

***Business & Legal Issues in  
Tribal Energy Projects***

---

**Douglas C. MacCourt, Ater Wynne LLP**

**Co-Chair  
Indian Law Practice Group  
Ater Wynne LLP  
dcm@aterwynne.com  
www.aterwynne.com**

**Indian Law Executive Committee  
Oregon State Bar Association**

**ABA Renewable Energy Resources  
Committee; Vice Chair, Native  
American Committee of SONREEL**

**Tribal Business Development & Project Financing Workshop  
*January 21-24, 2008  
Hilton Hotel  
Sacramento, California***

## **Overview of Presentation**

---

- **Key drivers to energy investment in Indian Country**
- **Understanding the investors**
- **Issues in leasing, joint ventures and tax credit investment (flip and other models)**
- **Considerations for tribes to improve the conditions for successful energy deals**

## **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 tribe**
- **Cash flow to equity investors**
- **Affiliate contracts**
- **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**

## **Other Types of Equity Investors**

---

- **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**

## **The Formation of the Deal – Traditional 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 coupled with a Confidentiality and Nondisclosure Agreement**
  - **Sets the basic tone for discussions between the tribal sponsor and developer**
  - **Allows both parties to share information without fear of disclosure to competitors**
- **Most non-tribal third parties will accept dispute resolution at this stage pursuant to tribal law**

## **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 tribal sponsor and the developer**
- **Establishes the business relationship, and the allocation of project development risk between the tribe and non-tribal project entities**

## **Major Issues in Joint Venture Structure**

---

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

## **Critical Issues for Tribal Parties in Joint Ventures**

---

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

## **Key Sticking Points**

---

- **Dispute resolution, governing law, choice of forum**
  - **Waiver of defense and right of sovereign immunity**
  - **Exhaustion of remedies in tribal courts**
  - **Arbitration vs. litigation**
- **Indemnification, limitation of liability, remedies on default and termination**

## **Negotiating the Sticking Points**

---

- **Limited waiver of immunity to suit essential - limit to specific assets, protect tribal officials and individuals, tie to dispute resolution**
- **Binding arbitration to avoid state court jurisdiction**
- **Authority to compel arbitration, enforce awards, protect parties during arbitration in any court of competent jurisdiction**
- **Insist on clear terms preserving tribal jurisdiction (covenant not to contest tribal jurisdiction on tribal status as Indian nation)**

## **Leasing 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 to avoid surprises during the development process**

## **Lease Basics**

---

- **Most likely vehicle for siting energy facilities on trust lands**
- **Federal law and regulation governing leases on trust lands (.e.g., 25 USC §415; see *also* 25 CFR pt 162 and 25 USC §81).**
- **Allows tribe to collateralize trust land. The tribe may then assign the lease to a project company or third party lender**

## **Suggestions to Improve the Leasing Process**

---

- **Evaluate tribal code provisions, if any, and consider adopting business site leasing regulations under BIA authority**
- **Consider creation of tribal energy authority (e.g., Dine Power Authority of the Navajo Nation) with leasing powers**
- **Talk with the local BIA officials *early* about the approval process, timelines, federal appraisal requirements, etc.**

## **Select Features of Lease 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**

# Structures for the Tax Motivated Equity Investor

---

- **Recap:**
  - **Joint venture or joint development agreement provides rights of equity investment for tribal sponsor and third party equity investors, including tax credit investors**
  - **Joint venture and lease provide for rights of third party investors as approved encumbrances**

## **Significance of Structuring Tax Equity Investment**

---

- **Typically, 60 to 65% of the economic benefits in US wind projects (on or off tribal lands) are tax benefits; also applies to other energy projects**
- **Two primary benefits**
  - **Depreciation**
  - **Production Tax Credits**
- **Tribe not subject to federal income tax, not eligible for tax credits. Deal needs to structure tax credit investment opportunities**

## **Accelerated Depreciation**

---

- **Most components of renewable energy projects may be depreciated using five year MACRS, 200% declining balance**
- **Placed in Service date will determine the use of the mid-year or quarter-year convention for the first year of depreciation**
- **Accelerated depreciation for qualifying projects in Indian Country even shorter if Congress renews law**

## **Production Tax Credit (IRC Section 45)**

---

- **Applies to qualifying renewable energy facilities placed in service by specific deadlines**
- **The Production Tax Credit would provide a tax credit of 1.8 cents per kWh produced over ten (10) years**
- **For example, a 40 MW project operating at 30% capacity would be expected to spin off ~ \$2,000,000 per year in tax credits**

## **Institutional Tax Credit Investors**

---

- **Established market of institutional tax credit investors – e.g. insurance companies, investment funds, oil companies -- to invest in the equity side of renewable energy projects, particularly for the tax credits.**
- **These investors are primarily interested in the tax benefits, not long-term ownership.**
- **For up-front capital-intensive energy projects, a project's cost of capital and financial structure has a significant impact on the financial performance of the project.**

## **Why the Flip Structure Exists**

---

- **In order to claim the PTC, the taxpayer must own the facility and produce the electricity**
- **The party claiming the credit must receive the same proportion of gross revenues and PTCs from the project**
- **PTCs cannot be stripped and sold separately**
- **Other limitations (reduced by federal, state and local credits and grants related to construction of the facility, offsets limits to other taxes, subject to passive loss rules)**

## **The Flip Structure Basics**

---

- **LLC agreement provides for percentage interests among investors, usually 90% or more to tax equity investor and remainder to sponsor equity/developer**
- **After 10 year period, or longer period for PTC investor to meet agreed-upon internal rate of return, percentage interests “flip” such that sponsor/developer holds 90+% and PTC investor holds 10%**
- **Usually combined with a purchase option for the PTC investor’s interest after the flip**

## **Variety of Structures for Tax Equity**

---

- **Not all structures work or are appropriate in all transactions. Transaction specific tax advice is critical and must be obtained at an early stage**
- **If flip is used, tribe should negotiate position to acquire PTC share after flip**
- **Majority position usually negotiable after 20-25 year life of project**

## **Citizens and DPA Joint Venture**

---

- **MOU with Dine Power Authority entered July 2006**
- **DPA Citizens and DPA working together through wind development process:**
  - **Site selection and Leasing**
  - **Wind assessment**
  - **Environmental & Permitting**
  - **Transmission & Interconnection**
  - **Power marketing**
- **DPA has ownership interest in Dev. Co. and rights to increase stake up to majority stake over time**
- **All development funding provided by Citizens**



## **For More Information**

---

**Doug MacCourt**

**Ater Wynne LLP**

**222 S.W. Columbia, Suite 1800**

**Portland, Oregon 97201**

**001-503-226-8672 telephone**

**001-503-705-6031 cell**

**001-503-226-0079 facsimile**

**[dcm@aterwynne.com](mailto:dcm@aterwynne.com)**



# A name with **power.**

**Since the 1930's, energy has been the heart of our business. Ater Wynne serves as energy and environmental counsel to utilities, Indian tribes and industry throughout the West and Alaska for all aspects of their power needs.**

**ATERWYNNE** LLP  
ATTORNEYS AT LAW

*Leading Counsel to Northwest Entrepreneurs*  
222 S.W. Columbia, Suite 1800 Portland, OR 97201  
503-226-1191 [www.aterwynne.com](http://www.aterwynne.com)

P O R T L A N D

S E A T T L E

## Overview of Presentation

---

- Renewable energy statistics & terminology
- Overview of select initiatives, incentives
- Summary of select tribal projects
- Issues to consider with grants
- Keys to attract private development funding
- Suggested resources & contacts for further information

## The Big Picture: Growth

---

- In October, 2006 the US population reached 300 million; 400 million projected by 2043
- Energy use increase by 2030 projected 34%
- Other sources of energy are essential to keep up with growth & control fossil fuel impacts
- Renewable energy
  - Cuts greenhouse gas and other harmful air emissions
  - Creates economic growth & development
  - Reduces dependence on foreign energy
  - Creates opportunities for tribes

## Terminology

---

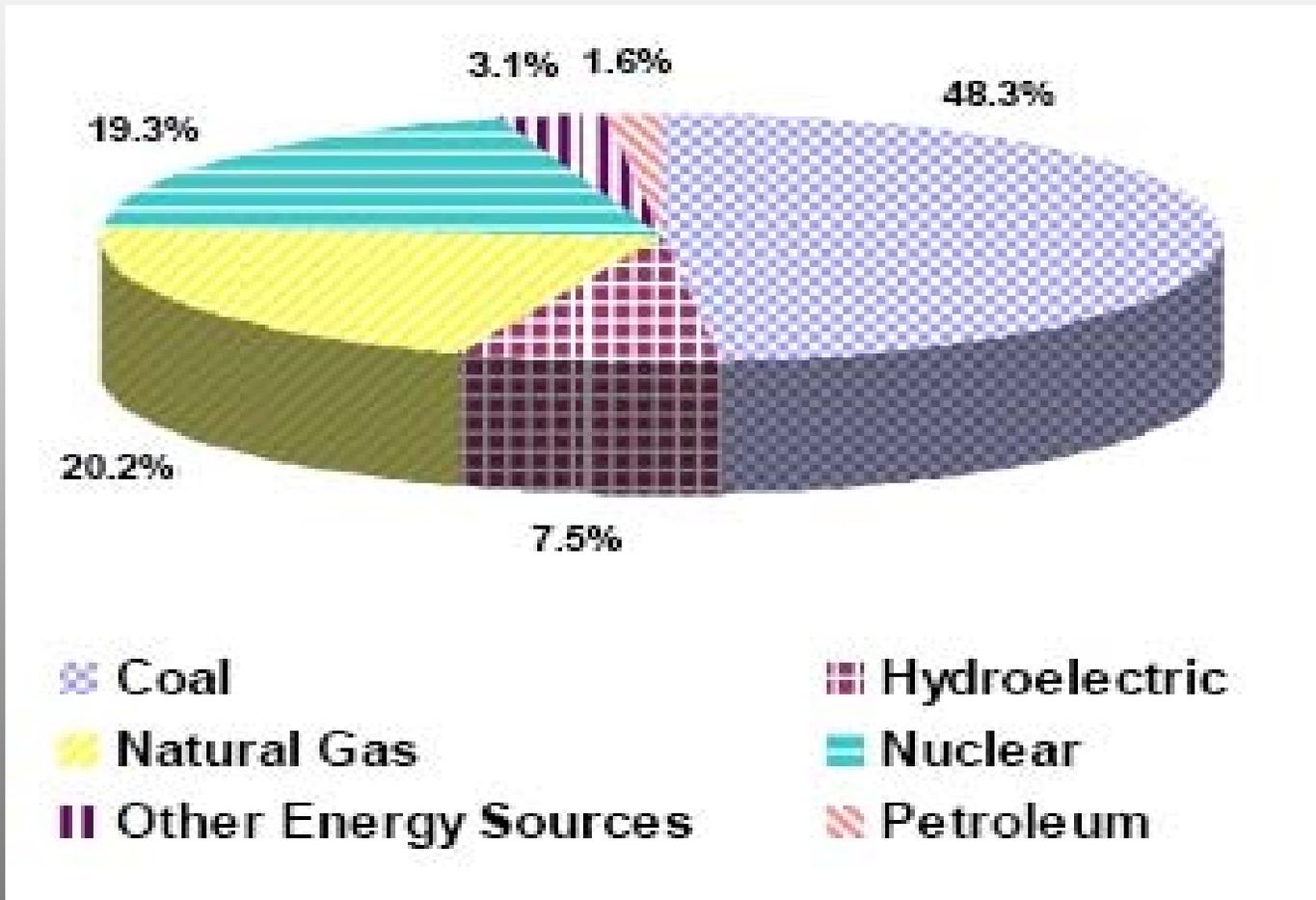
- Renewable energy: EPA Act 05 §203(b)(2): electric energy generated from solar, wind, biomass, landfill gas, geothermal, municipal solid waste, or new hydroelectric generation capacity achieved from increased efficiency or additions of new capacity at an existing hydroelectric project.
- Terms vary for specific incentives
- “Clean and diversified” - WGA
- Energy efficiency/conservation:  
*all of the above*

## **Terminology, cont.**

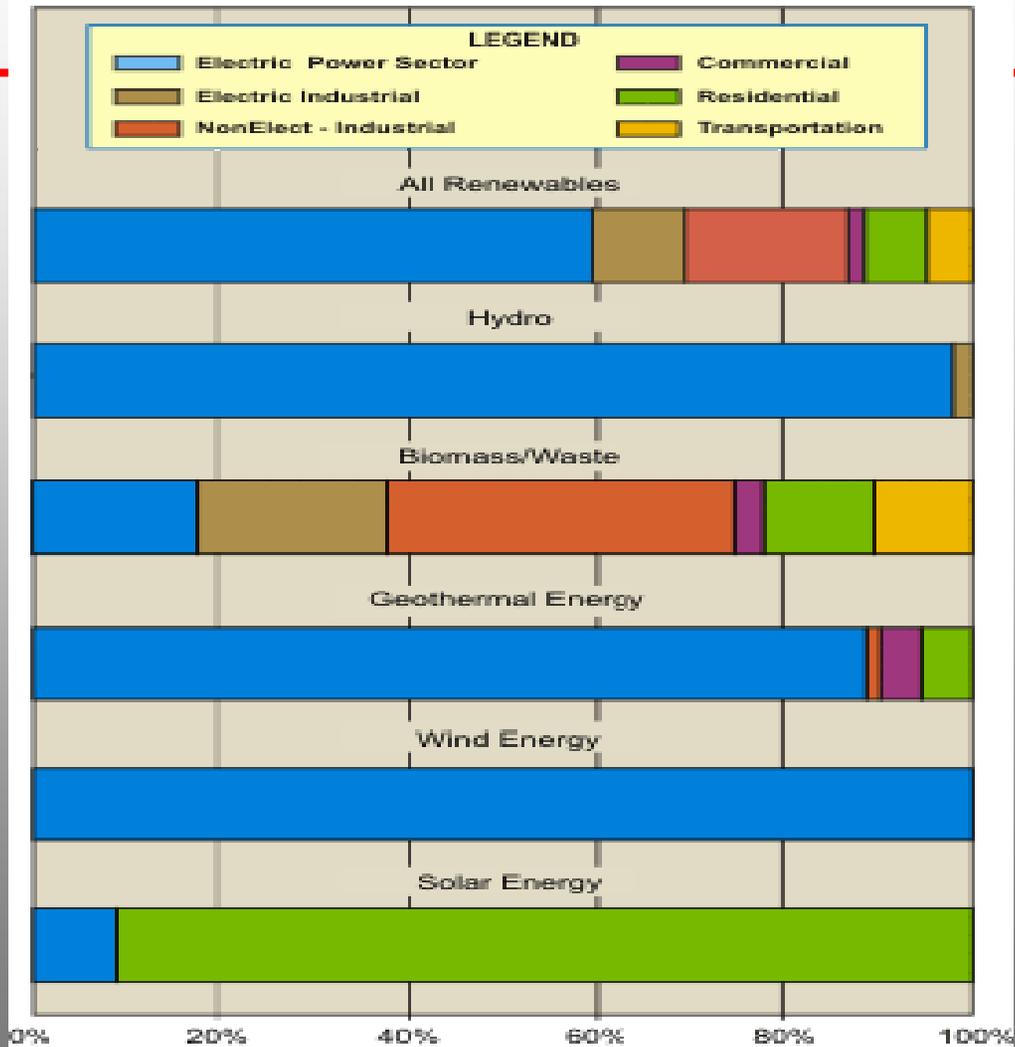
---

- Production Tax Credits (PTC; IRC §45)
- Renewable Portfolio Standards (RPS)
- Renewable Energy Credits/Certificates (REC)
- Solar photovoltaic (PV) and thermal
- Open loop biomass, closed loop biomass
- Ethanol (E10, E85, E95), bioethanol
- Biodiesel (B20, B100)
- Biofuel

## Electrical Generation – 8-05 to 8-06



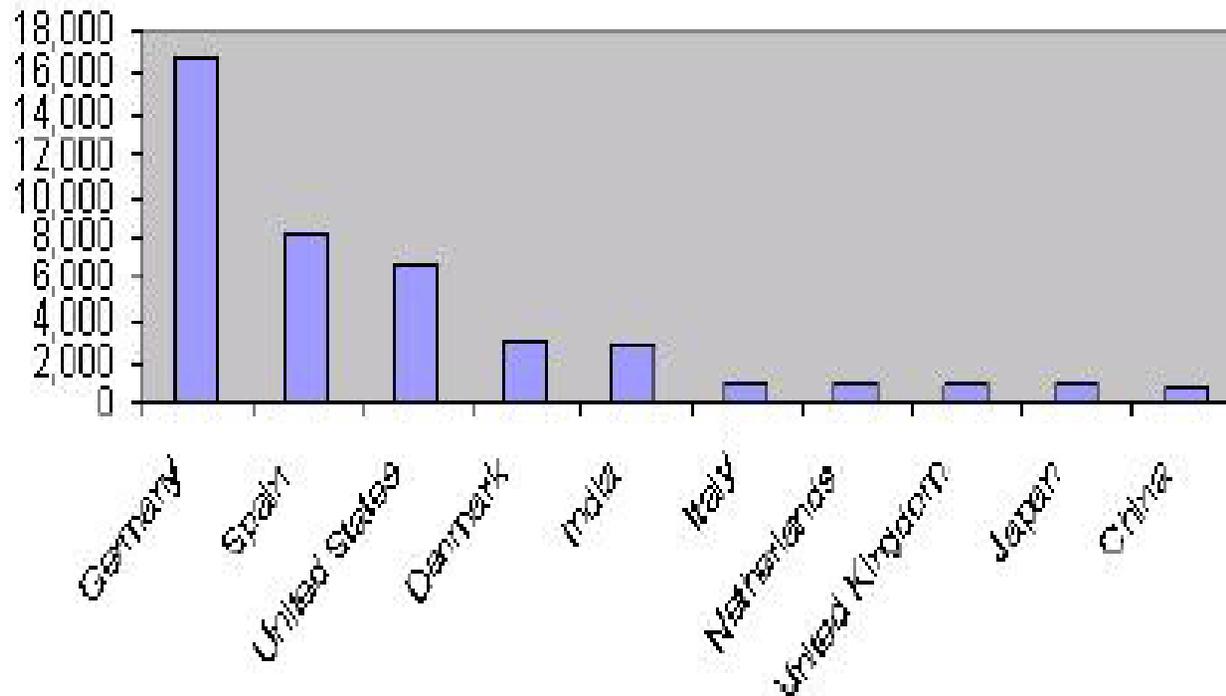
## ATTOR Type of Renewable Energy Consumption by Sector, 2004 (Percent)



Source: Energy Information Administration.

## How the US Compares Abroad (wind/2004)

TOP TEN COUNTRIES - TOTAL INSTALLED WIND POWER CAPACITY END 2004 (in MW)



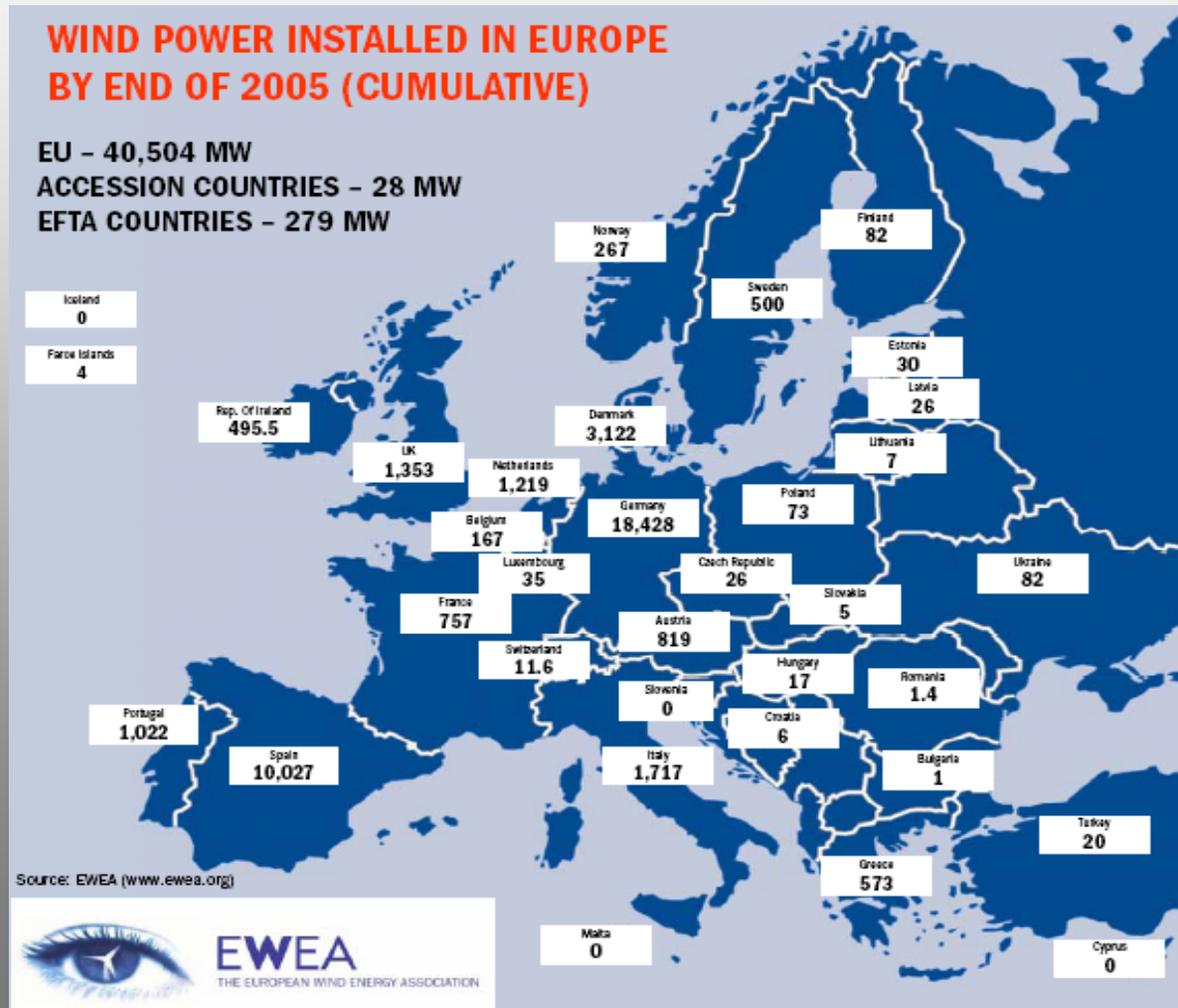
European Wind Energy Association.

## Wind Compared to Coal

---

- As of January 1, 2006, 27,884 MW of coal-fired capacity were planned
  - Texas, Illinois and Kentucky make up over 50% of this planned capacity
- In 2005, over 2000 MW of wind were added
- Over 5000 MW of planned wind capacity are scheduled to go online between 2006-2007

# 40,504 MW Wind in EU Alone by End of 2005



## Debunking a Myth about Ethanol

---

- Myth: “It takes more fossil fuel to make ethanol than it does to make gasoline from petroleum”
- GREET (Greenhouse gas, Regulated Emissions and Energy use in Transportation) model developed by US DOE/EERE and Argonne National Laboratory Center for Transportation Research
- 0.74 MMBtu’s fossil energy for each 1 MMBtu of ethanol delivered, compared with 1.24 MMBtu fossil energy for each 1 MMBtu of gasoline delivered

## **A Growing Market Response to Renewables**

---

- By 2005, over \$15 billion in annual installations of renewable energy systems around the world
- Wind, biofuels & solar largest sectors of recent private and public investment in generation development and technology
- Western US development spurred by state Renewable Portfolio Standards (RPS) and other state & federal incentives
- WGA: 30,000 MW “clean and diversified” by 2015 [www.westgov.org/wga/policy/04/clean-energy.pdf](http://www.westgov.org/wga/policy/04/clean-energy.pdf)

## Why Renewables are Growing in the US

---

- Policy
  - Federal incentives
  - State incentives
    - Database of State Incentives for Renewable Energy
    - [www.dsireusa.org](http://www.dsireusa.org)
- Market forces
  - Fossil fuel price volatility/long term investment issues
  - Increased investment in renewables & renewable technology

## What is Limiting Growth of Renewables?

---

- Transmission capacity
  - Constrained system and significant non-renewables going planned or under construction
  - High cost of new transmission
  - System integration issues
- Uncertainty of key federal tax & financial incentives being renewed
- Lack of RPS in many states
- Immature retail markets for biofuels

## **Renewables in Energy Policy Act of 2005**

---

- Renewable resource assessment
- Renewable Fuel Standard (RFS) for ethanol
- Production incentives
- Grants
- Leasing federal lands for production
- Hydro efficiency improvements
- Energy efficiency and conservation
- Indian energy program

## **Title V of EPA Act 05: Indian Energy**

---

- Sec. 502: Office of Indian Energy Policy and Programs
- Sec. 503: Indian energy
- Sec. 504: Consultation with Indian tribes
- Sec. 505: Four Corners transmission line project and electrification (DPA's Navajo Transmission Project)
- Sec. 506: Energy efficiency in federally assisted housing.
- HR 6 (2007): new tribal energy incentives

## **Energy Tax Incentives Act of 2005**

---

- Clean Renewable Energy Bonds (CREBS)
  - §54 of Internal Revenue Code
  - Authority for up to \$800 million of tax credit bonds
  - Qualified issuers: includes Indian tribes in definition of “governmental body”
  - Minimum 95% bond proceeds to capital expenditures for one or more qualified projects
  - Qualified borrower also includes Indian tribes

## **Accelerated Depreciation of Property**

---

- **The Omnibus Reconciliation Act of 1983 provided special incentives to business to invest in Indian Country**
  - **Any for-profit business investing in Indian Country for after January 1, 1994, and before December 31, 2003, is entitled to special accelerated depreciation on its assets. Property can be written off in about 60% of the normal time allowing significant tax deferrals (Section 168 IRC). Limitations on infrastructure.**
  - **Tax credit of 20% of the first \$20,000 of qualified wages paid a Native American, or the spouse of a Native American. (Section 38(b) IRC)**
- **Extended once to the end of 2005; now expired**
- **Proposals being developed to extend and possibly modify eligibility criteria**

## **Tribes Taking the Lead – Utility Scale Projects**

---

- Navajo Nation – Dine Power Authority (DPA)
  - Navajo Transmission Project
  - 200 MW Dine Wind Project
  - Renewable opportunities created by low-emission baseload coal-fired generation from Desert Rock Energy Project
- Campo Band of Kumeyaay Indians (CA)
  - 50 MW wind project
- Confederated Tribes of the Warm Springs Indian Reservation (Oregon)
  - 17 MW biomass project

## **Dine Wind Project**

---

- Joint development of Dine Power Authority of the Navajo Nation and Citizen's Energy, non profit based in Boston, MA
- Phase 1: Up to 200 MW
- Equity credit at financial close; equity ownership in development
- Reinvestment in local community

## **Campo Band of Kumeyaay Indians - CA**

---



- **25 turbines at 2 MW each**
- **Power for approximately 30,000 homes**
- **Prevent 110,000 tons of greenhouse gas emissions annually**
- **Helps San Diego Gas & Electric meet California RPS**
- **Provides revenues to tribe through lease fees and royalties**

## **Warm Springs Biomass Project**

---

- Expansion of existing biomass cogen that supplies steam to sawmill and 3 MW electricity
- Open-loop biomass facility on trust land
- Likely LLC with tribe's Warm Springs Forest Products Industry and others as equity owners
- Fuel: mill & harvesting residues, precommercial thinning, slash, brush, landscape tree trimmings
- 2 boilers, 1 steam turbine generator at 17MW
- Long term PPA's under negotiation; development pending renewal of federal PTC's

# Warm Springs: Biomass Plant and Fuel

---



## **Why Should Tribes Consider Renewables?**

---

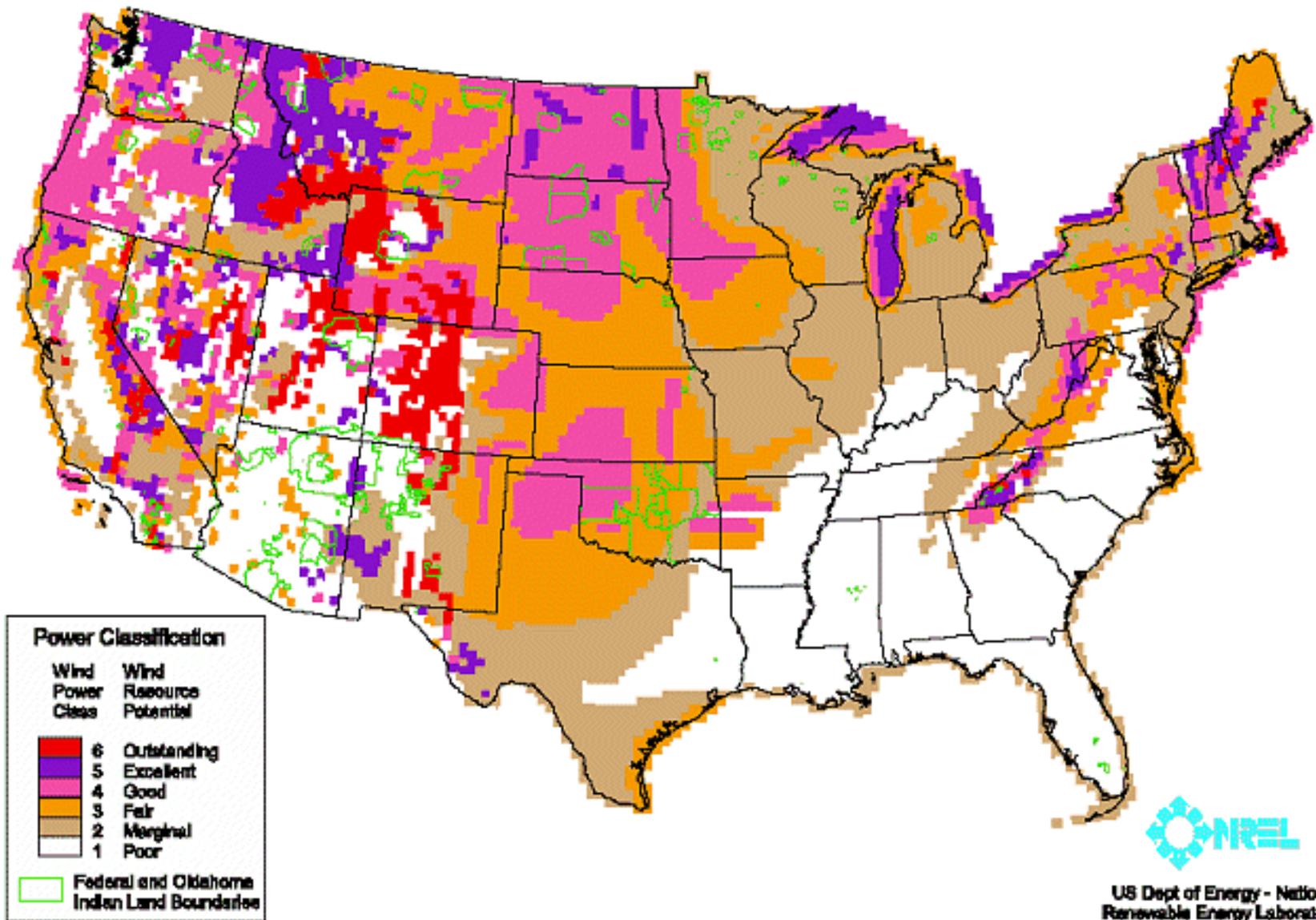
- Economic development on tribal lands
- Increased availability of electrification, especially in rural areas
- Improved housing quality
- Improve the tribe's foundation for sustainable economic growth
  - Attract private investment
  - Organize and improve tribal government
  - Environmental quality

## Renewable Resources

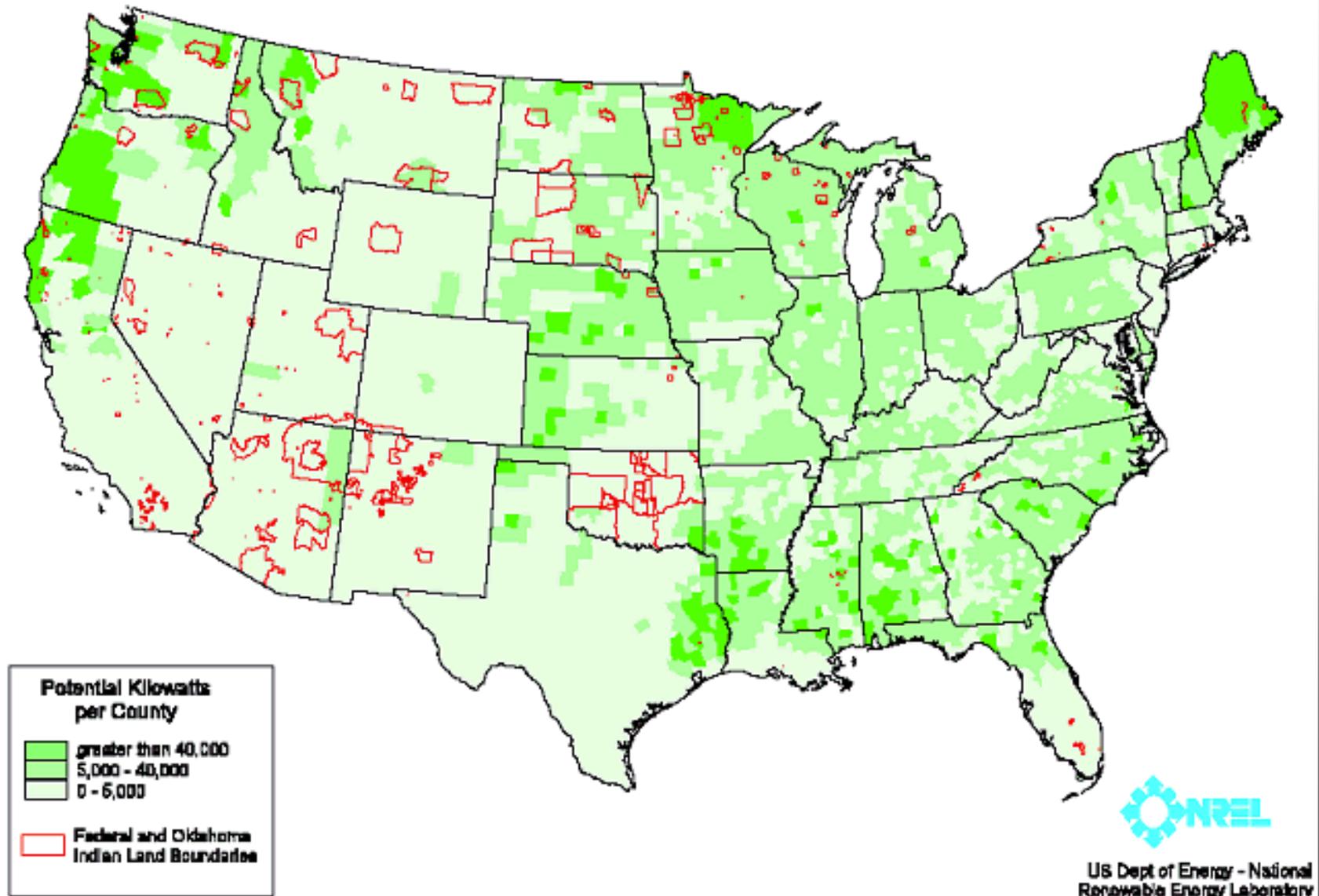
---

- *Energy Consumption and Renewable Energy Development Potential on Indian Lands, Energy Information Administration (US DOE April 2000)*
  - SR/CNEAF/2000-01
  - [www.eia.doe.gov/cneaf/solar.renewables/page/pubs.html](http://www.eia.doe.gov/cneaf/solar.renewables/page/pubs.html)

**Figure 13. Wind Resource Potential**



**Figure 14. Biomass and Biofuels Resource Potential**



## **Assessment of Tribal Energy Resources**

---

- 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 tribal objectives
  - Tribe as sponsor of renewable energy projects
  - Tribes as utility owners/operators
  - Tribes as regulators

## **Grants from US DOE Tribal Energy Program**

---

- **"FIRST STEPS TOWARD DEVELOPING RENEWABLE ENERGY AND ENERGY EFFICIENCY ON TRIBAL LANDS"**
  - (Reference Funding Opportunity Announcement Number DE-PS36-06GO96038) Submission deadline January 23, 2007.
- **"FEASIBILITY OF RENEWABLE ENERGY PROJECTS ON TRIBAL LANDS"**
  - (Reference Funding Opportunity Announcement Number DE-PS36-06GO96037) Submission deadline February 6, 2007.
- For a copy of the NOFA and how to apply, see [www.eere.energy.gov/tribalenergy/financial.html](http://www.eere.energy.gov/tribalenergy/financial.html)

## DOE Tribal Energy Program

---

- Office of Energy Efficiency and Renewable Energy (EERE), with a mission to:
  - Enhance energy efficiency and productivity
  - Bring clean, reliable and affordable energy technologies to market
  - Create energy choices, improve quality of life
- Section 2606 of Title 26 of Energy Policy Act of 1992:
  - Promote tribal self-sufficiency and economic development, and foster employment on tribal lands through the use of renewable energy

## **Tribal Energy Program Peer Review: Results from the Peer Review Team**

---

- Develop/disseminate info on innovative financing mechanisms, improve relation to fossil fuel side
- Tribes must develop tools to overcome fear of investing on tribal lands such as limited waivers, tribal enterprises, and make potential investors aware of them
- Tribes should develop, publicize, and exploit tribal financing such as tax-exempt revenue bonds, gaming revenues, federal grant and loan guarantee programs, and the tribe's own freedom from liability for federal income tax

## **USDA Tribal Renewable/Efficiency Projects**

---

- Alaska Village Electric Cooperative, Inc., Hooper Bay Wind Generation, Alaska **\$1,156,811**
- The Hualapai Nation, Grand Canyon West Solar PV Hybrid Power Project, Hualapai Reservation, Arizona **\$2,000,000**
- Sacred Power Corporation, Solar PV hybrid power stations for remote tribal homes on Ojo, Encino & Torreon Chapters, Navajo Nation, New Mexico **\$825,108**
- Tlingit-Haida line extensions and efficiency Improvements, Alaska **\$2,119,517**

## **Do you really need or want a grant?**

---

- Before you spend much time evaluating grants for renewable energy, you need to ask:
  - 1. How will the grant affect the tribe and/or the tribal organization?
  - 2. What are the tribe's rules, if any, for this type of funding?
  - 3. Can the tribe/tribal enterprise afford a grant?
  - 4. Are other sources of funds available?

## Issues with Federal Grants

---

- *Skewed priorities:* are the activities required under the grant really the ones you or the tribe want to accomplish?
- *Grant dependence:* grantees are subordinate to the federal grantor agency
- *Commitment to providing new services:*
  - Who are you serving?
  - Will they want it to end when you do?

## How do you know if a grant is the right vehicle?

---

- How is the grant activity integrated into tribal planning, programming and resource allocation procedures?
- Can you meet matching fund obligations?
- Do you really have the time?
  - Application
  - Implementation

## **Go to the Market or Become a Part of It?**

---

- Pros and cons of each approach
- Assess tribes resources and willingness to commit to the project regardless of choice
- Long-term partnership with non-Indian owners and operators on Indian lands in both cases:
  - Tribal-owned/operated: PPA's
  - Not tribal owned/operated: long-term presence and partnership, potentially significant tax benefit to tribe
- DOE Tribal Energy Program can help tribes evaluate this issue

## **From Grants to Long Term Resources**

---

- Attracting private 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)

## **Quantify and Verify Potential Resource**

---

- Developer
  - Wind & solar: monitoring, minimum 6 months data collection & comparison with reported data
  - Biofuels: distance to either fuel source or market will dictate
- Tribe/tribal enterprise
  - Grants, appropriations
  - Tribal commitment

## Land Control

---

- Site control and fair market valuation early in the development process
- Assumption by some private energy developers that obtaining third-party control of Indian lands may be simpler and cheaper than non-Indian private land
- Budget and schedule must factor:
  - Tribal land-withdrawal processes
  - Federal lease requirements

## Buyers

---

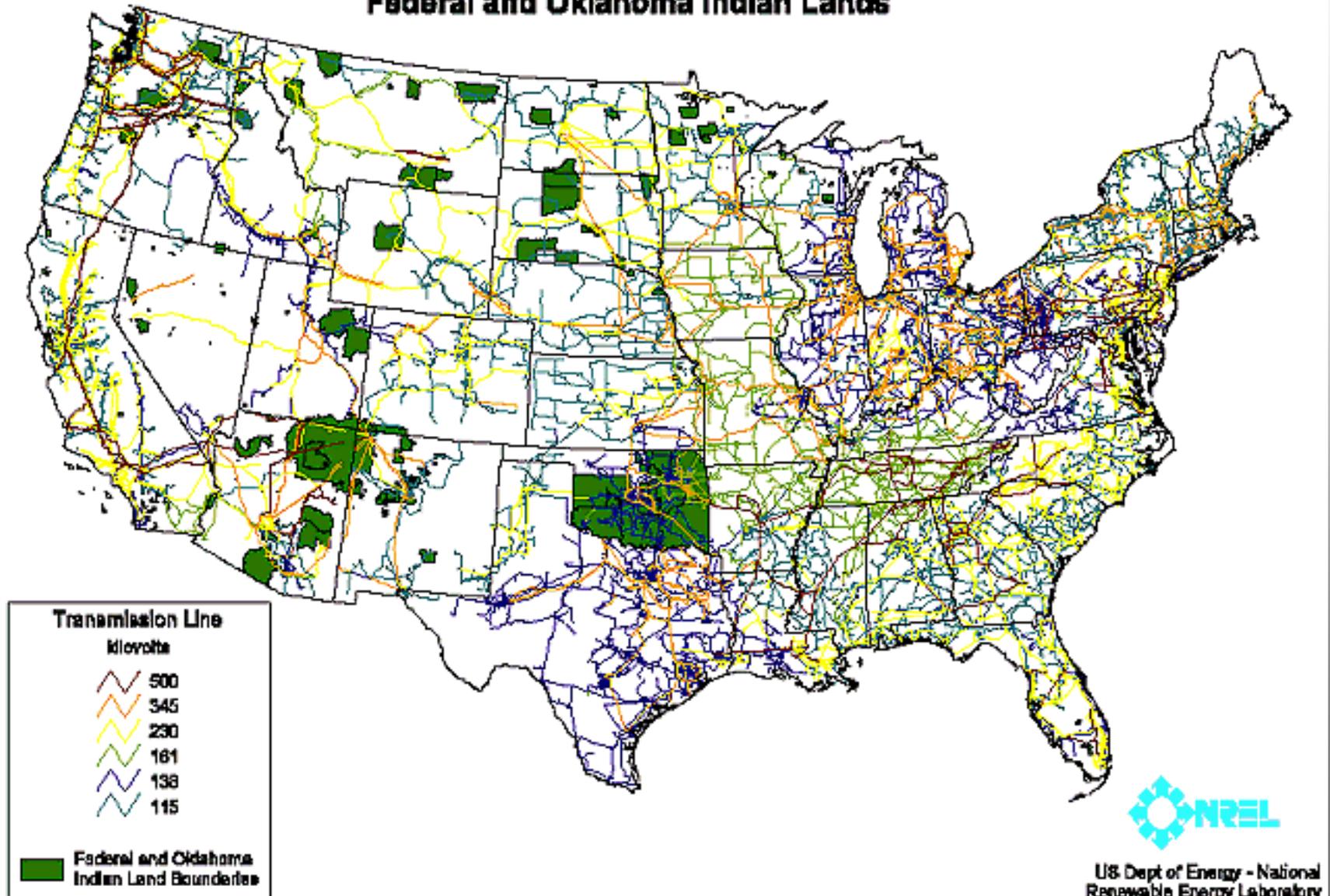
- Fairly certain in states with RPS
- Tribal & non-tribal utilities
  - Firm capacity?
  - Infrastructure?
- Merchant vs. long-term offtake agreements with credit-worthy third buyers

## **Transmission**

---

- Distance to transmission system
- Load capacity to deliver to market
- Ballpark overview a fairly simple exercise for qualified energy consultants
- Western Electricity Coordinating Council (WECC) manages regional transmission grid and maintains data, requires reliability and capacity studies
- Other DOE agencies, private and public utilities with transmission info

**Figure 16. Transmission Lines with Federal and Oklahoma Indian Lands**



## Tips on Economic Advisors

---

- Experience in nonrenewable energy development
- Advisors to lending institutions
- Proprietary models based on gas price curve projections important, but need to be supplemented with case-sensitive data
- Prior working experience in Indian Country helpful but not essential
- Transmission analysis essential

## More Information

---

- **Program/project info:**
  - [www.eere.energy.gov/tribalenergy](http://www.eere.energy.gov/tribalenergy)
  - [www.eia.doe.gov](http://www.eia.doe.gov)
  - [www.westgov.org](http://www.westgov.org)
  - [www.nrel.gov](http://www.nrel.gov)
  - [www.wrapair.org](http://www.wrapair.org)
  - [www.dsireusa.org](http://www.dsireusa.org)
  - [www.ewea.org](http://www.ewea.org) (European wind info)
- [dcm@aterwynne.com](mailto:dcm@aterwynne.com)
- **503-226-8672 (office); 503-705-6031 (cell)**

