow. Tribes, with the exception of very few, do not enjoy the resources to collateralize or fund

pre-cash flow based on rate-based revenues and almost none have a sufficient tax base. Supreme Court cases have exacerbated this lack of Tribal tax base recently by allowing states to tax on Indian lands and limiting Tribal taxation of non-Indians on reservations.

In short, while the purpose of this program is commendable and addresses the inequities between consumer-owned utilities and private investors, the practical effect on authorized Tribal entities has made this a program that falls short in addressing the fundamental challenges facing Tribal governments.

Recommendations & Solutions

A. *Require implementation of the DOE Indian Energy Loan Guarantee Program* ($2 billion) which is already authorized by the Energy Policy Act of 2005. And if any centralized incentive program is authorized in either statute or by the Secretary, whether it be a green bank or other restructured DOE program, that loan guarantee funds be segregated for Indian Country projects and coordinated by the DOE Office of Indian Energy Policy and Programs.

B. *Authorize Production Tax Credits (IRS Section 45) to be Assignable.* Incentivize Tribal and Alaska Native investment via transferability of IRS section 45 production tax credits between Tribes (and intertribal energy development entities) and their partners within a defined legal relationship. Congresswoman Herseth-Sandlin (SD) has introduced as stand-alone version of this request, titled the Fair Allocation of Internal Revenue Credit for Renewable Electricity Distribution by Indian Tribes Act of 2009 (H.R. 2982).

C. *Authorize Investment Tax Credits (IRS Section 48) to be Assignable.* Incentivize Tribal and Alaska Native investment via transferability of IRS section 48 investment tax credits between Tribes (and intertribal energy development entities) and their partners within a defined legal relationship.

Or in the alternative, the ICREC recommends the possible inclusion of these assignability authorizations in the section of the Code where these tax credit incentives emanate. IRS Section 38—General Business Credits, be amended by the addition of one subsection as follows:

D. Proposed new Section 38(e):

(e) Indian Tribes, and Alaskan Native village governments—An Indian tribe and Alaskan Native village government, or qualified intertribal energy development entity, as a lessor of property may elect to treat the lessee of such property as having purchased such property for purposes of the credits provided for in Section 45 and Section 48, even if the property would not otherwise be Section 38 property in the hands of such Indian tribe, Alaskan Native village or qualified intertribal energy development entity.

Proposed language addition at end of Section 168(h)(2)(A):

A Qualified Facility under Section 45 and Energy Property under Section 48 shall not be characterized as Tax-Exempt Use Property as the result of an ownership interest by an Indian tribal government.

E. *Authorize a Permanent Extension of the Indian Wage Credit and Accelerated Depreciation Allowance.* These have been relatively uncontroversial provisions which put in place and reauthorized over the years and are a tremendous help in both attracting and optimizing capital to projects in Indian Country. Businesses cannot effectively plan with only annual reauthorizations of these incentives.

F. *Amend P.L. 98–369 section 60(b)(c) to Allow Loss Transfers by Alaska Native Corporations.* Incentivize Tribal and Alaska Native Investment via loss transferability between Native Corporations and Tribes and their partners within a defined legal relationship.

G. *Reauthorize (a Tribal) Renewable Energy Production Incentives (REPI)*—reauthorize the REPI for Tribal Projects for production tax credit (PTC) projects in order to provide a non-tax credit financial incentive for renewable energy electricity produced and sold by qualified renewable energy generation facilities that can be used in conjunction with New Markets Tax Credits and accelerated depreciation allowances on Indian lands.

H. *Reauthorize Grants-in-Lieu-of-Tax Credits And Authorize Eligibility For Tribes.* If there is any reauthorization of this program which was established in section 1603 of the American Recovery and Reinvestment Tax Act of 2009, authorize specific eligibility of Indian Tribes and Alaska Native Corporations in this program.

IV. Federal Programs

CHALLENGES & CONCERNS: Indian Country renewable energy & transmission projects are positioned to be one of the most significant economic and infrastructure development opportunities in decades. With Tribal communities economically hamstrung by inadequate infrastructure, no tax base and population growth outpacing infrastructure growth—energy and infrastructure development that will not just provide new revenue streams but also attract capital investments in manufacturing, new sustainable employment and a new hope to tribal communities deserves a dedicated focus and coordination by the agencies that serve Indian Country.

Many provisions in the Energy Policy Act of 2005 remain not only unfunded but inadequately implemented. It is no surprise then that the provision have not served the purpose for which Congress enacted them. To support current renewable and transmission initiatives in Indian Country requires immediate implementation of these statutory provisions.

One important example to help illustrate the point is The Department of Energy's Office of Indian Energy Policy and Programs (OIEPP). This program was intended, among other things, to permit for far greater intra-agency coordination and facilitate tribal access to DOE programs. But the OIEPP Office was implemented woefully. Although authorized by Congress for a $20 million budget, only this year have funds been requested. The OIEPP Director in the last Administration directed only himself; he had no staff; he had few resources; he oversaw no programs. Indeed, although under the Act he was to have a robust office with oversight of "policy and programs," he has no line authority over any programs. Needless to say, this must change.

The Department of Interior also plays a critical role. Bureau of Indian Affairs' realty staff will need far greater and more intensive training and support to handle the influx of new technology and commercial agreements otherwise this will continue to be a bottleneck and limit renewable project development.

Recommendations & Solutions

A. *Department of Energy Office of Indian Energy Policy & Programs.* We need to fill the political position of the Director of OIEPP. The fact that it has not been filled, *going into our ninth month* of this Administration, and we still have not come close to filling this position is unacceptable. Moreover, that there is so little focus on a position which is such a priority for tribes is, in and of itself, proof positive of the centrally critical role this Office, properly staffed and funded, could play at DOE. Moreover, if we were to look at the plain language of the authorized statutory language—a Director was authorized which implies that the Director should have basic direction authority over Indian energy policies and programs. So far the OIEPP Director has only languished under DOE's Intergovernmental offices—with non policy or program oversight. That too must change. Although we recognize that the Office has not been appropriated the funds authorized in past years, and the Office of Intergovernmental has stepped in to administratively host the position in the past administration—the fact remains that it was authorized to stand alone and, moreover, it authorized Director to direct Indian energy policy and programs and we call for it to be not just filled but to also be restructured to fill this very important policy and programmatic role.

B. *Department of Interior/Indian Lease Support.* For renewable and energy infrastructure projects on Indian lands, for the Department of Interior, it remains a basic fact that in order to secure rights to a project and site any sort of renewable investment, the base agreement on Indian lands will involve a lease and/or right of way agreements. We fear an even greater bottleneck at the Bureau of Indian Affairs unless additional training and resources are devoted to ensuring prompt approval of leases and right of way grants. Among other things, BIA should provide tribes with a specific checklist of material they need and develop timelines for the approval process. Transparency and predictability are key virtues and should be central objectives in BIA's evaluation, processing and approval of the myriad of pre-development, development, construction and operational agreements necessary for any commercial project. The Bureau of Indian Affairs needs additional, updated and adequate support for the new and complex set of tasks it will be charged with during this wave of clean energy development—support that will help it retain and fulfill its central trust responsibility as well as support that will help Tribes fulfill the promise set before us today.

About Indian Country Renewable Energy Consortium

In 2009, the Indian Country Renewable Energy Consortium was formalized as by its original founding members—the Cherokee Nation, the Lower Sioux Indian Community, Oneida Nation of Wisconsin, Osage Nation of Oklahoma and Sealaska Cor-

poration. Since its formation, other Tribes and tribal entities have joined as members, including Tribes and tribal corporations whose reservations are located in the Dakotas to the Pacific Northwest to Southwest States to California.

The founding Tribes made a collective decision to focus on policy matters now actively before the Administration and Congress. Many of the founders, including Osage Nation which is testifying on behalf of the Consortium today, are Tribes which already have energy production but are seeking to, as the country is, diversify its energy economy through clean energy development. While the Tribes involved in ICREC have long lived in harmony with their natural surroundings and indeed thrived by utilizing their natural, often renewable, resources, they now are looking at the sun's, wind's and water's abundance as the source of greater self-sufficiency and accordingly self-governance. ICREC members are optimistic that this time tribes will share in the emerging economic opportunity. Working with this Congress and this Administration, we are confident to find a way to bring some equity and opportunity to Indian Country in this new clean energy frontier.

Conclusion

ICREC is representative of not only the member Tribes, but representative of numerous Tribes who are interested, already invested in or able to invest in renewable energy projects in Indian Country—to finally have an opportunity to be an equity participant and owner in Tribal projects. Economic development and diversification cannot grow in Indian Country unless the infrastructure is there to support it and unless Tribes can play a significant part in the ownership and control of infrastructure Until that happens, the cycle continues.

Renewable energy represents an opportunity to break this cycle of passive economic participation by Tribes in a sector that has, for obvious philosophical and cultural reasons, stimulated tremendous interest by Indian Country and also stimulated tremendous interest by industry to site projects in Indian Country. An intriguing twist of history has placed reservation lands in some of the most arid and windiest areas of the country. In addition, often by use of coercive tactics, transmission siting has often occurred on tribal lands. These two factors now present unrivaled opportunities to Tribes to finally develop some of the best class wind and solar resources not just in North America but the world.

This Administration and this Congress has made sincere attempts to make investment and siting of renewables more economically feasible. The recommendations and opportunities discussed today will ensure that Indian Tribes, tribal enterprises and Alaska Native Corporations will be participants. We look forward to continuing to work with you to make this a reality.

Thank you.

The CHAIRMAN. Chief Gray, thank you very much. We appreciate your being here.

Now we will hear from the Honorable Steve Herrera, who is a Tribal Council Member from the Southern Ute Indian Tribe in Colorado. Mr. Herrera, thank you very much for being with us. You may proceed.

Let me say that the entire statement will be in the record. We are taking your summaries, of course, but your entire statement will be made a part of the permanent record of the Committee.

STATEMENT OF HON. STEVE HERRERA, TRIBAL COUNCIL MEMBER, SOUTHERN UTE INDIAN TRIBE; ACCOMPANIED BY TOM SHIPPS, LEGAL ADVISOR

Mr. HERRERA. Chairman Dorgan, thank you for allowing us to speak today, Vice Chairman Barrasso and the rest of the Committee. It is an honor for the Southern Ute Tribe to be called on to provide testimony today. And it is a personal honor for me to be here as well.

Today I am accompanied by Mr. Tom Shipps, who is a longstanding legal advisor for the Southern Ute Tribe with 30 years experience. His firm was employed first in 1968, so we have a lot of

help from that firm in all of our aspects of our governing and our oil and gas revenues.

Today I would like to give a little background of the tribe and its history. We have approximately 1,447 tribal members. Our reservation encompasses 700,000 acres in the southwest of Colorado. We have a checkerboard reservation, which incorporate fee land, trust land and other lands as well.

History of the oil and gas success. My written testimony contains more detail about the steps our tribe has taken in natural gas development. But I will summarize some of that history today. In 1949, the tribe began leasing and was in the role of a passive royalty owner. In 1980, the tribe created its own energy department. The purpose was to study and collect data on the resources under the ground in which we knew there was resources but we did not know what, how much resources there were and how much reserves there might have been.

In the late 1980s, we negotiated flexible mineral agreements under the Indian Mineral Development Act. In 1992, we actually formed our own gas company, which is called Red Willow Production Company, which actually provides most of the revenue to the Southern Ute Tribe.

In 1994, with help from a partner, we purchased an on-reservation pipeline gathering and treating company called Red Cedar Gathering Company. Today we have operations in approximately 10 States and the Gulf of Mexico and most of these have been remarkably successful. Success in energy has translated to a better life for our tribal members. This Committee has a very big responsibility and we appreciate everything that has been done to date. Hopefully we can get through some of these hurdles.

Representatives from our tribe have been part of an *ad hoc* working group of Indian tribes and organizations to review problems in Indian Country related to energy development and potential situations. We are generally supportive of the ad hoc working group and responses to the committee staff's concept paper. Today I would like to bring special attention to a few items that we have. Item number one is the tribal energy resource agreements. The Energy Policy Act of 2005, Title V, establishes opportunity for electing tribes to contract with the Secretary to remove energy-related approvals from the Secretary Congress intended to be a broad and flexible win.

The Department of Interior passed implementing regulations that accepted inherent Federal functions from what could be included in a TERA. Inherent Federal functions is not defined in the regulations and it is believed that we need to define those in order to move forward. In fact, to date, I do not believe that there have been any tribes who have entered into a TERA. It is believed that because of the inherent Federal functions concept or exemption, this is one of the reasons why.

Number two, NEPA review, related Interior approval, leases and rights-of-way applications for permits to drill and other land related to approvals unduly delays decision-making and opportunities in Indian Country. Solutions in this area range from removing tribal land decisions from NEPA to allowing tribal environmental review procedure to be a substitute for NEPA review or alternatively,

set mandatory deadlines for completion of reviews. Indian lands should not be treated like public lands.

Number three, granting, perfecting and establishing priority of security interest in Indian lands associated with energy projects. There is no clear, simple system. This is an impediment to access to commercial capital.

Number four, absence of diversity, jurisdiction, and access to Federal courts for Indian tribes, tribally-owned entities and those who contract with them also independent to commercial capital and contracting with third parties.

Mr. Chairman, I would like to again thank you for allowing the Southern Ute tribe to provide testimony today. We look forward to working together to identify current and historical road blocks and removing those to help tribes develop their own lands and become successful in obtaining financial success for their membership as well as the Country. Thank you.

[The prepared statement of Mr. Herrera follows:]

PREPARED STATEMENT OF HON. STEVE HERRERA, TRIBAL COUNCIL MEMBER, SOUTHERN UTE INDIAN TRIBE

Good afternoon Chairman Dorgan, Vice Chairman Barrasso, and members of the Committee on Indian Affairs. I am Steve Herrera an elected member of the Southern Ute Indian Tribal Council, the governing body of the Southern Ute Indian Tribe. Unfortunately, our Chairman, Matthew Box, is unable to attend this hearing on the Southern Ute Indian Tribe's behalf because of an important, previously scheduled, medical appointment. However, the Tribal Council and the Chairman have designated me to appear before you today on behalf of the Southern Ute Indian Tribe. In addition to our tribe being honored by your invitation to testify, it is a great personal honor to appear before you today.

Also with me is Tom Shipps, whose firm has served as general legal counsel for our tribe since 1968. Mr. Shipps has represented us on energy matters for more than 30 years. He has testified before this Committee on several occasions and has worked cooperatively with Committee members and staff throughout his distinguished career. If needed in answering questions, I would like to call upon him for assistance.

As a final introductory matter, our tribe would like to thank the Committee, not only for its work on behalf of tribes in the energy arena, but also for it leadership on numerous issues that affect Indian people throughout this Country, including law enforcement and health care.

Background

The Southern Ute Indian Reservation, the exterior boundaries of which were confirmed by Congress in 1984 (Pub. L. No. 98–290, 98 Stat. 201), consists of approximately 700,000 acres of land located in southwestern Colorado in the Four Corners Region. The land ownership pattern within our Reservation is complex and includes tribal trust lands, allotted lands, non-Indian patented lands, federal lands, and state lands. Based in part upon the timing of issuance of homestead patents, sizeable portions of the Reservation lands involve split estates in which non-Indians own the surface but the tribe is beneficial owner of oil and gas or coal estates. In other situations, non-Indian mineral estates are adjacent to tribal mineral estates. These land ownership patterns have significant implications when considering energy mineral development ranging from the potential for drainage to jurisdiction. Historically, we have established solid working relationships with the State of Colorado and local governmental entities, which have minimized conflict and emphasized cooperation.

Our reservation is a part of the San Juan Basin, which has been a prolific source of oil and natural gas production since the 1940s. Commencing in 1949, our tribe began issuing leases under the supervision of the Secretary of the Interior. For several decades, we remained the recipients of modest royalty revenue, but were not engaged any active, comprehensive resource management planning. That changed in the 1970s for our tribe as energy resource tribes in the West recognized the potential importance of monitoring oil and gas companies for lease compliance and maintaining a watchful eye on the federal agencies charged with managing our resources. A series of events in the 1980s laid the groundwork for our subsequent suc-

cess in energy development. In 1980, the Tribal Council established an in-house Energy Department, which spent several years gathering historical information about our energy resources and lease records. In 1982, following the Supreme Court's decision in *Merrion v. Jicarilla Apache Tribe,* our Tribal Council enacted a severance tax, which has produced more than $500 million in revenue over the last three decades. After Congress passed the Indian Mineral Development Act of 1982, we carefully negotiated mineral development agreements with oil and gas companies involving unleased lands and insisted upon flexible provisions that vested our tribe with business options and greater involvement in resource development.

In 1992, we started our own gas operating company, Red Willow Production Company, which was initially funded through a Secretarially approved plan for use of $8 million of trust funds received in settlement of reserved water right claims. Through conservative acquisition of on-Reservation leasehold interests, we began operating our own wells and received working interest income as well as royalty and severance tax revenue. In 1994, we participated with a partner to purchase one of the main pipeline gathering companies on the Reservation. Today, our tribe is the majority owner of Red Cedar Gathering Company, which provides gathering and treating services throughout the reservation. Ownership of Red Cedar Gathering Company allowed us to put the infrastructure in place to develop and market coal-bed methane gas from Reservation lands and gave us an additional source of revenue. Our tribal leaders recognized that the peak level of on-Reservation gas development would be reached in approximately 2005, and, in order to continue economic growth, we expanded operations off the Reservation.

Today, the Southern Ute Indian Tribe, through its subsidiary energy companies, conducts sizeable oil and gas activities in approximately 10 states and in the Gulf of Mexico. Despite the recent downturn in energy commodity prices, we continue to be successful and growing. We are the largest employer in the Four Corners Region. We are also diversifying into other areas, including renewable energy development. Along the way, we have encountered and overcome numerous obstacles, some of which are institutional in nature. We have also worked actively with this Committee over the decades in an effort to make the path easier for other tribes to take full advantage of the economic promise afforded by tribal energy resources.

These economic successes have allowed us to provide a higher standard of living for our tribal members than many would have thought possible a generation ago. Our members have jobs. Our educational programs provide meaningful opportunities at all levels. Our elders have stable retirement benefits. We have exceeded many of our financial goals, and we are well on the way to providing our children and their children the potential to maintain our tribe and its lands in perpetuity.

Indian Energy Initiative

One persistent theme reflected in the last thirty years of our tribe's history is the notion that ultimately 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 and reasonable access to opportunities extended to other members of society. Though recognizing the critical historical importance of the federal trust responsibility, we also see on a daily basis the immobility that arises from forced reliance on a pervasive system of protection that is underfunded, understaffed, and often of questionable competence. Congress has created many paths for tribes to assume increased control over the governmental institutions that affect the daily lives of tribal members, and our tribe has taken advantage of many of them. The shift in roles, however, is particularly difficult when the systems that are being transferred are broken. Even for our tribe, which has achieved remarkable success, the challenges and responsibilities of preserving our culture, our tribal community, and our remaining attributes of sovereignty are daunting. We believe that this Committee knows that improvements can be made in fostering effective tribal governance and opportunity, and that when recognized, impediments to tribal success can be removed. It is for all of those reasons that we have participated actively in recent discussions related to problem-solving in the energy arena, and we hope that our ideas will be of value to the Committee.

Representatives of our tribe have participated actively in an *ad hoc* working group of energy producing tribes and associated organizations, which has responded to the initial energy concept paper prepared by this Committee's staff. Although we have been involved in discussions related to all of the issues contained in the initial concept paper, we have also identified some specific items that we hope will be addressed by the Committee and, potentially, in legislation.

First, with respect to Title V of the Energy Policy Act of 2005, we were vocal advocates for the Tribal Energy Resource Agreement (TERA) mechanism approved by Congress. We believe that the Secretary's regulations implementing those provisions

undermined much of what Congress intended by eliminating "inherent Federal functions"—an undefined term in the regulations—from the scope of functions that could be assumed by a tribe. To be sure, the Director of the Office of Indian Energy and Economic Development has encouraged us to prepare a proposed scope for a Southern Ute TERA, and we may yet prepare one. We do request, however, that the Committee examine this issue and obtain some clear understanding from the Administration as to how this regulatory restriction is to be interpreted.

Second, we strongly believe that National Environmental Policy Act (NEPA) review mandated in the course of a federal agency's consideration of approval or disapproval of tribal land use decisions and related activities discourages tribal energy development, whether renewable or non-renewable. We have provided several suggestions for mitigating the unintended adverse consequences of NEPA review on Indian lands. Those suggestions include removing Indian lands from NEPA review, utilization of alternative tribal environmental review processes, and commanding expeditious review by Federal agencies involved in decisions affecting tribes or their lands.

Third, one impediment to access to commercial capital related to tribal energy projects involves the absence of an effective, clear system for issuing security interests in tribal lands in a way that will confirm a first priority in the event of default. We urge the Committee to investigate the relationship of the BIA Land Title and Records system and its function, if any, in perfecting or providing assurances of priority of encumbrances and security interests with respect to tribal energy projects.

Fourth, we request that this Committee initiate review and communicate with other applicable committees the absence of access by tribes or parties contracting with tribes to federal courts under diversity jurisdiction. This limitation imposes institutional obstacles to tribes who wish to provide for effective and commercially acceptable judicial mechanisms for dispute resolution, yet who are unwilling to default to state courts in the resolution of potential contractual disputes.

Conclusion

In conclusion, the Southern Ute Indian Tribe is honored to appear before you today. We intend to remain active participants in this process as it develops, and we believe that our experiences have contributed to a unique perspective on matters related to energy development in Indian country.

The CHAIRMAN. Mr. Herrera, thank you very much for being here.

Finally, we will hear from the Honorable Ralph Sampson, Chairman of the Yakama Nation, Indian tribe in Toppenish, Washington. Mr. Sampson, welcome. You may proceed.

STATEMENT OF HON. RALPH SAMPSON, JR., CHAIRMAN, YAKAMA NATION

Mr. SAMPSON. Thank you, Mr. Chairman and members of the Committee. Good afternoon.

My name is Ralph Sampson, Jr. I am Chairman of the Confederated Tribes and bands of the Yakama Nation. Also, I am Chairman of the Board of Directors for Yakama Power, the Yakama Nation's publicly-owned utility. Our utility has been delivering power since 2006, and serves four average megawatts. We are actively growing to serve the entire reservation and working to provide renewable energy generation to the Northwest.

We support many of the ideas of the committee concept paper and greatly appreciate this Committee's willingness to assist tribes. We would like to see five obstacles of energy development addressed by this or other legislation, and we have experienced all of these problems first-hand in forming our utility and working as a public utility.

The first is in dealing with the National Environmental Policy Act implementation. The Bureau of Indian Affairs and the Yakama Nation require environmental assessments that follow NEPA proc-

ess for all major projects on the Yakama Reservation. What is frustrating is that the BIA's sister Federal agencies are requiring separate NEPA reviews of our environmental assessments. The original NEPA process takes six months to a year, only to have the various programs within the Government repeat the same process, doubling the time involved. This is done at the USDA under the Rural Utilities Service, RUS, and at Bonneville Power, the Administration and the Department of Energy.

We understand and encourage the protection of the environment, as we are stewards of our land also. But this process places an undue burden on the tribal projects. We need a process that requires these other Federal agencies to participate in the original NEPA process, not to oversee what has already been done or to simply provide comments instead of repeating that whole process.

Second, despite statutory language encouraging Federal agencies to purchase renewable energy, especially from Indian tribes, whenever we attempt to sell our renewable energy to Federal agencies operating within our reservation, we get nowhere. The failure means our local economy was not stimulated and the Federal incentive for renewable energy on our reservation evaporated.

We need a Federal regulation or programs with teeth to support the development of Indian renewable energy and the purchase of power by Federal agencies, especially those operating on our reservation. One potential solution would be to have Federal agencies that acquire Indian renewable energy and delivers it to key trading hubs for use with other Federal agencies.

Third, we would encourage that any legislation that is proposed and or enacted would be supported in the budgeting process. The Energy Act of 2005 promoted the production of renewable energies by providing money in various grants and loans, but failed mainly because many of the provisions of the Act had never been funded.

Fourth, based on their experiences, tribes need statutory language that makes it clear that when the BIA transfers title or control of a Federal irrigation project, small hydro turbines and related substations or local distribution lines to a tribe, language in transmission contracts between the BIA and its sister Federal power marketing agencies, namely BPA and WAPA, cannot be used to prevent such transfers simply because the transmission contracts fail to contemplate such unique circumstances in Indian Country.

Federal law makes it clear that empowering the tribe to manage their own affairs on their reservations and to pursue development of renewable energy are primary Congressional goals.

Finally, that leads to our last issue. The Yakama Nation, through our tribal utility, Yakama Power, paid to examine, rebuild and restore three hydro power turbines on the Wapato Irrigation Project, a federally-owned and operated irrigation project. The irrigation project benefits both the Yakama Nation and many non-Indian farmers who farm the majority of these irrigated lands. Built in the 1930s and 1940s, the turbines have nameplated capacities of 4.2 megawatts.

The sale of the renewable energy from these turbines will provide revenues back to the Federal irrigation projects for project-wide repair and maintenance. The BIA has never had the funds to

repair these old turbines. This has only been made possible because Yakama has used $3.2 million of its own utility's money with the understanding that if we couldn't get the money back any other way, the $3.2 million would be repaid to our utility from the sale of energy. But if that happens, our utility cannot expand, or this Federal irrigation project will not have the money from the energy sales to cover its long-deferred maintenance for quite some time.

We attempted to apply for a DOE grant for the development of small scale hydro projects that would have covered this debt that the Federal Government owes us. But because of a technicality in the law, the projects have FERC license. We are not eligible, we didn't have a FERC license because this is a Department of Interior project and thus exempt from FERC licensing.

Any help that we can get recovering this money from the Federal Government would be much appreciated, whether in fixing the DOE grant requirements so that non-FERC licensed projects are eligible or providing a one-time appropriation to the BIA to repay the money.

Ultimately, perhaps Committee members could assist in getting a waiver form FERC requirements for using their money only for FERC-licensed hydro projects. I appreciate this opportunity to speak before the Committee.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Sampson follows:]

PREPARED STATEMENT OF HON. RALPH SAMPSON, JR., CHAIRMAN, YAKAMA NATION

Good afternoon, my name is Ralph Sampson, and I am the Chairman for the Yakama Nation Tribal Council, and the Chairman of the Board of Directors for Yakama Power, the Yakama Nation owned utility. Our utility has been delivering power since 2006, and serves 4 average megawatts. We are actively growing to serve the entire reservation, and are working to provide renewable energy generation to the northwest.

We support many of the ideas in the Committee's concept paper and greatly appreciate this Committee's willingness to assist tribes. We would like to see five obstacles to energy development addressed by this or other legislation.

The first is in dealing with National Environmental Policy Act implementation. The Bureau of Indian Affairs and the Yakama Nation require environmental assessments that follow NEPA, for all major projects on the Yakama Reservation. What is frustrating is that the BIA's sister federal agencies are requiring separate NEPA reviews of our Environmental Assessments. The original NEPA process takes six months to a year, only to have the various programs within the government repeat the same process, doubling the time involved. This is done at USDA under the Rural Utilities Services or RUS, at the Bonneville Power Administration, and the Department of Energy. We understand and encourage the protection of the environment, but this process places an undue burden on tribal projects. We need a process that requires these other federal agencies to participate in the original NEPA process or to simply provide comments instead of repeating the NEPA process.

Second, despite statutory language encouraging federal agencies to purchase renewable energy, especially from Indian tribes, whenever we attempt to sell our renewable energy to federal agencies operating within our Reservation, we get nowhere. This failure means our local economy was not stimulated and the federal incentive for renewable energy on our Reservation evaporated. We need a federal regulation or program with teeth to support the development of Indian renewable energy and the purchase of that power by federal agencies especially, those operating on Indian reservations. One potential solution would be to have a federal agency that acquires Indian renewable energy and delivers it to key trading hubs for use by other federal agencies.

Third, we would encourage that any legislation that is proposed and or enacted, would be supported in the budgeting process. The Energy Act of 2005, promoted the production of renewal energies by providing money in various grants and loans, but failed mainly because many of the provisions of the Act have never been funded.

Fourth, based on our experiences, tribes need statutory language that makes it clear that, when the BIA transfers title or control of a federal Indian irrigation project's small hydro turbines and related substations and local distribution lines to a tribe, language in transmission contracts between the BIA and its sister federal power marketing agencies, BPA and WAPA, cannot be used to prevent such a transfer simply because the transmission contracts failed to contemplate such unique circumstances in Indian country. Federal law makes it clear that empowering the tribes to manage their own affairs on their reservations and to pursue development of renewable energy are primary Congressional goals.

Finally, that leads to our last issue. The Yakama Nation through its tribal utility, Yakama Power, paid to examine, rebuild, and restore three hydropower turbines on the Wapato Irrigation Project, a federally owned and operated Indian irrigation project. This irrigation project benefits both the Yakama Nation and many non-Indian farmers who farm the majority of these irrigated lands. Built in the 1930s and 1940s, the turbines have a nameplate capacity 4.2 megawatts. The sale of the renewable energy from these turbines will provide revenues back to this federal irrigation project for project-wide repairs and maintenance. The BIA has never had the funds to repair these old turbines. This was made possible only because the Yakama's used 3.2 million dollars of its utility's money with the understanding that, if we couldn't get the money back any other way, the $3.2 million would be repaid to our utility from the sale of the energy. But if that happens, our utility cannot expand, and this federal Indian irrigation project will not have the money from the energy sales to cover its long deferred maintenance for quite some time.

We attempted to apply for a DOE grant for the development of small scale hydro projects that would have covered this debt that the Federal Government owes us. But because of a technicality in the law, that the project have a FERC license, we weren't eligible. We didn't have a FERC license because this is a Department of Interior project and, thus, exempt from FERC licensing.

Any help we can get in recovering this money from the Federal Government would be much appreciated, whether in fixing the DOE grant requirements so that non-FERC licensed projects are eligible or any providing a one-time appropriation to the BIA to repay the money.

I appreciate this opportunity to testify and if I can answer any questions, please let me know.

The CHAIRMAN. Mr. Sampson, thank you very much. We appreciate the testimony that all four of you have given.

I am going to, in the interest of time, because Senator Murkowski has to leave, I am going to recognize Senator Murkowski first for questions, then I will recognize Senator Udall and then I will complete questions following that.

Senator Murkowski.

Senator MURKOWSKI. Thank you, Mr. Chairman. I appreciate the courtesy to my schedule.

And gentlemen, I appreciate your testimony here this afternoon. There is certainly a recurring theme that each of you have raised. You have talked about the NEPA issues, you have talked about just the regular process that seems to strangle many good projects. And then of course, at the end of the day, it always comes down to how we are going to finance this, how we are going to make this happen.

We have a situation up in the State of Alaska right now, Cook Inlet Region is looking to build a 60 megawatt farm, and they are also looking to move forward on a demonstration project that would provide for coal gasification technology to advance. But what they are finding is that there is no Federal aid that is currently available. So they have to figure out how they piece this together internally. That, as we all recognize, is very, very difficult.

I think it was you, Mr. Gray, that suggested that typically what we do around here is we advance tax credits, production tax credits, and that is one way to facilitate projects. But with the tribes,

that is not a mechanism that can be realized. You have suggested perhaps monetization of those credits.

I direct this to all of you in terms of what you think that we can do, particularly given what we are seeing right now with the very tight credit markets, how can we better facilitate the financial end of some of the roadblocks that we are seeing with Indian energy projects right now? Mr. Gray?

Mr. GRAY. Thank you for the question. I really do want to just add to the urgency that exists in Alaska that most people may not be aware of, that in Native villages in Alaska, that the electrical costs for heating their homes is often ten times the national average. So the burden is twice as hard on them to find renewable resources.

To the extent that we can tweak the law to make it possible for tribes who have limited capital investment capacity to be able to partner with industry that has the capacity to do this, this gives the tribes what we would call an investment capability into a project. By monetizing some of the tax incentives and the production tax credits and the investment tax credits, the tribes would be a full partner in many ways to participate in these projects. This would ensure at least the production of these renewable resources.

The problem that I continue to see, that I am certain is probably just as evident in Alaska as it is in the lower 48, and that is that the electrical grid needs a major overhaul in this Country. Much like the Federal highway system needed a major commitment from the United States to see it through, the electrical grid provides not only development opportunities but capacity building for individual tribes across the Country who have often been left out of the whole process over the years, just because of the bureaucratic issues that we have raised already.

So those two issues seem to be the big, important ones. The bonding authority for tribes to be able to issue bonds to be able to finance these kinds of projects is also critical to the development of sustainability. And having a degree of tribal control over the development and allocation of electrical resources.

Senator MURKOWSKI. Mr. Herrera, do you have anything that you wanted to add on that? I know you have certainly been keyed in on the financial transaction aspect of it.

Mr. HERRERA. Yes, ma'am, and thank you very much for asking the question.

Some of the projects that are not seen or followed through with are because of a lack of financial backing is in some cases attributed to lack of recording for the monetization or the potential for the financial backer to make sure that they have access to that land if there is a foreclosure or if there is a potential for the tribe to become delinquent. So one of the things that we think is, we need to set up a recording and monitoring of these lands so that whenever a financial backer comes onto the reservation, that we can actually show that they have first right of refusal or there is actually some monetary amounts that they can recapture from this investment. Because they pretty much stay away from it if they aren't assured that they can actually recoup their money.

So being able to have a system in place to ensure that they understand and it is actual that there is a method for them to recoup

their money, or at least to make sure that they don't lose the investment in whole.

Senator MURKOWSKI. Mr. Levings, I understand that you had participated in crafting at least certain parts of the 2005 Energy Act. It was not just me, I think Senator Udall noted it, I think it is recognized that much of what we had hoped was going to materialize from that 2005 Energy Act, when it comes to the Indian energy title, we haven't seen. Do you have any specific suggestions as to how we could have made it work better or in hindsight now, what we should have done differently?

Mr. LEVINGS. Senator Murkowski, I wasn't involved in that, I don't believe.

Senator MURKOWSKI. Okay, well, we are giving you credit for that.

[Laughter].

Mr. LEVINGS. The one-stop shop, though, Senator, I was involved with.

Senator MURKOWSKI. Maybe that was it.

Mr. LEVINGS. I guess I am kind of a grass roots chairman, as my colleagues here and fellow presidents and chairs and council members and councilwomen across Indian Country. I came up from the bottom. I was a realty specialist in Warm Springs, Oregon, back in 1990 and 1991. I did work in oil and gas as a land man. And now to come full circle as chairman, to see all of the hurdles and the red tape and the bureaucratic process, it is amazing that oil industry comes to Indian Country.

The 49 Steps, for instance, that Chairman Dorgan, he got those right from our people on the ground at the agency.

Senator MURKOWSKI. You weren't making up the numbers?

Mr. LEVINGS. No, it is actual. Then you almost had a 50th step with the EPA guideline that they were going to try to implement on Fort Berthold. It is really frustrating, because every morning I wake up and I look out the west window where I live. I am about half a mile from the reservation border on the western side by Keene and Charleston. And there is a derrick standing up on the ground. Twenty days later, there is a 30-foot flare of natural gas flaring. They move the rig southwest, I would say, a quarter of a mile, and they are drilling there. And then there is another flare. And they are just going right down the line. And it is on fee land off the reservation.

I am looking on my land, my grandparents' land, the Wells place, the Levings place, Bird Bearers, Banks, all the way down to the buttes, and it is dark. But off the reservation, it is light to the west, it is just a horizon. It is like coming up into a city horizon. You go north, same difference. I can look out my porch on the east side of the home, on the north side, it is just lights up there. And that is just from my front steps.

Now, my elders, they see this day in and day out. And their words are this, Chairman, I signed the lease. I am going to get my bonus and I am going to spend it, but I am never going to see royalties. I am going to die before I see my royalties. And three of those grandmas have passed on.

That is our frustration. So that photo, that map up there is reality. And on the reservation, as many tribal leaders will attest to,

when things go bad, you blame the council and you blame the chairman. And right now, that is the problem that we have, there is a lot of finger-pointing. When that happens, it gets a connotation that you are not doing enough. So any time I am requested to be here to give the grass roots, what is really happening, here I am. Because I need to pass the message along.

With the 2005 opportunity, I don't know why we wouldn't try it. Because Fort Berthold, the Mandan, Hidatsa and Arikara, we want to try anything and everything. There is a TERA provision in there. The second opportunity would be to 638 contract the Bureau of Indian Affairs' realty program.

But the problem I have on Fort Berthold is in 1986, they had a referendum. And the people voted not to do that. So 2009, I would have to send it back to the Mandan, Hidatsa and Arikara 11,000 membership and ask them, is it safe to do it today. Because that would provide us an opportunity to do our own paperwork.

However, the Federal Government still has to sign off on those leases and permits. So, Senator, in the long and short of it, I am really frustrated.

Senator MURKOWSKI. We hear your frustration. But you are clearly doing more than just working at the grass roots. You are obviously representing your people well, and I thank you for your testimony.

Thank you all. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Udall.

Senator UDALL. Thank you, Mr. Chairman. Thank you for allowing me to go at this point.

Let me just follow up, Chairman Levings, with you. As you know, and you were here when Senator Dorgan put the chart up, you should know you have a real champion in him.

Mr. LEVINGS. Yes.

Senator UDALL. He has put that chart up many times, when Larry Echo Hawk was here, when Secretary Salazar was here. He is trying to shake the bureaucracy and get things done with you. He is really making an attempt, I think, to cut through the bureaucracy and get things done.

One of the things, in light of talking about bureaucracy that I would like to ask, if any of you on the panel have any experience with this, when we passed the 2005 Energy Bill, one of the provisions to try to cut through bureaucracy allowed tribes to enter into mineral leases without day to day oversight from the Secretary. But apparently, no tribe has applied for this program. Do any of you have any sense of why that has happened, why that provision hasn't helped us move this along? Please, go ahead, Mr. Gray, go ahead, or Chairman Levings.

Mr. GRAY. We affectionately refer to it as the war on TERA back home in Indian Country, largely because people are in the mind set that there is a lot of things that tribes give up in way of the trust responsibilities that often should come with some kind of balancing. This is what we get in return for giving up certain portions of our trust responsibilities. Tribes haven't been able to really find that balance very equitable. I think that many times that we, especially those treaty tribes, certainly do hold those trust responsibilities very near and dear to their heart as a generational obligation

that they pass down from their elders to their children. And anyone who breaks that agreement is highly criticized back home.

The critical elements of the Tribal Energy Resource Agreements require us to give up certain responsibilities to the United States or waive the liability of the United States on certain projects. And while the details of each individual TERA may be different from tribe to tribe, the overall message that tribes got from that agreement is that there is a lot of liability that the United States does not any longer want to absorb in developing tribes' energy resources.

Because of that, I think tribes are stuck in limbo, saying, well, short of that, what can we do? Because no one wants to go to that ultimate step of being the first one to go through the chute, as they say. I would say that right now, that is probably the biggest reason.

Senator UDALL. Please, Chairman Sampson, go ahead.

Mr. SAMPSON. Thank you. I would like to agree with Chairman Gray that it is true that it is, I take an oath of office just like you do. It is within our oath that we are to uphold the treaty of June 9th, 1855, the Yakamas with the United States of America. In that treaty, there are trust responsibilities that are obligating the United States to uphold to. By signing onto that, we would be relinquishing some of the trust responsibilities. That is mainly the main course why you haven't seen the Yakama Nation sign onto that.

Senator UDALL. Please, Councilman Herrera.

Mr. HERRERA. Thank you, Senator Udall. Thank you for the question.

We feel that along with comments that have been heard already is that it is a government responsibility. We have been in that mode for a very long time. Of course, there is a lack of funding in all aspects of the oversight and the responsibility of the Government to take care of the tribal organizations or tribal members and tribes as well. One of the other aspects is, it is difficult for a certain tribe to go ahead and enter into this type of agreement with actually some comprehension of, what does this mean for all of Indian Country.

So if we go into it and there is negative impacts that are seen in the future, it is one of those things where we really have a hard time, and we are apprehensive to doing it, because there could be some negative connotations that are going to be seen throughout Indian Country, and definitely no tribe wants to be set in the forefront of establishing negative impacts to the rest of the tribes in the United States.

Senator UDALL. Thank you. Chairman Levings?

Mr. LEVINGS. Senator Udall, the Three Affiliated Tribes, the Mandan, Hidatsa and Arikara, have heard the problems, heard the stumbling blocks, the hurdles. And we took care of many of those in 1997 under the support of Chairman Dorgan and Senator Conrad and Congressman Pomeroy. They established an opportunity for Fort Berthold to change the mineral ownership requirement for a lease from 100 percent criteria to 51 percent. That was one of the hurdles.

The second one was we had a dual taxation in the State of North Dakota. So the tribal council and the Governor and the legislative body for North Dakota worked that out. We have an MOU on tax, there is one tax and we divvy it up and we work through it. Of course, it was respectively to not waive any sovereignty.

Then we also did a regulation. This month, or shortly into November, Governor Hoeven and I are going to sign that document in the tribal chambers. So we are doing everything we can to remove the uncertainty for the industry. We are working here with Chairman Dorgan and the one-stop shop to make it perfect, is probably the word that I am looking for, because right now, it is not staffed yet. There are some things that have to do.

The TERA itself, I am willing to try it. I was ready and willing to go with the MOU with the State, with a one-stop shop with them. But I wanted to give Chairman Dorgan his all due attention, because he said he was going to give me that opportunity to streamline. And I believe it is going to get done. Because Chairman Dorgan can build bridges. There is one built at Fort Berthold, and it cost $50 million and he got it done. So that is not an issue.

[Laughter.]

The CHAIRMAN. It's not a bridge to nowhere, right?

[Laughter.]

Mr. LEVINGS. So he can move mountains as well, if we need Rocky Mountains moved, he can do it.

So what I am doing as a chairman is trying to let you know that we appreciate everything that has been accomplished. But the problem that I have is our elders are passing away. And they are making their premonitions come true, their predictions and their comments. Before I left, I had a fellow councilman tell me about his aunt and his uncle, who just can't get to that drilling. And they see it happening all around the reservation.

So we are willing to try TERA. But like Chief Gray said, the jury is still out. What are they going to provide to the tribe, what trust responsibility are they going to give us? And then on the 638 concept, which is similar to a TERA but different, you would still need to have the area office sign off for Federal officials. So you are pretty much just preparing the paperwork and they are still signing off. So I guess in Federal lands, we understand there are a lot of issues.

But when you have fee land right across the way, everything is going fine. And then you come to us and it stops. It is really tough, because a lot of these oil companies are turning their lease back. Three years have burned, four years have burned, and now they are coming to us and saying, do you want these? We can't get the permit.

Thank you, Senator Udall.

Senator UDALL. Thank you very much.

Let me thank the entire panel. I think all of you have as leaders been excellent advocates for your tribes and for your people. Thank you very much, and I yield back, Mr. Chairman.

The CHAIRMAN. Senator Udall, thank you very much, and thanks for your continuing interest in these issues. I know that your State has an abiding interest in these issues as well.

Let me ask, if we can put the chart back up that shows the, and in many ways, this is a metaphor for the entire Country, that Indian land is treated different than other lands. And particularly when it comes to energy development, to have the Indian nations left behind in development means that they are denied the opportunity that comes with that development, the opportunity for the royalties and the revenue, but also for the jobs and so on.

[The information referred to follows:]

So this shows oil and gas wells that are being dug or have been dug on the Reservation. Frankly, it shows we have made a little progress, because it wasn't very long ago that the map of the Indian reservation showed a big vast area of gray with very little energy activity. You will see that around the Reservation there are a lot of oil wells that have been drilled. Wells are now producing oil. So when the Chairman and his tribal council brought this to my attention, I immediately wondered why, why is this the case, how can this happen? If ever there is a need to go into the Bakken Formation and drill, you would think the most significant need is on the Indian reservation. The Bakken Formation exists throughout that reservation as it does north, south and west.

And what I discovered was a 49-step process, I believe it was 49 steps by the Interior Department, with four separate agencies inside the Department that were required to give their individual stamp of approval. And if an oil company wanted to come on the reservation and get a permit to drill, it meant that it was going to take them much, much, much longer to get a permit if they ever did get a permit than going a mile and a half off the reservation and in five to seven days, just like that, getting a permit to drill.

Now, that is unbelievable to me. So when I learned that, it has taken, I understand now, two years to get 24 wells drilled on the reservation. When I learned that, I met with the Interior Secretary, we put together an initiative called a virtual one-stop shop, tried to get the four agencies working together. And I think there has been some progress. But Chairman Levings, tell me, what more is necessary? Have they streamlined the 49 step process? Have they hired what they have promised to hire to make the one-stop shop work? Tell me what is necessary.

Mr. LEVINGS. There are four posts that they have advertised. They filled one, but they didn't fill it with an expert. They filled it with a manager, which I guess is okay, but we need an oil and gas expert. We borrowed one from the Denver office, Jeff Hunt, and he is great. We need about four or five of his capacities and abilities.

But the three other posts aren't filled. Then as soon as they are filled, he is going back to Denver and the one-stop shop. Dawn Charging has been hired, she means well, she is a tribal member, but she doesn't have the oil and gas background. So she respectfully hears our words.

Out of the Aberdeen area, they had a one-person show doing these permits for all these 40 companies. And it just wasn't happening. So they reassigned him to do a programmatic document for Mandaree segment and west segment. But they put three new people on to do the permits themselves. So that changed things overnight. In a matter of two weeks, they did 22 permits. So that was a step in the right direction, and I commend Bob Middleton with the Washington, D.C. office and Mike Black from the area director's office. But that was needed some time ago.

What I think they need to do is detail in some people from Chief Gray's area or the Billings office and get them in there to help on this effort, whether it is four, six or maybe more, just to get us to where we need to go. Because the winter is coming upon us. And if you recall last winter, Chairman Dorgan, it was tough in North Dakota. I don't think we dug out until April, somewhere in there. So we have that issue of walkovers now. Walkovers aren't going to happen when the snow hits, so we are going to have to wait.

But as far as the initial progress, I think we are patient and we know that it is going to happen, it is going to take place. But those are some opportunities I think they can do.

Within the Department itself, our words and our testimony are accurate. They transferred in, detailed in people who never worked in realty prior. And they were learning on the job. My words are true, because I did interview a couple of them, and they said, well, I got detailed in from Aberdeen. I never worked in permits before, I used to be in probate. Well, probate is over here and oil and gas

is over there. And respectfully I said, well, I will help to do the best I can to give you any insight. Then the realty officer, first post on oil and gas. And she is the one who is going and sitting side by side with my staff at these lectures and trainings.

So it is the Bureau type of rules, I guess, on transfers and details. But they need to probably provide the best resumes versus, well, they are just a GS–9 and they are qualified, so send them up there. That was kind of the issue, Chairman.

The CHAIRMAN. I don't want you to be patient any more. I will, following this meeting today, be in touch with the BIA and try to understand from them, why is it representations were made about what they were going to do and why those positions haven't been filled with qualified people with experience. It is not satisfactory to me to say, here is what we pledged to do to get this moving and then not to have them do it. There are so many broken promises. You don't need more broken promises from the agencies that have told us explicitly, we will fix this.

So tomorrow, we will be at those agencies to try to understand why it is you have been told that, here is the staffing level, we are going to get you people, and they don't get you all the people you need, number one, and number two, the people they get you aren't experienced. That is unsatisfactory to me.

Mr. Gray?

Mr. GRAY. Thank you, Chairman.

The question that you identified that is going on at Three Affiliated is something that is going on across Indian Country. That is that we do need a concerted effort from the Administration to recruit and hire and retain qualified individuals with the expertise in the areas that they are asked to work in.

When you talk about one-stop shop, I just want to throw out to you for your consideration to take a look at the Osage Agency, which has been in effect a one-stop shop for many years now. This one agency serves the dual functions that the BLM serves on other reservations, as well as MMS, as well as the trust responsibilities that are carried out through the BIA and OST. The sole purpose of really trying to accomplish a one-stop shop can be undermined simply by the fact that you have the wrong people in the right positions.

With the limited funding that has been made available for recruitment and training and retaining these individuals to work in these fields, some of the areas in Indian Country are in the most remote areas of the United States. To recruit the best people that you can in the industry is going to be very difficult without some incentives.

I would like you to consider that the agency, that BIA consider doing something like IHS does, of funding through a scholarship program that allows individuals to be able to work off their school loans on an Indian reservation working in that specific field. That might be one, that might be a longer term solution to an immediate problem that we have.

But I think a lot of it stems from the one issue that I did bring up in my testimony, which had to do with the DOE position that after nine months, is still not filled. As you mentioned before, there are 49 steps, well, not only are there 49 steps just getting the

leads, but there is also multiple overlapping jurisdiction of different agencies, from the Fish and Wildlife Department to the EPA, to DOE, DOI.

There are a variety of different agencies with acronyms overlapping that could impact the lease as well. If that position was filled and staffed and given the kind of director authority that the Energy Policy Act of 2005 actually envisioned, it might address some of these issues from a WASHINGTON level that could impact the local agencies around the Country.

The CHAIRMAN. You are saying the Osage Agency works, functions, is a model. Is that staffed with BIA personnel, Interior personnel?

Mr. GRAY. Yes, it is. And it has been operating that way for a number of years now. The hope is that we can actually use that as a model for other tribes to look at. I certainly invite the Committee to send a representative down there to check out the operations. It could prove to be worthwhile.

The CHAIRMAN. Where is that located again?

Mr. GRAY. Pawhuska, Oklahoma.

The CHAIRMAN. Mr. Herrera?

Mr. HERRERA. Yes, Chairman Dorgan, thank you very much.

I would just like to also comment on the NEPA review and some of the troubles that the Southern Ute Tribe has gone through as well. On fee lands, just outside the reservation, and even within the reservation, the State actually allowed 80 acre spacing, where it was 160 acre spacing. So we got more wells on the same amount of land.

In order for the tribe to do this, we have just actually got through the NEPA process that took two and a half years, and it actually took over a million dollars of our own money just to get this done. When it comes to the Bureau of Indian Affairs function, we actually have employed some of the ex-employees who are tribal members to do functions when it comes to realty and all the functions, when we are trying to drill locations. So those are funded by the tribe already. We haven't had a superintendent up until recently, for the last five years. And in reality, there are only three people at this agency, where before you could go down there and probably see about 14, 20 people there. It is just understaffed.

The CHAIRMAN. You haven't had a superintendent for five years?

Mr. HERRERA. Prior to this last, we just got one recently. And in closing, I think that in reality, I understand the trust responsibility from the Government. But we need to understand that if it is not going to be funded, we need to make sure that the roadblocks are taken out of the way, so that we can go ahead and do our business as we need to. It is imperative that we are able to get this stuff done because our tribal members are dying. They are in dire need. If the roadblocks are still there, we are not going to be able to do what we need to do to make sure that our lives and the lives of our children and children's children are taken care of in the future, sir.

The CHAIRMAN. The three items that we identified in the report, the concept paper, are antiquated laws and cumbersome regulations, we are talking about that; lack of tribal access to the transmission grid, and I would also include in that any conveyance grid,

of pipelines in the case of oil and natural gas; and then lack of available financing and incentives for investment by tribal energy projects, all of which we think are dilemmas that need to be addressed and all of which in some ways thwart full development.

I don't think any of us are suggesting just essentially, get rid of all of the 49 steps and let anybody do whatever they want at any moment. That is probably not possible and not advisable. But it is the case that we need to try to understand what is thwarting development and how do we address those challenges so that we have robust development on tribal lands.

Mr. Sampson?

Mr. SAMPSON. Thank you, Chairman Dorgan. I just wanted to make a comment. Before I came up here this afternoon, I made a stop down at the Office of Indian Energy and Economic Development and spoke with them about a project that the Yakama Nation has under review at the present time. I checked into their loan program to fund this project. I was informed by the gentleman there that they only have $100 million for the whole Nation there within their program for funding sources for fiscal year 2010. For our project alone would take half the whole budget for the United States, that we were proposing. I just can't see that there is enough funding that should be shoveled toward that agency, of all agencies, to help us develop our resources here within our reservations. It is severely underfunded.

The guaranteed loan program is fine. But then that allows the, requires the tribes to come up with the capital investments to come up with the big dollar projects that are out there to develop.

So I think this program does need a good kick in the pants there to get it some fund toward the tribes at the reservation levels. We could probably see more projects being developed if they did have more funding.

Thank you, Mr. Chairman.

The CHAIRMAN. I think one of the common themes we hear across the Country is that on Indian lands, because they are different and unique, we have the requirements of so many different steps. I don't think my State is unique, that if you are in my State, and wish to drill on private lands or even State lands, you will very quickly get a drilling permit. You file an application and pay a small fee and get a drilling permit in not very many days.

That is not the case if you aspire to drill on the Indian reservations. We should find ways, it seems to me. My point is, I believe that is not the case just in North Dakota. I believe that is the case across America with respect to Indian lands. If that is the case, then I appreciate that there may be a model at the Osage Nation. But my guess is that at almost every reservation where there is the potential for substantial energy development we face the same myriad of steps and the same bureaucracy that moves very, very slowly.

In Interior, I think in our State there are four different agencies of Interior that have to come to bear on these things. Each take their time. There seems to be no urgency on any of them. Then we get an agreement to do a one-stop shop, and you hire people that don't really have experience. So then it takes a while for them to understand and learn and get trained.

That is just not satisfactory. We need to do much, much better.

I think what I am going to do as a result of these discussions, I am going to ask Secretary Salazar if he will appoint one person in the Interior Department to work with this Committee, one person as a coordinator, representing the Secretary himself, to work with us to solve these problems and so that one person understands there is responsibility to get something done, and there is a time line to get something done. Otherwise, this will just go on forever. People on Indian lands that want to develop energy will continue to be frustrated. So we don't want to walk into the future that way. We want to begin to solve problems.

The purpose of this hearing really is to evaluate what, in the concept paper, can come from these discussions that could result in some legislation to move this along. I think some of the answers are in legislation. But I think some of the answers are as well just in administrative decisions to make agencies work the way we would expect them to work, with some dispatch, some coordination, so that you can work together to get something done.

Mr. Levings?

Mr. LEVINGS. Chairman Dorgan, the concept of partnering, the industry is with us, and we are with them. They wanted to accompany, one time, 15, 20 companies strong, and they said, we want to come there and fill that Committee room up with you, and I said, no, that is my job. And they are looking out for the allottees just as hard as I am and the tribe in general.

Two, these expos we have had, whether it is a State expo with the oil producing counties, or it is the tribe expo or the Bureau of Indian Affairs expo, we all come together and we brainstorm. The distinction is huge. On Wednesday, I signed a lease for a company, we have ownership in fee lands as well. I signed a lease on a Wednesday, they pulled the drilling rig in on a Thursday. That is how quick it is. On one of our wells that is on trust land, we approved it in January of 2005, they pulled the rig in in April of 2008. That is the big difference, Mr. Chairman.

The CHAIRMAN. I think that describes it in stark detail.

First of all, let me say I appreciate all four of you traveling some distance to be with us. Senator Barrasso and I, as a result of the concept paper, as well as our staffs, are trying to determine with this concept paper, what do we move forward. And having a hearing of this type is very helpful. I think it might be useful for us to take a look at the Osage Nation model, as you suggest. All of us believe everything that exists back home for all of us is a model. But I but you are right, that you have a good functioning system, and we want to take a look at that.

It does, in many respects, no matter what the location, require skilled people with experience, and who also are determined to try to make something happen. The bureaucracy, I use that term advisedly, doesn't always work that way. Bureaucracy means big organizations. There is corporate bureaucracy, there is Government bureaucracy. It is hard to get the bureaucracy to turn on a dime and to move and understand there is an urgency.

But we want to try to at least substantially improve things as we go forward on energy development. It is in the Nation's interest. We have an energy security need. We have a national security need

to develop energy. And it is also certainly in the interest of the First Americans who live on reservations that have great amounts of energy to contribute and whose citizens especially need the revenues that come from that energy and the jobs. It seems to me, if we can begin to streamline this and provide some solutions, it will be beneficial in a dozen different ways to this Country.

Mr. Gray, do you have a final comment?

Mr. GRAY. Yes. Just to add to your suggestion that possibly somebody from the Department of Interior is appointed to work directly with this Committee on this issue, I would just like to suggest that maybe you identify someone from the Department of Energy who could work directly with the Committee on this.

The CHAIRMAN. That is a good suggestion.

I thank you again, and this Committee is adjourned.

[Whereupon, at 3:47 p.m., the Committee was adjourned.]

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