

**If Barriers Are Opportunities  
Waiting To Be Developed,  
Tribal Utility Authorities  
Should Prepare For A Boom**

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The rural, tribal infrastructure contains a range of problems that can be perceived of instead as opportunities for developing tribal utilities. There is a great need for improved basic infrastructure on tribal lands. As the federal government has receded from providing some of these functions, tribal governments are moving in to fill the breach. Tribes are beginning to look at regulatory jurisdiction and changing the manner in which off-reservation energy companies use tribal lands. This presentation looks at confluence of issues that may be described as opportunities that will impact tribal utilities as they prepare to meet the daunting demand for better utility services and improved economic development on tribal lands.

# Off the Grid But Not By Choice

34% of Native American population resides in rural areas.

Plumbing: One in every 10 homes\* lack adequate plumbing.

Wastewater: Less than half of on-reservation homes connected to public sewer septic.

Housing: Lack of infrastructure major impediment to housing construction. 18% of Native American households are overcrowded, compared to 6% national average - 200,000 homes needed to meet basic housing needs of Native Americans.

Telephone: 69% of Native American households have telephone service compared to 98% American average. NOTE- This probably indicates lower internet access as well but these stats are not readily available.

\*all references are to on-reservation Native American households

**Heating:** Only 32% of tribal elders have access to natural gas for heating. For tribal elders, heating sources more likely to be oil, wood or coal than Gas or electric.

**Water:** Access to running water: tribal elders - 7% no access, 30% well, 70% municipal or rural water source.

**Electricity:** 14.2% of reservation households lack electricity compared to 1.4% of all U.S. households.

#### Cost of Services:

Native Americans don't pay significantly higher utility costs, but utilities are a larger portion of their budget because of lower incomes.

#### Sources:

[liheap.ncat.org/pubs/eiastudy](http://liheap.ncat.org/pubs/eiastudy)

Housing Assistance Council Report of Housing on Native American Lands

National Resource Center on Native American Aging

Energy Consumption and Renewable Energy Development Potential on Indian Lands, DOE, Energy Information Administration

2000 Census Data reported by NAIHC

## So Tribes Need Better Water, Access To Natural Gas Or Low Cost Heating, Better Access To Telecommunication Services, Better Access To Electricity

Tribal Utility Authorities are emerging to address this need.  
Supported by various factors:

- Self-Determination
- Economic Development Needs
- Lack of Federal capacity
- Inability of market to meet these needs
- Federal support through seed funding
- Jurisdictional confusion
- Business opportunities with energy providers
- Interest in renewables

# Opportunities in the Regulatory Environment

“Tribe has inherent sovereign authority over its members and its territory.” (U.S. v. Mazurie, 419 U.S. 544, 557 (1975)). This extends to legislative jurisdiction to tax and regulate non-Indian businesses on tribal land. (See Merrion v. Jicarilla Apache Nation, 455 U.S. 130 (1982)).

By the same term, States do not possess general regulatory authority on tribal lands if it impacts Tribes, their members or their lands, because to allow state jurisdiction would undermine the federal policy of preserving Indian nations as self-governing entities with control over their internal affairs. State authority over non-member conduct subject to a preemption/infringement balancing test. Is the activity pre-empted by federal law or does it infringe on right of Tribe to “make its own laws and be ruled by them”? (White Mountain Apache v. Bracker, 448 U.S. 136 (1980).) (See also general discussion and cases cited in Cohen’s Handbook of Federal Indian Law, 2005 Edition, Sections 4.02 and 6.01 et. seq.)

Off-reservation utilities also have rights of ways that must be approved by Tribe. While tribes have not yet exercised significant regulatory authority over on-Reservation utilities, that will be changing as Tribes begin developing their own utility authorities and begin adopting regulatory entities or laws to regulate utilities.

In New Mexico, Public Regulatory Commission does not have jurisdiction over Tribes and their utility authorities. Many telecomm, gas and electric utilities operating on tribal lands are non-Reservation based and subject to off-reservation PRC jurisdiction.

In New Mexico, PRC is authorized to hold joint hearings with a Pueblo, Nation or Tribe. N.M.S.A. 1978 §62-4-1.

A Pueblo could enter into a Memorandum of Understanding or Joint Powers Agreement, N.M.S.A. 1978 §11-1-1 et. seq. with the PRC to conduct joint hearings, allow PRC to investigate concerns about a utility's performance, and together the PRC and Pueblo could issue a joint finding.

# Opportunities Around Negotiating Legal Rights to Use Tribal Lands

Many energy companies secured right-of-ways across Indian lands beginning in the 1950s using 25 U.S.C. 323-328, 1948 Right-of-Way Act. Those rights-of-way, often granted for 50 years, and many times for \$1.00 are now coming up for renewal.

Indian Tribes may see renewal of those rights-of-way under the 1948 Act as a risky proposition, and as out of step with notions of self-determination, and the new desire to explore entrepreneurial partnerships with businesses that come onto the Reservation.

Under Right-of-Way Act, the Secretary issues the right-of-way, but requires tribal consent. In recent years, that consent has taken the form of lengthy agreements between the tribe and energy company for compensation, access to the fiber or electricity crossing the reservation, scholarship funds, recognition of tribal authority to tax, etc.

Federal courts in circuits other than the 10th Circuit have extended Strate v. A-1 Contractors, 520 U.S. 438 (1997) to hold that land under a right-of-way is no longer fee land and therefore no longer subject to taxation and regulation. (10th Circuit has not followed this approach.)

Right-of-ways also came under attack by energy companies that sought federal legislation to condemn right-of-ways if agreement for consent could not be reached between the energy company and the tribe. This led instead to the 1813 Study, authorized by the Energy Policy Act of 2005 (EPAAct).

The 1813 Study concluded that the Indian Energy Policy in EPAAct and the history of right-of-way negotiations between energy companies and tribes promoted the concept of letting tribes and energy companies work it out and possibly in the process even develop new business agreements.

EPAAct, 25 U.S.C. 3501 et seq. encourages energy development on Indian land through among other things business agreements between energy companies and tribes. It also provides for Tribal Energy Resource Agreements which would transfer the authority to issue Rights-of-Ways from the Secretary to the Tribe. TERA regulations have been promised for this summer and funding for tribes to begin TERA planning was recently announced with grant proposals closing on August 6.

TERA promotes “integration of energy resources” defined in 25 U.S.C. 3501(5) as “any project or activity that promotes the location and operation of a facility (including pipeline, gathering system, transportation system or facility, or electric transmission or distribution facility) on or near Indian land to process, refine, generate electricity from, or otherwise develop energy resources on, Indian land.”

Even without TERA, tribes can use alternatives to the 1948 Right of Way act to grant legal access to energy companies and utilities seeking to use tribal land and cross tribal reservations. Companies should expect tribes to begin discussing licenses, leases, use agreements, business agreements, and franchises as alternatives to renewing right of ways.

See also Indian Mineral Development Act Agreement, 25 U.S.C. 2102(a), with tribe for the “development of a mineral resource in which the tribe owns a beneficial or restricted interest, or the sale or other disposition of the production or products of a mineral resource in which the tribe owns a beneficial or restricted interest.”

Utility Authorities will likely be at the table when an energy or utility company comes to meet with the Tribe to discuss the right-of-way renewal. As one tribal utility authority General Manager noted recently, the people living on the lands that the companies are using often don't have access to the same services as the communities at the end of the line. Tribal Utility Authorities will try to change this, and will look to expiring rights-of-ways as opportunities for change.

# Opportunities with Renewable Energy

Energy security experts often decry the centralized grid system of the United States, and conservationists bemoan the country's reliance on fossil fuel, imported fuel and carbon emitting fuel. Tribal lands, off the grid or at the end of the grid, with vast amounts of sunlight, some windy areas, and biomass potential, offer an enticing opportunity for alternative energy development.

It is estimated that renewable energy resources are potentially available for 50% of the on-reservation Indian population, with 52 of the 61 reservations having good potential for developing biomass energy stations.

Recommend reviewing data available from Sandia National Labs, Sandra K. Begay Campbell; Department of Interior Indian Energy Department, Department of Energy.

Tribes generally NOT interested in nuclear energy as a form of clean energy. Navajo Ban, controversy around Senate Memorial introduced by Senator Ulibarri from Grants supporting new uranium mining.

Business agreements that do not trigger NEPA may provide for fast track approval for alternative energy development on tribal lands.

# Organizational Opportunities

## Section 17 Corporation

The Best Structure for organizing a for profit business of an Indian Tribe.

The IRS in Rev. Ruling 94-16 ruled that section 17 corporations were tax exempt for both on-reservation and off-reservation activity.

IRS also stated that it had not yet determined whether a tribally chartered business was tax exempt.

If tribal utility will engage in any business activity that will generate profit, use Section 17.

All amendments must be approved through BIA – make charter flexible and broad enough to cover future growth.

Section 17 can be much more entrepreneurial, than Tribe waiving sovereign immunity on a case by case basis, and not putting any tribal assets at risk, serving as a joint venture partnership.

As the joint venture partner, Section 17 Tribal Utility can:

- Facilitate access to tribal infrastructure.
- Serve as liaison with tribal community and leadership.
- Serve as business partner to acquire legal right to cross or use reservation lands.
- Provide certain tax advantages.
- Qualify for federal programs geared to small or Native owned businesses.

# FUNDING /GRANT OPPORTUNITIES



Agencies will allow applicants for Federal Grants to apply for and ultimately manage grant funds online through a common web site, simplifying grants management and eliminating redundancies.



Environmental Protection Agency  
Tribal Grants



Department of the Interior  
Indian Affairs Office of Indian Energy and Economic Development (IEED)



The NMFA assists qualified governmental entities in the financing of capital equipment and infrastructure projects at any stage of completion – from pre-planning through construction – by providing low-cost funds and technical assistance.



U.S. Department of Energy

**Office of Energy Efficiency and Renewable Energy**

Bringing you a prosperous future where energy is clean, abundant, reliable, and affordable

The Tribal Energy Program, under the Department of Energy's (DOE's) Office of Energy Efficiency and Renewable Energy, provides financial and technical assistance to tribes for feasibility studies and shares the cost of implementing sustainable renewable energy installations on tribal lands. This program promotes tribal energy self-sufficiency and fosters employment and economic development on America's tribal lands.