

Suagee: Tribal sovereignty and the green energy revolution

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On Sept. 8, Sen. Tom Udall, D-N.M., and Sen. Max Baucus, D-Mont., hosted a briefing for Senate staff on the inclusion of tribal governments in pending bills to deal with the climate crisis and promote renewable energy and energy efficiency. The panel of speakers was coordinated by the [National Congress of American Indians](#) and [National Tribal Environmental Council](#), and I was a speaker.

The speakers made many important points about the impacts of climate change on tribes, as well as points about how tribes should be included in specific bills, mainly the [Waxman-Markey](#) bill, also known as the American Clean Energy and Security Act, and similar bills under consideration in the Senate, such as the [American Clean Energy Leadership Act](#), sponsored by Sen. Jeff Bingaman.

My assigned role was to focus specifically on two sections of the Waxman-Markey bill that deal with energy efficiency in buildings. Section 201 deals with building codes and would put us on a path toward making zero-net-energy the standard practice by about 2030. This one measure has the potential to achieve about half the greenhouse gas reductions we need in order to reduce our emissions 80 percent below 2005 levels by mid-century. Section 202 would create a program, to be administered by states, for retrofitting existing buildings for energy efficiency. It fails to mention tribal governments.

During the briefing, several people offered comments on some of the connections between the various facets of the climate crisis and the proposed federal legislation. Afterward, I wrote these observations.

If renewable energy is going to fulfill its potential to replace reliance on fossil fuels, we need to get well beyond grant-funded demonstration projects.

Cultural survival. Survival of tribes as distinct cultures is at risk.

Tribal cultures and religions are rooted in the natural world. As weather patterns and wildlife and plant populations change, tribal cultures will be affected differently than the larger American society. The traditional ecological knowledge of elders, acquired over countless generations, is likely to seem less and less relevant to younger tribal citizens, making the intergenerational transmission of cultural knowledge increasingly challenging.

Tribal self-government. From the history of federal Indian policy, we know that one of the prerequisites for the survival of Indian tribes as distinct cultures is federal recognition and support for the right of tribal self-government within recognized territories. Tribal governments of today face many challenges that are legacies of federal Indian policies of the past, including the “allotment” era and the “termination” era. Alaska Native tribes face similar challenges resulting from the legacy of the [Alaska Native Claims Settlement Act](#).

The transition to a low-carbon economy. Reducing greenhouse gas emissions on the scale needed to avert the more catastrophic impacts of the climate crisis will require a national transition to a low-carbon economy. This will mean widespread and fundamental changes in our economy, as we become much more energy efficient and greatly expand the extent to which we use renewable energy.

Sovereign partners. Tribal governments need to be sovereign partners in the effort to transition to a low-carbon economy, as well as partners in programs for adaptation to the impacts of climate change. The peoples of Indian country and Native Alaska need to benefit from the low-carbon economy, and have access to green jobs and business opportunities in energy efficiency and renewable energy. America needs Native traditional ecological knowledge in fashioning adaptation programs. The world needs the moral leadership that can be provided by those who are grounded in tribal cultural traditions.

Tribal governments need to be included in federal programs to promote energy efficiency, especially support for the adoption and enforcement of energy efficient building codes and federal support for retrofitting existing buildings. To the extent that energy efficiency services are provided through state government agencies with federal funding, we need to be sure that the assistance reaches Indian country, or that tribes have workable options to run programs directly. Congress might want to know, for example, how much of the \$4 billion appropriated in the Recovery Act for the Department of Energy's Weatherization program is actually reaching eligible households in Indian country.

We need more reliable federal support for tribal governments to incorporate renewable energy into their planning processes, but we also need more than grant funding. If renewable energy is going to fulfill its potential to replace reliance on fossil fuels, we need to get well beyond grant-funded demonstration projects. We need to have some standard ways of financing projects with private capital. Tribes should be able to use the same kinds of financing strategies used by other non-federal governmental entities in America. The private parties investing in tribal projects should not be subject to taxation by states and local governments; rather, like states, tribes should be able to use tax incentives to attract private investment for renewable energy.

In addition, as the electric utility industry evolves to promote distributed generation using renewable sources, from large-scale wind turbines to rooftop photovoltaic arrays, tribal electric utilities should be part of making that evolution happen.

Tribes should not be subject to arguments that they have been divested of their authority in this field of governmental activity. The kinds of stresses that climate change will cause for wildlife and plant communities will cause impacts on tribal cultures unlike the impacts experienced by the larger American society. Tribes must have prominent roles in federal programs to adapt to climate change, with due respect afforded to tribal traditional ecological knowledge. Interior Secretary Ken Salazar has taken a big step in this direction with Secretarial Order No. 4389, "Addressing the Impacts of Climate Change" (Sept. 14, 2009), which includes "traditional ecological knowledge" within the term "best available science."

Indigenous peoples around the world are suffering the impacts of the climate crisis. The role of the United States in dealing with the climate crisis on a global scale should be consistent with the international law of the human rights of indigenous peoples. Appropriate engagement of tribal governments in our national program will set an example.

Tribal sovereignty. It can be argued that the climate crisis imperils the political integrity, the economic security, and the health and welfare of most Indian tribes in the United States. That

language, of course, is the second exception to the “general proposition” announced by the U.S. Supreme Court in its 1981 decision in *Montana v. U.S.*, the “proposition” that “the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.” If there is any case in which the second exception actually operates to preserve inherent tribal sovereignty over the activities of non-members within reservation boundaries, then activities that directly contribute to global warming should be subject to tribal government authority. Since 1981, however, the Supreme Court has applied both exceptions to the Montana general proposition quite narrowly – tribes never win. But the general proposition of Montana was fashioned in a case in which, in the court’s view, there was no federal law on the books supporting the exercise of tribal sovereignty. The so-called plenary power of Congress to recognize and affirm inherent tribal sovereignty can trump the recently proclaimed plenary power of the Supreme Court to rule that tribes have been divested of certain aspects of their original sovereignty. As the court held in the 2004 case of *United States v. Lara*, Congress has the power to “relax” limits on tribal sovereignty that the court had previously found to exist. In other words, Congress can overrule the Supreme Court in federal Indian law.

Faced with the climate crisis, the sovereign authority of tribal governments to enact and enforce laws to control conduct that causes greenhouse gas emissions, and to deliver governmental services to help people reduce emissions, should be presumed to be at least comparable to the range of powers that states and local governments exercise. Tribes should not be subject to arguments that they have been divested of their authority in this field of governmental activity. The exercise of tribal authority over non-members is on much more stable ground if Congress has enacted laws recognizing that a given subject matter is still within the realm of inherent tribal sovereignty. Thus, if tribes are going to be sovereign partners in responding to the climate crisis, it’s important that climate legislation under consideration in Congress include roles for tribal governments in all appropriate aspects of the federal program.

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