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INDIAN ENERGY SOLUTION CONFERENCE

GOLDEN NUGGET HOTEL & CASINO
LAS VEGAS, NEVADA

AUGUST 6, 2008

10:06 a.m. - 12:16 p.m.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

TRIBAL MANAGEMENT AND TRIBAL ENERGY
RESOURCE AGREEMENTS (TERAS)

Moderator: Paul G. Moorehead, Esq., Partner
Drinker Biddle & Reath, LLP
Washington, D.D.

Chair: Arvin Trujillo, Executive Director
For the Division of Natural Resources
For the Navajo Nation

25 Reported by: JUNE W. SEID, NV CCR 485

1 PROCEEDINGS

2 MR. TRUJILLO: Good morning, everybody. Why
3 don't we go ahead and get the session started.

4 For everybody's benefit my name is Arvin
5 Trujillo. I'm the Executive Director for the Division
6 of Natural Resources for the Navajo Nation. This
7 morning I'll be moderating this session on the Tribal
8 resources and Tribal energy resource agreements.

9 Joining me is Mr. Paul Moorehead and he will
10 be helping me as we go through this discussion. Paul
11 has a lot of information on what was developed, how it
12 was developed, for your benefit. And again, we are
13 looking for input in terms of how we want to begin to
14 look at management.

15 In your booklets here, there's a short
16 synopsis on the breakout session for your benefit just
17 to give it context, then I'll turn it over to Paul.
18 Let me just go ahead and read through this, and from
19 there I'll turn it back over to Paul and we will start
20 the session and the discussions.

21 The enactment in 2005 of the Indian Tribal
22 Energy Development and Self Determination Act afforded
23 Indian Tribes unparalleled opportunities to develop
24 their energy resources, whether renewal or
25 nonrenewable, and to develop and manage environmental

1 programs related to energy activities.

2 In April 2008, the Department of Interior's
3 regulations to implement the TERA aspect of the new
4 law became final. The DOI may now implement the new
5 law in earnest. As energy development accelerates in
6 Indian Country, the incapacities of Interior agencies
7 to keep up with their Indian trust duties -- as energy
8 development accelerates in Indian Country, the
9 incapacities of Interior agencies to keep up with
10 their Indian trust duties are exposed.

11 But TERA was not designed as the alternative
12 to bureaucratic delay. Its intent is to continue the
13 progression of the policy of recognizing Tribal
14 sovereignty and self governance as it applies to
15 Tribal energy development. Building Tribal governance
16 capacity is not just good energy policy, good
17 competent government is good public policy in its own
18 right, meriting adequate financial and technical
19 assistance to achieve these goals.

20 As I turn this over to Paul, for some of you
21 who may be looking at this aspect or thinking about
22 exploring these aspects, a lot of this discussion
23 began back in 2000 with then Senator Nighthorse
24 Campbell. Paul was a part of those discussions at the
25 capitol building when we were looking at where do we

1 begin and what are some of the areas where Tribes are
2 lacking, and how do we begin to address issues
3 concerning the BIA and how they interact with
4 different Tribes.

5 As an example, the Navajo Nation, my own
6 Tribe, for years had problems in terms of getting
7 agreements to right-of-ways, but once agreements were
8 made we had to have those agreements passed through
9 BIA, which added extra time before the right-of-way
10 was finally approved.

11 We have gone to a lock box system now
12 whereby it still takes the BIA time, and in some cases
13 up to a year and a half, to finally approve the
14 agreements we have in place. But by putting this
15 money into a lock box, we have been able to earn
16 interest on that money so it's just not sitting there
17 doing nothing. And in some cases, we have been able
18 to obtain agreements where we can pull the interest
19 for our own use and benefit. Once the agreement's
20 set, then the principal comes into the Navajo Nation
21 Treasury.

22 So again, these are some of the things we
23 did to address these issues, but TERA takes it beyond
24 that aspect and allows Tribes, once an agreement is in
25 place with the Department of Interior, to go out and

1 negotiate and manage energy resources. And when
2 agreements are made and a Tribe does its processes to
3 formally agree to what was discussed in the form of a
4 resolution or legislation, et cetera, then the
5 agreement is in place. You don't have to send it
6 through the BIA for review.

7 So with that brief summary, I'll turn it
8 over to Paul and we will go from there.

9 MR. MOOREHEAD: Thank you.

10 And as the Chairman indicated in reading the
11 synopsis and in the discussion of the processes and
12 some of the thoughts that went into the EPAct in '05,
13 as always for me it's helpful to look back and throw a
14 broad net when you look at past congressional actions,
15 and in this case with regard to Indian mineral
16 development. Back in the thirties, the Indian Mineral
17 Leasing Act relegated Tribes to an entirely passive
18 role. The Secretary auctioned Indian leases and
19 approved those documents.

20 And then in 1982, Congress passed the Indian
21 Mineral Development Act which provides for retained
22 Secretarial approval, but provided for a more active
23 Tribal role in negotiating with third parties. And
24 then after 1982 we had, of course, a variety of 638
25 Indian Self Determination Act and self governance

1 statutes, the broad theme of which is to devolve
2 authority from federal agencies to Tribal chambers.
3 And when you step back enough, that's still the
4 policy, although we have had some minor steps back.
5 But still the general thrust is trial decision-making,
6 not federal decision-making.

7 The Chairman mentioned the Navajo Nation
8 Surface Leasing Act that was enacted in 2000. I think
9 in large part that is the intellectual godfather for
10 what became Title V, and essentially as the Chairman
11 said, what it provides is once the Navajo Nation
12 builds a regulatory apparatus regarding surface
13 leases, not subsurface leases, and that regulatory
14 regime is approved by the Interior Department, the
15 Nation is then liberated to go out and negotiate and
16 approve surface leases without review or approval by
17 the Secretary of Interior. It's not just a question
18 of shifting the decision-making as the Chairman said,
19 you know, real opportunities were being lost because
20 of the delays at Interior and within the Bureau.

21 In the early 2000s when Congress was
22 considering, even back then, energy legislation, the
23 Indian Affairs Committee and its sister committee in
24 the house, the Resources Committee, worked hard to
25 make sure there was an Indian component. With these

1 precedents, Mineral Leasing Act, Mineral Development
2 Act, self governance, NAHASDA even to a lesser extent,
3 and the Navajo Surface Leasing Act has the
4 off-the-shelf models, it wasn't hard to fashion what
5 should be the new energy regime for Indian Tribes.

6 It's important, I think, to note it was not
7 without controversy when this was going through
8 Congress. It's important to note that participation
9 by a Tribe is entirely voluntary. If it wishes it can
10 choose to operate under pre-2005 statutes, IMDA,
11 Indian Mineral Development Act authority for one. So
12 it's not mandatory, it welcomes and assists Tribes in
13 all aspects of energy development, at least in theory,
14 from energy resource inventories and technical
15 assistance, assistance in drafting the TERA document
16 itself by Interior, and a variety of other statutory
17 authorities that are only now, within the last two
18 fiscal years, only now being funded and implemented by
19 Congress.

20 And we can go through if the group would
21 like, although I think as a group you're further along
22 than most people when it comes to understanding what
23 is required in a TERA. The new regulation was made
24 effective in April of this year, it's found at 25CFR,
25 Part 224, and it is in a user friendly format.

1 It asks a variety of questions: What needs
2 to be in a TERA? How are TERA provisions enforced?
3 How can the Department of Interior assist the Tribe
4 even before submitting a TERA to make sure you're not
5 wasting money and that you're on the mark? And a
6 variety of others. It's about 40 pages long, but it's
7 very, very helpful.

8 I handed out two documents, one is a draft.
9 And it is a draft, it has some typos in it, but it's
10 really a primer on TERAs and what some of the hot
11 button issues have been, both from consideration in
12 Congress to enactment, and then to the current day
13 when we are in the implementation phase. And so
14 that's the two-page document called the primer.

15 And then the one-pager is an alert that
16 CERT, in fact, put out some time ago when the Office
17 of Indian Energy and Economic Development under Bob
18 Middleton's direction made available, I want to say a
19 million dollars, but I could be wrong, made available
20 funds for Tribes to identify what capacities they have
21 internally to manage and regulate their environment
22 and their energy development, and identify gaps in
23 that expertise, and then with an eye toward remedying
24 either developing it internally or contracting with an
25 outside expert so that when the Tribe formulates its

1 TERA and submits its application to the Department, it
2 has either internally or through contract of all of
3 the expertise that it needs to be successful, and
4 success defined as getting an approved TERA out of the
5 Department of Interior. So that talks about some of
6 the items and activities that Bob's office funds.

7 It's fair to say I think some of you have
8 worked with Bob Middleton already. I found Bob to be
9 very active, very positive, very energetic in making
10 the statute understood, and getting the regulation in
11 a format that will provide maximum support I think to
12 Tribes and decision makers as this law is enacted.

13 So for my part, Mr. Chairman, I think that's
14 the context that I would give and perhaps we could
15 open it up.

16 MR. TRUJILLO: Yes. Again, what I would
17 like to ask is just to help out the recorder here, we
18 are recording this so that we capture not only your
19 input, but the essence of the meeting as we go through
20 it, so that as we go back to look at developing a
21 platform, we can capture your feedback and your input
22 there to put that into some type of white paper.

23 So what I would like to do is open it up.
24 If you have questions or comments concerning the TERA,
25 its development, what it has in it, I would like to go

1 ahead and open up the mic and if you could state your
2 name.

3 MR. CONNELLY: Mike Connelly from Campo.

4 I have a question regarding the NEPA
5 compliance, and I don't see anything in the TERA or in
6 the language that I've seen so far that says that you
7 couldn't, say, do a programmatic EA or EIS for the
8 areas that you wanted to do the energy development on
9 and run that concurrently with the TERA approval
10 process. I don't see anything that says you can do
11 that either, and I'm not sure from the language if
12 that would be -- would you end up having to go back
13 and redo that again as part of the TERA process, or
14 can those things kind of run in parallel?

15 MR. MOOREHEAD: Well, the reg -- this is
16 probably in addition to the question of what effect
17 does TERA approvals and the involvement of the
18 Secretary in energy decisions on Indian lands have
19 with regard to the trust obligation. This was
20 probably the biggest issue that was debated in
21 Congress, and that is the application of NEPA and how
22 it gets fleshed out.

23 The reg makes this clear, when what the
24 Secretary is involved in doing, and the reg provides
25 that he will or she will do a NEPA analysis as regards

1 the impact of approving a TERA on the physical quality
2 of the unit, the environment, or whatever the language
3 is. So it's that decision, not the underlying scope
4 of the TERA, that's included in at least the
5 Secretary's review under NEPA.

6 But the threshold question was is NEPA even
7 going to be considered by the Secretary, and I think
8 the answer is clearly yes. But I think in my mind,
9 the important part is what is it he will be looking
10 at, and what he will be looking at is the
11 demonstration by the Tribe on a variety of fronts
12 whether it has the ability, in the phrase of the
13 statute in the regs, the capacity to develop its
14 energy resources and regulate its physical
15 environment. So I think the answer is it's not
16 precluded, and I think that that would be considered
17 by the Secretary.

18 MR. CONNELLY: So you can get double duty
19 out of your programmatic EA and basically run it and,
20 you know, just say on the off chance that at some
21 point you may decide you don't want to do the TERA,
22 you could go ahead and complete your programmatic EA,
23 and go ahead and submit your leases for approval the
24 normal way through BIA, because you have the
25 programmatic EA done with the BIA as the lead agency

1 on it, or would they assume that role or would they
2 even want to assume that role as lead agency if you
3 were also considering a TERA?

4 MR. MOOREHEAD: Well, yes, I think one thing
5 the reg also makes clear is that portions of lands
6 within a Reservation can be covered by a TERA, it
7 doesn't have to be all, and portions of resources too.
8 But for purposes of the reg, the first effort here is
9 a TERA application. That brings with it the
10 Secretary's scrutiny under NEPA, but only insofar as
11 the four corners of that document go. So I'm not sure
12 that -- I mean for purposes of this regime, I don't
13 think it would countenance or make possible, lease
14 submissions under other statutes. If you're going to
15 operate under Title V, the triggering document is a
16 TERA.

17 Is that your sense?

18 MR. TRUJILLO: That's my sense. The way I'm
19 looking at it would be when you bring the application
20 to the Secretary, he or she will have to consider the
21 NEPA implications of that.

22 Now, the boundaries is where do you want
23 this TERA to have jurisdiction over? Is it over a
24 particular area? Is it over a particular energy
25 source, or is it the whole Reservation? That's the

1 first part in terms of looking at the application.

2 Then I think as you go through it, there are
3 certain aspects in terms of capacity, and I think the
4 Secretary at that point will then begin to weigh what
5 type of NEPA actions need to be taking place. Is it
6 an EA? Do we have certain areas that are already
7 cleared? How is the Tribe going to handle these
8 areas? And does the Tribe or the Pueblo, et cetera,
9 have the necessary capacity to address these areas?
10 Then again, if the answer is no, then what do we do
11 there? How do we alleviate that problem to help the
12 Tribe in the direction for it gaining a TERA?

13 MR. CONNELLY: Is there a TERA in place yet
14 anywhere?

15 MR. MOOREHEAD: I don't think so.

16 CHAIRMAN TRUJILLO: No.

17 MR. CONNELLY: It looks a lot like the
18 treatment as a state procedure that the EPA did on the
19 environmental programs. The first treatment as state
20 applications went through the EPA took years before
21 they were approved, because nobody wanted to be the
22 one to sign off on the first one. So I'm kind of
23 wondering like on some of the projects on my
24 Reservation, maybe it's better to do the programmatic
25 EA, or even not a programmatic EA, but just an EA for

1 particular projects and split them off from the other
2 projects, and then maybe try to run a TERA on the
3 other ones, at least until somebody is the first one
4 to put their head in the noose on this.

5 MR. MOOREHEAD: I can't speak for Interior
6 or Bob Middleton, but institutionally I would surmise
7 that they, as we do I think, want the first TERAs in
8 to be successful. And for that matter, you know,
9 there will be adjustments and analyses made.

10 I think that's why, as we were discussing
11 yesterday, why this idea of a presubmission
12 consultation with Middleton's office could be so
13 helpful is it can clarify any ambiguities with regard
14 to NEPA, for instance, how big the scope the TERA has
15 to be, and then have them walk the Tribe and its staff
16 through here's what -- here are the contours of how
17 the department would see -- would look favorably on a
18 TERA submitted. And I think that's why the premium is
19 on let's get the good ones in first for fear that if
20 they are not successful or it takes five years, people
21 on the Hill or elsewhere will call for its repeal,
22 which I think most people would say wouldn't be fair,
23 but nonetheless that's a possibility.

24 MR. TRUJILLO: Now, we do have indications
25 that the Southern Ute is working towards putting that

1 first one in. How far they are to get to that point
2 I'm not sure, but in meetings such as this they have
3 indicated that they do have a lot of interest and they
4 are working in that direction.

5 Yes?

6 MR. MICKLIN: Will Micklin for Ewiiapaayp.

7 I can see how a TERA would fairly easily
8 incorporate procedural protection such that subject
9 matter experts either internal to the Tribe or
10 contracted by the Tribe would process the mechanics of
11 a NEPA application satisfactory for Secretarial review
12 and approval. My question is since there are recent
13 court decisions that seem to expand the parties --
14 interested parties' definition, it would seem to come
15 down to a reasonable interpretation of NEPA for any
16 particular project that the impact is either
17 appropriately, or substantially, or satisfactorily
18 mitigated by either measures taken or that there's no
19 significant impact. When it gets down to it, it's a
20 reasonable interpretation by the Tribe of the NEPA
21 requirement.

22 If there's a dispute that's judicable for a
23 particular question or project, can that be reserved
24 for Tribal adjudication within the Tribal court, if
25 they have one, or Tribal counsel sitting as the Tribal

1 court or whatever their decision, ultimate
2 decision-making body is? Or does a dispute reach
3 beyond the Tribe into Federal District Court? Can it
4 be taken out of the Tribal venue and adjudicated?

5 MR. MOOREHEAD: Two points. I think as the
6 federal decision maker at the front end, once a TERA
7 is submitted the Secretary will engage in NEPA. There
8 will be publication in the Federal Register that a
9 TERA has been submitted, public comments are accepted,
10 critiques of his analysis under NEPA and other
11 statutes. So there's a comment and remedy provision
12 included at that level, but also at the Tribal level.

13 And with regard to interested parties that
14 can adduce, they're going to sustain some
15 environmental impact. There is a remedy provided, but
16 Tribal exhaustion is required first, for instance,
17 before that individual or entity proceeds to the
18 Secretary or takes more formal legal action. But as
19 you say, if there's not a trial apparatus, then the
20 entity can proceed right to the Secretary when you get
21 down to that level, and that level being either the
22 Tribe's compliance with its TERA or other
23 environmental laws, or the third-party's compliance
24 with the lease, the business agreement or any term of
25 the TERA.

1 So there are various opportunities. And of
2 course the Tribes that we heard when this was going
3 through didn't want all these opportunities. But
4 nonetheless, the political process resulted in the
5 ability of interested parties, third parties to
6 comment on, critique, and otherwise question decisions
7 at the federal level and again at the Tribal level.

8 MR. MICKLIN: If we assume the TERA is
9 approved, and subsequent to that a project comes along
10 with the application of the TERA to that particular
11 project, and an interested party that's a nontribal
12 entity disputes the reasonable interpretation or
13 decision, a decision of the Tribe in application of
14 its TERA is unreasonable, and Tribal remedies
15 exhausted, is there then recourse to the Secretary or
16 the Federal District Court beyond that available to
17 this nontribal third-period entity?

18 MR. MOOREHEAD: I think the answer would be
19 both. I think the charge would be that the Secretary
20 failed in its analysis, given the subsequent project
21 developed by the Tribe, if I understand your question,
22 Will. Approved TERA, the Tribe has the TERA in hand,
23 then approves a lease, a business agreement with a
24 third-party, and an interested party says that that
25 project does not comport with the TERA that you

1 submitted to the Interior department and therefore,
2 the Secretary was unable to make a reasoned judgment.

3 MR. MICKLIN: I guess that's my question,
4 right. Is the test, therefore, that the decision of
5 the Tribe was reasonable in its decision and
6 application of NEPA as implemented by the TERA, or is
7 it that the Tribe complied with its plan?

8 If the test is only that it complied with
9 its plan, then the dispute doesn't reach to a
10 reasonable or unreasonable interpretation, Tribal
11 interpretation of its TERA. It's just whether it
12 complied with its plan or not. So I am wondering
13 which is an available dispute for a third party.

14 MR. MOOREHEAD: Well, I would think both,
15 but at different times in the process. All right?
16 Because the demonstration that a Tribe, as I read the
17 reg, that a Tribe has to make under the TERA
18 regulation is not entirely divorced from its plans to
19 develop its resources. It has to identify these are
20 the resources we intend to develop. It doesn't have
21 to say we are going to put a coal plant over here, we
22 are going to put a gas plant over here, but it has to
23 give I guess some basic specificity in order to allow
24 the Secretary to make a judgment.

25 So based on subsequent projects that the

1 Tribe launches under its TERA, I guess that would be a
2 point of challenge. But also once a TERA and a lease
3 or business agreement is entered into, there are also
4 challenges that can be made at that level by
5 interested parties as to the Tribe's compliance with
6 its TERA and the third-party's compliance with the
7 underlying document. That's my sense.

8 Is that --

9 MR. TRUJILLO: I'm not quite sure yet. I'm
10 not as well versed.

11 MR. MOOREHEAD: There are ambiguities here
12 and bright people with fifty dollars can file a
13 lawsuit.

14 MR. MICKLIN: Of those two questions, I
15 assume it makes a difference as to what extent the
16 Tribe is at risk, at jeopardy for an unfaithful
17 decision that either didn't follow its TERA, would be
18 placed in jeopardy to one extent, and whether it's
19 decision that it appropriately applied its TERA, but
20 its ultimate decision was unreasonable given a
21 reasonable interpretation of NEPA, that if it failed
22 to do that, then it would be at jeopardy to a
23 different extent, having taken on the liability of the
24 Trustee for its resources under the TERA plan.

25 MR. MOOREHEAD: Right, but only for terms

1 that are negotiated by the Tribe, all right, that
2 result in damage to the Tribe. Not parts of the TERA
3 itself.

4 MR. MICKLIN: What is it at risk for at that
5 point?

6 MR. MOOREHEAD: The United States.

7 MR. MICKLIN: But is it at risk for damages
8 or punitive judgments or, you know, what -- let's say
9 it erred in court, or that the Secretary determined
10 that it erred in its decision on a uranium project and
11 people were harmed by the release of some substance,
12 is the Tribe at risk for punitive damages or -- that
13 the United States would otherwise stand for, if not
14 for the TERA plan?

15 MR. MOOREHEAD: Well, I think liability
16 would attach under environmental -- under the
17 environmental statutes, but the damages are not
18 defined in the act or in the reg as to punitive
19 damages.

20 MR. MICKLIN: Is there a recourse to Tribal
21 assets?

22 MR. MOOREHEAD: Or remedial. That's a good
23 question.

24 MR. TRUJILLO: Yes, I don't know.

25 MR. MOOREHEAD: But I think your instinct is

1 right, I mean as I understand your questions, that is
2 how do you shape a TERA, how do you work with the
3 OIEED to look down the road ten steps and try to
4 insulate yourself from liability.

5 MR. MICKLIN: Or at least knowingly take on
6 liability that you can take on sensibly.

7 MR. MOOREHEAD: Right. And the decision, as
8 we said at the outset, may be the Tribe doesn't want
9 to take part in Title V. And it may be that on one
10 large Reservation you have some that are TERAed and
11 some that are not. The respective roles and
12 responsibilities and liabilities would be parceled out
13 accordingly, which brings up interesting issues like
14 common media, like air and water and damage, and how
15 do you parcel that out.

16 MR. TRUJILLO: Let me ask a general question
17 of everybody, especially those of you who are members
18 of Tribes. Is there a sense here of you or your
19 Tribe, and I'm not asking you to speak for your Tribe,
20 I'm just trying to get a sense at this point in time,
21 of being able to manage and administer your natural
22 resources without having to go to BIA for a final
23 approval, or do you see that process being a process
24 that you feel more comfortable with?

25 As Paul noted, anyone can put a lawsuit out

1 there, but besides that, is there a sense within your
2 Tribe or your Pueblo Nation of moving in a direction
3 where you could negotiate and follow through with an
4 agreement without going through a BIA approval
5 process?

6 MR. EVANS: Jesse Evans, Jicarilla Apache
7 Energy Corporation.

8 And yes, I think we do those. The only
9 thing that I think we are mindful of is we want that
10 trust responsibility behind us, the Secretary's
11 signature that Paul is saying is going to be there
12 anyhow if we do a TERA, the way I'm understanding it,
13 which sounds good to us, but we do joint venture
14 agreements, we do pipeline negotiation type agreements
15 along the same line. So I think yes, we have got the
16 capabilities.

17 MR. TRUJILLO: Okay. I guess what I'm
18 trying to get a feel for is as we look at putting
19 together a platform, you know, a number of Tribes have
20 worked towards the development of a TERA process or a
21 TERA, an agreement whereby we can move forward in this
22 direction, and there are some Tribes that are looking
23 at it. With CERT, is this something that would be
24 important to put in there in terms of how do we
25 structure this, or how do we -- you know, we have got

1 the regulations now, which is what we didn't have
2 before. You know, are we interested in looking at
3 some aspects as we begin to establish some type of
4 platform? Are we looking at these agreements? Are
5 there things now that we may have a better picture of
6 in terms of what we would like to use these agreements
7 with or for?

8 The question of time was brought forward,
9 and right now the regulations say that the Secretary
10 has 120 days to make a decision, if I remember right.

11 MR. MOOREHEAD: 270.

12 MR. TRUJILLO: Okay, 270 days to make a
13 decision, at which point the agreement will be valid.
14 So, you know, I guess I'm just trying to get a feel
15 for where some of you, as Tribal members, are looking
16 at possibly incorporating it. It's not bad to say,
17 too, we are going to wait until somebody tries this
18 thing out and we see what happens, because I think
19 there are some Tribes out there who are, like I said,
20 Southern Ute, Navajo, right now we are looking at
21 different questions and seeing how we might want to
22 look at this and structure this building on our lock
23 box process. So these are some of the things that we
24 are looking at right now to better understand. So I'm
25 just asking a question here.

1 MR. MOOREHEAD: If I could make one comment.
2 I was going to comment on the Jicarilla Apache Energy
3 Corporation, the gentleman's comment about trust and
4 responsibility. This was a very contentious issue in
5 Congress, and both the statute and the reg are a
6 little bit schizophrenic in terms of how it's
7 characterized.

8 Let me just read you part of the reg.

9 "This act," meaning Title V, "preserves the
10 Secretary's trust responsibilities related to mineral
11 and other trust resources, and requires the Secretary
12 to act in good faith and in the best interest of
13 Indian Tribes. Neither this act nor this part,"
14 meaning the reg, "absolves the Secretary of
15 responsibilities to Tribes under the trust
16 relationship, treaties, statutes, regulations,
17 executive orders, agreements or other federal law."

18 So you have that kind of broad prophylactic
19 that the obligation is still in place. But -- and I
20 think this is an important part -- the United States
21 is not liable for losses to any party, including the
22 Tribe, for a negotiated term of, or any loss resulting
23 from the negotiated terms of leases, business
24 agreements, rights-of-way, that the Tribe executes
25 under a TERA.

1 So some have characterized that as with
2 decision-making comes liability. But you know, for
3 any Tribe that's interested in moving ahead as Will
4 highlighted in spades, it's got to be done with eyes
5 open and people have to understand that with TERAs
6 come considerable Tribal responsibilities. But at the
7 same time, come with the freedom, the liberation of
8 not having to wait however long, two years, whatever.

9 MR. TRUJILLO: Yes.

10 MR. MOOREHEAD: In order to get documents
11 processed.

12 And we heard that -- when I was on the
13 Hill -- we heard that to such a degree, that's why
14 along with the benefit of the Navajo Surface Leasing
15 Act, that's why this has the flavor and spirit of
16 expedition, and let's expedite this.

17 And the 270-day clock limit was also a point
18 of contention, and it can be extended by the
19 Secretary, but only with the consent of the Tribe. So
20 you want to do it right, yes. But we don't want to it
21 to take ten years.

22 The Three Affiliated Tribes, I think
23 Chairman Wells is here, back in the late nineties had
24 a situation where because of some statute with regard
25 to the need for a hundred percent of the allottees to

1 agree to a lease, and couldn't get a hundred percent,
2 had a situation where an energy partner walked away.
3 This was after Congress enacted a statute that
4 authorized 51 percent of allottees to agree. So time
5 really is a factor here in terms of opportunity and
6 decision-making.

7 Sir?

8 MR. CONNELLY: Mike Connelly.

9 I've run into a lot of different review
10 processes where the government has a time limit and
11 you get up to day 269, and then they come and tell you
12 look, we are going to need more time, either more time
13 or we will send you your rejection letter. Then, of
14 course, the Tribe says okay, we will give you more
15 time then. And those things can go on like that, and
16 I don't have a whole lot of faith in those deadlines,
17 but I mean it's good that they are there.

18 One of the things that we have with NCAI, we
19 have that Supreme Court project, you know, that people
20 work on. And a lot of the BIA regions, there's Fee to
21 Trust Consortiums, and we all have these different
22 groups and different types of activities that are
23 occurring; and is there any kind of consortium that
24 has been put together to try to usher in these TERAs
25 where everybody can kind of be sharing their

1 knowledge, and in helping to get these through so that
2 we don't have to keep repeating the same mistakes?

3 MR. MOOREHEAD: Yes? When the regulation
4 was being drafted, one of the ideas that was
5 ultimately jettisoned was to, much like
6 self-governance agreements, model agreements, to
7 develop a model TERA, and have with respect to local
8 differences and the need to tailor things from Tribe
9 to Tribe, the fundamentals, the template if you will,
10 and that was ultimately jettisoned. But as far as I
11 know, there's nothing on the Tribal side that
12 approximates what you're talking about, Mike, but that
13 I think would be a good idea in terms of vetting,
14 perhaps, or peer review.

15 MR. CONNELLY: Maybe CERT could take the
16 lead on that.

17 MR. TRUJILLO: One thing as far as that's
18 concerned, I think as Southern Ute moves through this,
19 Tom Shipps who is their legal adviser has been kind of
20 keeping people updated in different meetings of this
21 nature on their progress. I think once they do get it
22 through or get their application in and get things
23 through, I'm sure Southern Ute would be more than
24 willing to meet with Tribes to discuss what they went
25 through, their experience with it, and the pros and

1 cons and how they worked through some of the areas
2 they had difficulties in.

3 I think this is an offshoot from their
4 aspect in terms of their growth fund. Any Tribe that
5 wants to look at their growth fund and possibly wants
6 to develop something of that nature, not necessarily
7 mimicking it, but they are willing to sit down with
8 you, and they are doing that with the Nation right
9 now, sitting down with us and saying this is what we
10 did, how we did it, we tried it this way, this didn't
11 work, this didn't work, but this process here worked,
12 and we are not saying how to work with your Council,
13 et cetera, but here's what we did. You can take that
14 learning and begin to shape how you want to develop,
15 so I'm thinking they are looking at that same type of
16 model when it come to TERA development.

17 But again, I can't speak for them, but I'm
18 just going from what I'm seeing right now in public
19 and how he's been sharing a lot of information with
20 Tribes on that process.

21 MR. MOOREHEAD: And Tom worked very closely
22 with Interior and their lawyers in drafting the regs,
23 at least the draft regs.

24 MR. TRUJILLO: Yes, sir.

25 MR. PAYTIAMO: I have some other ones.

1 Before that, you know, the Tribe can go ahead and do
2 whatever they want to do. Like BIA used to review the
3 Tribal constitution. Now they say, we don't have to
4 review it no more, just put your stuff together and
5 send it in, and we'll give our blessing if that's what
6 you want.

7 Then also with the President right now with
8 rights-of-way, the Continental Divide, we are kind of
9 almost at a standstill for the last three years, can't
10 move, because the Tribe is proposing something else.
11 And we sat down with the southern agency in
12 Albuquerque, and we asked them what their thoughts
13 were.

14 Usually the Continental Divide brings their
15 attorney and then we bring the BIA, we bring our
16 attorney, and after everybody starts talking we ask
17 BIA well, what are you going to say? They said
18 whatever you guys want to do, we have to follow the
19 25CFR. What do you want to do? We don't have that
20 authority at the area office, it's got to be done at
21 headquarters. If we give our blessings, at the agency
22 they said most likely that they will. If it's
23 something that you want to do that's against 25CFR,
24 they have to be the one to say yes, because it's
25 something that's going to be a model for everybody in

1 the country, whatever we are doing.

2 And then also with the Energy Act, I want to
3 ask, I've been here and there, can you tell us what
4 part of the act is not good for the Indians? What is
5 it that they think that they don't like for us to
6 consider? It's the only act that's there now, we
7 almost have to live with it.

8 MR. MOOREHEAD: Well, in terms of the Energy
9 Act itself from 2005, one thing that no Tribe liked
10 was the right-of-way study, the proposal that would
11 have led to or could have led to an eminent domain
12 condemnation authority in the Secretary of Interior or
13 another federal decision maker. And as Mr. Shelly
14 said this morning, Tribes got together and there was a
15 report issued and that's not an issue now. So that
16 was one thing the Tribes didn't like. I'm sure there
17 are other things. I mean, it's 18 titles long.

18 But in Title V, there were a number of
19 issues, the trust obligation, NEPA, the time within
20 which the Secretary has to make a decision on a TERA,
21 these were all things that there was a lot of debate
22 on. As is the case with legislation, decisions were
23 made and the statute is as it is. And even after
24 enactment, there were a number of Tribes that were
25 opposing it, and I guess the answer for those Tribes

1 is, if you find provisions of Title V objectionable,
2 then you don't have to operate under it. We have
3 existing law in the form of other statutes, and that
4 may not be satisfying to some people, but that's --
5 it's an optional new law.

6 But just to be candid, I haven't heard
7 recently Tribes opposing provisions of the reg or
8 statutes. Most of the opposition I heard was when it
9 was being considered. There may be opposition, I just
10 haven't heard it aired.

11 MR. PAYTIAMO: The other ones are on the
12 items that they may not approve, is that the one
13 that's -- I don't remember any of these listed in the
14 A87, for instance, the leasing of equipment, and then
15 the purchase of office equipment like a computer, and
16 then the indirect cost, and then also legal fees, and
17 then research and development, and training. Those
18 are the things that we need.

19 MR. MOOREHEAD: Right.

20 MR. PAYTIAMO: Are those listed in the A87
21 as allowable?

22 MR. MOOREHEAD: No. In terms of eligible
23 activities for these capacity grants, they're the
24 goods and services that Interior, for whatever reason,
25 determined are not eligible if you get a capacity

1 building grant. And I think the rationale was
2 capacity is human expertise, not necessarily
3 computers. But your point is a good one, if you do
4 not have the equipment, scientific and otherwise, you
5 know, you can be a genius, but you're not going to be
6 able to do your job.

7 MR. PAYTIAMO: Because if they don't allow
8 the direct cost, then who pays for it? The Tribe has
9 to pay for it at the end.

10 MR. MOOREHEAD: Right. Well, Interior is
11 charged with, when you look at the way the new Indian
12 Energy Law is structured it's kind of bifurcated. DOI
13 has most of the activities generally, but also all of
14 the activities with regard to strengthening Tribal
15 governments, code development, regulation development,
16 scientific expertise, environmental staff. And Energy
17 has responsibility for, for instance, providing
18 scientific, the internal scientific expertise that
19 Energy has to Tribes, either directly or through
20 contract.

21 And things like, oh, there's a billion
22 dollar guaranteed loan fund that's supposed to be
23 managed by the Department of Interior, they haven't
24 done anything to implement this, and that's a question
25 perhaps for Steve Morello who is the office of Indian

1 Energy Policy and Programs at DOE, but DOE has been
2 slow to the call in terms of doing anything, to be
3 frank, under Title V.

4 Interior has been the vigorous actor here,
5 but your point is a good one. I mean, you know, this
6 is what DOI put on the street in terms of how you
7 qualify for grant money, and there was a lot of
8 dissatisfaction with it.

9 MR. TRUJILLO: Yes, sir.

10 UNIDENTIFIED SPEAKER: The Crows looked at
11 TERA when it first came out for 2005, more with the
12 oil and gas committee on the Crow Indian Reservation,
13 and we looked at TERA. The question we had was if we
14 adopt TERA do we, the Crows, subject ourselves instead
15 of the federal government to lawsuits? That was the
16 question we had and the answer to that was yes, TERA
17 opens up the Crows to lawsuits instead of the federal
18 government. So it's shifting this liability issue
19 which should be on the federal government side, but
20 because of what's embedded in the legislation -- we
21 looked at it from that perspective.

22 MR. MOOREHEAD: Well, it might.

23 UNIDENTIFIED SPEAKER: I mean, we know it
24 is.

25 MR. MOOREHEAD: Right.

1 UNIDENTIFIED SPEAKER: That's our position.

2 MR. MOOREHEAD: Well, there's no liability
3 to, again, to the United States. Liability rests with
4 the Tribe for terms that it chooses to negotiate and
5 enter with a third party under a lease, or
6 right-of-way or another business agreement. So
7 liability is limited to those damages that spring from
8 those terms.

9 For instance, a bad business deal. If the
10 Tribe enters with its eyes open into a bad deal, I
11 mean the idea is you can't turn around and sue the
12 federal government. I mean that's the bargain of
13 Title V, and what you get for -- liability is the flip
14 side of you don't have to go back to C Street in
15 Washington and get your leases renewed or your leases
16 approved. I mean, that's the deal. And what it comes
17 down to is does the Tribal government, as the
18 decision-maker, want to enter that deal. So yes,
19 clearly there could be liability to the Tribe.

20 MR. TRUJILLO: This person here, then back
21 there.

22 Can you state your name for us?

23 MR. DVORAK: Yes, my name is Tony Dvorak and
24 I'm with Argonne National Laboratory.

25 The comment about putting information up on

1 the TERA process and examples of TERA, I know that Bob
2 Middleton's shop right now is considering establishing
3 a website with a portal for information related to
4 environmental impacts of different energy development,
5 and they are also considering putting up information
6 on the TERA processes, et cetera. They haven't made
7 those decisions yet, so I guess those of you that have
8 some ideas of what you might like to see on such a
9 website, I would encourage you to contact Bob
10 Middleton's office, or Daryl Francois who is the
11 division director in charge of that. I know they have
12 had some preliminary meetings to explore what content
13 might be on that site, but it's still early enough in
14 the development phase that that can be added to it.

15 I guess I would like to comment on some of
16 the NEPA discussions that occurred a little earlier.
17 I need to caution that I certainly don't speak for the
18 Department of Interior and I can only talk about some
19 preliminary discussions that have taken place.
20 Decisions haven't been made, but if you read the
21 Federal Register notice for TERA, it says NEPA is
22 excluded and, therefore, the Interior doesn't have to
23 do any NEPA for the actual regulation itself, but I
24 believe they are considering doing a programmatic EA
25 and I'll give you some reasons why I think they're

1 thinking of that.

2 The decision that's being made by the
3 Secretary of Interior is a shifting of the
4 decision-making authority. So if you think of it from
5 an environmental impact point of view, they are not
6 looking at oil and gas development or coal development
7 or whatever. It's a shifting of the decision-making
8 authority from the Secretary of the Interior to the
9 Tribe. So if you look at that from the EA
10 perspective, what are the environmental impacts of
11 that, you say. As long as the Tribe has the capacity
12 to assume the responsibilities of doing environmental
13 analysis, doesn't matter whether Interior does it or
14 the Tribe does it, just ensure it's done. So a big
15 component of the TERA process is the capacity the
16 Tribes have to assume that responsibility for
17 environmental analysis.

18 The NEPA for the individual TERA -- again,
19 does the Tribe have the capacity to undertake the
20 activities associated with TERA? The thought is if
21 you do the programmatic EA, an individual TERA will be
22 no different and, therefore, you might be able to just
23 tier off that programmatic and simply do a FONSI, so
24 you can reduce the amount of work you have to do for
25 NEPA.

1 As Paul said, TERA has to come in and define
2 enough that you're going to be doing oil, gas, coal or
3 something else, but they can make that determination
4 on your capacity to undertake those things. But once
5 a TERA is granted and a Tribe moves forward to enter
6 into a business agreement or other developments, the
7 Tribe now has the responsibility for the environmental
8 analysis for that, not Interior.

9 So that's the decision that's been shifted,
10 and part of the capacity assessment is are the Tribes
11 capable of doing that work. So that shifts and they
12 call it a NEPA type process within the regulations,
13 but it means you've got to do an analysis, you may
14 have to have public meetings, you need to have your
15 analysis out so the public can view it, and you need
16 to have the ability to have comments on that and
17 respond back, which is sort of the NEPA process. And
18 that's sort of the shift, and that's sort of my
19 understanding of kind of the current thought that's
20 being considered on NEPA. It certainly is not the
21 final thought, but I thought I would give you that
22 perspective.

23 MR. TRUJILLO: Okay.

24 MR. MOOREHEAD: One comment. During the
25 consideration of this act, those are all good points,

1 in addition to the idea that Tribes in their
2 application, their documents at times have taken a
3 long time to get through the process. There was
4 another factor considered and that is Tribal parcel
5 under the old law, the Secretary reviews leases, NEPA
6 is applicable. Across the road from this Tribe is a
7 private land owner who can enter any kind of document
8 or lease with whoever he wants and the Secretary has
9 no involvement.

10 The comparative disadvantage to the Tribe
11 arguably in that process is significant, and having
12 the Secretary make that analysis doesn't bring, again
13 arguably, value to the Tribe at the end of the day.

14 Those are the kinds of considerations that I
15 know the committees went through and Congress went
16 through in trying to fashion this process so that
17 there is an environmental process, it's not a sham, it
18 does have public involvement, interested parties do
19 have remedies, you do have to exhaust your Tribal
20 remedies, but there is a solid environmental regime in
21 place and it is not simply a waiver of NEPA, and a
22 waiver of federal environmental laws with havoc
23 resulting on any Reservations. I don't think anyone
24 had that intent and certainly doesn't want to support
25 that, so there are good points about NEPA.

1 CHAIRMAN TRUJILLO: Yes, sir.

2 MR. LOEHER: My name is Mark Loeher. I'm
3 with the law firm of Snell & Wilmer.

4 The liability question I thought is a very
5 good question for the Tribes, the Tribes I represent.
6 It sounds like the statutory background is more that
7 the Tribe is releasing the BIA or Department of
8 Interior from liability, as opposed to just gathering
9 liability for themselves, but really is releasing
10 them.

11 Is there a separation there with what the
12 liability is for the Tribe versus what they are
13 releasing that responsibility for?

14 MR. MOOREHEAD: Well, I think the portion of
15 the reg that I read about a negotiated term is the
16 trigger that could expose Tribes to liability, and
17 that involves the underlying document, the business
18 documents that are negotiated under an approved TERA
19 by the Tribe and a third-party or a private entity.
20 So it's not -- I guess it's. Overt, it's a release in
21 the sense that if you agree to the regime, and you get
22 a TERA, and you negotiate a document and a loss comes,
23 there ought to be some expectation of liability at the
24 Tribal level, so I think it's overt in that sense,
25 it's tacit.

1 MR. TRUJILLO: Any other questions?

2 MR. CONRAD: David Conrad with Osage Nation.
3 I've previously been the Executive Director of the
4 National Tribal Environment Council when this was bill
5 was being put together a second time.

6 Our comment in working with the CEQ, Council
7 on Environmental Quality, at the White House looking
8 at Tribal NEPA capacity was that Tribes really needed
9 some capacity building in the NEPA process.

10 First, the federal government was failing in
11 the NEPA process. We had something like NEPA, Tribes
12 have to demonstrate capacity and they need the
13 capacity of building, but nobody is really offering
14 capacity of building in NEPA. So we developed this
15 National Tribal Environmental Resource Review Center
16 concept that's in the bill, and that really hasn't
17 been implemented. There's some maybe lower cost
18 technology based alternatives that are been offered or
19 developed right now, but it's not really the
20 investment in intellectual capacity of Indian people
21 to perform the NEPA like analysis.

22 Do you see any of that potentially coming
23 forward, or is it just based on appropriations why
24 people have chosen the cheaper option and using
25 existing nontribal capacity to develop this

1 environmental review process?

2 MR. MOOREHEAD: Yeah, I think at some level
3 the intention was, you know, full-blown Title V once
4 implemented will result in TEPAs, Tribal Environmental
5 Policy Acts. But you're right, as we sit here three
6 years after the enactment of the law, and it's only
7 within the last two years that Congress has made money
8 available to Bob Middleton's shop. And just to give
9 you an idea of what kind of money we are talking
10 about, I think Bob's appropriation last year let's say
11 was two million dollars, and I think the bulk of it,
12 1.4, was dedicated to Tribal capacity, Tribal
13 activities, and the balance, \$600,000, was dedicated
14 to the operation of his office, both pre-TERA
15 submission consultations and all the other stuff that
16 they do, the reg, what have you.

17 But I think it is dependent in -- for those
18 Tribes without wherewithal, capacity development will
19 be dependent either on more federal probes or another
20 source of money, because that's really the threshold
21 in getting a TERA approved. That's what TERA is all
22 about, you know, both being business savvy in
23 negotiation and what kind of savvy does the Tribe
24 have, as well as the regulatory and environmental
25 expertise that's needed to ensure that these

1 environmental processes are solid and people can have
2 confidence.

3 As I said at the outset, the collective
4 interest is in making sure that because this is a pro
5 Tribal decision-making statute, that it succeeds, and
6 how do we ensure that at the front end. I think
7 that's the gauge that I'm using and a lot of people
8 are using on the Hill.

9 MR. TRUJILLO: Any other questions?

10 Yes, sir.

11 MR. MICKLIN: Will Micklin for Ewiiapaayp
12 again.

13 Just a question in terms of advantage for a
14 Tribe with a TERA, you know, one of the issues we deal
15 with always is whether there's a federal action
16 involved in a project that would therefore, if there
17 was, trigger a NEPA compliance. By the Tribe -- by
18 the Secretary's approval of the Tribe's TERA, does the
19 federal action therefore begin and end with a Tribal
20 decision, or is there after approval of the TERA, no
21 federal action because the Tribe is therefore
22 delegated with the authority to implement the TERA
23 plan?

24 MR. MOOREHEAD: Well, I think the concept is
25 the Secretary engages in a NEPA analysis in reviewing

1 the TERA and either approves or disapproves it.

2 In approving it, thereafter, we are talking
3 about Tribal decision-making, not federal
4 decision-making, and I don't think NEPA would be
5 properly part of what a Tribe undertakes post-TERA
6 approval. I mean, there's no federal decision there.

7 MR. MICKLIN: Right, so it would be a TEPA
8 at that point.

9 MR. MOOREHEAD: I think that's right. May
10 not call it a TEPA.

11 MR. DVORAK: Tony Dvorak again with Argonne.

12 I think you're wrong, Paul. Shifting the
13 decision-making authority means that a federal action
14 where the Secretary or the BIA would do a NEPA, Tribes
15 now have to do a NEPA like analysis of their actions,
16 and that's the shift of responsibility as far as the
17 environment goes.

18 MR. MOOREHEAD: But it's not NEPA.

19 MR. DVORAK: The regulations specifically
20 say it's not NEPA, but they lay out all the elements
21 that are in essence the components of NEPA that would
22 have to be undertaken.

23 MR. MOOREHEAD: But I think your question
24 is, is there a federal hook post-TERA approval.

25 MR. MICKLIN: Actually, sort of both,

1 because once the TERA is approved, I wonder what the
2 trigger is and what is being triggered, and I think
3 what I'm hearing is there's a NEPA like trigger, and
4 is that for any project on the Reservation that comes
5 under the colors of the TERA?

6 MR. MOOREHEAD: It would be under the
7 Tribe's environmental process that it has to lay out
8 as part of the TERA.

9 MR. DVORAK: And I would assume it would
10 follow the same logic that the federal government
11 does, here's the action we are going to do, what are
12 the impacts, can we do an EA? Or we have done these
13 things many times, maybe we could exclude this from
14 doing an environmental analysis. But if it's a major
15 type of activity that has impacts, you may have to
16 do -- I say EIS like, but what's an EIS? Well, you
17 have to make it available to the public, public
18 comments, you respond back and get some sort of record
19 of your decisions. An EA is smaller and less public
20 involvement, smaller document, limited analysis, but I
21 think those things are triggered.

22 MR. MOOREHEAD: Well, they are definitely
23 triggered in the reg, but the discrete question of if
24 the Secretary does its NEPA analysis, approves the
25 TERA, there's a bright line there. Now the Tribe

1 doesn't do another NEPA analysis, it does an analysis
2 that it has to lay out in its TERA, public comment as
3 Tony said.

4 MR. MICKLIN: That conforms to the standards
5 established by the TERA.

6 MR. MOOREHEAD: The procedures established
7 by the TERA it has to abide by.

8 MR. MICKLIN: I guess the other kind of real
9 world question is a lot of the issues that Tribes deal
10 with in environmental documents is the plain reading
11 of the regulation versus the interpretation, you know,
12 the question of whether do you start with an EA or do
13 you skip straight to an EIS.

14 Part of that decision was informed by --
15 sometime back, DOJ kind of publicized it didn't want
16 to defend EAs anymore. Is the Tribe therefore able to
17 make that judgment call and not have to defend its
18 reasonable -- the reasonableness of its decision at
19 that point?

20 And another example that may be more
21 appropriate would be like Fish and Wildlife Service,
22 that they like to -- they like Tribes to rehabilitate
23 part of the land for critical habitat for endangered
24 species that are not necessarily there, but if the
25 land were rehabilitated it could be. So it's part of

1 the negotiation in some environmental processes that,
2 all right, you will reserve part of the land for
3 Checkered Butterfly or Royal Toad that may not be
4 there at the moment, but we would like them to be
5 there if we'll rehabilitate it.

6 That's all part of a negotiation that's not
7 strictly -- you can't read it in the reg or the
8 authorizing law, but it goes on. And the impact is
9 that the agency like Fish and Wildlife would dispute
10 the environmental document if you didn't follow the --
11 the Tribe didn't concede -- make concessions for some
12 of the demands of the other agency.

13 I guess the question is does the Tribe under
14 the TERA therefore have full control of the subjective
15 interpretation of what the standard is under the TERA,
16 without therefore giving recourse to another agency or
17 a party at interest for disputing their judgment, or
18 to what extent is that disputable?

19 MR. MOOREHEAD: I mean, the statute is
20 pretty clear that having an approved TERA in hand does
21 not shield the Tribe from having to comply with other
22 federal environmental laws. So to the extent that
23 they are still in place and an insufficient Tribal
24 process that didn't take into account the Snail Darter
25 or whatever it is, could be grounds I suppose to an

1 interested party.

2 MR. MICKLIN: Yes, I don't dispute where
3 there could be an endangered species or critical
4 habitat, but it's kind of these gray areas where
5 agencies sort of convince you that you need to set
6 aside some for establishing critical habitat as sort
7 of a bargain on the way towards getting your document
8 moving, because otherwise it stalls.

9 MR. MOOREHEAD: That's a good point. I
10 mean, that's a strategery question, you know, in terms
11 of would that be wise to do. That's the kind of thing
12 that I think Tony and others have mentioned in terms
13 of the practical considerations, not just how do you
14 read the reg, that you're bringing up. How do you
15 strengthen your application at the front end so that
16 you not only get it approved, but you've considered
17 things down the road and you've taken those things
18 under consideration presubmittal.

19 MR. MICKLIN: I'm just wondering how much
20 authority does the Tribe have in making decisions in
21 application of its TERA standard? Is it as much as
22 the federal government would have, or is it more in
23 question because they are operating under a TERA?

24 MR. TRUJILLO: I would think that would be
25 under the discretion of the Secretary and, really, the

1 Tribe who is putting the application in, as to how
2 much authority they want to take.

3 I mean, you're right that is a gray area.
4 We won't know until somebody actually puts it together
5 and says this is how much authority we want to have
6 and here's how much we are willing to take
7 responsibility for.

8 MR. MICKLIN: That's really a question of
9 the benefit. Because Tribes I think are going to be
10 willing to take on the TERA and its potential
11 liability if there's a benefit to be gained, so if the
12 Tribe has a greater authority over interpretations of
13 the standard, the regulation and its application of
14 the standard to the regulation, to the federal
15 compliance requirement, then that would be great
16 because we could advance the document to record of
17 decision, still subject to appeal, but it could be
18 advanced to that point more quickly.

19 MR. MOOREHEAD: And if not, on the other
20 hand, if not, then why you don't want to do it.

21 MR. MICKLIN: Right.

22 MR. MOOREHEAD: Well, I think as the
23 Chairman said, in terms of what roles and
24 responsibilities and obligations the Tribe wants to
25 assume, and this is not at the end of the day terribly

1 helpful, the only activities it cannot assume, may not
2 assume, are those hideous inherently federal
3 functions, and what that is, you know, there's
4 guidance from the Solicitor, et cetera, but that will
5 be an argued-over, negotiated term with the
6 Department, I presume.

7 MR. TRUJILLO: Because again, as you look at
8 TERAs, in my opinion as a Tribe begins to really start
9 thinking about this, it comes back in essence to where
10 do you want the buck to stop? And where do you want
11 your sphere of control to be versus your sphere of
12 influence? Because there are decisions and there are
13 things that you make as a Tribal government, a
14 sovereign, and you say we have gone through the
15 discussions, we have gone through the different
16 aspects, here's the decision that this government is
17 making, understanding that factions within your
18 government, meaning a community, an individual can
19 bring their point out now because of the internet.
20 The rules have changed in that aspect. But as a
21 whole, if a Tribal Council rules and makes a decision,
22 and the decision is in the majority and that's the way
23 things are going to move, then that's the way things
24 are going to move.

25 What we are finding with different areas

1 within the Navajo Nation is decisions are made, but
2 then we have to play the politics at the state and at
3 the federal level, given the different regulations
4 being used against us, for a decision we have already
5 made. And now we have got to go defend to EPA, we
6 have got to defend to BIA, we have to defend to Fish
7 and Wildlife, we have to go defend to all these other
8 agencies that the decision we made was correct; yes,
9 we understand the implications; yes, we understand the
10 pros and cons; yes, we know all these things and
11 here's the decision we made.

12 And it could go vice versa where the Council
13 comes back and says we made the decision in the
14 negative and we don't want to do that. And it's the
15 reverse where they start putting pressure on us saying
16 this will be great, this is what it's going to do,
17 etcetera, so there's two aspects of that.

18 Where I see the TERA piece coming in as far
19 as energy development is when a decision is made and a
20 Tribe is willing to take on different aspects of that
21 decision-making process, but we're also willing to
22 take on the liability with that, the responsibility
23 with that decision, we are going to do it. And to me,
24 it's moving us down that road of, you know, each and
25 every one of us talk about sovereignty. We are a

1 sovereign, we have the ability to govern our area of
2 jurisdiction. So as we move down that path it allows
3 us to begin to look at that. And again, each Tribe is
4 different, each Tribe has to weigh it's capacity, each
5 Tribe has to look at how they want to apply this, and
6 that's why it's a rule of option, you know, you can
7 opt into this.

8 One of the aspects early on was saying we
9 don't have the expertise, nor do we have the capacity
10 to do some of these things. Money has been provided
11 in some aspects to help us get to there and some
12 Tribes have taken advantage of that, others haven't as
13 yet. But again, the idea here is how do we build that
14 capacity, or how do we build the ability for Tribes to
15 make those types of decisions and then not to be held
16 by an agency to say well, we will get to it when we
17 get to it. We don't have the funding to do that so
18 you've got to wait. We can't run -- we know there's a
19 federal action that's being taken, but we can't do it
20 because we don't have any people to carry that aspect
21 out.

22 You know, those are some of the things that
23 Southern Ute has example after example. The one
24 that's really surprising me is they have got leases
25 ready to go, but their BIA says we don't have the

1 people to handle that so you've got to wait. So these
2 are decisions that are being made that impact the
3 Tribe in terms of compensation coming in.

4 So the idea with the TERA again was to say
5 what are we willing to take on, let's put that on
6 paper, let's work with the Secretary and negotiate
7 what we are going to do and how we are going to do it,
8 and then move forward with it, and we are willing to
9 take these aspects into consideration.

10 The NEPA like process, we are doing that
11 right now within the Navajo Nation at Desert Rock. We
12 have got a Fish and Wildlife Department, we have a
13 Historical Preservation Department, we have a Land
14 Department, we have a Minerals Department, we have a
15 Water Department. They are all taking care of
16 regulations and policies that are set under Navajo law
17 to protect those entities, those aspects of the
18 environment. So those things are being taken care of.
19 But still, we are running that process where we have
20 taken care of it.

21 But there's a bigger political issue --
22 carbon dioxide. Big one with us right now is the
23 ruling on the polar bear listing. That helped release
24 things because U.S. Fish and Wildlife was holding on
25 putting any kind of decision out there on Navajos

1 because of the impact of global warming and how that
2 would affect species. And again, no one knows, so how
3 do we get through that so we can move forward with the
4 power plant project? So we have got that resolved,
5 but you can see how something that has really larger
6 implications, yet impacts a smaller decision here can
7 be used to put pressure on a Tribe. And so again, you
8 know, that's what we are looking at.

9 And the idea of liability, and lawsuits and
10 et cetera, we are seeing that also. You know, the
11 ruling came out by US EPA, they have approved an air
12 permit for the Desert Rock project. Immediately now
13 we have got Governor Richardson and the New Mexico
14 U.S. Attorney saying they are going to file a lawsuit.
15 So we are just going to say fine, file it. We are
16 moving.

17 MR. MOOREHEAD: Could I add a couple of
18 things?

19 MR. TRUJILLO: Sure.

20 MR. MOOREHEAD: When the energy bill was
21 going through Congress, one of the ironies to me was
22 the Navajo Nation Supreme Court case was then pending,
23 and the factual gist of this case was the allegation
24 by the Nation that the Secretary of Interior had been
25 subject to an ex parte proceeding by a lobbyist, an

1 agent for the Tribe's partner, which resulted in
2 economic damage to the Tribe. And that hung in the
3 air, it was a question about is there specific
4 statutory authority to sue the United States for
5 damages. That was the legal issue. The factual
6 situation was as I described.

7 And you know that, coupled with, in this era
8 of Cobell and what have you, the Department is very
9 leery of making even the most modest decision for fear
10 that it will be sued, and I mean modest decisions,
11 like taking land in the trust for housing, because of
12 fear of lawsuits. So I think when we talk about this,
13 and as Will mentioned several times, the real world,
14 when we are in the real world arena and the Tribe
15 needs to move ahead with a project, understanding the
16 atmosphere in the Department and the attitude of the
17 officials who would ultimately make these decisions or
18 not, depending if you give them that opportunity, is
19 important in deciding whether to pursue a project in
20 Title V. So I offer that in terms of context.

21 MR. TRUJILLO: So that's the -- from the
22 Navajo point of view, that's kind of how we have been
23 involved in this whole process, understanding some of
24 the areas that are there. And, again, the idea here
25 is for those Tribes who are ready to move to that next

1 phase, you know, go ahead and allow them to do that as
2 other Tribes understand and as we get better at doing
3 this. Then I think again, that allows each and every
4 Tribe to make those types of decisions for themselves,
5 based off of their own goals, and areas that they want
6 to move forward in. So that's where we are looking at
7 this whole aspect.

8 And, again, looking at the platform here in
9 terms of that TERA, you know, are there things that we
10 need to identify, you know, maybe even having
11 continued discussions like this that maybe the federal
12 government can fund that will allow Tribes to talk
13 this thing through so that at least we have an idea as
14 to how we may want to proceed. And we may get to the
15 point to where Paul was saying to when they are saying
16 here's a boilerplate of an agreement, but there's all
17 sorts of areas where you can negotiate and specify
18 what you want as a particular Tribe, and negotiations
19 you want to have with the Secretary in order to
20 achieve what you see as your goals.

21 Because for the Navajo Nation to say this is
22 what we want, you know, that would be somewhat
23 presumptuous to say that's what you guys want. You
24 have your own goals, you have your own aspirations,
25 you have your own focus. So again, that's kind of

1 what we are looking at with the Nation, and we are
2 kind of just moving through the experiences that we
3 have seen up to this point in time and trying to find
4 ways that we can streamline not only the processes
5 within the federal government, but also within our own
6 government too.

7 So we are learning from two aspects: The
8 surface leasing, and we just recently got the business
9 site leasing agreements where we don't have to go back
10 to the BIA on that, so we are learning how to do that
11 now too. And not without controversy, let me tell
12 you, at the local level we have got some things that
13 we have got to work out, but we are working those
14 things out.

15 So again, that all comes down to
16 self-governance and how you want to govern your
17 particular Tribe and what's important to you. So
18 that's kind of the way we are kind of packaging this
19 whole thing.

20 Any other comments, questions?

21 Good discussion, I mean some things that I
22 didn't even think about.

23 Yes?

24 MR. FOX: With taking on the duties and
25 responsibilities of the federal government of any arm,

1 what type of compensation, other than the capacity
2 grant does the federal government provide to the
3 Tribes while taking on these responsibilities?

4 MR. MOOREHEAD: There's no mechanism for
5 payment, any kind of compensation within the TERA reg
6 that I'm aware of, other than the presubmission
7 capacity grants. I think that's right.

8 MR. TRUJILLO: That's it, yes.

9 MR. MOOREHEAD: I mean, in terms of
10 compensation I don't think it's an ala carte kind of
11 mechanism where you'll take this, this and this, and
12 in exchange you'll get certain compensation. I mean
13 there are other authorities under which tribes' can do
14 that and contract out the activities of the
15 Department, but not under Title V. I mean, they would
16 be under 638 I would presume, land issues, surveys,
17 what have you.

18 MR. FOX: Before taking on the TERA, you
19 would have to have a full-fledged office that's
20 approved by the federal government, so the Tribe
21 itself would have to beef up its own office with its
22 own Tribal monies, right?

23 MR. MOOREHEAD: Well, not necessarily with
24 its own Tribal money. The capacity grants that the
25 Energy office has made available, I want to say it's

1 1.4, 1.5 million, I would have to check with Middleton
2 on the specific dollar amount, but those dollars are
3 the only federal dollars that are available. Tribes
4 that have their own wherewithal can complement that,
5 but as we sit here, that's the source of federal money
6 for capacity building that's available from Uncle Sam.

7 But you're right, before any Tribe will
8 receive the blessing of the Secretary for TERA, a
9 demonstration of warm bodies with expertise at the
10 Tribal level is going to have to be made. And whether
11 they are homegrown Tribal members or Tribal members
12 from outside or nontribal members, I think the Indian
13 office, the Indian Energy and Economic Development
14 Office is indifferent. I don't think -- they would
15 probably prefer to have homegrown Tribal members on
16 each respective Reservation. But at the end of the
17 day, they are looking for the demonstration to be made
18 by the Tribe.

19 MR. TRUJILLO: Again, I think it would
20 depend on how the Tribe wants to look at that type of
21 development. For instance, within EPA, with the
22 Navajo Nation, they now have primacy over water
23 quality. And one other area under EPA that the Nation
24 now has primacy. Within my division, natural
25 resources, my minerals department is working on

1 primacy under SMCRA right now.

2 So it depends on where you as a Tribe want
3 to move in terms of obtaining that aspect of control
4 over those natural resources, both in the development
5 and in the regulation, the monitoring, and ultimately
6 if needed, the reclamation of those resources. That
7 would be consistent with what your Tribe wants to do
8 rather than what the federal government wants to do.

9 Because if you read SMCRA and look at
10 regulations of OSM, I mean I used to be an engineer
11 out here in the west, and those regulations are skewed
12 very much to eastern type mining and reclamation, not
13 western, but they are in the federal regs, so the
14 western portion of the mining operations and et cetera
15 have to follow what the criteria and standards are.

16 Looking at the Tribe, if you begin to obtain
17 primacy, then you can begin to determine what is it
18 that's important in how you look at regulation, as
19 well as reclamation within your own given area and
20 again, those goals that you think are important. You
21 know, is it important to have native species there,
22 medicinal plants that were there before? You can
23 begin to establish the criteria for how you're going
24 to do these kinds of things.

25 But again, it's where you want to go and

1 what your ultimate goals are. Will these things
2 happen overnight? No, but it's a process that you may
3 want to look at as a Tribe to begin to figure out
4 okay, where do we want to be ten years from now and
5 how do we want to do this.

6 The NEPA aspects in terms of capacity
7 building are not in the TERA aspects at all really,
8 but there are dollars that were built into Title V on
9 different aspects, and that's what we are trying to
10 fight right now to get money to begin to help Tribes
11 in those areas in terms of building that type of
12 capacity, so not only in the NEPA areas or the
13 environmental areas, but also in the actual energy
14 development areas where you could have your own
15 experts in wind and solar, geothermal, biomass. You
16 have your own experts who are there looking out for
17 your goals and aspirations for what you think is
18 important, fighting for what you feel is just
19 compensation. That is what we are looking at in terms
20 of Tribe -- or that's what the goals of the Navajo
21 Nation are.

22 And so that's kind of how we are looking at
23 this piece and looking at getting away, as Mr. Dvorak
24 said, we are also looking at getting away from this
25 passive aspect of leasing, lessee/lessor type of

1 thing. We are beginning to participate in these
2 projects, but even that again is a new concept, so we
3 are learning how to do all that.

4 So again, those are some aspects that the
5 Navajo Nation is looking at in terms of how to bring
6 these different pieces together, for the aspect of
7 saying, okay, how do we build our Nation and utilize
8 our resources for the benefit of the Nation. That's
9 the goal that we are looking at right now.

10 MR. FLORES: Chester Flores, Cortina
11 Rancheria.

12 I think that there are other people that can
13 probably speak to the issue better than I, but in
14 regards to those questions for capacity and NEPA, you
15 know, states and the federal government have
16 processes, taxation and permitting and those types of
17 things, which Tribes are -- they don't -- currently
18 we're not at capacity for Tribes that seek benefit
19 from local taxation with air with any of the
20 regulations under NEPA that states and the feds do.

21 So when we talk about funding, it's
22 difficult to have regulatory agencies that are grant
23 driven. Because then you either -- the Tribes have to
24 pass that on to either the Tribe or the developer
25 without the tax benefits to fund those departments to

1 continually to run. I mean, when you talk about NEPA
2 process within the state, they have those monies when
3 they are looking at things, their technical resource
4 or their technical people are paid through a lot of
5 the taxes to ensure that those things are followed,
6 where the Tribes don't have that currently. So the
7 inequity as some people have said in taxation that
8 Tribes have, as opposed to the federal and state
9 agencies, is very unequal. So that needs to be looked
10 at as we go forward also.

11 MR. MOOREHEAD: If I could make a couple of
12 points.

13 MR. TRUJILLO: Yes.

14 MR. MOOREHEAD: One, I totally agree on the
15 lack of a tax base and activities that can be levied
16 to provide government revenues. That's true in Indian
17 Country. I have to think, though, that some of the
18 projects that are envisioned under Title V or other
19 authorities are intended to result in revenue
20 generation, so we are not talking about capacity for
21 capacity's sake. It is a means to an end, which in
22 itself is a means to an end. The TERA will hopefully
23 bring good things.

24 The other thing I wanted to mention in
25 response to Mr. Fox's point and supplement, what I

1 said about availability funding for capacity, Title V
2 authorizes to the appropriators, have made certain
3 money available, Bob Middleton thus far, but there are
4 other programs. I mean 2005 was not the beginning of
5 the discussion of Tribal environmental capacity.
6 Other agencies have had money, not enough, we all
7 know.

8 The point is blending, perhaps, these funds
9 from a variety of federal and other programs can,
10 along with Tribal effort and resources, get the Tribes
11 to the cusp of that capacity level that they can move
12 ahead with the TERA. I think that's something to keep
13 in mind.

14 It's not just 1.4 million dollars is my
15 point, across the federal government. And you know,
16 that's probably something that CERT can do is
17 inventory environmental capacity programs, to the
18 extent it hasn't already, and made that available as
19 part of the TERA consideration and decision-making the
20 Tribes have to go through.

21 MR. DVORAK: Tony Dvorak again.

22 One of the things that hasn't been mentioned
23 here, but I'm assuming people are aware of it, one of
24 the things that is being encouraged is preapplication
25 meetings.

1 You go in and sit down, and I think a lot of
2 the questions that I think have been asked here could
3 be covered at such a meeting in advance of putting in
4 an application for TERA and provide the clarifications
5 that you're looking for. None of us here are experts,
6 so to speak, we are interpreting as we read it, but
7 having that meeting with IDD lays out what their
8 actual expectations are and clarifies specific issues
9 that you have. Any Tribe that's considering a TERA, I
10 would encourage them to think about having such a
11 preapplication meeting.

12 MR. MOOREHEAD: That's a good point, because
13 what does the Department consider sufficient expertise
14 so that they can check the box and move on? Is it
15 you're a negotiator? Do you need an MBA? Do you need
16 to work on Wall Street? I have no idea. I mean,
17 that's not fleshed out in the reg, so that's a good
18 point.

19 MS. WASHINES: Arvin?

20 CHAIRMAN TRUJILLO: Yes.

21 MS. WASHINES: A quick comment on the
22 process, and I do not mean to be rude, but in respect
23 to our traditionally people and our Tribal
24 representatives, there are some that are not as
25 aggressive in, you know, by our custom in raising

1 their hands. This gentleman that was sitting here had
2 his hand up about five times.

3 MR. TRUJILLO: I'm sorry, I didn't see him.

4 MS. WASHINES: So certain people, they are
5 used to being acknowledged in these types of settings
6 and people pay attention to them, but they're not as
7 aggressive. And many of the people are not following
8 instructions -- it's got to be difficult for the
9 recorders -- in stating their names, because I want to
10 know, too, who is making these comments, and I don't
11 hear their name and where they are from before they
12 speak.

13 So just for the process, you know, it was
14 difficult, I did this yesterday and I had a great
15 moderator that helped me out that way, but it's a
16 little embarrassing to me as a CERT delegate to have
17 one of our Tribal folks not acknowledged.

18 MR. TRUJILLO: Okay, I'm sorry, but I didn't
19 see him. I apologize.

20 MR. DEAN: My name is Dean, and he is also a
21 co-tribal member, the gentlemen that walked out.

22 What I think he was trying to put to the
23 forefront in the discussion is that the Crow Tribe has
24 successfully negotiated an oil and gas exploration
25 agreement with a major natural gas company, and

1 presently they have a lease on the Crow Nation close
2 to 90,000 acres. We have negotiated these agreements
3 with, like I said, the business entities that came on
4 to the Reservation.

5 The committee that negotiated, included in
6 the agreement a very aggressive performance clause.
7 Basically if you have a lease with the Crow Tribe,
8 you're not just going to sit on this lease, you're
9 going to have to perform. So that's pretty aggressive
10 according to what other Tribal members from other
11 countries and states have told us.

12 Anyway, we were pretty elated about the
13 completion of the negotiation process by December 1st
14 of last year. And then about two or three weeks
15 later, we get this e-mail from a major oil company,
16 and in a nutshell, they were pretty disturbed and
17 worried that the BLM under the radar slipped in this
18 \$4,000 per well requirement, and they -- the oil
19 company has programmed for -- planned a joint program
20 of about 50 to 80 wells on the Reservation, so I think
21 that's what he was trying to say.

22 MR. TRUJILLO: Okay. You know, again --

23 MR. DEAN: I mean that's totally -- it's not
24 a TERA thing but we are dealing with the BLM. The BLM
25 just like slipped it in, without informing or bringing

1 to the table any sort of discussion. In fact, in
2 later meetings, the Crow Tribe brought this to the
3 attention of the Bureau of Land Management from my own
4 city office and they claimed to have no knowledge,
5 which we don't buy.

6 So anyway, I think that's what he was trying
7 to raise. I'm not speaking for him, but --

8 MR. TRUJILLO: Okay, and I do want to
9 apologize. I didn't notice the hand.

10 MS. WASHINES: This is a difficult room,
11 too, because you have to be swivel headed. I had an
12 easier room because it was long and we were up front,
13 so I know you're not rude.

14 MR. TRUJILLO: I think when we look at
15 issues like this, you know, having ways that Tribes
16 can begin to assert their authority, not only on their
17 particular Tribal land, but surrounding Indian
18 Country, meaning the lands that are adjacent to your
19 particular Tribe or Pueblo, because that \$4,000 fee is
20 also impacting the Navajo Nation and it came up one
21 day.

22 MR. DEAN: It's a barrier.

23 MR. TRUJILLO: Yes, and we have got
24 producers who are coming to us saying what are we
25 going to do? So again, what the aspect here in terms

1 of looking at a TERA is when we started this back in
2 the discussion back in 2000, there were a number of us
3 that met at the capitol. And one of the big issues,
4 and I think he is going to be here today also, Derek
5 Watchman, he was Chief of Staff when I was over the
6 division at that point, both of us were discussing the
7 point that one, we need to have a process by which
8 Tribes can begin to assert its authority or its
9 jurisdiction over its lands.

10 And in order for us to do that we need to
11 have the expertise, and we need the capacity in order
12 to do that. Because right now we have instances where
13 we are not in agreement with states, we are not in
14 agreement with the federal government, yet it's lands
15 that are on our own Reservations or adjacent to
16 Reservations that impact our abilities to meet
17 whatever goals we want to meet in those areas.

18 So again, that's what we were looking at,
19 and not only looking at energy development with TERAs
20 but even with sacred sites. Like with the Navajo, we
21 have got the Dinetah where we believe our beginning,
22 our creation, our origin started, yet we are fighting
23 the BLM on exploration and et cetera on those lands
24 and it's off the Reservation.

25 So again, those are the kinds of things that

1 we are looking at too, but the idea here is what
2 areas, again, are we willing to take responsibility
3 over, so that when we make decisions, the decision is
4 made and we move on? We don't have to wait for the
5 BIA to put its stamp of approval on.

6 Because again, right now the BIA comes up
7 with a number of different reasons on why they can't
8 meet a deadline, or they want an extension to a
9 deadline, or they want this or they want that. And so
10 we sit holding the bag, and especially if it's
11 developers that we are working with, they are not
12 yelling at the BIA, they are yelling at us. And then
13 we are the ones that get the black mark. Then they go
14 and say don't work with Tribes, you know, Tribes can't
15 make a decision. We made the decision, we just can't
16 get the federal government to follow through on those
17 decisions.

18 MR. MOOREHEAD: May I?

19 CHAIRMAN TRUJILLO: Yes.

20 MR. MOOREHEAD: Or the other quick question
21 that people on the Hill and people in the agencies
22 bring up all the time is with this enormous resource
23 base, why aren't Tribes developing their resources?
24 They have got the ATD fee that was unveiled last year,
25 no one saw it coming. It's applicable to federal

1 lands is what it says, but BLM interprets that to
2 include Indian lands as well. So we have a double
3 tax, we have a lack of infrastructure, we have got a
4 federal bureaucracy that's unresponsive, fear in
5 lawsuits, and now on top of that \$4,000 for every new
6 hole. Why aren't Tribes developing their energy
7 resources?

8 That's why this exercise is a platform to
9 look broadly and not just stove pipe it. Yesterday we
10 talked about taxes. I mean arguably this \$4,000 levy
11 is a fee, it's a tax is what it is.

12 MR. DEAN: Yes, the question we asked BLM:
13 The energy companies pay \$4,000 per well, is that
14 going to improve your services to us as an Indian
15 Nation who wants to develop their untapped resources?
16 And they said no, it's not going to improve, so
17 what --

18 MR. MOOREHEAD: The idea is that it will
19 offset the need for Congress to fund BLM.

20 MR. DEAN: I have a question, is it worth
21 travelling to Las Vegas?

22 (Laughter.)

23 MR. DEAN: So it's a headache.

24 MR. MOOREHEAD: When this was unveiled --

25 MR. DEAN: I'm glad the Navajo -- I mean I'm

1 not glad, but you are aware of it, and every Indian
2 Nation who are just now starting their energy
3 development program, you're going to run into that. I
4 don't know how many Indian Reservations are just now
5 starting, but you're going to run into that.

6 MR. TRUJILLO: Yes.

7 MR. MOOREHEAD: And, in fact, that's the
8 attitude of the appropriators was that every energy
9 Tribe is the Southern Utes. When we told them that as
10 successful as they are, it's an aberration, and you
11 have these would-be Tribes facing a number of
12 challenges, this \$4,000 fee is going to conceivably
13 knock them out of contention. And the answer was
14 well, we need to fund the BLM and user fees are the
15 way to do it. So that's where their heads are at.

16 MR. DEAN: Yes, I think it's important for
17 Indian Tribes to bring this to the attention of not
18 only CERT, but to NCAI and each of the Tribal leaders
19 to band together and create a stink about this,
20 because you know, the money for social and health
21 services on our Reservation are dwindling, and our
22 goal is to develop our resources and improve like the
23 CHR monies, we want to divert that. We need experts
24 like TERA requires experts, warm bodies as you
25 indicated. We want to use our money to generate from

1 our energy resources to send our young people to top
2 universities to get a geology degree or whatever.
3 That's our goal, but this \$4,000 just puts everything
4 to a screeching halt and we are not happy about that.

5 You know, all Indian Tribes should be
6 unhappy about that. And I'm sure they are facing the
7 same problems that we are dealing with on our
8 Reservation, and that's lack of money coming from the
9 federal government and their failing to fulfill their
10 trust responsibilities. I think that's what we are
11 looking at.

12 MS. WASHINES: Arvin, it sounds like -- I'm
13 Stella Washines from the Yakama Nation Tribal Council.

14 It almost seems it would be appropriate for
15 CERT to send a position statement on this type of fee,
16 where your Tribal leaders spoke so eloquently
17 portraying Navajo Nation and some of the discussion in
18 our group yesterday. When a part of the country is
19 without electricity or water for a few days it becomes
20 national news, and CNN is there covering all the time.
21 Now, I'm a native person, I went to high school,
22 college with Navajo Nation, I have friends that are
23 Navajo. I was never aware that over half their homes
24 are without electricity and water. You know, and I
25 watch CNN every day probably, you know, national news.

1 Senator Dorgan, you know, is speaking to the
2 issue of these wells all around the Three Affiliated
3 Tribes. And on the one hand he is saying okay, it
4 needs development on Indian land, energy resources.
5 Is he aware of these barriers? And as someone that
6 was speaking yesterday, one of our speakers in our
7 group mentioned, not only Tribal leaders, but our
8 constituents tends to be very myopic. So if they
9 don't have money for their basic needs to pay their
10 light bill, if they are not lucky enough to have
11 electricity or to feed their families, they are going
12 to take a very dim view of Tribal leaders spending
13 this much money to get into, you know, a new business
14 endeavor when we don't know what that's going to
15 happen to our environment.

16 I've been on Council now for -- I'm in my
17 second term and I hear this all the time, and I don't
18 think Tribes as personalities vary very much from
19 community to community, that we always have our very
20 conservative traditional faction that want those
21 mineral resources left alone, they don't want us
22 digging up our ground and things. So it would seem
23 like that would be a position that CERT as an
24 organization or the delegates could do is a resolution
25 or position letter statement to Senator Dorgan on this

1 issue to perhaps waiver these, because that's a very
2 big barrier to drilling.

3 We have been approached also by a number of
4 companies wanting to drill for natural gas which they
5 know we have, we know we have. This has never come up
6 in the discussion, who is going to pay this.

7 MR. TRUJILLO: Yes.

8 MS. WASHINES: So I think it's something
9 that CERT could -- the task that CERT could take on as
10 delegates to assist member Nations.

11 MR. TRUJILLO: Okay. Great. Stanley? And
12 we will take one more after that. We're getting to
13 about four minutes to noon and lunch will be served.

14 Stanley?

15 MR. PAYTIAMO: Stanley Paytiamo.

16 I think what Arvin is saying is that we have
17 some lands that are -- like last week we were out in
18 the field and we were looking at Tribal shrines, and
19 because they are on BLM land or under a wilderness
20 area, and somebody else is doing the work, UNM is
21 doing the work that we are supposed to be doing as
22 Tribes where we're trying to protect them.

23 And also somebody said a while ago about
24 time, you know, at home. Technically, a Tribal
25 Council needs 120-day lead time, whereas the corporate

1 world, they want to deal with the Tribal government,
2 they want to deal with the -- the enterprise board so
3 they can have some kind of a decision made, you know,
4 like right now. Okay? But that's not the way the
5 Indian world works.

6 Somehow what I'm trying to lead up to is
7 when we have these kinds of meetings, we need to
8 invite those other people, different agencies, so we
9 can educate them. Because like, for instance, they
10 know when there's any business development that's
11 going to come on the Indian Reservation, Tribal lands,
12 whereas in Pueblo Country we don't call them
13 Reservation lands, we call them Land Grants, and they
14 give you such short notice, and they think that Tribal
15 government are too slow. So when we have our first
16 get together meetings, we usually tell them that you
17 guys have to put up with all this, you have to wait
18 for us. Because sooner or later they are going to
19 come out and say well, we have got until next week for
20 you to give a yes or no answer, because some of this
21 stuff has to -- four times it has come before the
22 Tribal Council, and then the Tribal Council asks the
23 community people what do you think about this? And we
24 continually keep talking about -- I learned this new
25 word about dilemma. We have always got dilemma.

1 And someone else mentioned we don't have
2 enough manpower, and so somehow I wear so many hats.
3 There's so many meetings, so many conference calls.
4 And we -- we have still got to get the work done at
5 home. I think that somehow we need -- I always said
6 that we can't say anything that leads -- I say I go to
7 these meetings, I try to jump up and down, roll on the
8 floor, maybe not that bad, but at least maybe I can
9 make some attention, somebody will know that something
10 is wrong here.

11 And we need to find out really -- help each
12 other. Like somebody else mentioned consortiums,
13 maybe it's groups like the Missouri Valley and
14 Associates Group, they are doing pretty good. Then
15 there's the Arizona -- I think it's Tribal Chairman
16 Association, used to be a National Tribal Chairman
17 Association.

18 I think those kind of groups, because they
19 are beginning -- they are beginning to find out that
20 hey, there's things that we are being attacked on all
21 sides that we have to come up with a strategy. And
22 also whenever we put some things together, the TERA,
23 for instance, like EPA, it has audited some six Tribes
24 in the central states. They have made all those
25 things public, where there's millions of dollars of

1 possibly paybacks of violation of expenditures or
2 exceptions.

3 And now it's coming down to Region 6.
4 Region 6 is asking us that when you put your proposals
5 together, you have to -- you can't just no more put
6 your goals and objectives together. You have to put
7 in there everything if you're talking about the
8 environment, you have to put in and justify how are
9 you going to -- how this goal that you're putting in,
10 how are you going to enhance the environment. Every
11 other word you've got to put in there environment,
12 environment, environment. And then how do you know
13 you have accomplished your goal, how do you know
14 you're going to -- how do you know that you're getting
15 there? How do you know that you're making progress?

16 These are the kind of things -- and these
17 are tough things. We as Native Americans, we don't
18 think this way. And when I get back home I have to
19 tell the leadership in the community, the people that
20 I work with, the program directors, we have a hundred
21 programs, let them know what I have learned, the
22 technical assistance. And that's how come I wear so
23 many high tech stuff and share this information with
24 them, and they come tease me and say grab a high tech.
25 Got to have those toys. Got to have those toys,

1 because that's the modern world, that's what it does,
2 that's where we are going.

3 What I'm trying to teach the young people is
4 we can't use the bows and arrows no more. We don't
5 have any friends in Congress. We lost all those
6 friends in Congress, because most of the people in
7 Congress are foreigners and they just became
8 Americans. A good example, a good example is
9 Kissinger. He was a good man, he was speaking for us,
10 for the United States, but there are some other people
11 that are not. They don't think that way.

12 And we have to learn verbal judo. I think
13 that's the main thing. How to get the things across
14 without losing your cool, and sometimes it's very,
15 very hard for leaders to keep cool. I'll just speak
16 for myself.

17 Like they had a good name for me. They used
18 to tell me, Mr. Paytiamo, you're just not human. I
19 think sometimes you have to be that way, especially
20 when you're a leader you're up there all by yourself.

21 Just like somebody mentioned the other day,
22 that you're up there by yourself and you've got nobody
23 to help you. It's cold up there, it's lonely up there
24 up in the mountains. I've been up there several times
25 and I know all the roads going up there, and I know

1 where all the potholes are, but the young people don't
2 know where the potholes are, and so we have to pass
3 this information on to the young people and let them
4 know what we are all about.

5 You know, those of you that are Native
6 Americans, we know what -- I keep saying, keep
7 stressing, learn all this stuff from grandpa, go talk
8 to them, talk to your grandma. I say men, we are
9 nothing without a woman. A woman is the one that
10 tells us, and we don't like this, but it's true, women
11 always tell us what you're doing. My wife used to
12 tell me, Mr. Paytiamo this is your job, you go do it.
13 Traditional stuff. That's your job. That's what your
14 clan tells you to do, but then it's the women that
15 told us to go to the community and other places like
16 this trip for us to speak for our people.

17 Like for instance, all the ladies tell you
18 there's a meeting, I want you to go to the meeting.
19 Come into this meeting, tell them about this pothole
20 outside our house. Then he comes home from lunch and
21 the lady says, did you tell them about the pothole?
22 No, I couldn't get a word in edge-wise. Everybody was
23 talking.

24 This is real life. And I think that the
25 more we teach our young people about the facts of

1 life, not just only about the birds and the bees,
2 but -- because they have the answers. You and I know
3 this. Those that are on the Tribal Council just for
4 recent times, I've sat through 39 Tribal Council
5 administrations, I'm like a walking encyclopedia.

6 I'm glad they let me sit in even when they
7 have the executive session. I'm ready to leave they
8 say Mr. Paytiamo, you stay here, we want you to see
9 what's going on. So they know that whatever they
10 talk, I put all my stuff together, go back to the
11 office and start writing proposals and bringing them
12 back, and just keeping feeding them into the system.

13 That is what our job is, us staffers, we
14 just keep feeding the system. We don't get credit for
15 it, we don't get pat on their back for it, they don't
16 mention our names. I don't mind about that. It's the
17 Council that puts its John Henry and they the ones
18 that get all the credit, but we are glad we had a
19 small part of it.

20 So much for the sermon. Thank you very
21 much.

22

23 MS. SADDLEBACK: My name is Rose Saddleback.
24 I'm with the Samson Cree Nation, central umbrella
25 Canada, and I'm a Council member.

1 We have a lot of experience with different
2 types of agreements and I make -- I was hearing this
3 \$4,000 fee. We successfully negotiated with an oil
4 company, even though there are four Nations, four
5 Bands within our area, just in our neighbors, we
6 negotiated a \$20,000 per well -- every well that is
7 drilled, \$20,000, that's the lands that we developed.
8 And yet our neighboring Bands who dealt with the same
9 company did not have that type of term in their
10 agreement. So for me, it's really useful to have
11 these kinds of sessions and share information about
12 the terms and conditions that you have successfully
13 negotiated.

14 One of the areas that we didn't negotiate is
15 aggressive performance. I mean, for me that's new.
16 That's new information. It's so critical that we do
17 continue to have these kind of sessions. CERT, we
18 have an Indian Resource Council. I don't know what
19 kind of an affiliation there is with CERT, but I think
20 the idea is similar, and that is to share information
21 and the expertise.

22 I have so much to say, yet I feel so
23 pressured. Thank you.

24 MR. TRUJILLO: Well, again, please, if you
25 want to sit and just talk with the recorder so we can

1 get a document, again, we are not here to pressure
2 anybody, but we would like to get your input.

3 It's ten after 12:00. I think they are
4 serving lunch.

5 MS. SADDLEBACK: Oh, I just failed to
6 mention, I guess this \$20,000 compensation, I guess
7 that's what it's called, it goes into an education
8 trust fund, and in that fund only the interest is
9 used. I guess we built it up over the years. It
10 started out with ten million dollars and we have
11 something like 27 million dollars nowadays, and only
12 the interest is used to assist our students. Every
13 month we get a small incentive.

14 MR. TRUJILLO: Okay. With that, let me turn
15 it over to Paul and kind of close off or add comment
16 to that.

17 MR. MOOREHEAD: You can close it off. I
18 just wanted to suggest if anyone has additional ideas
19 or materials or suggestions that -- I think the idea,
20 the board's idea is that today at the end of this
21 generic session, we will get together and talk about
22 what these breakout sessions entailed. If you have
23 stuff, you can submit it to me and I'll get it to
24 CERT, or submit it to CERT directly in addition to
25 what's in the record here, because I mean as we went

1 through, I jotted down a number of ideas that I'll box
2 up and send to Mr. Lester and the people here in
3 Denver and I encourage you to do it too. So I
4 wouldn't think that these breakouts are the end all
5 and be all of these matters because this is going to
6 go on for months. And I encourage you to do that.

7 MR. TRUJILLO: And in closing just for
8 everybody's benefit, the basic idea with this is to
9 establish a platform, and what's going to be happening
10 in the future is David and his staff will be making
11 some phone calls, and we will be bringing some people
12 together to look at all of this information with the
13 idea of coming together with a general platform. And
14 again, this is because we are going to have a new
15 administration. Whether it's the McCain
16 administration or the Obama administration, it's going
17 to be a brand new administration coming in.

18 This will be an opportunity for us to
19 present to this new admission what we see as far as
20 energy development, as a very broad area of
21 discussion. We can say here's what we are looking at,
22 this is what's important to us. And so the idea here
23 is to establish that type of platform that can not
24 only begin discussions, but also direct us in where we
25 want to focus our efforts as the administration comes

1 together and as new faces come into the different
2 departments. So again, this is what we are wanting to
3 do, and gain everybody's input with the idea of then
4 partnering up with -- a number of people mentioned
5 NCAI, partnering up with NCAI.

6 This was the same process that was utilized
7 when we went out and defended the Tribal Sovereignty
8 aspect with the Section 1813 study. We saw that to be
9 very successful in getting our message across to
10 Congress as well as to the administration as to what
11 we saw was important, so we are using that same type
12 of vehicle. When I say we, I'm a part of the CERT
13 process so that's what we are looking at.

14 So as Paul mentioned, if you have further
15 comments or ideas, you can get it to Paul and you can
16 get it to CERT. I mean, they have a website,
17 certreearth.com, or e-mail it to David and he can
18 take that information down so that the team that comes
19 together, that they will be able to provide or look at
20 your input as we begin to shape different areas
21 concerning energy development in Indian Country.

22 So with that, thank you for your comments
23 and thank you for your feedback.

24

25 (Proceedings adjourned at 12:16 p.m.)

1 CERTIFICATE OF REPORTER

2 STATE OF NEVADA)
3)
3 COUNTY OF CLARK)

4 I, June W. Seid, Certified Court Reporter,
5 do hereby certify:

6 That I reported in shorthand the proceedings
7 had in the above-entitled matter at the place and date
8 indicated.

9 That I thereafter transcribed my said
10 shorthand notes into typewriting, and that the
11 typewritten transcript is a complete, true and
12 accurate transcription of my said shorthand notes.

13 IN WITNESS WHEREOF, I have set my hand in my
14 office in the County of Clark, State of Nevada this
15 11th day of August, 2008.

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JUNE W. SEID, CCR #485

