INTERTRIBAL COUNCIL ON UTILITY POLICY
Tribes Building Sustainable Homeland Economies

Tribal Joint Venture Production Tax Credit

An Intertribal COUP Background Policy Paper for a Comparable and Appropriate Tribal Energy Production Incentive

Produced for Western Governors, 25 x25 Campaign, Intertribal COUP and NCAI

Support Needed for Tribal Renewable Energy Incentives:

In the context of reaching the Western Governors' goal of 30,000 MWs of clean and diversified energy throughout the West by 2015, it is recognized that Indian Tribes control a vast renewable power potential, including the wind resource found across the Western reservations, but that a comparative and appropriately tailored incentive is needed to encourage tribal development compatible with tribal aspirations, federal responsibilities and the financial realities of the existing energy system.

A Tribal Joint Venture Production Tax Credit incentive for "partnership sharing" of the PTC is needed to spur Tribally owned renewable energy development, attract needed capital investment to reservations in an equitable and respectful manner, reduce the cost of clean power, and keep more of the benefits in the local community.

This tribal "partnership sharing" concept was proposed by the Wind Task Force and recommended by the Clean and Diversified Energy Advisory Committee of the Western Governors' Association after 18 months of study. This recommendation was adopted unanimously by the Western Governors on June 11th in Sedona, AZ, (WGA Policy Resolution 06-10) and endorsed as a key recommendation by the 25 x 25 Campaign. The Intertribal Council On Utility Policy (COUP) and the National Congress of American Indians (Resolution SAC-06-030) have proposed the language below.

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A tribal energy production incentive is recommended, whereby Tribes may assign their share of any production tax credit (PTC) within a tribal joint venture, such as a tribal energy resource development organization (EPAct 2005, Section 2602), so that Tribes can retain significant project ownership while allocating their share of the PTC to their taxable TJV partners:Section 45(d)(3) of 26 USC 45 (relating to additional definitions and special rules) should be amended by adding at the end the following new paragraph:

PTC Sharing Allowed within a Tribal Joint Venture:

In the case of a qualified facility as defined in 26 USC 45 (c)(3) in which one or more of the persons with an ownership interest is an Indian tribe or tribes, the tribal owner or owners may allocate their share of the renewable electricity production credit among the other, non-tribal, taxpaying owner or owners of the production in the gross sales from such facility.

The Economic Potential of Tribal Renewable Energy:

Even with numerous amounts of tribal land areas excluded from development, the Department of Energy's National Renewable Energy Laboratory estimates that the total tribal wind generation potential is about 535 billion kWh/yr, or 14% of the total U.S. electric generation in 2004, which is estimated to be 3,853 billion kWh/yr. As the chairman of the Mandan, Hidatsa and Arikara Nations, Tex G. Hall has noted that his Ft. Berthold reservation in North Dakota has over 17,000 times more power in the wind that blows across his reservation than is used there every day. Tribes are interested in meeting their own energy needs, as well as supplying clean power to the nation's commercial markets, from tribally owned projects. Renewable energy can be exported beyond the reservation boundaries, while bring benefits to the local communities.

The export of rural tribal wind power can provide the basis for a sustainable reservation economy that brings revenues and employment to impoverished rural tribal communities without diminishing the quality of the air, water or land resources of the reservation in the ways that other extractive and consumptive energy development has done in the past. And unlike other forms of energy development, a wind project can bring in a 25 year revenue stream from the sale of energy, green tags, and from other incentives, with out leaving behind degraded air, polluted water, flooded lands or gaping holes in the ground. Moreover, with a wind project, after 25 years the Tribe will still have 100% of the energy resource it started with!

In the simplest terms, the economics of building any wind project comes down to the relative cost of producing the power being lower than the price that would be paid for that power. Faced with the relatively low cost of power in the West, due to: 1) the highly subsidized price of federal hydropower, 2) the externalized pollution costs of coal, and 3) the artificially low ("avoided cost") prices utilities offer to pay independent power producers for energy, the cost of clean, non-water-consuming wind power must be incentivized to be competitive, and Tribes need to be able to access to such incentives.

Federal Renewable Energy Incentives:

Current federal renewable energy incentives serve to underwrite the productive development of a variety of renewable energy resources. Federal incentives, such as the Production Tax Credit (PTC), the Renewable Energy Production Incentive (REPI), and the Clean Renewable Energy Bonds (CREBs), have all been designed to meet the needs of a variety of entities (for-profit developers, municipal utilities, cooperatives, and other non-profit public power entities). But these incentives were not designed expressly for Tribes, ironically the only group that the federal government has an explicit trust responsibility to assist in economic development. While Tribes have been recently included in the eligibility of several of these renewable energy incentive programs (usually as an afterthought), none have been designed or adapted to meet their unique situation, as governments with abundant trust assets, but with limited practical access to long-term financing, and with limited control over their membership as a rate base for competitive commercial development on or off their reservations.

Tribally specific programs under the 1992 and 2005 energy policy acts have been routinely under-funded to adequately assist Tribes in full scale economic development of multi-megawatt renewable energy projects. Where significant funding has, in some cases been authorized, adequate corresponding appropriations have failed to follow. Under the energy policy act of 1992, $10 million dollars had been authorized for each of the DOI and DOE tribal renewable energy programs for tribal renewable projects, but the DOI has never requested any funding under this title, and the requests of DOE are always significantly reduced through lower appropriations, and then further reduced, by the practice of earmarks. Direct federal funding, to the extent authorized for large commercial tribal projects serving loads beyond the local rural areas, is unlikely to be actually available due to the constraints and limitations on appropriated federal support.

The federal renewable energy incentives, as designed, are problematic for Tribes, in that they are both insufficient and inappropriate as drivers of tribal development as presently configured. The presently formulated federal incentives have actually worked as dis-incentives in the unique context of tribal renewable energy development.

The Production Tax Credit (PTC): The federal Production Tax Credit is widely recognized as the principal driver of private capital to renewable projects around the nation. It is based upon the proportion of one's ownership interest in the kilowatt-hours generated by a project. It is designed to reduce the cost of power by rewarding actual energy production, and not simply investment in hardware that may or may not, in fact, produce power. As a "tax credit", the PTC is a "bankable" part of a business plan, because once obtained, it is guaranteed for a 10 year period, reducing the cost of power. The PTC has been far more effective in stimulating the large-scale build out of renewable energy projects, particularly under current federal spending constraints, than the other federal incentives which depend upon annually appropriated federal dollars, eligibility, selection, and tiered payments.

The PTC, coupled with the ability to depreciate the capital investment in project assets, can provide for much lower costs of power than any of the other federal incentives. The PTC is inapplicable, however, as an incentive to tribally-owned projects because Tribes, as governments, have no federal tax liability against which to use the credits, and outside investors seeking to joint venture with a Tribe are penalized with the loss of the PTC to the extent of tribal ownership in the partnership.

Clearly, the PTC has been a very effective incentive in the commercial arena, as witnessed by the fact that construction and investment halt each time the PTC expires, rippling economic dislocation throughout the industry. Since it was designed to make renewable energy competitive with other subsidized power sources, when the PTC is in place, power purchasers assume in their tariffs that the credits will be utilized by their wind suppliers. Thus, the PTC becomes a two-cent per kWh penalty for Tribal projects that can not utilize the production tax credit.

The PTC can work on an Indian reservation project, but the Tribe must then forego any ownership interest in the project through at least the first ten years (the term of the tax credit). The extreme poverty on many Indian reservations in the West today is a direct result of the business as usual exploitation of tribal resources without significant ownership or control of that development. In the 2005 energy policy act, Congress expressly provided for tribal participation with private capital through tribal energy resource development organizations, with the stated purpose of having these tribal organization or joint ventures include tribal/private partnerships. Gaming has proven successful (to both reservations and the surrounding states) in those locations where significant off-reservation populations can support facilities, especially where Tribes have secured and maintained ownership and control. Tribes today want an ownership interest in any large-scale energy production to be built on their reservations. The PTC works to penalize such tribal interest, and thwart such development.

The Renewable Energy Production Incentive (REPI): The more limited REPI program, originally designed for "states and subdivisions of states" has recently been made available to Tribes, but it is not designed to support large-scale project financing because of its uncertain dependence on annual appropriations, eligibility, selection and multi-tiered award structure. It could have limited application to small projects dedicated to particular loads, but is not designed for commercial scale projects.

The Clean Renewable Energy Bonds (CREBs): The newly established Clean Renewable Energy Bonds (CREBs) program went through its first application and award process in 2006. While CREBs explicitly allow for tribal participation, of the estimated 700 applications submitted requesting over $1.3 billion dollars, few, if any, Tribes have apparently applied. With nearly $38 million dollars in CREBs applications filed in the state of Montana alone, for example, there were no tribal applications for CREBs funding. While this situation is disappointing, it is also understandable. The CREBs program was expressly designed for municipalities and rural cooperatives with far more practice and experience with bonding protocols and requirements, with interest in small scale projects to meet customer needs, and with customer bases that could underwrite the shorter-termed, scheduled repayments for the no-interest loans required by the bonds. For these and a variety of other reasons, CREBs, unfortunately, appears rather ineffective in underwriting utility scale reservation based projects, and is especially ill-suited for larger, commercial scale, multi-megawatt projects that might otherwise be built to tap the tremendous renewable energy potentials on tribal lands.

Shared PTC Partnership Incentive: What is needed to encourage Tribal development is an incentive that allows for a substantial degree of tribal project ownership, coupled with the suitability, certainty and availability of private investment capital that could be obtained through a tradable or assignable PTC circumscribed within a tribal joint venture, partnering a tribe (or tribes) with a taxable partner for reservation based projects. A PTC sharing partnership would simply allow Tribes to assign their presently unusable tax credits with their taxable, equity partners within federally recorded tribal joint ventures. This limited application of the full PTC to known and identifiable taxable entities within a tribal project partnership would bring both credit accountability and much needed private capital to tribal economic development in a manner that supports tribal sovereignty and meets the federal trust responsibility within the federally designed system of economic energy incentives. A tradable PTC within a tribal joint venture, such as a tribal energy resource development organization, would provide a tribal energy production incentive in a revenue-neutral manner, wherein the same PTC would otherwise be used by the taxable partner on other off-reservation projects that would exclude any tribal ownership interest.

Past proposals for a tradable or assignable PTC for use by municipal utility authorities and rural electric cooperatives seeking to serve their customers' demand for renewable energy, have only incidentally included Tribes. Such proposals in previous energy bills have passed the U.S. Senate, but were excluded by the House over objections to granting non-profit organizations use of the tax credit and concerns about the sale of tax credits into the general economy. The CREBs was inserted in the EPAct of 2005 by the Senate at the eleventh hour to address the House concerns, and to provide a needed alternative incentive to those entities unable to utilize the PTC. However, CREBs does not appear to be workable for tribal interests, which must be distinguished from that of municipal power authorities, rural cooperatives and other "non-profit" entities. Tribes do not control a customer rate base, as most Tribes are served by rural cooperatives. More importantly, Tribes are sovereign governments with a unique "trust relationship" with the federal government recognized under the U.S. Constitution, numerous Supreme Court decisions and copious legislative enactments. The federal government has a special responsibility to support tribal economic development, and thus a special obligation to enact workable, comparable and appropriate incentives, uniquely tailored to tribal circumstances, which promote and not penalize tribal development project

Numerous studies have shown that the most successful path to tribal economic development is to have the Tribes be full and active partners in such development on their reservations.[1] An energy incentive such as a Tribal Joint Venture PTC, that would be available only to federally recognized Tribes in partnership with private, taxable entities, such as in a tribal energy resource development organization, would keep the workable tax credits accountably shared within the scope of the partnership and not open to the general economy, would effectively lower the cost of clean energy production, and would attract much needed private capital to tribal development projects both in a manner supportive of tribal sovereignty, of the goals of the energy policy act of 2005, and of the obligations of the federal trust responsibility, and most importantly, in amounts unavailable through congressional appropriations.

Production tax credits have been set by Congress under a bill that was passed for wind generation as part of the Energy Policy Act of 1992. The Production Tax Credit (PTC) was expanded to other renewable energy sources under the Energy Policy Act of 2005. The PTC was originally set at 1.5 cents per kWh adjusted for inflation. The PTC expired on December 31, 2001; was then extended for 2 more years; expired and extended again in 2005; and is now scheduled to expire on December 31, 2007, unless Congress acts to extend it again.

The current value of the PTC is about 1.9 cents per kWh on its face, and is actually worth a lot more to the taxpaying owner, since the levelized value of the PTC is larger than the nominal value because it is an after-tax credit (perhaps up to 3.4 cents after taxes). In 2004, the Energy Information Administration assumed a value of 2.8 cents/kWh for ten years in its National Energy Modeling System. This calculation is based on the face value of the PTC divided by 1 minus a tax rate of 36%. Because of the artificially low and highly subsidized price of conventional power in some Western markets, the tax credit itself may be of greater value than the price paid for the energy generated. In any case, development does not happen without it.

Tribally owned projects, however, can not utilize the tax credits, nor can Tribes allow their tribal joint venture partners to use any federal credits that would be apportioned for the tribal share of production the unless new legislation is passed and the PTC is appropriately expanded. A workable, streamlined and circumscribed Tribal Joint Venture PTC incentive would allow Tribes, through joint ventures with private capital partners, to effectively participate in producing lower-cost renewable energy by assigning their share of the PTC to their taxable partners. This remedy also avoids the awkward need for Tribal Governments to engage in the more fictional aspects of the "flip-structure" model, which are currently under examination by the IRS.

Western Governors Seek Extended and Expanded PTC:

Western Governors set some fifty National Policy Recommendations, including:

Renewable Energy: Extend the long-term (10 years) production tax credit and investment tax credit across all clean energy technologies, provide for partnership sharing of tax credits for certain entities such as tribes, extend and raise the cap on new clean energy bonding authority for non-profits (public power) and Native American tribal authorities, and raise the cap on the residential investment tax credit to $10,000. (Emphasis added)

In Appendix A of the CDEAC Report to the Western Governors, a listing of the Fuel Task Force Recommendations for Wind power states that "implementation of the following actions will result in far more wind development than would otherwise be the case." Among the top recommendations are those entitled:

On June 11, 2006, the Western Governors endorsed by resolution (Policy Resolution 06-10) a number of policy recommendations from the WGA's Clean and Diversified Energy Advisory Committee and Wind Task Force, including one in support of an extended and expanded PTC that provides for partnership sharing of tax credits for certain entities such as tribes.

http://www.westgov.org/wga/press/plenary1-pr.htm

http://www.westgov.org/wga/publicat/CDEAC06.pdf

Financial Incentives from Wind Task Force:

The Production Tax Credit (PTC) has been instrumental in encouraging investment in wind energy projects, increasing the economies of scale in the production of wind turbines, and thereby lowering the costs of production. Unfortunately, the stop-and-start nature of the PTC undercuts the incentive benefits of the PTC and undermines stable growth of the emerging wind energy industry. A long-term extension of the federal Production Tax Credit (PTC) is vital to expand the experience with integrating large amounts of intermittent resources into the power system, continue technology advances, and drive costs down through mass deployment.

Recommendation 1: Enact a long-term extension of the federal Production Tax Credit (PTC), and comparable incentives that would be useful to non-profits, tax exempt entities, public utilities, and tribes. Alternative financial incentive policies include the use of tax exempt bond financing, tradable tax credits, and partnership sharing of tax credits for certain entities such as tribes. (Emphasis added)

Guiding the 25 x ’25 Alliance recommendations is the principle that, after efficiency, renewable sources will be the first choice for electricity generation given that it is safe, reliable and affordable.

The first Key Policy Recommendation is for Increasing Production. To ramp up the production of renewable electricity more rapidly, the 25x’25 Alliance recommends that the federal government increase and expand two critical tax incentives – the Production Tax Credit (PTC) and the Clean Renewable Energy Bonds (CREBs), and make them long-term and stable. Both of these tax incentives expire at the end of 2008. Specifically, the PTC should be extended for 10 years at a rate of 1.9 cents per kilowatt hour for all renewable technologies, and be made available for a term of at least five years. CREBs should be increased to $1 billion a year and should be extended for at least five years.

25 x 25 Campaign’s Key Policy Recommendations:

The 25x'25 National Steering Committee in consultation with more than four hundred 25x'25 Alliancepartners has developed a set of **KEY POLICY RECOMMENDATIONS**, announced February 27, 2007 in a report entitled, IMPLEMENTING THE 25X’25 GOAL: A CALL TO ACTION. The full report can be found here:

http://www.25x25.org/storage/25x25/documents/IPDocuments/Action_Plan/actionplan_64pg_11-11-07.pdf

The 25 x 25 first Key Policy Recommendation concludes:

In addition, the PTC shall be made transferable for renewable energy produced by Native American tribes (emphasis added).

Tribal Joint Venture PTC Incentive:

To encourage the production of electricity from renewable sources by Tribes, Congress should provide for more flexible rules so that the full production tax credit can be used by taxable, non-tribal partners in tribal joint ventures to promote sustainable economic development, tribal self-sufficiency, tribal sovereignty and national energy security, and encourage stable, long-term private investment in Indian Country that is sustainable, respectful of Tribal sovereignty and self-determination, is integrative of tribal ownership interests in the project, and is in accordance with the Federal Trust Responsibility to Tribes. Such Congressional action would be in accord with the Western Governors' and the 25 x25 Campaign recommendations for encouraging renewable energy development in the West.

The NCAI has urge the Congress to adopt legislation to create a Production Tax Incentive (www.ncai.org/ncai/resolutions/doc/SAC-06-030.pdf) that will allow federally recognized Indian tribes to develop alternative energy sources in an economically feasible manner, by amending the Section 45 of the Internal Revenue Code by adding a new paragraph at the end of Section 45(d)(3) of 26 USC 45 to read as follows:

PTC Sharing Allowed within a Tribal Joint Venture:

In the case of a qualified facility as defined in 26 USC 45 (c)(3) in which one or more of the persons with an ownership interest is an Indian tribe or tribes, the tribal owner or owners may allocate their share of the renewable electricity production credit among the other, non-tribal, taxpaying owner or owners of the production in the gross sales from such facility;

With the Tribal energy production incentive language proposed, Tribes would be able to assign their production tax credits (PTC) within tribal joint ventures so that Tribes can retain significant project ownership while allocating their share of the PTC to their taxable partners. Federal clean energy incentives should not to penalize private development partners for engaging tribal participation on Indian reservation, while bringing private capital to Indian renewable energy projects and cleaner, cheaper renewable energy to America.

[1] See, e.g., Cornell, Stephen and Joseph P. Kalt, “Two Approaches to Economic Development on American Indian Reservations: One Works, the Other Doesn't.” 2006. ISBN 0-9743946-1-0; Cornell, Stephen et. al. “Seizing the Future: Why Some Native Nations Do and Others Don't.” 2005. ISBN 0-9743946-8-8.

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