Energy Development in Indian Country

Insider tips for successful transactions

BY MICHAEL DROST

The various types of lands that are permanently set aside for use by Native Americans are rich with potential for energy development. They are estimated to hold 20 percent of the nation's extractable fossil fuels, and 10 percent of its renewable resources. Developing these lands can produce substantial dividends not only for companies who want to exploit previously untapped resources, but also for the hundreds of Native American tribes and surrounding communities that inhabit them. Still, developing energy resources on tribal lands is not a simple process, as the land can fall within three different jurisdictions.

Companies hoping to develop these lands need to navigate a complex web of conflicting interests and regulatory policies. Compounding this is a longstanding distrust resulting from hundreds of years of not-so-pleasant treatment of tribal communities and their lands by federal and state authorities, a history that has plagued relations between developers, tribes and regulators to this day.

To get an insider's look at projects being developed in Indian country and what it takes to create a successful business venture in these territories, I reached out to several speakers at the recent Tribal and Indian Country Energy Development conference in New Mexico. They shared their expertise and offered some tips for those wishing to create mutually beneficial collaborations between tribes and those working in the power industry.

Know What Indian Country Is

Before a company even thinks about developing an energy project on Indian land, they must first understand what it entails. Currently, there are four types of lands that are designated as tribal by the federal and state authorities:

1) Land supported by U.S. government and held under guardianship of the Bureau of Indian Affairs (BIA);

2) Allotted land that is subject to state and local taxation;

3) Restricted land status; land title is held by tribe or individual Indian person; and

4) State Indian reservations, which are lands held in trust by a state for an Indian tribe.

Each of these land types is subject to differing jurisdictions and processes. Sometimes tribal authorities are in charge of leasing while the federal government is in charge of environmental permits. Sometimes the state is in charge of the land, and sometimes all three jurisdictions need to be consulted before receiving a permit or obtaining financing. Knowing who you are supposed to deal with, how to engage them, and whose laws you are subject to are essential to getting a project off the ground.

According to John Lewis, Board Chairman, Gila River Indian Community Utility Authority, "There's a lot of unfamiliarity and perceived risk when working with tribes. Every tribe, by design, has their own government and process, and it's really up to the developer to figure out what their process is."

In addition to knowing which lands are subject to which rules, it is equally important to know the tribe to which the land belongs, inside and out.

"Developers who serve a tribal community need to know how a society works, and they need to design the project around that, not the other way around," said Tara Kaushik, an attorney with Holland & Knight. "Consensus-based communities, like the Navajo, need time to process a project and make sure it's going to work for their people. This includes addressing the opportunities for job growth and revenue potential for the community."

Further, there is a historical component to relations with tribal communities that developers must be familiar with. Relations between tribes and governments are complicated by several generations' worth of hostility, and this spills over into relations between tribes and private companies. Kaushik added, "There is a history here and it isn't a great one. You need to be able to respect the sovereignty of the tribal nations that you're dealing with, and work to educate the legislators and council members so everyone understands the benefits of an offgrid project."

Make Sure Your Systems Work

Some development ideas look great on paper. The proposal is comprehensive, the financing is secured, and the community is excited for the economic opportunities the project may bring. When put into practice, however, it is not uncommon for a project to suddenly get derailed because of a defect in the technology or because something impacted the project in a way that was unforeseen by the developers.

Renewable energy systems can become defective through improper installation. In one example, a school in Navajo country was forced to pay $5,000 a month to run a propane generator because the solar and wind turbine systems the school installed failed to perform as planned. This included the batteries, which were on the verge of failing because of insufficient charging performance. After receiving a Native American Preference grant, the school was eventually able to hire a contractor to refit the system.

Kaushik describes a similar experience after touring some lead acid-battery storage systems that were installed for a Southwestern tribe, noticing how many had not been functioning for years.

"In that scenario, they had acid-battery storage. Folks came in, they got federal funding, the tribe installed a variety of lead acid-battery storage systems paired with wind and solar, and now a lot of them are dead or haven't functioned in years," said Kaushik. "Whether it's because of the weather or the way they are being used or the quality of the product itself, the homeowners and communities using them have no other option. So there it is…you know you have batteries deteriorating on your lands, and how is that good for anybody? You have to make sure you have a product that works."

Aim Small, Miss Small

The microgrid industry in particular has a lot to gain by looking at tribal communities. For starters, most tribal communities are rural, sparsely populated areas in desperate need of a steady supply of energy. This makes them ripe for smaller scale distributed generation projects.

"For the near term, unless something changes with the tax code or regulations, there's going to be a lot more small-scale energy projects," said Lewis. "That's a function of the regulatory framework that exists and where the need is."

In addition, smaller projects have the added benefit of getting a tribal community to buy in to a low-risk, high-reward concept. Smaller projects use less land, and therefore fewer resources, reducing the risk to the tribe while also giving it a taste of what distributed energy can provide. This can allow tribes to become more familiar with energy project development, which can be a real benefit if they decide to move on to larger energy needs.

"If the tribe gets a small 5 megawatt solar project executed, for example, and later has the need for a commercial or larger scale utility project, they are prepared to move forward with those bigger projects," said Lewis.

Kaushik agreed, saying that the opportunity for microgrids and offgrid projects provide hope and opportunities for the people who live in tribal communities. "This is a new way for folks to get some lights on without having to go through an expensive utility project or the costly means of extending the power grid to these remote homes," she said. ✪

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Michael Drost is the Managing Editor of Energize Weekly, a publication of EUCI. Visit http://euci.com/energize/ or email mdrost@euci.com.