

Review of Provisions of the American Clean Energy and Security Act and Related Legislation impacting Indian Tribes

Background

NCAI supported House passage of the American Clean Energy and Security Act (ACESA) while reserving the opportunity to improve its provisions as the legislation is considered by the Senate. We are pleased to provide the following observations and recommendations on the bill, and where applicable, in comparison to related Senate legislation (e.g. the Lieberman-Warner bill in the 110th Congress (S. 3036) and the American Clean Energy Leadership Act (S. 1462) (ACELA). In collaboration with tribal governments, intertribal organizations and others, a core team is developing more detailed recommendations which we will provide in the near future.

Overall, NCAI is encouraged that the ACESA recognizes the crucial role Indian tribes play in several critical areas, including renewable energy, transmission siting, carbon capture and sequestration, domestic adaptation, and natural resource adaptation. However, the percentage of the allocations of emission allowances in applicable areas to support state and tribal efforts is not sufficient. Allocations to Indian tribes must be increased to tap the vast renewable energy potential on tribal lands, address the disproportionate impact of climate change upon tribal governments and peoples, and ensure equitable federal support comparable to that provided to states. Furthermore, such funding in these and other areas should be sufficiently flexible to support the underlying tribal capacity to implement programs.

In other critical areas, tribal interests are not adequately addressed in ACESA from both a programmatic or funding perspective, including: energy efficiency; the dire circumstances of Alaska Native Villages; green jobs; tribal traditional practices; international offsets; international adaptation; and Reduced Emissions from Deforestation and Degradation (REDD). Finally, ACESA and related legislation does not address issues critical to the success of renewable energy deployment in Indian Country. Some of these issues – such as leasing, permitting, siting, and financing – cut across other aspects of tribal governance and economic development. Viewed from the perspective of renewable energy deployment, these obstacles often place tribes at a competitive disadvantage, and additional legislative provisions can help overcome them.

Thus, tribal priorities for climate change legislation are:

- 1) Tribal set-asides of no less than 5% of allowances that are provided to states to support programs in renewable energy, energy efficiency, domestic adaptation, and natural resources adaptation, among others;**
- 2) Flexible use of such funds to build tribal capacity to develop plans, collaborate, and administer related programs;**
- 3) Substantive inclusion of: Indian tribes in energy efficiency; Alaska Native Villages in adaptation; green jobs; tribal traditional practices; indigenous peoples in international programs; and**
- 4) Overcoming underlying obstacles to renewable energy deployment on tribal lands.**



Clean Energy

ACESA's Clean Energy Title (Title I) includes Indian tribes as participants in programs and planning, including Carbon Capture and Sequestration, Smart Grid, Smart Way transportation, and transmission siting, with the exception of siting and construction in the Western Interconnection (ACESA Sec. 216B). In comparison, ACELA does not provide similar tribal inclusion in the areas mentioned above, with the exceptions of transmission siting (where tribes are additionally protected through a provision ensuring the application of federal law for obtaining rights-of-way on or over Indian land) and a provision providing double credits for renewable energy generation from facilities on Indian land (ACELA Sec. 132).

In the ACESA, Indian tribes are also provided a tribal-specific provision (ACESA Sec. 133) to support tribal renewable energy and energy efficiency programs. However, funding provided for those programs is only 0.5% of the emission allowances provided to states and tribes, and local governments for this subpart. NCAI has consistently advocated for a 5% tribal allocation for the following reasons:

- Tribal lands comprise over 4% of the nation's land base and contain 10% of the nation's energy resources.
- Tribal wind potential can provide 20 percent of the installed electric power that was generated in the United States in 2004.
- Tribal solar energy potential can provide 4.5 times the installed electric power that was generated in the United States in 2004.
- Renewable energy is one of the most significant economic development opportunities available to tribes during these difficult economic times, particularly tribes in remote areas which have to date never experienced economic opportunity.
- The federal government has yet to provide tribes support for renewable energy activities that is even remotely comparable to that provided to states over a period of a number of years. For example, DOE has provided states \$7.2 billion in funding since 1975, including \$3.1 billion under the Recovery Act. DOE's Tribal Energy Program (TEP) has received \$22.5 million since 2002 and \$0 under the Recovery Act.

ACESA Sec. 133 needs to be amended to ensure that funding emanating from the allowances is directed at existing federal programs (particularly those within Title V of the Energy Policy Act of 2005, 42 U.S.C. 15801 et seq., the Indian Tribal Energy Development and Self-Determination Act of 2005), and to provide the necessary flexibility to: 1) allow individual tribes the opportunity to receive the allowances directly or through the proceeds from the sale of such allowances, and 2) to be eligible for both competitive and non-competitive grants and other financial support.

In addition, definitions of biomass in ACESA Sec. 101 and ACELA Sec. 133 should be amended to increase the potential contributions from Indian lands toward renewable fuels/energy production. Finally, as mentioned above, other challenges to renewable energy deployment in Indian country – some uniquely tribal – need to be addressed to ensure that tribes are on an equal playing field. Issues of note include the transfer to tribal governments of production and investment tax credits; extension of the accelerated depreciation allowance; bundling of leases

and rights of way on Indian lands; streamlining of environmental reviews; and implementation of relevant provisions the Indian Energy Development and Self-Determination Act of 2005.

Energy Efficiency

The ACELA does not yet include tribes in its energy efficiency provisions. The ACESA includes Indian tribes in several programs under energy efficiency, including grants and technical assistance to public institutions (Sec. 261), demonstration projects for multifamily housing projects (Sec. 285), loan guarantee programs for tribal homeowners (Sec. 288), and loans to tribal governments to incentivize energy efficiency and renewable energy practices by homeowners, commercial properties and public buildings activities (Sec. 299D). However, tribes are not sufficiently included in provisions relating to a national building code and energy efficiency targets for buildings.

Tribes are not provided the financial assistance given to states and local governments that would enable tribes under this subtitle to develop and implement tribal building codes that meet the national building code targets (Sec. 304). In addition, tribes are not, but should be, provided a percentage of the allowances provided to state and local governments related to the energy efficient retrofitting of existing buildings (Sec. 202); a percentage of allowances provided to state and local governments for Energy Efficient Manufactured Homes (Section 203); a percentage of allowances provided to states to offset increased costs to consumers for home heating oil, propane, and kerosene (Sec. 785); and eligible for grants provided to state and local governments to enforce building codes (Sec. 207). Tribal participation in all of these energy efficiency provisions and programs should be tailored to tribal circumstances, taking into account the integral role that the Department of Housing and Urban Development, the Bureau of Indian Affairs, the Indian Health Service, the Department of Energy, and other federal agencies play regarding the construction and maintenance of homes and buildings on tribal lands.

Domestic Adaptation

NCAI is grateful that ACESA includes Indian tribes in national and regional planning efforts to adapt to the impacts of climate change. However, the tribal set-aside of 1 percent of the allowances made available to engage in these activities (Sec. 453) must be increased to no less than 5%. The Intergovernmental Panel on Climate Change recognizes that Indian tribes are disproportionately impacted by climate change due to their high dependence on natural resources for economic and cultural purposes and their locations in areas prone to extreme weather events. Tribes' ability to adapt to climate change is further challenged by the relatively vulnerable state of their infrastructures and services, such as buildings, water infrastructure, and health care.

Indian tribes should be provided flexible use of such funds for activities such as capacity-building and strategic planning. Because only a small number of the 562 tribes are engaged in adaptation planning, compared to over 60% of states, tribes should not be required to have a plan as a precondition to funding, but rather should be able to use such funds to develop those plans. Furthermore, most tribal grants, unlike state funding, are applied for on a competitive basis and not guaranteed each year, impeding the ability to do long term projects. Section 625 of the

Lieberman-Warner bill (S. 3036) provided a promising alternative. This subtitle directed EPA to allocate allowances to states and Indian tribes for adaptation purposes, with 15% of the allowance proceeds placed in a Tribal Climate Change Assistance Fund which could be used for a variety of purposes, including capacity building and planning.

Finally, the dire circumstances that Alaska Native Villages confront because of global warming should be directly addressed in climate change legislation. Two reports prepared for congressional requesters by the Government Accountability Office report that 86% of Alaska Native Villages are threatened by erosion and flooding due to warming temperatures; that 31 villages qualify for permanent relocation; that Alaska Native Villages cannot access some federal program assistance due to prohibitive funding criteria; and that there is no overarching federal plan or lead federal agency to address the fact that many of these residents are becoming climate change refugees, (see December, 2003, GAO-04-142, *Alaska Native Villages: Most Are Affected by Flooding and Erosion, but Few Qualify for Federal Assistance*, and June, 2009, GAO-09-551, *Alaska Native Villages: Limited Progress Has Been Made on Relocating Villages Threatened by Flooding and Erosion*). Legislation should mandate that federal agencies develop, fund and implement a strategic plan in consultation with, and with the free prior and informed consent of Alaska Native Villages, to ensure the safe and permanent relocation of Alaska Native Villages.

Natural Resource Adaptation

Tribes, heavily dependent on fisheries for cultural, economic and subsistence livelihoods, face predictions like a 50% reduction in the nation's salmon habitat in the coming decades. ACESA recognizes these disproportionate threats to Indian tribes by including them in national and regional planning efforts and provides allowances for natural resource adaptation. Tribes would receive assistance under three portions of a fund provided to the Department of the Interior: 1) a 4.9% set-aside to tribes through the DOI's Fish and Wildlife Services' (FWS) Tribal Wildlife Grants (TWG) program; 2) competitively available funding through the Land and Water Conservation Fund, (LWCF); and 3) funding to the Bureau of Indian Affairs (BIA) for tribes to carry out natural resources adaptation activities on "public lands" under their jurisdiction (ACESA Sec. 480).

Improvements need to be made, including ensuring that tribes receive, in total, 5% of the value of all allowances for natural resource adaptation. Regarding Sec. 480: 1) the 4.9% currently allocated to the USFWS TWG program should be divided among this and other programs, including the FWS Tribal Landowner Incentive Program, the BIA Trust Natural Resource Program, and others; 2) LCWF funding must be clarified to ensure that tribes receive a share proportionate to their needs and the high value of habitat and wildlife on tribal lands; and 3) a specific and express allocation to BIA, and change in this provision from "public lands" to "tribal lands." In addition, specific attention should be directed to activities that protect tribal traditional practices which are directly threatened by the consequences of a rapidly changing climate. Finally, the savings provision in this subpart must be reworded to ensure protection of tribal treaty and other rights, and not merely to recognize the federal trust responsibility to Indian tribes (Sec. 482).



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International Offsets, Deforestation, Adaptation, and Clean Technology

The ACESA provides for the use of allowances to support reduction in emissions due to deforestation (Sec. 754) and other activities that reduce carbon emissions. The ACESA also establishes an International Offset program (Sec. 743) for reductions in emissions from deforestation and degradation (REDD). These provisions fall short of protecting indigenous peoples. Indigenous peoples engage in natural resource management strategies that are inherently proven, sustainable, climate-resilient, and time tested. Indigenous peoples would not have survived and co-existed on their traditional lands for hundreds or thousands of years without having developed and applied such practices. In turn, this traditional knowledge adds inestimable value to local and global efforts to preserve biodiversity, the health of the forests, and adaptation to and mitigation of climate change. Indigenous peoples and their traditional ways are critical to the success of larger societal conservation efforts, and are often far more cost effective. However, experience continues to demonstrate that in the absence of the rule of law, indigenous peoples in many of these countries lack title or meaningful rights to their traditional lands and natural resources, are marginalized by larger society, and are subject to forcible relocation and violence.

Affirmative obligations must be placed on applicable countries to protect the rights, interests and traditional practices of indigenous peoples. The international provisions in ACESA merely encourage such nations to give due regard to the rights and interests of indigenous peoples, merely promote consultation with indigenous peoples, and merely encourage the sharing of benefits with them. This kind of ineffectual language has been utilized for decades in other international regimes affecting indigenous peoples, such as biodiversity and intellectual property rights. The REDD program inadequately values the concept of stewardship of the resource as practiced by indigenous peoples and as the U.S. agreed to in the Bali Action Plan – so-called REDD plus. International Adaptation provisions provide funding to developing countries and international organization to developing resilience to climate change, but not indigenous peoples. (Sec. 491, et. seq.). ACESA provisions relating to the export of clean technology (Sec. 441 et. seq.) should include eligibility for indigenous peoples.

Finally, virtually every nation of the world with which the United States would deal with on these issues voted in favor of the United Nations Declaration on the Rights of Indigenous Peoples. These nations should be held to the standards set forth in that Declaration. There is no more appropriate time than right now to recognize in a tangible way, through climate change legislation, the value of human endeavors such as the traditional practices of indigenous peoples that are in sustainable, climate-resilient, time tested, and in harmony with the natural environment.

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