

**Testimony of Christopher Clark Deschene**  
**Former Director of the Office of Indian Energy Policy & Programs, U.S. Department of Energy**  
**before the U.S. House of Representatives,**

**Subcommittee on Interior, Energy, and Environment**  
**Committee on Oversight and Government Reform**

**Hearing on Tribal Energy Resources: Reducing Barriers to Opportunity**  
**July 17, 2018**

**A. Introduction**

Good morning, Chairman Gianforte, Ranking Member Plaskett and members of the Committee. My name is Christopher Clark Deschene, I am a member of the Navajo Nation and I am currently a partner with Rosette, LLP, a national tribal law firm. In my former capacity as the Director of Indian Energy Policy and Programs at the Department of Energy, I was fortunate to address the challenges with tribal energy development. I am here to share my thoughts and recommendations for improving tribal energy development within Indian Country.

**How do we change an industry for Indian Country?**

To change an existing industry and create a new tribal energy niche, we must first recognize there's a problem. Generally, this is the necessary first step to recovery. The problem is simply, there is not enough resources to fully support the build out of programs to help tribes become energy independent. Secondly, we need information to act on and therefore, require baselines to understand the problem and potential with tribal energy development in Indian Country.<sup>1</sup> We cannot responsibly fix the problems if we do not know where or how to begin. For example, the Department of Energy has funded baselines studies under the National Energy Technology Laboratory (NETL) and the Office of Energy Efficiency & Renewable Energy (EERE) to determine the potential markets, costs, performance standards, opportunities and risks associated with both fossil and renewable technologies and development. Federal, state, and tribal efforts all need transmission, fossil, renewable and market baseline studies to build data, metrics, policy and effective programs for tribal energy development.<sup>2</sup> Third, our entire government should help support tribal leaders who are currently developing a national strategic energy plan for a tribal energy industry. For example, tribal leaders have formed the National Inter-Tribal Energy Council (NITEC) to address the common interests of its members while building industry partnerships and developing a

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<sup>1</sup> According to the Bureau of Indian Affairs, 56.2 million acres of land—approximately 2.3% of the total U.S. landmass—is held in trust for federally recognized Indian tribes. This land contains an estimated 5% of all U.S. renewable energy generation potential, (Doris, Elizabeth, Lopez, Anthony, and Beckley, Daniel. 2013. *Geospatial Analysis of Renewable Energy Technical Potential on Tribal Lands* (Technical Report). NREL-56641. National Renewable Energy Laboratory (NREL), Golden, CO. <http://www.nrel.gov/docs/fy13osti/56641.pdf>). Utility-scale solar alone is 5.1% of the entire solar PV generation potential of the United States (Ong et al. 2013). This level of solar resource, coupled with the vast land resources of Indian tribes, creates a unique opportunity for solar development on a large scale.

The U.S. Energy Information Administration website also states that the United States generated 4,087.4 terawatt-hours of electricity in 2015 largely produced from coal and natural gas. The U.S. Department of Energy's (DOE's) National Renewable Energy Laboratory (NREL) estimates that, on average, it takes 2.8 acres of land to produce 1 gigawatt-hour of electricity through solar PV, (Ong, Sean, Campbell, Clinton, Denholm, Paul, Margolis, Robert, and Heath, Garvin. 2013. *Land-Use Requirements for Solar Power Plants in the United States* (Technical Report). NREL-56290. National Renewable Energy Laboratory (NREL), Golden, CO, available at <http://www.nrel.gov/docs/fy13osti/56290.pdf>). Tribes, working with government agencies and private partners, could potentially offset the entire electricity generation of the United States with solar PV using just 20.4%—approximately 11.4 million acres—of their land.

<sup>2</sup> See NETL Baseline Studies at <https://www.netl.doe.gov/research/energy-analysis/baseline-studies>; see also EERE at <https://www.energy.gov/eere/spsc/energy-efficiency-potential-studies-catalog>.

national strategic tribal energy plan. Fourth, stakeholders including this body, need to actively participate and partner with tribal leaders working to solve problems within Indian Country. Continued meetings and hearings do nothing but repeat the problems. What we need is vested leadership, dedicated resources and government and industry partners willing to support the entire strategic plan. Finally, we need some votes on existing legislation to continue the work initiated under the 2005 Energy Policy Act.

Despite the complex, paternalistic and burdensome networks of federal Indian law and regulations, tribes and their partners must also continue to educate everyone and as Navajo's say, "A'achi'ji' Nantii'en", which means "Educate Them All."

## **B. Policy Challenges Imposed by Fragmented Federal Regulatory Process for Energy Development**

There are four general reasons underlying tribal energy issues and undermining federal-tribal energy policy. These are 1) the federal government's antiquated land policies with respect to American Indians and Alaska Natives, 2) the federal courts' use of judicial plenary power, 3) the inability of the legislative branch to pass comprehensive tribal energy legislation and dedicate adequate resources and 4) the paternalistic, inefficient, and archaic bureaucracy of the executive branch and agencies. Together, these hurdles have hurt tribal energy development in Indian Country. Today, we will focus on the latter two reasons.

### **1. United States Congress**

With respect to Congress, the congressional elections over the last twelve years have hurt Indian energy development. Tribal energy bills designed to continue the work started under Title V of the 2005 Energy Policy Act, the 2007 Energy Independence and Security Act (EISA), and the 2009 American Resource and Recovery Act (ARRA), have all stalled due to House and Senate inaction.<sup>3</sup> The first sequence of congressional failure, impairment and delay, occurred with the non-passage of the 2010 Indian Energy Promotion and Parity Act and the Indian Tribal Energy Development and Self Determination Act Amendments (ITEDSDAA) of 2011.<sup>4</sup> These laws were designed to continue the support of tribal energy development initiated in 2005. Congress never gave them an up or down vote. The second and third sequences of congressional failures began with the Indian Tribal Energy Development and Self-Determination Act Amendments of 2015.<sup>5</sup> Although the Senate has passed the legislation by unanimous consent in December of 2015, the House has referred the bill to three subcommittees with no action since the same time period. Currently, the 2017 version of this legislation has once again been passed within the Senate, referred to the same three House Subcommittees and not received a vote.<sup>6</sup> Subsequently, funding resources that would have been extended under the 2010, 2015 and the 2017 versions of the legislation have been eliminated or delayed, therefore hurting the energy services and programs under the Departments of Interior and Energy.<sup>7</sup>

### **2. Executive Branch**

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<sup>3</sup> Energy Policy Act of 2005, Pub. L. No. 109-58 (2005) (Title V, Section 503 also named the Indian Tribal Energy Development and Self-Determination Act of 2005); The Energy Independence and Security Act of 2007, Pub. L. No. 110-140 (2007); The American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5 (2009).

<sup>4</sup> Indian Energy Promotion and Parity Act of 2010, S.3752, 111<sup>th</sup> Cong. (2010)(introduced by Sen. Dorgan (D, ND)). Since the formation of Inter-Tribal Energy Network (ITEN) Energy Vision, tribes have worked with the 109<sup>th</sup>, the 110<sup>th</sup>, the 111<sup>th</sup> Congresses to past Indian energy provisions under the 2005 EPAct, the 2007 EISA, and the 2009 ARRA respectfully.

<sup>5</sup> S. 209, 114<sup>th</sup> Cong. (2015); S. 245, 115<sup>th</sup> Cong. (2017); *See also* 25 U.S.C. §§ 3501-3506 (2000).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* *See also* H.R. 5325, Energy and Water Development and Related Agencies Appropriations Act of 2013, 112<sup>th</sup> Cong. (2012)(introduced by Congress. Frelinghuysen); *see also* H.R. 2354, S.2465, 112<sup>th</sup> Cong. (2012).

The executive branch has also encumbered Indian energy development by inadequately staffing personnel for key energy positions and project reviews.<sup>8</sup> Federal agencies have also minimized the budget needed to provide adequate and meaningful services and financial support to tribal energy development. In some instances, the executive agencies have disregarded the basic principles of government-to-government consultation required for tribal nations.<sup>9</sup> For example, the Navajo Nation argued that the U.S. EPA's 2011 Mercury and Air Toxics Standard (MACT) Rule adversely affected the Navajo Nation's existing natural resource economy and government revenue sources.<sup>10</sup> Under the MACT rule, the Navajo Nation argued that the U.S. EPA failed to consult with the Navajo Nation as required by law.<sup>11</sup> Consequently, some tribal leaders have begun to disregard bureaucratic and trust limitations and federal oversight and pursue independent economic policies to end nonconsensual or exploitive agreements.<sup>12</sup> The problems however, still exist to hinder tribal energy development. As a result, tribal leaders are shifting the tribal energy development paradigm despite the federal government's challenging network of energy laws and regulations.<sup>13</sup>

### C. Changing the Tribal Energy Paradigm

"Energy projects represent the most meaningful and sustainable economic development opportunities to ever arise for some tribes that have been mired in endemic poverty."<sup>14</sup> Tribal leaders throughout Indian Country have expressed over and over that tribal resources including water, land, minerals, and labor can help solve our Country's energy challenges.<sup>15</sup> Tribes have consistently repeated that if our Country seeks energy independence, tribes and their resources must be part of the equation and solutions offered by our Country's energy industry. Accordingly, tribes have offered recommendations to change the old energy industry's model. For example, some recommendations made to Congress, the Administration, and federal agencies, and Industry are as follows:

#### 1. Congress

Both the House and Senate leadership and committees should consider the following:

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<sup>8</sup> *Indian Energy and Energy Efficiency: Hearing on Indian Energy and Efficiency Before the Senate Indian Affairs Committee*, 111<sup>th</sup> Cong. (statement of Jim Gray, Chairman Osage Nation; Chair, Indian Country Renewable Energy Consortium).

<sup>9</sup> See Troy A. Eid, *Beyond the Dakota Access Pipeline: Working Effectively with Indian Tribes on Energy Projects*, ABA (last visited July 13, 2018), [https://www.americanbar.org/groups/environment\\_energy\\_resources/publications/trends/2017-2018/march-april-2018/beyond-the-dakota-access-pipeline.html](https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2017-2018/march-april-2018/beyond-the-dakota-access-pipeline.html) (explaining that the Executive branch has expanded consultation policies to give tribes more say in decision-making and established detailed consultation requirements at the agency level); See also *The American Energy Initiative: What EPA's Utility MACT Rule Will Cost U.S. Consumers: Hearing on U.S. EPA's MACT Rule Before the House Comm. On Energy and Commerce*, 112<sup>th</sup> Cong. (statement of Harrison Tsosie, Attorney General, Navajo Nation). See also National Energy Policy, May 2001, National Energy Policy Development Group (NEPD). Under his National Energy Policy of 2001, President Bush initially sought to respond to America's growing energy consumption. President Bush presented his solution to America's energy problems in May 2001 with the National Energy Policy (NEP). The problem in Indian Country, was that the NEP did not consult with tribes.

<sup>10</sup> *Id.* at 3 (the MACT ruling directly impacts coal-fired power plants sited on the Navajo Nation).

<sup>11</sup> *Id.* at 4. See also E.O. 13175, 65 Fed. Reg. at 67249 (stating that "the United States has a unique legal relationship with Indian tribal governments... [every federal agency] shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.").

<sup>12</sup> See generally Robert N. Clinton, *There Is No Federal Supremacy Clause For Indian Tribes*, 34 Ariz. St. L.J. 113, 179-180 (2002) (discussing tribal termination and surplus land policies).

<sup>13</sup> Interview with Roger Fragua, Deputy Executive Director, Council of Energy Resource Tribes, in Washington, D.C., (Oct. 15, 2003).

<sup>14</sup> *Indian Energy Promotion and Parity Act of 2010: Hearing on 2010 Indian Energy Promotion and Parity Act Before the Senate Comm. On Indian Affairs*, 112<sup>th</sup> Cong. (statement of Joe Garcia, President, National Congress of American Indians).

<sup>15</sup> *Id.* See also *Energy Development in Indian Country: Hearing on Energy Development in Indian Country Before the Senate Comm. On Indian Affairs*, 112<sup>th</sup> Cong. (February 16, 2012).

- a. Continue tracking the implementation of the 2015, 2016 and 2017 GAO Report Recommendations related to tribal energy development.<sup>16</sup>
- b. Pass national tribal energy legislation that updates, amends, and supports tribal leadership recommendations to date, including but not limited to amending the 2005 Energy Policy Act<sup>17</sup>
- c. Amend Hearth Act to allow tribes to approve leases and easements for tribal energy development.<sup>18</sup>
- d. Reauthorize and fund the Office of Indian Energy at DOE at \$100M with 25 Full Time Employees
- e. Create a Senate confirmed Assistant Sec. of Indian Energy position
- f. Address Tax Issues including Dual Taxation and Incentives<sup>19</sup>
- g. Authorize and allocate funds for the Tribal Energy Loan Guarantee Program at a minimum of \$100M<sup>20</sup>
- h. Support Tribal-Industry Partnerships by supporting DOE’s Office of Indian Energy’s Strategic Roadmap 2025 strategic goals including the build out formal tribal business roundtables.<sup>21</sup>

## 2. The Administration

With respect to the Administration, the White House and its senior advisors should:

- a. Review, track, and implement the aforementioned 2015, 2016 and 2017 GAO Report Recommendations related to tribal energy development.
- b. Appoint senior staff to coordinate tribal energy activities across the Administration as developed under the White House Council on Native American Affairs.
- c. Implement a five to ten-year budget plan for tribal energy programs at the Departments of Energy and Interior through the Office of Management and Budget.

### Federal Agency: Department of Energy

- a. Fund the Office of Indian Energy Policy and Program (OIEPP) at \$100M annually
- b. Staff the OIEPP at 25 Full Time Employees

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<sup>16</sup> See GAO Rep. to Senate Comm. Indian Affs., *Poor Management by BIA has Hindered Energy Development on Indian Lands*, GAO-15-502 (2015); see also GAO Report, *Indian Energy Development: Additional Actions by Federal Agencies to Overcome Factors Hindering Development*, GAO-17-43 (2016); see *Progress on Many High Risk Areas, While Substantial Efforts Needed on Others*, GAO-17-317 (2017); see also *Testimony* from Frank Rusco, Director, Nat. Resources and Environment (Feb. 15, 2017) (outlining federal management challenges related to Indian energy resources); see also *Testimony* from Michael Black, Acting Assistant Sec., Bureau of Indian Affs., to the Senate Comm. on Indian Affairs (May 17, 2017) (explaining that the development of energy resources offers tribes many opportunities to bolster their economies, and previous GAO reports recommend supporting tribal energy development).

<sup>17</sup> S. 209, 114th Cong. (2015); S. 245, 115th Cong. (2017).

<sup>18</sup> Helping Expedite and Advance Responsible Tribal Home Ownership (HEARTH) Act of 2012, Pub. L. No. 112-151 (2012) (codified at 25 U.S.C. §415); see also *Indian Country Today*, *Why Tribes Need the HEARTH Act and BIA Leasing Regulations* (Oct. 18, 2013), <https://newsmaven.io/indiancountrytoday/archive/> (arguing that the HEARTH Act permits tribes a greater measure of control over the leasing of tribal lands, allows for specially tailored leasing programs, and enables tribes to implement leases at their own pace).

<sup>19</sup> See *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 175 (1989) (permitting dual taxation in which both the state and tribe may impose a tax); see also Kelly S. Croman & Jonathan B. Taylor, *Why Beggar Thy Indian Neighbor? The Case for Tribal Primacy in Taxation in Indian Country*, JOPNA 2016-1 (May 4, 2016); Valerie Volcovi, *Native American Tribes Decry State Taxation of Reservation Energy Projects*, REUTERS (Jan. 27, 2017) (quoting Mark Fox, Chairman of the Mandan, Hidatsa, and Arikara Nation) (“Dual taxation is an impediment to development[.]”).

<sup>20</sup> See S. Amdt. 3833 (114th) (Alan Franken) to H.R. 2028 (114th). While Sen. Franken’s amendment provided for \$10M, Congress should allocate \$100M for the Tribal Energy Loan Guarantee Program.

<sup>21</sup> Strategic Roadmap 2025: Office of Indian Energy Policy and Programs, available at <https://www.energy.gov/sites/prod/files/2016/03/f30/DOE%20Office%20of%20Indian%20Energy%20Strategic%20Roadmap%202025.pdf>.

- c. Support Senate confirmed Assistant Sec. of Indian Energy position for OIEPP
- d. Support changes to 50% matching and allow for 0-10% matching requirement
- e. Assign a career Deputy Director to OIEPP
- f. Fund and establish the Tribal Energy Loan Guarantee Program
- g. Follow Strategic Roadmap 2025 Recommendations as originally approved<sup>22</sup>
- h. Fund national laboratory baseline studies for tribal energy development and policy needs
- i. Hire federal Indian law experts to serve within the Office of the General Counsel, Congressional & Intergovernmental Affairs; and Western Area Power Authority

#### **Federal Agency: Department of Interior**

- a. Continue to implement 2015 and 2017 GAO Recommendations<sup>23</sup>
- b. Fund DOI's Office of Indian Energy & Economic Development (IEED) and the Department of Energy & Mineral Development (DEMD) to maximize programs supporting tribal energy development

### **3. Industry**

Since the inception of DOE's Tribal Energy Program in 2002, Indian Tribes and Alaska Natives have consistently identified the lack of, and the need for focused, facilitated industry/tribal partnerships to develop new and innovative approaches for tribes to access capital for construction of clean energy systems on Indian Lands.<sup>24</sup> The DOE's Office of Indian Energy Policy and Program's Indian Country Energy and Infrastructure Working Group (ICEIWG) has recently identified access to private capital as the single largest barrier to clean energy development, and the single highest priority for Indian tribes and Alaska Natives seeking to deploy community and commercial scale clean energy projects on Indian Lands.<sup>25</sup> Accordingly, Industry with Congress could:

- a. Support the National Inter-Tribal Energy Council (NITEC)<sup>26</sup>
- b. Support Legislation that Address Procurement Opportunities<sup>27</sup>
- c. Support Financial Industry Development Opportunities

### **4. Policy**

- a. Support and fund agency programs related to energy: Housing, EPA, Transportation, USDA, etc.
- b. Support Programs that build Tribal Capacity: Education, Workforce Development, etc.
- c. Support Transmission Planning, Access, Studies, and Ownership<sup>28</sup>
- d. Support Renewable Energy Standards, Incentives, and Partnerships
- e. Support and Encourage Cross-Agency Coordination

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<sup>22</sup> *Id.*

<sup>23</sup> *Hearing High Risk, No Reward: GAO's High Risk List for Indian Programs Before Senate Comm. On Indian Affairs* (Testimony of Michael Black, Acting Ass't Sec., Bureau of Indian Affairs, U.S. Depart. of Interior) (May 17, 2017). See also *Energy Development in Indian Country: Hearing on Energy Development in Indian Country Before the Senate Comm. On Indian Affairs, 112<sup>th</sup> Cong.* (Jodi Gillette's Testimony, February 16, 2012).

<sup>24</sup> Pierce, Lizana, Personal Interview, Golden, CO. (2016).

<sup>25</sup> Doris, Elizabeth, MacCourt, Douglas, Policy Priorities Report, Quarterly Meeting of the Indian Country Energy and Infrastructure Working Group (ICEIWG), Portland, OR. (June 2016).

<sup>26</sup> National tribal energy trade association established May 3, 2018 with the purpose to promote the common interests of its members and improve their business and economic conditions for the benefit of American Indian and Alaska Natives.

<sup>27</sup> *Energy Development in Indian Country: Hearing on Energy Development in Indian Country Before the Senate Comm. On Indian Affairs, 112<sup>th</sup> Cong.* (February 16, 2012).

<sup>28</sup> James Steele, Vice President, Affiliated Tribes of Northwest Indians, Address at the Department of Energy Tribal Summit (May 4, 2011).

f. Continue and Strengthen Consultation and Coordination Processes

**D. Conclusion**

No message resonates better than success. To be successful, Congress and the Administration together with Indian Country, must support the changes necessary for tribal energy industry shifts. As noted, dedicated resources and funding investments are vital in addition to halting policies to decrease tribal energy programs. What's missing are partners including the federal government and industry with resources and funding to sustain energy development in Indian Country.

As David Lester stated many times, "Tribes want to develop the resources with which nature endowed their lands for the economic and social benefit of their own communities and families and according to their own values... tribes want to make their valuable energy resources, both conventional and renewable, available to help all Americans remain prosperous and energy-secure. Tribes are now taking their rightful place in the American system of government and are more able to fulfill their governmental responsibilities... Equally important, Indian tribes are participating and competing in the American economic marketplace."<sup>29</sup>

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<sup>29</sup> Statement of David Lester, former CEO of the Council of Energy Resources Tribes (CERT), *available at* <https://www.indianz.com/News/2009/013334.asp>.