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Renewables on Tribal Land: Addressing Environmental and Economic Equity on the Path to a Clean Energy Economy

Article By:

Bart J. Freedman

Benjamin A. Mayer

Demand for renewable energy projects has never been greater. The newest, latest trend is the push for renewable energy projects with positive social impacts and benefits to marginalized communities. Indeed, some of the most significant consumers and supporters of renewable and carbon-free power are now making environmental and economic justice a central focus and condition of their use of and investments in clean energy projects.[1] Utility leaders have identified racial justice as a top concern in the transition to a clean energy economy.[2] Key stakeholders and influential civil rights organizations, including the NAACP, have created toolkits and are advocating for just energy policies and practices.[3] The Rocky Mountain Institute announced this summer that it will be launching a residential solar program to expand the use of solar in communities of color.[4] At the same time, clean energy transition legislation throughout the country is accelerating the need for carbon-free resources, including wind, solar, and storage projects, to replace traditional fossil fuel resources, such as coal, oil, and natural gas, to power the grid.[5]

Corporations and utilities can bring clean energy online while simultaneously promoting historically underserved communities by partnering with tribes and tribal entities to develop and operate renewable energy projects on tribal lands, and/or by funding those partnerships and projects. Tribal reservations in the West, Midwest, and Southwest are particularly well suited for solar, wind, and storage projects, as they are often expansive and enjoy abundant sun and wind resources. Tribal governments meanwhile provide a level of regulatory flexibility that makes them uniquely situated to support partnerships between tribal and non-tribal entities for the development of renewable energy projects on tribal lands, all while driving economic and social development for tribal communities.

Good Corporate Citizenship

Corporate procurement of clean energy has accelerated over the past decade. “As of early 2018, companies sourced renewable electricity in 75 countries either through power purchase agreements (PPAs), utility green procurement [programs] or unbundled energy attribute certificates.”[6] Companies like Apple, Capital One, Google, and Microsoft have reached their 100% renewable energy targets.[7] Many others, including T-Mobile and Target, have committed to sourcing 100% renewable energy.[8] Colleges and universities, including Georgetown and Boston University, are also purchasing

renewable electricity.[9] Consumers are not only focused on obtaining clean electricity; they are looking to do so in socially responsible and ethical ways.[10]

The Clean Energy Transformation

More and more states are considering and enacting legislation that requires the use of greenhouse gas (GHG)-neutral and carbon-free resources by 2050 or earlier. As of April 2020, 10 states, Washington, D.C., and Puerto Rico had passed laws phasing in the use of clean energy electricity.[11] These states are California, Colorado, Hawaii, Maine, Massachusetts, Nevada, New Jersey, New Mexico, New York, Virginia, and Washington.[12] The governors of Connecticut, New Jersey, Rhode Island, and Wisconsin had signed 100% clean energy executive orders.[13] The Washington clean energy transformation act, for example, requires the state's utilities to (1) eliminate coal-fired generation by December 31, 2025, (2) be GHG-neutral by January 1, 2030, and (3) carbon free by January 1, 2045.[14] Additional solar, wind, storage, and other renewable energy projects will be necessary for these states to meet their clean energy goals.

At least some of these laws acknowledge the need for equitable distribution of the environmental and economic benefits associated with the transition to a clean energy economy. The Washington clean energy transformation act specifically recognizes the need for "equitable distribution of energy benefits and reduction of burdens to vulnerable populations and highly impacted communities," including tribes and other marginalized communities.[15] The law requires utilities to transition to carbon-free and renewable resources in a way that ensures "that all customers are benefiting from the transition to clean energy," through among other things, "the equitable distribution of energy and nonenergy benefits," "the reduction of burdens to vulnerable populations and highly impacted communities" and "long-term and short-term public health and environmental benefits and reduction of costs and risks."[16]

Tribes Are Well Positioned to Accelerate the Development of Renewable Energy Projects

For a number of reasons, tribes and tribal lands are uniquely situated to advance the development of renewable energy projects to benefit tribal communities and the transition to a clean energy economy.

First, tribes in the Northwest (e.g., Washington and Montana), the Midwest (the Dakotas), and the Southwest (Arizona and New Mexico) have large reservations and abundant natural resources.[17] This makes them prime candidates for solar and wind farms as well as storage projects. Oklahoma, especially in the aftermath of the Supreme Court's recent decision in McGirt v. Oklahoma,[18]is another area that could be ripe for the development of renewable energy projects for tribes.

Second, there are tax advantages for businesses operating on tribal lands. State and local governments, for instance, cannot tax the land itself, so there can be no state or local real property or rental taxes that touch the land.[19] Federal leasing regulations also prohibit certain taxes on businesses operating on tribal lands.[20] Under those regulations, subject only to applicable federal law, state and local governments may not assess taxes on lessees of tribal trust lands, including taxes on permanent improvements on tribal lands and activities on those lands, such as business use, excise, and gross revenue taxes.[21] These regulations are consistent with U.S. Supreme Court precedent that states and local governments have less jurisdiction on tribal lands than they do outside reservations.[22] A developer may therefore be able to structure a project to reduce or avoid sales taxes, business and occupation taxes, and use taxes on construction services performed on tribal lands.[23] There are also opportunity zones in Indian country with incentives for investments in

certain businesses, real estate, and other types of project financing.[24] For additional information on taxing and opportunity zones on tribal lands, see the PowerPoint from a May 2019 presentation on tax developments that provide opportunities for economic growth in Indian country.[25]

Finally, tribes are sovereign entities with the authority to structure partnerships with project developers in creative ways that can result in the development and operation of renewable energy projects to green up the grid and benefit tribal communities. Since Congress passed the Indian Gaming Regulatory Act in 1988, casino resorts have provided economic development for tribes. Tribes have had other economic successes as well, including water parks, family resorts, and timber operations, which have provided on-reservation employment opportunities. And the Confederated Salish and Kootenai Tribes own and operate a hydroelectric dam that will supply power to Puget Sound Energy as the utility transitions from coal-fired to clean electricity.[26] Yet many tribal communities continue to be economically disadvantaged. The development and operation of renewable energy projects can offer social and economic opportunities to tribal communities, resulting in a win-win-win for corporate green energy policies, state clean energy laws, and tribal communities.

1See, e.g., Leading U.S. Corporations on the Cusp of Achieving 100 Percent Renewable Energy Goals, Solar Magazine, Andrew Burger (May 20, 2019), available at https://solarmagazine.com/leading-us-corporations-achieving-100-percent-renewable-energy-goals/ (last visited Sept. 11, 2020) (discussing renewable energy's role in corporate sustainability and social and environmental responsibility initiatives).

2Racial justice, climate-related disasters cited as top concerns by utility execs, S&P Global Market Intelligence, Zack Hale (Sept. 10, 2020), available at https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/racial-justice-climate-related-disasters-cited-as-top-concerns-by-utility-execs-60293784 (last visited Sept. 11, 2020).

3See, e.g., Just Energy Policies & Practices, NAACP, available at https://www.naacp.org/climate-justice-resources/just-energy/ (last visited September 10, 2020); How energy issues and civil rights issues intersect, Energy News Network, Kathiann M. Kowalski (June 30, 2020), available at https://energynews.us/2020/06/30/national/how-energy-issues-and-civil-rights-issues-intersect/ (last visited Sept. 11, 2020).

4Solar Campaigns: Helping Communities of Color Access Rooftop Solar, Rocky Mountain Institute, Lacey Saver, Ryan Shea (July 28, 2020), available at https://rmi.org/solarize-campaigns-helping-communities-of-color-access-rooftop-solar/ (last visited September 24, 2020).

5See, e.g., States Are Laying a Road Map for Climate Leadership by Sam Rickets et al. (April 30, 2020), available at https://www.americanprogress.org/issues/green/reports/2020/04/30/484163/states-laying-road-map-climate-leadership/ (last visited September 7, 2020).

6IRENA (2018), Corporate Sourcing of Renewables: Market and Industry Trends – REmade Index 2018 at 9, available at https://irena.org/-/media/Files/IRENA/Agency/Publication/2018/May/IRENA_Corporate_sourcing_2018.pdf (last visited September 24, 2020).

7RENA (2018), Corporate Sourcing of Renewables: Market and Industry Trends – REmade Index 2018 at 29, available at https://irena.org/-/media/Files/IRENA/Agency/Publication/2018/May/IRENA_Corporate_sourcing_2018.pdf (last visited September 24, 2020). See also RE100 Members, The RE100, available at https://www.there100.org/re100-members (last visited September 24, 2020).

8See RE100 Members, The RE100, available at https://www.there100.org/re100-members (last visited September 24, 2020).

9See, e.g., Renewable Energy Purchasing, Moving Toward 100% Clean, Renewable Energy on Campus, PennEnvironment, available at https://pennenvironment.org/energy-101/renewable-energy-purchasing (last visited September 24, 2020)

10See, e.g., Leading U.S. Corporations on the Cusp of Achieving 100 Percent Renewable Energy Goals, Solar Magazine, Andrew Burger (May 20, 2019), available at https://solarmagazine.com/leading-us-corporations-achieving-100-percent-renewable-energy-goals/ (last visited Sept. 11, 2020) (discussing renewable energy's role in corporate sustainability and social and environmental responsibility initiatives).

11States Are Laying a Road Map for Climate Leadership by Sam Rickets et al. (April 30, 2020), available at https://www.americanprogress.org/issues/green/reports/2020/04/30/484163/states-laying-road-map-climate-leadership/ (last visited September 7, 2020); See also State Fact Sheet: A 100 Percent Clean Future, How State Policy Successes Can Inform Federal Action on Climate Change by John Podesta et al. (Oct. 16, 2019), available athttps://www.americanprogress.org/issues/green/reports/2019/10/16/475863/state-fact-sheet-100-percent-clean-future/ (last visited September 7, 2020).

12States Are Laying a Road Map for Climate Leadership by Sam Rickets et al. (April 30, 2020), available at https://www.americanprogress.org/issues/green/reports/2020/04/30/484163/states-laying-road-map-climate-leadership/ (last visited September 7, 2020).

13States Are Laying a Road Map for Climate Leadership by Sam Rickets et al. (April 30, 2020), available at https://www.americanprogress.org/issues/green/reports/2020/04/30/484163/states-laying-road-map-climate-leadership/ (last visited September 7, 2020).

14Chapter 19.405 RCW.

15RCW 19.405.010(6); RCW 19.405.020(23) ("'Highly impacted community' means a community designated by the department of health based on cumulative impact analyses in RCW 19.405.140 or a community located in census tracts that are fully or partially on 'Indian country' as defined in 18 U.S.C. Sec. 1151.").

16RCW 19.405.040(8); RCW 19.405.060(1)(c)(iii); RCW 19.405.060(2)(b)(iii).

17Bureau of Indian Affairs, Map of Indian Lands of Federally Recognized Tribes of the United States

(June 2016), available at https://www.bia.gov/sites/bia.gov/files/assets/public/webteam/pdf/idc1-028635.pdf (last visited September 7, 2020).

18140 S. Ct. 2452 (2020) (ruling that land in eastern Oklahoma reserved for the Creek Nation pursuant to a treaty ratified over a century ago remains “Indian country” today).

1925 U.S.C. § 5108; Seminole Tribe of Florida v. State of Florida, 799 F.3d 1324, 1328-29 (11th Cir. 2015) (state rental tax on non-Indian lessee was an impermissible tax on the land).

2025 CFR § 162.017.

2125 CFR Part 162. At least two tribes, the Gila River Indian Community in Arizona and the Ohkay Owingeh in New Mexico can enter into leases for renewable energy projects (solar and wind and solar, respectively) without further BIA approval. See, e.g., HEARTH Act of 2012, Regulations & Date Approved by the Secretary of Interior, Bureau of Indian Affairs, Department of the Interior, available at https://www.bia.gov/bia/ots/hearth (last visited September 17, 2020).

22See, e.g., White Mountain Apache v. Bracker (US 1980) (Arizona could not require a non-tribal logging company operating on tribal and federal roads to pay the state’s motor carrier license and fuel use taxes).

23See, e.g., Washington Department of Revenue, Indian tax guide, Construction services performed in Indian Country, available at https://dor.wa.gov/education/industry-guides/indian-tax-guide/construction-services-performed-indian-country (last visited September 7, 2020).

24See, e.g., Tribal Economic Development Principles-at-a-Glance Series, Opportunity Zones in Indian Country, U.S. Department of Interior, Assistant Secretary-Indian Affairs, Office of Indian Energy and Economic Development, available at https://www.bia.gov/sites/bia.gov/files/assets/as-ia/ieed/ieed/pdf/Opportunity_Zones_Primer.pdf (last visited September 17, 2020).

25See also Tax Developments Provide Opportunities for Economic Growth in Indian Country by Bart Freedman et al., available at https://www.klgates.com/Tax-Developments-Provide-Opportunities-for-Economic-Growth-in-Indian-Country-01-04-2019 (last visited September 30, 2020).

26See, e.g., Washington Utility to Buy Power from Montana Tribal Group, Associated Press (March 29, 2020), available athttps://apnews.com/04c1b57a5d48289af73fee11deb41ef6 (last visited September 17, 2020).

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