



GROWING TRIBAL ECONOMIES

STRENGTHENING TRIBAL FINANCE

House Natural Resources Subcommittee on Indian & Insular Affairs

Oversight Hearing On

Implementation of the Indian Tribal Energy Development & Self-Determination Act

September 28th, 2023

Good morning, Chairwoman Hageman, Ranking Member Leger Fernandez, Committee Chairman Westerman, Ranking Member Grijalva, and Members of the Indian & Insular Affairs Subcommittee and Natural Resources Committee. My name is Nicholas Lovesee, I am Director of Policy for the Native American Finance Officers Association (NAFOA) and I would like to thank all of you for your time today and for the opportunity to speak with you about Tribal Autonomy and Energy Development. Over the past two plus years NAFOA has made tribal energy development and policy a focus of our organization and a goal of ours to help increase tribes' ability to participate in the new energy economy and help unlock the massive energy potential of Indian Country, which for too long has gone untapped.

There is one point I want to stress before continuing, there should be focus on leveling the playing field for tribes to have a fair opportunity to compete. At NAFOA, we hear repeatedly from both member and non-member tribes, "we don't want anything more than anyone else, we want to ensure that we have a fair shot". As we've seen over and over, when tribes are able to compete on a fair playing field, they succeed.

Lastly, as an organization, NAFOA is energy source agnostic. A crucial part of tribal self-determination is being allowed to make decisions based upon the unique needs and situation of any given tribe, and it should be up to tribes and tribal members to decide what the best solutions are for their unique needs and situations. Just like for states, there is no "one size fits all" solution for tribes.

Loan Program Office (LPO)

Last summer, NAFAO testified before the House Energy & Commerce Committee on the Department of Energy's Loan Program Office (LPO) program. At the time, LPO had just been granted the ability to give direct loans to tribes, rather than guarantee loans that a tribe would receive. However, it was a temporary situation and there was uncertainty as to whether LPO would be able to continue to maintain that option. Fortunately, the Inflation Reduction Act (IRA) made the change permanent and increased

the total amount of loans that could be offered, going from \$2 billion to \$20 billion. These changes were major steps forward for the LPO program and could have a huge potential impact on tribal energy development opportunities.

Unfortunately, we have yet to see LPO grant any loans and there are unnecessary stumbling blocks still in the way. For example, the Inflation Reduction Act (IRA) included a provision limiting the use of appropriated funds by making the subject to a federal support restriction. DOE has heard from Congress and tribes that this restriction creates uncertainty when trying to get loans to projects through the LPO program.

Elect/Direct Pay

As part of last summer's IRA, Congress made an exciting change to tribal energy development by allowing, for the first time, tribes to access the federal Direct Pay, clean energy tax credits. Adding up all the bonuses, these credits potentially enable a tribe to cover 70% of a project's cost. NAFOA has been working with the Department of the Treasury to ensure that information about these changes and tax credit opportunities is available to all tribes that are interested in taking advantage of them.

However, as exciting as Direct Pay possibilities are, there have been some major roadblocks put in the way of accessing them. First, following passage of the IRA there has been almost a hold placed on many tribal energy projects as developers and tribes have adopted a "wait and see" approach to Direct Pay changes. Without guidance from Treasury and the IRS, no one is really sure what to make of these Direct Pay provisions for tribes, how they would be implemented, and what they actually mean in practical terms. For almost a year now we've seen this holding pattern and while Treasury has released some guidance, there are still key questions outstanding and many of the tribes and developers that I've spoken with are hesitant about what the landscape will look like going forward. Even the financing side of a project is impacted and slowed while we wait for Direct Pay guidance and rules, as tribes have an option to receive lending based on Direct Pay credits.

Another major issue is the lack of technical assistance that IRS and Treasury can offer tribes. To this point, tribes do not file federal income tax. So how would they access a federal income tax credit payment? Our understanding from IRS statements is that they do not have the legal authority to provide this assistance. There needs to be an authorization that will allow IRS to give in-depth information and technical assistance to tribes, similar to the types of technical assistance available with many other tribal programs, as well as a place where tribes can go to ask for guidance or clarification.

Tribally Chartered Corporations

On the 18th of last month, NAFOA submitted consultation comments in partnership with the Tribal Economic Tax Reform Advocacy Alliance (TETRAA) and the National Congress of American Indians (NCAI) as part of a Department of Treasury and IRS "Dear Tribal Leader" letter sent around on May 15th of this year. The purpose of the letter and consultation was to seek guidance on the tax status of tribally chartered corporations, including those that are just jointly owned by a tribe. This is a problem that tribal leaders have asked to be addressed for decades. Per the Department of the Treasury's letter:

Presently, however, no guidance addresses the Federal tax status of corporations chartered under Tribal law that may be wholly owned, majority owned, or jointly owned by a Tribe. In response to substantial Tribal leader requests for guidance on this question for over thirty years, Treasury's Office of Tax Policy is seeking Tribal leader feedback to inform its understanding of Tribally chartered corporations.

Why is this relevant for today's hearing and tribal energy development? As anyone who's worked in the energy industry or around energy projects knows, the ownership structures and entities of energy projects can make a massive impact on the profitability and/or viability of a given project. How tax credits are assigned, liability protections, ownership and investment stakes, and more all play key roles in the life cycle of energy projects and the current situation creates uncertainty and liabilities.

Unfortunately, tribes have been dealt an unfair hand. Going back to the Direct Pay, currently IRS is not able to offer the required technical assistance on tax filings that many tribes need or will need. This will require a change in authorization, just to bring the assistance to parity with the types of technical assistance already available to other programs.

Tribal Energy Development Issues

Another issue that doesn't get nearly enough attention is the shortage of experts and staffing when it comes to tribal energy development. There are plenty of experts in the energy industry and sector, but very few have any kind of experience working with tribes or tribal governments, and often don't even know the first place to start or where to take their issues. On the flip side, there are plenty of tribal experts who can tell you inside-and-out how tribal governments work, the unique issues tribes and tribal members face, and how to best address issues that tribes are used to facing. However, there is a shortage of those types of tribal staff and experts that have experience working in the energy sector.

We recently lived through a good example of this with COVID-19. To deal with the sudden influx of COVID funding, various Departments throughout the Administration had to "staff-up" and were finding themselves responsible for millions of dollars in aid to Indian Country, many of which had never dealt with tribes or tribal issues before. There was a shortage of experienced people from which these Departments were able to hire and at NAFOA we spend a significant amount of time these past three years having to educate staff on how to reach tribes and tribal members, what they needed to know about working in Indian Country, how to solve the issues they were facing, and more.

I want to stress that in almost all cases these were extremely competent, smart, hardworking, and dedicated staff, but from the outside looking in, it appeared as though they were thrown into the deep end of a pool and told "now swim!"

Another unique situation that has created unique barriers for tribes is the land into trust system, and these are barriers that non-tribal energy developers don't face. When testifying before the Senate Committee on Indian Affairs this past March, NAFOA stated:

I have repeatedly heard that delays in approvals by the Bureau of Indian Affairs of rights-of-ways, permits, and leases increases costs of tribal projects, delays projects unnecessarily, and sometimes, directs projects onto neighboring non-tribal fee lands. Beyond energy, these delays

impact broadband and other infrastructure projects. Congress can improve the efficiency of these processes by putting authority back into the hands of tribal governments where they wish to exercise it. Archaic and stifling rules regarding tribal land use can tie-up the process in red tape and discourage investments. In some cases, BIA requests could take up to two years, which can be the end to of any economic, development project. According to the GAO, the permitting review process under the BIA can take two times as long as the Bureau of Land Management.

Two years for a permitting review is a lifetime for many energy projects and developers and financiers sometimes decide “why put up with this when I can do a different energy project that won’t face these issues?”

One of the solutions that NAFOA has recently been working on is legislation that would give tribes more control over permitting and regulations on their own land. States are allowed to set regulations, why can’t tribes? If tribes want to create a situation that is attractive to developers or capital, they should have that option. Being able to create an environment where energy projects are economically attractive to businesses is going to be a huge step forward in making tribal energy projects a reality.

This would also help ease the business “friction” that exists for tribal energy projects and development. Sadly, some companies and developers look at working with tribes as “adding headaches” or hurdles and not as an advantageous partner. This creates issues not just in financing, but in trying to bring on additional partners so that tribes don’t have to do a project alone and accept the full burden of a project’s risk, a huge ask for almost any tribe but especially smaller ones.

Lastly, there is a disconnect between Washington, D.C. and the realities tribal governments face. In April, NAFOA hosted its Spring Conference here in D.C. and we were very fortunate to have a strong turn-out of Administration and government staff. However, while they discussed a wide range of programs and monies available, there was a sentiment of “that’s nice, but how are we supposed to access it.” There needs to be more done to make these programs practically accessible. During COVID the amount of information flooding the field was nearly impossible for tribes to keep up with, from application deadlines to changes in guidance to new opportunities.

Conclusions

Again, tribal energy is not about more or special, it is about creating a level and fair playing field and certainty. The good news is that there is a lot of excitement for tribal energy development. Webinars and information sessions that NAFOA hosts are widely attended, and we often receive information requests about different energy programs, grants, credits, and possibilities from both members and non-members. Tribal energy development is a massive opportunity, not just for Indian Country but the United States as a whole, it is estimated that the 53 million acres of Indian lands are host to 20% of Americas conventional energy resources, as well as holding the potential for vast renewable energy resources.

NAFOA is eager to work with the Subcommittee and Members to help ease the energy transition and allow all tribes an opportunity to participate in the new energy economy we are building.