

OPPORTUNITIES FOR ON-RESERVATION SUSTAINABLE DEVELOPMENT

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INTRODUCTION

With the combination of the federal government acting on its trust responsibility to provide tribes adequate funding and other tools and the advancement of clean energy technologies, tribes are well positioned to pursue cost-effective, sustainable on-reservation economic development. Among others, opportunities include the development of clean energy for tribal use and potential sale to the grid, development of microgrid and energy resiliency projects, development of tribal clean energy “virtual” utilities, the implementation of electric vehicle charging, and the development of economically and environmentally sustainable housing. The passage of the fiscal year 2021 federal budget, COVID relief legislation,¹ and the Infrastructure Investment and Jobs Act,² as well as the potential passage of at least portions of the Build Back Better Act³ and the promulgation of rules such as the Department of Interior (DOI) right-of-way regulations, combine with important, long-standing federal programs to provide a unique federal legislative and regulatory backdrop for tribes to pursue sustainable economic development.

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1. American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4.
2. Pub. L. No. 117-58, 135 Stat. 429 (2021).
3. H.R. 5376, 117th Cong. (2021).

I. OPPORTUNITIES TO PROVIDE COST-EFFECTIVE CLEAN ENERGY ON RESERVATIONS

The combination of available federal and state grants and incentives with tax credit financing provide tribes unique opportunities to meet their environmental goals while lowering tribal, tribal business, and tribal member energy costs. For example, the U.S. Department of Energy (DOE) provides tribal energy grant opportunities with significant funding for both energy efficiency and renewable energy projects.⁴ In recent years, this program has provided up to \$1 million for energy efficiency and smaller and other renewable energy projects; this program also has provided up to \$2 million for community-scale renewable and other energy projects.⁵ In addition, with the 2021 budget, the DOE is able to lower the cost-share⁶ requirement under this grant program. Similarly, the Indian Community Development Block Grant (ICDBG) program provides funding for housing rehabilitation that can be used for energy efficiency and solar projects serving existing homes.⁷ These programs can be combined with state and/or utility programs that provide funding for clean energy and energy efficiency improvements.⁸

Perhaps more importantly, the programs can be combined with significant tax credits available for solar and certain other renewable energy facilities. For example, the present investment credit for solar

4. *E.g.*, OFF. OF INDIAN ENERGY POL'Y & PROGRAMS, DEP'T OF ENERGY, DE-FOA-0002317, ENERGY TECHNOLOGY DEPLOYMENT ON TRIBAL LANDS – 2020: FUNDING OPPORTUNITY ANNOUNCEMENT (FOA) (2020), <https://www.energy.gov/indianenergy/past-funding-opportunities> [<https://perma.cc/VNV3-QLZ9>] (providing \$50,000 to a maximum of \$1,000,000 to install energy-generating systems and energy efficiency measures for Tribal Buildings (Topic Area 1); \$250,000 to a maximum of \$2,000,000 to deploy community-scale energy-generating systems or energy storage on Tribal Lands (Topic Area 2); \$50,000 to a maximum of \$1,000,000 to install integrated energy systems for autonomous operation (independent of the traditional centralized electric power grid) to power a single essential tribal facility or multiple essential tribal facilities during emergency situations (Topic Area 3.a.); \$250,000 to a maximum of \$2,000,000 for tribal community resilience (Topic Area 3.b.); and \$250,000 to a maximum of \$2,000,000 to deploy energy infrastructure and integrated energy systems to electrify Tribal Buildings (Topic Area 4)).

5. *See id.*; *see, e.g.*, *DOE Awards \$12 Million to Tribal Communities to Maximize Deployment of Energy Technology*, DEP'T OF ENERGY (July 13, 2021), <https://www.energy.gov/articles/doe-awards-12-million-tribal-communities-maximize-deployment-energy-technology> [<https://perma.cc/4A6V-UULU>].

6. Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, § 8013(b), 134 Stat. 1182, 2592–93 (2020) (to be codified as amended at Section 2602(b)(5) of the Energy Policy Act of 1992 (25 U.S.C. § 3502(b)(5))).

7. 24 C.F.R. § 1003.202(b)(4) (2021).

8. *See, e.g.*, WIS. STAT. § 196.374(2)(a)(1) (2019–20) (“The energy utilities in this state shall collectively establish and fund statewide energy efficiency and renewable resource programs.”).

projects is twenty-six percent of the system cost.⁹ The value of the tax credits, plus potential state, utility, and other private funding, can often be used to leverage and meet cost-share requirements under federal grant programs. For example, with the potential opportunity to pursue lowered cost-share requirements under the DOE grant program, tribes may be able to fully fund solar and certain other renewable energy projects solely from grant and tax credit financing sources.¹⁰

With the substantial advancement of solar and wind technologies, as well as the recent, rapid advancement of energy storage technologies, tribes also can consider becoming hosts of large-scale clean energy projects. Under the proper conditions, tribes can negotiate for significant annual payments for hosting these projects.¹¹ In addition, depending on the local utility net metering rules and other strategies to provide billing credits from larger-scale energy systems, tribes can potentially negotiate for a carve-out of a portion of the project to directly serve the tribe and its members.¹² Tribes then could seek federal grant funding and tax credit financing to pay for the portion of the project that serves them. They could also take advantage of the economies of scale of these larger energy systems to lower the cost of their portion.

With the advancement of storage, tribes also can increase energy resiliency while meeting their clean energy needs through the development of microgrids (i.e., self-contained energy islands that include renewable energy and storage and that can operate independently when the utility grid is down).¹³ Fortunately, the DOE and ICDBG grants and

9. I.R.C. § 48(a)(2), (a)(6).

10. For example, if a tribe or tribal entity is able to reduce the cost-share requirement under the DOE grant to 26% and it partners with a tax credit investor that provides the tribe the value of the 26% tax credit but keeps the depreciation tax benefits, the project potentially could be fully funded by tax credits and grants.

11. See, e.g., Grace Connatser, *Large-Scale Renewable Energy Projects Expected to Increase Across Wisconsin*, WIS. STATE FARMER (May 12, 2021, 4:19 PM), <https://www.wisfarmer.com/story/news/2021/05/11/large-scale-renewable-energy-projects-expected-increase-wi/5035425001/> [https://perma.cc/APM3-KM6G]; *Lease Rates for Solar Farms: How Valuable Is My Land?*, SOLARLANDLEASE, <https://www.solarlandlease.com/lease-rates-for-solar-farms-how-valuable-is-my-land> [https://perma.cc/5TWN-Y2XW] (last visited Mar. 1, 2022).

12. Utilities in New York State, for example, allow community solar, under which billing credits from a solar project can be distributed among multiple customers. See, e.g., N.Y. STATE PUB. SERV. COMM'N, NIAGARA MOHAWK POWER CORP., P.S.C. NO. 220 ELEC., SCHEDULE FOR ELECTRIC SERVICE APPLICABLE IN ALL TERRITORY SERVED BY THIS COMPANY, at leafs 148–51.2 (2020), https://ets.dps.ny.gov/ets_web/search/showPDF.cfm?M%3AIS%20%3B%2A%29LOUNWD%5CJ%5E8%2B%22%2B5%2F0MD%2F0%29%21QF%26R%5CW%5EU2R%2AK%3AR%5CA%5B%2A2H%22N%5EAISF%20XNY%0A%27N7JEJK%5F%2CB%40%20%20%0A [https://perma.cc/QL6M-UJZ3].

13. Sanjay Kumar, R. K. Saket, P. Sanjeevikumar & Jens Bo Holm-Nielsen, *A Comprehensive Review on Energy Management in Micro-Grid System*, in MICROGRID

the tax credit financing discussed above often can be used for these important clean energy and resiliency projects.

II. POTENTIAL CREATION OF TRIBAL CLEAN ENERGY “VIRTUAL” UTILITIES

As discussed in detail in Brian Pierson’s Essay, *Right-of-Way Sovereignty*,¹⁴ under the Obama administration, the DOI dramatically changed its approach regarding rights-of-way on reservations.¹⁵ Essentially, the administration changed its approach from having the DOI determine what is in the best interest of tribes to deferring to tribes and supporting them in setting their own right-of-way fees, as well as clarifying tribes’ rights to seek trespass damages and to tax rights-of-way.¹⁶

These relatively new regulations provide significant opportunities for tribes to receive many of the benefits of operating their own electric distribution utility without necessarily incurring the cost and headaches of doing so. The combination of the ability to tax rights-of-way and to potentially set fees for new and expired rights-of-way provides tribes with unique tools to obtain value from transmission and distribution lines on their reservations.¹⁷ These tools, combined with the ability to cost-effectively develop solar and other clean energy that serves tribal buildings and member homes, provide tribes with the unique ability to receive many of the benefits of having an electric utility without the need to pay for or operate and maintain utility lines and charge members for energy services.

III. OPPORTUNITIES TO MODERNIZE TRANSPORTATION WITH ELECTRIC VEHICLE CHARGING

With the rapid development of electric vehicles (EVs), tribes and others have the ability to dramatically lower their vehicle operating costs while using potentially emission-free vehicles. This is due to the significantly higher fuel efficiency of EVs compared to gas vehicles. For example, many EVs are rated at above one hundred miles per gallon-

TECHS. 1, 3–4 (C. Sharma, P. Sivaraman, P. Sanjeevikumar & Jens Bo Holm-Nielsen eds., 2021).

14. Brian L. Pierson, *Right-of-Way Sovereignty*, 2022 WIS. L. REV. 225.

15. *Id.* at 227, 235.

16. *Id.* at 235–36.

17. *See, e.g.*, 25 C.F.R. §§ 169.110 (compensation for right-of-way across tribal land), 169.112 (compensation for right-of-way across individually owned Indian land), 169.114 (fair market value), 169.120 (taxes associated with use of the land), 169.413 (Occupancy of tribal lands without right-of-way grant is trespass.) (2020).

equivalent.¹⁸ Also, EVs generally have lower maintenance costs because they do not have an engine but just a battery and simple motors.¹⁹ The use of EVs can allow tribes to meet emission-reduction goals while also reducing their fleet vehicle costs. Especially as the relative upfront cost of EVs lessens compared to gas vehicles, this provides an opportunity for tribes to meet both their environmental and economic goals.

One major issue with EVs is the present lack of availability of convenient charging. The limited amount of available charging creates what is often called “range anxiety” among users and potential users of EVs.²⁰ This lack of convenient charging ability provides important economic opportunities for tribes, however. By providing EV charging at their operations or businesses, including—especially—casinos, hotels, and convenience stores, tribes have the opportunity to bring in new customers to those operations. This can be especially valuable because EV users typically need to charge substantially longer than it takes to fill a car’s gas tank, and EV users can leave their vehicles to utilize the services that tribal businesses offer (e.g., users may enjoy gaming, eating a meal, purchasing goods, or staying overnight at a hotel).

Fortunately, the Infrastructure Investment and Jobs Act includes billions of dollars for EV charging, and tribes are eligible for this funding.²¹ For example, the Act makes \$2.5 billion available for up to eighty percent grant funding to tribes and other eligible entities for EV charging along designated alternative fueling corridors and at community projects.²² The Act makes \$5 billion of funding each year available for fiscal years 2022 through 2026 for a national electric vehicle formula program with up to eighty percent federal share grants provided to and through states for EV charging infrastructure along designated alternative fueling corridors.²³

18. See, e.g., EPA & Off. of Energy Efficiency & Renewable Energy, U.S. Dep’t of Energy, *2022 Best and Worst Fuel Economy Vehicles*, FUELECONOMY.GOV, <https://www.fueleconomy.gov/feg/best-worst.shtml> [<https://perma.cc/QNG4-98EQ>] (last visited Mar. 1, 2022).

19. See, e.g., ANDREW BURNHAM ET AL., COMPREHENSIVE TOTAL COST OF OWNERSHIP QUANTIFICATION FOR VEHICLES WITH DIFFERENT SIZE CLASSES AND POWERTRAINS, at xvii tbl.ES-1, xxi, xxii, xxii tbl.ES-4 (2021).

20. Christian Wardlaw, *What Is Range Anxiety with Electric Vehicles?*, J.D. POWER (Nov. 3, 2020), <https://www.jdpower.com/cars/shopping-guides/what-is-range-anxiety-with-electric-vehicles> [<https://perma.cc/AQ26-FYWA>].

21. Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, § 11401, 135 Stat. 429, 546–53 (2021) (to be codified as amended at 23 U.S.C. § 151).

22. Infrastructure Investment and Jobs Act §§ 11101, 11401, 135 Stat. at 443–50, 546–53.

23. *Id.* § 11401, 135 Stat. at 546–53, 1419–28.

IV. ONCE-IN-A-LIFETIME OPPORTUNITY FOR SUSTAINABLE HOUSING

With the significant federal funding available under the American Rescue Plan Act of 2021 (ARPA),²⁴ tribes have unique opportunities to pursue sustainable housing. There is \$20 billion in additional funding for tribes for the Coronavirus State and Local Fiscal Recovery Funds, of which \$1 billion is allocated equally to all tribes, and \$19 billion is allocated to tribes by the U.S. Department of the Treasury based primarily on population.²⁵ In addition, there is \$750 million for housing assistance,²⁶ including \$455 million for Indian Housing Block Grants (IHBG)²⁷ and \$280 million for Indian Community Development Block Grants.²⁸ In addition to ARPA, other key funding available for tribal housing includes the following:

- \$100 million for competitive Native American Housing Block Grants²⁹
- \$70 million for Indian Community Development Block Grants³⁰
- Funding for specific types of housing under a variety of programs, including Native American Housing Assistance and Self-Determination Act,³¹ non-competitive IHBG,³² Housing and Urban Development (HUD) Section 184 Loan Guarantee,³³ Section 202 Supportive Housing for Elderly,³⁴ HOME Investment Partnerships Program, Housing for Persons with

24. Pub. L. No. 117-2, 135 Stat. 4.

25. American Rescue Plan Act of 2021 § 9901, 135 Stat. at 223–36 (codified as amended at 42 U.S.C. § 802).

26. *Id.* § 11003(a), 135 Stat. at 242–43.

27. *Id.* § 11003(a)(1), 135 Stat. at 242–43.

28. *Id.* § 11003(a)(2), 135 Stat. at 243.

29. Department of Housing and Urban Development Appropriations Act, 2021, Pub. L. No. 116–260, 134 Stat. 1182, 1878 (2020).

30. *Id.*

31. Native American Housing Assistance and Self-Determination Act of 1996, Pub. L. No. 104-330, § 201, 110 Stat. 4016, 4031 (codified at 25 U.S.C. § 4131); *see* 24 C.F.R. pt. 1000 (2021).

32. Native American Housing Assistance and Self-Determination Reauthorization Act of 2008, 77 Fed. Reg. 71,513 (Dec. 3, 2013) (to be codified at 24 C.F.R. pt. 1000).

33. Housing and Community Development Act of 1992, Pub. L. No. 102-550, § 184, 106 Stat. 3672, 3739–45 (codified at 12 U.S.C. §§ 1715z-1715a); 24 C.F.R. pt. 1005 (2022); 63 Fed. Reg. 12,334, 12,349–74 (Mar. 12, 1998); 63 Fed. Reg. 48,988, 48,988–94 (Sept. 11, 1998). Section 184 was reauthorized through 2012 by enactment of the Native American Home Ownership Opportunity Act of 2007, Pub. L. No. 110-37, 121 Stat. 229.

34. Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, 132 Stat. 348, 1021–22.

Disabilities, Section 811,³⁵ and HUD-Veterans Affairs Supportive Housing Program³⁶

- Significant funding for energy efficiency, generation, and storage projects for housing and other buildings under the DOE tribal energy grant program³⁷

While the \$20 billion in ARPA funding does not have leveraging requirements, many of the other grants do, especially if they are competitive grants. In order to allow the ARPA funds and other grant funds to go further, tribes may want to consider utilizing the newly improved 4% low-income housing tax credit program.

This program generally provides 4% tax credit each year for ten years (i.e., 40% total over time).³⁸ While the program does not in itself provide adequate funding for new or rehabbed housing, it can serve as an important form of leveraging for new housing and housing rehabilitation under all the funding programs previously mentioned.

The 2021 federal budget adjusted the 4% tax credits, so unlike before they truly provide full 4% credits.³⁹ Combined with the “adder”⁴⁰ that applies to projects in qualified areas, the program can allow for the credits to be worth up to close to half the cost of a low-income housing project.

The recent, large influx of ARPA money available to tribes for affordable housing, combined with programs that have been historically available, allows tribes to seek and obtain a large base of funding that can be leveraged with 4% tax credits to implement larger-scale new housing and housing rehabilitation projects.

35. Cranston-Gonzalez National Affordable Housing Act, Pub. L. No. 101-625, § 811, 104 Stat. 4079, 4324–31 (1990) (codified at 42 U.S.C. § 8013); *see also* 24 C.F.R. pt. 891 (2021) (program regulations); OFF. OF HOUS., U.S. DEP’T OF HOUS. & URB. DEV., 4571.2, SECTION 811 SUPPORTIVE HOUSING FOR PERSONS WITH DISABILITIES (HUD HANDBOOK 4571.2) (1991) (additional program information).

36. Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130, 2554 (2014).

37. OFF. OF INDIAN ENERGY POL’Y & PROGRAMS, *supra* note 4, at 30–31 (providing that projects potentially funded under this FOA included installation of energy-generating systems and energy efficiency measures for Tribal Buildings (Topic Area 1); deployment of community-scale energy-generating systems or energy storage on Tribal Lands (Topic Area 2); installation of integrated energy systems for autonomous operation (independent of the traditional centralized electric power grid) to power a single essential tribal facility or multiple essential tribal facilities during emergency situations (Topic Area 3.a.); for tribal community resilience (Topic Area 3.b.); and deployment of energy infrastructure and integrated energy systems to electrify Tribal Buildings (Topic Area 4)).

38. *See* I.R.C. § 42(b)(3), (f)(1).

39. Taxpayer Certainty and Disaster Tax Relief Act of 2020, Pub. L. No. 116-260, 201, 134 Stat. 3038, 3056 (2020) (“In the case of any new or existing building . . . which is placed in service by the taxpayer after December 31, 2020, the applicable percentage shall not be less than 4 percent.”).

40. I.R.C. § 42 (d)(5)(B).

There are also 9% tax credits available for housing.⁴¹ If a tribe can seek and obtain these competitive 9% credits,⁴² the credits will obviously be more valuable than the 4% credits. However, 9% credits are very competitive and 4% credits can be obtained simply by applying for and receiving multi-family housing bonds.⁴³ With the large influx of funding available from ARPA and other sources, even if a tribe can obtain 9% tax credits, it may also want to utilize 4% tax credits and combine them with other federal funds.

CONCLUSION

The combination of rapid technological advancements and significant federal financial and legal support to tribes is providing them with tools to pursue significant sustainable development on their reservations. These tools can potentially allow tribes to both enjoy the benefits of twenty-first-century technology and advance their “Seven Generations” environmental ethics.

41. *Id.* § 42(b)(2)(B).

42. MARK P. KEIGHTLEY, CONG. RSCH. SERV., RS22389, AN INTRODUCTION TO THE LOW-INCOME HOUSING TAX CREDIT 1 & n.2 (2021) (“The 9% credit is also commonly referred to as the ‘competitive credit’ because awards of 9% credits are drawn from a state’s annual LIHTC allocation authority and developers must compete for an award.”).

43. *Id.* (“The 4% credit is also commonly referred to as the ‘non-competitive credit’ or ‘automatic credit’ because developers do not have to compete for an award if at least 50% of the development is financed with tax-exempt bond financing; they are automatically awarded 4% tax credits.”).