



Tribal Energy Development

The Tribal Clean Energy Development Year in Review – 2017 Impacts and 2018 Forecast

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2017 – The Year That Was

For a lot of reasons, many Indian tribes viewed the incoming Trump Administration with some degree of depredation. There were several reports about a desire to “privatize Indian lands” – which many tribes took to mean, taking their lands away and/or opening it up to resource extraction and exploitation by private industry. In addition, the President’s first budget request included substantial cuts in Indian programs, including at the Department of the Interior, Indian Health Services, Environmental Protection Agency, and the Department of Energy. Thankfully, none of these potential derailments of Indian Country progress have come to fruition. However, during 2017 there were several key sets of action – at the federal, state, local, and industry levels – that have, or will, directly impact Indian clean energy development opportunities. Some of these actions will benefit Indian tribes seeking to develop clean energy resources or becoming more energy self-sufficient. Other actions will likely be to tribes’ detriment. This article provides a brief summary of the most important actions from 2017 and some thoughts on key opportunities in 2018 for Indian tribes or others interested in clean energy issues.

Changes From the Federal Government

2017 brought a substantial amount of change from the new Trump Administration related to support for energy development and energy regulations. President Trump issued several new Executive Orders that began the “deregulatory” efforts to promote more fossil fuel energy development – especially on federal lands – to deemphasize climate change and conservation, and to reduce the regulatory burdens of energy development.

Presidential Executive Orders to Expedite Energy Development

Executive Order 13766 - On January 24, 2017, President Trump signed Executive Order 13766 “Expediting Environmental Reviews.” Under this Executive Order, the President stated that “it’s the policy of the executive branch to streamline and expedite, in a manner consistent with law, environmental reviews, and approvals for all infrastructure projects.” This order placed a specific focus on high priority infrastructure projects, including pipelines and improving the U.S. electric grid. The EO also created a mechanism for Governors (but not tribal leaders) to make a request to the Council on Environmental Quality (CEQ) to designate an infrastructure project as “high priority.” Once so designated, the CEQ and responsible federal agency are to establish expedited procedures and deadlines for completing environmental reviews and approvals.

Executive Order 13783 - Two months later, President Trump issued Executive Order 13783 “Promoting Energy Independence and Economic Growth.” This Executive Order seeks to promote the development of “affordable, reliable, safe, secure and clean” forms of energy – all energy, including renewable energy. To accomplish this goal, the EO requires all executive agencies to “immediately review existing regulations that potentially burden the development or use of domestically produced energy resources and appropriately suspend, revise, or rescind those that unduly burden the development of domestic energy resources” For purposes of the EO, burden means “to unnecessarily obstruct, delay, curtail, or otherwise impose significant costs on the siting, permitting, production, utilization, transmission, or delivery of energy resources.”

EO 13783 rescinded several previous presidential actions – Executive Orders and Presidential Memoranda – related to climate change, carbon pollution standards, and natural resource mitigation from energy development. The agencies, in turn, were to take action to suspend, revise or rescind any agency proposed rules, final rules, or guidance directly related to these presidential actions. More specifically, this EO orders the Environmental Protection Agency (EPA) to review the Clean Power Plan, and “if appropriate . . . as soon as practicable, suspend, revise and rescind” the final rules, proposed rules, and any guidance.

Lastly, more directly related to Indian energy development, EO 13783 instructs the EPA and the Department of the Interior (DOI) to review rules and guidance related to oil and gas development on federal and tribal lands. This includes rules related to hydraulic fracturing, methane waste and flaring, and royalty valuations. In furtherance of this, the DOI has repealed the hydraulic fracturing rule, postponed compliance with the methane flaring rule, and rescinded the royalty valuation rules.

Executive Order 13807 - The most recent Executive Order, issued on August 15, 2017, seeks to hold agencies more accountable for expediting infrastructure permitting and establishes a goal of permitting projects within two years, on average. Executive Order 13807, “Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure,” re-emphasizes the Administration’s policy to promote development of infrastructure in an environmentally sensitive manner, ensure federal decision-makers are informed about environmental impacts of projects, conduct environmental reviews in a coordinated, consistent and timely manner, ensure federal agencies speak with a coordinated voice, and make decisions within two years (measured from the publication date of the Notice of Intent to prepare an Environmental Impact Statement). This EO applies to energy generation, transmission and pipeline projects.

In addition to leveraging the Federal Permitting Improvement Steering Committee (FPISC) established under the FAST Act, EO 13807 creates a “One Federal Decision” process. Under this process, each major infrastructure project will have a lead agency responsible for coordinating all other federal agency actions. While this is already established under current National Environmental Policy Act (NEPA) regulations, the intent is to ensure that all agency decisions will be recorded together in one Record of Decision (ROD), unless certain circumstances exist. It also sets a deadline for final agency authorization within 90 days of NEPA completion and issuance of the ROD. The Office of Management and Budget (OMB) and Council on Environmental Quality (CEQ) are responsible for developing guidance to implement the One Federal Decision process, which will include provisions if a tribe, state, or local government agency is the lead agency for a federal project.

Finally, in July of 2017, the President announced the United States withdrawal from the Paris Climate Accord. While the greenhouse gas emission reduction targets in the Paris Accord are voluntary, several federal climate change initiatives were developed to support these emission reductions. Almost all of those initiatives have been reversed or are under review.

Department of the Interior (DOI) Actions

Immediately following on the heels of EO 13783, Secretary Zinke issued Secretarial Order 3349. In this Order, the Secretary revoked a previous Secretarial Order related to mitigation, and called for agency review of existing Department policies, guidance, and existing regulations related to mitigation and climate change. The Secretarial Order further ordered the review of “any other actions that impact energy development” and the bureaus and offices (including the BIA) were directed to report on “all existing Department Actions . . . that potentially burden the development or utilization of domestically produced energy resources with particular attention to oil, natural gas, coal and nuclear resources.” (Emphasis added.)

In response to this Secretarial Order, the Department issued a Final Report on its review of DOI policies and actions that create obstacles to energy development. According to the Final Report, the DOI took the following actions:

- Repealed department manual chapters related to climate change policy, landscape-scale mitigation, and Bureau of Land Management (BLM) mitigation.
- Repealed Hydraulic Fracturing Rule and Royalty Valuations Rule – both applicable to oil and gas development on tribal lands.
- Issued new Secretarial Order to streamline NEPA processing, requiring completion of NEPA within a one year time frame. This is also applicable to BIA approvals necessary for tribal energy projects on tribal trust lands.
- Identified the need to clarify certain provisions under the Tribal Energy Resource Agreements regulations.

Environmental Protection Agency (EPA) Actions

The EPA has also taken several actions to review and change regulations that have an impact on energy development on tribal lands. The EPA has begun the formal rulemaking process to repeal the Clean Power Plan final rule, which would have had direct impacts on four power plants on tribal lands. The EPA has also begun to repeal the rule that regulates carbon emissions from new power plants, as well as to stay compliance of the rule that regulates methane emissions from oil and gas production. Furthermore, the EPA has revised its position on its review and enforcement of Title I and Title V air quality permits. While these regulatory review efforts currently only impact a very limited number of Tribes with oil and gas production (approximately 10 tribes), or existing regulated power plants (3 tribes), it is unclear what additional impacts there may be for tribes that seek to develop their fossil fuel resources, or potentially develop fossil fuel electricity generation plants on tribal lands.

OMB and CEQ Actions

The Council on Environmental Quality (CEQ) has published guidance for the 2-year permitting timeframes, implementation of the federal permitting infrastructure steering committee, and consideration for working with Indian Tribes for NEPA compliance. The results of this guidance will impact energy projects on tribal lands, as well as off-reservation infrastructure projects that may affect off-reservation tribal interests.

While these agency actions will mostly benefit non-Indian, or off-reservation energy development, many of these actions could also support faster development of clean energy projects on tribal lands (such as the expedited NEPA process for DOI, and the OMB expedited permitting process). But, the biggest winners will most likely be tribes with oil, gas, and coal – fossil energy resources

115th Congress—Key Legislation for Tribal Energy Development

In the 115th Congress, both the Senate Energy and Natural Resources Committee and the House Energy and Commerce Committee have developed full agendas introducing legislation and conducting hearings on energy infrastructure. So far, the Senate Indian Affairs Committee and the House Natural Resource Committee have only worked on two bills specific to tribal energy legislation. Key legislation relevant to tribal energy development introduced, passed or enacted during 2017 includes:

- S. 245, amends Title V of the Energy Policy Act of 2005, and was passed by the Senate in November.
- H.R. 210, the Native American Energy Act, was passed by the House in November.

- S. 1460, the Energy and Natural Resources Act of 2017, is still pending in the Senate. Built on last year's Energy Policy Modernization Act, S. 1460 has eleven titles, including S. 245 which amends the Indian Tribal Energy and Self-Determination Act. The Act includes provisions related to energy efficiency, workforce development, distributed energy, microgrid development, energy resource and resiliency planning, hydropower licensing, grid modernization, and fossil energy development.
- S. 951, Regulatory Accountability Act of 2017, is still pending in the Senate.
- H.R. 2786, H.R. 3043, streamline hydroelectric licensing and development.
- H.R. 3050, provides energy grid security and planning tools.
- H.R. 627, H.R. 723, to promote energy efficiency and savings.
- H.R. 2883, H.R. 2910, to streamline international and natural gas pipeline approval processes.

State/Local Government Actions

Arizona

The state of Arizona has seen very different courses of action regarding energy development during 2017. The Arizona Corporation Commission (ACC) completed ratemaking decisions for every utility except Tucson Electric Power (TEP). These decisions have resulted in higher utility rates for most rate-payers, and include changes to the net metering program and compensation for excess power generation from rooftop solar projects. The ACC also commenced a new rule making for the net metering program.

Notwithstanding the US position on the Paris Climate Agreement, across the state, several cities signed on to support the Paris Climate Agreement. Phoenix, Mesa and Tucson were three of those cities.

Lastly, the Navajo Nation and the DOI signed a lease extension for the Navajo Generating Station (NGS) through 2019. This will ensure the NGS stays in operation, thus providing power to the Central Arizona Project until at least 2019.

California

California continues to take the lead on clean energy development and climate change initiatives. With the adoption of SB 350 in 2015, the state began to implement several initiatives that could influence and support renewable energy and energy efficiency projects on tribal lands. Those initiatives included:

- Implementation of recommendations to reduce barriers to low income communities, including tribal lands, and disadvantage businesses to participate in the benefits of clean energy and energy efficiency technologies.
- Maintaining the net metering program to continue support for distributed energy projects.
- Establish separate funding for tribal microgrids through the EPIC program.

In addition, several California cities and counties continue to establish community choice aggregation entities. These entities allow its members to choose different clean energy sources than what might be offered by their utilities. One such entity has a member tribe.

The State of California and over 45 cities and counties – and at least one tribe (Blue Lake Rancheria) - have pledged to continue to support the Paris Climate Agreement.

Industry Actions

There were several key industry trends observed in 2017 that could likely impact tribal clean energy development efforts, including:

Corporate Sustainability / Paris Climate Accord Support – over 100 businesses have expressed continued support for the Paris Climate Accord, and many of them have adopted sustainability goals including 100% renewable energy. Corporate clean energy goals create a market opportunity for tribal clean energy projects

Solar Panel Tariffs – based on an unfair trade practice claim filed with the Department of Commerce, the White House imposed a 30% tariffs on imported solar panels from China. This will result in increased costs for some solar projects, likely making them less economical for tribal projects. However, opinions differ on whether these tariffs will have a negative impact on the residential roof-top solar market.

Tax Cuts – the newly enacted tax cut bill preserved many of the tax incentives for renewable energy, including the production and investment tax credits, as well as the new market tax credits and immediate capital expense deductions. With the reduction of the corporate tax rate from 35 to 21%, many energy companies and utilities will see reduced tax bills. This could encourage more project development as well lower utilities bills for ratepayers.

2018 – A Look Ahead

Clean energy development will still likely continue at a relatively rapid pace – despite the change in federal emphasis from clean energy/climate change initiatives to oil, gas, coal support – for a few important reasons:

- Many states continue to support and emphasize renewable energy development, including distributed energy and storage;
- Corporations continue to adopt sustainability goals, many of them because of shareholder demand for climate change mitigation;
- The tax cut bill retained investment tax credits; financial incentives will continue until at least 2020;
- Notwithstanding the new solar tariffs, technology costs – especially storage - continue to decline; and
- Wholesale and organized transmission markets have proven incredibly adaptive at integrating renewable energy, distributed energy and storage into their markets.

For these reasons, as well as others, tribes should continue to evaluate and develop clean energy projects for economic development, commercial, and energy self-sufficiency purposes.

Federal Actions - To that end, tribes that are interested in clean energy development should stay aware of – and even consider commenting on or expressing support for – the following federal actions in 2018:

- S. 1246 – Energy and Natural Resources Act. Senators Murkowski and Cantwell have sought priority to bring this bill to a vote. This bill contains programs support for tribal energy, energy efficiency, and utility development.

- 2018 Farm Bill. The Farm Bill will contain provisions related to rural energy development and rural economic development programs. The Native Farm Bill Coalition consists of over 80 tribes that are working together to ensure Indian Country equities are included in the Farm Bill. Tribes interested in agriculture, rural development, rural energy, and natural resource conservation – in addition to nutrition and food support programs – are encouraged to join and participate in the coalition.
- OMB / Council on Environmental Quality Guidance on Expedited Permitting. OMB has identified a key opportunity for more tribal government participation in the NEPA process. Tribes might consider submitting comments to CEQ and DOI regarding potential amendments their NEPA regulations to support tribal government environmental review processes.
- DOI – While DOI continues its efforts to develop fossil fuel energy on federal lands, and off-shore, there are other activities underway that could benefit tribal energy development. The DOI is continuing its evaluation of the Sec. 368 Energy Corridors (for transmission lines and pipelines), many of which run near tribal lands. Furthermore, DOI, like other federal agencies, will consider reorganization of the Department, including moving some bureaus and offices out of DC. Lastly, DOI has issued its 2018 Regulatory Agenda.

In the agenda, which provides a preview of the potential regulatory actions, the Department proposes to address the following regulations which impact energy development on tribal lands:

- Right of Way regulations, related to waiving bonding requirements
- NEPA regulations to streamline the review process
- Fee to Trust regulations for “off-reservation” applications
- Tribal Energy Resource Agreements to clarify the definition of “inherent federal function”

As tribes continue to monitor these DOI efforts, there will continue to be opportunities to provide comments that are supportive of tribal clean energy efforts.

- The EPA will continue to act on its regulations through the prism of “Cooperative Federalism” – the federal-state relationship in environmental protection. This will likely result in less federal oversight of state environmental agencies, and less federal enforcement under the Clean Air Act and Clean Water Act. Tribes should continue to pay attention to how this approach will impact energy projects on tribal lands, since the EPA (and not the states) is responsible to permit projects on tribal lands under the Acts.

State Activities – In Arizona, ACC Commissioner Tobin has proposed an Energy Modernization Plan that would, among other things, increase energy storage by 2030, clean energy deployment by 2050 and promote distributed energy resources. The ACC is also currently reviewing its net metering rules, but these new rules will likely reduce rooftop or distributed solar deployment. The ACC is also reviewing whether to reduce utility rates because of the passage of the Tax Cut and Jobs Act. To ensure tribal energy interests are considered in these ACC actions, Arizona tribes are encouraged to participate and comment on these actions.

In California, there will continue to be substantial state action to promote clean energy development, including distributed energy resources and climate change action. The CEC is currently implementing the recommendations for reducing barriers for low-income and tribal communities to access clean energy technology. The CEC has also established an advisory board – which tribes should seek appointment to – to oversee the implementation of the recommendations. And, as part of the microgrid commercialization efforts, there will also likely be another round of funding for microgrid projects on tribal lands.

Market Trends – Companies and local governments will likely continue to implement climate change mitigation and sustainability policies, based on corporate and civic values; shareholder, investor or voter pressure, and economic benefits that will result in continued investment and procurement of renewable energy and energy efficiency resources. This represents a continued opportunity for tribes to sell renewable power to these corporate or government entities or to create energy services companies to provide services such as energy audits or energy efficiency upgrades. This may also create opportunities for tribes to partner with their local governments – cities or counties – to promote clean energy development and climate change initiatives.

Please let us know if you would like to discuss these issues further, or if you have any questions or comments.



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