



**United States Senate
Committee on Indian Affairs**

**LEGISLATIVE HEARING
on the
Discussion Draft of the
“Indian Energy Promotion and Parity Act of 2010”**

April 22, 2010

**Testimony of the
NATIONAL CONGRESS OF AMERICAN INDIANS**

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I. Introductory Comments

The National Congress of American Indians wishes to thank Chairman Dorgan for his interest in and leadership on Indian energy development, and in particular, for recognizing the need to overcome historic and present day inequities in tribes' ability to harness their vast energy potential for the benefit of all Americans. We hope that this effort will be part of the long and outstanding legacy that Senator Dorgan has secured championing legislation that meets the needs of Indian tribes.

We are grateful for the significant tribal outreach that Chairman Dorgan and Vice Chairman Barrasso have conducted. Since May of 2009, the Committee has developed a concept paper, hosted roundtable sessions to solicit tribal comments, and held hearings in first session of 111th Congress. We look forward to working with all members of the Committee to ensure passage of this important legislation.

This discussion draft of the Indian Energy Promotion and Parity Act (IEPPA) reflects the Committee's efforts. We believe it is a commendable effort to remove obstacles for tribally-driven energy development. As tribal lands are estimated to contain 10% of the nation's traditional and renewable energy resources, realizing this potential is critical to the nation's efforts to achieve energy independence, promote clean energy, and create jobs. Such efforts are especially needed in Indian Country, where unemployment rates are many times higher than the national average. Further, energy projects represent the most meaningful and sustainable economic development opportunities to ever arise for some tribes that have been mired in endemic poverty.

However, the challenges are massive. For example, the vast majority of large scale renewable energy projects on tribal lands, even those which have made it through the maze of federal bureaucratic processes, are stuck in the pre-development phase among other things, for lack of financing, transmission access, and unfavorable tax structures. Furthermore, states and counties are increasingly keen on taxing tribal energy projects, threatening their very viability and siphoning off revenue that should be going to tribal governments for needed programs and services. If the nation seeks energy independence, it must call upon, and support, Indian tribes in their energy development efforts.

a. Legislative Process

The number of legislative days remaining in the 111th Congress is few. We urge the Committee to move quickly to take action on a legislative proposal. We understand that a new climate bill, which contains energy provisions, is being drafted by Senators Kerry, Graham, and Lieberman, may be rolled out as early as next Monday. We look forward to working with the Committee, in collaboration with other Senate Committees, such as the Energy and Natural Resources Committee and the Finance Committee, to attach provisions from the IEPPA discussion draft into this and other suitable legislative vehicles as quickly as possible.

b. Tribal Process

NCAI has been working with tribal leaders, tribal representatives, and tribal energy resource development organizations, including the Council of Energy Resource Tribes, the Indian Country Renewable Energy Consortium, and the Intertribal Council on Utility Policy, to provide comments to Committee staff on the IEPPA discussion draft. Our outreach and collaboration in the tribal community is ongoing, and we look forward to continuing to provide input as the legislation develops.

The IEPPA discussion draft includes provisions to streamline and eradicate some of the 49 bureaucratic steps that tribes currently must go through to undertake energy development projects on tribal lands, and to ensure equitable access to the transmission grid, financing mechanisms, and federal programs for energy development and energy efficiency. It is important the Committee moves to remove these barriers to ensure that tribes are placed on a level playing field to facilitate the realization of their energy potential for the benefit not only of tribal governments and peoples, but the entire nation.

II. Comments on the IEPPA discussion draft

In this context, NCAI is pleased to provide general comments on issues not yet adequately addressed in the IEPPA discussion draft and 3) specific comments about Department of Energy (DOE) programs.

a. General Comments

i. Transmission

Opportunities for large scale energy development on tribal lands are moot if tribes do not have access to the transmission grid. While IEPPA calls for a study on tribal inclusion in infrastructure planning, more robust language is needed to ensure that tribal projects already in development, as well as those which may be developed in the future, have equitable and appropriate consideration in the transmission queue.

We believe that that there should be a priority in the transmission queue for energy emanating from federal lands, including tribal lands, and look forward to working with the Committee to provide language to that effect.

ii. State Taxation

A critical issue not currently addressed in the IEPPA is state and county taxation of tribal renewable energy projects. The Campo Band of Kumeyaay Indians has perhaps the only large-scale renewable project in Indian Country. Yet for the first part of that project, the state and county received more revenue than the tribe, through the imposition of three kinds of taxes: 1) state sales tax, 2) county property tax, and 3) county possessory interest tax. Notably none of the taxes collected are shared with the tribe. This practice sets a dangerous precedent. The State of South Dakota has told the Rosebud Tribe that it

intends to impose taxes on renewable energy projects located on tribal trust lands, reversing a position the State held several years prior. Other states are contemplating similar actions.

In the past, states and counties have justified this incursion into the Native tax base on the grounds that non-Indians engaging in commercial operations on Native lands are users of state services and, as such, should not get a “free ride” by working on tribal lands located within the state. But commercial scale wind energy brings very little impact to schools, law enforcement, roads, or other infrastructure. These taxes siphon revenue away from the tribes, prevent the tribe from enacting their own taxes, and, in the future, will place even more financial burdens upon projects. It is estimated that states can net approximately \$65 million in state sales, property, and corporate income taxes from a 200 MW tribal project worth nearly half a billion dollars in construction costs. This is revenue rightfully due to the tribe, and for which the states and counties provide no reciprocal services. Therefore, we urge the Committee to develop legislation that will prevent states and counties from imposing taxes upon tribal energy projects.

iii. Leasing and Siting Provisions

Many of the IEPPA discussion draft provisions related to Department of the Interior processes, such as leasing and siting on tribal lands, address or have the potential to address the broader issues, such as the overall trust relationship between the federal government and the tribes, and economic development opportunities beyond energy. We look forward to working with the Committee to broaden and narrow the parameters of those provisions as appropriate.

iv. Appraisals

In general, we strongly support the appraisals provisions of the IEPPA discussion draft found in Section 106. Delays in BIA appraisals have been a severe detriment to many economic development projects. NCAI has long supported reforming the appraisals requirement to allow tribes to perform their own appraisals. We believe however, that the proposed 60-day Secretarial review and approval process of an already certified appraisal - conducted by the Secretary or by a tribe or through a third-party appraiser - is an unnecessary step that only adds further delay. In addition, we believe that the proposed options for conducting appraisals should extend to other transactions involving Indian land or Indian trust assets, and not just energy-related transactions. We urge the Committee to consider broader language involving land transactions.

v. Leases and Rights-of-Way

Section 201 of the IEPPA discussion draft would make helpful improvements in the area of leases and rights-of-way. However, with respect to leases by Section 17 Indian Reorganization Act corporations (subsection (d)), we are concerned that certain 99-year leases can amount to a *de facto* sale of tribal land (for example, non-Indian residential housing). Historic experience has shown that it is very difficult for a tribe to recover its

property once a non-Indian residential community is established. A period of 50 years should suffice for *energy* projects – including wind energy - and we recommend that the Committee consider making those changes to the language of the bill prior to introduction.

In addition, we would ask that the Committee consider including in IEPPA provisions which would expand the Navajo Leasing Act to *all* tribes, similar to the provisions of H.R. 2523, the Helping Expedite and Advance Responsible Tribal Homeownership (HEARTH) Act. This legislation would permit each tribe to lease surface properties without Secretarial approval under tribal regulations that are approved by the Secretary. This legislation is supported by NCAI Resolution PSP-09-016.

vi. Financing

Regarding the title on Energy Financing, Title III of the IEPPA discussion draft, Indian tribal governments have long supported and advocated for many of these provisions in other contexts, such as tribal assignability of production and investment tax credits. We look forward to working with this Committee and the Finance Committee to develop creative solutions for the implementation of a tax credit transfer program. At the same time, the Committee should pursue alternatives to offset the additional cost of money for tribal investments, such as providing grants, rebates, or payroll tax credits (which tribes can use) in lieu of income tax credits (which tribes cannot use). In addition, the Committee should encourage energy development by facilitating greater tribal access to the Renewable Energy Production Tax Incentive program. Such measures will help put tribal energy projects on an equal competitive footing with other energy projects.

vii. Definitions of “Indian tribe” and “Indian land”

We note that the IEPPA discussion draft contains different definitions of “Indian tribe” and “Indian land.” It is important to ensure use of the most appropriate definition in the specific context. For example, the definition of Indian tribe as it relates to leasing will likely be different from that used in the context of a Weatherization program. We look forward to working with the Committee to ensure that these definitions are appropriate to the specific issues, underlying statutes, and programs.

b. Provisions related to DOE Programs

We are pleased to provide comments on provisions related to federal programs, especially those at the Department of Energy, as they have not been fully addressed in previous forums.

The Department of Energy’s (DOE) Tribal Energy Program provides tribes with an impressive degree of knowledge and professionalism, to the extent they are able given the modest resources provided. DOE’s efforts to work with tribes, however, are hampered by outmoded laws, regulations, and programs that have resulted in tribal exclusion and dramatically inequitable levels of funding, compared to other governments. As the nation

moves resolutely towards energy independence and reductions in greenhouse gas emissions, now is the time for DOE to partner more fully and meaningfully with tribes, especially as DOE possesses unique and unparalleled expertise to work in partnership with tribes to tap tribal energy potential.

We are pleased that the IEPPA discussion draft seeks significant changes to DOE's Weatherization Program, State Energy Conservation Plan Program, tribal loan guarantee program, and the Office of Indian Energy Policy and Programs, including the provision of funding directly to tribes and funding to build tribal institutional capacity to carry out energy development and energy efficiency programs. Tribes are sovereign nations with a direct nation-to-nation relationship with the federal government. Arrangements that exclude tribes, or compel tribes to work through the states in order to access federal programs are demonstrably unfair and obsolete.

i. Support for the Committee's Views and Estimates regarding DOE's tribal budget

We support the Committee's sentiments related to DOE's budget request. The Committee has asked for \$50 million more than the President's FY2011 budget request for DOE's Tribal Energy Program, for a total of \$61 million.

ii. State Energy Program

DOE's State Energy Program and DOE's Weatherization Program were created 35 years ago, providing financial and technical support directly to states for energy and home efficiency initiatives. Tribes cannot receive funding directly from DOE under these programs. In the case of the State Energy Program, tribes receive funding only at the state's discretion. The equivalent DOE Tribal Energy Program was only established in 2002. Not including the 35 years of disparate federal funding, the Recovery Act alone provided states through the State Energy Program with \$3.1 billion, and the Tribal Energy Program \$0. Tribal access to the State Energy Program will ensure consistent support for tribal energy and energy efficiency endeavors.

iii. Weatherization

Under the Weatherization Program (Wx), tribes cannot receive direct funding from DOE, unless they prove that to DOE that the state is failing to serve tribal members. Tribal homes in remote areas are often beyond the reach or awareness of state Wx programs. Direct state support of tribal needs varies by state. Even if a tribe does demonstrate the state's failure, the funding is often too paltry to justify the creation of a tribal program. DOE has helped state and local Wx networks and services for decades. In contrast, only the Navajo Nation and Northern Arapaho Tribe have tribal Wx Programs.

The impact of this awkward statutory and regulatory arrangement upon tribes is significant. The Recovery Act alone provided the states with nearly \$5 billion through the Wx Program with no assurances that tribes could receive some of this funding

directly. The IEPPA discussion draft provisions to make Wx funding directly available to tribal governments will help address decades of exclusion.

These historic program and funding inequities and omissions result in present day unpreparedness to undertake those programs. Therefore we are heartened by the IEPPA discussion draft provision to allow DOE's Office of Indian Energy Policy and Programs funding to help tribes build the institutional capacity undertake this programs.

We look forward to working with all Committee members to improve upon the IEPPA discussion draft, so that tribal governments can develop their energy resources for the benefit of their peoples and all Americans, and to ensure that tribes meaningful participants in national energy efficiency initiatives. We urge quick action to ensure that these important measures are adopted during this Congressional session. We are thankful that the Committee, through the IEPPA discussion draft, is working toward this goal.