

# Native American Resources Committee Newsletter

Vol. 7, No. 2

May 2010

## A MESSAGE FROM THE COMMITTEE CHAIR

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**Jana L. Walker**  
*Chair, Native American  
Resources Committee*

Please enjoy this latest issue of the Native American Resources Committee newsletter on renewable energy in Indian country. As the nation's domestic energy production evolves, it remains to be seen how tribes and Indian country might contribute to and transition into the sustainable energy scheme and what issues—whether cultural, jurisdictional, or economic—might be associated with renewable energy development on and near tribal lands. The Committee extends its appreciation to Donald Clary, Timothy Humphrey, Sr., and Robert Gruenig, its vice chairs for the newsletter, for assembling this special focused issue, which includes the views of a very diverse group of authors, including a non-lawyer.

While the Committee and Section offer many publishing opportunities, the newsletter is a casual vehicle where you can publish an article or notice of interest to Committee members fairly quickly. Success of the newsletter depends on contributions of current, emerging, and interesting articles by members of the Committee and Section, so if you would like to write a newsletter article, please contact Donald Clary, lead newsletter vice chair, at [clarydonald@gmail.com](mailto:clarydonald@gmail.com). Please visit our Web site for further information about the Committee and Section, including links to the current and archived editions of the newsletter: <http://>

[www.abanet.org/environ/committees/nativeamerican/](http://www.abanet.org/environ/committees/nativeamerican/). We also would be particularly interested in hearing your comments regarding what information would be most useful to include on the Committee Web site. For suggestions about the Web site, please contact the Committee's technology vice chairs, Ivy Anderson at [ivy@atg.wa.gov](mailto:ivy@atg.wa.gov) and Brian Nichols at [bkn@modrall.com](mailto:bkn@modrall.com). Should you have any other questions or comments regarding the Committee, or if you are interested in serving in a future leadership role on the Committee, please contact me by e-mail at [jlw@stetsonlaw.com](mailto:jlw@stetsonlaw.com). Thank you.

## A MESSAGE FROM THE EDITORS

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**Donald M. Clary, Timothy J. Humphrey, Sr.,  
and Robert Gruenig**

We hope you will enjoy this issue of the Native American Resources Committee's Newsletter, the theme of which is renewable energy in Indian country. This area is becoming increasingly important to tribes, as they seek to play a role in our nation's clean energy future and fuel their own economic development.

The opening article, "Capturing the Full Benefit of On-Reservation Renewable Energy," by Michael Connolly Miskwish, describes some of the significant issues involved in capturing the full benefit of renewable energy projects on reservations. It will be thought provoking for those considering the development of such projects. Alyssa Moir's article, "Tribal Transmission: Moving Renewable Energy from the

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**Donald M. Clary, Robert Gruenig, and  
Timothy J. Humphrey, Sr., Editors**

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Any opinions expressed are those of the contributors and shall not be construed to represent the policies of the American Bar Association or the Section of Environment, Energy, and Resources.

Reservation to the Grid,” considers some of the more important concerns relating to transmission for tribal renewable energy projects.

Additional perspectives on renewable projects are provided by Donald Clary and Ralph Hitchcock in their article, “Tribal Renewable Energy Projects: An Opportunity to Expand Tribal Infrastructure and Evaluate a Tribal Utility,” in which they suggest that those tribes considering renewable projects also consider the improvement of infrastructure and the formation of a tribal utility. With regard to a related issue, in “Thoughts About Copenhagen from an NTEC Perspective,” Robert Gruenig provides his views regarding his experiences while attending the 15th United Nations Climate Change Conference in Copenhagen.

Finally, we provide a summary of Senator Byron Dorgan’s (D-ND) draft legislation, the Indian Energy Promotion and Parity Act, which (among other things) is directed at addressing some of the impediments that have prevented the development of renewable projects in Indian country.

We wish to emphasize that these articles are intended to stimulate thought and discussion, and represent the opinions of the authors. We welcome contrary views and invite contributions from all members. Please feel free to contact the vice chairs directly if you have any comments, questions, or wish to contribute to the newsletter.

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## **CAPTURING THE FULL BENEFIT OF ON-RESERVATION RENEWABLE ENERGY**

**Michael Connolly Miskwish**

A 200 megawatt wind energy project is common in the present market. Where do the investment dollars go? Who benefits from the initial investment and from the ongoing revenue generation? How can tribes capture a fairer share?

This paper summarizes basic financial analysis for a theoretical project based on some real world assumptions. It highlights the scope of benefit to tribal communities and how that differs from the benefits derived for off-reservation governments. Basic changes are suggested for the creation of a fairer system. Also discussed are some current methods to reduce the negative impacts of the present economic realities.

Commercial wind projects are generally capital-intensive developments. A substantial percentage of the initial investment (sometimes over 50 percent) goes to development of infrastructure necessary to transport power from the generator to the distribution system. Additionally, it is not uncommon for the distribution system itself to require upgrades, including new substations that add some cost to the renewable energy project. The analysis contained herein starts with the assumption that the studies on the energy resource, construction access, transmission capacity, and fatal flaws have been completed. Of course, while many of these factors are studied concurrently with fiscal analysis, for the sake of clarity, this article assumes their analysis has resulted in positive results.

A developer on tribal lands must negotiate a long-term agreement in order to site turbines in the appropriate locations to generate power. A distinction arises in relation to the goals of for-profit and nonprofit developers. What is their motivation? Maximizing the return on each project may have more importance for the for-profit developer, while the nonprofit developer typically is more interested in the quantity of projects. On the other hand, the nonprofit developer may be willing to work for a smaller return. Does the smaller return offset the loss of motivation for a higher project return? For tribes, the distinction must be carefully

assessed and enough authority must exist within the agreement to motivate the nonprofit developer to maximize the return if that decision is chosen.

There are two classes of governmental incentives in the present renewable energy market. The first is federal tax credits in the form of investment tax credit (ITC), production tax credit (PTC), and accelerated depreciation (AD). The second is the individual state minimum renewable standards (MRS). These drivers push up the price of the energy sold; in some locations the cost is over 300 percent of the price of fossil fuel generation. While the federal incentives are national, the impacts of the MRS are much more regional.

In focusing on the fiscal side of the project, the tax incentives must be folded into the cost of money. Since the PTC extends for ten years, the project is analyzed in ten year increments.

A 200 megawatt wind energy facility can cost \$460,000,000 in construction costs. This represents a ratio of \$2.3 million per megawatt, a generally representative ratio. Making some basic assumptions on return allows a relatively simple calculation of the costs of money for the investment. On a ten year project with a money cost of 8.5 percent, the annual cost of money is approximately \$70 million. Assuming a capacity factor of 34 percent, if power is sold at \$75 per megawatt-hour, the expected gross return is \$44 million—hardly lucrative. However, by factoring in the tax credits and accelerated depreciation the debt can be retired at 10 years. Assuming an operations and maintenance cost of 5 percent and a reliability factor of 98 percent, the developer, who puts up an initial \$2 million and who is obligated to pay the site lease costs, could experience an actual loss in the initial ten year period. The next ten year period, however, is when the developer is most likely to recoup his initial investment and enter the lucrative phase of the project. Even with a 25 percent reinvestment in aging equipment, income from the project would still leave a potential windfall of over \$30 million per year, mostly coming into play after year 12 or 13.

Compare this to an average passive royalty to a tribe of 5 percent, which would represent \$2.2 million per year but would start from year one (passive royalties

are generally running between 3 percent and 10 percent, depending primarily on construction costs, regional market prices, distribution capacity, competitive sites, and the resource). If the developer is only able to capture a 15-year power purchase agreement (PPA), then it has tremendous risk on overall earnings in the project; however, a 20- or 25-year PPA could be extremely lucrative. Of course, for the developer, the longer the renewal term beyond year 20, the greater the potential reward. However, earnings could be very difficult to quantify since renewable energy rates are impossible to predict with any accuracy over such a long time.

Under this scenario we now fold in some of the big issues that come up with on-reservation development. For many tribes there has been a recurring theme of Indian resources extracted or used with little or no significant economic gain for the community at large. In fact, the process of exploitation of resources on Indian lands has significant similarities to the third world economic colonialism of the early twentieth century. Resources were taken from Indian lands for a royalty payment that was often deemed “fair” by government representatives with very little stake in the community. These resources then went to other locations where they were transformed into products sold into the commercial product flow of modern society. The “value added” to these materials was significantly skewed toward the off-reservation economy. The end result of decades of economic colonialism has been a basic mistrust of “passive” deals which simply extract resources and don’t include a direct involvement of the tribes as investors or owners, and fail to reinvest in the long-term tribal economy.

This resistance to passive development runs headlong into the federal energy incentive programs. Since the federal incentives are based on tax credits and accelerated depreciation, tribes are excluded from the critical role of investor. In this particular scenario, federal incentives represent 37 percent of the investment return. If the tribe has investment money for the project it must weigh the loss of investment return against the opportunity costs of other potential investments. In addition, tribal communities are often impoverished and the potential of having to wait for over a decade before realizing a substantial return may be politically unfeasible.

Some tribal communities are exploring the use of “flip” agreements and power prepurchase agreements that offer some methods for recouping some of the losses created by the lack of direct investment. Still, these types of machinations are a poor substitute for accessing the direct tax benefit. Pending federal legislative changes could further enhance the viability of tribal direct investment if enacted.

Another role for tribes in projects is as a developer. Some tribes have, or are in the process of negotiating, agreements that give them a direct partnership with the developer. This role can vary tremendously depending on the level of risk assumed by the tribal partner, its investment, and the immediate and ultimate payoff. There are many variations on the role as developer and/or investor. These are beyond the scope of this article, which focuses on the governmental role in development.

The three primary governmental benefits of commercial wind generation are sales tax, property tax, and corporate income tax. These three areas are often neglected by tribes when negotiating agreements with developers. They are often neglected by developers who may not understand that their property, income, and purchases could be subject to state law, even though they are operating on tribal lands.

States have attacked tribal taxation (or lack of taxation) many times over the last few decades. Tribes are unable to offer the incentive of a “tax holiday” to attract investment without the concurrence of the state. The states 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 is different. It is the closest thing you can get to an impact-free development to the state. Unlike most industry, tourism, or residential development, \$460 million worth of wind energy development brings very little impact to schools, law enforcement, roads, or other infrastructure impacts. Yet a \$460 million project can easily represent an appraised property value of \$230 million. A one percent property tax rate can generate an average of over \$1.1 million per year over a 20-year period.

State sales tax rates in western states vary from zero in Montana to 8.25 percent in California. For this article we will assume a 6 percent rate. If two-thirds of the development cost is subject to sales tax this represents over \$18 million.

Finally, western state corporate income tax ranges from zero in Nevada and South Dakota to 8.8 percent in California. For this article, we will assume a 6 percent corporate income tax as a representative rate; thus, \$25 million in corporate income tax is generated revenue for the state.

Summarizing the government benefits of project development, the total revenue of the state is as follows:

State property tax	-	\$22 million
State sales tax	-	\$18 million
State income tax	-	<u>\$25 million</u>
Total		\$65 million

This total is for illustrative purposes only. To get a truly accurate picture the quantities must be put into “net present value” since the value of money today holds significantly more value than money received twenty years from today. Since most of the state income tax will be collected after year ten and the value of the sales tax and property tax are toward the beginning, there is an element of self-correction that is inherent in the comparison.

A passive royalty return to a Native nation of 5 percent would amount to \$44 million over 20 years. In other words, the jurisdiction that shoulders the responsibility for site protection, infrastructure maintenance, environmental protection, and fire and emergency services must cover the costs of these services from their royalty earnings as the landholder (even though the United States holds the land in trust, the tribe still exercises considerable authority and can be treated as the “owner” for the purposes of this article). The state meanwhile has become a partner in the project without any risk, responsibility, or investment. The MRS could be seen by some as a state contribution to the market

price. However, since energy from other states or other countries can also benefit from this market driver without penalty, it should not be seen as an excuse to single out Native communities for plunder.

So what’s a community to do? The low hanging fruit appears to be the sales tax. By shifting the ownership to a tribal development corporation with a lease to the developer there is the potential for saving a significant portion of the sales tax to the benefit of the tribal economy. This has to be weighed against any potential impacts to the federal tax incentives and any negatives for the tax investors.

Income tax is subject to agreements with each specific state. For some states, such as California, there is a very hostile climate toward fairness in tax revenue use. Others, such as New Mexico, Utah, and Nevada, have shown much greater consideration toward sharing these needed government revenues. Income tax is probably not touchable at the present time. But the case is certainly a legitimate one and worthy of discussion.

Tribal economic development has long been hampered by the infringements of state tax policies onto Native lands. Renewable energy holds a tremendous promise for tribal communities across the nation. Yet, current policies are hamstringing tribal development and putting them at a competitive disadvantage to off-reservation competitors. This is a battle that must be fought on a state-by-state basis, but one that could benefit from development of federal policies that help to level the playing field. Current efforts to create tax credit or depreciation transferability are a significant step in the right direction. Direct grants in lieu of the tax credit would also be constructive. Federal help in limiting state encroachment into tribal economies is desperately needed in many areas, but nowhere is it as clearly unfair and regressive as in the commercial wind/renewable energy sector.

**Michael Connolly Miskwish** is president of *Laguna Resource Services, Inc.*, an environmental consulting firm and a principal with *High Pass Energy, Inc.* He served 17 years as a councilman for the *Campo Band of Kumeyaay*.

## TRIBAL TRANSMISSION: MOVING RENEWABLE ENERGY FROM THE RESERVATION TO THE GRID

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**Alyssa Moir**

Tribes that are able to sell electricity generated on their lands to regional electrical grids stand to gain significant economic advantages. However, off-reservation transmission adds another layer of complexity to the already difficult process of financing, siting, and building a tribal renewable energy source. While the hurdles of transmitting to regional, nontribal grids are substantial, some tribes have succeeded or are making progress toward success, and are looking forward to eventually profiting from the sale of their reservation-generated renewable energy.

The push to develop renewable energy projects on tribal lands has accelerated tremendously. The U.S. Department of Energy (DOE) Tribal Energy Program estimates that the 55 million acres of Indian lands across the country are capable of producing an estimated 535 billion kilowatt hours of electricity per year from wind power, and 17 trillion kilowatt hours per year of solar power (<http://apps1.eere.energy.gov/trialenergy>). This is four times the amount of electricity generated annually in the United States. To encourage renewable energy development, \$3.2 billion was made available under the American Recovery and Reinvestment Act of 2009 for funding the Energy Efficiency and Conservation Block Grant Program. This program provides funds to units of local and state governments, and Native American tribes and territories to improve energy efficiency and reduce energy use and fossil fuel emissions in their communities. The application period for this funding concluded on January 15, 2010.

Currently, most renewable energy projects provide on-reservation energy to power casinos or individual homes. Those projects that are large enough to sell electricity to regional electrical grids potentially provide several advantages: (1) a sustainable, profitable revenue stream; (2) a success story to use as financial and political leverage for future economic development; and (3) the proven ability to successfully generate and transmit power that could lead to more renewable energy projects based on different energy sources.

## Opening Up the Lines: Legal and Policy Mechanisms to Facilitate Tribal Transmission

Open and accessible transmission capacity is key to selling tribal power to regional grids. Under sections 205 and 206 of the Federal Power Act, the Federal Energy Regulatory Commission (FERC) has the responsibility to remedy undue discrimination with respect to transmission of electric energy, which in part has encouraged the growth of independent power producers such as tribes. In 1996, FERC Order No. 888 opened up the transmission system as a “highway” for any utility to use the wires, rather than the previous prior use of wires by utilities that were structured as monopolies (owning generation, transmission, and distribution and serving all customers in a geographic area). The restructuring fostered the growth of independent power producers because it required utilities to purchase power provided by them.

In 2005, FERC finalized grid-interconnection rules for wind power facilities larger than 20 megawatts, which accommodated the differences between intermittent power producers and traditional generating facilities. In addition to these and other efforts, on January 21, 2010, FERC issued a notice of inquiry seeking public comment on perceived barriers, solutions to removing those barriers in order to integrate into the existing grid, and expanding variable energy resources such as wind, solar, or nonstorage hydro generation plants. The focus of FERC’s inquiry is how to best structure agreements and operational practices to address variability in the output from renewable sources. The end results of this inquiry will influence the interconnection agreements required for tribal (and nontribal) projects selling electricity to the grid, particularly with respect to requirements for data recording and forecasting, scheduling flexibility and scheduling incentives, market participation and reliability commitments, and redispatch and curtailment practices .

Specific to tribes, Tribal Energy Resource Agreements (TERAs) have sought to streamline energy project approvals. Finalized in March 2008, the TERAs apply to both renewable and nonrenewable projects, as well as transmission lines on tribal lands (25 C.F.R. pt. 224). Essentially, the TERAs act as environmental review “umbrellas” for covered projects, in which the

Department of Interior (DOI) gives programmatic approval, subsequent to National Environmental Policy Act (NEPA) review, to all of the proposed energy projects that the tribe has included in the TERA. Once that approval is given, the tribe may enter into agreements with energy companies for development of each project under the TERA without the need for further project-specific review by DOI. Tribes are required to conduct their own NEPA-type analysis based on minimum standards set in the TERA rules, which require public comment but do not make the projects subject to judicial review.

While the TERAs appear to be a step in the right direction, the number of required federal and tribal environmental reviews remains a substantial burden. Further, tribes themselves may be or have been deterred by the requirements to demonstrate that they have the expertise, experience, laws, and administrative structures in place to shoulder their responsibilities under the program. As such, whether the TERAs are facilitating expedited energy development and, in turn, tribes' sale of power to the grid, remains to be seen.

## Challenges

Benefits and policy incentives aside, connecting to off-reservation grids is complex and not without significant challenge. While the concept of distributed generation (relatively small systems that generate electricity at or near the point of use) from renewable energy to smaller, dispersed sources such as tribes, and its interconnection with the main grid has seen increased support, technical needs, legal and procedural aspects, and tariff and pricing issues remain. Among these issues, particularly since the adoption of national technical standards, the main difficulties now associated with this type of energy production continue to lie in the legal and procedural arenas.

To address interconnection standards that vary widely from state to state, FERC and several nongovernmental organizations have developed model distributed generation interconnection standards for distributed generation on a range of scales. These model standards include model agreements that seek to remove barriers to grid interconnection by

simplifying the legal and financial process. They address key issues, including a statement of the technical performance principles, rights of access to the system, liability and indemnification, dispute resolution, termination of contract, and disconnection of the system from the grid. Further, DOE's Office of Energy Efficiency and Office of Electricity Delivery and Energy Reliability issued a short document listing best practices for distributed generation interconnection. *See* [http://www1.eere.energy.gov/solar/pdfs/doe\\_interconnection\\_best\\_practices.pdf](http://www1.eere.energy.gov/solar/pdfs/doe_interconnection_best_practices.pdf). However, tribes should be cautioned that despite some unification under FERC Order 2006, disparity between state interconnection standards continues. Familiarity with a particular state's interconnection rules is essential in negotiating interconnection agreements, transmission agreements, and power agreements prior to interconnection.

Further, tribes, as well as any other distributed generation source must conduct studies to determine whether there is available capacity within existing grid facilities and the impact of a new addition to the system. These studies must be shared with the regional body of the North American Electric Reliability Corporation, and can be expensive depending on the size of the project and its location on the grid.

Additionally, basic infrastructure and the physical location of a reservation present challenges. As described below, whether a tribe can connect its power source to the physical infrastructure of the off-reservation grid and whether a sufficiently large power market is available remain key considerations in a tribe's ability to sell electricity.

## Feasibility Factors—Insights from the Jemez Pueblo and the Campo Band of the Kumeyaay Nation

### *Jemez Pueblo*

The Jemez Pueblo in New Mexico provides a recent example of the effort required to produce a commercial scale renewable energy project with the intent to connect to the nontribal grid. It is currently in line to claim itself as the first utility-scale solar plant on tribal land with the ability to sell power off the reservation. Almost 15,000 solar panels will occupy

the tribe's 30-acre site, generating up to four megawatts, enough electricity to power about 600 homes. The tribe's intent is to feed power to the Jemez Mountains Electrical Cooperative system on a 14.4 volt distribution line, and sell the power (and possibly renewable energy credits) to either Los Alamos County or the DOE Power Pool.

The Jemez Pueblo has some distinct advantages that allowed it to consider connection to the regional grid: (1) two power lines were readily available for interconnection; (2) options of power purchasers; and (3) easy access off a major state highway. The pueblo also took advantage of grants, loan guarantees, and technical assistance from DOE's Tribal Energy Program, as well as the double credit for tribal energy provided by the Energy Policy Act of 2005. However, the ability to actually sell the power produced has proven challenging. Because population densities near the reservation are low, the only potential buyers are utilities and federal facilities. These purchasers may not be able to afford higher tribal rates without subsidies, or they may prefer to buy power at below-market rates from DOE entities such as the Western Area Power Administration. Despite DOE tribal policies that are intended to favor purchasing from tribes, procurement officials have in the past stated that these policies do not obligate them to purchase Jemez power for more than the market rate. As of this writing, negotiations on a power purchase agreement are continuing. Additionally, the Jemez Pueblo continues to work on its interconnection application.

### ***Campo Band of the Kumeyaay Nation***

The Campo Band of Kumeyaay Nation's reservation is located in southern California in the southeast portion of San Diego County. Its wind farm started generating energy in late 2005, annually producing enough power for 30,000 homes. This saves approximately 110,000 tons of greenhouse gas emissions per year and assists San Diego Gas & Electric in meeting its target of supplying at least 20 percent of its customers' electricity from renewable sources by this year, 2010. The Campo Band receives revenue on the land lease contract and royalties on electricity purchased from the project. Sempra Energy, which owns San Diego Gas

& Electric, pays \$49.50–\$51.75 per megawatt-hour on a 20-year power purchase agreement.

Transmitting power from the Campo reservation was facilitated by a number of factors. First, San Diego Gas & Electric substations were already located close to the wind turbines. Second, the transmission capacity of these substations and their lines were easily upgraded; 69 kilovolt lines to the existing substation were upgraded from a 269 to 418 amp capacity. Third, there is good road access to both the turbines and the substation. Fourth, and perhaps most importantly, the reservation is located near a major market—over three million people reside in San Diego County, with an additional 10 million within a 100-mile radius. Finally, the aggressive renewable energy portfolio standard mandated by the state of California provides an incentive for energy companies to look for all sources of renewable energy, and is essential for long-term project feasibility.

The success of the Campo Band's first wind power development has led to more renewable energy opportunities for the tribe. In June 2009, the Campo Band, Invenergy, and San Diego Gas & Electric signed a memorandum of understanding for the second wind generation facility on the reservation, which will be capable of generating up to 160 megawatts of renewable power.

### **Conclusion**

Transmitting electricity from tribal renewable energy projects presents opportunities for a significant and sustainable revenue stream. Federal agency support and incentives from state-mandated renewable energy portfolios are key to facilitating tribal connection and electricity sales. While challenges remain, tribes that have the capacity, infrastructure, and physical location to produce renewable power and sell it to the grid can make a substantial and long-lasting investment in their future.

*Alyssa Moir is an attorney with Marten Law in Seattle, where she practices energy and environmental law.*

# TRIBAL RENEWABLE ENERGY PROJECTS: AN OPPORTUNITY TO EXPAND TRIBAL INFRASTRUCTURE AND EVALUATE A TRIBAL UTILITY

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**Donald M. Clary**  
**Ralph E. Hitchcock**

Another door is opening for economic development on Indian reservations. This door is the development of energy generation projects (both renewable and fossil based). Opening this door can enable tribal leaders to add and diversify economic resources for their tribes. However, tribes (and those advising them) should also consider the chances such projects present for the broader development of tribal infrastructure and utilities. Attorneys advising a tribe on the development of energy projects should not narrowly focus on the development of a single generation project on the reservation, but should make sure that broader opportunities are fully considered during such development.

## **The Gaming Precedent**

Those attempting to develop energy projects on reservations can derive substantial guidance from the success that has been witnessed in the gaming sector. Gaming businesses have become an established resource for economic development on many reservations. Though not all tribes have pursued these enterprises, where they have, they have often made very important contributions to tribal self-sufficiency. They have established model enterprises that have made great economic contributions. They have provided significant examples of projects in which nontribal businesses have successfully done business with tribes.

While special consideration is required relating to such issues as the energy tax incentives available for such projects (*see* Michael Connolly Miskwish's excellent article in this newsletter addressing these issues), the business forms and approaches used in the tribes' gaming enterprises are sufficiently analogous to the types of project structures that can be used in energy

projects to present successful precedents that can provide guidance to both tribes and developers.

In addition to project structure, there are other important analogies between gaming and energy development that are also relevant. Just as it is often helpful for gaming locations to be located near urban centers, it is equally important for tribes that wish to pursue development of energy resources to possess wind, solar, hydro, or geothermal resources. Fortuitously, many tribes have such resources. Just as some reservations where gaming has been developed are beneficially located near highways, some tribes are also located near transmission lines or corridors where such transmission lines will soon be developed. Some tribes also have extensive land available, which is often essential for the development of both gaming and renewable energy resources.

From these similarities, it is safe to assume that there are lessons that can be learned from the successes that have been achieved in the development of gaming projects and applied to the development of energy projects. One of these lessons has been the recognition that it is best for project infrastructure to be planned and developed in a manner that is not only focused upon one particular project or enterprise, but which also contemplates (and plans for) the broader current and future needs of the tribe.

As gaming development has taken place, such development has often required the addition of substantial infrastructure. These changes have related to the expansion of such items as highways and roads, water, wastewater, communications, and power. In our discussions with those involved with such projects, many of those involved have informed the authors that these projects have provided a unique opportunity for the tribes involved to efficiently and relatively inexpensively (as part of such projects) address larger issues relating to the future development of infrastructure on their reservations. These issues relate to the expansion and extension of service, the location of facilities, and expanding the ability of the tribe to control these improvements.

## **Applying These Lessons to Renewable Projects**

In one form or another, tribes have been actively involved in energy development for decades. However, a great amount of emphasis is now being placed upon the development of renewable energy projects by tribes. In addition to the fact that tribes are looking for new enterprises into which to expand, this momentum is being enhanced by such factors as the implementation of targeted tribal energy programs by the current administration as well as more general state and federal incentives that have been structured to enhance the development and use of renewable energy in the legacy utility's generation portfolio. While the current tax structure effectively prevents tribes from using the lucrative tax and other financial incentives provided from such projects, some tribes are now having success in working through these problems with developers. Moreover, legislative action is being contemplated to resolve these issues.

The implementation of renewable portfolio standards by some states that would impose penalties on utilities that do not obtain a sufficient percentage of generation from renewable sources has resulted in power purchase agreement pricing that is several times greater than the utility's average cost for power generation. This factor alone provides substantial motivation for the development of renewable energy resources in Indian country. Therefore, many tribes are now actively considering such ventures.

Many times, when a tribe is initially considering proceeding with a renewable energy venture, its first considerations tend to focus on such questions as whether the tribe should own the project or lease land to a developer, should the tribe take an equity interest in the project, or whether the tribe should set up a special entity to construct the project. However, prior to formal adoption of the business structure, we believe there are several important issues to be considered in the formation of the business plan.

As reservation locations and tribal priorities vary, so do the needs for the individual reservation. Therefore, we suggest that a comprehensive assessment of the resources, needs, and long-term objectives of the

reservation be conducted prior to the adoption of energy-related business plans.

Therefore, before proceeding from this initial point, a tribe should undertake a broader and more general review of the infrastructure and overall utility service available on the reservation. Such a review should include an objective evaluation of the current level of utility services, the level of services required for existing tribal functions, and the level of utility services required to support the long-term economic development plan or strategies for the reservation. This evaluation should include transmission access for both import and export power requirements, the adequacy of on-reservation utility infrastructure, and the relevant options to overcome deficiencies.

The findings of this evaluation should then be incorporated into the tribe's business plan. Any new project should then be fashioned in such a way as to incorporate any changes identified in the analysis or at least in a manner such that the project will not interfere with such future developments.

## **Considering a Tribal Utility**

In this era of declining reliability and spiraling rates for legacy utilities, a tribal utility may also be a viable alternative. Existing tribal utilities have proven that a tribal utility can provide reliable service and lower rates that are much more favorable than continuing legacy utility services. There are also a number of regulatory, financial, and technology benefits associated with the organization and operation of a tribal utility. In one instance, our recent preliminary analysis for the formation of a tribal utility suggested service rates twenty-five percent lower than the existing utility while providing increased service reliability. We anticipate that this difference will increase as the cost of power for legacy utilities increases according to current projections.

The formation and operation of a tribal utility provide an opportunity to use a portion of reservation-generated power to supplement the resources required to enhance the service levels of the reservation. The utility can also facilitate transmission access that may not be available to retail service customers.

Among other benefits, the formation of a tribal utility can also

- Promote the tribe's ability to serve remote locations;
- Provide additional employment to tribal members; and
- Give the tribe greater discretion concerning infrastructure energy improvements needed for future economic development.

## An Eye to the Future

Therefore, it can be seen that those advising a tribe contemplating the development of tribal energy projects should have an extremely broad view of the tribe's needs, and should remember to vigorously examine what additional opportunities might be available as an adjunct to the project. This review may lead to surprising and very profitable benefits for the tribe and dramatically enhance the tribe's infrastructure and economic future.

**Donald M. Clary** is an editor of this publication and practices energy and environmental law (with a tribal emphasis) in his practice in Los Angeles, California. **Ralph E. Hitchcock** is a utility consultant who assists tribes and other clients through his firm, *Ralph E. Hitchcock and Associates*.

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## THOUGHTS ABOUT COPENHAGEN FROM AN NTEC PERSPECTIVE

**Bob Gruenig**

*This review of the 15th United Nations Climate Change Conference is provided by Bob Gruenig, our Newsletter vice chair, who attended this event. It is reprinted (with permission) from NTEC Environmental Insights, volume 21.*

The 15th United Nations Climate Change Conference (COP-15) was held in Copenhagen, Denmark, from December 7th to the 18th. Of the more than 45,000 delegates registered for the conference, 24,000 actually attended. The Conference was also held in the Bella Center, a facility with a 15,000-person capacity limit. The National Tribal Environmental Council (NTEC) sent a representative to participate in Indigenous Peoples' discussions. Overall, the outcomes of COP-15 were far less than expected, and for Indigenous Peoples, the results were even more dismal. It became apparent that for Indigenous Peoples to make their voices heard on the crucial issue of climate change, they will have to be involved on a larger scale than heretofore. It is especially crucial that Indian tribes from the United States become actively engaged in future climate change meetings because our country largely ignored the indigenous representatives present at COP-15.

## General Outcomes from COP-15

What came out of COP-15 was the Copenhagen Accord, an agreement drawn up by five nations (United States, China, India, Brazil, and South Africa) setting forth some general principles and some important "commitments," such as providing money to developing nations, and moving toward more transparency in allowing monitoring of nations' actions. Unfortunately, the Accord provides little in effectuating substantial global greenhouse gas (GHG) emissions reductions, although global leaders claim to have secured an agreement aimed at keeping temperatures from rising above two degrees Celsius.

Under the Accord, no country is committed to new emissions reductions. Instead, preexisting commitments

of emissions reductions by Annex I countries under the Kyoto Protocol are to be strengthened. In addition, the Accord fails to provide any means for closing loopholes in existing controls under the Kyoto Protocol, such as the need to address rising GHG emissions among the airline and shipping industries, items not covered under the current Protocol.

The Accord also fails to reflect what was included in earlier drafts, such as requiring developed nations to reduce their GHG emissions by 80 percent or requiring developing countries to make their own emission reduction commitments. These omissions, along with others from the final Accord were attributed by Western leaders to some countries unwilling to “play ball.” As one example, China openly refused U.S. overtures to specifically include its emissions reduction targets in the Accord.

The drafting of the final Accord by five nations raised the ire of the other countries left out of the process, particularly the developing nations that have done little to contribute to global GHG emissions but which nonetheless are experiencing its deepest and most adverse effects. When all was said and done, the lack of commitments in the Accord led U.N. Climate Chief Yvo de Boer to express his general dismay about what was achieved, believing that the countries of the world could and should have done better. Many of the scientists on hand at the meeting also claimed that the world is now on a path of increasing temperatures of 3.5 degrees Celsius by 2100. The Copenhagen Accord may be found at: [http://unfccc.int/files/meetings/cop\\_15/application/pdf/cop15\\_cph\\_auv.pdf](http://unfccc.int/files/meetings/cop_15/application/pdf/cop15_cph_auv.pdf).

## **The COP-15 Experience for Indigenous Peoples**

Indigenous Peoples came to COP-15 to actively engage in the international forum, with individual workgroups focused on such issues as adaptation, finance, and reducing emissions from deforestation and degradation (also known as REDD). The direction of these groups was affected early on during the Conference as the International Indigenous Peoples Forum on Climate Change (Indigenous Peoples Forum), and the official indigenous caucus of the

United Nations Framework Convention on Climate Change (UNFCCC), learned that the final Accord was expected to be no longer than six or seven pages. This required the positions of the Indigenous Peoples to be captured in a few short sentences, understanding that they would be competing for space with the countries officially represented at the Conference as well as with innumerable non-governmental organizations (NGOs).

A subsequent workgroup was convened, including staff from NTEC and the Native American Rights Fund (NARF) with whom NTEC works on these issues, to draft concise preambular and operational language for the Accord that would adequately take into account the rights of Indigenous Peoples. In particular, it needed to protect their rights to land, territories, and associated resources, in accordance with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and other international instruments and obligations; to ensure the full and effective participation of Indigenous Peoples in accordance with the right to free, prior and informed consent (FPIC), and to recognize the contribution Indigenous Peoples and their traditional knowledge can make to addressing climate change. After spending a number of hours finalizing such language, the workgroup brought its product to the full Indigenous Peoples Forum, which provided its approval after a few minor edits. All efforts to get this language into the final Accord, however, proved futile because of the inability to influence the COP-15 process.

Organizations like NTEC, NARF, the International Indian Treaty Council, and the Indigenous Environmental Network made repeated requests to meet with the U.S. Delegation to discuss the concerns of the Indigenous Peoples Forum such as those related to the UNDRIP, and to obtain some assurances that the U.S. commitment of monies to developing countries would also be made available to Indigenous Peoples. While Jonathan Pershing, Deputy Special Envoy for Climate Change, made a public commitment on behalf of the State Department to meet with Forum representatives to discuss their concerns during COP-15, nothing came to fruition. NTEC staff, however, was later assured that the White House would be willing to meet regarding such concerns at a later date.

To add to the frustration which Indigenous Peoples were feeling about COP-15, they, along with other civil society organizations, were essentially locked out of the negotiation process during the last two days. The UNFCCC only allowed 300 pre-identified people to enter the Bella Center each day out of the 24,000 representatives present. Of these 300, only 12 indigenous representatives were allowed to enter the building. On one day, not even 12 indigenous representatives were allowed in because the names of such individuals were required to be submitted to the UNFCCC between 2:00 a.m. and 5:00 a.m. on that morning.

Finally, the Indigenous Peoples Forum worked closely with its champions, such as countries in Latin American and Scandinavia, to craft language that would be acceptable to other countries. Unfortunately, these champions were effectively locked out of the final process as well. The net result of all these efforts was that, while early drafts of the Accord included reference to UNDRIP language, everything having to do with Indigenous Peoples was stripped from the final Accord, a document that ended up being only four pages long. This was an extremely disappointing result, thereby leading the Indigenous Peoples Forum to prepare the following statement for submission to the UNFCCC, expressing its frustration with the COP-15 process:

**International Indigenous Peoples Forum on Climate Change High Level Statement—  
December 18, 2009**

*Dear Excellencies. As Indigenous Peoples from all regions of the world, we have advocated that all climate policies and actions, from mitigation and adaptation, to emissions reduction targets, to finance mechanisms and capacity building, must recognize and respect the rights and contributions of Indigenous Peoples. However, our demands have not been met at this COP. Global leaders have not reached consensus on the need for a legally binding agreement that recognizes our human rights as indigenous peoples, including those embodied in the UN Declaration on the Rights of Indigenous Peoples.*

*As Indigenous Peoples, we also express our disappointment and frustration with the lack of progress made at this critical Climate Change meeting. It is our very survival at stake. We support those states who take the position that emissions must be reduced by 40% below 1990 levels by 2020 and by 95% by 2050. We join the wider civil society in their call for Climate Justice Now. Talks have broken down over the central issues of finding real solutions to secure adequate emission reductions as well as sufficient support for finance and technology transfer to developing countries.*

*We do take note of advances in the decisions relative to REDD+ and agriculture affirming respect for traditional knowledge and the rights of Indigenous Peoples. However, these references are omitted from all other COP outcome documents. These human rights must be protected through clear and unequivocal language recognizing our rights to land, territories and resources, our full and effective participation including our right of free, prior and informed consent, and protection for our traditional knowledge. In order to protect our forests, biodiversity, the air, and the water that sustains us all, we need a binding commitment to the UN Declaration on the Rights of Indigenous Peoples.*

*Finally, we express our sincere appreciation to all of the state parties and civil society organizations who have supported Indigenous Peoples around the world—without their support, we could not make the progress that Indigenous Peoples and the world need.*

*We invite all states to join in creating a world where Indigenous Peoples finally realize the enjoyment of our human rights. We fully intend to work to implement this vision of reality beyond COP 15.*

*Nia:wen, Thank you.*

## **Bringing a U.S. Tribal Leader to Copenhagen**

Apart from NTEC's role in the Indigenous Peoples Forum, it also worked closely with NARF and the National Wildlife Federation (NWF) to bring a tribal leader to COP-15. We were invited to do so by the Obama Administration after Indian tribes were unable to secure a spot on the U.S. Delegation. The tribal leader who attended, Chairman James Steele, Jr. of the Confederated Salish-Kootenai Tribes, went to the Conference on NTEC's credentials and with the generous financial support of NWF. While the Chairman faced a number of unexpected problems along the way, such as having to wait more than eight hours in a registration line for COP-15, he made his presence known. Specifically, the Chairman served on a December 17th panel with other U.S. representatives, including Wisconsin Governor Jim Doyle, who spoke to the leadership and innovations that their state and tribal governments have been taking to address and reduce GHG emissions. Thereafter, the Chairman had the opportunity to sit down with staff from Senator Max Baucus' (D-MT) office to discuss some of the issues and concerns facing Indian tribes with respect to climate change, and how the current Senate bill, namely, the Clean Energy Jobs and American Power Act (S. 1733), might be improved to the benefit of such tribes.

To view some press releases concerning Chairman Steele's participation at the Copenhagen Conference, *see* please go to <http://buffalofire.com/?p=1300>, <http://www.greatfalltribune.com/article/20091216/NEWS01/912160307/Flathead-tribal-leader-heads-to-Copenhagen>.

## **Why Indian Tribes Should Be Concerned About International Negotiations, Especially in Light of the Difficult Experience at COP-15**

Although Chairman Steele was present at COP-15, participation by other tribal leaders was rather limited. Increased participation, however, is crucial as countries of the world attempt to forge a treaty beyond the Kyoto Protocol that will affect how America does business in the future. This, in turn, will have a sub-

sequent impact on Indian country and Alaska Native villages. As such, tribes and their leaders are urged to participate in forthcoming meetings under the UNFCCC. When fighting to be heard in a crowd of nearly 200 countries and innumerable NGOs, as many sovereign indigenous voices as possible are necessary to break through the many other voices. Tribes need to be in attendance in greater numbers to get the United States to pay attention to their rights and needs. It is all too easy for such issues to get lost in global politics.

The UNFCCC is an especially important forum for Indigenous Peoples because climate change implicates every aspect of indigenous rights—i.e., self-determination; lands, territories, and natural resources; FPIC; traditional knowledge; full and effective participation in all matters affecting them, etc. In addition to these matters implicated by climate change action and policy, there is the matter of the direct importance of climate change to all Indigenous Peoples, including those in the United States. Climate change is impacting all of the great tribal nations of our country. It is essential that Indian tribes receive adequate funding and are allowed adequate access to the process of assessing and addressing climate change. To help provide some assurances that these resources are forthcoming, tribes must make their voices heard in international fora. In addition to the direct importance of climate change, international rights under the UNDRIP can be undermined at such international fora if Indigenous Peoples are not present to protect them. These international rights provide guarantees relevant to domestic Indian law doctrines in the United States.

The plenary power doctrine, in its extreme form, allows the federal government to terminate an Indian tribe's very existence, or to terminate the government-to-government relationship that tribes have a right to as sovereigns. The UNDRIP and other international human rights instruments provide an invaluable bulwark against such adverse actions on the part of the federal government. When the entire world acknowledges the right of Indigenous Peoples to exist and exercise their right of self-determination, it becomes extremely difficult for the United States to push the plenary power doctrine and to act with impunity toward its Indian tribes.

Another place where the UNDRIP has relevance for Indian tribes is the doctrine that aboriginal title can be extinguished without the requirement to pay just compensation under the Fifth amendment to the U.S. Constitution. The UNDRIP does not allow such a disrespect for indigenous rights. Additionally, the UNDRIP requires FPIC on matters affecting Indigenous Peoples and recognizes the rights of Indigenous Peoples to their traditional knowledge and other rights.

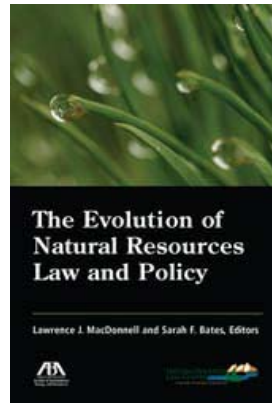
The problem remains, however, that in any international forum, there are countries such as the United States, Canada, and New Zealand which have not approved the UNDRIP, but even other countries that have frequently tried to weaken and undermine the it. It is therefore crucial that Indigenous Peoples are present and engage at every possible forum so as to uphold their hard won rights, and to push such rights toward adoption as customary law.

In conclusion, there is a direct relationship between the attempt to weave tribal sovereignty into the fabric of climate change law as sovereign partners, and what happens at the international level. If the rights of Indigenous Peoples are undercut at either level, it will not bode well for tribal rights in other fora. If Indian tribes are excluded from domestic legislation, they would unlikely obtain the international rights which are their due and vice-versa. Tribes are therefore encouraged to participate in upcoming international fora such as a mid-year one planned for Copenhagen or Bonn, and the COP-16 scheduled to begin at the end of November in Mexico City.

For further information about COP-15 or how your tribe might engage in future international forums, contact Bob Gruenig at (505) 242-2175 or [bgruenig@ntec.org](mailto:bgruenig@ntec.org).

## The Evolution of Natural Resources Law and Policy

Lawrence J. MacDonnell and Sarah F. Bates, Editors



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## SENATOR DORGAN RELEASES DRAFT OF INDIAN ENERGY PROMOTION AND PARITY ACT

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For two years, the Senate Committee on Indian Affairs has been considering the impacts of impediments to Indian energy development. The committee has held hearings and sought comments throughout Indian country. Based upon this work, Senator Byron Dorgan (D-ND), chairman of the Senate Committee on Indian Affairs, has released a draft of a proposed Indian energy bill. The draft bill contains provisions that may address some of the perennial obstacles to Indian energy development. The draft bill is entitled the “Indian Energy Promotion and Parity Act.” Some of its most important provisions include:

**Predevelopment Feasibility Activities.** This provision would allow tribes to conduct some renewable energy activities on tribal land without requiring approval by the secretaries of the Department of the Interior (DOI) or the Department of Energy (DOE). Activities must be temporary and cannot last longer than two years. Activities would typically be studies and assessments to determine the feasibility of a renewable energy project. This provision is intended to assist tribes in getting projects started and attracting investors by eliminating secretarial approval and NEPA review at the project feasibility study stage.

**Comprehensive Energy Resource Planning.** This provision would authorize DOI to support tribes in doing reservation-wide energy resource planning. Planning documents could also streamline NEPA review of individual projects on a reservation.

**DOE Indian Energy Education Planning and Management Assistance Program.** This provision would expand the existing program that directs DOE to provide grants supporting Indian energy education and development. Under the proposed draft, eligibility for the program would be broadened from tribes to also include “intertribal organizations” as eligible entities. Providing funding to intertribal organizations would permit a single organization to spread the benefit of the limited funding across many tribes.

**Appraisals.** This provision would allow tribes to conduct their own appraisals for energy-related activities. Appraisals must still be approved by the DOI secretary; but if not approved within 60 days, they would be deemed approved.

**Preference for Hydropower Preliminary Permits.** This provision would provide Indian tribes with the same preference for the development of hydropower facilities that is provided to states and municipalities. This proposal is premised upon the idea that Indian tribes should have this preference because they provide many of the same services provided by state and municipal governments. The preference could lower costs for tribes and encourage tribal hydropower development.

**Study on Inclusion of Indian Tribes in National and Regional Electrical Infrastructure Planning.** One of the most significant barriers to renewable Indian energy development is access to the transmission grid. This provision would require the Department of Energy to conduct a national study that identifies renewable energy resources on tribal lands and potential corridors for transmitting that power to the grid. The study would help tribes plan for the development of energy resources, and provide a forum for tribes and transmission providers to discuss transmission and connection issues.

**Leases and Rights-of-Way on Indian Land.** This provision would amend the law to provide tribes two new ways around federal limitations on lease terms and the awkward approval process. The provision would (1) allow tribes and individual Indians to bundle approvals for a lease and any reasonable rights-of-way into one approval process, and (2) allow tribes to lease their lands for 99-year terms if they choose.

**Distributed Energy and Community Transmission Demonstration Project.** This provision would authorize a demonstration program to provide communities not connected to the traditional energy grid with electricity and reduce high energy costs. The provision would also increase research in distributed generation and forms of green energy and reduce these communities’ dependence on diesel fuels.

**Delegation of Environmental Review.** This provision would allow tribes to expedite projects by taking control of the development process and assuming the role of the responsible federal official through a delegation by the secretary.

**DOE Loan Guarantee Program.** Obtaining financing for energy projects is one of the most significant barriers to Indian energy development. DOI currently runs a highly successful Indian Loan Guarantee Program, but not enough funding is available to fund expensive energy projects. This provision would require DOE to implement the Indian Energy Loan Guarantee Program that was enacted by the Energy Policy Act of 2005. Implementing the Indian Energy Loan Guarantee Program could be done in the same manner that DOE implemented its Title XVII Loan Guarantee Program that was also enacted in 2005.

**Inclusion of Indian Tribes in State Energy Conservation Program.** Generally, there are no programs that support tribal energy efficiency efforts. The American Recovery and Reinvestment Act of 2009 included some funding for tribal energy efficiency, but this appears to be one-time funding. This provision would create a set-aside for tribal governments in a long-standing DOE program that supports state energy efficiency efforts.

**Home Weatherization Assistance.** Under current law, Indian tribes are supposed to receive federal weatherization funding through state programs funded by DOE. Unfortunately, very little of this funding actually passes through to the tribes. This provision would create a set-aside for tribal governments to receive funding directly. The provision would also allow tribes to address the unique weatherization issues in Indian country.

**Woody Biomass Demonstration Projects.** Energy production from woody debris biomass is a possibility in areas where tribes live in or near heavily forested areas. This provision would amend the Tribal Forest Assets Protections Act to allow Indian tribes to enter into 20-year contracts to collect woody debris for biomass generation.

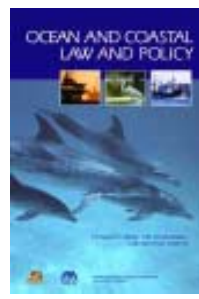
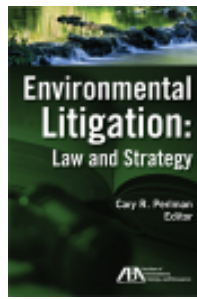
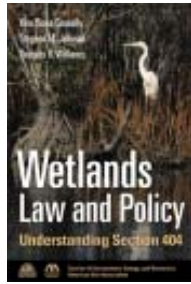
**Transferable Renewable Energy Tax and Investment Tax Credits.** Tax credits are one of the primary ways of lowering the cost of renewable energy to make projects viable. Because tribes are not able to take advantage of these tax credits, tribal projects are effectively priced out of the market. This provision would allow tribes to transfer their credits to an energy partner who could use those credits.

**Reauthorization of Grants in Lieu of Tax Credits and Clarification of Eligibility for Tribes.** While tribes currently are not able to take advantage of the investment and renewable energy tax credits, an existing program could offer tribes a benefit similar to tax credits. The American Recovery and Reinvestment Act of 2009 included a program that allowed nontaxpaying entities to receive grants instead of tax credits for certain kinds of energy development. The draft bill would extend the program and provide a clarification so that tribes can use the program.

**Permanent Extension of Depreciation Rules for Property on Indian Reservations.** The extension of depreciation rules provision has expired and needs to be extended. It would allow a quicker depreciation recovery period for qualified Indian reservation property. In general, qualified Indian reservation property is property used by businesses within an Indian reservation.

Public comment on the legislation has been solicited. At a recent conference on tribal energy development sponsored by the Sandra Day O'Connor College of Law at Arizona State University, congressional staffers indicated that at least two other versions of this legislation may be introduced.





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