DOE OFFICE OF INDIAN ENERGY

Tribal Energy – Past, Present and Future

February 22, 2017

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Overview of Presentation

- Historical model and trends in energy development on tribal lands
- Select legal issues driving the trend for tribal ownership and control of energy projects
- Pacific Northwest trend: hydropower settlements

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

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

Reasons for the Trend

- Significant energy resources
- Economic diversification
- Solid legal foundation
  - Case law and legislation favor self determination
- 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

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.

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.

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

Cushman Settlement - Skokomish River, WA

- Skokomish Tribal Nation
- Tacoma Power
- Settlement includes 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 - Flathead 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

New Federal Legislation (Jan. 23, 2015)

- Indian Tribal Energy Development and Self-Determination Act Amendments of 2017 (S. 245)
- Reintroduction of former S.2132 and S.209

- Learn about S.245 and other key legislative and policy issues in the next DOE Indian Energy Webinar!
  - March 29, 2017
  - Federal and State Policy: Advancing Strategic Energy Partnerships

Thank You!

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