

**Holland+Knight**

**REGULATORY CHALLENGES FOR  
MODERN TRIBAL DEVELOPMENT**

**Indian Energy Solutions 2007**

**CERT**

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# Tribes Have “Utility Jurisdiction”

As sovereigns, Tribes have the authority to:

- Purchase utility service from others for the reservation
- Form their own utility for the reservation
- Build infrastructure on the reservation
- Build Generation Projects, or
- Any combination thereof

Most of these decisions can be made by the Tribe without interacting with outside agencies

# Interaction With Regulatory Agencies

- Sometimes, interaction with other agencies may be required.
  - This will be the case if the Tribe wishes to obtain transmission service off the reservation.
  - This will also be the case if the Tribe wishes to build facilities off the reservation.
  - This will be the case if the Tribe wishes to purchase or sell power off the reservation.
  - If natural gas or fuel oil is purchased off the reservation.

# Primary Agencies

- Federal Energy Regulatory Commission
- State Public Utilities Commissions
- State Energy Commissions
- Independent System Operators or other regional industry organizations that implement planning and operating standards.

# Federal Energy Regulatory Commission (FERC)

- Governs wholesale rates for the sale of energy and transmission services
- Resolves disputes between wholesale sellers and customers
- Licenses hydroelectric projects, (including those that are located on reservations).
- Has jurisdiction over natural gas and oil pipelines.
- FERC has also been given (from time to time) broader review powers over national energy issues. FERC is also active in the selection of national transmission corridors.

# Public Utilities Commissions

- Utilities are also governed by state agencies that are often called “Utility Commissions” or “Corporations Commissions”
  - Formed to provide oversight to monopolistic utilities by providing a substitute for the competitive market.
  - Provide regulatory oversight to the business practices and rates of the Investor Owned Utilities (IOU’s).

# Public Utilities Commissions

- Approve rates and business practices in “tariffs” and authorize investments in infrastructure and facilities expansion programs via “certificate of need and necessity” determinations.
- Require the IOUs to operate in a nondiscriminatory fashion. This means that all *equally situated* customers are to be treated in the same way.
- Review the prudence of utility purchases and transactions. Have the ability to refuse the recovery in rates of imprudent utility spending decisions.

# The Regulatory Compact

- The PUC's judgment is generally exercised in accordance with the "regulatory compact," which is the principle that the utility should be allowed to earn the appropriate amount through rates to cover the cost of doing business and an appropriate return on investment for the shareholder, if the IOU runs the business properly.
- Not a guaranteed return.

# Other Agencies

- Other agencies may play a role in the future of a tribal energy project.
- For example, the California Energy Commission plays an important role in California
  - Forecasting future energy needs and keeping historical energy data
  - Licensing thermal power plants

# Other Entities

- Local authority for scheduling or dispatching power can be delegated to other entities. That entity can implement rules.
  - In California, the Independent System Operator (ISO) functions in this capacity.
- Regional organizations also promulgate rules relating to reliability.

# New Projects Will Require Interaction With These Entities

- Examples

- New generation project may require:

- A third party power sale contract that is approved by a PUC
    - Access to off-reservation transmission service
    - Interconnection arrangements for parallel operation consistent with the IOU's PUC approved requirements
    - The construction of new facilities off the reservation
    - The issuance of a FERC hydropower license
    - Consistency with ISO or regional rules

- These examples may require agency interaction.

# Tribes Need To Anticipate These Requirements

- Tribes contemplating development need to actively monitor the regulatory proceedings that may impact their projects. Because of regulatory planning requirements, issues regarding such matters as transmission may need to be addressed years in advance of the development of the project.
- Tribes need to communicate that their projects can solve the utility's (and agency's) problems.
- Tribes need to educate agencies regarding their needs and requirements so that they can be accommodated in the agency's plans.

# “Negative” Perceptions

- In the Section 1813 proceeding, tribes appropriately protected their rights to fair compensation for right-of-ways.
  - However, some agencies or utilities may have perceived the tribes’ position as expressing hostility to energy development in principle.
- Tribes have frequently protected cultural and historic resources in project application proceedings.
  - May be improperly perceived as general opposition to energy development.
- Some tribes have opposed hydroelectric relicensings as interfering with their livelihood and culture
  - May also be perceived as hostility to energy development

# Does Negative Perception Lead to Negative Consequence?

- These negative perceptions may be reflected in the current failure of transmission plans to address transmission needs on reservations:
  - Federal corridor study does not address Southern California Reservations' needs
  - Plans for Sunrise transmission line do not address tribal needs in the Salton Sea area
- Could adversely impact energy development on reservations that would benefit from new transmission facilities

# An Educational Opportunity

- If tribes desire to develop energy projects, transmission access will be a critical factor.
- In order to succeed, tribes need to identify any ill-founded negative impressions, and demonstrate that tribal energy development can provide a Win-Win for utilities and Tribes.

# How Can This Be Achieved?

In addition to compliance with required application procedures, the following steps can be instrumental in creating an environment in which tribes can be successful in accessing these agencies:

- Allocation of funds for the monitoring of relevant agency proceedings as part of a project budget.
- Active monitoring of proceedings (such as agency transmission proceedings) and providing consistent input on the tribes' needs and positions on the issues under consideration
- Education of agencies on the extensive resources that are available on reservations, and the tribes' willingness to develop those resources

# How Can This Be Achieved?

- Presenting tribal projects in a context where it is evident that they present a solution to greater issues confronting the agency.
- Collective action (where appropriate) by tribes to more efficiently use tribal resources in participation in agency proceedings. This could be done either by individual tribes or through organizations such as CERT.

# Where to Start?

- Transmission Proceedings
  - If fair compensation and tribal access is provided, right-of-ways *can* be constructed on willing reservations.
- Portfolio Standard Proceedings
  - Renewable Resources located on reservations can significantly contribute to the goals states are imposing upon utilities. Utilities are falling behind on their compliance efforts in this area.
- Greenhouse Gas Proceedings
  - Clean alternative resources located on reservations can assist states in the achievement of these greenhouse gas goals.

# Next Steps

- Questions and Answers
- Follow-up Contact Information

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