

DOE OFFICE OF INDIAN ENERGY

# Organizational Models Tribal Energy Development

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**National Tribal Webinar Series: Tribal Business Structures for Financing Projects**



U.S. DEPARTMENT OF  
**ENERGY**

Office of  
Indian Energy

# Historical Paradigm

- 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

# 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 choice of organizational or business model for the project can have a significant impact on the tribe's ability to achieve these objectives.*

## Many Responsibilities...

- Initial project design and layout
- Regulatory and permitting analysis
- Negotiation of key agreements (e.g., land, water, fuel supply, offtake, interconnection and transmission, EPC, financing, shareholders)
- Market analysis for power sales
- Selection and management of advisors, EPC contractors
- Community and government relations
- Finance (projections, debt, investors, etc.)
- Operation and maintenance plans and budgets

# Capture &/or Transfer Benefits

- Accelerated depreciation
- Double REC's for power sold to federal buyers
- Simplified wind/solar leases
- Organizational models such as Section 17 Corporations that have tribal attributes (e.g., issue tax exempt debt, waive sovereign immunity) without tribal political processes
- Strategic resource locations throughout the West

# Tribes and Tribal Lands - Definition

- Federally recognized tribes and Alaska Native Corporations
- “Indian Land” 25 USC § 3501:
  - Any land located within the boundaries of an Indian reservation, pueblo or Rancheria;
  - Any land not located within the boundaries of an Indian reservation, pueblo or Rancheria, the title to which is held in trust by the United States for benefit of an Indian tribe or an individual Indian;

## Indian Land, cont.

- By an Indian tribe or an individual Indian, subject to restriction against alienation under laws of the United States; or
- By a dependent Indian community; and
- Land that is owned by an Indian tribe and was conveyed by the United States to a Native Corporation pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.) or that was conveyed by the United States to a Native Corporation in exchange for such land.

## Understand the Risks

- Input Risk
- Construction Risk
- Operational Risk
- Output Risk
- Sales/growth/reinvestment Risk

***\*\*A key consideration for creating the right business structure is matching the tribal authority and support (financial, political and legal), to the risks of the venture.***





# Sovereignty

- Tribes are free to choose the form of governmental or non-governmental organization through which they do business. *Mescalero Apache Tribe v. Jones*, 411 US 145, 157 n 13, 93 Sct 1267 (1973).
- As a general rule, state civil laws do not apply to Indians or their affairs within Indian country because either state laws are preempted by federal law, or state laws infringe on Indian self-rule. *White Mountain Apache Tribe v. Bracker*, 448 US 136, 100 Sct 2578, 65 LEd2d 665 (1980).

# 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.

## However, Tribal Authority Controls

- A tribe's constitution and bylaws, or treaty and codes, are the starting point for understanding the scope of its powers in the business context.
- Many tribal constitutions or codes do not spell out the scope of the tribe's authority as applied to particular types of business transactions.
- When examining a tribe's constitution the focus should be on express *limitations* on authority rather than on express grants of authority.

## Other Sources of Law

- When doing business with a particular Indian tribe, it may be important to examine treaties or the specific act of Congress bestowing federal recognition on that tribe. Federal legislation may define the tribe's reservation boundaries, the organization of the tribe, the extent to which state civil jurisdiction applies to the tribe, land use and management issues, and federal rights and privileges, any one of which might have an effect on a particular business transaction.

## Tribal Law Governs

- The power of a subordinate agency, enterprise or corporation is a matter of tribal law. *Navajo Tribe v. Bank of New Mexico*, 700 F2d 1285, 1288 (10th Cir 1993).
- A non-Indian party's claim that it detrimentally relied on a subordinate tribal entity's apparent authority will not save an *ultra vires* contract.

## Part of the Tribe, or Not?

- The enterprise may or may not be a legal entity separate from the tribe. A tribal enterprise which is an integral part of a tribe enjoys all the privileges and immunities of the tribe itself for activities conducted on or off reservation. *Central Machinery Co. v. Arizona Tax Comm.*, 448 US 160, 164 n 3, 100 Sct 2599, 65 LEd2d 684 (1980).



# Tribal Government Enterprises

- **The Tribe**
  - Many successful ventures have been undertaken directly with the tribe.
  - Benefits include sovereign immunity, exemption from income tax, ability to issue tax exempt bonds, direct authority.
  - Downside includes exposing tribal assets to liability, delays in approvals due to political processes, lack of experience with business ventures

# Tribal Enterprises/Instrumentalities

- **Still a part of the tribe, but**
  - Formed by tribal resolution, ordinance or code
  - Managed by separate Board of Directors and management staff
  - Certain financing options available to the tribe may or may not be available without full tribal approval
  - Can incur debt, enter into contracts, be sued without exposing tribe to liability



# Tribal Political Subdivisions

- Full delegation of sovereign powers to a separate government entity
- BIA and IRS confirmation typically required
- Exempt from federal income tax, retains sovereign immunity, may issue tax exempt bonds
- May be less flexible than a tribal corporate entity, and less attractive to some business partners or investors

# Political Subdivisions

- In some cases, a tribal authority may constitute a separate political subdivision of the tribe, meaning that the subdivision possesses one of the three commonly recognized attributes of a sovereign: police powers, taxing powers, or eminent domain powers.



## Section 17 Corporations

- Section 17 of the Indian Reorganization Act (25 USC § 477)
- Requires tribal resolution, followed by BIA approval of the corporate charter, and Tribal ratification of the charter
- Must be wholly owned by the tribe, which precludes equity ownership by outside investors

## Benefits of the Section 17

- Assets of the Section 17 corp. may be pledged as collateral
- Exempt from federal income tax
- May issue tax exempt bonds
- Unlike political subdivisions, assets and liabilities are wholly separate from assets and liabilities of the tribe
- Can be sued in its corporate form, with tribe retaining sovereign immunity
- 25 year leasing authority; Section 81 approval of leases/contracts by BIA not required

# Tribally Chartered Corporations

- Established under tribal law
- Separation of corporate assets and liabilities from tribal assets and liabilities
- Financing options broad (loans, taxable bond issuances, commercial debt)
- Tax status uncertain; may not be able to issue tax exempt debt

# State Chartered Corporations

- Easy to form
- Full separation of assets and liabilities from tribe
- Same financing tools as tribal corporations
- Subject to federal income tax
- Cannot assert sovereign immunity
- Subject to state laws and state reporting requirements



# State Chartered LLC's

- Limited Liability Companies are easy to form
- May be needed to bring in certain federal or state tax benefits
- Full separation of assets and liabilities from tribe (e.g., no sovereign immunity)
- Structure familiar to lenders and potential business partners
- LLC members achieve tax benefits of a pass through entity
- May not issue tax exempt debt

# Project Company Organizations

- Most common types of entities for creating a joint venture between a tribe and a non-tribal business partner include:
  - Corporation
  - Limited Liability Company
  - Partnership
- The Section 17 Corporation can establish all of these entities



## Corporation as a Joint Venture Entity

- Corporate owners enjoy complete protection from personal liability for the activities of the corporation.
- Unless a wholly-owned Section 17 or wholly-owned tribal corporation, the corp. is subject to federal income tax, and even then, federal tax treatment is uncertain where taxable partners participate.
- Non-tribal owners may also be required to pay income taxes on any income received from the corp in the form of dividends or distributions.

# Partnership as a Joint Venture Entity

- General and limited partnerships
- Both types enjoy the same tax status:
  - Partnership not directly subject to federal income tax
  - Each partner reports its share of the partnership's income or losses as part of its own annual income or losses (“flow-through” taxation)
  - IRS clear that tribal partners not subject to federal income tax

## LLC as a Joint Venture Entity

- Most common between tribes and non-tribal businesses because it combines the limited personal liability of corporate status with the pass through tax feature of partnerships.
- Does not have the attributes of the tribe (e.g., sovereign immunity) and cannot issue tax exempt debt.
- Tribal participation may make certain types of federal tax credits and depreciation benefits difficult or prohibited.

# 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

# Confederated Salish & Kootenai Tribes

- CSKT acquired Kerr per the FERC license and became the sole owner of the Kerr Hydropower Project.
- CSKT, as a government, will assume licensee status and retain ownership of Kerr Project lands and assets.
- CSKT has developed Energy Keepers Inc. a Section 17 business enterprise to possess, manage, and operate Kerr.

## CSKT's Section 17 for Kerr - EKI

- Energy Keeper Inc. (EKI) will assume possession and operation of Kerr and will sell the electrical output as a wholesale power generator to provide a long term stream of income to CSKT as the sole shareholder.
- In May 2010, CSKT established a Tribal Department of Energy to oversee successful completion of goals
- The US DOE award capacity grant in 2011

# What About TERA? New Legislation!

II

- Indian Tribal Energy Development and Self-Determination Act Amendments of 2015 (S. 209, Jan. 23, 2015)
- Reintroduction of S.2132
- Improvements to TERA's to work with existing tribal structures

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.

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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 italic]

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## 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 Tribal Energy Improvements

- 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 being 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