**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.