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The Business of Energy Development

Basics for Tribal Projects

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NREL Tribal Training
Forest County Potawatomi Tribal Casino
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Milwaukee, WI

Overview of Presentation

Objectives:

- **What's NEW?**
 - **HEARTH Act finally becomes law**
 - **DOD \$7 Billion RFP**
 - **Solar on brownfields at Tohono O'odham**
 - **Community Wind at Winnebago**
- **Energy project essentials**
- **Basics of common business structures**
- **Key issues in joint ventures, leases and rights of way**

HEARTH Act: Public Law No: 112-151

- **Helping Expedite And Advance Responsible Tribal Home Ownership Act**
- **At the discretion of any Indian tribe, any lease by the Indian tribe for**
 - **public, religious, educational, recreational, residential, business, and other purposes requiring the grant of long-term leases**
 - **except a lease for the exploration, development, or extraction of any mineral resources,**

HEARTH Act Lease Exemption

- **Adopted under tribal regulations approved by the Secretary**
 - **shall not require the approval of the Secretary, if the lease is executed under the tribal regulations approved by the Secretary under this subsection and**
 - **Does not include allotments**

HEARTH Act Lease Term Limits

- **the term of the lease does not exceed—**
 - **“(A) in the case of a business or agricultural lease, 25 years, except that any such lease may include an option to renew for up to 2 additional terms, each of which may not exceed 25 years; and**
 - **“(B) in the case of a lease for public, religious, educational, recreational, or residential purposes, 75 years, if such a term is provided for by the regulations issued by the Indian tribe.**

HEARTH Act Tribal Regulations Required

- **Secretary “must” approve tribal leasing regulations that:**
 - **Are consistent with regulations issued by Secretary**
 - **Provide for an environmental review process that identifies and evaluates significant effects on the environment and provides a public review process**

HEARTH Act Public Review Requirements

- **Public review process must ensure that:**
 - **the public is informed of, and has a reasonable opportunity to comment on, any significant environmental impacts of the proposed action identified by the Indian tribe; and**
 - **the Indian tribe provides responses to relevant and substantive public comments on any such impacts**

HEARTH Act Approval

- **Technical assistance “may” be provided if tribe requests for developing regulations**
- **120 time limit for Secretary to act in approving tribal**
- **Tribe can choose to use NEPA**
- **Tribe must supply Secretary with**
 - **Lease**
 - **Documentation of the lease payments that are sufficient to enable the Secretary to discharge the trust responsibility of the United States**

HEARTH Act Enforcement Authority

- **Secretary can, at Secretary's discretion, enforce or cancel a tribal lease**
- **Interested parties may petition Secretary after exhaustion of tribal remedies to enforce tribal leasing regulations**
- **If violations of tribal leasing regulations, Secretary may take any action the Secretary determines to be necessary to remedy the violation, including rescinding the ... tribal regulations and reassuming responsibility for the approval of leases of tribal trust lands.**

DOD's \$7 Billion MOU



**Memorandum of Understanding
between
The Department of Defense
and
The Department of the Interior
on
Renewable Energy and a
Renewable Energy Partnership Plan**

The MOU

- **<http://www.doi.gov/news/pressreleases/loader.cfm?csModule=security/getfile&pageid=312415>**
- **DOD and DOI collaboration**
- **“Partnership Plans” for offshore wind, installation of renewables at DOD facilities, and an Alaska initiative**
- **Administrative Provisions:**
 - **Nothing required unless Congress appropriates funds, etc.**

THE RFP

- **Each of the military branches has committed to deploying 1 GW of renewable energy on or near its installations by 2025.**
- **U.S. Army's Central Contracting Command just released the \$7 billion request for proposals (RFP) for renewable energy generation**
- **The RFP calls for wind, solar, geothermal and biomass energy generation through 30-year power purchase agreements (PPAs)**

The RFP

- **99--Pre-Solicitation Notice for W912DY-11-R-0036: Renewable and Alternative Energy Power Production for DoD**
- **https://acquisition.army.mil/asfi/solicitation_view.cfm?psolicitationnbr=W912DY11R0036**
- **Download RFP and instructions and definitions**

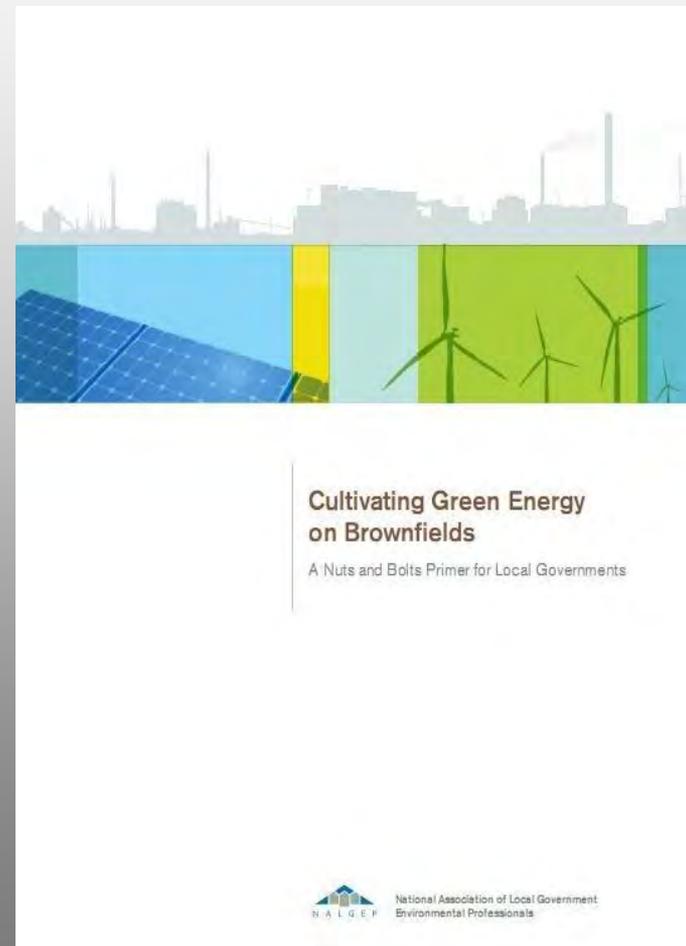
Utility Scale Renewables on Brownfields

- 1. New (and recent) resources**
- 2. Utility scale project basics/essentials**
- 3. Case study:**
 - Tohono O'odham Nation & Tucson Electric Power**
 - Phased solar pv on tribal lands: EPA study**
 - Developing on the active Asarco Mission mine complex**



Hot Off the Press

- **NALGEP/EPA
Primer for Local
Governments on
Cultivating Green
Energy on
Brownfields**
- **www.nalgep.org**

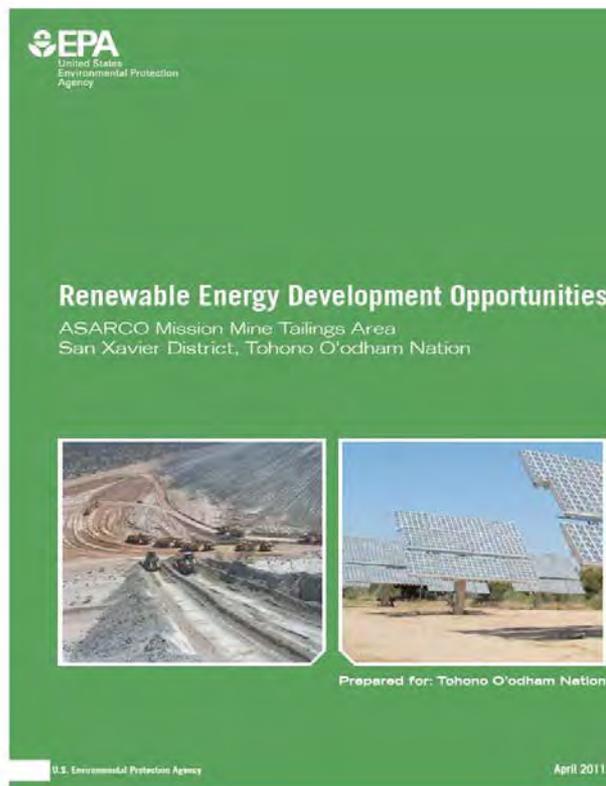


National Renewable Energy Laboratory

- **Renewable Energy Development in Indian Country: A Handbook for Tribes**
- **Project essentials**
- **<http://www.nrel.gov/docs/fy10osti/48078.pdf>**
- **Updates 2013**



EPA Report on Asarco Mine Tailing Project



Fly To Find Businesses Directions

Fly to e.g., Reservoir Rd. Clayville, NY

Search input field with a dropdown arrow and a magnifying glass icon.

EPA Tracked Sites

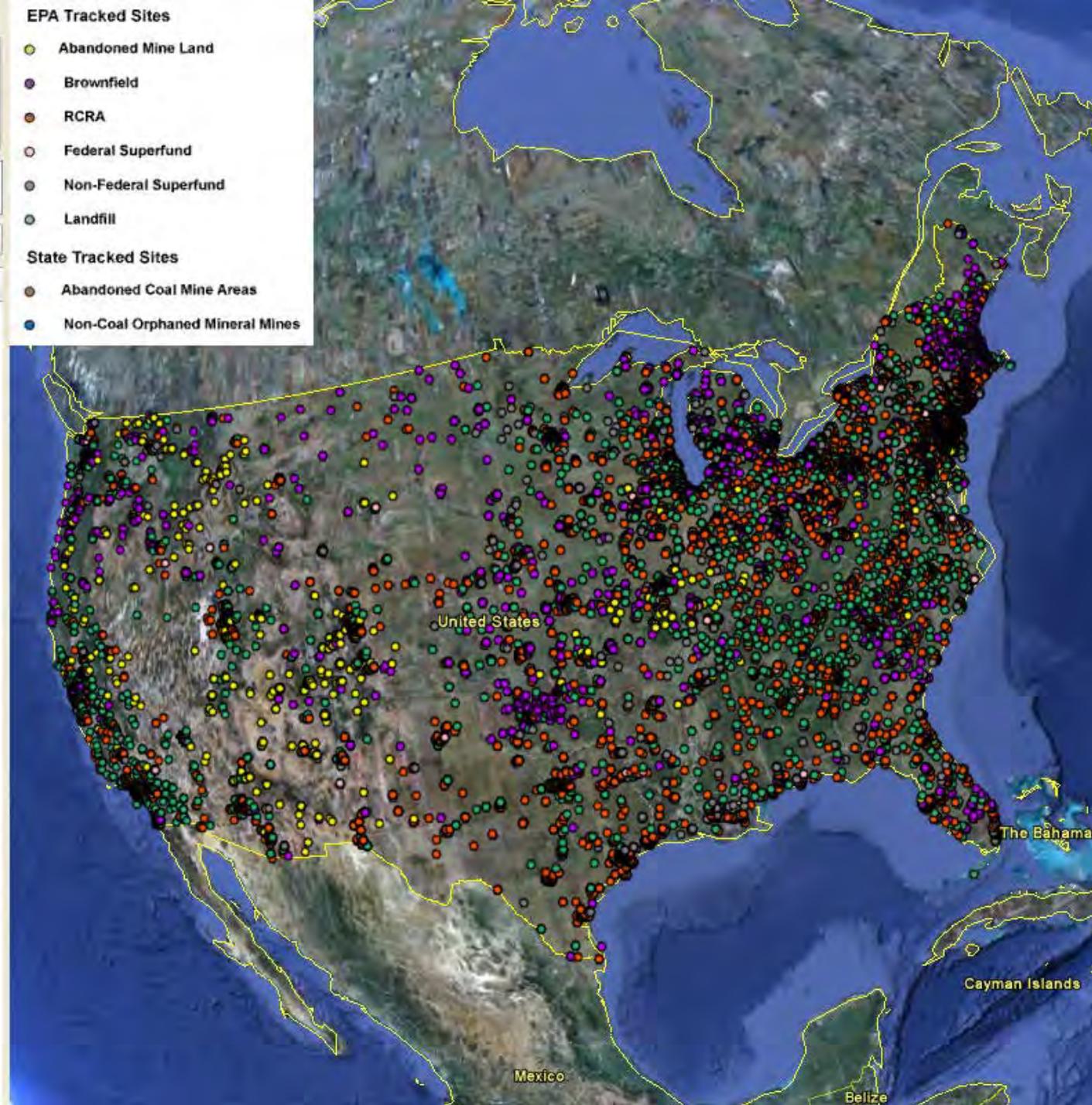
- Abandoned Mine Land
- Brownfield
- RCRA
- Federal Superfund
- Non-Federal Superfund
- Landfill

State Tracked Sites

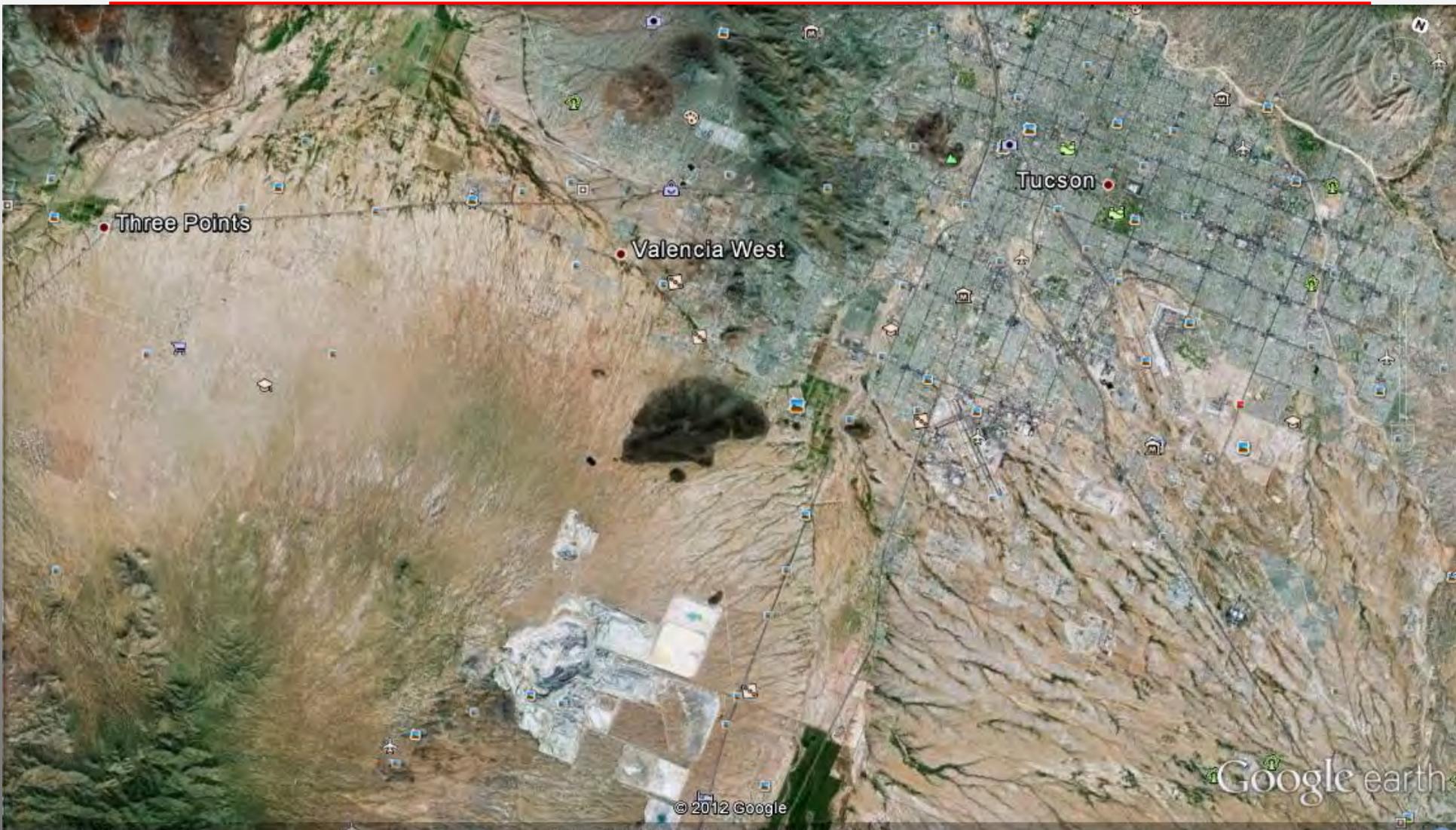
- Abandoned Coal Mine Areas
- Non-Coal Orphaned Mineral Mines

Places

- My Places
- Temporary Places
- EPA Renewable Energy Sites
 - EPA Site Type Legend
 - [Google Earth Instructions](#)
 - Utility Wind
 - Community Wind
 - Non-Grid Wind
 - CSP Utility Solar
 - PV Utility Solar
 - PV Policy Driven Solar
 - Non-Grid PV Solar
 - Biopower Facility
 - Biorefinery Facility
 - Geothermal Flash Power Plant
 - Geothermal Binary Power Plant
 - Geothermal Heat Pump
 - Landfill Gas Energy Project
 - [Data Guidelines](#)



Case Study: The View from Space



Project Basics

- **The ASARCO Mission Mine Complex is a commercial open pit / underground copper mine**
- **The facility is located near Sahuarita, Arizona (18 miles south of Tucson).**
- **The mine site covers approximately 19,000 acres (29 square miles) and includes an open pit 2.5 miles long and 1.5 miles across, associated crushing, grinding and flotation facilities, tailings areas, waste rock dumps, and warehouse and administrative areas**

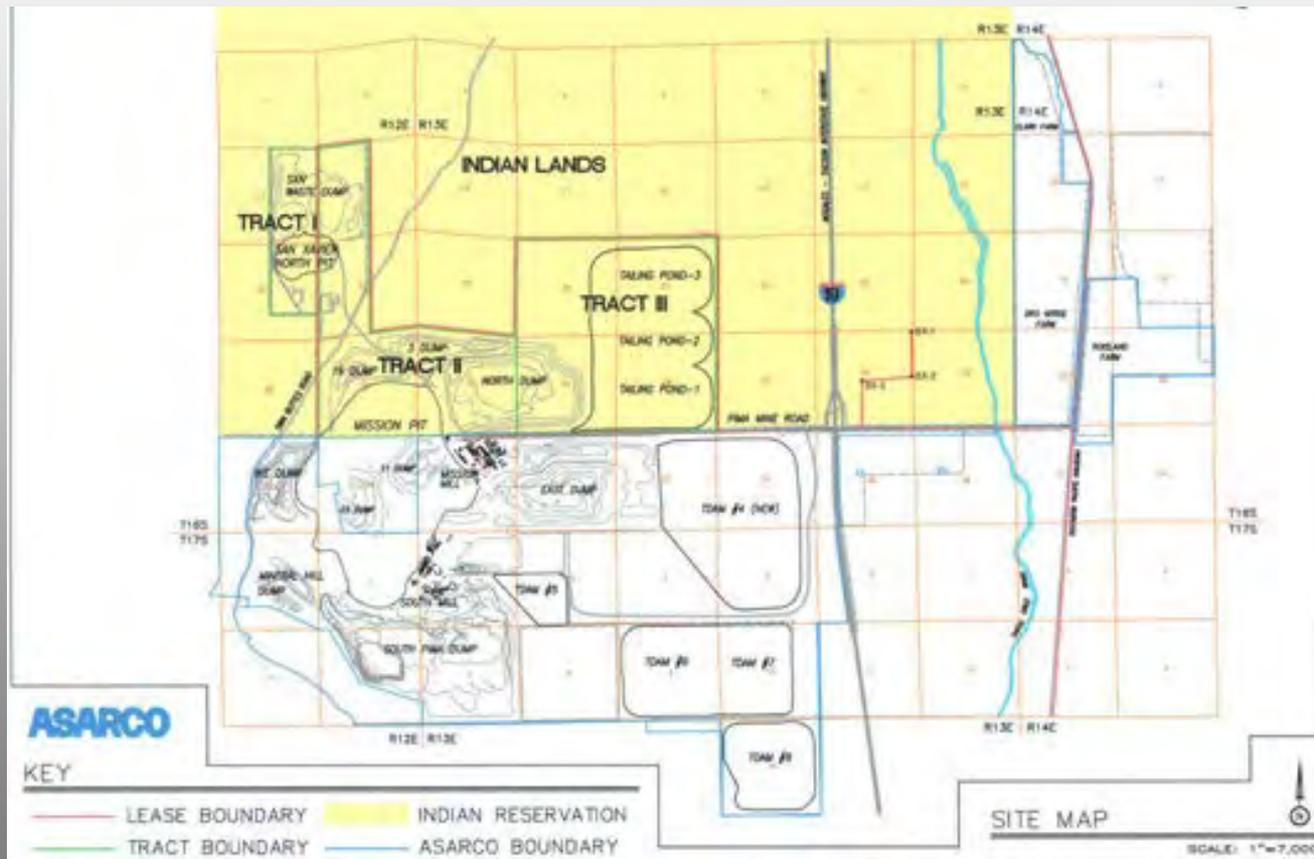
Tribal Interests

- **A portion of the mine complex is located on leased lands within the San Xavier District of the Tohono O’odham Indian Nation**
- **The lands within the District, referred to collectively as “San Xavier Reservation lands,” consist of both Nation Trust Lands and individually-allotted Trust Lands**
- **Tucson Electric Power (TEP) and Tribe negotiating lease of brownfield to site and operate solar pv for delivery of electricity to TEP customers**

Asarco Mission Mine Complex



Land Ownership



Copper Mining



Large Scale Brownfields



“Capping” the Mine Tailings

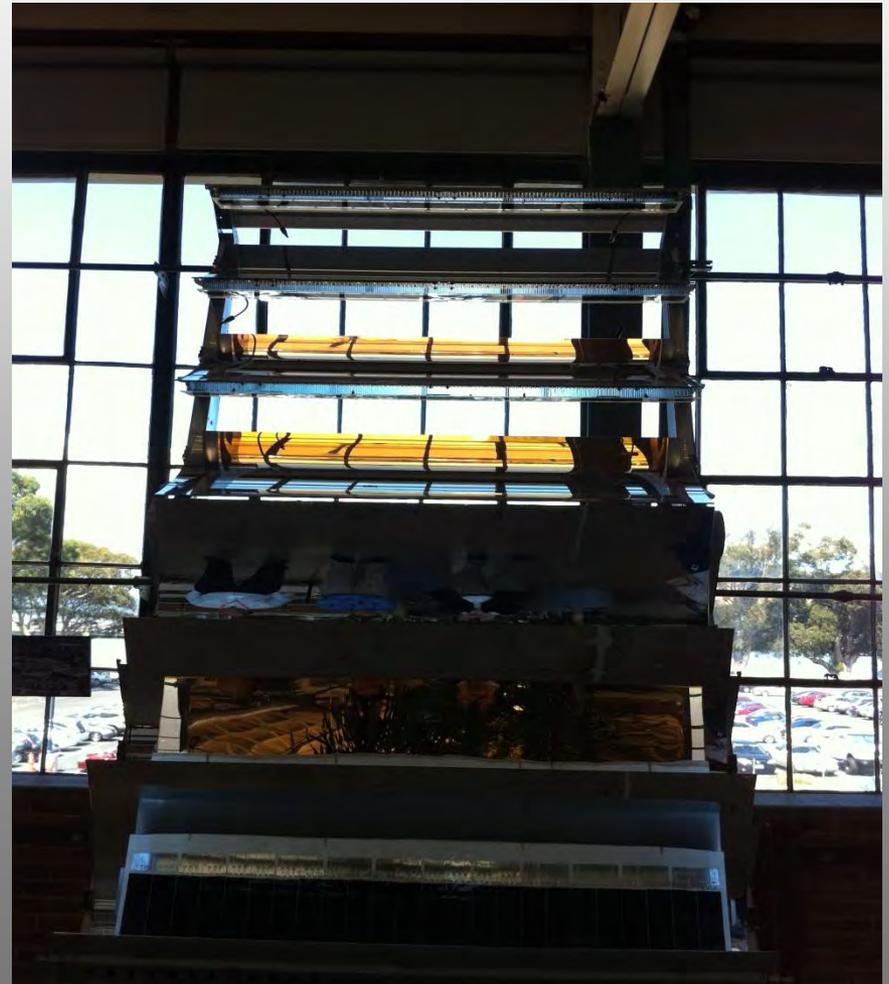


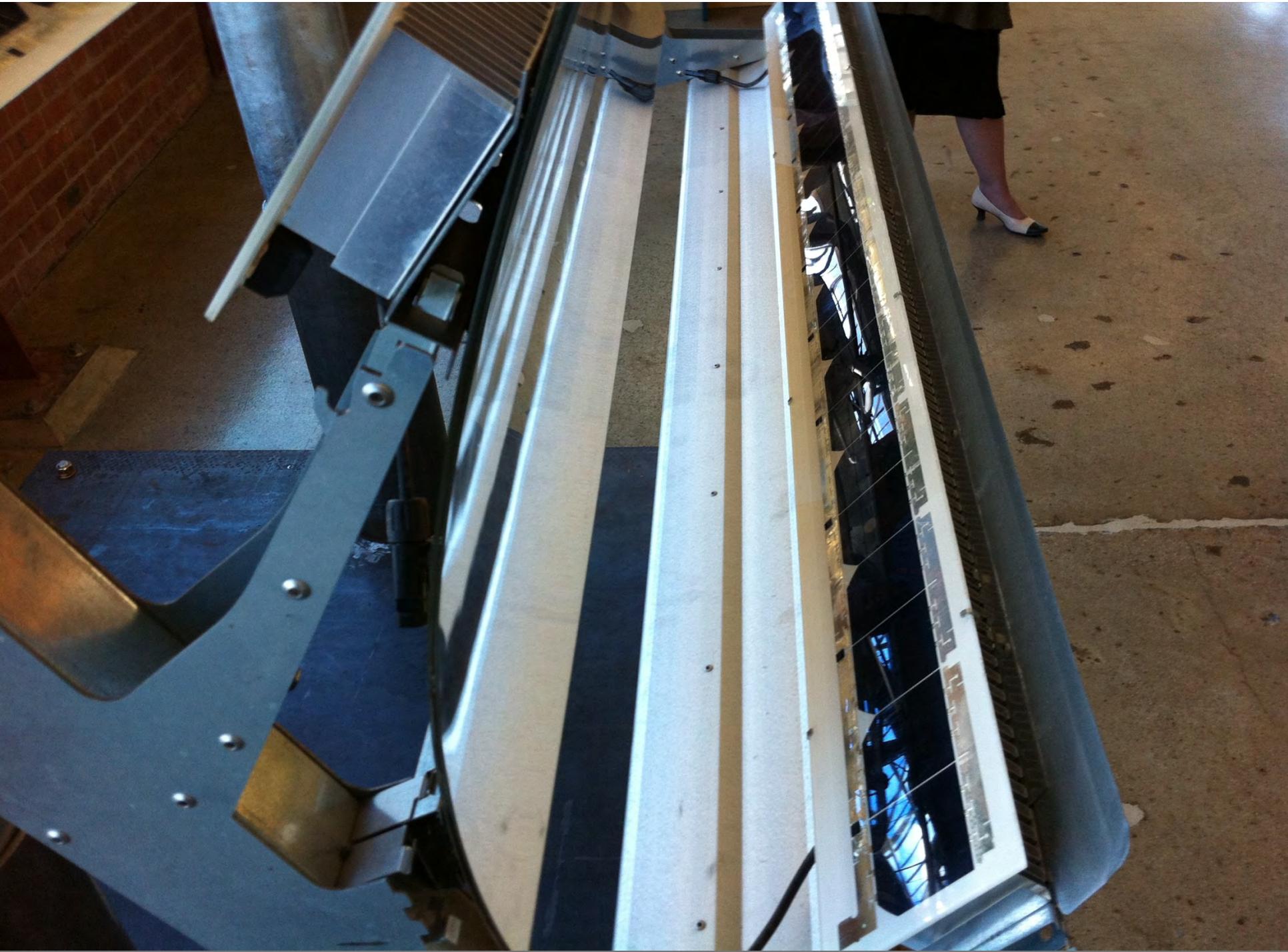
Making it Shovel Ready



Getting Better All the Time

- **New concentrator technology for site application**
- **7X increase to output per pv panel**
- **Low tech, some additional space needed to avoid shadow effect**





Next Steps

- **EPA technical assistance from R9 Abandoned Mine Lands (AML) Team confirmed geotechnical suitability of site for either surface mount or piling mounted pv panels**
- **Connection to nearby TEP substation**
- **Lease of project site and NEPA analysis**
- **Phased buildout starting with 5 MW in 2013, ramping up to 50 MW in five years**

Select EPA Web Resources

- **EPA Renewable Energy Maps**
<http://www.epa.gov/renewableenergyland/>
- **EPA Abandoned Minelands Team Reuse**
<http://epa.gov/superfund/programs/aml/revital/index.htm>
- **EPA Guide to Purchasing Green Power**
http://www.epa.gov/greenpower/documents/purchasing_guide_for_web.pdf

Energy as a Business Venture

- **Project development a long-term strategy**
- **Successful ventures, no matter how large or small, require 3 elements:**
 - **Efficient business structures**
 - **Standardized and fair regulatory processes administered by reliable, stable and transparent government authorities**
 - **Enforceable, fair and balanced contracts**
- **Once a level playing field is established, these three elements can foster a wide variety of economic opportunities**

A Team Approach

- **Every successful venture requires a team**
- **The team must have financial, legal, political and public relations experience**
- **Within each discipline, certain subject matter expertise is essential**
 - **Legal: e.g., tax, real estate/land, finance, contracts (joint venture, equity), environmental law, government relations**

Top 10 Development Issues

- **Early stage development capital**
- **Efficient business structure**
- **Clear, realistic, and mutual understanding of expectations (e.g., time, cost, return on investment)**
- **Sizing the project correctly**
- **Sharing risk (financial, legal, competition)**

Top 10 Development Issues, Cont.

- **Finding the right offtaker at the right price**
- **Access to transmission**
- **Building and maintaining the right team to get the job done**
- **Streamlining permitting**
- **Funding in a tight market**

Finding Financial Resources for the Project

- **Attracting capital for renewable resource projects generally requires five essential elements:**
 - 1. **Renewable resource**
 - 2. **Site control**
 - 3. **Buyers for the energy**
 - 4. **Transmission to market**
 - 5. **Incentives (production tax credits, other tax incentives)**

Have Energy Resources Been Assessed?

- **Type and amount/magnitude of resource**
- **Economic feasibility of development**
- **Will resource(s) meet demand (both on and off the reservation)**
- **Ability to meet other objectives**
 - **Sponsor of renewable energy projects**
 - **Utility owners/operators**
 - **Regulators**
 - **Public/community**

Land Control

- **Site control and fair market valuation early in the development process**
- **Requirement for many regulatory processes**
- **Budget and schedule must account for all the approvals**
 - **Major federal action – NEPA**
 - **Overlapping jurisdictions**

Buyers

- **Fairly certain in states with RPS**
- **Price increase predictions driven by climate change issues changing the demand and supply outlook**
- **Utilities**
 - **Firm capacity?**
 - **Infrastructure?**
- **Long-term offtake agreements (power purchase agreements or “PPA’s”) with credit-worthy third party buyers**

Transmission

- **Distance to transmission system**
- **Market factors for creative transmission contracts**
- **Load capacity to deliver to market**
- **Ballpark overview a fairly simple exercise for qualified energy consultants**
- **Regional transmission coordinating agencies manage regional transmission grid and maintain data, require reliability and capacity studies**
- **Other DOE agencies, private and public utilities with transmission info**

Key Drivers for Energy Investment

- **Tax benefits: Accelerated depreciation and Production Tax Credits (renewables)**
- **Serve local energy demands (small projects) or economic development with utility scale projects with revenues to participants**
- **Cash flow to equity investors**
- **Affiliate contracts**
- **Economic Development and Other Policy**
 - **State/federal incentives**
 - **Environmental/social benefits**

Understanding the Investors

- **Strategic investors**
 - **Capacity to develop investment in the sector**
 - **Capacity to accept project risks because of knowledge and active management**
 - **Historically balance sheet financed development and acquisition**

Institutional Equity Investors

- **Mainly passive investors, motivated by tax benefits and overall return**
- **Experienced in other energy tax credit regimes**
- **Will not accept significant development risk**
- **Requirements similar to lender requirements**

Investors of all Shapes and Sizes

- **Utilities**
- **Oil/energy companies**
- **Other tribes**
- **European developers/markets (e.g., AIM)**
- **Other tax credit investors**
- **Other financial & development companies**
- **Nonprofits (Citizens Energy)**
- **Private equity funds/investors**
- **Venture capital investors**

Early Stage Development Equity

- **Substantial development costs required to reach a financeable project**
- **Sponsor and developer may lack adequate capital, development expertise and ability to arrange additional financing**
- **Alternatively, sponsor finds developer with capital, expertise and financing ability**

Late Stage/Construction Stage Equity

- **Made through purchase or joint venture/limited liability company**
- **Required to support power purchase agreements (PPA) or interconnection agreement security, turbine purchase order and construction loans**

Fundamental Truths About Project Finance

- **Tax incentives alone don't drive the deal**
- **Ready market is vital**
- **Lenders loan to cash flow, and against assets**
- **The investment is secured against the assets**
- **Biggest risks occur BEFORE cash flows**

Types of Risks Managed in the Deal

- **Construction risk**
- **Operation risk**
- **Sales risk**
- **Contract extension risk**
- **Environmental/regulatory risk**

Project Finance Basics

- **Non-recourse debt, meaning the lenders do not have any other collateral except for the assets of the project**
- **Loan repayment is from the project cash flows net of operating and capital expenses**
- **Project cash flows will provide scheduled debt repayment**

The Lender's Perspective vs. Equity

- **Debt providers (banks and bond holders) provide more affordable capital but want little or no risk**
- **Lenders look for contracts that shift risk to someone with a deeper pocket and risk appetite (e.g., utility)**
- **Equity providers, by contrast, take the greatest risks but get compensated by getting all the cash available after paying project costs and debt**

Renewable Energy Project Finance

- **Majority of renewable projects have been financed with a tax equity model**
- **Tax equity model is a combination of:**
 - **Small amount of sponsor equity,**
 - **Bank debt, and**
 - **Tax equity (monetization of tax credits)**

The Formation of the Deal – One Model

- **Sponsor**
- **Developer**
- **Project company formed to carry out:**
 - **Development**
 - **Construction**
 - **Operation**

Getting Organized

- **Legal counsel and key project advisors play a key role in helping the tribe and/or tribal enterprise get its team together**
- **Understand and Define the Project**
- **Know Your Total Funding Needs**
- **Answer the Questions:** (in plain, short, common English words).
 - **Is this investment “right sized?”**
 - **Can this team execute?**
 - **Can I get a reasonable return in a reasonable time?**

Should the Sponsor be Passive or Active?

- **Generally, the question is how much of the development process, risk and rewards, does the sponsor want to take on?**
- **Pros and cons of each approach**
- **Assess the parties' resources and willingness to commit to the project regardless of choice**
- **Long-term partnership with the parties to the project in both cases**

The Business Structure(s)

- **Most common types of entities for creating a joint venture between parties to a project include:**
 - **Corporation**
 - **Limited Liability Company**
 - **Partnership**

Many Responsibilities of the project company...

- **Initial project design and layout**
- **Regulatory and permitting analysis**
- **Negotiation of key agreements (e.g., land, water, fuel supply, offtake, interconnection and transmission, EPC, financing, shareholders)**
- **Market analysis for power sales**
- **Selection and management of advisors, EPC contractors**
- **Community and government relations**
- **Finance (projections, debt, investors, etc.)**
- **Operation and maintenance plans and budgets**

LLC as a Joint Venture Entity

- **Most common between tribes and non-tribal businesses because it combines the limited personal liability of corporate status with the pass through tax feature of partnerships.**
- **Does not have the attributes of the tribe (e.g., sovereign immunity) and cannot issue tax exempt debt.**
- **Tribal participation may make certain types of federal tax credits and depreciation benefits difficult or prohibited.**

The Formation of the Deal – One Model

- **Sponsor (including the tribe and/or a tribal entity such as an enterprise, tribal corporation or Section 17 corporation)**
- **Developer (could be tribe or non-tribal entity)**
- **Project company formed to carry out:**
 - **Development**
 - **Construction**
 - **Operation**

Joint Venture Process

- **Usually begins with a non-binding Letter of Intent (LOI) coupled with a Confidentiality and Nondisclosure Agreement**
 - **Sets the basic tone for discussions between the sponsor and developer**
 - **Allows both parties to share information without fear of disclosure to competitors**

The Term Sheet

- **Could be in the form of an MOU, an MOA, or even in the LOI**
- **This is where you should reach consensus on major issues**
- **You will have a much better idea who your potential partner is, and whether the deal is right for your client, upon completion of the term sheet**
- **Don't be afraid of detail here; but make the parties expectations clear on whether the terms are concepts or precise contract language**

Winnebago Tribe- Winnebago Wind Project

- **Northeast Nebraska**
- **120,000 Acres of Land- Total**
- **600 Acre Wind Project Site**
- **9 member Tribal Council**
- **Renewable Energy Journey Began Early 2000's**
- **Regained steam after tribe hired project consultant who attended NREL training**

Renewable Energy Journey

- **Strategic Planning – Early 2000's**
- **Assessment of Opportunities**
- **Options Reviewed**
 - **Wind**
 - **Solar**
 - **Biomass**
- **MET Tower Deployment at Current Site
January 2009- NPPD Partnership**

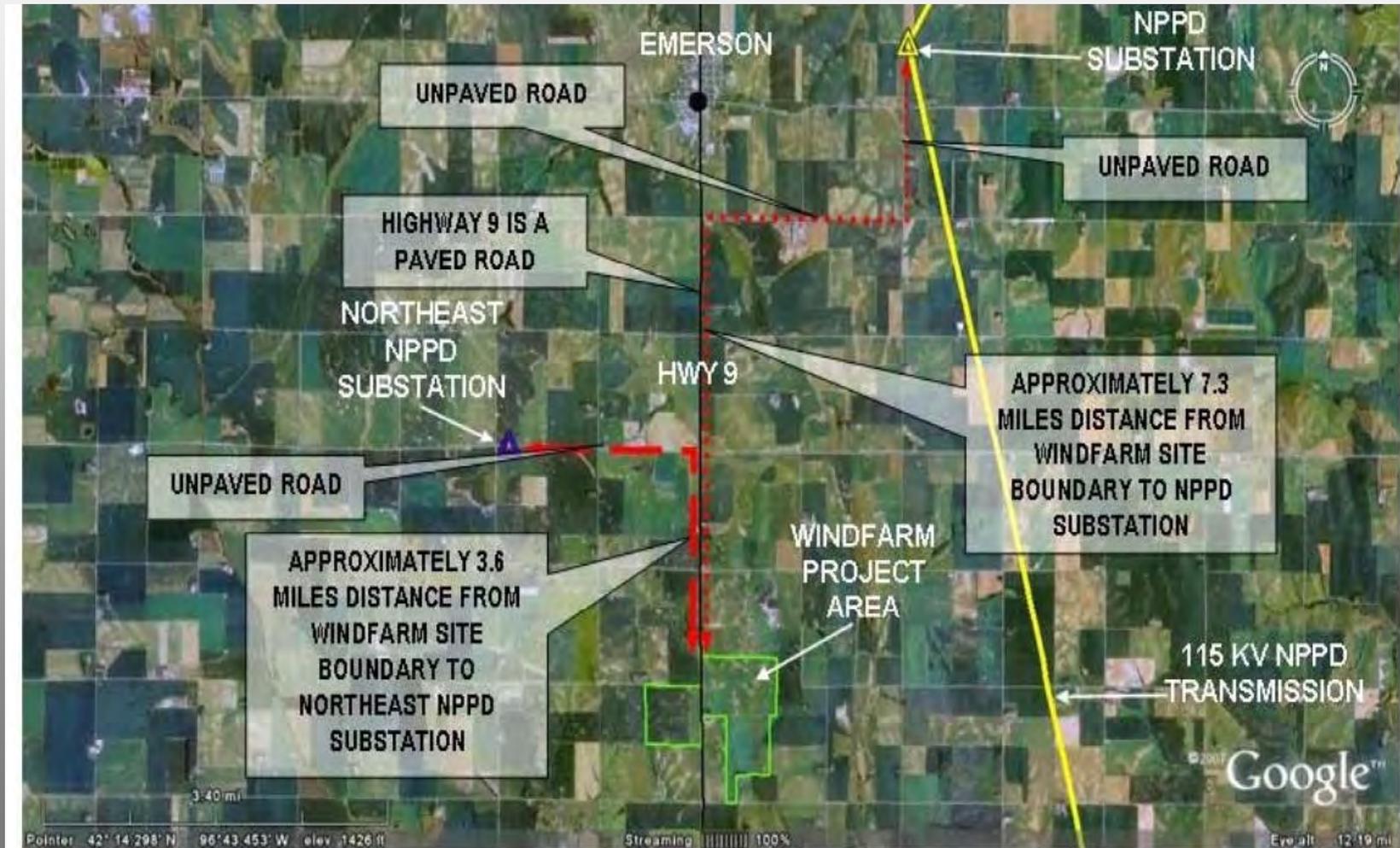
Objectives of Tribe- Stewardship

- **Primary - Direct Economic Benefit to Tribal Members**
- **Additional Step Toward Economic Self Sufficiency**
- **Utilize Existing Land Resources**
- **Manage Financial Risk**
- **Preserve Sovereignty**

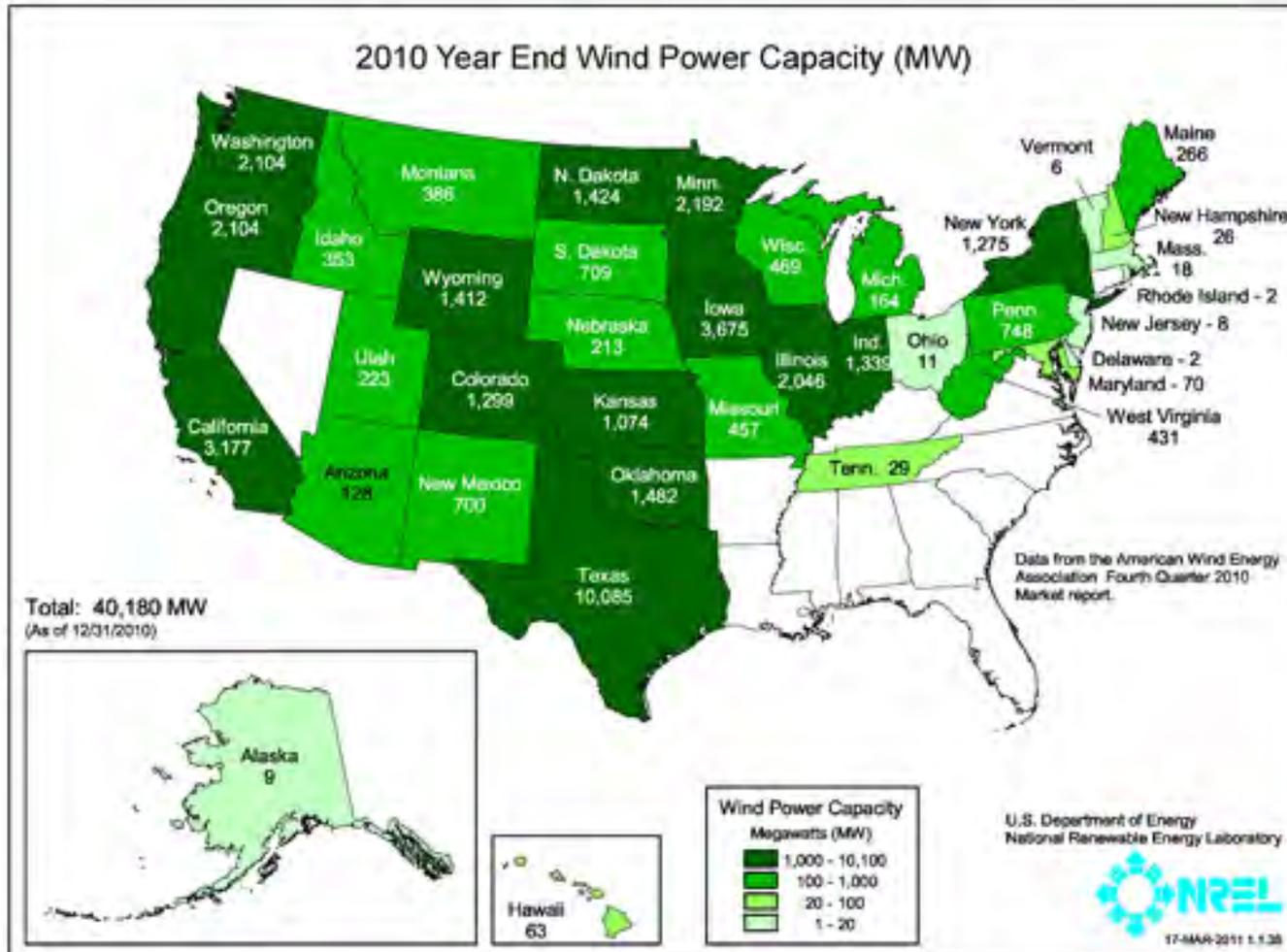
Wind Project Scope

- **Community Scale - 10 MW (4 turbines) 2.5 MW each**
- **Tribal Ownership**
- **Power Purchase Agreement with Nebraska Public Power District**
- **Acceptable Rate of Return**
- **Construction in 2013**
- **NPPD passed resolution for negotiation of PPA in March, 2012**

Project Site



Installed Capacity- The Issue for Nebraska



Strengths - Wind

- **Good Wind Resource (7-8 m/s)**
- **Available Land 600 Acres**
- **Interconnection & Transmission Worked Out- 7.5 Miles to NPPD Substation**
- **No Known Environmental, Cultural, FAA or Wildlife Issues Identified to Date**
 - **Land is Currently Cropland**

MOU Adopted By Tribal Council 7-25-12

- **Sets template for Joint Development Agreement**
 - **Sovereign immunity waiver requirements and limits for future agreements**
 - **Basic financial structure**
 - **Some resources to tribe to negotiate JDA and lease**
 - **Non-binding**

Joint Venture/Joint Development Agreement

- **Guides the parties through the pre-construction development process**
- **Sets the tone and the “template” for future agreements between the sponsor and the developer**
- **Establishes the business relationship, and the allocation of project development risk between the project entities**

Major Issues in Joint Venture Structure

- **Preconstruction development budget**
- **Project schedule and milestones**
- **Delineation of development activities and responsibilities between sponsor and developer**
- **Rights of compensation before and after financial closing**
- **Allocation of development costs**
- **Property rights**

Other Critical Issues

- **Shareholder rights, especially minimum proposed minority shareholder protections (e.g., anti-dilution, rights to acquire interests in the project and project company, management issues)**
- **Employment and contracting**
- **Compensation for use of lands, taxation**

Preconstruction Development Budgets

- **Recovery of sponsor's expenses prior to execution of development agreement**
 - **Upon execution or financial close, or both**
- **Internal costs (personnel and overhead), third party costs, fees, litigation expenses**
- **Flexible mechanisms to update and revise the budget**
- **Earned fees and success fees**

Hammer this out up front or it will be trouble down the road...

Ownership of Assets and Work Product

- **Data, studies, reports, analyses**
- **Typically property of the project company or if contributed by one party, held in trust for the company until certain conditions met (e.g., payments, milestones, etc.)**
- **Disclosure to third parties restricted?**
- **Ownership upon termination**

Equity Participation

- **Ownership of the project and ownership of the project company should be clarified**
 - **Some parties may seek to participate as equity partners in the project without an ownership share of the company**
 - **Some parties propose different structures before and after financial closing**
- **The equity rights of the parties should be clear and specific**
- **Rights to sell, add partners, in-kind contributions, carried equity**

The Minority Shareholder Position

- **Retain rights to approve certain matters, such as sale of the project, admission of additional partners, or dissolution of the joint venture**
- **Right to participate in issuance of additional equity interests**
- **Caps on required contributions**
- **Rights to participate in material decisions**
- **Contributions in kind**

Leasing and Rights of Way Issues

- **Critical early issue due to importance of site control in permitting, negotiations for PPA's, transmission interconnection**
- **Joint venture or development agreement should guide sponsor and developer with general goals of project site lease and rights of way to avoid surprises during the development process**

Select Features of Lease & ROW Structure

- **Permitted uses**
- **Compensation, alternative tax structure**
- **Term (primary and renewal)**
- **Assignment and transfer**
- **Rights on termination, default**
- **Removal of improvements; reserve account**
- **Approved encumbrances**
- **Liability allocation**
- **Dispute resolution**

For More Information

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