

Mause and Moorehead: Climate change indecision can be costly

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Story Published: Nov 6, 2009

Story Updated: Nov 6, 2009

This year began with congressional and presidential commitments to addressing global warming. At the same time, those Indian tribes with energy resources continued to consider energy development as an economic development strategy. All tribes, whether energy producers or not, will be affected by proposals to reduce greenhouse gas emissions.

In March, the [Council of Energy Resource Tribes](#) convened the Indian Energy and Global Warming Summit, to examine how climate change proposals will affect tribes and efforts to develop tribal resources. The summit featured Interior Secretary Ken Salazar who noted the importance of tribal interests and whose presence underscored the importance of this issue for the department and for the Obama administration.

In the intervening months, momentum to deal with global warming has slowed and we are seeing the emergence of a legislative traffic jam on Capitol Hill, with health care pre-empting action on energy and climate change. The Waxman-Markey bill passed the House, the Senate is considering the “energy only” bill sponsored by Sens. Bingaman and Murkowski, and the chambers are far apart in agreeing to consensus legislation.

At the same time, the [Environmental Protection Agency](#) has proposed regulations to control greenhouse gases under the Clean Air Act pursuant to the Supreme Court’s decision in [Massachusetts v. EPA](#).

In June, CERT submitted comments to the EPA on its proposed regulation stressing that Indian tribes did not contribute as much to the greenhouse gas buildup as did the American population and did not share in the economic benefits of the last 60 years. Accordingly, CERT noted, it would be grossly inequitable to subject tribal communities to new restrictions designed for affluent, high gas-emitting societies.

While we should not rush blindly into a new and complex regulatory regime, indecision has costs as well.

The CAA is not ideally designed for greenhouse gas regulation. Like most environmental laws, the EPA is seeking to impose best available control technology under its New Source Review authority which focuses on new sources of pollution. So, at the very time the EPA is delaying or denying permits to state-of-the-art plants like the Navajo Nation’s Desert Rock facility, existing dirty, inefficient plants – some more than 100 years old – crank away creating health hazards for the people unlucky enough to live nearby.

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It’s no accident that the greatest financial crisis since the Great Depression occurred as the world price of crude oil reached \$145 a barrel. America’s dependence on imports strips money from consumers and homeowners, puts it in the hands of detestable regimes, and makes it harder for Americans to pay their mortgages and credit card bills. Low income, rural Americans are hit the hardest.

At this time of great unemployment, renewable and conventional power plant construction could create

tens of thousands of good-paying jobs and reinvigorate the economy. But congressional indecision makes it hard to decide what to build and where. If a renewable portfolio standard is enacted into law – solar and wind power will benefit. If Congress decides on a cap and trade system – the old coal plants will be phased out and natural gas will benefit. If the required massive funding is made available for carbon capture and storage – coal will continue to be viable. As long as these questions are unanswered, electric utilities will protect their shareholders by adopting a “wait and see” strategy.

Achieving a national consensus on energy policy should address the following issues.

International climate change agreements all recognize that most greenhouse gases in the atmosphere were put there by developed economies, and that developing economies deserve “room to grow” and flexibility. In a real sense, tribal communities are “developing economies” located within the United States and deserve the same consideration in the form of free, tradable allowances, attractive terms for offsets, and funding for conservation and alternate energy development.

America’s vast coal deposits, many of which are located on tribal lands, simply cannot be written off. A crash program to deploy carbon capture and storage could be commenced immediately. Indian tribes wishing to participate should be assisted in identifying and developing CO2 storage sites on their lands. In the interim, the coal-fired electricity plant analog to the successful “Cash for Clunkers” program should be considered. The idea would be to permit electric utilities to build new coal plants in exchange for the retirement of the dirty, old plants with the same capacity.

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Natural gas, also an important tribal resource, must play a major role in our energy future – increasingly as a fuel for electric generation. Impediments to exploration and production of domestic oil and natural gas should be eased. On Oct. 22, the Senate Committee on Indian Affairs continued its examination of impediments to energy development by tribes including rigid environmental regimes, untimely federal permitting and decision making, and a lack of financing to turn energy potential into energy production.

As a nation, we must also reduce our dependence on oil imports and look to the vast areas of the U.S. that have proven resources such as the Bakken Oil Reserves in the Plains, the state of Utah, and the Gulf of Mexico.

Those who maintain that energy development can lead the country out of this recession are correct – but it will not happen unless the private sector is given clear signals about the direction public policy will take. This should not happen without serious consideration of the interests of tribes with respect to fashioning a solution.

The authors are partners in the Washington, D.C. office of Drinker Biddle & Reath LLP. Philip Mause has represented energy producers, electric utilities and regulatory authorities. Paul Moorehead has represented Indian tribes, tribal organizations and private sector entities doing business with Indian tribes.