DOCKETED	
Docket Number:	25-OIIP-01
Project Title:	Informational Proceeding on Tribal Energy Sovereignty and Tribal Affairs
TN #:	273486
Document Title:	Kelsey Freeman Comments - Background Resource – Understanding Federal Indian Law for Renewable Energy (Stanford University, 2025)
Description:	N/A
Filer:	System
Organization:	Kelsey Freeman
Submitter Role:	Public
Submission Date:	11/9/2026 5:12:14 PM
Docketed Date:	11/10/2026

Comment Received From: Kelsey Freeman
Submitted On: 11/9/2026
Docket Number: 25-OIIP-01

Background Resource â€“ Understanding Federal Indian Law for Renewable Energy (Stanford University, 2025)

Dear Commissioners and Staff,

I am submitting my report, Understanding Federal Indian Law for Renewable Energy: A Guide for Clean Energy Stakeholders to Build Successful Partnerships with Tribes (Stanford University, 2025), as a background resource for this proceeding.

The report is an introductory guide for developers and other non-tribal partners. It covers tribal sovereignty and land status, sovereign immunity, HEARTH Act leasing, TERAs and TEDOs, double taxation, rights-of-way, and how tribes, utilities and state regulation interact. It also includes four hypothetical project structures.

The report covers federal law generally, not California law. It also focuses on federally recognized tribes. It is meant as a starting point and is not legal advice. I hope it is useful to staff and participants.

Respectfully,
Kelsey Freeman

Additional submitted attachment is included below.

Understanding Federal Indian Law for Renewable Energy

October 2025

A Guide for Clean Energy Stakeholders to Build Successful Partnerships with Tribes

Kelsey Freeman

Stanford University

MS in Environment and Resources

MA in International Policy

Stanford | Doerr
School of Sustainability

Emmett Interdisciplinary Program
in Environment and Resources

Contents

Introduction

Considerations for Tribal Engagement
General Considerations for Tribal Engagement
Potential Starting Questions for the Tribe
Potential Strategies for Navigating Complications

Section I: Federal Indian Law Background
Overview
Land Status and Ownership
Regulatory Authority

Section II: Case Studies to Understand Complexities in Practice
Third Party Owned Projects
Tribally Owned Projects

Section III: Additional Considerations
Transmission, Interconnection and Rights-of-way
Tribes' Rights Regarding Off Reservation Projects
Legal Status in Alaska and Hawai'i
Tribal Law and Systems of Governance

Conclusion

Stanford | Doerr
School of Sustainability

Emmett Interdisciplinary Program
in Environment and Resources

Introduction

A New Era for Energy in Indian Country?

As the clean energy transition continues across much of the United States, many Native American tribes are harnessing their sovereignty to transition to renewables as well. The Infrastructure Investment and Jobs Act (IIJA) and the Inflation Reduction Act (IRA) included unprecedented funding for tribal renewable energy and extended the benefits of tax credits to tribes.[1] Even as many of these efforts are rolled back under the Trump Administration, tribally owned businesses, philanthropies, and many states are continuing to support this work. For many tribes, clean energy could offer the opportunity to enhance energy resiliency, drive economic development, and ultimately support self-determination and tribal sovereignty. However, even substantial funding will not guarantee projects that substantially benefit tribes. There is often a lack of capacity to apply for funding, a need for technical expertise, workforce development gaps, and a long history of energy extraction on tribal lands that leaves many Native people understandably wondering if they will actually benefit from clean energy. Such barriers highlight the importance of strong partnerships that support tribes' priorities and uphold their sovereignty.

Yet as the incentives for renewables on tribal lands garner significant interest, there is not always a proportionate understanding of federal Indian law and the unique jurisdictional interactions involving Indian tribes, tribal lands, and potential energy development partners. Interviews with tribal leaders and practitioners reveal that when non-tribal entities do not understand potential complications under federal Indian law, they may either be reluctant to pursue projects in partnership with a tribe or assume the process to operate as it might on non-tribal lands. Neither is likely to build strong partnerships for successful projects.

This report seeks to help address this knowledge gap by serving as an introductory guide for non-tribal renewable entities interested in partnering with tribes. It highlights some fundamental tenets of federal Indian law as they pertain to renewable energy development and builds on the work of other issue briefs[2] by further engaging potential complications that could arise under various circumstances. It certainly does not attempt to summarize these issues for all tribes. There are 574 federally recognized tribes alone, representing vast cultural, geographic, political and legal diversity. Each have their own systems of government and laws. Because it is focused on federal Indian law, this brief does not apply in the same ways to state-recognized tribes or unrecognized tribes, who face their own unique circumstances. It also does not necessarily apply to the unique legal circumstances pertaining to Alaska Native villages or Native Hawaiian communities. Even so, this report seeks to provide non-tribal entities a baseline of knowledge of the federal system pertaining to tribes. It is intended to be a practical starting point for developers, green banks and other non-tribal energy entities to have better partnerships, ask the right questions, and proactively engage complications. However, because federal Indian law and the jurisdictional intersection of federal, state, and each tribe's laws is incredibly complex, anyone wishing to partner with one or more Indian tribes should seek out experts in Tribal affairs early in their process.

[1] The White House. "GUIDEBOOK TO THE INFLATION REDUCTION ACT'S CLEAN ENERGY AND CLIMATE INVESTMENTS IN INDIAN COUNTRY," April 2023. https://www.whitehouse.gov/wp-content/uploads/2023/04/Inflation-Reduction-Act-Tribal-Guidebook.pdf.

[2] Laura Beshilas et al., *Addressing Regulatory Challenges to Tribal Solar Deployment*, (2023), https://www.osti.gov/biblio/1968249.



To understand both the opportunities in renewable energy and its potential downfalls, it is crucial to recognize the roots of energy inequities that exist across many reservations. First, many tribal citizens pay disproportionately high energy costs. This is often due to the relative isolation of many reservations from the power grids that serve population centers, leaving residents dependent on expensive propane heating and trucked in fuels.[3] Such isolation stems from a history of colonization that dispossessed Native nations of their lands, but it was later exacerbated by explicit federal policy choices. For instance, most 20th Century plans to expand transmission infrastructure to rural areas, such as the Rural Electrification Act of 1936, excluded tribes.[4] As a result, across Indian Country today, utilities are often the largest expense of individuals' monthly budgets.[5] Citizens of the Navajo Nation, for instance, pay between $150 and $700 per month for heating and to power generators, which takes up a sizeable percentage of incomes.[6] Many households lack electricity altogether. Approximately 14% of households on reservations have no electricity access, compared to 1.4% of overall U.S. households.[7] On the Pine Ridge Reservation in South Dakota, that number is as high as 40%.[8] In addition to high individual costs, utility costs can also strain the sometimes-limited budgets of tribal governments, who operate without a traditional tax base.[9] By either reducing individual and government energy costs or by generating revenue, renewables could thus have outsized impacts.

[3] "With renewables, Native communities chart a path to energy sovereignty," Canary Media (2022), https://www.canarymedia.com/articles/energy-equity/power-by-the-people-native-energy-sovereignty

[4] Joseph Lee, *Living in the dark: Native reservations struggle with power shortages in pandemic*, The Guardian, Aug. 12, 2020, https://www.theguardian.com/environment/2020/aug/12/native-americans-energy-inequality-electricity

[5] Margaret Schaff, *REGULATION OF ELECTRIC UTILITIES ON INDIAN RESERVATIONS: TRIBAL GOVERNMENTS' OVERSIGHT OF RENEWABLE ENERGY DEVELOPMENT AND UTILITY PROVIDERS AND AUTHORITY TO CREATE TRIBAL UTILITIES*, 41 Energy Law Journal 261 (2020).

[6] With renewables, Native communities chart a path to energy sovereignty, Canary Media (2022), https://www.canarymedia.com/articles/energy-equity/power-by-the-people-native-energy-sovereignty.

[7] Id.

[8] Id.

[9] Joseph Lee, *Living in the dark: Native reservations struggle with power shortages in pandemic*, The Guardian, Aug. 12, 2020, https://www.theguardian.com/environment/2020/aug/12/native-americans-energy-inequality-electricity

The renewable energy potential on tribal lands is also significant. According to a 2018 report from the National Renewable Energy Laboratory (NREL), 5.4% of total U.S. solar potential and 7.8% of total wind potential are on tribal lands.[10] These numbers increase to 11.5% and 16% respectively when including land within 10 miles of reservation borders.[11] This potential alone could satisfy a sizeable amount of overall U.S. energy needs.[12] According to U.S. Department of Energy estimates, if developed to capacity, wind power on tribal lands alone could fulfill 32% of total U.S. electricity demand.[13]

Yet such incentives for development exist in the context of a long history of energy extraction on tribal lands that has flagrantly disregarded sovereignty, sometimes with little economic benefit for the tribes.[14] Both historically and today, the majority of energy projects occur when non-tribal entities lease tribal lands.[15] Prior to the 21st century, third party developers did not need permission from the tribe itself to extract fossil fuels if they had first received approval from the Department of the Interior.[16] Often these rights of way were granted for 50 years with minimal payment to tribes, tribal members, or allotment owners.[17]

Even with subsequent legislative changes[18] and some efforts to prevent such extractive patterns today, many fear that renewable energy incentives will produce a green colonialism that disregards tribal sovereignty. Indeed, many tribes have fought renewable energy developments on or near their lands when they adversely impact the environment and cultural sites,[19] as well as the extraction of critical minerals in culturally significant areas.[20] Thus, nothing in this report is meant to suggest that renewables are inherently the right solution or priority for tribes. That is a sovereign decision for each tribe. Rather, this report intends to serve as a resource and emphasize that the energy transition cannot simultaneously come at the expense of tribes or give inadequate weight to tribal sovereignty.

To uphold tribal sovereignty, third parties must thoroughly understand it and center the Tribe at each stage. They must also implement what they learn with intention and humility. This report can serve as a starting point, but engaging the right experts is crucial to avoid assuming what is needed. Along these lines, this report begins with a reference list for general considerations in tribal engagement. It includes 1) considerations for tribal engagement; 2) potential questions to ask a partner tribe; and 3) potential strategies

---

[10] Anelia R. Milbrandt, Donna M. Heimiller & Paul D. Schwabe, *Techno-Economic Renewable Energy Potential on Tribal Lands*, (2018), https://www.osti.gov/biblio/1459502

[11] Id.

[12] Id.

[13] Sarah A. Husk, *Scattered to the Winds?: Strengthening the National Historic Preservation Act's Tribal Consultation Mandate to Protect Native American Sacred Sites in the Renewable Energy Development Era*, 34 Tul. Env't L.J. 273 (2021).

[14] *See e.g.* Ambler, M. Breaking the Iron Bonds: Indian Control of Energy Development (Univ. Press of Kansas, 1990); Lawson, M. L. Dammed Indians Revisited: The Continuing History of the Pick-Sloan Plan and the Missouri River Sioux (SDHS Press, 2009); Curley, A. Carbon Sovereignty: Coal, Development, and Energy Transition in the Navajo Nation (Univ. of Arizona Press, 2023); Ben Reiter, *A New TERA: Why It's Time to Revisit Tribal Energy Resource Agreements*, 10 LSU Journal of Energy Law and Resources (2022), *at* 342.

[15] Elizabeth Kronk Warner & Heather Tanana, *Indian Country Post-McGirt: Implications for Traditional Energy Development and beyond Symposium*, 45 HARV. ENVTL. L. REV. 249 (2021).

[16] Miranda Willson, *Climate law boost for renewables hits barrier on tribal lands*, E&E News (2022), https://www.eenews.net/articles/climate-law-boost-for-renewables-hits-barrier-on-tribal-lands/

[17] Id.

[18] Elizabeth Kronk Warner & Heather Tanana, Indian Country Post-McGirt: Implications for Traditional Energy Development and beyond Symposium, 45 HARV . ENVTL . L. REV . 249 (2021).

[19] *See* Jeanette Wolfley, *Embracing Engagement: The Challenges and Opportunities for the Energy Industry and Tribal Nations on Projects Affecting Tribal Rights and Off-Reservation Lands*, 19 Vermont Journal of Environmental Law 115 (2018).

[20] *See e.g. Scott Sonner, Judge Rules against Tribes in Fight over Nevada Lithium Mine They Say Is near Sacred Massacre Site | AP News, Nov. 17, 2023, https://apnews.com/article/lithium-mine-tribes-climate-energy-lawsuit-nevada-7a65eee7d78d93a1e44e3f8e10445143; Kaili Berg, Apache Stronghold Takes Oak Flat Fight to Supreme Court, Native News Online (2024), https://nativenewsonline.net/environment/apache-stronghold-takes-oak-flat-fight-to-supreme-court*

for navigating complications, including many lessons learned from tribes. Section I then delves into background on some fundamental tenets of federal Indian law relevant to energy development. It describes land status and ownership across Indian Country, since the types of land that a project crosses affect approval and regulatory processes. The section concludes with a brief explanation of civil jurisdiction in Indian Country in order to highlight how land status and citizenship affect regulatory oversight. Section II provides a series of hypothetical case studies. Based off common occurrences, these case studies provide background on required approvals and regulatory oversight based on the project's ownership, size and the status of the land it crosses. In the discussion, Section II highlights issues such as federal permitting requirements, exceptions to federal permitting requirements, land fractionation issues, double taxation and mechanisms for tribal ownership, as well as common complications. These case studies include two third-party owned and two tribally owned projects. Section III discusses additional areas of consideration, including transmission, interconnection and rights of ways; tribes' rights regarding projects off-reservation; legal systems in Alaska and Hawaii; and tribal law and governance structures.



Reference List: Overall Considerations for Tribal Engagement

These lists are by no means exhaustive and instead are intended as a starting point to help build respectful, reciprocal relationships.

General Considerations for Tribal Engagement:

- Prioritize a baseline level of education regarding Native affairs before asking Tribal members to provide background.
    - On the macro level, read about Native history, federal Indian law, and the how the legacies of past policies affect the present-day.
    - On the local level, read about each Tribe you will work with, including tribes currently located near a project and those with historical ties to the area. Take the time to understand these tribes' histories, governance structures, and current events. If the tribes have a newspaper, radio station, or newsletter, subscribe. Read articles from Native outlets covering the tribes.
    - Staying informed helps avoid situations where tribal members must spend unnecessary time and energy giving commonly available context. Rather, non-tribal partners can develop context for what the Tribe *might* be facing, without assuming what their reality is.
    - Humbly ask questions but recognize that there may be topics the Tribe does not what to discuss or share.

- Recognize legacies from centuries of extractive colonialism, non-Native institutions proclaiming they know what is best, and energy exploitation.
    - Explore opportunities for tribal ownership, co-ownership, or co-management.
    - Understand why there might be distrust. Don't expect or assume that people will automatically want to engage. Learn not to take it personally.
    - Develop a lens for recognizing when and how historically oppressive patterns repeat themselves. Develop strategies for recognizing when your entity might be perpetuating those same patterns.
    - Be willing to put aside your organization's agenda to truly understand the goals of the Tribe. Listen more than you speak.
    - Don't assume that renewables are inherently the path forward for tribes. Listen to the Tribe's priorities and whether it fits within those.
    - Demonstrate a genuine long-term commitment to the community beyond the duration of the project, including through workforce development and other efforts.

- Treat tribes as the sovereign nations that they are.
    - Begin by asking how best to engage with the Tribe. If the Tribe has a formal system for meeting requests, use it. In general, begin with humble outreach to the elected leadership of the tribe unless they have delegated their authority.
    - When convening with tribal leadership, make sure those who have decision-making authority from your organization are present to respect the time that tribal elected officials are setting aside.
    - Respect the hierarchy of the tribe. Tribal elected officials are national leaders and therefore will almost always outrank you. Except for minor introductory remarks, tribal elected

officials should be offered to speak first. In general, direct any questions you may have to leadership first, rather than tribal staff.
    - Be willing to adapt your entity's processes, meetings, timelines and norms to the Tribe's, as they are the sovereign government. Plan meetings that are convenient and accessible for tribal leadership, staff and citizens.
    - Establish clear lines of communication early on. Establish channels for on-going feedback.
    - Use proper greetings and titles. If appropriate, consider small gifts to honor people's time.
    - If you receive an invitation to attend or present, prioritize it. Avoid perpetuating a pattern where the Tribe extends invitations that are only accepted when there is a tangible benefit to your organization.
    - Recognize that tribal governments, like many governments, may operate slowly. Tribes may lack resources and staff capacity. Be willing to adapt to these timelines.

- Engage the complications upfront
    - Resist the urge to ignore the barriers. Have frank, upfront conversations. Do your best to find answers when it comes to complications. Focus on how your entity can help address the barriers.
    - Be willing to wrestle with the nuances and complications. Be willing to bring in other entities that can offer relevant expertise or resources.
    - Respect the Tribes' right to control their data. When confidentially cannot be guaranteed, be upfront about it. Do not use or share information about a tribe without their explicit permission.

- Build relationships based on mutual exchange.
    - Ask to meet when you have something to offer and be clear about the purpose of the meeting.
    - Be clear and specific about the benefits to the Tribe and ensure those benefits are actualized. Solidify benefits in a written, binding document whenever possible.
    - Reflect on what your entity brings to the partnership in terms of expertise, resources, capacity, or opportunities for political participation. Ensure you are contributing, not just asking for engagement, knowledge or insight from the Tribe.
    - If you are invited (or if they are public events), show up to community events outside the bounds of what may be considered typical business space. Prioritize building relationships.
    - Reach out to tribal members already working on or interested in similar areas.

- Recognize that each tribe is unique.
    - Do not assume that your entity's engagement with one tribe represents the views of all tribes or that one tribal member represents the general views of all the Tribe's members.

Potential Strategies for Navigating Complications

- Take the time to understand the Tribe's laws and governance structure and comply with all obligations. Work to understand their administrative processes and follow them.
- Hire a tribal liaison with expertise in the Tribe's own laws to help navigate the Tribe's additional requirements. Engage attorneys knowledgeable in Native affairs. Anticipate that navigating the Tribe's legal processes will take additional time and build this into the budget.

- During meetings, take notes and share with tribal staff and leadership attending the meeting to ensure you are on the same page.
- Explore and support various forms of tribal ownership. If a project is third party owned, is there potential for partial tribal ownership or ownership down the line? Explore opportunities for co-management if desired.
- Do not require a waiver of sovereign immunity in contracts, partnership agreements, or other agreements. Where not possible, limit waivers of sovereign immunity to very narrow and specific issues.
- If needed, allow sufficient time for BIA permitting processes and maintain clear and open communication with the Tribe regarding the timeline.
- Discuss whether the Tribe has considered pursuing lease authorization under the HEARTH Act or through a Tribal Energy Development Organization (TEDO), which give the Tribe authorization to manage energy leases and rights-of-way. If there is interest but barriers remain, potentially work with tribal partner to connect with the right resources.
- Plan ahead regarding transmission capacity, especially in rural areas. If insufficient, be clear with the Tribe on what developing transmission infrastructure would entail. Engage with the utility early on.
- Proactively work with Tribe, tribal members, and entities such as the Tribal Historic Preservation Office, to ensure proper siting of project to avoid damage or impediments to sacred sites or sensitive environmental zones.
- Work with tribal partners and state representatives on issues such as taxation. If the Tribe desires, support the negotiation of a tax agreement with the state.
- Include robust community benefit plans/tribal benefit plans or other enforceable means of ensuring that the Tribe and individual tribal members benefit from leasing.
- Plan for unexpected costs and maintain clear communication with the Tribe about what costs may arise. Create a fair and beneficial plan for sharing costs.
- Look for gap financing for unanticipated costs, such as interconnection fees. Develop back-up financing plans should unexpected challenges arise.
- Prioritize hiring tribal members to ensure benefits, increase the sustainability of the project, and support workforce development goals. Understand Tribal Employment Rights Ordinances (TERO, discussed below) and other forms of tribal preference.
- Support capacity-building initiatives throughout the process.

Potential Starting Questions

These questions may be explored through preparatory research or in initial conversations with the Tribe.

General:

- What are the Tribe's energy-related goals? Ideally, what types of projects would they like to see?
- What role would the Tribe like to play?
- Is the Tribe familiar with renewable energy projects and how they are structured compared to other infrastructure or conventional energy projects?

Economic Benefits:

- What are the economic goals of the project? What specific economic benefits does the Tribe hope to gain from the project? Are they interested in ownership?

- How can the project align with existing community development goals or programs?
- What measures can be put in place to maintain job opportunities and revenue streams after the project is completed?
- Does the Tribe have any existing tax agreements with the state?

Tribal Governance:

- Is the Tribe federally recognized, state recognized or unrecognized?
- How is the Tribe's governing structure organized? Does it have a tribal council, chairperson or tribal court? How are leaders elected and how long are their terms?
- How are decisions made within the Tribe regarding economic development projects?
- How does the Tribe engage its members in the project development process?
- What are specific protocols or meetings (e.g., Tribal Council meetings) we should be aware of for presenting project proposals?
- How might we find out about the Tribe's land use policies and regulations?
- What is the typical process for project approval, and what documentation or proposals are required?
- What legal agreements or contracts does the Tribe require for this partnership?
- Does the Tribe have its own court system? What additional mechanisms might the Tribe have in place for conflict resolution, particularly in relation to development projects?
- Does the Tribe have the ability or willingness to enter into a limited waiver of sovereign immunity (discussed below) if necessary?

Land Status:

- What are the types of lands represented?
- If they are willing to discuss, what is the Tribe's traditional territory? Are there any sacred or sensitive areas that should be avoided? Are there any less-impact areas for potential projects?
- What is the extent of checkerboarding across reservation lands?
- If the project involves land owned by individual tribal members or non-tribal entities, what is the best process for negotiating agreements with these parties?

Permitting:

- What is the Tribe's relationship with its regional Bureau of Indian Affairs office if any ?
- Does the Tribe have a Tribal Energy Resource Agreement (TERA), a Tribal Energy Development Organization (TEDO) or authorization under the HEARTH Act that allow would allow them to manage energy leases? (discussed below)
- Has the Tribe carried out a contract under the Indian Self-Determination and Education Assistance Act?

Education and Workforce Development:

- Does the Tribe have a Tribal Employments Rights Ordinance and associated office?
- What workforce development and training needs does the Tribe have? How can the project support those goals?
- What are the best ways to advertise open positions such that they reach tribal members?

Section I: Federal Indian Law Background

Overview

Federal Indian law is the law made by U.S. courts, the President and Congress that shapes the relationship between tribes, states and the federal government. It sets the rules for what each of these sovereigns can and cannot do regarding tribes, tribal members, and associated lands. It is distinct from tribal law, which is the law that individual tribes set forth to govern themselves as sovereign nations. This brief does not cover tribal law, as it is unique for each tribe. Federal Indian law, however, sets the boundaries for what tribes can and cannot do.[21]

The foundation of federal Indian law rests on the fact that tribes are sovereign nations, with that sovereignty predating that of the United States, and they thus have a government-to-government relationship with the United States.[22] Tribal sovereignty is not granted by the federal government but rather is inherent. This is distinct from states, which derive their sovereignty from the 10th Amendment. Federal Indian law is a field of retained powers, meaning that tribes hold all powers of a sovereign nation that have not been taken away through court decisions and Acts of Congress.[23] Even with this inherent sovereignty, the federal government still has the power to define the bounds of how tribes can govern themselves.

A series of three key court rulings in the 1820s and 1830s, known as the Marshall Trilogy, set this foundation that endures today. These rulings defined tribes as "domestic dependent nations" and left them with the legal rights to "occupy" their own lands. [24] Exclusive title to most lands remains with the United States.[25] The decisions also began to establish the doctrine of trust responsibility—the idea that this federal authority over tribes as domestic dependent nations also with comes responsibility.[26] This trust responsibility has evolved over time, and although its legal authority has narrowed in the courts, it remains a key aspect of tribal engagement across federal political branches.[27] Despite the limitations of this trust relationship, tribes proudly retain their sovereignty today.

In addition to delineating the bounds of what powers tribes retain, federal Indian law also defines the relationship between federal, state and tribal power. It is outside the scope of this report to explore the evolution of federal plenary power over tribes and the growing role of states. In general, however, authority over tribes rests in the federal government.[28] As such, many federal laws apply to tribes, particularly when tribes are explicitly mentioned in the statute.[29] State laws generally do not apply to tribes unless Congress authorizes otherwise.[30] Questions around jurisdiction and the coordination of services, as discussed below, however, have complicated the lines between state and tribal purview.

---

[21] Nell Newton, Felix Cohen & Robert Anderson, *Cohen's Handbook of Federal Indian Law* (2012), https://scholarship.law.nd.edu/law_books/76.
[22] Id.
[23] Id.
[24] Cherokee Nation v. Georgia, 30 U.S. 5 Pet. 1 (1831)
[25] Kronk Warner & Tanana, supra note 16.
[26] Newton, Cohen & Anderson, supra note 22.
[27] Kevin K. Washburn, *What the Future Holds: The Changing Landscape of Federal Indian Policy*, 130 Harvard Law Review (2017), https://papers.ssrn.com/abstract=2896916
[28] Newton, Cohen & Anderson, supra note 22.
[29] Id.
[30] Id.

Box 1: Federal Recognition

Federal recognition of a tribe means that United States federal government acknowledges the tribe's political status as a government.[31] Tribes' unique government-to-government relationship with the federal government, and the powers, protections, and responsibilities described in this report apply primarily to tribes that are federally recognized.[32] Federally recognized tribes are also eligible for funding and services from the Bureau of Indian Affairs.[33] Many additional federal programs and grants are only available to federally recognized tribes.

In the United States, approximately 400 tribes lack federal recognition, according to a 2012 Government Accountability Office report.[34] In California alone, eighty-one tribes have sought recognition since 1978, with just one receiving it.[35] While tribes can gain recognition through Acts of Congress or court decisions, unrecognized tribes most commonly do so through an administrative process established in 1978[36] and revamped under the Obama Administration in 2015.[37] The procedure requires that the community has been identified as an American Indian entity on a substantially continuous basis since 1900, is a distinct community, has maintained authority over its members since 1900, has a governing document, that the members are descendants of a historical Indian Tribe, that it is not primarily composed of those who are members of another recognized Tribe, and that Congress has not terminated the status of the Tribe.[38]

The last requirement has been of particular difficulty for some tribes. In the 1950s and 1960s, the federal government nullified its special trust relationship with 109 tribes, bands and rancherias[39] in what is known as the Termination Era, cutting off federal funding and decertifying their status as tribes under the rhetoric of "emancipating" them from what was then seen as the burden of federal dependency.[40] The results were devastating for terminated tribes, particularly those unable to gain their status back through federal recognition. Proving the continuity of a tribe is also very difficult given the long history of policies aimed explicitly at destroying and assimilating tribes—from boarding schools to forced relocation, to a myriad of other examples. Today, the same government that intended to eliminate tribes now has the authority to decide if they still exist. Overall, the administrative process for attaining federal recognition is complex and it can take decades for applications to be decided, with no timelines governing the federal government's process.[41] For the purposes of this report, it is important for partners to understand that state recognized and unrecognized tribes do not have the same legal status or access to the same funding as federally recognized tribes.

[31] National Congress of American Indians, Tribal Nations and the United States: An Introduction (2015), https://archive.ncai.org/resources/ncai_publications/tribal-nations-and-the-united-states-an-introduction.
[32] U.S. Department of the Interior, *What Is a Federally Recognized Tribe? | Indian Affairs*, https://www.bia.gov/faqs/what-federally-recognized-tribe
[33] Id
[34] U. S. GOVERNMENT ACCOUNTABILITY OFFICE, INDIAN ISSUES: FEDERAL FUNDING FOR NON-FEDERALLY RECOGNIZED TRIBES (2012), https://www.gao.gov/products/gao-12-348.
[35] Olivia M. Chilcote, *Why so Many California Indians Lack the Federal Recognition given to Other Native Americans*, LOS ANGELES TIMES, Jun. 15, 2024, https://www.latimes.com/opinion/story/2024-06-15/california-indian-tribe-native-american-us-recognition-san-luis-rey.
[36] *Office of Federal Acknowledgment | Indian Affairs*, https://www.bia.gov/as-ia/ofa
[37] *Department of the Interior Announces Final Federal Recognition Process to Acknowledge Indian Tribes | U.S. Department of the Interior*, (Jun. 29, 2015), https://www.doi.gov/pressreleases/department-interior-announces-final-federal-recognition-process-acknowledge-indian-tribes.
[38] 25 CFR Part 83
[39] Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 AMERICAN INDIAN LAW REVIEW 139 (1977).
[40] *Bureau of Indian Affairs Records: Termination*, NATIONAL ARCHIVES (Mar. 16, 2023), https://www.archives.gov/research/native-americans/bia/termination.
[41] National Congress of American Indians, Tribal Nations and the United States: An Introduction (2015), https://archive.ncai.org/resources/ncai_publications/tribal-nations-and-the-united-states-an-introduction at 23.

Land Status and Ownership

1. Defining Indian Country

With an understanding of sovereignty, it is also key to understand over which lands tribes exert that sovereignty. "Indian country" is the legal term that impacts regulatory authority, defines eligibility for grant programs, delineates criminal and civil jurisdiction, and affects the ownership of natural resources. Federal, state and tribal governments rely on the following statutory definition of Indian country to determine civil and criminal authority.[42]

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,
>
> (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and
>
> (c) all Indian allotments, the Indian titles to which have not extinguished.[43]

In other words, under the first prong, Indian country consists of all lands within a reservation, which are the federally defined lands reserved for a tribe by treaty, federal statute, executive order or administrative actions as permanent homelands for the Tribe.[44] While the Tribe generally exercises sovereignty over these lands (within the bounds of federal limitations), they do not necessarily own all the lands within reservation boundaries. In other words, a reservation boundary is a jurisdictional, not a property line.[45] Therefore when working within a reservation, it is essential for third parties to consider both who owns the land and who governs the land, as they are not one in the same.[46] Lands within the reservation can be owned by Native people, non-Natives or the Tribe. Additionally, a large portion of the land typically thought of as owned by the Tribe is technically owned by the federal government and held in trust for the Tribe to use and manage.[47] This land is known as trust land and is discussed further below. The second prong of this definition highlights that dependent Indian communities, which are communities with federally set-aside land and under federal superintendence also fall into the legal definition of Indian country.[48] The last category includes allotment lands, even those outside of reservation boundaries, as Indian country. Allotment and its subsequent impacts are discussed in the following subsection.

---

[42] 1. What is Indian Country? | Center for Indian Country Development, https://www.minneapolisfed.org/indiancountry/What-is-Indian-Country
[43] 18 U.S.C. § 1151.
[44] Newton, Cohen & Anderson, supra note 22.
[45] Id.
[46] Id.
[47] Id.
[48] Id.

2. *The Impacts of Allotment*

Because the Allotment Era had such a profound impact on land status across Indian country, it is essential that non-tribal entities understand how this federal policy impacted their tribal partner. Not every tribe was subjected to allotment.[49] However, for those who were, the consequences have been devastating, parceling out tribal lands, prompting significant land loss, and further complicating jurisdiction and ownership.

The Allotment Era began with the Dawes Act in 1887, which took tribal lands held in common and divided them up into 160-acre parcels to be held by individual tribal members.[50] The purpose of the bill was to break up communal ownership and compel Native peoples to assimilate by farming individualized plot of land. Its purpose was also to seize remaining lands. Tracts that were not divided among Native families were sold off to white settlers, creating a checker-board pattern of land ownership on many reservations.[51] Between 1887 and 1934, over 90 million acres of land were sold to white settlers, representing nearly two-thirds of all reservation lands.[52] On top of this land lost, many individual tribal members lost their allotment because under the original law, after a period of 25 years, allotment tracts could be owned in fee simple by the tribal member. The fee simple ownership structure subjected the lands to state property taxes, which were often profoundly unaffordable. Many tribal members thus lost their lands to tax liens and state seizure in the subsequent decades.[53]

In addition to devastating land loss, this system creates complications for land ownership today in two key ways. First, after individual plots of land were divided among tribal members during the allotment period, trust ownership in these plots have since been divided among heirs with each generation, with ownership growing exponentially. Five or six generations later, individual plots of land may have hundreds, or in some cases even thousands, of owners.[54] Income received through the leasing of fractionated lands can be so divided that owners may receive just a few cents for their share.[55] Such a system means that traditional land-leasing arrangements that span fractionated allotment lands may provide only marginal benefits to individual tribal members. Even in less extreme instances of fractionation, getting individual ownership approval across heirs for a renewable project may be exceedingly difficult.[56] Attaining ownership information from the Bureau of Indian Affairs (BIA) can also be difficult. In some cases, the BIA may not have processed the inheritance or probate of a deceased trust owner, causing additional delays.

Secondly, fractionated land tracts, paired with the checkerboard nature of land ownership on reservations creates jurisdictional challenges, which can make it difficult to pursue economic development or infrastructure projects. The 1934 Indian Reorganization Act attempted to regain some of the land lost under the allotment period, allowing the Secretary of the Interior to acquire lands for Indian use. Like much of Indian country, these lands are held in trust, meaning that the federal government holds the lands "for the benefit of a Native American individual or Tribe."[57] However, only approximately eight percent of lands have been reacquired in trust status since 1934, and many tribes have no land base at all.[58]

---

[49] Id.
[50] National Congress of American Indians, *Trust Land*, https://www.ncai.org/policy-issues/land-natural-resources/trust-land
[51] Kronk Warner & Tanana, supra note 16.
[52] National Congress of American Indians, *Trust Land*.
[53] Judith Royster, *The Legacy of Allotment*, 27 Arizona State Law Journal (1995), https://papers.ssrn.com/abstract=1091180
[54] U.S. Department of the Interior, *Fractionation*, Land Buy-Back Program for Tribal Nations (2019), https://www.doi.gov/buybackprogram/fractionation
[55] Id.
[56] Shoemaker, J. A. *Like snow in the spring time: allotment, fractionation, and the Indian land tenure problem.* Wis. Law Rev. 4, 729–787 (2003).
[57] U.S. Department of the Interior, *Managing Indian Trust Assets*, (2022), https://www.doi.gov/ost/managing-indian-trust-assets
[58] National Congress of American Indians, supra note 40.

3. Resulting Land Types

Because of such policies, land ownership across Indian country can be complicated. In general, there are three main types of land in Indian country:

Trust Land:

Most lands within Indian country—over 56 million acres—are held in trust by the federal government.[59] Most reservation land falls into this category as well.[60] With tribal trust lands, the federal government holds title to the lands "for the benefit of a Native American individual or Tribe," but the Tribe controls and manages the land.[61] Trust lands are subject to federal oversight and restrictions and many federal programs and services are available only on trust lands.[62] Tribes can also petition to take new lands into trust through the Secretary of the Interior under 25 U.S.C. § 465. Trust lands can be either on or off reservation. As a matter of formal law, trust land is owned by the federal government for the benefit of the tribe or individual tribal member.[63]

Restricted Fee Land:

With restricted fee lands, the Tribe or an individual tribal member holds title to the land, but there are restrictions on what can be done with it. It cannot be encumbered or alienated.[64] As with trust lands, restricted fee lands can exist on or off reservation, but off reservation fee lands may subject to taxes and state regulatory authority.[65] Some allotment tracts, for example, are held as restricted fee land.[66]

Fee Simple Absolute Land:

Fee simple is the standard form of property ownership that most are familiar with. When an individual purchases a house, they typically purchase a fee simple property right. One common way to describe property interests is a bundle of sticks—with each stick being a right in the property, such as access and right of alienation. If you own the entire bundle of sticks, you have fee simple ownership. In the context of Indian affairs, fee simple land may be owned by non-Indians (non-Indian fee land), tribal members, nonmember Indians, or the Tribe itself. Land owned by tribes and tribal members in fee simple absolute is less common and mostly consists of areas that have been purchased by tribes in recent years.[67] These lands are freely alienable and can be encumbered without federal oversight or approval.[68]

---

[59] Beshilas et al., supra note 3.
[60] Id.
[61] U.S. Department of the Interior, Managing Indian Trust Assets , (2022), https://www.doi.gov/ost/managing-indian-trustassets
[62] Bureau of Indian Affairs, Benefits of Trust Land Acquisition (Fee to Trust), U.S. Department of the Interior, https://www.bia.gov/service/trust-land-acquisition/benefits-trust-land-acquisition
[63] Newton, Cohen & Anderson, supra note 22.
[64] Laura Beshilas et al., supra note 3.
[65] Id.
[66] Maria Grogan, *Native American Lands and Natural Resource Development*, (2011), https://resourcegovernance.org/analysis-tools/publications/native-american-lands-and-natural-resource-development
[67] Grogan, supra note 54.
[68] Beshilas et al., supra not 3.

Regulatory Authority

While tribes in general exert sovereignty over lands within their reservation boundaries, the Supreme Court and Congress over time have narrowed such authority when it comes to both criminal and civil jurisdiction over non-tribal members. Understanding how these limitations work is crucial for clean energy development, especially when the project is owned by non-tribal entities. Yet it is also very complex. States subject to Public Law 280, for instance, will operate differently. It is thus important to engage an expert for the specifics of each case. For the purposes of this report, we focus solely on civil jurisdiction, with the following subsections providing a brief overview of two key civil regulatory areas that have evolved over time: 1) a tribe's ability to regulate non-members and 2) the state's ability to regulate non-members in Indian Country.

1. Can a tribe regulate non-tribal members and entities?

In certain cases, tribes may have civil regulatory and adjudicatory authority over developers operating on tribal lands. When regulatory matters involve non-Indians operating within a reservation, courts may turn to the ruling in Montana v. United States. Montana holds that there is a presumption against tribal civil authority over the conduct of non-members within the reservation unless either of the two exceptions occur:

1) "A Tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the Tribe or its members, through commercial dealing, contracts, leases, or other arrangements.
2) A Tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee land within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the Tribe."[69]

These exceptions have been the subject of significant additional litigation, in which the Supreme Court has largely construed these exceptions narrowly.[70] Subsequent cases have also clarified that this Montana test for civil jurisdiction may include conduct on trust lands as well fee lands.[71] However, for renewable energy development cases, the developer will have likely entered into "commercial dealing, contracts, leases, or other arrangements" with the Tribe through a lease or other contract, and therefore the Tribe may have civil regulatory and adjudicatory power over the developer and developer-related conduct, depending on the terms of the arrangement and other factors. Many Tribes may wish to explicitly stipulate their regulatory and adjudicatory power over third parties in the contract for clarity, though developers should be aware that a tribe may have regulatory authority even if not provided for in the contract.

[69] Montana v. United States. 1981. U.S. Supreme Court.
[70] *See* Nevada v. Hicks, 533 U.S. 353 (2001)., Strate v. A-1 Contractors, 520 U.S. 438 (1997). Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316 (2008).
[71] Nevada v. Hicks, 533 U.S. 353 (2001).

Box 2: The Double Taxation Dilemma

Because tribes operate without a typical citizen tax base as states or other governments do, they must be able to generate revenues through other means in order to fund services and government functions. This often occurs through the taxation of third-party entities operating on the reservation. In the context of energy development, however, if the state or county asserts taxation authority over the project as well, it may result in double taxation, making the project economically uncompetitive.[72] Federal statute 25 U.S.C. § 5108 provides that lands brought into trust are exempt from such state or local taxation.[73] Additionally, in 2013, the Bureau of Indian Affairs (BIA) issued further guidance that reiterated a prohibition on local or state taxation on permanent improvements, leasehold, possessory interests, or activities under a lease that has been established with BIA approval.[74] However, this topic has been the subject of extensive litigation and is not definitively resolved. Additionally, if a project is sited on fee land, state taxation may apply. If the project is likely to be taxed by the state or county, the Tribe may waive its ability to tax in order to prevent double taxation on the project. In this case, the Tribe would be only financially benefit from the project through land-lease payments. The developer should take this limitation into account when negotiating lease terms, accounting for the loss in tax revenues through fair and beneficial lease payments.



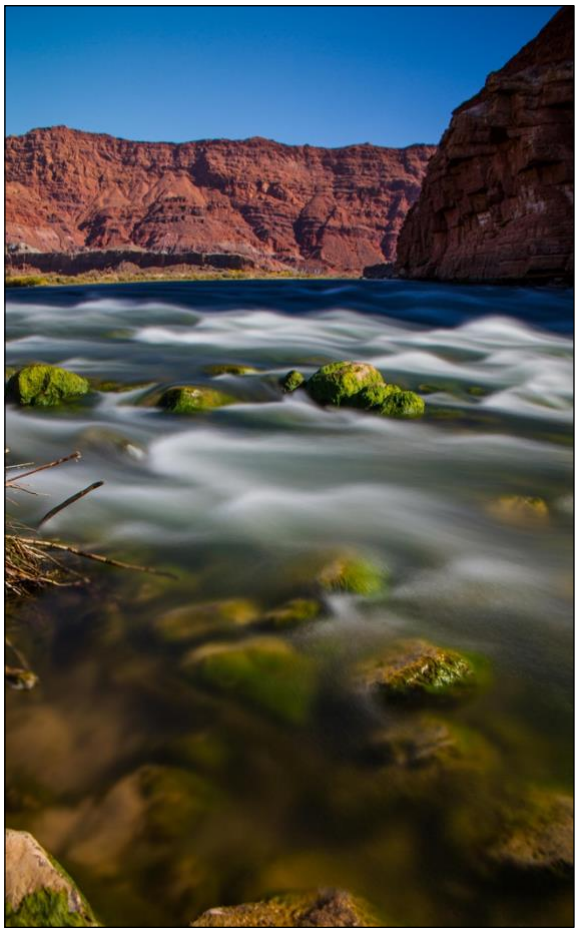
[72] Beshilas et al., supra note 3 *at* 33.
[73] 25 U.S.C. § 5108 *as cited in* Laura Beshilas et al., *Addressing Regulatory Challenges to Tribal Solar Deployment*, (2023) *at* 33.
[74] Beshilas et al., supra note 3 *at* 33.

2. *Can a state regulate non-Indians in Indian Country?*

While the foundations of Federal Indian law set the premise that states do not have authority over Indian country,[75] the Supreme Court has qualified and shifted this principle when non-tribal members are involved. When on-reservation conduct concerns only Indians, state law still should not apply, absent Congressional authorization.[76] However, to determine whether a state may regulate non-Indians operating in Indian country, courts apply a balancing test known as Bracker Balancing.[77] A state may be able to regulate non-Indians in Indian country when the majority of the following occur:

a) The value of the conduct at issue is produced outside of Indian country
b) The state provides significant services to the conduct
c) There is not federal support for the conduct
d) It is possible to have concurrent jurisdiction with the tribe or the federal government

In a hypothetical example of a state seeking to regulate a developer-owned renewable energy project on tribal lands, a court may apply Bracker Balancing to reason through whether this authority exists. In this case, the energy produced would be within Indian country, likely nullifying point a. The state could certainly argue that it provides significant services to the conduct, especially if the tribe is serviced by an outside utility or if the project relies on transmission infrastructure, but a court may disagree. Point c might also strike against the state if the project relies on federal funding or tax credits. Lastly, concurrent jurisdiction may be technically possible, as the state, tribe and federal government could all simultaneously regulate.[78] In such an instance, it is not clear how a court might rule.



Given that states may exercise the authority to regulate non-tribal entities in certain instances, it is crucial to work proactively with tribal partners and state representatives. A tribe may already have a tax agreement in place with the state, or it may wish to negotiate one. Overall, while complications with civil jurisdictional authority may arise, third party entities should work directly with the Tribe to understand how it has navigated such issues (see above for suggested questions, strategies and overall considerations for tribal engagement). The following section begins to give more concrete examples of how these jurisdictional questions may play out in terms of project approval and oversight.

[75] Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).
[76] White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).
[77] ROBERT ANDERSON ET AL., AMERICAN INDIAN LAW: CASES AND COMMENTARY (4th ed. 2020).
[78] Id.

Box 3: Sovereign Immunity

Sovereign immunity is the basic principle that sovereigns are immune from liability and suit unless they otherwise consent, which applies to federal, state, foreign and tribal governments.[79] As sovereign governments, tribes are thus entitled to sovereign immunity, which extends to state, federal and tribal courts.[80] Many tribes view sovereign immunity as an essential tool to protect their way of life, as it can help protect tribal assets from unwarranted litigation.[81] Tribal sovereign immunity applies unless 1) Congress has expressly abrogated it; 2) there is a suit brought by the federal government; 3) in the case of suits against individual officers under the *Ex Parte Young* doctrine; or 4) the Tribe has explicitly waived sovereign immunity.[82] Sovereign immunity also extends to entities that function as an "arm of the tribe,"[83] including tribal housing authorities,[84] tribal colleges,[85] non-profit health associations,[86] tribal newspapers,[87] casinos,[88] and off-reservation for-profit companies,[89] among others. While there are instances in which an individual tribal member or employee is not subject to sovereign immunity,[90] the Supreme Court has also recognized that "courts should look to whether the sovereign is the real party in interest to determine whether sovereign immunity bars the suit"[91] and that "a plaintiff cannot circumvent tribal immunity by the simple expedient of naming an officer of the Tribe as a defendant, rather than the sovereign entity."[92]

Tribes most often grant waivers of sovereign immunity in the context of economic development opportunities in which they contract with non-tribal entities, such as energy projects.[93] To uphold their sovereignty, tribes may refuse to waive sovereign immunity, grant limited waivers, or stipulate to the tribal court within limited waivers of sovereign immunity.[94] As such, the partner should recognize the importance of upholding tribal sovereignty—including the role that sovereign immunity plays—and approach negotiations accordingly.

[79] Anderson et al., supra note 77.
[80] Kathryn Seaton & Jessica Big Knife, *Tribal sovereign immunity: What is it, and what are its limitations?*, State Bar of Montana, https://www.montanabar.org/News/View/ArticleId/11402/Tribal-sovereign-immunity-What-is-it-and-what-are-its-limitations
[81] Kathryn Seaton & Jessica Big Knife, *Tribal sovereign immunity: What is it, and what are its limitations?*, State Bar of Montana, https://www.montanabar.org/News/View/ArticleId/11402/Tribal-sovereign-immunity-What-is-it-and-what-are-its-limitations
[82] ROBERT ANDERSON ET AL., AMERICAN INDIAN LAW: CASES AND COMMENTARY (4th ed. 2020).
[83] *See Allen v. Gold Country Casino,* 464 F.3d 1044, 1046 (9th Cir. 2006); *Hagen v. Sisseton-Wahpeton Community College,* 205 F.3d 1040, 1043 (8th Cir. 2000) as cited in Luke Hasskamp, *Tribal Sovereign Immunity: A Defense Available to Individuals*, Bona Law (Jul. 3, 2020), https://www.bonalaw.com/insights/legal-resources/tribal-sovereign-immunity-a-defense-available-to-individuals.
[84] *See Dillon v. Yankton Sioux Tribe Housing Authority*, 144 F.3d 581 (8th Cir. 1998); *Marceau v. Blackfeet Housing Authority*, 455 F.3d 974 (9th Cir. 2006); *Duke v. Absentee Shawnee Tribe of Oklahoma Housing Authority*, 199 F.3d 1123 (10th Cir. 1999)
[85] *See Hagen v. Sisseton-Wahpeton Community College*, 205 F.3d 1040 (8th Cir. 2000)
[86] See Pink v. Modoc Indian Health Project, 157 F.3d 1185 (9th Cir. 1998)
[87] See *Subranni v. Navajo Times Publishing Co. (In re Star Group. Communications, Inc.)*, 568 B.R. 616 (Bankr. D.N.J. 2016)
[88] *See Prescott v. Little Six, Inc.*, 387 F.3d 753 (8th Cir. 2004); *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006); *Trudgeon v. Fantasy Springs Casino*, 71 Cal. App. 4th 632, 84 Cal. Rptr. 2d 65 (1999)
[89] *Redding Rancheria v. Superior Court*, 88 Cal. App. 4th 384, 105 Cal. Rptr. 2d 773 (2001)
[90] *See Lewis v. Clarke,* 137 S. Ct. 1285 (2017) as cited in Luke Hasskamp, *Tribal Sovereign Immunity: A Defense Available to Individuals*, Bona Law (Jul. 3, 2020), https://www.bonalaw.com/insights/legal-resources/tribal-sovereign-immunity-a-defense-available-to-individuals.
[91] Lewis v. Clarke, 137 S. Ct. 1285, 1291 (2017) as cited in Luke Hasskamp, *Tribal Sovereign Immunity: A Defense Available to Individuals*, Bona Law (Jul. 3, 2020), https://www.bonalaw.com/insights/legal-resources/tribal-sovereign-immunity-a-defense-available-to-individuals.
[92] *Cook v. AVI Casino Enters.*, Inc., 548 F.3d 489, 492 (9th Cir. 2002) as cited in Luke Hasskamp, *Tribal Sovereign Immunity: A Defense Available to Individuals*, Bona Law (Jul. 3, 2020), https://www.bonalaw.com/insights/legal-resources/tribal-sovereign-immunity-a-defense-available-to-individuals.
[93] Kathryn Seaton & Jessica Big Knife, *Tribal sovereign immunity: What is it, and what are its limitations?*, State Bar of Montana, https://www.montanabar.org/News/View/ArticleId/11402/Tribal-sovereign-immunity-What-is-it-and-what-are-its-limitations
[94] Id

Section II: Case Studies to Understand Complexities in Practice

Because federal Indian law is a complex and evolving field, it is impossible to cover the full range of circumstances under which project approval and jurisdiction may play out. However, certain situations are more common than others. Based on the most common types of land status and project ownership, this section offers four hypothetical case studies to examine complications that may arise in approval and oversight of a project. Nothing in this section should be regarded as certain, as each Tribe and situation is unique. These examples are simply meant to be a starting point for organizations to understand unique legal processes that generally apply when working with tribes and under what circumstances they might arise.

Third-Party Owned Projects

1. Hypothetical Scenario 1: Developer-owned utility scale solar on tribal trust land

According to a 2024 study, approximately 79% of reservation land that is in the top quartile of wind and solar potential is held in federal trust.[95] Additionally, because tribes were unable to take advantage of renewable energy tax credits until 2022 when the IRA passed, the majority of renewable projects on reservations are third-party owned.[96] As such, under the common hypothetical of a developer owned, utility scale project on tribal trust lands, the following chart highlights potential outcomes under Federal Indian law for revenues, project approval, and regulatory oversight.



[95] Dominic P. Parker et al., *Economic Potential of Wind and Solar in American Indian Communities*, Nat Energy 1 (2024).
[96] Heather J. Tanana & John C. Ruple, *ENERGY DEVELOPMENT IN INDIAN COUNTRY: WORKING WITHIN THE REALM OF INDIAN LAW AND MOVING TOWARDS COLLABORATION*, 32 Utah Environmental Law Review (2012), https://epubs.utah.edu/index.php/jlrel/article/view/620 *at 35.*

Hypothetical Scenario 1

Ownership: *developer-owned*
Project Size: *utility-scale*
Land Status: *tribal trust land*

Key questions:	Potential outcomes according to Federal Indian Law:
What are the sources of revenue for the tribe?	• Land lease payments • Revenue sharing agreements • Taxes
Who approves the project?	• Tribal government • Bureau of Indian Affairs (unless tribe has a TERA, TEDO or approved under HEARTH Act, see below) • Potential for federal review processes under National Environmental Policy Act (NEPA) and National Historic Preservation Act (NHPA) to apply
Who regulates the project?	• Applicable Tribal Ordinances • Applicable federal statutes • Applicable state statutes if fall into Bracker Balancing exceptions (see above)

Discussion

1.1 Federal Permitting Requirements

Within the federal government, the Department of the Interior (DOI) is the main entity overseeing Native affairs. Under DOI is the Bureau of Indian Affairs (BIA), which provides services to tribes (directly or through contracts, grants and compacts) and oversees tribal trust lands.[97] When an entity other than the tribe operates a project on tribal trust lands, the BIA has to approve each new project and lease in many circumstances. This system stems directly from the aforementioned trust relationship between tribes and the federal government and is outlined in the Indian Long-Term Leasing Act.[98] Additionally, for non-Tribal entities developing tribal trust lands for wind or solar, the BIA also must issue specific Wind Solar Resources (WSR) leases, which requires information from both the tribe and the third-party.[99]

[97] About Us | Indian Affairs, https://www.bia.gov/about-us
[98] 25 U.S.C. § 115
[99] Beshilas et al., supra note 3 at 72.

Overall, BIA permitting processes have been criticized for inefficiencies.[100] It is important for third party partners to know that BIA permitting processes can take time—sometimes two or three years longer than parallel permitting outside of reservations, even when compared to projects on federal lands.[101] In a 2011 congressional hearing, tribal officials outlined several concerns with BIA permitting processes, including erroneous BIA records that cause permitting delays, BIA understaffing, and a lack of communication between the BIA, Department of the Interior, and the Environmental Protection Agency.[102] A more recent Government Accountability Office report confirms such issues, noting that undue delays in reviewing permits caused tribes to lose interconnection agreements with utilities, resulting in stalled or failed projects.[103] While non-tribal entities can receive land reports in just a few days, some tribes wait up to six years to receive the same information from the federal government, according to a 2018 statement before a U.S. House Committee.[104]

As part of the BIA permitting requirements, projects on tribal trust lands may also be required to do a National Environmental Protection Act (NEPA) review.[105] Even for projects that do not include tribal trust lands, a NEPA review may be required when a project is partially funded by the federal government, crosses federal land, or connects to federally owned transmission infrastructure.[106] In this case, the BIA would be the federal entity responsible for the NEPA process.[107] The same is true for the National Historic Preservation Act (NHPA) and other applicable statutes.[108] There are also instances where similar state statutes would apply if the state is involved in funding the project or can otherwise assert jurisdiction.[109] Even in the absence of federal NEPA or NHPA requirements, tribes often have their own parallel requirements required by the Tribal government. Third parties should therefore not assume that standard approval processes typical to federal lands do not apply in these cases. Instead, they should work closely with their tribal partner to ensure that cultural and environmental effects are proactively accounted for in siting their project.

---

[100] *See e.g.* Elizabeth Ann Kronk Warner, *Renewable Energy Depends on Tribal Sovereignty,* 69 KANSAS LAW REVIEW; Ben Reiter, *Expanding Renewable Energy Tax Credits to Tribal Governments: How Current Legislative Proposals Will Benefit Tribes and Their Members in Their Continued Efforts to Address Climate Change* in SearchWorks Articles, 46 William & Mary Environmental Law and Policy Review 687 (2022); M. Maruca, *From exploitation to equity: building Native-owned renewable energy generation in Indian country*, William Mary Environ. Law Pol. Rev. 43 (2) (2019) 391–499; N.M. Ravotti, *Access to energy in Indian country: the difficulties of self-determination in renewable energy development,* Am. Indian Law Rev. 41 (2) (2017) 279–318.; J.V. Royster, *Tribal energy development: renewables and the problem of the current statutory structures*, Stanf. Environ. Law J. *31 (1) (2012) 91–137.; E.A. Kronk Warner, Alternative energy development in Indian Country: lighting the way for the seventh generation, Ida. Law Rev. 46 (2010).*

[101] *Indian Energy and Energy Efficiency: Hearing before the Sen. Comm. On Indian Affairs,* 111th Congress (2009) (statement of Hon. James Roan Gray, Chairman, Indian Country Renewable Energy Consortium).

[102] Michael G. Zimmerman & Tony G. Reames, *Where the wind blows: Exploring barriers and opportunities to renewable energy development on United States tribal lands*, 72 Energy Research & Social Science 101874 (2021).

[103] Government Accountability Office, *Indian Energy Development: Poor Management by BIA Has Hindered Energy Development on Indian Lands*, (2015), https://www.gao.gov/products/gao-15-502 *as cited in* Zimmerman & Reames, *Where the wind blows.*

[104] Tribal Energy Resources: Reducing Barriers to Opportunity, (2018), https://www.perc.org/2018/07/23/tribal-energy-resources-reducing-barriers-to-opportunity/

[105] Beshilas et al., supra note 3 at 35

[106] Id.

[107] National Environmental Policy Act (NEPA) Compliance | Indian Affairs, https://www.bia.gov/service/nepa-compliance

[108] Beshilas et al., supra note 3 at 35

[109] Id.

1.2 Exceptions to Permitting Requirements: TERA, HEARTH Act and TEDO

Tribal Energy Resource Agreements (TERA):

Past reforms have attempted to streamline these processes. In 2005, the Department of the Interior implemented reforms through the Indian Tribal Energy Development and Self-Determination Act (ITEDSA), introducing a federal agreement called the Tribal Energy Resource Agreement (TERA).[110] While TERAs require initial DOI Secretarial approval, once approved, they also allow tribes to enter into specific leases, rights-of-way, and business agreements without obtaining approval for each individual project.[111] However, the initial TERA approval is complex, requiring an environmental review and careful scrutiny of Tribal capacity to regulate and finance projects.[112] The process takes over a year and the DOI provides no assistance.[113] Furthermore, the Act includes a waiver stating that the federal government cannot be held liable for any loss related to negotiations, potentially undermining the federal responsibility inherent in the trust relationship.[114] Because of these complications, no tribes have utilized a TERA as of 2025.[115]

HEARTH Act:

Because of the difficulties of obtaining a TERA, many tribes instead take advantage of the provisions under the Helping Expedite and Advance Responsible Tribal Home Ownership (HEARTH) Act of 2012. The HEARTH Act amended the Indian Long-Term Leasing Act, allowing tribes to lease surface rights to trust lands for various purposes, including for renewable energy.[116] Under this process, the Secretary of the Interior reviews a tribe's overall leasing regulations and environmental review laws, and, upon approval, the tribe does not have to seek BIA approval for every individual lease.[117] This vests permitting in a single entity, the Tribe, which can substantially speed up permitting times.[118] These leases last for 25 years, with the option of renewal twice.[119] The HEARTH Act also waives federal liability for leases approved under the tribe's regulations,[120] which may discourage some tribes from pursuing this option. Even so, over 100 tribes have utilized and been approved under HEARTH Act provisions to take control over leasing, although not all of them for renewable energy.[121]

Tribal Energy Development Organizations (TEDOs):

In 2018 reforms to ITEDSA, Congress created another avenue, the Tribal Energy Development Organization (TEDO). A TEDO is a business organization in which the Tribe owns all or majority interest and may "enter into and manage energy-related leases, rights-of-way, and business agreements without obtaining Secretarial approval for each."[122] In addition to potential benefits regarding tribal ownership

---

110 Kronk Warner & Tanana, supra note 16.
111 Id.
112 Fitzpatrick, Tana. "Tribal Energy Resource Agreements (TERAs): Approval Process and Selected Issues for Congress." Congressional Research Service, July 9, 2020. https://perma.cc/D2W6-LWPF.
113 Kronk Warner & Tanana, supra note 16.
114 Id.
115 Fitzpatrick, supra note 92.
116 Elizabeth Ann Kronk Warner, *Renewable Energy Depends on Tribal Sovereignty*, 69 KANSAS LAW REVIEW.
117 Beshilas et al., supra note 3 *at 72.*
118 Roger Freeman. "Memo: Federal Indian Law Summary," 2016.
119 Kronk Warner, supra note 96 at 83.
120 Id.
121 Approved HEARTH Act Regulations | Indian Affairs, https://www.bia.gov/service/HEARTH-Act/approved-regulations#approved-in-2017-2
122 Indian Affairs Approves First Ever Tribal Energy Development Organization, https://www.bia.gov/news/indian-affairs-approves-first-ever-tribal-energy-development-organization

(discussed below), the streamlined Secretarial approval for projects covered by a TEDO may make projects on tribal lands more competitive to third-party developers. This is because the 2018 reforms to ITEDSA give tribes more authority and flexibility over their own environmental review processes for energy development, rather than triggering a National Environmental Protection Act (NEPA) review for every project, which takes an average of 4.5 years.[123] Developers on federal lands do have to adhere to the NEPA review process. Thus, if a Tribe pursues either a TERA or a TEDO, they can choose whether they want to offer developers a more streamlined process.[124] One advantage of a TEDO over a TERA in this respect is that the BIA has to approve or deny the TEDO application within 90 days, a significant improvement from the typical TERA timelines.[125] Additionally, in order to qualify for a TEDO, a tribe must "have carried out a contract pursuant to the Indian Self-Determination and Education Assistance Act" without having had an uncorrected audit exceptions within the last three years.[126] Many tribes use these contracts to run essential programs. Even if they do not qualify under these grounds, they may still be eligible of they demonstrate substantial energy resource experience.[127] Whereas the TERA process depends heavily on the discretion of the Secretary to determine whether tribes have capacity to manage energy developments, a TEDO standardizes assessments of tribal capacity.

While no Tribe has been granted a TERA thus far,[128] the Red Lake Band of Chippewa in northern Minnesota was the first tribe to be granted a TEDO in March 2022.[129] Under the certification, Red Lake's business, Twenty-First Century Tribal Energy Inc., can now ascertain all the benefits of a TEDO. Red Lake had previously pursued over a dozen solar projects, and the TEDO will potentially allow it to do so more rapidly.[130]



[123] Ben Reiter, *Expanding Renewable Energy Tax Credits to Tribal Governments: How Current Legislative Proposals Will Benefit Tribes and Their Members in Their Continued Efforts to Address Climate Change* in SearchWorks Articles, 46 William & Mary Environmental Law and Policy Review 687 (2022).
[124] Id.
[125] Bureau of Indian Affairs, *Tribal Energy Resource Agreements and Tribal Energy Development Organizations*, U.S. Department of the Interior, https://www.bia.gov/service/tribal-energy-resource-agreements-development-organizations
[126] Id.
[127] Reiter, supra note 103 *at* 369.
[128] Id.
[129] Supra note 102.
[130] Jossi, Frank. "Crowdfunded Solar Puts Red Lake Nation on a Path to Energy Sovereignty." *Energy News Network*, November 13, 2020. http://energynews.us/2020/11/13/crowdfunded-solar-puts-red-lake-nation-on-a-path-to-energy-sovereignty/.

2. *Hypothetical Scenario 2: Developer-owned utility scale solar spanning tribal trust and tribal restricted fee land*

Hypothetical Scenario 2

Ownership: *developer-owned*
Project Size: *utility-scale*
Land Status: *spanning tribal trust land and allotments*

Key questions:	Potential outcomes according to Federal Indian Law:
What are the sources of revenue for the tribe?	• Land lease payments (to the Tribe and individuals, see below) • Revenue sharing agreements • Taxes
Who approves the project?	• Tribal government • Individual tribal members (see below) • Bureau of Indian Affairs (unless tribe has a TERA, TEDO or approved under HEARTH Act, see above) • Potential for federal review processes under National Environmental Policy Act (NEPA) and National Historic Preservation Act (NHPA) to apply
Who regulates the project?	• Applicable tribal ordinances • Applicable federal statutes • Applicable state statutes if fall into Bracker Balancing exceptions (see above)

Discussion

Under Scenario 2, this hypothetical project spans both trust land (as discussed above) and tribal-member-owned allotments. Because of the checkerboarded nature of many reservations, a utility-scale project that requires at least 5,000 contiguous acres[131] would likely span multiple land types, making this scenario somewhat common. All the previously discussed considerations around sources of revenue, permitting processes, and regulatory authority still apply. However, there are two key distinctions to make if the project spans tribal allotment lands.

2.1 Fractionation and Owner Approval:

As previously discussed, allotted lands may be fractionated across many owners. In addition to getting approval from the Tribal Council and following its permitting requirements (as would be the case if the

[131] *See* Winikoff, J. & Parker, D. P. Farm size, spatial externalities, and wind energy development. Am. J. Agric. Econ. https://doi.org/10.1111/ajae.12438 (2023).

project in on tribal trust lands), a project spanning allotted lands would require identifying, finding and getting approval from individual landowners. Under federal law, the BIA is required to maintain ownership records of allotted lands, as previously mentioned.[132] Due to the personal nature of these records, they are not publicly available and are not always up-to-date. A third-party developer would likely need to work closely with the tribal government to identify those with ownership interest.

According to the American Indian Probate Reform Act, if there are 20 or more owners of a land parcel, only a majority approval is required for development.[133] However, with fewer owners, 90% of all heirs would need to approve of development or leasing.[134] Across 147 tribes with reported data on fractionation, allotted land parcels had an average of 14 owners.[135] Thus in many cases, a 90% approval for leasing would be required. Under federal regulations, the Secretary of the Interior can consent to leasing on behalf of some owners (such as minors and those whose whereabouts are unknown) to acquire requisite consent.[136] However, it is important to recognize that this comes at the cost of full consent to the project. Any payments must also be distributed to all owners, not only those who consent.

As previously mentioned, income received through the leasing of fractionated lands can be so divided that owners may receive just a few cents for their share.[137] It is therefore crucial to recognize that development may be of marginal benefit to individual owners. Third-party entities should consider including robust community benefit plans and other means of ensuring that individual tribal members benefit from leasing.

Tribally Owned Projects:

Researchers have found that renewable energy projects led and owned by tribes are the most likely to ensure project sustainability, equitable benefits, sovereignty, and community buy-in.[138] These projects also have the most potential to garner tribal support, build tribal institutional capacity, mitigate environmental and cultural impacts, generate local employment, and ensure the project is in line with the Tribe's priorities.[139] Tribal ownership may also open the project to additional funding sources. Lastly, as research from the Harvard Project on American Indian Economic Development confirms, where tribes make their own decisions on

---

[132] 25 U.S.C. §§ 5, 9; C.F.R. §§150.1-150.11 *as cited in* Shoemaker, J. A. *Like snow in the spring time: allotment, fractionation, and the Indian land tenure problem.* Wis. Law Rev. 4, 729–787 (2003). At 746.
[133] American Indian Probate Reform Act, 25 USC 2201 et seq. (2004).
[134] Id.
[135] Updated Implementation Plan: Land Buy-Back Program for Tribal Nations (US Interior Department, 2013). *As cited in* Dominic P. Parker et al., *Economic Potential of Wind and Solar in American Indian Communities*, Nat Energy 1 (2024).
[136] Indian Land Tenure Foundation, *Leasing Indian Land*, https://iltf.org/resources/red-tape/.
[137] U.S. Department of the Interior, Supra note 44.
[138] Corrie Grosse & Brigid Mark, *Does Renewable Electricity Promote Indigenous Sovereignty? Reviewing Support, Barriers, and Recommendations for Solar and Wind Energy Development on Native Lands in the United States*, Environmental Studies Faculty Publications (2023), https://digitalcommons.csbsju.edu/environmental_studies_pubs/28.
See also: A. Doyon, J. Boron, S. Williams, Unsettling transitions: representing Indigenous peoples and knowledge in transitions research, Energy Res. Soc. Sci. 81 (2021), 102255, https://doi.org/10.1016/j.erss.2021.102255. J.L. MacArthur, C.E. Hoicka, H. Castleden, R. Das, J. Lieu, Canada's Green New Deal: forging the socio-political foundations of climate resilient infrastructure? Energy Res. Soc. Sci. 65 (2020), 101442 https://doi.org/10.1016/j. erss.2020.101442.; J. Krupa, L. Galbraith, S. Burch, Participatory and multi-level governance: applications to aboriginal renewable energy projects, Local Environ. 20 (1) (2015) 81–101, https://doi.org/10.1080/13549839.2013.818956; K. Karanasios, P. Parker, Tracking the transition to renewable electricity in remote Indigenous communities in Canada, Energy Policy 118 (2018) 169–181, https://doi.org/10.1016/j.enpol.2018.03.032; J. Hunt, B. Riley, L. O'Neill, G. Maynard, Transition to renewable energy and Indigenous people in northern Australia: enhancing or inhibiting capabilities? J. Hum. Dev. Capabilities 22 (2) (2021) 360–378, https://doi.org/10.1080/19452829.2021.1901670; V. Herrmann, A new path in the last frontier state? Transforming energy geographies of agency, sovereignty, and sustainability in Alaska, in: U.P. Gad, J. Strandsbjerg (Eds.), The Politics of Sustainability in the Arctic, Routledge, London, 2019, pp. 209–223.
[139] Michael Maruca, *From Exploitation to Equity: Building Native-Owned Renewable Energy Generation In Indian Country*, 43 William & Mary Environmental Law and Policy Review 391 (2019).

whether to develop and what approaches to take, they consistently outperform outside decisionmakers.[140] Yet when it comes to utility scale renewables, one 2024 study finds that across 169 utility-scale wind and solar projects on reservations, only 5.4% of them had any tribal ownership.[141]

As the importance of tribal ownership gains continued traction and tribes build their capacity, third-party entities should consider various arrangements that support tribal ownership. The following hypothetical explores various ownership structures, revenue sources, approval processes, regulation, and transmission considerations for a tribally owned, utility-scale project on tribal trust lands.

3. *Hypothetical Scenario 3: Tribally owned, utility-scale solar on tribal trust land*

Hypothetical Scenario 3

Ownership: *tribally owned*
Project Size: *utility-scale*
Land Status: *tribal trust land*

Key questions:	Potential outcomes according to Federal Indian Law:
What types of ownership structures might a tribe pursue? (see below)	• Tribal utility • Tribal corporation (incorporated under tribal or state law) • Section 17 Corporation • Tribal Energy Development Organization (TEDO)
What are the sources of revenue for the tribe?	• Business revenues • Renewable Energy Credits (for states with renewable portfolio standards)
Who approves the project?	• Tribal government • Bureau of Indian Affairs (unless tribe has a TERA, TEDO or approved under HEARTH Act, see below) • Potential for National Environmental Policy Act (NEPA) to apply
Who regulates the project?	• Applicable tribal ordinances • Applicable federal statutes • Potential for applicable state statutes (if interconnect to state transmission/off taker is utility)

[140] Jorgensen, Miriam, and Jonathan Taylor. 2000. "What determines Indian economic success? Evidence from tribal and individual Indian enterprises." *Red Ink* 8 (2):45-51.
[141] Parker et al., supra note 76 at 6.

Discussion:

Because Hypothetical Scenario 3 is also on tribal trust lands, many of the same factors from Scenario 1 in terms of permitting, and regulatory authority would still apply. The ownership structures, however, would differ and potential options are discussed further below. Because the project is on tribal trust lands, the tribe might still need to go through BIA permitting processes (including potential for NEPA review), unless they had a TERA, a TEDO or had been approved under the HEARTH Act (as previously discussed).

In terms of regulatory authority, because the tribe owns the project, there is less of a question about whether the tribe can regulate it. In this case, the tribe can regulate the project, especially if it is incorporated under tribal law. Whether the state has any authority to regulate the project depends on whether the ownership structure is incorporated under state law and whether a non-tribal utility is involved as the off-taker or supplies transmission infrastructure.

Tribal Ownership Structures

There are several structures of ownership a tribe might choose, and each project will have its own set of factors to consider. It is important for third parties to recognize that a tribally owned business is different than a business owned by tribal members.[142] In general, a tribe can form a business under federal, tribal or state law and the following outlines some of the structures tribes might pursue under each.[143]

3.1 Federal:

Section 17 Corporation:

At the federal level, a tribe can form a business under Section 17 of the Indian Reorganization Act, which in the interest of supporting self-governance, created a process whereby the Secretary of the Interior could approve charters of incorporation for tribal businesses.[144] Under a Section 17 Corporation, tribes can keep assets and liabilities separate from the tribal government. If the corporation defaults, only the corporation's assets and property would be at risk, not those of the Tribe overall.[145] Section 17 Corporations are also exempt from federal and state taxes and retain their sovereign immunity.[146] They can also issue tax-exempt bonds if the proceeds finance crucial government services.[147] However, this type of corporation can't be dissolved without an act of Congress or amended without Secretarial approval,[148] meaning it is may have less flexibility. The sub-corporations of a Section 17 corporation may have more flexibility in this regard. Lastly, because they are less statutorily defined than many business types, this may increase the risk of litigation and decrease investor confidence.[149]

---

[142] Bureau of Indian Affairs, *Choosing a Tribal Business Structure*, https://www.bia.gov/service/starting-business/choosing-tribal-business-structure
[143] Beshilas et al., supra note 3 *at* 74.
[144] Id.
[145] Bureau of Indian Affairs, *Choosing a Tribal Business Structure*, https://www.bia.gov/service/starting-business/choosing-tribal-business-structure
[146] Beshilas et al., supra note 3 *at* 74.
[147] Bureau of Indian Affairs, supra note 127.
[148] Id.
[149] Id.

3.2 Tribal:

Tribally Chartered Corporation:

A tribally chartered corporation is created under the Tribe's laws and operates without approval from the federal government. These corporations are also exempt from state oversight or taxes, as long as they are doing business on tribal lands.[150] It is not entirely clear, however, whether these corporations are always free from federal taxation.[151] Since tribal governments do not pay federal taxes, tribally-chartered corporations are also exempt if they operate as an "integral part" of the tribe.[152] Many factors go into this decision. Lastly, tribes are not required to disclose operational information, as state-chartered corporations are. Lenders, investors and other business partners may perceive difficulties in accessing such information, and their unfamiliarity with tribal business operations may reduce their confidence.[153] Even when such risk is perceived rather than real, it still may affect tribes' ability to access capital.

3.3 State:

State Charter Corporation:

A state charted corporation is either entirely or partially owned by the tribe but incorporated under state law. Tribes may choose to incorporate under state law if the procedures are easier to access and if they wish to attract creditors and potential partners familiar with state corporations.[154] However, there is no presumption of sovereign immunity in this case, which can make this option less favorable for many tribes. Additionally, the corporation must pay federal taxes, even if they do business on the reservation, and they could potentially be subject to state taxes and regulation as well.[155]

3.4 Energy Specific Models:

Tribal Energy Development Organization (TEDO):

As previously discussed, a TEDO is a business organization in which the Tribe owns majority interest and may "enter into and manage energy-related leases, rights-of-way, and business agreements without obtaining Secretarial approval for each."[156] Such a model guarantees at least partial tribal ownership and safeguards the Tribe's ability to govern and direct the financial benefits of a project. A TEDO can be wholly owned by the Tribe or by multiple entities in which one is a tribe, as long as the Tribe maintains majority interest and control.[157] A TEDO also ensures tribal governance over these projects, as it is organized under the Tribe's laws and "includes a statement that the TEDO is subject to the jurisdiction, laws, and authority of the Tribe."[158] Because of the complicated nature of jurisdiction across Indian country (which can discourage developers), this explicit clarification can be helpful, particularly when a project spans multiple land types.

---

[150] Bureau of Indian Affairs, supra note 127.
[151] Id.
[152] Id.
[153] Id.
[154] Id.
[155] Id.
[156] Indian Affairs Approves First Ever Tribal Energy Development Organization, https://www.bia.gov/news/indian-affairs-approves-first-ever-tribal-energy-development-organization
[157] Reiter, supra note 103.
[158] Bureau of Indian Affairs, supra note 105.

Previously, most Tribes have had to rely on a third-party who could monetize tax credits in order to make renewable energy projects economically feasible. While direct pay and transferability now allow Tribes (and other tax-exempt entities) to monetize tax credits while they are available,[159] some tribes may still choose to include some third-party ownership out of capacity restraints or to mitigate the risk of a project. As such, the TEDO provides a structure for private partnerships with developers who specialize in solar or other renewable energy, while still ensuring Tribal ownership.[160] Even when it includes a third party, a TEDO still ensures that the Tribe maintains controlling interest and that the third party is subject to the jurisdiction, laws, and authority of the Tribe.[161]

Tribal Utility:



Over twenty tribes have their own utilities that may then develop and own renewable energy projects.[162] Some serve their entire reservations, while others are growing their service territory.[163] The Navajo Tribal Utility Authority, founded in 1959, is the oldest example. In the wake of the 2019 closure of the Navajo Generation Station, the Tribe's coal-fired power plant, the utility has taken an active role in developing renewable energy.[164] As of 2022, one of its major solar farms, Kayenta Solar had already generated over $3 million in tax revenue for the Tribe, with substantially more projected to come. The Navajo Nation intends to use this revenue to electrify reservation homes.[165]

While tribal utilities may be incorporated under federal, state or tribal law, most are incorporated under tribal law.[166] When incorporated under tribal law, tribal utilities are not subject to public utilities commission oversight.[167] While tribes may own projects under their utility, they may also rely on third-party owned infrastructure and transfer power over from that infrastructure.[168]

[159] David Potts, *Transferability of Clean Energy Tax Credits in Inflation Reduction Act*, Hall Estill Attorneys at Law (2023), https://www.hallestill.com/newsroom/transferability-of-clean-energy-tax-credits-in-the-inflation-reduction-act
[160] Reiter, Ben. "A New TERA: Why It's Time to Revisit Tribal Energy Resource Agreements." *LSU Journal of Energy Law and Resources* 10, no. 2 (2022). https://digitalcommons.law.lsu.edu/jelr/vol10/iss2/6.
[161] Reiter, supra note 103.
[162] Beshilas et al., supra note 3 *at* 78.
[163] Id.
[164] Ben Mayer et al., *Renewable Energy on Tribal Lands: Native American Tribes Are Well Positioned to Play a Key Role in the Clean Energy Transition in SearchWorks articles*, The Federal Lawyer 42 (2022).
[165] Id.
[166] Laura Beshilas et al., supra note 3 *at* 78.
[167] Id.
[168] Id.

4. *Hypothetical Scenario 4: Tribally owned distributed solar on tribal restricted fee land (i.e. tribal housing project)*

Hypothetical Scenario 4

Ownership: *tribally owned*
Project Size: *distributed solar*
Land Status: *restricted fee land*

Key questions:	**Potential outcomes according to Federal Indian Law:**
What are the ownership structures a tribe might pursue?	• Tribal utility • Tribal energy company • Tribal Energy Development Organization (TEDO)
What are the sources of revenue for the tribe?	• Tribal or individual cost saving • Net metering potential
Who approves the project?	• Tribal government
Who regulates the project?	• Applicable tribal ordinances • Applicable federal statutes

Discussion

Hypothetical scenario 4 explores a situation where a tribe decides to install distributed solar located on restricted fee land, such as rooftop solar on tribal housing, where the tribe owns and operates the project. Just as in scenario 3, a tribe might use one of the previously discussed business structures to own the project. In terms of approval, the project would need to be approved by Tribal Council and work through any associated permitting and approval processes, including the Tribe's environmental review processes. However, because it is on fee lands and the Tribe owns the project (rather than leasing the land), they could likely avoid the BIA permitting process. However, if the project is federally or state funded, it may still need to go through NEPA or state environmental review. Additionally, because it is tribally-owned, the same regulatory authority as Scenario 3 would likely apply—although because a distributed project is less likely to rely on transmission infrastructure, the potential for state authority in these cases may be reduced.

The financial benefit of this type of project would likely come in the form of savings to the tribal government (if on a government building) or to individual tribal members (if on housing, where the utility savings are passed to residents). Additionally, if the Tribe is serviced by a non-tribal utility within a state with net metering, it may be able to earn income by selling power back into the grid. However, net metering constraints, as discussed below, may affect that viability of a project.[169]

[169] Laura Beshilas et al., supra note 3 *at* 16.

4.1 Net Metering Considerations:

Net-metering is a system whereby utility customers who have solar (or other generation) on site can receive credits for excess electricity they export into the grid. With this system in place, the utility bills customers only for their net energy use.[170] However, the compensation rate and net-metering caps at the project or aggregate level can affect whether this system is economically advantageous. In Wisconsin, for instance, the state has set the net metering rate at the avoided energy cost, which is below the retail rate, making distributed energy less economically advantageous.[171] In Nevada, there is an aggregated cap on the amount of net-metered solar across the state, and if it is exceeded, the net-metering rates decrease. In 2024, new net-metered solar could only earn a credit of 75% of the retail rate.[172]

Additionally, net-metering only applies to tribes that are served by a utility that has a net-metering rate. Many rural electric cooperatives, which often serve rural tribes, do not have net-metering policies and instead acquire their generation through contracts with larger generators.[173] The tribe may be able to negotiate with the utility to set up or modify net-metering rules or advocate at the relevant rulemaking body.[174] However, such an example illustrates that while a state does not have inherent authority over projects on tribal lands, by virtue of providing services via utilities, state legislation may be implicated and therefore relevant, as discussed in the next section.



[170] Id. *at 15*
[171] Id.
[172] Net Metering in Nevada, https://puc.nv.gov/Renewable_Energy/Net_Metering/
[173] Beshilas et al., supra note 3 *at* 16.
[174] Id.

Section III: Additional Considerations

Transmission and Interconnection

While all projects connected to the power grid must consider transmission capacity and the interconnection queue, projects on tribal lands may face particular challenges because of the lack of grid investments previously mentioned. While these barriers are complex and multifaceted, the cost of new transmission is one challenge. Renewable developers may find themselves in a situation where their projects make their way through the interconnection queue only to find that there is not enough transmission capacity to come online.[175] Under the current model, developers must then pay for the new transmission or upgrades that their project requires. However, the benefits of these lines are then broadly distributed to others, including all the developers that follow who use that new capacity.[176] These developers do not necessarily know in advance whether they will need to plan for such costs, adding risk and uncertainty to the process.[177] An Americans for a Clean Energy Grid (ACEG) report compared the current system to "charging the next car to enter a congested highway for the cost of building a new lane."[178] This current participant funding model has the potential to disproportionately dissuade projects on tribal lands. Because rural tribes in particular are less likely to have sufficient transmission capacity for new projects, developers working in these areas may anticipate that they are likely to pay for transmission upgrades, potentially making the project less economically viable.

In addition to potential costs of financing transmission, the Federal Energy Regulatory Commission (FERC) maintains commercial readiness requirements that can require project developers to pay millions to remain in the interconnection queue.[179] This fee is meant to decrease speculative projects and speed up the interconnection queue, but such cost uncertainties are already sinking vital projects. For instance, the Oceti Sakowin Power Authority (OSPA), a renewable energy developer owned by seven Sioux Tribes, cancelled two wind farms because of interconnection costs that were estimated at $48 million.[180] Many small-scale developers, including tribes, simply cannot afford such costs, especially when they are unpredictable. When it takes an average of four years to even get through the interconnection process—double the time it took ten years ago[181]—tribes and developers alike cannot afford to lose the time and costs they've put into projects.

Funding in the Infrastructure Investment and Jobs Act (IIJA) and Inflation Reduction Act (IRA) attempted to address some of these barriers. The IIJA included the Grid Resilience and Innovation Partnership (GRIP) program, which provided $10.5 billion in grants to strengthen existing transmission and distribution lines, as well as build new transmission.[182] In addition to its sub-program focused on industry, GRIP also

---

[175] David Roberts, *Volts Podcast: The Challenges of Building Transmission in the US, and How to Overcome Them, with Liza Reed*, https://www.volts.wtf/p/volts-podcast-the-challenges-of-building

[176] David Roberts, *Transmission Week: How to Start Building More High-Voltage Power Lines*, (2021), https://www.volts.wtf/p/transmission-week-how-to-start-building

[177] Id.

[178] *Jay Caspary et al., Disconnected: The Need for a New Generator Interconnection Policy, (2021), https://cleanenergygrid.org/wp-content/uploads/2021/01/Disconnected-The-Need-for-a-New-Generator-Interconnection-Policy-1.14.21.pdf* \

[179] Post et al., *Tribal Nations Want Utility-Scale Clean Energy, but Upfront Costs Pose a Barrier*, Utility Dive, https://www.utilitydive.com/news/tribal-nations-want-utility-scale-clean-energy-but-upfront-costs-are-barrier/729681/

[180] Willson, supra note 17.

[181] Brad Plumer, *The U.S. Has Billions for Wind and Solar Projects. Good Luck Plugging Them In.*, The New York Times, Feb. 23, 2023, https://www.nytimes.com/2023/02/23/climate/renewable-energy-us-electrical-grid.html

[182] *Grid Resilience and Innovation Partnerships (GRIP) Program, Energy.gov, https://www.energy.gov/gdo/grid-resilience-and-innovation-partnerships-grip-program*

had two sub-programs that tribes were eligible to apply for to collaborate with electric sector owners and operators to increase transmission capacity or deploy smart grid technologies.[183] However, as of 2025, this funding was likely to be rescinded. Section 50152 of the IRA also provided $760 million in grants to tribes and other entities "to study and analyze the impacts of covered transmission projects, examine up to three alternate transmission siting corridors, participate in regulatory proceedings, and for economic development activities for communities that may be affected by the construction and operation of a covered transmission project."[184] More recently the Alliance for Tribal Clean Energy filed a petition with FERC requesting an exception for tribes from the first three commercial readiness deposits, asserting that tribes do not put speculative projects in the queue.[185] As of 2025, this request was under consideration.[186]

For third party entities, it is important to plan for such fees associated with the project and maintain clear communication with the tribe about what costs may arise. Finding gap funding for unanticipated costs, such as interconnection fees, is likely a key strategy for ensuring successful projects.



[183] Id.
[184] Nicole Elliot, Kenneth Parsons & Kayla Gebeck Carroll, *Tribal Provisions In The Inflation Reduction Act Address Energy, Climate Change*, Holland & Knight (2022), https://www.mondaq.com/unitedstates/climate-change/1261342/tribal-provisions-in-the-inflation-reduction-act-address-energy-climate-change
[185] Post et al., supra note 161.
[186] Id.

Box 4: Utilities, Tribes and State Law

Although some tribes have their own utilities (as discussed below), the majority are serviced by third party utilities, sometimes multiple.[187] As such, these utilities are governed by state law, often under the regulation of public utility commissions.[188] As attorney Margaret Schaff points out, this leads to a *de facto* application of state law in Indian Country over the tribal members that the utility serves.[189] Tribes and their members will thus be subject to state-set structures and regulations, threatening the presumption against state regulation of tribal members discussed above. Because utilities typically do not distinguish between a reservation in their service district and the rest of their territory, they obligate their policies and rates without regard to differences for Indian country. There is legal ambiguity, however, over whether tribes are actually required to pay state-approved rates or contribute to state priorities and whether utilities must charge the state-set rates to their tribal-member customers in Indian country.[190] As tribes develop energy resources, many are actively exploring ways to assert their sovereignty over rate structures and other utilities policies to better serve their members.[191] To solve any legal ambiguity, the tribe and utility could negotiate an agreement on rates or other policies and seek approval of the state regulatory body through a request for a declaratory order.[192] Yet in the absence of utility cooperation, the Tribe may still be able set its own rates and adopt only relevant utility policies if it can show that these state-set regulations impede the Tribe's sovereignty.

Rights-of-Way

In addition to the fees and infrastructure-related deficiencies in transmission and interconnection, challenges with rights-of-way can pose particular hang-ups with projects on tribal lands. A right-of-way is a specific form of easement that gives a legal right to go across tribal land or individually owned Indian land for a specific purpose, such as building a utility line or road.[193] Rights-of-way are still considered Indian country and do not change the title to the land itself.[194] Rather, they create a right to use the land that is not terminable at will by the tribe or the individual landowners.[195]

Rights-of-way are very common across Indian Country, and both historically and today, the BIA drives the right-of-way process.[196] Prior to 1948, the Secretary of the Interior did not necessarily need consent from the tribe to grant a right-of-way.[197] While this changed with the passage of the Right of Way Act in 1948, tribal consent was often still a mere formality and the federal government retained regulatory authority over the right-of-way.[198] In 2016, the Department of the Interior adopted regulations that recognize tribal regulatory authority over rights-of-way and that support tribal decision-making authority.[199] However, existing case law may make it difficult for tribes to assert jurisdiction over these easements in some

[187] Laura Beshilas et al., supra note 3.
[188] Margaret Schaff, *REGULATION OF ELECTRIC UTILITIES ON INDIAN RESERVATIONS: TRIBAL GOVERNMENTS' OVERSIGHT OF RENEWABLE ENERGY DEVELOPMENT AND UTILITY PROVIDERS AND AUTHORITY TO CREATE TRIBAL UTILITIES,* 41 Energy Law Journal 261 (2020).
[189] Id.
[190] Id.
[191] Id. *at 273*
[192] Id. *at 276*
[193] Michelle Lee, *Joint State-Federal Workshop: Rights of Way for Utility Infrastructure Development on Tribal Lands in Southern California.*, (2024), https://www.cpuc.ca.gov/-/media/cpuc-website/commissioners/darcie-l-houck/documents/master-slides--joint-state-fed-workshop-on-row--utility-development-on-tribal-lands-111424.pdf.
[194] Id.
[195] Lee, supra note 192.
[196] Brian L Pierson, *RIGHT-OF-WAY SOVEREIGNTY*, WISCONSIN LAW REVIEW (2022).
[197] Pilar Thomas, *Joint State-Federal Workshop: Rights of Way for Utility Infrastructure Development on Tribal Lands in Southern California.*, (2024), https://www.cpuc.ca.gov/-/media/cpuc-website/commissioners/darcie-l-houck/documents/master-slides--joint-state-fed-workshop-on-row--utility-development-on-tribal-lands-111424.pdf.
[198] Pierson, supra note 195.
[199] 25 C.F.R. § 169 as cited in Brian L Pierson, *RIGHT-OF-WAY SOVEREIGNTY*, WISCONSIN LAW REVIEW (2022).

circumstances.[200] Additionally the BIA must still approve all new rights-of-way, unless the Tribe has a Tribal Energy Resource Agreement (TERA) or a Tribal Energy Development Organization (TEDO). The HEARTH Act does not currently grant tribes the ability to approve their own rights-of-ways.[201] Therefore, tribes may wish to turn to an easement agreement to explicitly assert their regulatory authority and safeguard other priorities.

One of the greatest challenges regarding rights-of-way today is that many utility lines were either never properly authorized or exist under expired approvals. As such, the records of these rights-of-way are often faulty or missing entirely. In a study surveying the rights-of-way of one of the Chippewa reservations in Wisconsin, a significant number of utility lines had never been approved by a BIA right-of-way, several were under expired rights-of-way, and very few of those that had been properly authorized required any payment to the tribe. Other easements were perpetual without the ability for the tribe to renegotiate the terms.[202] Many tribes across the country face a similar situation.[203]

When rights-of-ways are missing or noncompliant, this holds several implications. First, it results in both unauthorized use of tribal lands and substantial revenue loss for the Tribe. Additionally, noncompliant lines may impede service to unelectrified homes. For instance, in order to obtain a service line agreement to connect the distribution line to a customer's home, that line needs a proper right-of-way. If the line is out of compliance, the utility must go through a lengthy process to obtain a proper right-of-way, relying on an understaffed BIA and often incomplete records.

Noncompliant utility lines can also impede tribes' ability to build new infrastructure and energy generation. Some tribes, for instance, have made plans to deploy broadband by co-locating the necessary infrastructure with utility lines. When those utility lines lack proper rights-of-way, this may inhibit their ability to do so.[204] In specific cases, tribes have hit underground lines while building energy infrastructure because they were not documented through a proper right-of-way. Additionally, if the tribe is serviced by noncompliant utility lines, it may face difficulties interconnecting new generation onto the grid. All of these situations may create unique case-by-case hang ups that require extra time.

In addition to the challenges with historical rights-of-way, the clean energy transition will require significant transmission buildout,[205] some of which will require rights-of-ways across tribal lands. Today, tribes can leverage their sovereignty to negotiate easement agreements for rights-of-way, which may include taxes, trespass ordinances, dispute resolution mechanisms, just compensation to the Tribe, and other means of ensuring that tribal citizens will benefit.[206] The Secretary of Interior commonly defers to what tribes negotiate. The relevant third-party seeking the right-of-way should therefore prioritize the time necessary to negotiate these agreements, both to support tribal sovereignty and to ensure that there are not hang-ups down the line.

---

[200] *See* Strate v. A-1 Contractors, 520 U.S. 438 (1997). As cited in Pilar Thomas, *Joint State-Federal Workshop: Rights of Way for Utility Infrastructure Development on Tribal Lands in Southern California.*, (2024), https://www.cpuc.ca.gov/-/media/cpuc-website/commissioners/darcie-l-houck/documents/master-slides--joint-state-fed-workshop-on-row--utility-development-on-tribal-lands-111424.pdf.
[201] Thomas, supra note 196.
[202] Pierson, supra note 195.
[203] Id.
[204] Denise Turner Walsh, *Joint State-Federal Workshop: Rights of Way for Utility Infrastructure Development on Tribal Lands in Southern California.*, (2024), https://www.cpuc.ca.gov/-/media/cpuc-website/commissioners/darcie-l-houck/documents/master-slides--joint-state-fed-workshop-on-row--utility-development-on-tribal-lands-111424.pdf.
[205] Roberts, supra note 174.
[206] Thomas, supra note 196.

Tribes' Rights Regarding Off Reservation Projects

While this brief generally concerns collaborative partnerships for renewables on tribal lands, as previously noted, tribes have also fought renewable energy developments (or related critical mineral extraction) off-reservation when they are adversely impacted.[207] In addition to protesting on cultural, spiritual, moral and environmental grounds, tribes also may have legal claims to halt projects, as with any other development. These claims generally fall into four categories:

Consultation rights: The tribe may slow down or halt development if they have not been adequately consulted, particularly if the project is on federal lands or involves the federal government such that government-to-government consultation processes come into play.[208] State law may also require adequate consultation with tribes, which tribes may also leverage.

Treaty rights: In several cases, the Supreme Court has upheld tribes' ability to safeguard a treaty right even when the conduct at issue occurs outside of Indian Country.[209] For instance, in *Washington v. United States,* the Supreme Court upheld lower court rulings that required the State of Washington to replace hundreds of culverts that blocked fish passage, ruling that they violated treaty rights guaranteeing tribes the right to fish at "usual and accustomed places" and imposed a duty on the state not to degrade fish habitats in ways that would render those rights meaningless.[210] This decision reinforced that treaty rights include protections for the conditions necessary to exercise those rights.

Water rights: Tribes might assert a right to sufficient or clean water especially when an off-reservation project affects that prospect. This is especially true when a treaty guarantees such as right, although recently the Supreme Court has limited this right unless there is language of enforceability attached to it.[211]

Religious rights: Tribes have also sued under the First Amendment for freedom of religion when ceremonies, access, or other religious practices are adversely affected by a project.[212] Many tribes' freedom of religion claims have to do with the preservation of a specific place or environment, which can be challenging to fit into a strict First Amendment religion claim. This challenge has sometimes led to unsuccessful freedom of religion claims.[213]

Overall, third-party developers operating off-reservation should engage at the onset with any and all affected tribes. Proactively working with tribes and entities such as Tribal Historic Preservation Offices can help ensure the proper siting of projects before they are too far along to avoid damage or impediments to sacred sites or sensitive environmental zones. This is not only in the best interest of the tribes, but it can also save

---

[207] *See e.g.* New Report Finds Nevada's Lithium Mine Permit Violates Indigenous Peoples' Rights, American Civil Liberties Union, https://www.aclu.org/press-releases/new-report-finds-nevadas-lithium-mine-permit-violates-indigenous-peoples-rights; Kevin Rector, *Battle for Oak Flat: How Apache Opposition to a Copper Mine Became a Religious Liberty Test*, Los Angeles Times, Jun. 14, 2023, https://www.latimes.com/environment/story/2023-06-14/apache-copper-mine-sacred-land-arizona.

[208] *See The White House, Memorandum on Uniform Standards for Tribal Consultation, The White House (2022), https://www.whitehouse.gov/briefing-room/presidential-actions/2022/11/30/memorandum-on-uniform-standards-for-tribal-consultation/*

[209] *See Washington v. Wash. State Comm'l Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979); Washington v. United States, 138 S. Ct. 1832 (2018); Herrera v. Wyoming, 139 S. Ct. 1686 (2019); Washington State Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000 (2019).*

[210] *Washington v. United States, 138 S. Ct. 1832 (2018)*

[211] *See* Arizona v. Navajo Nation, 599 U.S. ___ (2023).

[212] *Lyng v. Nw. Indian Cemetery Protective Ass'n,* 485 U.S. 439 (1988); *Navajo Nation v. U.S. Forest Serv*., 535 F.3d 1058 (9th Cir. 2008); *Apache Stronghold v. United States*, 38 F.4th 742 (9th Cir. 2022).

[213] *See Lyng v. Nw. Indian Cemetery Protective Ass'n,* 485 U.S. 439 (1988); *Navajo Nation v. U.S. Forest Serv*., 535 F.3d 1058 (9th Cir. 2008)

developers and investors substantial time and money. The preceding list of this brief contains further considerations for effective tribal engagement.

Legal Status in Alaska and Hawai'i

The majority of the information in this primer applies to tribes in the contiguous United States and may not necessarily apply to Alaska Natives and Native Hawaiians. Because of their unique histories, Indigenous peoples in Alaska and Hawaii have unique land, governance, and legal statuses.

Alaska

There are 227 federally recognized Alaska Native Villages, representing a significant portion of the 574 federally recognized tribes.[214] Because the U.S. government's treaty-making period ended in 1871 and Russia officially transferred Alaska to the United States in 1867, Alaska Native Villages do not have treaties with the U.S. government. Instead, after over a century of a lack of clarity over Alaska Native lands claims, Congress passed the Alaska Native Claims Settlement Act (ANCSA) in 1971. ANCSA represents a very different approach to federal Indian policy than the reservation system in the contiguous U.S.[215]

ANCSA extinguished aboriginal title to land and instead divided the state into twelve regional districts, each with its own Alaska Native regional corporation, as well as over 200 Alaska Native village corporations.[216] Qualifying Alaska Native individuals born before December 1971 were then given shares in these corporations.[217] The federal government transferred 44 million acres of land to be held by regional and village corporations and compensated the newly-formed corporations $962.5 million for the land lost in the agreement. The Metlakatla Indian Community opted out of the settlement, instead choosing to be designated as a federal Indian reservation. It is currently the only reservation in Alaska.[218] In 1975, Congress amended ANCSA to add a thirteenth regional corporation to include eligible Alaska Native shareholders that were not permanent residents of the state, but it did not convey any land or funding to this corporation.[219]

As part of the land selection process, Alaska Native village corporations were required to choose lands on which any part of the village was located, and in most cases, they received title to just the surface rights of those lands.[220] In contrast, regional corporations could select lands not otherwise conveyed within their region, and they received both surface and subsurface rights.[221] ANCSA also contained provisions requiring revenue sharing both across regional corporations and among a regional corporation and the village corporations within its boundaries for timber sales or subsurface estate.[222] While the original law stipulated the requirements for enrollment in an Alaska Native Corporation, 1991 amendments allowed corporations to independently amend shareholder enrollment eligibility.[223] Even so, many Alaska Native corporations continue to be restricted to the original shareholders and their heirs.[224]

---

[214] U.S. Department of the Interior, *Tribes Served by the Alaska Region*, Indian Affairs, https://www.bia.gov/regional-offices/alaska/tribes-served
[215] Robert Anderson et al., *American Indian Law: Cases and Commentary* (4th ed. 2020).
[216] *About the Alaska Native Claims Settlement Act*, ANCSA Regional Association, https://ancsaregional.com/about-ancsa/
[217] Robert Anderson et al., *American Indian Law: Cases and Commentary* (4th ed. 2020) at 875.
[218] *About the Alaska Native Claims Settlement Act*, ANCSA Regional Association, https://ancsaregional.com/about-ancsa/
[219] Id
[220] Id
[221] Id
[222] Id
[223] Id
[224] Robert Anderson et al., *American Indian Law: Cases and Commentary* (4th ed. 2020) at 875.

As a result of this history, there are several key distinctions when it comes to Alaska Native lands today. First, most land owned by Alaska Native corporations and by villages is not considered Indian country, which has profound implications for criminal and civil jurisdiction.[225] Instead, the only Alaska Native lands that qualify as Indian country are allotment lands and The Annette Island reserve of the Metlakatla Indian Community.[226] As such, Alaska Native Villages cannot exercise civil jurisdiction over most lands, with a few areas of exception, such as child custody disputes.[227] Additionally, the land held by Alaska Native corporations is generally held in fee simple rather than in trust. Land conveyed to the corporations thus is not subject to restrictions on voluntary alienation.[228] The 1991 amendments to ANCSA, however, indefinitely extended the restrictions on alienation of Alaska Native corporation stock.[229] Lastly, it is important to note that while Alaska villages are federally recognized, Alaska Native corporations are not, which means they may not qualify for some federal programs unless explicitly included.[230]

Hawai'i

Like tribes across the contiguous U.S., Native Hawaiians have a long history of sophisticated government. However, since the overthrow of the Kingdom of Hawaii in 1893, there has not been one singular unified government that represents all Native Hawaiians.[231] The U.S. federal government did not engage with Native Hawaiian communities through the same government-to-government relationship that it maintained with tribes in the lower 48 and Alaska.[232] As such, there are no federally recognized tribes in Hawai'i, and they do not qualify to apply for federal recognition under the typical administrative process.[233] Congress has repeatedly considered legislation to recognize a sovereign Native Hawaiian government.[234] In 2016, the Obama Administration created a final rule for a unified Native Hawaiian government to reestablish a formal government-to-government relationship with the federal government, but it has not yet come to fruition.[235]

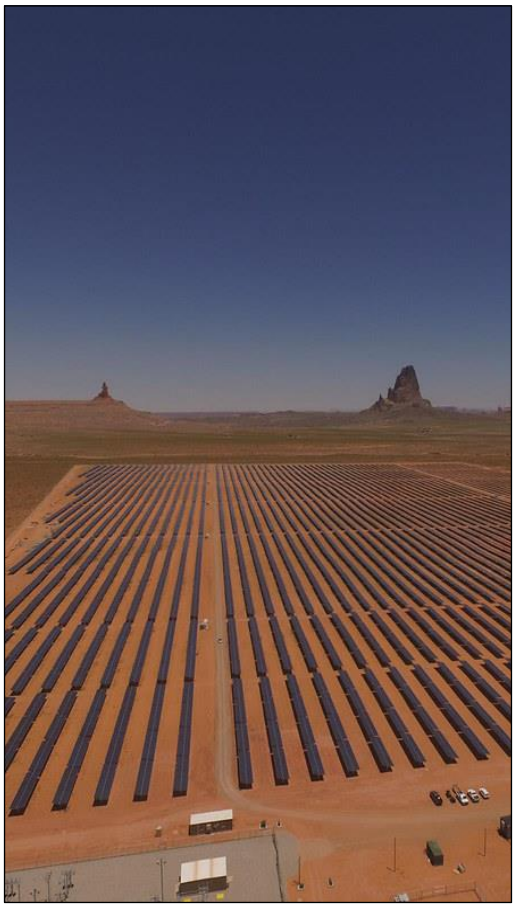
Despite these differences, Congress has established and acknowledged a special political and trust relationship with Native Hawaiians through over 150 enactments.[236] The Hawaiian Homes Commission Act of 1920, for instance, placed approximately 200,000 acres of land into the Hawaiian Home Lands Trust to be leased to "native Hawaiians," or those identified as having at least 50 percent Hawaiian blood.[237] When Hawai'i was admitted as a state in 1959, Congress transferred title to this trust to the State, meaning that these lands are not managed in the same way as federal trust lands.[238] However, the federal government reserved the right to sue the State for breaches of trust and the law continued to operate under a federal framework, reaffirming the federal role in this area.[239] Overall, while the federal government recognizes the

---

[225] Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520 (1998)
[226] Robert Anderson et al., *American Indian Law: Cases and Commentary* (4th ed. 2020) at 875.
[227] Id
[228] Id
[229] Id
[230] *See Yellen v. Confederated Tribes of Chehalis Reservation, 594 U.S. __ (2021)*
[231] Robert Anderson et al., *American Indian Law: Cases and Commentary* (4th ed. 2020) at 919.
[232] Robert Anderson et al., *American Indian Law: Cases and Commentary* (4th ed. 2020) at 916.
[233] Id
[234] Id
[235] U.S. Department of the Interior, *Consultation with the Native Hawaiian Community*, (Nov. 25, 2020), https://www.doi.gov/hawaiian/frequently-asked-questions-consultation.
[236] Id
[237] U.S. Department of the Interior, *Hawaiian Home Lands Trust*, (Jul. 1, 2015), https://www.doi.gov/hawaiian/hawaiian-home-lands.
[238] Id
[239] Id

special political relationship with Native Hawaiian communities, it does not go so far as to recognize their sovereign authority, which dramatically alters the legal relationship.

Tribal Law and Systems of Governance



This primer has focused on federal Indian law rather than tribal law—that is, each individual tribe's unique legal and governance structures. It is just as crucial, if not more so, for third parties to understand the Tribe's own laws and government processes. There are 574 federally recognized tribes alone, each unique. Yet because of parallel histories, there are some commonalities worth mentioning to help partners effectively work within tribal law and the Tribe's government systems.

Tribal law predates European contact and has shifted over time as tribes work to protect their cultures and serve the needs of their citizens. Some tribes are organized under the structures of the Indian Reorganization Act of 1934, which among other things, encouraged tribes to adopt constitutions and structures of government modeled after the United States.[240] While the Indian Reorganization Act (IRA) recognized and supported self-government in some ways, it also promoted boilerplate constitutions that may or may not have represented tribes' unique cultures and previous systems of government.[241]

Today, 60 percent of tribal governments have constitutions based off of IRA constitutions.[242] Most tribes elect a governing council through the process outlined in their Constitution or as dictated by traditional practices. The Tribal Council typically has the authority to write tribal laws, along with other administrative duties.[243] Additionally, most tribes elect a chairperson, chief or leader who has the authority to represent the Tribe in dealings with the federal government.[244] Often the specific powers of the Tribe's leaders are set in the bylaws rather than the constitution, meaning that their role can vary significantly across tribes.[245] Many tribes also have a tribal court that enforces the laws over their citizens and in certain civil cases, over non tribal-members operating on the reservation as well (as previously discussed). Tribes whose governments are not based off of IRA constitutions typically govern in ways that are more in line with their pre-contact systems. Many of the Pueblos in New Mexico, for instance, operate under customary law that is not written down.[246] In general, the best way to understand the laws and government of a Tribal nation is to hire a tribal liaison that is well-versed in the laws of the Tribe, to develop relationships, and ask informed questions.

---

[240] Robert Anderson et al., American Indian Law: Cases and Commentary (4th ed. 2020).
[241] Id
[242] National Congress of American Indians, Tribal Nations and the United States: An Introduction (2015), https://archive.ncai.org/resources/ncai_publications/tribal-nations-and-the-united-states-an-introduction.
[243] Id *at 22*
[244] Id *at 22*
[245] Id *at 22*
[246] Id at 22

Conclusion

As the funding for renewable energy on tribal lands has increased with the Inflation Reduction Act, so too has the interest in partnering with tribes. When done well, partnerships can play a key role in supporting tribal sovereignty, increasing capacity, and bringing together entities with various expertise. Yet such incentives can also reproduce the same patterns of extraction, paternalism and disenfranchisement that have long characterized energy extraction on tribal lands. For entities committed to avoiding the reproduction of these same patterns, the first place to start is education. Federal Indian law is complex. Yet beginning partnerships with at least some foundational knowledge can help establish better trust and allow entities to work together to proactively engage complications. This guide is intended to be brief starting resource. It is not meant to replace the need to engage experts or create a false sense of confidence in understanding what is an incredibly complex area. Nor is it intended to homogenize or essentialize the vast diversity across 574 federally recognized tribes. Rather, it is meant to provide some background information about the various laws and policies that *might* apply so that third parties can ask questions and anticipate complications.

