

DOE OFFICE OF INDIAN ENERGY

Understanding the Energy Policy and Regulatory Environment

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U.S. DEPARTMENT OF
ENERGY

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Indian Energy

Presentation Agenda

- Regulatory and Policy Considerations
 - Legal Issues, Interconnection, permitting considerations, Clean Power Plan
- Federal, State, & Utility Incentives
 - Net metering, Renewable Portfolio Standards, ITC
- Tools



REGULATORY AND POLICY CONSIDERATIONS



Legal Issues

Legal issues to consider in exploring your market occur on three levels:

- **Tribal**

- Will the project operate as a profit-making enterprise?
Is this a governmental function of the tribe? Is this a public service under the tribal government (e.g., a tribal utility)?
- New tribal laws may be needed to govern financing arrangements and development contracts

- **State**

- How do state incentives and policies impact energy development on tribal lands?
- How do utility procedures of state-regulated utilities affect energy development on tribal lands?
- State building codes do not apply to construction on Indian lands

- **Federal**

- Environmental protection
- Cultural preservation
- Rights of way or leases
- Taxation – see www.irs.gov/Government-Entities/Indian-Tribal-Governments.

Tribal Legal Background

- 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).

Tribal Energy Determination and Self-Determination Act

II

Calendar No. **501**

- 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
- Now part of S. 2012

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.

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]

Current Legislation

- S. 2012: Energy Policy and Modernization Act of 2016
 - Incorporates S 209 Indian Tribal Energy Development and Self-Determination Act Amendments
 - Other provisions of interest to Tribal Energy:
 - Section 4002 modifies the existing 1703 loan guarantee program to allow state green banks, as well as Tribal entities, to access loan guarantees for non-innovative projects.
 - <http://www.energy.senate.gov/public/index.cfm?p=legislation&id=87D9E1CF-1B96-4815-9D05-387798EFAEA7>

■ S 2012 Modifications to 1703 Loan Program

- Eliminates the innovative technology requirement for Title XVII projects for states, state energy financing institutions (i.e. green banks), Indian tribal entities, and Alaska Native Corporations, but maintains the requirement that these projects reduce, sequester or avoid GHGs;
- Authorizes DOE to make loan guarantees to state energy financing institutions thereby creating a loans to lenders program where the lenders are state energy financing institutions (e.g., green banks);
- Allows state energy financing institutions receiving a loan guarantee to partner with private parties; and
- Makes these entities ineligible for existing credit subsidy for Title XVII projects.
- Overall, the language is a positive change to the Title XVII program that would make it easier for states, state energy financing institutions, Indian tribal entities, and Alaska Native Corporations to access Title XVII funds. The downside is that these entities would not be eligible for credit subsidy.

■ Appropriations

- In the Energy and Water Appropriations Bill, a report from Senator Franken of Minnesota attached a set aside creating the Tribal Energy Loan Guarantee Program
 - \$9 million carve out of existing LPO authority
 - Details being worked out

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



PERMITTING AND REGULATORY KEY CONSIDERATIONS



Permitting and Regulatory Key Considerations

Action	Applicability	Timeline	Contacts
Interconnection	If on grid (with a utility)	Communicate with utility early; this should be one of the first topics that is discussed and finalized before construction	Local utility
Net metering	If available in state (check)	Communicate with utility before construction	Local utility
Local tribal permitting	<ul style="list-style-type: none"> Internal tribal process approvals For off-reservation projects, state permits may apply 	Determine permitting requirements early	Tribal Historic Preservation Office (THPO) and local tribal government
Environmental	Impacts to: <ul style="list-style-type: none"> Wetlands/waterways Wildlife, habitat, flora Cultural resources 	<ul style="list-style-type: none"> May not be necessary Determine applicability early 	Applicable federal agency

Permitting and Regulatory Key Considerations Cont.

Outside Tribal Boundaries

- In general, if located on private, nontribal land, or state properties, local and state land-use policies do apply.
- If located on tribally-owned fee land outside of reservation boundaries, then project is subject to state and local land-use, permitting jurisdiction.

Inside Tribal Boundaries

- In general, state and local land-use laws do not apply.
- In addition, the extent to which federal rules and regulations apply depends on the type of project and its location.
- Tribal law, regulations, and policies will apply.
- Tribes may “self-regulate” under federal law (e.g., Tribal Energy Resource Agreements, Hearth Act).

Determine What Type of Permitting Is Necessary for Grid Connected Systems

Key Types of Permitting at Tribal Community & Facility Level	Always	Sometimes	Rarely
Interconnection agreement	✓		
Net-metering agreement		✓	
Environmental permitting		✓	
Transmission permitting		✓	
Off-take agreement			✓
Local and state permitting			✓
Federal permitting		✓	
Local tribal permitting	✓		

What Is Interconnection?

- An agreement required to connect your energy generation system to the grid
- Systems under 20MW may be eligible for fast tracking interconnection under the Small Generator Interconnection Procedures (SGIP)
 - Larger projects will likely require additional interconnection studies
- Involve your utility *early and often* in the project development process
 - Many utilities have their interconnection procedures and the necessary contacts posted on their website

Interconnection cont.

- Interconnection is required for any power generation project to become “grid tied”
- The process varies by utility based on state regulations and policies
- Most utilities
 - Have tiered applications based on the size of the interconnected system
 - Have applications available online
 - Follow time constraints on application process flow

When Will NEPA Apply to Tribes?

The National Environmental Policy Act (NEPA) requires all federal agencies to assess environmental impact of proposed actions

- Federal funding alone may trigger environmental review of tribal projects (federal nexus, e.g. federal grants, BIA initiated/approved projects, rights of way, land lease deals)
- Each federal agency will have its own particular NEPA procedure (check with appropriate agency)
- **Recommendations:**
 - Work with Federal and Environmental--Experts--NEPA experts to determine and prepare required analysis

NEPA cont.

Types	Complexity	Timeline
<p>Categorical exclusions (CX)— Categories of actions that federal agencies have determined do not have a significant effect on the quality of the environment and neither an environmental assessment (EA) nor an environmental impact statement (EIS) is required.</p>	<p>Does not require any public reviews, hearings, and unless any ‘extraordinary circumstances’ exist, an EA or an EIS is not required.</p>	<p>The Categorical Exclusion Exception Review (CEER) conducted by the BIA is an internal two step process and mainly involves a simple check-box form.</p>
<p>Environmental assessment (EA)— The document that provides sufficient analysis for determining whether a proposed action may or will have a significant impact on the quality of the environment and therefore require the preparation of an EIS.</p>	<p>Usually requires a 30 day public commenting period and may also require a 14-30 day scoping period upfront.</p>	<p>Generally allow 6-9 months for this process before issuing either a FONSI or proceed with an EIS.</p>
<p>Environmental impact statement (EIS)— If an action is expected to have significant impacts, or if the analysis in the EA identifies significant impacts, then an EIS will be prepared.</p>	<p>Requires more rigorous and expanded review including public involvement, public meetings and hearings.</p>	<p>Generally should allow 18 to 24 months for completing this process.</p>

<http://www.bia.gov/cs/groups/xraca/documents/text/idc009157.pdf>

Other Environmental Regulations to Consider

Clean Air Act

- Purpose is to protect the nation’s air and public health.
- Mandates identification of both mobile and stationary pollutants and the sources—gives authority to U.S. Environmental Protection Agency (EPA) for listing such pollutants.



Clean Water Act

- Goals are to make the nation’s water fishable and swimmable by 1983 and eliminate the discharge of pollutants into navigable waters by 1985.
- Gives authority to the EPA to regulate National Ambient Water Quality Standards (and effluent limitations applied to all point sources of pollution).



Endangered Species Act

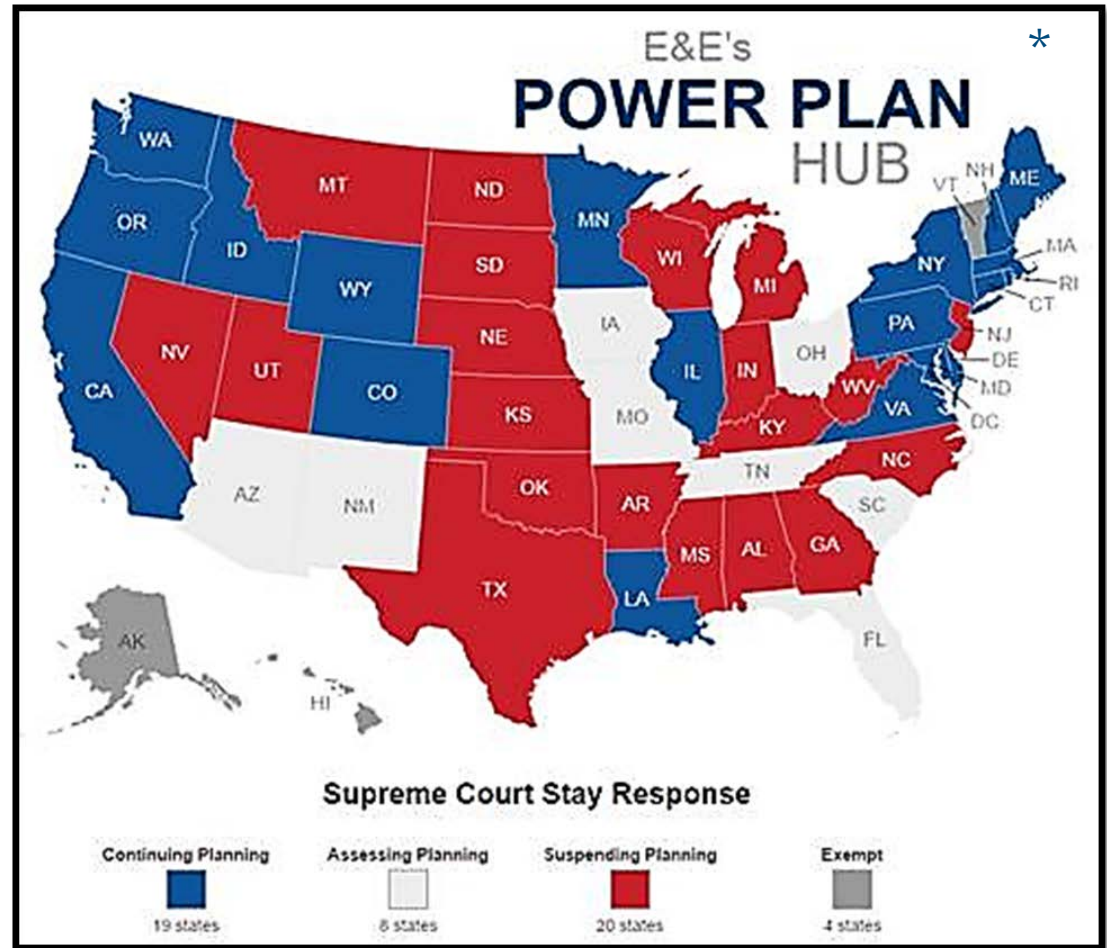
- The purpose is to protect plants and animals that are listed by the federal government as “endangered” or “threatened.”
- Enforced by the U.S. Fish and Wildlife Service and the National Marine Fisheries Services



Clean Power Plan—111(d)

Goal: To reduce carbon pollutions from the largest source, power plants.

- Currently the CPP is on-hold by the Supreme Court, but many states are continuing to plan



Clean Power Plan cont.

- Under section 111(d) of the Clean Air Act, the plan creates a partnership between the EPA, states, tribes and U.S. territories
 - EPA sets the goals, and states and tribes choose how they will meet the carbon reduction goals.
 - State Implementation Plans (SIPs) will ensure that the power plants in their states (Fossil fuel-fired electric steam and Natural gas-fired combined cycle generating units) *“will either individually, together or in combination with other measures—achieve the interim carbon dioxide emissions performance rates over the period of 2022 to 2029 and the final carbon dioxide emission performance rates, rate-based goals or mass –based goals by 2030”**



FEDERAL, STATE, & UTILITY INCENTIVES



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State Incentives and Programs

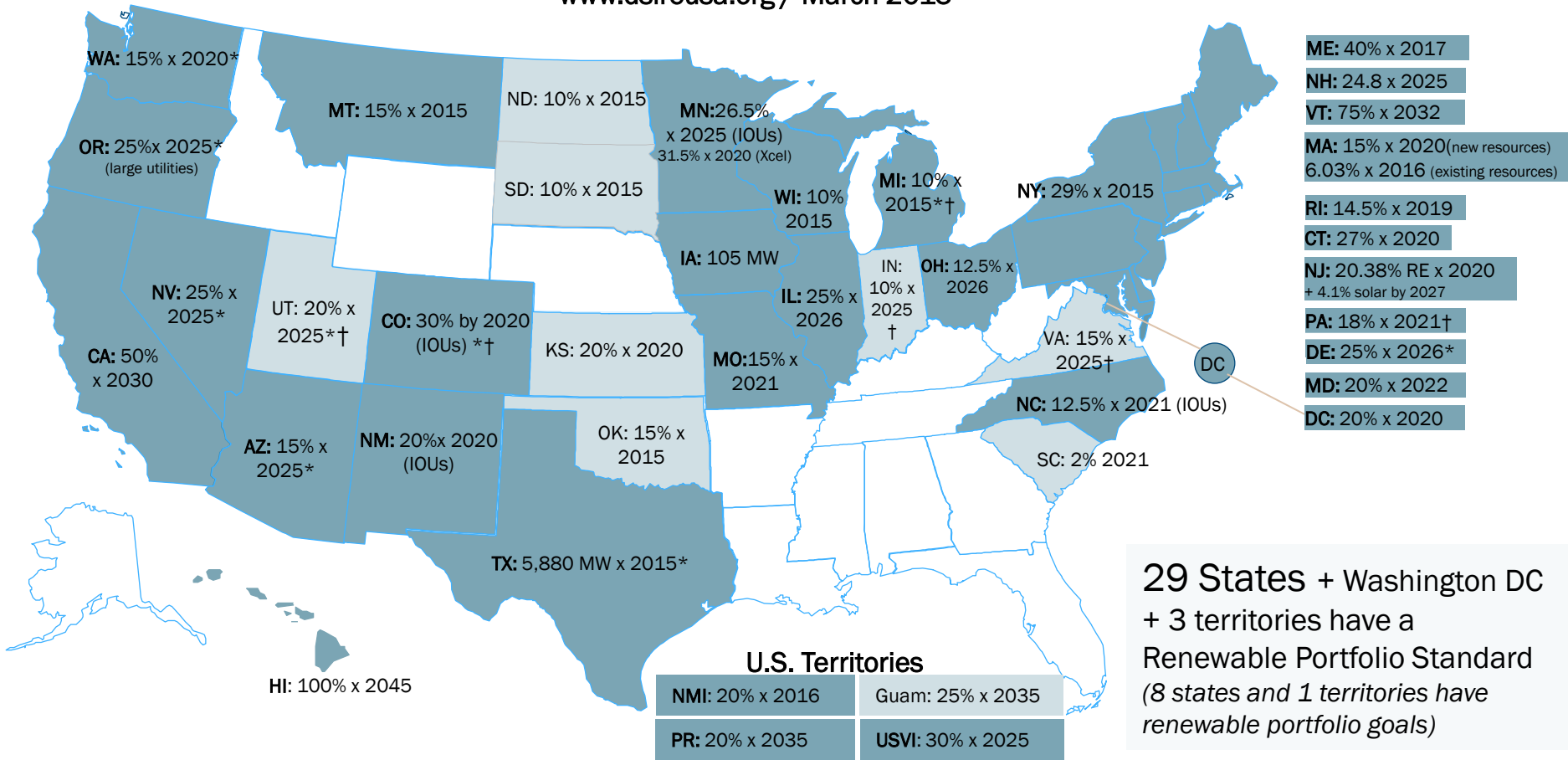
- Tribes may be eligible for incentives under some state programs.
 - Include rebates, tax incentives, community solar options
- State-regulated utilities are often mandated to buy renewable energy or renewable energy credits through the creation of state Renewable Portfolio Standards

Renewable Portfolio Standards

- Renewable portfolio standards (RPS) are implemented by states and require utilities to use renewable energy or renewable energy credits to account for a certain percentage of their retail electricity sales—or a certain amount of generating capacity—according to a specified schedule
- States will often design them to drive specific technologies through “carve-out” provisions, requiring a certain percentage of electricity generation from a given technology

RPS Policies

www.dsireusa.org / March 2015



Renewable portfolio standard
 Renewable portfolio goal

Extra credit for solar or customer-sited renewables
 Includes non-renewable alternative resources

Net Metering

- Way for utilities to encourage customers to deploy grid-connected generation (owned by the customer or a 3rd party)
- Excess generation flows to the grid and can be credited back to the customer at the wholesale rate, retail rate or a higher incentive rate
- Often credit for net excess generation can be carried over to future months and “trued up” on a set schedule
- Can improve the economics of small-scale renewable power systems; may be a critical element in determining project economic feasibility

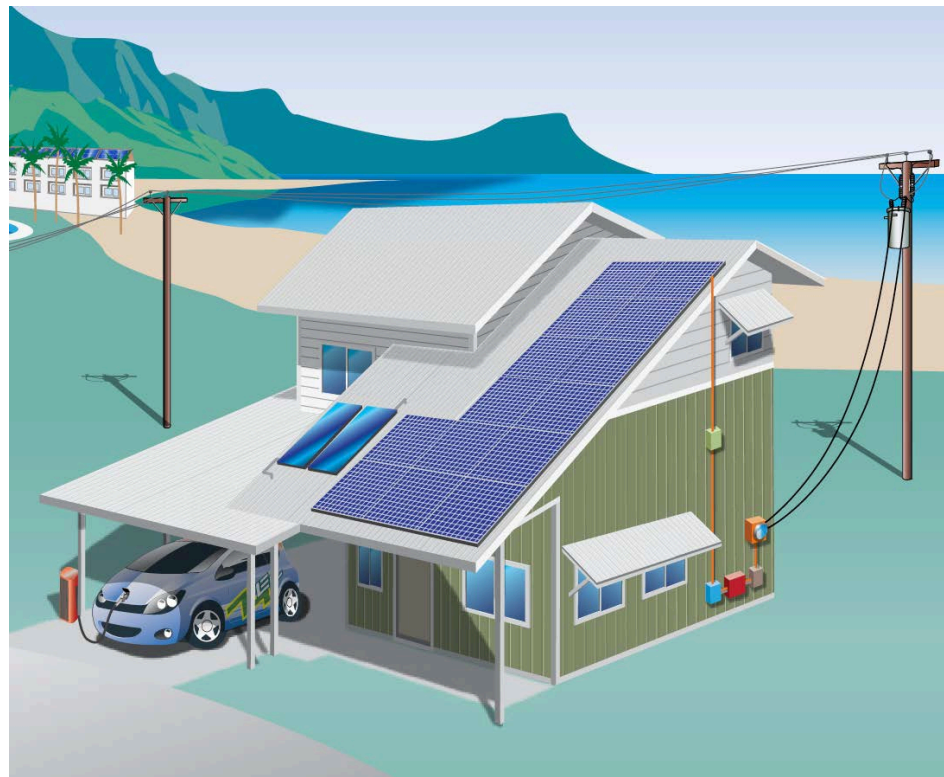
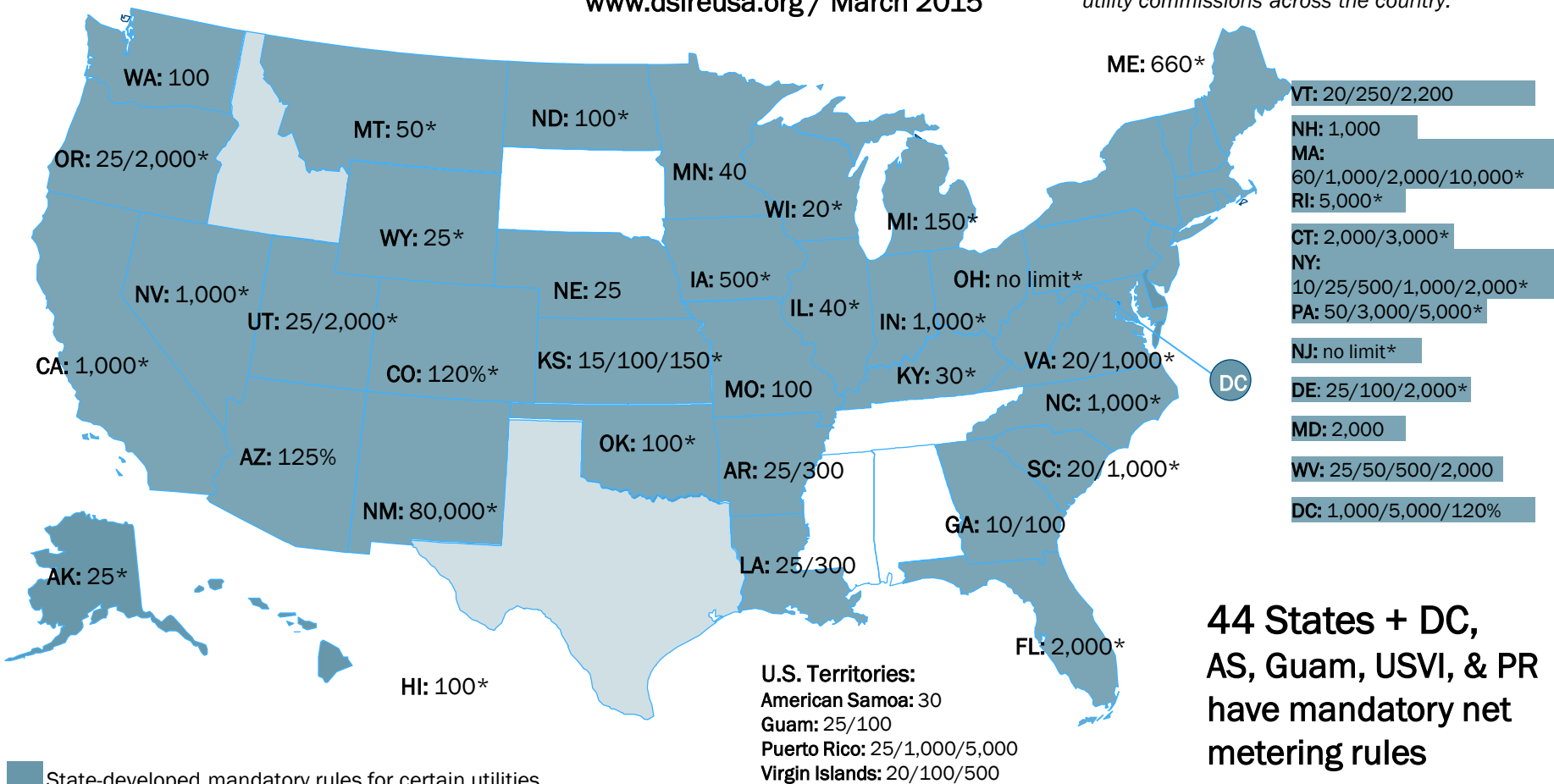


Illustration by Ray David, NREL

Net Metering

www.dsireusa.org / March 2015

Note: Net Metering rules are being actively discussed in over a dozen state public service and utility commissions across the country.



Note: Numbers indicate individual system capacity limit in kW. Percentages refer to customer demand. Some limits vary by customer type, technology, and/or application. Other limits might also apply. This map generally does not address statutory changes until administrative rules have been adopted to implement such changes.

Federal Incentives

- Investment Tax Credit
- MACRS
- Production Tax Credit

Eligibility for tax credits depends on business and finance structures

Renewed Federal Incentive – Investment Tax Credit (ITC)

Technology for ITC	12/31/16	12/31/17	12/31/18	12/31/19	12/31/20	12/31/21	12/31/22	Future Years
PV, Solar Water Heating, Solar Space Heating/Cooling, Solar Process Heat	30%	30%	30%	30%	26%	22%	10%	10%
Hybrid Solar Lighting, Fuel Cells, Small Wind	30%	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Geothermal Heat Pumps, Microturbines, Combined Heat and Power Systems	10%	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Geothermal Electric	10%	10%	10%	10%	10%	10%	10%	10%
Large Wind	30%	24%	18%	12%	N/A	N/A	N/A	N/A



TOOLS AND TECHNICAL ASSISTANCE

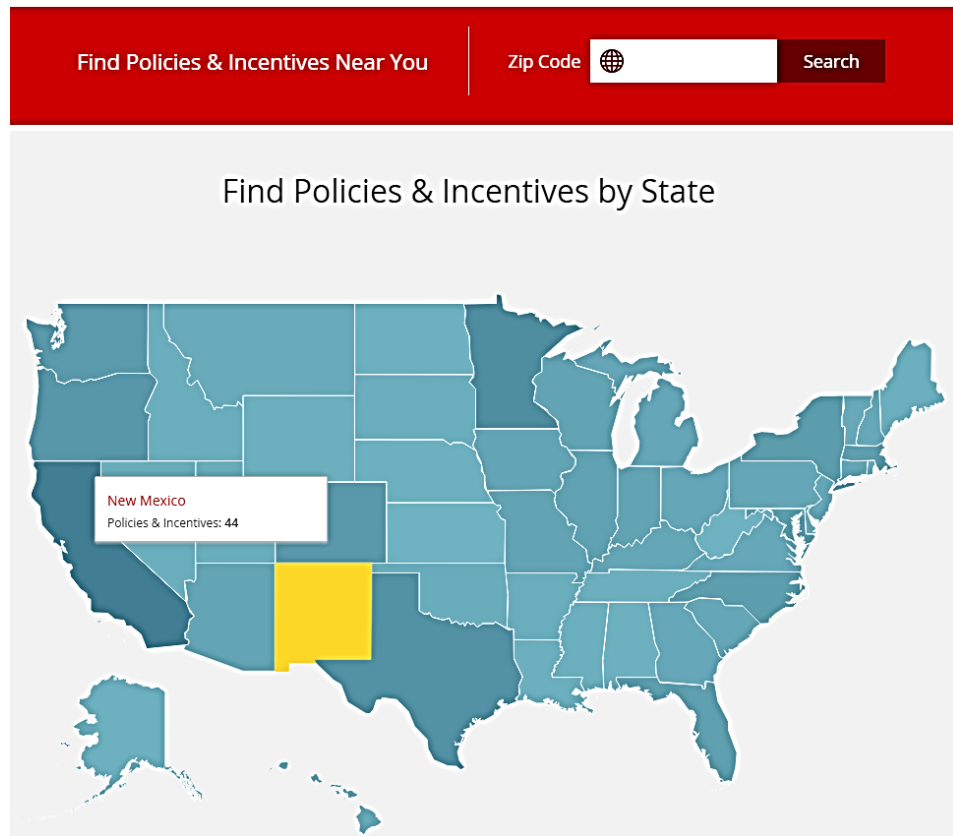


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DSIRE Database of State Incentives for Renewables & Efficiency

- <http://www.dsireusa.org/>
- The Database of State Incentives for Renewables & Efficiency (DSIRE) tracks all policies and incentives being implemented at the Federal, State, Local, and Utility levels.



Regulatory and Policy Resources

- The Database of State Incentives for Renewables & Efficiency (DSIRE) tracks all policies and incentives being implemented at the Federal, State, Local, and Utility levels.
 - <http://www.dsireusa.org/>
- Freeing the Grid website provides and grades best practices for net metering and interconnection procedures.
 - <http://freeingthegrid.org/>
- The American Planning Association provides case studies and FAQ's for local Planning and Zoning considerations for developing solar energy projects.
 - <https://www.planning.org/research/solar/faq.htm>
- DOE State & Local Energy Data (SLED)—Retrieve basic energy market by zip code or local community name.
 - www.eere.energy.gov/sled
- The RAPID Toolkit provides information about federal, state, and local permitting and regulations for utility-scale renewable energy and transmission projects. Utility-scale solar was recently added to the RAPID toolkit.
 - <http://en.openei.org/wiki/RAPID>

On-Request Technical Assistance

Apply for up to 40 hours of in-depth technical assistance to:

- Address a specific challenge
- Fulfill a need that is essential to a current project's successful implementation

Two categories of technical assistance:

1. **Strategic Energy Planning**—an on-site workshop that walks tribal leaders and staff through a nine-step planning process
2. **Project Development Support**—Expert guidance and analysis that helps address specific project barriers. Examples include:
 - Third-party independent reviews of transmission studies, financing structures, lease agreements, project reports
 - Modeling and analysis (or assistance using modeling/analysis tools)
 - Pre-feasibility transmission Studies
 - Interconnection agreement facilitation
 - Economic evaluations
 - System design reviews.

Apply for Technical Assistance

Use this online form to request technical assistance from the Tribal Energy Program for planning and implementing renewable energy and energy efficiency projects.

To help us determine whether your request fits within the program's scope and can be addressed with available resources, please provide the information below and then click on "Submit Request."

Only requests from federally recognized Indian tribes, bands, nations, tribal energy resource development organizations, and other organized groups and communities—including Alaska Native villages or regional and village corporations—will be considered.

*Required

Salutation*	<input type="text"/>
First Name*	<input type="text"/>
Last Name*	<input type="text"/>
Title/Position*	<input type="text"/>
Are you a designated tribal representative with the authority to request technical assistance on behalf of the tribe/Alaska Native village/regional or Native village corporation?*	<input type="radio"/> Yes <input type="radio"/> No
Type of Affiliation*	<input type="text"/>
Name of Affiliation*	<input type="text"/>
Reservation Name or Location*	<input type="text"/>
Address*	<input type="text"/>
Address 2	<input type="text"/>
City*	<input type="text"/>
State*	<input type="text"/>
ZIP Code*	<input type="text"/>
Phone*	<input type="text"/>
Email*	<input type="text"/>
Confirm Email*	<input type="text"/>

Learn more and apply online:

energy.gov/indianenergy/technical-assistance