

## **TESTIMONY OF VICE PRESIDENT REX LEE JIM**

February 16, 2012

Energy Development in Indian Country  
Senate Committee on Indian Affairs

Chairman Akaka, Ranking Member Barrasso, and distinguished members of the Senate Committee on Indian Affairs. Thank you for the opportunity to testify before you today concerning energy development on tribal lands. The Navajo Nation and the United States are at a crossroads: high unemployment, deteriorating or non-existent infrastructure, a lack of capital investment, and a need for low cost power have come together as the nation faces some of the worst economic conditions since the Great Depression. Our nation needs to foster regional economic development to see us through these tough economic times. Unfortunately, unlike most of the states of our great union, the Navajo Nation faces significant regulatory burdens placed on us by the federal government that hinder development. In terms of energy development, the most onerous of these regulations come from the Environmental Protection Agency, but we are also burdened by the regulations from many federal agencies. My testimony this morning will address the conditions we face on the Navajo Nation, our plans for future energy development, and the regulatory hurdles preventing us from successfully developing a sustainable economy.

The Navajo Nation has approximately 300,000 members, with nearly 200,000 members living on more than 27,000 square miles of Navajo land. Fifty-five (55) percent of our people are unemployed and nearly fifty (50) percent live below the federal poverty line. Our annual per capita income is approximately \$6,800, more than forty (40) percent of Navajo's live without water services or electricity, and ninety (90) percent lack natural gas. However, in the face of this poverty the Navajo Nation is rich in natural resources. We have abundant renewable energy

resources such as solar and wind, substantial oil and natural gas reserves, and nearly 150 years of low cost coal.

The Navajo Nation is seeking to leverage all of our available assets to spur economic development. Economic development requires the presence of land, water, power, and human capital. The Navajo Nation is blessed with land, water, and a young and dynamic workforce. The power component of this recipe for success has two pieces, the power needed to run businesses, and the tax and royalty revenues that can be realized from power generation.

Studies have shown that a sustainable economy requires that dollars circulate a minimum of three (3) times within a region. Currently, the majority of dollars earned by Navajos are spent in the towns and business that border the reservation because the Navajo Nation lacks basic businesses. Large energy projects provide the cornerstone of economic development by infusing local economies with dollars earned from high paying jobs, and drawing in the subsidiary businesses that serve these flourishing communities. In addition to jobs and business development, these projects and the communities that thrive around them raise the tax base and royalties from which the Navajo Nation can draw to develop infrastructure and provide social services. It is these revenues that will allow the Navajo Nation to be independent from the federal government and stand on its own.

To that end, the Navajo Nation has a multi-pronged approach to develop these cornerstones of economic self-sufficiency. The Navajo Nation recently created an energy task force and has signed an MOU with the U.S. Department of Energy's Lawrence Livermore Laboratory and is developing a comprehensive energy strategy that will take into account all of the Navajo Nation's energy assets.

On the renewable energy front the Nation is developing four (4) projects that capitalize on our abundant wind and solar resources: 1) a 500 Mega Watt (MW) wind farm on the Boquillas Ranch in Seligman, AZ; 2) a 500 MW wind farm in the Grey Mountain chapter in Cameron, AZ; 3) a 200 MW wind farm in the Black Mesa chapter in Kayenta, AZ; and 4) a large scale solar project which we are currently reviewing solar intensity data to pick the best possible site.

While we look forward to maximizing our available renewable resources, our most abundant, valuable, and stable resource is the vast coal deposits that lie within the Navajo Nation. Coal is, and for the foreseeable future will continue to be, the best source of low cost energy in the United States. We are continuing to explore alternatives to coal fired power plants such as the Desert Rock Energy Project that crumbled under the weight of EPA and DOI regulations and review. Projects such as Desert Rock would have been the cleanest pulverized coal-fired power plant in the country. This new cleaner technology would have set new standards of achievable control technologies across the spectrum, and brought in thousands of jobs and more than \$1.5 billion in revenue to the Navajo Nation. With the tide clearly against pulverized coal fired power plants, we are also reviewing several coal-to-liquid plants that could convert coal to diesel or other needed industrial products. Unfortunately, the EPA's hostile view towards any further coal development makes attracting much-needed capital patterns to these projects difficult. The Navajo Nation must find solutions to utilizing its vast coal resources.

Native Nations have struggled to find avenues for economic development to provide for their people. For decades we have been trapped by government mandates to lead lives of poverty and government dependence. Now several tribes have realized that their resources can provide the avenue to economic self-sufficiency they have always longed for. However, now we

find that the same government that forced us on to reservations now punishes us further by forcing stifling federal regulation because our lands, while held in trust for our benefit, are subject to federal oversight. As such, the federal government is the face of poverty on tribal lands, and no department is more responsible for this today than the EPA.

Perhaps the greatest hurdle to energy development in Indian Country generally is the applicability of the National Environmental Policy Act (NEPA) to the use of tribal lands and resources. Indian tribes do not hold legal title to tribal trust lands, which are titled to the federal government. Accordingly, the Bureau of Indian Affairs (BIA), the federal land manager for tribal trust lands, generally approves tribal leases and rights-of-ways (ROWs) for tribal energy projects. In other words, BIA approval of tribal leases and ROWs constitutes a major federal action thereby triggering NEPA, and the concomitant EIS/EA (SPELL OUT) (absent a categorical exclusion). The Navajo Nation recognizes that Congress has taken action to relieve the NEPA burden for energy development in Indian Country pursuant to the 2005 Energy Policy Act, which provides for Tribal Energy Resource Agreements (TERAs). Under a TERA, a tribe is essentially pre-authorized by the federal government to make its own leasing and ROW decisions for energy projects, as long as they comply with an environmental review process. Unfortunately, even for the Navajo Nation, which has a sophisticated tribal government, including a Minerals Department, Fish and Wildlife Department, Historic Preservation Department and Tribal Historic Preservation Officer, and an Environmental Protection Agency, the Navajo Nation does not yet have the capacity to undertake a TERA. Consequently, we urge Congress to provide funding for tribal capacity building so that the purposes of the 2005 Energy Policy Act in regard to tribal energy development can be realized.

The Navajo Nation is also seeking an avenue for tribal energy development free of the NEPA process by seeking amendments to 25 U.S.C. § 415(e) to authorize the Navajo Nation to issue mineral leases without federal approval. By Navajo Nation Council Resolution CAU-35-11, attached hereto as Exhibit A, the Navajo Nation approved the above proposed amendments which have been introduced in the House of Representatives by Representative Young of Alaska in Section 11 of HR 3973. The Navajo Nation is simultaneously seeking approval of its General Leasing Regulations from the Secretary of the Interior pursuant to § 415(e), and would be able to immediately assume leasing authority over mineral leases if HR 3973 is passed by Congress. The Nation therefore asks for your support, and potentially one or more Committee members' sponsorship of equivalent Senate legislation. As a final NEPA concern, it may be helpful for future NEPA exceptions for tribes, such as those described above, to have more express language exempting such tribal actions from NEPA compliance.

As mentioned above, Indian lands are treated as federal lands for purposes of NEPA compliance. As a result of that federal ownership, the land status of tribal trust lands causes additional hurdles for economic development that are not present, for example, on tribally owned fee lands. In the case of tribally owned fee lands these are still subject to state and local taxation and regulation, which additionally circumvents what, should be inherent jurisdiction over tribal lands. In the long run, Congress should consider developing a new land status for tribal trust lands that is not federal title, and which would allow tribes to develop their own land tenure systems for economic development purposes. Any such change in land status should ensure that tribal lands remain free of state taxation and regulation.

Of additional concern certain parties believe that the federal government has the right to determine the value of tribal lands and resources, including for leases and ROWs. Consistent

with the sovereign status of Indian tribes and the federal policy for tribal self-determination, Congress should clarify through legislation that the value of tribal lands and resources should be determined solely by the responsible tribe.

Another hurdle to energy development on the Navajo Nation is the imposition of dual taxation by states and tribes. The Navajo Nation is situated across three different states and faces the complexity of dealing with three distinct state tax regimes. In situations where state taxes are applicable on the Nation, the Navajo government is placed in a situation whereby if the tribe imposes its tax regime, it effectively discourages economic development, including energy development on the Nation, and if it does not impose taxes, it diminishes its capacity to generate needed government revenues and provide government services. Accordingly, and in recognition of the sovereignty of Indian tribes and the inherent right of tribes to tax, *see, e.g., Kerr-Mcgee v. Navajo Tribe of Indians*, 471 U.S. 195 (1985), the Nation urges the Congress to clarify the inapplicability of state tax regimes where they may adversely affect economic development on tribal lands.

Finally, the Nation urges Congress to recognize the unique situation of Indian tribes as similar to that of developing Nations in the international community, and prevent federal agencies from imposing regulatory requirements on tribes and tribal resources that are more stringent than required by federal law. For example, the Nation's Desert Rock Energy Project, which was slated to be the cleanest coal fired power plant in U.S. history, was essentially derailed by overzealous regulation by U.S. E.P.A. requiring the Navajo Nation to implement unproven and prohibitively expensive technologies. As a further example, U.S. E.P.A is requiring Selective Catalytic Reduction (SCR) technology for Best Available Retrofit Technology (BART) under the Regional Haze Rule (under the Clean Air Act) for San Juan

Generating Station. U.S. E.P.A. has also proposed SCR technology in a draft rule for BART for Four Corners Power Plant, located on the Navajo Nation and utilizing Navajo coal, as well as in a Notice of Advanced Proposed Rulemaking for Navajo Generating Station, also located on the Navajo Nation and using predominately Navajo coal. U.S. E.P.A.'s requirement for SCRs is unreasonable and unnecessary to meet the requirements of the Regional Haze Rule, meant to be phased in over decades, as there is currently far cheaper existing technology which would meet the requirements of phase one of the Regional Haze Rule. Congress should consider legislation requiring U.S. E.P.A. and other federal regulatory agencies to implement the least costly regulatory requirements on tribes and tribal lands that are still consistent with federal law. The stringent requirements of federal agencies now affecting tribes costs tribes not only the ability to develop economically, but impacts existing royalties and lease rentals, and most importantly critical jobs and the government's ability to provide services.

There is only one way out of the trap of poverty and federal dependence, to allow and encourage Tribes to stand on their own and develop their own sustainable economies. In times of decreasing federal budgets this imperative is even more pronounced. The only way to accomplish this objective is to get the federal government out of the way and allow the Tribes to make their own decisions. The Navajo Nation is ready. Give us the opportunity.

RESOLUTION OF THE  
NAVAJO NATION COUNCIL

22ND NAVAJO NATION COUNCIL - First Year, 2011

AN ACTION

RELATING TO NABIKÍ'YÁTI'; RECOMMENDING AMENDMENTS TO 25 U.S.C. § 415(E) TO AUTHORIZE THE NAVAJO NATION TO ISSUE MINERAL LEASES WITHOUT FEDERAL APPROVAL AND TO INCREASE THE DURATION OF AUTHORIZED BUSINESS AND AGRICULTURAL LEASES

BE IT ENACTED:

1. The Navajo Nation hereby recommends amendments to 25 U.S.C. § 415(E) to authorize the Navajo Nation to issue mineral leases without federal approval and to increase the duration of authorized business and agricultural leases. Proposed amendments attached hereto as Exhibit "A."

2. The Navajo Nation Oil and Gas Company supports and recommends the same amendments proposed herein. Its resolution is attached as Exhibit "B."

CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Navajo Nation Council at a duly called meeting in Window Rock, Navajo Nation (Arizona) at which a quorum was present and that the same was passed by a vote of 15 in favor and 1 opposed, this 19th day of August 2011.

  
Johnny Naize, Speaker  
Navajo Nation Council

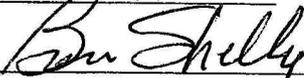
Aug 24, 2011

Motion: Alton Joe Shepherd  
Second: Charles Damon

ORIGINAL

ACTION BY THE NAVAJO NATION PRESIDENT:

1. I hereby sign into law the foregoing legislation, pursuant to 2 N.N.C. §1005 (C) (10), on this \_\_\_\_\_ day of AUG 31 2011.

  
\_\_\_\_\_  
Ben Shelly, Jr., President  
Navajo Nation

2. I hereby veto the foregoing Legislation, pursuant to 2 N.N.C. §1005 (C) (11), this \_\_\_\_\_ day of \_\_\_\_\_ 2011 for the reason(s) expressed in the attached letter to the Speaker.

\_\_\_\_\_  
Ben Shelly, President  
Navajo Nation

**ORIGINAL**



(e) **Lease of restricted lands for the Navajo Nation**

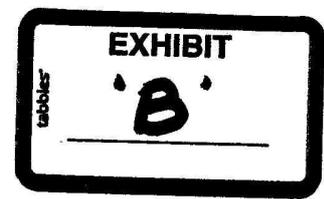
(1) Any leases by the Navajo Nation for purposes authorized under subsection (a), and any amendments thereto, ~~except including~~ leases for the exploration, development, or extraction of any mineral resources, shall not require the approval of the Secretary if the lease is executed under the tribal regulations approved by the Secretary under this subsection and the term of the lease does not exceed

(A) in the case of a business or agricultural lease, ~~90~~25 years; ~~except that any such lease may include an option to renew for up to two additional terms, each of which may not exceed 25 years; and~~

(B) in the case of a lease for public, religious, educational, recreational, or residential purposes, 75 years if such a term is provided for by the Navajo Nation through the promulgation of regulations; and

~~(C) in the case of a lease for the exploration, development, or extraction of mineral resources including geothermal resources, 25 years, except that any such lease may include an option to renew for one additional term not to exceed 25 years.~~

[Remainder of 25 U.S.C. § 415(e) is unchanged.]



**RESOLUTION OF THE  
BOARD OF DIRECTORS OF THE  
NAVAJO NATION OIL AND GAS COMPANY**

**No. 159 Respectfully Requesting the Navajo Nation Council to Recommend, and the Congress to Enact, Amendments to 25 U.S.C. § 415(e) to Permit the Navajo Nation to Issue Mineral Leases without Federal Approval and to Increase the Authorized Duration of Authorized Business and Agricultural Leases**

**WHEREAS:**

1. The Navajo Nation Oil and Gas Company ("NNOGC") is a wholly owned corporation of the Navajo Nation organized under section 17 of the Indian Reorganization Act, as amended, and charged with developing and operating a profitable integrated oil and gas company for the benefit of the Navajo Nation; and

2. In 2000, the Navajo Nation sought and obtained amendments to 25 U.S.C. § 415 to permit the Navajo Nation to issue business site and other leases of Navajo Nation land held in trust by the United States without federal approval under Navajo Nation regulations approved by the Secretary of the Interior, but such amendments did not include the authority for the Nation to issue mineral leases under that leasing structure; and

3. The Navajo Nation Council enacted and the Secretary approved regulations under the amended 25 U.S.C. § 415(e), and the Navajo Nation has been evaluating, administering, and approving leases thereunder for over five (5) years; and

4. The Navajo Nation's history of leasing and lease administration under its own regulations has been positive and virtually without controversy, and the streamlined leasing structure has eliminated or greatly reduced delays inherent in the federal approval process; and

5. The Navajo Nation has a well established Division of Natural Resources, Minerals Department, Environmental Protection Agency, Historic Preservation Department, judiciary, and other administrative offices with demonstrated expertise in mineral leasing and lease administration, environmental protection, historic and cultural preservation, surface mining, oil and gas well inspections and APD issuances, and fair and thorough dispute resolution, all of which agencies handle federal responsibilities under delegations of authority, treatment as a state provisions, or P.L. 93-638 contracts with federal agencies; and

6. The Navajo Nation has demonstrated the capability to evaluate, administer, and approve mineral leases in the same capable manner as it performs such functions with respect to other leases of Navajo Nation trust land; and

7. Permitting the Navajo Nation to undertake such functions for mineral leasing would be consistent with the modern Congressional policy of enhancing tribal self-determination and self-sufficiency, and would have the added benefits of reducing the extraordinary delays and costs associated with federal approval of such leases and of facilitating responsible mineral

production for the benefit of the United States generally; and

8. NNOGC's management and legal counsel recommend that this Board recommend to the Navajo Nation Council that it seek amendments to 25 U.S.C. § 415(e), as set forth on the attached Exhibit "A," to permit the Navajo Nation to approve and administer mineral leases of Navajo Nation trust land under the same leasing structure as is now permitted for all other such leases, and to urge Congress to adopt such amendments; and

9. This Board has heard the report and recommendation of management and has determined that it should recommend that the Navajo Nation Council by formal enactment seek amendments to 25 U.S.C. § 415(e), as set forth on the attached Exhibit "A," and urge Congress to adopt such amendments.

**NOW THEREFORE BE IT RESOLVED THAT:**

1. The Navajo Nation Oil and Gas Company Board of Directors hereby respectfully recommends to the Navajo Nation Council that it request by formal enactment the Congress of the United States to amend 25 U.S.C. § 415(e) as set forth on the attached Exhibit "A" and that the Navajo Nation Council, the Office of the President and Vice President, and other appropriate officials of the Navajo Nation government (including without limitation the Navajo Nation Washington Office and the Executive Director of the Division of Natural Resources, as may be authorized by the President) urge Congress to adopt such amendments.

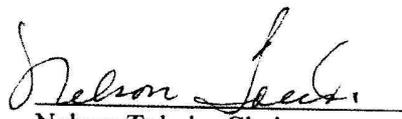
2. Management is hereby authorized and directed to cooperate fully with appropriate officials and employees of the Navajo Nation to process this recommendation within the Navajo Nation government, to testify and engage in lobbying efforts that may be requested or authorized by appropriate officials or committees of the Navajo Nation, and to take any and all other reasonable and proper steps to effect the intent of this resolution.

**CERTIFICATION**

I hereby certify that the foregoing resolution was considered at a duly called meeting of the Board of Directors of the Navajo Nation Oil and Gas Company at which a quorum was present at Albuquerque, New Mexico, and that the same was passed by vote of 8 in favor, 0 opposed, and 0 abstained, this 10<sup>th</sup> day of June, 2011.

Attest:

  
Secretary

  
Nelson Toledo, Chairman  
Board of Directors

(e) **Lease of restricted lands for the Navajo Nation**

(1) Any leases by the Navajo Nation for purposes authorized under subsection (a), and any amendments thereto, ~~except including~~ leases for the exploration, development, or extraction of any mineral resources, shall not require the approval of the Secretary if the lease is executed under the tribal regulations approved by the Secretary under this subsection and the term of the lease does not exceed

(A) in the case of a business or agricultural lease, ~~9025~~ years; ~~except that any such lease may include an option to renew for up to two additional terms, each of which may not exceed 25 years; and~~

(B) in the case of a lease for public, religious, educational, recreational, or residential purposes, 75 years if such a term is provided for by the Navajo Nation through the promulgation of regulations; and

~~(C) in the case of a lease for the exploration, development, or extraction of mineral resources including geothermal resources, 25 years, except that any such lease may include an option to renew for one additional term not to exceed 25 years.~~

[Remainder of 25 U.S.C. § 415(e) is unchanged.]