

Renewable Energy In Indian Country

The Handbook: Past, Present and Future

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Overview of Presentation

- **Overview of the Handbook**
 - **Origins**
 - **Goals**
 - **Details**
- **Trends**
- **Blueprint for a New Handbook**

Origins

- **In 2007, TEP desired to distill and consolidate the essence of renewable energy development on tribal lands**
- **Program management queried whether model contracts would advance the goals of tribes seeking to engage developers**
- **DOE/NREL/Tribes/Energy Professionals participating in TEP advanced a more comprehensive approach**

Goals

- **Understanding the development process**
- **Structuring the renewable energy transaction to protect tribal interests and attract third party capital**
- **Basics of key energy development agreements, including PPA's, interconnection agreements and leases**
- **Financing resources, investors, incentives**

Initial Feedback from Tribes

- **Greater emphasis on the essential elements of key energy project agreements**
- **Straightforward discussion about the use of debt and equity in energy project transactions**
- **Information on emerging policies and funding tools**

Historical Paradigm & Trends: Chapter 1

- **Energy facilities in Indian Country owned by non-tribal entities**
- **Typical business model**
 - **Lease/royalty arrangement**
 - **Some exceptions, but very few**
- **Tribal employment common, but management less common**
- **Federal control over development of tribal energy resources**

The Trend: Shifting the Historic Paradigm

- **Tribal energy assessments and inclusion of energy in economic development planning**
- **More vehicles for tribal investment**
- **Greater emphasis on tribal management and labor in construction and operation**
- **Greater tribal control over development of energy resources and less state control**

The Tribal Regulatory Revolution continues...

Reasons for the Trend

- **Significant energy resources on tribal lands**
- **Economic diversification from gaming**
- **Tribal employment and contracting**
 - **Courts uphold tribal hiring preferences**
- **Enhanced tribal capacity for conducting business, attracting investment, and planning options for future economic development**
- **Strengthening sovereignty**
- **Move from resource extraction as a means to protect tribal assets**

The Development Process: Chapter 2

- **Phase 1: Preliminary Feasibility Analysis**
- **Phase 2: The Project Basics**
- **Phase 3: Load, Transmission, Preliminary Engineering**
- **Phase 4: Project Entitlements**
- **Phase 5: Construction and Commissioning**
- **Phase 6: Operation**

Phase 1: Initial Assessment

- **Fatal flaw analysis**
 - **Demand and offtakers**
 - **Potential generating resources**
 - **Cost effective interconnection**
 - **Control of project sites**
 - **Tribal capacity and support**
 - **Potential partnering and financing opportunities**

Getting Organized

- **Legal counsel and key project advisors play a key role in helping the tribe and/or tribal enterprise get its team together**
- **Understand and Define the Project**
- **Know Your Total Funding Needs**
- **Answer the Questions:** (in plain, short, common English words).
 - **Is this investment “right sized?”**
 - **Can this team execute?**
 - **Can I get a reasonable return in a reasonable time?**

Should the Tribe be a Passive or Active Player?

- **Pros and cons of each approach**
- **Assess tribes resources and willingness to commit to the project regardless of choice**
- **Long-term partnership with non-Indian parties on Indian lands in both cases:**
 - **Tribal-owned/operated: PPA's, investors**
 - **Not tribal owned/operated: long-term presence and partnership**
- **DOE Tribal Energy Program can help tribes evaluate this issue**

Phase 2: Refining Feasibility and Scoping

- **Scoping the options**
 - **Key attributes of each project**
 - **Proposals from third parties**
- **Offtakers must be viable, creditworthy parties**
- **Formation of the tribal entity, at least for tribal participation**
 - **Project entities for investment can follow**
- **Refining the Tribal Energy Team**

Phase 3: Studies and Initial Development

- **The studies, at a minimum, must include:**
 - **Output and transmission**
 - **Preliminary engineering and cost**
- **If the Tribe has not engaged potential customers in earlier phases, it must be done now**
- **Understand potential contract requirements**
 - **By this stage the Tribe and the Team must have consensus on critical contractual issues and realities**

Phase 4: Securing Capital, Contracts & Permits

- **All the essential elements needed to allow construction to proceed**
- **Choice of entity in earlier stages should dictate key contractual issues such as leasing, which in turn dictates the process needed for approval**
- **Execute transmission and power sales agreements**
- **Obtain financial commitments**

Phase 5: Construction

- **Getting to this stage requires firm, consistent commitment from the Tribe and non-tribal sponsors, if any**
- **Be ready for cost overruns, delays, responding to changes in the regulatory and financial landscape**
- **The balance sheet, credit and experience of the team will be tested**

Assessing the Resource: Chapter 3

- **Clarifying the Tribe's goals**
 - **Is energy an economic development strategy, or serving local needs? Can it be both?**
- **Identifying markets, resources**
 - **Understanding utilities, and the role of the tribal utility**
- **Strategic energy plans**
- **Level of tribal control and tribal capacity needed to make the project a success**

From Grants to Long Term Resources

- **Attracting private capital for renewable resource projects generally requires five essential elements:**
 - **1. Renewable resource**
 - **2. Site control**
 - **3. Buyers for the energy**
 - **4. Transmission to market**
 - **5. Incentives (production tax credits, other tax incentives)**

Have Energy Resources Been Assessed?

- **Type and amount/magnitude of resource**
- **Economic feasibility of development**
- **Will resource(s) meet demand (both on and off the reservation)**
- **Ability to meet other tribal objectives**
 - **Tribe as sponsor of renewable energy projects**
 - **Tribes as utility owners/operators**
 - **Tribes as regulators**

Land Control

- **Site control and fair market valuation early in the development process**
- **Assumption by some private energy developers that obtaining third-party control of Indian lands may be simpler and cheaper than non-Indian private land**
- **Budget and schedule must factor:**
 - **Tribal land-withdrawal processes**
 - **Federal lease requirements**

Buyers

- **Fairly certain in states with RPS**
- **Price increase predictions driven by climate change issues changing the demand and supply outlook**
- **Tribal & non-tribal utilities**
 - **Firm capacity?**
 - **Infrastructure?**
- **Long-term offtake agreements (power purchase agreements or “PPA’s”) with credit-worthy third party buyers**

Transmission

- **Distance to transmission system**
- **Market factors for creative transmission contracts**
- **Load capacity to deliver to market**
- **Ballpark overview a fairly simple exercise for qualified energy consultants**
- **Regional transmission coordinating agencies manage regional transmission grid and maintain data, require reliability and capacity studies**
- **Other DOE agencies, private and public utilities with transmission info**

Late Stage/Construction Stage Equity

- **Made through purchase or joint venture/limited liability company**
- **Required to support power purchase agreements (PPA) or interconnection agreement security, turbine purchase order and construction loans**

Structuring the Project: Chapter 4

- **A passive or active role for the tribe?**
- **Tribal entities for project development**
 - **Tribal enterprises**
 - **Tribal corporations**
 - **Limited Liability Companies**
 - **State vs. Tribal entities**
 - **Section 17 Corporations**

Joint Development: Chapter 5

- **What do we mean by “Joint Development”?**
- **Types of entities to facilitate outside investment and participation**
- **Responsibilities of the project company**
- **Essential elements of the Joint Development Agreement**

The Balancing Act

- **Many business transactions do not rise to a level requiring review and approval by the entire council of a tribe (either elected or general council), but in many instances, the non-tribal party may insist on tribal approval or at least clear lines of authority and support.**
- **At most, review and approval of contracts by tribal council may be necessary.**
- **In many cases, transactions may be handled entirely by the relevant tribal enterprise or tribal corporation.**

Key Project Agreements: Chapter 6

- **Power Sales / Power Purchase Agreements**
- **Transmission and Interconnection Agreements**
- **Agreements for Tribal Land**
 - **Leases**
 - **Right of way and easement agreements**
 - **Options**
 - **Tribal Control**
- **TERA's and other federal policy impacts**

Key Sticking Points

- **Dispute resolution, governing law, choice of forum are not the roadblocks they used to be, but must be discussed early**
 - **Waiver of defense and right of sovereign immunity**
 - **Exhaustion of remedies in tribal courts**
 - **Arbitration vs. litigation**
- **Indemnification, limitation of liability, remedies on default and termination**

Financing a Renewable Project: Chapter 7

- **Traditional “Project Finance” of debt, equity and tax incentives**
- **Understanding debt, including bonds**
- **Equity financing and understanding the investors**
- **Tax credits and other incentives**
- **Project structures and agreements to blend debt, equity and tax incentives**

Evolution of the Handbook

- **New financing tools**
- **New federal and tribal policies**
- **Evolving TEP**
- **Elements of both utility scale and community scale projects**
- **Case studies of successful projects across a range of renewables**
- **Capturing trends...**

Shifting Gears/Trends

- **Project development is not the only way for Tribes to participate in renewable energy...**

Cushman Settlement/Skokomish River, WA

- **Skokomish Tribal Nation**
- **Tacoma Power**
- **Settlement inc. a \$12.6 million one-time cash payment, land transfer worth \$23 million and percentage of electricity value from # 2 powerhouse**



Klamath River, OR and CA

- **Klamath, Yurok, Hoopa Valley Tribes**
- **PacifiCorp**
- **Settlement with states, utility and federal government includes removal of four dams by 2020 at a cost of \$450M**



Wells Settlement, Columbia River, WA

- **Confederated Tribes of Colville**
- **Douglas County PUD**
- **\$13.5M payment + 466 acres of land + 4.5% of output until 2018 + 5.5% of output thereafter**



Pelton/Round Butte, Deschutes River, OR

- **Confederated Tribes of Warm Springs**
- **PGE**
- **Significant fish passage mitigation**
- **Co-ownership**
- **FERC approved in 2005**



Kerr Project, Columbia River, MT



Kerr Statistics

- **Generation Capacity (megawatts of electricity) = 188 MW**
- **Average Annual Output = capacity x time x efficiency (188 MW x 66% efficiency x 8,760 hrs/yr = 1,086,941 MWH/yr average) (rounded to 1,100,000 MWH/yr hereinafter)**
- **Households Served = 1,100,000 MWH/yr ÷ 8,760 hrs/year = 125.57 MW (average output) x 750 households/MW = 94,177.5 households**
- **Flood Control = 1,219,000 acres feet of storage capacity**

Section 17 Corporations

- **Section 17 of the Indian Reorganization Act (IRA), 25 U.S.C. §477, authorizes tribes to incorporate pursuant to a corporate charter approved by the Secretary of the Interior.**
- **The Section 17 Corporation is a separate legal entity from the tribal government entity but has key powers of the tribe, including the power to contract, to incur debt and pledge assets, and offer full or limited waivers of sovereign immunity.**
- **Eliminates BIA from leasing role.**

New Federal Legislation (Jan. 23, 2015)

- **Indian Tribal Energy Development and Self-Determination Act Amendments of 2015 (S. 209)**
- **Reintroduction of S.2132**

II

Calendar No. 501

113TH CONGRESS
2D SESSION

S. 2132

[Report No. 113-224]

To amend the Indian Tribal Energy Development and Self-Determination Act of 2005, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 13, 2014

Mr. BARRASSO (for himself, Mr. HOEVEN, Mr. MCCAIN, Mr. THUNE, Mr. ENZI, Ms. MURKOWSKI, Mr. MORAN, Mr. WALSH, Mr. TESTER, Mrs. FISCHER, and Mr. UDALL of Colorado) introduced the following bill; which was read twice and referred to the Committee on Indian Affairs

JULY 30, 2014

Reported by Mr. TESTER, with an amendment

[Strike out all after the enacting clause and insert the part printed in *italics*]

Amends EPACT 05

- **In introducing the bill, Senator Barrasso explained that in 2005, Congress had authorized a "new, alternative process for Indian tribes to take control of developing their energy resources on their own lands, without the burdens of administrative review, approval, and oversight" by entering into tribal energy resource agreements (TERAs) with the Secretary of the Interior."**
- **TERA's didn't work, so the bill attempts to streamline the TERA process**

Amendments to the 2005 Act

- **Title I of S 2132 would amend 25 U.S.C. §§ 3501-3506.**
- **Under S 2132, if the Secretary does not disapprove a TERA in 270 days, it would be deemed approved.**
- **3 consecutive years of a Self-Determination contract or Self-Governance compact that includes programs for management of tribal land without material audit exceptions is now sufficient to demonstrate capacity to regulate energy resources pursuant to a TERA.**

TERA Changes, cont.

- **Other changes relating to TERAs include: limiting challenges to environmental review under a TERA to "interested parties"; directing the Secretary to make available to TERA tribes their "shares" of federal funding; explicitly preserving tribal sovereign immunity;**
- **Clarifies the limitations on the potential liability of the United States under an agreement entered into pursuant to a TERA.**

Other Features of S. 209

- **Technical assistance to tribes from the US Department of Energy,**
- **A biomass energy demonstration program,**
- **Clarifies that tribes are included in the municipal preference under the Federal Power Act when applying for permits for hydroelectric projects.**

Other Changes to Improve Tribal Energy

- **In addition to TERAs, S 2132 includes a new option for eliminating the requirement for Secretarial approval of leases, rights-of-way, and business agreements on tribal trust or restricted land.**
- **Such transactions between a tribe and a certified "Tribal Energy Development Organization"**
- **(TEDO) would not require Secretarial approval.**

The Good News Outlook

- **Administrative changes (e.g., wind and solar lease amendments) don't require Congress to act**
- **Federal agency program budgets to promote tribal energy development have been approved at reasonable levels**
- **Political landscape fertile soil because many of the underlying themes (jobs, self-determination, economic growth) find bipartisan support**
- **Pressure to show results instead of gridlock**

For More Information

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