
Going “Code Green” in Indian Country

Dean B. Suagee

Fundamental changes are coming as we move toward a post-fossil-fuels economy. Global climate change is a compelling reason why we need to shift to an economic order that uses energy efficiently and meets most of our needs for energy services with renewable resources. Meeting our energy demands through efficiency and renewables will also reduce our dependence on imported oil, reduce the demand for energy resources that cause major environmental impacts other than global warming, and create the kinds of jobs that are not readily outsourced to other countries. See ROGER H. BEZDEK, *GREEN COLLAR JOBS IN THE U.S. AND COLORADO: ECONOMIC DRIVERS FOR THE 21ST CENTURY* (American Solar Energy Society 2009), www.ases.org.

For reasons such as these, Thomas Friedman says that America should step up and lead the world in the green energy revolution. THOMAS L. FRIEDMAN, *HOT, FLAT, AND CROWDED: WHY WE NEED A GREEN REVOLUTION—AND HOW IT CAN RENEW AMERICA* (2008). As Friedman puts it, we need to go “Code Green.” A green energy revolution will yield many kinds of benefits in addition to dealing with the main cause of global warming. We will have “cleaner air and water, more efficient products, more workers trained in the next great global industry, higher energy prices but lower bills, greater productivity, healthier people, and an export industry in clean power products that people across the world will want to buy.” *Id.* at 174. We will also have many kinds of amenities that add up to an enhanced quality of life: sunspaces in passive solar homes, daylighting in public buildings, walkable, mixed-use neighborhoods clustered in transit-oriented development, organic vegetables from local farms, less land paved over, and more land left for the plants and other creatures that make up the web of life.

American Indian and Alaska Native tribes need to be part of making this transition happen. They already are, with renewable energy projects coming on line in various parts of Indian country and Native Alaska. The level of interest in renewable energy development in Indian country is very substantial. See Robert Gough, *Tribal Wind Power Development in the Northern Great Plains*, 19 NAT. RES. & ENVT. 57 (Fall 2004) (describing a tribally owned, utility-scale wind turbine on the Rosebud Sioux Reservation and a plan to develop wind power on eight northern plains reservations in the range of 10 megawatts to 150 megawatts on each reservation). Some renewable energy projects in Indian country have been financed by outside investors. See, e.g., Michael L. Connolly, *Commercial Scale Wind Industry on the Campo Indian Reservation*, 23 NAT. RES. & ENVT. 25 (Summer 2008) (describing a 50-megawatt wind farm on tribal land leased to project sponsor). Some tribal renewable

energy projects are made possible by financial assistance from federal agencies, including the Department of Energy (DOE) Tribal Energy Program and the Department of Interior (DOI) Office of Indian Energy and Economic Development. From FY 2002 to 2008, the DOE Tribal Energy Program has provided grants for ninety-three tribal energy projects, for a total of just over \$16.5 million in federal funds, leveraging \$6.4 million in tribal funds. http://apps1.eere.energy.gov/tribalenergy/funding_history.cfm. (Information on DOI programs administered by the Office of Indian Energy and Economic Development is not readily accessible.)

The existing federal grant programs are worthwhile, but they only scratch the surface of what is possible. I am concerned that unless there is some real attention to how tribes as governments fit into realizing the transition to a green energy future, the communities of Indian country and Native Alaska will miss out—or be included at the margins, as afterthoughts. Even special programs designed for tribes are likely to be inadequate when compared to federal and state policies to bring renewable energy into the mainstream to make it the “default” choice by providing incentives, subsidies, technical assistance, and favorable regulatory frameworks.

The energy economy has been shaped by more than a century of laws and regulations, at the federal level and by the states. Achieving reductions in carbon dioxide emissions on the scale needed to avoid the more catastrophic impacts of climate change will require action at all levels of government. Some aspects of our energy economy are shaped by federal laws, or regulated by federal agencies. Some aspects are shaped or regulated at the state level, e.g., much of the electric utility industry. Some aspects of our energy economy are governed by municipal governments and other subdivisions of the states, such as land use regulations that may encourage sprawl (or smart growth) and building codes that increasingly require new buildings to be more energy efficient.

When most lawyers talk about all levels of government, they typically include federal, state, and local and overlook the third kind of sovereign in our federal system: Indian tribes. See, e.g., *GLOBAL CLIMATE CHANGE AND U.S. LAW* (Michael B. Gerrard, ed., ABA 2007) (including chapters on regional, state, and local government initiatives, but no discussion of tribal governments). In our federal system, tribal governments are conceptually comparable to states, in that they exercise sovereignty that is distinct from the federal government. Tribes are generally not subject to the lawmaking authority of the states, and so in Indian country, the kinds of laws that are typically enacted by states, or by local governments acting pursuant to state sovereignty, may be enacted by tribal governments.

Or may not be. In a lot of ways, the attributes of tribal sovereignty differ from the attributes of state sovereignty. Some of the differences include limits on the exercise of tribal powers imposed by federal courts applying the approach often called “implicit divestiture.” See COHEN’S

HANDBOOK OF FEDERAL INDIAN LAW § 4.02[3] (2005 ed.). On a practical level, implicit divestiture means that when tribal governments enact laws that apply to lands that are no longer in federal Indian trust or restricted status or laws that apply to persons who are not tribal members, they can expect to have to defend their tribal laws in federal court. While some states and local governments are changing their approach to land use regulation to discourage sprawl, tribes that might want to pursue such policies risk court challenges to their authority to enact such laws. On the bright side, Congress has the power to relax judicially imposed limits on tribal sovereignty. *United States v. Lara*, 541 U.S. 193 (2004) (upholding amendment to the Indian Civil Rights Act recognizing and affirming inherent tribal sovereignty to exercise criminal jurisdiction over all Indians, including nonmembers).

Some of the differences between the attributes of tribal sovereignty and state sovereignty have to do with the delivery of governmental services and the ways that such services are funded. This includes governmental services that are authorized in federal legislation and that are largely federally funded but delivered through state and local governments. Some such programs have provisions in statutes or regulations to allocate funding for programs to be run by tribes. Many tribes presently administer two programs that could evolve into the core of a tribal energy-efficiency program, e.g., the Weatherization Assistance Program administered by DOE and the Low-Income Home Energy Assistance Program (LIHEAP) administered by the Department of Health and Human Services (HHS). Both of these programs have a sort of tribal set-aside. See 10 C.F.R. § 440.11 (DOE Weatherization), 45 C.F.R. §§ 96.40–96.49 (HHS LIHEAP).

Energy efficiency is an essential step in going Code Green, so the development of a federal policy to support tribal efforts to go Code Green should include analyses of these programs to see how well they are working in Indian country and to identify ways in which they could be improved. Other federal assistance programs could be used to complement such programs, such as the DOE Building Energy Codes Program. www.energycodes.gov. Federal law has authorized support for states and local governments to incorporate energy efficiency into building codes since the Energy Policy Act of 1992. Pub. L. No. 102-486, § 101(a)(2); 106 Stat. 2783 (codified at 42 U.S.C. § 6833). Tribal governments have been left out of this federal assistance program. The building energy codes program is administered through DOE's State Energy Program. 10 C.F.R. part 420, § 420.15. There is no mandate in the State Energy Program for states to provide assistance to tribal communities, and there is no comparable program for tribes. Most federally subsidized new housing is required to conform to the standards in the 2006 version of the International Energy Conservation Code. Energy Independence and Security Act of 2007, Pub. L. No. 110-140, § 481 (to be codified at 42 U.S.C. § 12709). This requirement does not apply to federally subsidized Indian

housing funded by the Department of Housing and Urban Development pursuant to the Native American Housing and Self-Determination Act (NAHASDA). 25 U.S.C. §§ 4101–4243. The NAHASDA regulations emphasize the upfront costs of home construction, 24 C.F.R. § 1000.158, not the lower operating costs that could be achieved through energy efficiency. Given the omission of tribes from the energy codes program, Indian families can expect to live in homes that don't measure up. This just doesn't seem right.

The federal government and the states use tax policies to promote renewable energy development. Tax incentives don't work very well for low- and moderate-income families, categories that include many reservation households. In 1980, Congress authorized the Solar Energy and Energy Conservation Bank to provide some help for low- and moderate-income families. Pub. L. No. 96-294, title V; 94 Stat. 719. The Solar Bank died on the vine in the Reagan years. We should bring it back to life.

One of the main tax incentives for wind-power development is the federal production tax credit (PTC). 26 U.S.C. § 29. Indian tribal governments are not taxable entities, so this tax credit is not available for projects owned by tribes. The 2005 Energy Policy Act authorizes a financing mechanism for governmental entities, including tribes, called Clean Renewable Energy Bonds (CREBS). Pub. L. No. 109-58, § 1303 (to be codified at 26 U.S.C. § 54). The PTC, however, is likely to continue to be a major driving force in financing wind farms and similar projects, as it was in the Campo 50-megawatt wind farm. See Connolly, *supra*, at 27. To develop its wind power resource, the Campo Tribe leased its land so that its lessee could use the PTC. One implication of this arrangement is that the Tribe's lessee is subject to a tax assessment by San Diego County that exceeds the amount of the lease payments that the Tribe receives, even though the Tribe provides virtually all governmental services on its reservation and the County provides virtually none. *Id.* at 28. This situation results from a Supreme Court decision holding that even though a tribe can tax non-Indian business activities on its trust lands, so can the state. *Cotton Petroleum v. New Mexico*, 490 U.S. 163 (1989). This just doesn't seem right. Federal tax policy should encourage tribal ownership of renewable energy projects.

These observations are in no way comprehensive. Examination of these issues would benefit from the insights of members of the Section who are engaged in the transition to a green energy future, as well as those who work in the field of Indian law. I hope that the overlap between these two practice areas will grow rapidly. Maybe the overlap is already bigger than most of us imagine. Tribal governments can perform important roles in making the green energy revolution happen. Members of our Section can help. 🌱

Mr. Suagee is of counsel to Hobbs, Straus, Dean & Walker, LLP, in Washington, D.C., and a member of the editorial board of Natural Resources & Environment. He is a member of the Cherokee Nation. He may be reached at dsuagee@hobbsstraus.com.