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# Regulation of Behind the Meter Renewable Energy Projects in Indian County

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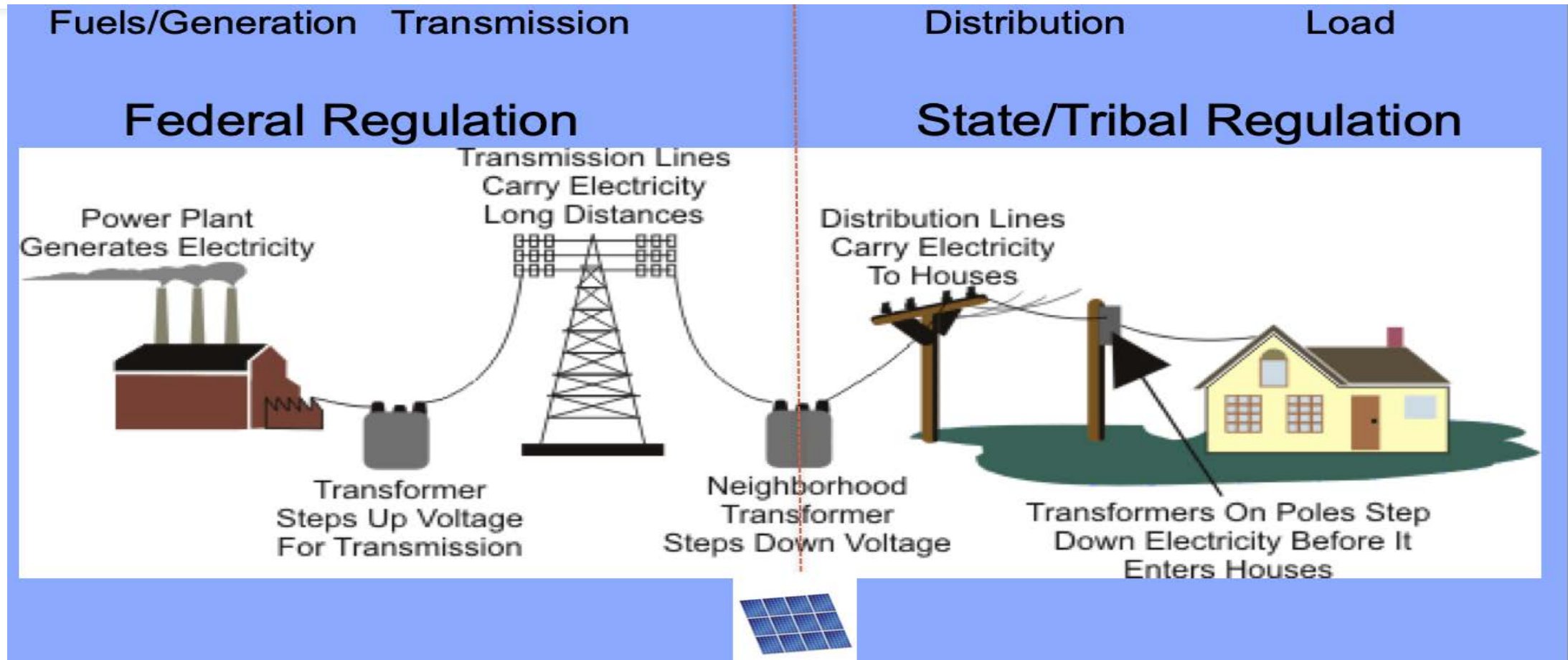
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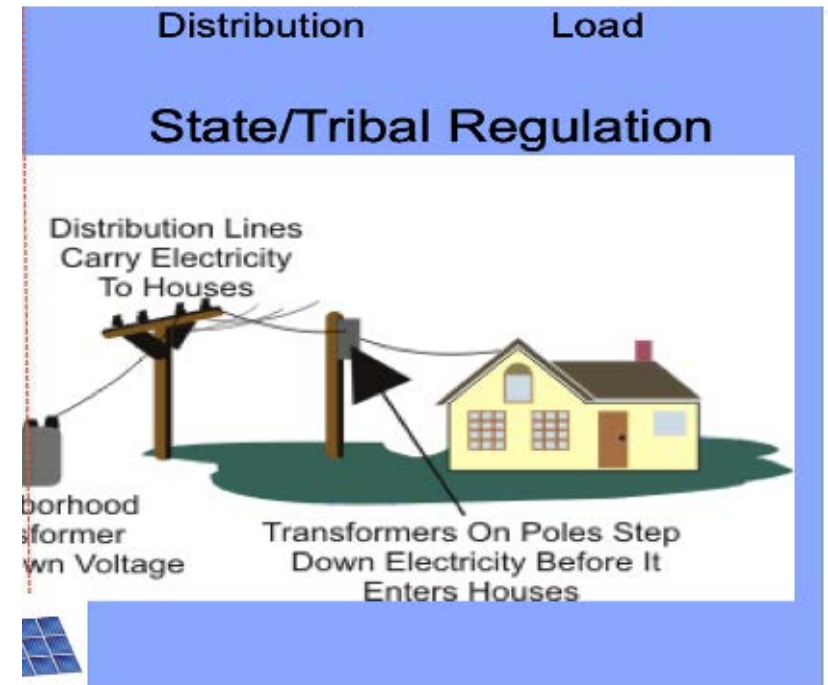
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# Overview of Regulatory Jurisdiction of Energy Projects



# Under principles of federal Indian Law, for Indian loads on trust lands on reservations:

- “Behind the meter” projects (and other projects or utility activities not in “interstate commerce”) can be regulated by the tribe.
- When publicly available Tribal laws and/or regulations are in place which contradict state net metering rules, or utility tariffs which are mandated or approved by the state, tribal law governs.



# The fine print:

## Applicable federal Indian law as relates to non-Indian utilities:

- Primary jurisdiction over land that is “Indian Country” rests with the federal government and the Indian tribe inhabiting it, and not with the states. *Alaska v. Native Vill. Of Venetie*, 522 U.S. 520, 527 (1988). Tribes have inherent sovereign authority in Indian Country to regulate entities doing business on tribal lands as an essential attribute of Indian sovereignty; it is a necessary instrument of self-government and territorial management. *Merrion v. Jicarilla Apache Tribe* 455 U.S. 130, 137 (1982).
- *Montana v. United States*, 450 U.S. 544 (1981): absent a treaty or federal law, a tribe has no civil regulatory authority over non-members (utilities), with two exceptions: (1) A tribe may regulate the activities of non-members who enter consensual relationships with a tribe or its members through commercial dealing, contracts, leases, or other arrangements; (2) A tribe may retain inherent power to exercise civil authority over the conduct of nonmembers when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.
- Tribal Tax Cases as related to power to regulate non-Indians: *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980) (related to cigarette taxes); *Kerr-McGee Corporation v. Navajo Tribe*, 471 U.S. 195, 198 (1985) (related to business activity and possessory interest taxes).
- One of the few federal cases to directly address this issue is *Devils Lake Sioux Indian Tribe v. ND Public Service*, 896 F. Supp 955, 961 (D.N.D. 1995). the tribe did not have exclusive authority to regulate the provision of electrical services on the reservation, however, where the service sought is to a tribal business located on trust land, the necessary nexus between Tribal interests and inherent sovereignty is present. In 2013, citing *Devils Lake*, the North Dakota Supreme Court later agreed that the North Dakota Public Service Commission did not have jurisdiction over the Turtle Mountain Chippewa’s decision under their “long standing tribal utility code” of who should provide electric service to their casino.

# Tribal Energy Laws



- Consider the jurisdictional statements in the tribe's Constitution, applicable treaties and other governance documents.
- A tribe can carefully develop additional tribal laws related to its utility service to clarify and forestall any issues of jurisdiction or dispute resolution.
- Even without tribal energy laws, utilities are flexible in applying their tariffs in Indian Country.
- Opportunities for NEGOTIATIONS with your utility.



# Example Tribal Energy Laws

- Sustainability Code
- Water Code
- Eminent Domain Code
- Net Metering Code
- Utility Franchise Code
- Utility Service Provisions Code
- Review of Rates and Tariffs
- Right of Way Code
- Tribal Utility Code
- Building efficiency Code
- Environment and Planning Codes applicable to Utilities
- Prohibition of State Taxes
- Taxation of Utility Property



# Net Metering Code Example Provisions

- Establish Utility Goals/Benchmarks
- Requirement to Offer Net Metering
- Applicable types of generation
- Size of facility provisions
- How net metering is accounted
- Metering
- Rates applied to power generated
- Interconnection process and customer costs
- Renewable Energy Credits
- Disputes
- Civil Penalties for non-compliance



# Questions?

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