

4th Annual Environmental Justice Symposium

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Panel: Developing Renewable Energy Projects on Rural & Tribal Lands

“Tax, Legal and Funding Considerations in Developing Renewable Energy on Tribal Lands”

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OUTLINE

A. Structure of Project

Structures for developing an on-reservation renewable resource can range from:

- (i) a passive lease or grant of easement from the tribe to the private developer; to
- (ii) a lease/easement relationship with the developer in which the tribe also provides services, capital, or other value to the project in addition to the site and is compensated therefor on a negotiated basis; to
- (iii) a joint venture in which both the private developer and tribe participate as owners of the development entity with rights and interests which are negotiated; and,
- (iv) full tribal ownership, which may include contracts with private parties for technical assistance, services, financing, and/or capital on a negotiated basis, but without any equity in the generation facility being held by such private parties.

The choice of a particular structure will be influenced by tax, legal, and financial considerations.

1. Tax Considerations.

a. Federal

(i) **Tribal Tax Status.** Tribes are not subject to federal income tax. Rev. Rul. 94-16, 1994-1 C.B. 14.

(ii) **Federal Tax Incentives.**

-Alternative energy production credit for power generated from wind, solar, geothermal, and “closed-loop” bioenergy facilities which is current at an inflation adjusted rate of 1.9¢ per kilowatt hour. 26 U.S.C. § 45. Applies to first ten years of production after each generator is placed in service. 26 U.S.C. § 45(a)(2)(A)(ii); Rev. Rul. 94-31, 1994-1 C.B. 16. Proposed legislation was recently introduced that would allow tribal owners to transfer

this credit to taxable development parties, but the prospects of its passage are currently uncertain. H.R. 1954.

-Accelerated depreciation for qualified Indian reservation property. 26 U.S.C. § 168(j). Investment can be deducted over three years, rather than the five-years. 26 U.S.C. § 168(j)(2).

-Employment credit for employing tribal member employees equal to twenty percent (20%) of qualifying salary and fringe benefits. 26 U.S.C. § 45A.

b. State Tax Considerations. A tribe is immune from state tax incident on the tribe arising from activities on the reservation. *Chickasaw Nation v. Oklahoma Tax Comm'n*, 515 U.S. 450 (1995).

(i) **State Income Tax.**

(ii) **State Property Tax.**

(iii) **State Sales Tax.**

2. Jurisdiction Issues. Easements and *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) and later cases.

B. Funding

1. Tax Exempt Financing/Clean and Renewable Energy Bonds.

a. Tax exempt financing is available for “essential governmental functions.” 26 U.S.C. § 7871(c).

b. Energy Policy Act of 2005 provided for a credit for holders of Clean and Renewable Energy Bonds which offsets interest income. 26 U.S.C. § 54. Tribes are one of the governmental bodies eligible to issue these bonds. 26 U.S.C. § 54(j)(3).

2. The Energy Policy Act of 2005. The Act created a number of programs for energy development on tribal lands. However, to date, those authorized programs have received minimal or no funding appropriations.

a. **Department of Energy Loan Guaranty Program.**

b. **Department of Interior Energy Resource Development Program.**

c. **Department of Energy Indian Energy Education Planning and Management Assistance Program.**

d. **Department of Interior grants and technical assistance concerning energy resource regulation.**

C. Market

The Energy Act provides that when purchasing electricity or any other energy product or by-product, a federal agency or department may give preference in the selection of a source to a production enterprise which is majority-owned or controlled by one or more tribes. 25 U.S.C. § 3502(d). A separate provision provides that the Bonneville Power Administration, the Western Area Power Administration, and any other federal power administration in whose service area an Indian tribe is located, shall encourage tribal energy development, including making firming purchases of electricity from, or sales of electricity to, tribes. *Id.* § 3505.

D. Approvals

1. Project

- a. National Environmental Policy Act
- b. Tribal Energy Resource Agreements. *See* 25 U.S.C. § 3504(e).

2. Transmission