

UNITED STATES SENATE  
COMMITTEE ON INDIAN AFFAIRS

OVERSIGHT HEARING  
ON INDIAN ENERGY AND ENERGY EFFICIENCY

OCTOBER 22, 2009

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WRITTEN TESTIMONY OF

**THE INDIAN COUNTRY RENEWABLE ENERGY CONSORTIUM (ICREC)**  
A NATIONAL NOT-FOR-PROFIT CONSORTIUM COMPRISED OF TRIBAL  
GOVERNMENTS, ALASKAN NATIVE CORPORATIONS, INTERTRIBAL RENEWABLE  
CONSORTIA, AND TRIBAL CORPORATIONS WITH POLICY AND INVESTMENT  
PRIORITIES IN RENEWABLE AND RENEWABLE TRANSMISSION DEVELOPMENT

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## 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.

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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.

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, 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.

### SOLUTIONS & RECOMMENDATIONS

- 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.

### SOLUTIONS & RECOMMENDATIONS:

- 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.

#### SOLUTIONS & RECOMMENDATIONS

- 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 Corporation. 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.

#### CONCLUSIONS

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.