



**FINANCING RENEWABLE ENERGY DEVELOPMENT
ON NATIVE AMERICAN LANDS**





Native American tribes control significant renewable resources. Numerous efforts have been undertaken by Tribes, private companies and governmental entities to encourage such development. The American Recovery and Reinvestment Act of 2009 extends existing programs and provides significant new incentives to the development of renewable energy generally, and on Indian lands in particular. This brochure explains some of the considerations involved in deciding to develop renewable energy resources on Indian lands.



What is a Renewable Resource?

Renewable energy resources are those that generate heat or electricity using sources other than fossil fuels, such as solar energy, wind or geothermal energy. Such sources generate electricity without contributing to air pollution and global warming. Advances in technologies over the past several years have made renewable and other alternative energy sources cost-competitive with conventional fuels, in some cases, and nearly cost-competitive in others. Other sources of renewable energy include plant material that is converted to renewable fuels or is burned to generate electricity.

How Significant a Role Can Renewable Energy Play?

Reliable estimates of renewable energy potential on Native American lands are scarce. Indian trust lands consist of approximately 55 million acres, much of which is suitable for wind, solar or other renewable energy development. The potential is enormous. The U.S. Department of Energy has evaluated the total potential of Indian lands for generating wind energy at approximately 190,000 megawatts (MW) of capacity, or a figure approximately almost twice the capacity of the 104 operating nuclear power plants in the United States. DOE estimates the solar energy potential on Indian lands at approximately twenty times this amount. The potential is so significant that even if only a small fraction of the potential is realized, the contribution to North American energy needs will be great. And the projects need not be massive; a 30 MW wind facility can be located within a 100-acre area.

How are Renewable Power Projects Financed?

There are several methods for financing construction of renewable energy facilities. The up front capital costs are high relative to conventional fuels, while the operating and maintenance costs are relatively low. That means that financing depends upon

a significant initial source of funding and a long period of time over which energy sales generate revenue. In general, electricity produced by renewable projects is sold to utility companies that distribute the energy through their service areas. The payments made by these customers are paid back to the generator to cover the capital and operating costs. Tax credits and other incentives play a significant role in ensuring that the revenues are sufficient to pay the capital costs of the project over time and maintain the facilities during operation.

What Role Can Tribes Play in Owning and Operating Renewable Energy Facilities?

In most financing structures, tax credits and deductions play a significant role in ensuring that the financing is successful. Tribes generally do not pay income taxes, which is the primary method of using these credits and deductions. As a result, in most financing structures, taxpayers – meaning non-Native American companies – would need to own the renewable energy facility in order to receive the tax benefit. A tribe could still benefit from the overall project by earning substantial lease payments from the development company, operating the facility, providing jobs to tribal members and purchasing electricity from the project. In some specialized structures, a tribe may need to own the facility in order to raise funds to finance construction.

What Form Would Financing Take?

The simplest form of financing would be a simple secured loan, where a lender would advance construction funds to a project developer and would receive security interests in the project assets and site. These arrangements are somewhat complicated by the need to obtain BIA approval, but the security for the lender and related rights can be established through contracts. Projects can be financed using the proceeds of bonds



issued by a tribal or non-tribal entity, the proceeds of which can be used to construct the renewable energy project. Where a non-tribal entity issues bonds, it would need to be the purchaser of the power generated by the project. Where a tribal entity issues bonds, it might be the owner of the project or a lender to the project company, depending on the program.

Where Does the Electricity from Renewable Energy Projects Go?

The most important element for a successful project is finding a utility or community that can use the electricity generated by the renewable energy project. There are many different types of such users, including the tribal community, nearby cities or towns that are not on Indian land or more distant communities, reachable only by high-voltage transmission lines. Utilities in many states have minimum thresholds of renewable energy that they must purchase, under renewable portfolio standards, and are interested in purchasing such energy pursuant to long-term power purchase agreements. The federal government administers an energy procurement program for federal agencies under which renewable energy is preferred, and renewable energy from Indian lands earns double credit.

How Does Renewable Energy Get to These Buyers?

Electricity is transmitted over an extensive national grid that includes high-voltage transmission lines and lower voltage distribution lines. Many tribes are located in areas with adequate transmission, and others would either need additional lines constructed, or would need to obtain access to the grid through short extensions of existing lines. Because renewable energy is often generated at some distance from population centers, transmission can be a significant challenge for new projects on Indian lands.

What Incentives Exist to Promote Renewable Energy Development on Indian Lands?

There are two tax credits available to taxpaying companies that own renewable energy facilities. One is the production tax credit, which is equal to 2.1 cents per kilowatt-hour, as of the beginning of 2009, and the other is the investment tax credit, which allows taxpayers to receive a credit of up to 30% of the initial investment in a project. Each of these can be used for wind, solar and geothermal projects, as well as other projects on Indian land, provided the owner is a taxpayer (not a tribe). In addition, there is very rapid depreciation allowed for these investments. Other tax incentives and credits may be available within Indian territories to encourage development, depending on a particular tribe's circumstances.

What Benefits Would Tribes Receive?

Tribes would earn some amount of royalties or rent from making sites available. Royalties or rent would reflect the amount of revenue generated from the sale of energy. Renewable energy projects may also generate certificates or credits that could be sold or conveyed to purchasers of electricity or other third parties to enhance the overall economics of such projects. These include so-called "renewable energy credits" and greenhouse gas reduction credits, each of which is part of programs under development. Renewable projects could also generate jobs for members of a tribe. In addition, the tribe or tribal members could play a role in the construction, development and operation of the renewable projects, for which additional fees might be earned. The amount of these benefits would depend on the size and cost of building and operating particular projects.

What Effect Would Such Projects Have on Scenery and the Environment?

As with any development, there is a possibility that renewable energy facilities will have adverse effects on the environment. Renewable energy projects would be subject to review and approval under federal environmental law, administered by BIA, and would be subject to the approval of tribes based on their own internal review process. In environmental reviews, effects on birds, bats and other wildlife, habitat and aesthetics are usually considered. Wind projects involve very tall towers and rotating windmill blades visible for great distances that may be a concern for local communities. Visual simulations are used to illustrate the effects such projects would have so that the Tribe, BIA and other involved parties may better decide whether certain effects are acceptable.

What Would Tribes Need to Give up in Order to Host Renewable Energy Development?

Renewable projects generally have very minor environmental and social impacts. Their main effect on tribal life is the long-term commitment involved in development and financing of the projects. In order to obtain financing, most projects have a minimum life of twenty years, and some projects operate significantly longer than that. To make the financing work, the rights granted to the project and the aspects of tribal control of the project would need to be determined at the beginning of the project life, and would need to remain fixed for the life of the project. For some tribes, the agreements and tribal ordinances required to maintain these long-term relationships will require the time and attention of tribal leaders and will represent a departure from the usual way in which tribes manage businesses and visitors within their territories.

ABOUT ORRICK

Orrick has been the nation's top-ranked bond counsel firm for more than a decade and is listed in Band 1 (highest category) in the field of Native American Law by *Chambers USA—America's Leading Lawyers for Business*. We have been privileged to represent tribal governments in more than a dozen states on a variety of projects, including land acquisitions, health clinics, tribal housing, schools, government administration buildings, cultural centers, tribal utilities, energy projects, parks and recreation facilities. In addition, we have represented tribal business enterprises in gaming, hotel and entertainment facilities, manufacturing plants and other commercial activities. Our Indian Tribal Finance Group is nationwide and includes lawyers from our Public Finance, Real Estate, Corporate, Tax and Energy practices.

Orrick also serves as counsel to developers, lenders, investors and other participants in renewable energy development and finance. We have represented wind energy companies, such as Babcock & Brown and Eurus Wind Energy, and solar energy companies, such as SunEdison, Suniva, Recurrent Energy and BrightSource. Our lawyers participate in financings of tribal energy projects, including the Campo Band wind energy project within the Kumeyaay tribal areas, and the financing and acquisition by the Confederated Tribes of Warm Springs Reservation of Oregon of a large hydroelectric project. Our Energy Projects group was ranked by *Chambers* among the leading firms in California and New York in 2007, and earned the 2007 "Project Finance Team of the Year" designation from *International Finance Law Review*.

For more information or assistance, please contact:

TOWNSEND HYATT, chair
Tribal Finance Practice
Pacific Northwest Office
(503) 943-4820
thyatt@orrick.com

BOB LAWRENCE, partner
Energy and Environment
Washington, D.C. Office
(202) 339-8430
rlawrence@orrick.com

CHRIS MOORE, partner
Energy Project Finance
New York, NY Office
(212) 506-5196
cmoore@orrick.com

Orrick, Herrington & Sutcliffe LLP | 666 Fifth Avenue | New York, NY 10103-0001 | United States | tel +1-212-506-5000
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