

Navajo Nation Energy Policy of 2013

APRIL QUINN, PRINCIPAL ATTORNEY, OFFICE OF LEGISLATIVE COUNSEL

VERONICA BLACKHAT, ASSISTANT ATTORNEY GENERAL, NAVAJO DOJ

NAVAJO NATION ENERGY SUMMIT

JUNE 5, 2024

Navajo Nation Energy: A Brief History

- The Navajo three-branch government was formed in the 1920's for oil and gas purposes.
- 1940's thru 1980's: Uranium mining occurred on and near the Navajo Nation.
 - Mining has had, and continues to have, devastating consequences for the health and well-being of the Navajo people, their communities, their land, air, water and other vital resources.
- 1950's: Oil was discovered in the Aneth and Montezuma Creek areas; since that time, oil companies have drilled hundreds of wells and pumped hundreds of millions of barrels of oil.

- Four Corners Power Plant & Navajo Mine
 - Leases approved in late 1950's and 1960 for large coal-fired power plant and coal mine on the Navajo Nation in the Four Corners Area.
 - Primary benefits to the Navajo Nation: well-paying jobs and coal royalties.
 - Owners: APS, Southern California Edison, SRP, PNM, Tucson Electric, El Paso Electric
- Navajo Generating Station & Kayenta Mine
 - Leases approved in 1960's for large coal-fired power plant and coal mine on the Navajo Nation in LeChee, Arizona.
 - U.S. Bureau of Reclamation's NGS interest: electricity for the Central Arizona Project
 - Primary benefits to the Navajo Nation: well-paying jobs and coal royalties.
 - Owners: SRP, APS, Tucson Electric, LADWP, Nevada Energy
- Peabody's Black Mesa Mine
 - Coal mine located on the Navajo Nation that provided coal to the Mohave Generating Station in Laughlin, Nevada.
 - The coal was transported via a coal slurry line that used large amounts of water from the N-aquifer.
 - The mine closed in 2005.
- Chevron's McKinley Mine
 - Coal mine located near Window Rock, AZ; supplied coal to several power plants in AZ; workforce was approximately 86% Navajo; mine closed in 2009.

- 1980 Navajo Nation Energy Policy (CAP-34-80)

- “The history of relations between the Indian people and non-Indians has shown that whenever Indian people have something valuable (land, water, gold, oil, gas, coal, etc.); legal, moral, and ethical obligations are ignored and the virtual confiscation and exploitation of Indian resources takes place.”
- “The Navajo people historically have come to the aid of the United States in times of national emergency, and yet America has not reciprocated by permitting the Navajo Nation to share equitably in America’s wealth; indeed, it has not permitted the Navajo Nation to share in a fair portion of its own energy resources.”
- Key policy provisions: the Nation shall maximize proceeds from energy resource development and take immediate steps to secure a more equitable share in its present agreements; Navajo ownership emphasized, including Navajo-owned entities; the interests and needs of the impacted communities will be considered and they’ll share in the benefits.

- Various lease amendments occurred in the 1980's including an amendment to the Four Corners Power Plant lease in 1985 and an amendment to Peabody's leases for the Kayenta Mine in 1987.
- Navajo Nation Oil and Gas Company was created in the late 1990's to engage in oil and gas production on behalf of the Navajo Nation.
- Trust Mismanagement Litigation
 - In 2006, the Navajo Nation sued the United States as its trustee alleging the mismanagement of the Nation's funds and tribal resources seeking \$900 million
 - The Navajo Nation and the U.S. settled in 2014 for \$554; it was the largest settlement with any Indian tribe.
 - The money from the settlement become the Navajo Nation's Sihasin Fund.

The Early 2010's: Four Corners Power Plant

- 2011: Four Corners Power Plant Lease Amendments
 - Navajo Nation Council approved via Resolution CF-08-11 and Navajo President Shelly signed it on March 7, 2011.
 - The lease term was extended 25 years (thru 2041); annual lease payments of \$7 million (adjusted for CPI).
- 2012: U.S. EPA's Regional Haze "BART" Requirements
 - Shut down Units 1,2, and 3 by January 2014 and selective catalytic reduction technology (SCR)'s on Units 4 and 5 by July 2018.
- 2013: Navajo Nation's purchases the Navajo Mine and creates the Navajo Transitional Energy Company (NTEC).

The Early 2010's: NGS

- Navajo Generating Station “Technical Work Group” Agreement
 - A group of NGS stakeholders agreed to an alternative to U.S. EPA’s BART determination for NGS, which was adopted by U.S. EPA; likely scenario was 1 unit shut down by December 2019 and SCR’s would be installed on the other two units by the end of 2029.
- Navajo Generating Station 2013 Lease Amendment
 - Navajo Nation Council approved via Resolution CJY-40-13 and Navajo President Ben Shelly signed the lease amendment in July 2013.
 - Lease terms: Renewed the lease term another 25 years (2044); annual lease payments of \$9 million (adjusted for CPI); additional payments of \$34 million; local community “Chapter Fund”; potential Navajo ownership and Right of First Refusal
 - NGS owners decided not to sign until the EIS was completed and the U.S. issued its Records of Decision.

Navajo Nation 2013 Energy Policy

Section 2: Scope and Review

- The Energy Policy sets forth principles relating to the exploration, development, sustainable management and use of energy resources on the Navajo Nation.
- The energy resources and assets addressed by the Energy Policy include fuel resources, mines, generation facilities, transmission and distribution infrastructure and pipelines. Energy uses include, but are not limited to residential, commercial, industrial and governmental uses, heating, cooling, mechanical, industrial process and transportation uses.
- The Energy Office will be the one to recommend amendments to the 2013 Energy Policy.

Navajo Nation 2013 Energy Policy

Section 4: Navajo Fundamental Law

- Before beginning any large-scale energy development or other projects utilizing the Nation's energy resources, the Navajo Medicine Men's Association may be consulted to ensure the proper ceremonies, prayers, and other rituals are conducted to maintain the Navajo people's Great Covenant with the deities.

Navajo Nation 2013 Energy Policy

Section 5: Sustainable Energy Economy

- “The Foundation of the Diné, Diné Law and Diné Government” describes the four sacred elements of life as “air, light/fire, water and earth/pollen” and provides that “in all their forms must be respected, honored, and protected for they sustain life.”
- Based on these elements, the Nation desires to establish a sustainable energy economy based on the Nation’s human capital, natural resources, capital resources and the exercise of its inherent sovereign authorities.
- This ensures an acceptable quality of life for Navajo people; proper planning and management by governmental officials; energy security; environmental stewardship; adequate rents, royalties, bonuses and taxes to ensure benefits for a sustainable Nation.

Navajo Nation 2013 Energy Policy

Section 6: General Provisions

- Section 601. Applicability of the Nation's Laws and Regulations. The Nation's laws and regulations will apply to energy projects located on the Nation's territorial jurisdiction.
- Section 602. Long-Term Sustainability of Energy Developments. Energy developments on the Nation will be designed to be sustainable over the long-term based on economic considerations and environmental and community impacts.
- Section 603. Lease Rent and Royalty Rates. Lease rental and royalty rates and charges for easements and rights-of-way will be equal to or greater than fair market value including energy projects where the Nation or its affiliate is an owner, taking into consideration the direct and indirect economic benefits of the energy project to the Nation.

Navajo Nation 2013 Energy Policy

Section 6: General Provisions

- Section 604. Renewal of Leases for Existing Energy Infrastructure. When negotiating renewals of rights-of-way, leases for existing power generating facilities, transmission infrastructure and pipeline infrastructure and related water allocations, the Nation will maximize the total value of consideration to be received by the Nation.
- Section 605. Selecting External Development Partners. External development partners of the Nation and its enterprises must possess relevant experience in the industry and those specific technologies required for the proposed energy development, as well as sufficient resources to adequately fund their portion of development expenses and contemplated investment in the project.
- Section 606. End of Project Life. Leases and rights-of-way for energy projects will require lessees to return the land to its original condition, or better, at the end of the projects, except where the Nation desires to retain improvements and related infrastructure after lease or right-of-way termination.

Navajo Nation 2013 Energy Policy

Section 6: General Provisions

- Section 607. Consistency in Energy-Related Decision Making. The development and management framework for the Nation's energy resources will encourage consistency in decisions involving the use of the Nation's resources.
- Section 608. Impact on Other Resources. New energy projects shall maximize negative impacts on other scarce and valuable resources of the Nation and manage such impacts in accordance with the Nation's laws, policies and plans for its resources, and will mitigate adverse impacts where necessary.
- Section 609. Negotiation of Energy Agreements. The executive and legislative branches of the Navajo Nation shall be involved in the negotiation and approval of energy agreements.

Navajo Nation 2013 Energy Policy

Section 7: Large-Scale Energy Developments

- Section 701. Maximizing Ownership, Control and Revenues.
 - The Nation promotes majority ownership by the Nation or its entities of large-scale energy projects that utilize the Nation's resources in order to optimize the Nation's participation in profits, in balance with the risks; maximize control and revenues; and to ensure the interests of the Navajo people are protected.
 - The Nation will have the option to purchase a majority of the equity of new large-scale energy projects on the Nation, including expansions of existing facilities and developments.

Navajo Nation 2013 Energy Policy

Section 7: Large-Scale Energy Developments

- Section 702. Maximizing Navajo Return on Investment. When the Nation invests in energy projects, the primary goal will be to maximize profits and return on investment for the benefit of the Nation.
- Section 703. Navajo Ownership and Development Representatives. The Nation may acquire or designate an entity as its representative in any energy project in which the Nation desires to take ownership of a portion of such project.
- Section 704. Operating Capabilities. The Nation will ensure that energy developments, including where the Nation or its enterprises possess a degree of ownership, will be operated and managed by entities that possess appropriate industry experience and capabilities.

Navajo Nation 2013 Energy Policy

Section 8: Community and Economy

- Section 802. Local Community Input, Support for, and Benefits from Energy Developments. Communities impacted by energy development will have the opportunity to provide input on and to indicate their support for such projects, and where substantially and adversely impacted by the development to share in a portion of the financial benefits of such projects. Equal to five percent (5%) of the annual lease payment each year.
- Section 805. Fostering Economic Development, Developing Capabilities and Creating Career Opportunities. Energy projects will be developed to foster industrial and commercial growth, create career opportunities, and build the management skills and capabilities of the Navajo workforce in order to build the Nation's institutional capacity to manage its own energy resources.

Navajo Nation 2013 Energy Policy

Section 8: Community and Economy

- Section 808. Health and Safety. The Nation will strive to protect the safety and health of Navajo communities when considering new energy developments and regulating existing energy developments.
- Section 809. Energy Efficiency and Conservation. The Nation will continue to seek ways to enhance and promote energy efficiency and conservation on the Nation in order to manage future energy demand, reduce environmental impacts, reduce the financial energy costs for the residents of the Nation and build energy efficient industries.

Navajo Nation 2013 Energy Policy

Section 9: Coal

- Section 901. The Future of Coal and Coal-Fired Power Plants.
 - Coal and coal-fired plants are a significant component of the Navajo economy and the Nation's revenues.
 - The Nation will encourage a future in coal as a key component of the Nation's energy mix as a coal producer that derives a significant amount of royalties, rent, fees, jobs and tax revenue from coal mining and productivity of electricity.
 - The Nation will pursue federal coal fuel legislation.

Navajo Nation 2013 Energy Policy

Section 10: Renewable Energy

- Section 1001. Renewable Energy Development. The Nation will continue to develop a renewable energy portfolio of power generating facilities that balances coal, gas or coal-fired generation with economically viable energy generation from such sources as wind, solar, hydro, geothermal and biomass.
- Section 1002. Renewable Energy Portfolio Standard. The Nation will evaluate the appropriateness of implementing a Renewable Energy Portfolio Standard (REPS) for electricity used on the Nation.

Navajo Nation 2013 Energy Policy

Section II: Nuclear Matters

- The Nation currently supports the moratorium on uranium mining on tribal trust, allotted trust and fee lands on the Navajo Nation.
- The Nation will continue to monitor uranium technologies and secondary mineral extraction techniques as well as market conditions to assess the safety, viability and potential of these activities for the future.

Navajo Nation 2013 Energy Policy

Section 13: Navajo Energy Office

- The Navajo Nation Department of Justice and the Office of Legislative Counsel shall work together to develop the appropriate statutory and regulatory language including a Plan of Operation for Council approval.
- Would be within the Executive Branch but separate and distinct from all existing divisions, departments, programs, enterprises and any other Navajo Nation entities or political subdivisions.

Navajo Nation 2013 Energy Policy

Section 13: Navajo Energy Office

- Responsibilities of the Navajo Energy Office include:
 - Acting as a clearinghouse for energy related projects.
 - Facilitating energy development on the Nation.
 - Increasing institutional capacity on energy issues within Navajo Nation governmental agencies and enterprises.

Navajo Nation 2013 Energy Policy

Section 13: Navajo Energy Office

- Development of Long-Term Strategic Energy Plan
 - Stimulate increase revenues from energy projects, spur energy infrastructure development, and diversify the Navajo energy economy.
 - Address opportunities to foster a competitive business environment to attract private investors to energy projects on the Nation, address how the Nation will engage the key governmental and community representatives on Navajo Energy Projects, investigate and inventory the reserves and potential of all the Nation's available energy resources in all regions and serve as a resource to assist the Nation's leadership to prioritize energy projects.

Navajo Nation 2013 Energy Policy

Section 15: Taxation

- Section 1502. Tax Incentive. The Nation may provide tax incentives to encourage the development of the Nation's energy resources, while balancing the needs to provide supporting infrastructure, services and the Nation's finances.

Post-2013 Issues

- Tronox Settlement Agreement
 - Legal settlement approved that provided almost \$1 billion to U.S. EPA to investigate and clean up approximately 50 uranium mines that were operated by Kerr-McGee Corporation on or near the Navajo Nation. The Navajo Nation also received \$45 million from this settlement that was deposited in the Navajo Nation's Superfund account.
- U.S. EPA's Clean Power Plan
 - The Clean Power Plan (or "CPP") was the Obama Administration's effort to regulate carbon dioxide emissions from both existing coal-fired and natural gas plants.
 - Creation of Navajo Nation Carbon Team, which participated in several government-to-government consultations and the Nation submitted numerous sets of comments.
 - The CPP was replaced by the Trump Administration's Affordable Clean Energy (or "ACE") Rule.
 - ACE Rule replaced by Biden Administration's carbon rule requiring carbon sequestration at coal plants operating beyond 2032.

Post-2013 Issues

- Gold King Mine spill (2015)
 - U.S. EPA personnel and an EPA contractor breached a tailings dam while attempting to drain ponded water near the entrance of the mine.
 - The breach caused the release of three million U.S. gallons of mine wastewater and tailings, including heavy metals, into a tributary of the Animas River and part of the San Juan River and Colorado River watershed.
 - Navajo people suffered numerous impacts from the spill, including damages to crops, home gardens, and cattle herds. An estimated 2,000 Navajo farmers and ranchers were impacted.
- NTUA Kayenta I & II Solar Projects
 - The Navajo Nation Resources and Development Committee approved the land lease for NTUA's Kayenta I solar project in 2015 via Resolution RDCS-67-15; Kayenta II was approved via Resolution RDCMY-50-18. The projects are 27MW and 28MW, respectively.
- NTEC acquires 7% ownership interest in Four Corners Power Plant
 - NTEC acquired El Paso Electric's ownership interest.

Post-2013 Issues

- Navajo Generating Station Extension Lease (2017)
 - SRP notified the Navajo Nation in August 2016 of a potential NGS shutdown.
 - Given provisions in the NGS lease, SRP was threatening an immediate shutdown in order to decommission NGS and be off site by December 2019.
 - NGS Owners' Vote
 - The Owners unanimously agreed to keep NGS operating through December 2019, if the necessary agreements could be executed with the Navajo Nation by July 1, 2017.
 - The negotiating, drafting and Navajo Nation approval of the NGS Extension Lease occurred over 5 months (February to June 2017).
 - Navajo Nation Council approved the NGS Extension Lease via Resolution CJN-33-17 and Navajo President Russell Begaye signed the lease on July 1, 2017.
 - The United States issued Records of Decision related to the lease in November 2017.

Post-2013 Issues

- New NGS Owner
 - The Navajo Nation and Peabody both undertook efforts to identify a new NGS owner; a new owner was identified, but negotiations fell through in late 2018.
 - NTEC stepped in to pursue ownership of NGS, but negotiations ceased in March 2019.
- Coal Community Transition Assistance
 - Navajo DOJ has intervened in APS and Tucson Electric rate cases seeking compensation for the Navajo Nation's transition away from coal.
- Navajo Nation Minerals Primacy
 - Navajo Nation approved the Minerals Department seeking "primacy" to be the primary regulator under the federal Surface Mining Control and Reclamation Act for coal mines located on Navajo; additional actions need to occur before the Nation's application is submitted to the Office of Surface Mining Reclamation and Enforcement.

Post-2013 Issues

- Attempts to Form a Navajo Nation Energy Office
 - Legislation 0273-19 (Closed/expired) & Legislation 0246-22 (withdrawn)
- NTUA solar projects
 - The Navajo Nation approved two leases for NTUA for two solar projects: one in Red Mesa, UT and another in Cameron, AZ (Resolutions RDCMA-10-21 & RDCMA-MA-10-21)
- Oil and gas; helium
 - NNOGC Operating Agreements (Resolution CD-60-22)
 - EOG Operating Agreement (Legislation 0228-22)
- Executive Order 02-2023 & Energy Vetting Team
 - The team conducted initial due diligence (i.e. vetted) approximately 20 proposals.

Considerations Moving Forward

- Creation of Navajo Nation Energy Office
- Lack of Navajo Nation Process
- Lack of Navajo Nation Resources/Staff
- Types of energy projects not contemplated by 2013 Energy Policy (e.g. hydrogen, hydro pump storage); Oil and gas adequately covered under 2013 Energy Policy?
- Tax Issues
- Waivers: sovereign immunity, taxes, Navajo Nation law
- Local Community Benefits
- “Equity”/“Ownership” in a project
- Short-term fixes?

Thank You Ahéhee'

aprilquinn@navajo-nsn.gov

veblackhat@nndoj.org