

REGULATION OF ELECTRIC UTILITIES ON INDIAN RESERVATIONS: TRIBAL GOVERNMENTS' OVERSIGHT OF RENEWABLE ENERGY DEVELOPMENT AND UTILITY PROVIDERS AND AUTHORITY TO CREATE TRIBAL UTILITIES

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Synopsis: Indian tribes are sovereign governments who have obligations to their members. As with any government, a basic need of a tribal government is to assure the public has cost effective and reliable utility services, safe and appropriate infrastructure on their lands, and fair access to voting for representation on elected utility boards and opportunities for utility employment. There is a complex set of jurisdictional rules to consider for determining which entity regulates a particular facility or an activity: i.e., the federal government, the tribe, or the state. This article describes the division of regulatory responsibility between state public utility commissions and tribal authorities over private utilities serving retail customers on the reservation. Principles of federal Indian law must be applied to determine when a tribe or a state has jurisdiction. The article also describes a tribe's jurisdiction when providing utility services or planning to form their own tribal utilities or developing renewable energy projects for use on the reservation. The article touches on the federal jurisdictional considerations of tribal utility and energy facility development.

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I. INTRODUCTION: UTILITY OPERATIONS IN INDIAN COUNTRY

Indian tribes are continuing to develop successful commercial enterprises, sometimes as large resort casinos and more frequently as smaller community enterprises.[1] Indian tribes are also expanding their government infrastructure with expanded office buildings and community gathering places.[2] They also operate farms, forestry businesses, and fishing enterprises related to tribal trust resources.[3] Indian tribes also often end up with responsibility over much of the housing on Indian lands since much of the reservation land where people live is held in trust for the tribe or the housing is operated by the tribe as public housing under government programs.[4]

These large commercial, small commercial, agricultural, and residential developments all use energy, water, and communications services, which are generally provided by third party non-Indian entities.[5] Utility costs are a significant expense for all tribes, who must operate their governments without a traditional tax base.[6] Utility expenses are often some of the largest monthly expenses for tribal members who frequently live in poverty on reservations.[7] Whether the tribal customer is a large casino user, a rural water user, or a tribal elder with limited income, monthly energy and telecommunication costs are significant expenses.[8]

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1. *See, e.g.*, Karen J. Atkinson & Kathleen M. Nilles, A Tribal Business Structure Handbook, U.S. DEP'T. OF THE INTERIOR, OFFICE OF INDIAN ENERGY & ECONOMIC DEVELOPMENT, I-1 (2008), https://www.bia.gov/sites/bia.gov/files/assets/as-ia/ieed/ieed/pdf/idc-022678.pdf; *see generally* U.S. DEP'T OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, NATIVE AMERICAN BUSINESS DEVELOPMENT, https://www.bia.gov/as-ia/ieed/division-economic-development/native-american-business-development.

2. U.S. DEP'T OF THE INTERIOR, IMPROVING TRIBAL CONSULTATION AND TRIBAL INVOLVEMENT IN FEDERAL INFRASTRUCTURE DECISIONS 2, 3 (Jan. 2017), https://www.bia.gov/sites/bia.gov/files/assets/as-ia/pdf/idc2-060030.pdf.

3. NAT'L CONG. OF AM. INDIANS, NATURAL RESOURCE CONSERVATION POLICY: INCORPORATING TRIBAL PERSPECTIVES 13 (Aug. 2011), https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb1045669.pdf.

4. NAT. RES. CONSERVATION SERV. OF THE U.S. DEP'T. OF AGRIC., DEFINITION OF INDIAN COUNTRY, https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs141p2_024362.pdf.

5. U.S. ENVTL. PROT. AGENCY, FEDERAL INFRASTRUCTURE TASK FORCE TO IMPROVE ACCESS TO SAFE DRINKING WATER AND BASIC SANITATION TO TRIBAL COMMUNITIES, https://www.epa.gov/tribal/federal-infrastructure-task-force-improve-access-safe-drinking-water-and-basic-sanitation.

6. *See, e.g.*, MONTANA BUDGET & POLICY CTR., POLICY BASICS: TAXES IN INDIAN COUNTRY PART 2: TRIBAL GOVERNMENTS (Nov. 2017), https://montanabudget.org/report/policy-basics-taxes-in-indian-country-part-2-tribal-governments.

7. *See, e.g.*, ROCKY MOUNTAIN INST., NATIVE ENERGY: RURAL ELECTRIFICATION ON TRIBAL LANDS (June 2014), https://rmi.org/blog_2014_06_24_native_energy_rural_electrification_on_tribal_lands/.

8. CONG. RESEARCH SERV., TRIBAL BROADBAND: STATUS OF DEPLOYMENT AND FEDERAL FUNDING PROGRAMS 2 (Jan. 2019), https://fas.org/sgp/crs/misc/R44416.pdf.

In most cases, utility costs cannot be deferred. Energy delivery becomes a safety issue in very hot climates requiring summer air conditioning and in very cold climates requiring winter heat. Communication infrastructure is essential in any commercial or resort enterprise, and more and more as a staple of society.[9] Water delivery is always essential since "water is life." Wastewater services are critical to maintain water quality and quality of life.[10] All these utility services can be considered essential government services and the necessary infrastructure as essential government infrastructure.[11]

With increasing frequency, these services are being taken on or taken over by tribal governments.[12] Tribes, or historically, the Bureau of Indian Affairs (BIA), have operated water and wastewater delivery systems on reservations.[13] Where possible, many tribes have taken over federally operated water systems[14] through contracts under the Indian Self-Determination and Education Assistance Act, [15] known as a "638 Contract." Using opportunities to access fiber optic backbones, many tribes have started communications companies.[16] Other tribes have taken over BIA electric systems using 638 contracts[17] or have started their own tribal electric utilities.[18]

In all these circumstances, Indian tribal governments must weave through a complex array of regulatory jurisdictions to determine their authorities to act. The utilities that provide services in "Indian Country"[19] must know which rules apply. This article describes the lines between state and tribal jurisdiction in the regulation and provision of electrical utility services on reservations, and it summarizes the federal energy regulatory role. The article also summarizes the state of the law related to Indian tribes' powers to regulate and negotiate electric utility services on reservations and the applicability of state-approved electric utility policies, tariffs, taxes, and other utility programs on reservations. Lastly, the article describes

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9. *See, e.g.*, CYBERSECURITY AND INFRASTRUCTURE SECURITY AGENCY, COMMUNICATIONS SECTOR, https://www.cisa.gov/communications-sector (identifying the Communications Sector as a "critical infrastructure sector").

10. *See, e.g.*, CYBERSECURITY AND INFRASTRUCTURE SECURITY AGENCY, WATER AND WASTEWATER SYSTEMS, https://www.cisa.gov/water-and-wastewater-systems-sector.

11. *Id.*; *see also* IMPROVING TRIBAL CONSULTATION AND TRIBAL INVOLVEMENT IN FEDERAL INFRASTRUCTURE DECISIONS, *supra* note 2, at 64.

12. *See*, *e.g.*, Atkinson, *supra* note 1, at I-1.

13. *See* U.S. DEP'T. OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, DIVISION OF WATER AND POWER: BACKGROUND AND HISTORY, https://www.bia.gov/bia/ots/dwp/background-and-history.

14. *See, e.g.*, SAN LUIS REY INDIAN WATER AUTH., https://www.slriwa.org/.

15. Pub. L. No. 93-638 (codified at 25 C.F.R. pt. 900).

16. *See e.g.*, CHEYENNE RIVER SIOUX TRIBE TELEPHONE AUTH., HISTORY, http://www.crstta.com/about; *see also* RURAL DEV. AND U.S. DEP'T OF AGRIC., COMMUNITY-ORIENTED CONNECTIVITY BROADBAND PROGRAM SUMMARIES (2002), https://www.rd.usda.gov/files/UTP-CCProjectSummaries2002.pdf.

17. *See, e.g.*, *The Salish and Kootenai Tribes: Mission Valley Power*, https://missionvalleypower.org/.

18. *See, e.g.*, *The Kalispel Tribe*, https://kalispelutilities.com/; *Navajo Tribal Utility Authority*, http://www.ntua.com/; *Pechanga Western Electric*, https://www.pechanga-nsn.gov/index.php/tribal-government/services/pechanga-western-electric; *Seneca Energy*, https://sni.org/departments/utilitiesseneca-energy/; *Umpqua Indian Utility Cooperative*, https://www.umpquaindianutility.com; *Yakama Power*, https://www.yakamapower.com/.

19. *See* 18 U.S.C. § 1151 (defining the term in criminal contexts); California v. Cabazon Band of Mission Indians, 480 U.S. 202, 208 (1987) (applying the term in a civil contexts).

strategies tribes can use to clarify jurisdiction over local electric utility facilities and services, as well as strategies for utilities to better serve their tribal customers.

Most of the general jurisdictional principles applicable to electric utilities also apply to natural gas and telecommunications services.[20] Many water and wastewater delivery services have tribe-specific applicable federal laws and/or are governed by various water agreements under water laws.[21]

II. THE INITIAL ISSUE: FEDERAL OR LOCAL JURISDICTION OVER UTILITIES?

All energy enterprises in the United States, including tribal utilities, tribal energy businesses, and tribal renewable or traditional energy generators must comply with the federal laws that apply to their facilities or activities.[22] Under the Commerce Clause of the U.S. Constitution, Congress was granted the "power . . . to regulate [c]ommerce . . . among the several states, and with the Indian Tribes."[23] Generally, Congress is authorized to regulate any commodity which is sold across state lines, known as interstate commerce.[24] On the other side of the jurisdiction coin, the Tenth Amendment to the U.S. Constitution states that "[t]he powers not delegated to the United States by the Constitution . . . are reserved to the [s]tates respectively, or to the people."[25] Therefore, any commerce deemed not to be governed by federal law can be locally regulated.

The federal laws that define the split between federal, state, or local jurisdiction include, but are not limited to: the Federal Power Act (FPA),[26] the Department of Energy Organization Act of 1977,[27] which created the Federal Energy Regulatory Commission (FERC) as an independent agency to regulate electricity, the Energy Policy Act,[28] and the Public Utility Regulatory Policies Act of 1978.[29] Tribal utilities doing business in a manner that is federally regulated or tribes that wish to build or own facilities, such as large-scale renewable or traditional power generators that are connected to the grid, must know and follow federal law and regulations.

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20. However, specific federal laws govern natural gas and telecommunications. The Natural Gas Act governs the interstate delivery of natural gas and gas pipelines. *See* Natural Gas Act of 1938, Pub. L. No. 75-688, 52 Stat. 821 (1938). The Telecommunications Act provides access to communications services. *See* Telecommunications Act of 1996, 47 U.S.C. §§151, 251, 271, 609 (1996). There are some instances where federal laws or programs apply to specific utility services, *see e.g.*, FED. COMMC'N COMM'N, UNIVERSAL SERVICE, https://www.fcc.gov/general/universal-service.

21. Many reservations have federal water and wastewater systems, and special federal laws related to water rights settlements or irrigation projects. *See e.g.*, the Blackfeet Water Rights Settlement Act, Pub L. 114-322, 130 Stat. 1814 (2016); U.S. BUREAU OF RECLAMATION, NAVAJO INDIAN IRRIGATION PROJECT, https://www.usbr.gov/projects/index.php?id=360.

22. 16 U.S.C. § 824 (2020).

23. U.S. CONST. art. I, § 8, cl. 3.

24. *See* United States v. Lopez, 514 U.S. 549, 559 (1995).

25. U.S. Const. amend. X.

26. 16 U.S.C. §§ 791(a)–828 (1920).

27. 42 U.S.C. §§ 7134, 7171(a) (1977).

28. 16 U.S.C. § 824j-1(a) (2005).

29. 16 U.S.C. §§ 796(17)–(18), 824(a)-(3) (1978).

There have been only a few instances where FERC has specifically addressed issues in Indian Country.[30] For example, for Indian tribes entering into wholesale power contracts, while FERC has *exclusive* power under section 201 of the FPA "over the [sale] of electric energy . . . at wholesale in interstate commerce," whether FERC must review and can apply its regulations to a wholesale power contract depends upon whether a party to the contract is a "public utility" subject to FERC's jurisdiction.[31] Under *Sovereign Power, Inc*., FERC has ruled that a tribal corporation is not a "public utility."[32] FERC's rationale was that the tribal entity "is an instrumentality of [government]."[33] FERC also has *exclusive* powers related to "the transmission of electric energy in interstate commerce" by public utilities.[34] While this general authority under section 201 of the FPA to regulate interstate transmission applies only to public utilities, FERC has additional powers under the Energy Policy Act of 2005[35] to set reliability standards for the bulk-power system applicable to all entities connected to the bulk transmission network. FERC also has the power to order non-public utilities to connect and provide wholesale transmission service under sections 210 and 211 of the FPA.[36]

Another way federal law impacts tribal matters concerns FERC's authority to license and regulate over 1700 hydroelectric non-federal dams.[37] Any non-federal entity developing or operating hydropower facilities, including tribes, must comply with licensing requirements.[38] For hydroelectric dam licenses or renewals of licenses that can impact tribes or trust resources (even off-reservations), a process is in place for establishing conditions to licenses.[39] Many tribes have participated in relicensing negotiations that have resulted in extensive agreements and ongoing conditions for operations of facilities, as well as compensation for the use of tribal lands or resources.[40]

III. THE NEXT ISSUE: IF FACILITIES OR UTILITIES ARE NOT FEDERALLY REGULATED, DOES THE STATE OR THE TRIBE HAVE JURISDICTION OVER SERVICES OR FACILITIES IN "INDIAN COUNTRY?"

This portion of the Article addresses who regulates tribal utilities; energy facilities being built by a tribe such as solar installations or other generators (even

30. Order No. 863, *Revised Policy Statement re Indian Tribes in Commission Proceedings*, 169 F.E.R.C. ¶ 61,036 (2019) (codified at 18 C.F.R. pt. 2).

31. 16 U.S.C. § 824(d)–(e).

32. *Sovereign Power, Inc.*, 84 F.E.R.C. ¶ 61,014 at P 4 (1998). *See also Confederated Tribes of the Warm Springs Reservation of Oregon*, 93 F.E.R.C. ¶ 61,182 (2000); *Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 149 F.E.R.C. ¶ 61,216 at P 1 (2014).

33. 84 F.E.R.C. ¶ 61,014 at P. 8.

34. 16 U.S.C. §824.

35. Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594.

36. 16. U.S.C. §§ 824j, 824k; 18 C.F.R. § 36.1.

37. FED. ENERGY REGULATORY COMM'N, HYDROPOWER: FERC'S RESPONSIBILITIES, https://www.ferc.gov/ industries-data/hydropower/ (last updated Sept. 9, 2020).

38. Federal Power Act, 16 U.S.C. § 797(e).

39. *Id*.

40. Thane D. Somerville, *Tribes and Dams: Using Section 4(e) of the Federal Power Act to Protect Indian Tribes and Restore Reservation Resources*, SEATTLE J. OF ENVTL. L. & POLICY, 125-126, 132 (2009).

when there is not a tribal utility); non-tribal utility owned facilities to which a tribal generator is interconnecting, or other non-tribal utility-owned distribution systems or activities, when the facilities or activities are in "Indian Country."

As defined in federal law, the term "Indian Country" means:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.[41]

Despite the federal definition of "Indian Country," land-based jurisdictional matters in Indian country are complicated. Many Indian reservations are checker-boarded, meaning that a land-ownership map of the reservation would show a variety of tribal trust lands[42], allotted lands owned by one or more individual Indians, and non-Indian fee lands. When lands within a reservation are checker-boarded with tribal, fee, allotted, and other lands, the jurisdictional analysis will be different for each of the lands.[43]

The question of Indian allotments can also present additional complications. Allotments are lands owned by the United States in trust for one or more individual Indians.[44] Generally, an Indian allotment within the boundaries of a reservation will be treated the same as tribal trust land, but many allotments are not within any reservation's boundaries, and some Indian allotments are no longer even affiliated with a tribe, which leaves their utility jurisdiction in question despite being considered within "Indian Country."[45]

Assuming exclusive federal jurisdiction does not apply to a particular activity, there are two related bodies of law to apply when one considers whether state or tribal jurisdiction will apply: (1) can the tribe exercise jurisdiction in this instance?; and (2) can the state exercise jurisdiction in this instance? The answer can

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41. 18 U.S.C. § 1151.

42. *Id.* "Trust lands" are those owned by the United States in trust for the tribe.

43. Checkerboarding resulted from federal policies responding to 19th century political pressure, social reforms, and land interests. In 1887, Congress passed the General Allotment Act (also known as the Dawes Act) which authorized the allotment of reservation lands. *See* 24 Stat. 388. The policy allowed many tribal lands to be transferred out of Indian control for the general benefit of non-Indians. Congress parceled out tribally owned lands to individual Indians to promote assimilation of Indians and Indian agriculture (creating allotments). This policy then created a pool of "excess" Indian lands that could be transferred to non-Indians, creating non-Indian fee owned lands throughout many reservations. By the 1920s, the federal government acknowledged that the allotment policy failed to serve any beneficial purpose to Indians. In 1934, Congress passed the Indian Reorganization Act (IRA), which repudiated the policy. *See.* 25 U.S.C. §§ 461-65.

44. Allotment is a term of art in Indian law, describing a parcel of land owned by the United States in trust for an Indian (trust allotment) or owned by an Indian subject to a restriction on alienation in the United States or its officials (restricted allotment). *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, §16.03 at 1071 (Nell Jessup Newton ed., 2012).

45. In some cases, the federal government created allotments from the public domain rather than from within an Indian reservation, in other cases, the federal government created an allotment within an Indian reservation then extinguished the reservation, returning it to the public domain. *See* 80 Fed. Reg. 72,504 (Nov. 19, 2015).

be just the tribe has jurisdiction, just the state has jurisdiction, both have jurisdiction, or a balancing test can be used to determine who has jurisdiction. Unfortunately, applying balancing tests means there will be legal ambiguities.

Even though non-federal jurisdictional utility activities are taking place within Indian Country, or even on trust lands, when non-Indians are either the service provider (even when providing service to the tribe itself) or the customer (even of a tribal utility) the question of tribal or state jurisdiction becomes more complex. The answers to these questions depend on *where* the activity takes place, *who* is involved in the activity, and the type of interests at stake.

IV. TRIBAL JURISDICTION IN "INDIAN COUNTRY" ON TRIBALLY OWNED LANDS OVER TRIBAL UTILITIES, TRIBES AND TRIBAL MEMBERS

Primary jurisdiction over land that is "Indian Country" rests with the federal government and the Indian tribe inhabiting it, and not with the states.[46] Tribes have inherent sovereign authority in Indian Country to regulate entities doing business on tribal lands as an essential attribute of Indian sovereignty; it is a necessary instrument of self-government and territorial management.[47] Therefore, tribal exclusive jurisdiction exists over utility matters as to tribal utilities serving Indians in Indian Country.[48] Tribes have plenary and exclusive power over their members and their territory subject only to limitations imposed by federal law.[49] It is clear that a tribally owned and operated utility would be "Indian."[50]

A tribal utility can avoid jurisdictional issues by focusing its tribal utility efforts only on the areas in which it maintains jurisdictional control. The tribe can generally exercise exclusive jurisdiction on trust lands over their own utilities. When a reservation is not checkerboarded, a tribal utility can serve the entire reservation without jurisdictional questions.[51]

Consideration of the jurisdictional statements in a tribe's treaty, the tribe's Constitution, and other governance documents is important to document in utility publications and policy in order to assert and uphold tribal law. Further, a tribe

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46. Alaska v. Native Vill. Of Venetie, 522 U.S. 520, 527 n.1 (1998) (citing South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343 (1998).

47. *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982).

48. This assumes there is no federal jurisdiction due to the types of facilities or transactions involved. *See e.g*., Sprint Commc'n Co. v. Crow Creek Sioux Tribal Court, 121 F. Supp. 3d 905, 912 (D. S.D. 2015) (holding that the tribe's Native American telecommunications company could provide services to its members on the reservation and determined the tribe could regulate telecommunications services on tribal lands).

49. Worcester v. Georgia, 31 U.S. 515, 555 (1832).

50. It can also be argued that an electric cooperative (which is member-owned and managed by a member voted board) is also "Indian" when serving Indians in Indian Country, since the Indians are owners of the entity. This would allow for full tribal regulation of the activities of the electric cooperative as relates to the cooperative's service to Indians. Such an assertion should be supported by any local statutory or case law authorities, by statements in the bylaws of the cooperative and by the specific numerical basis for Indian ownership. *See* Big Horn Elec. Coop. v. Adams, 219 F.3d 944, 955 n.1 (9th Cir. 2000).

51. *See, e.g.*, WESTERN AREA POWER ADMIN., TRIBAL AUTHORITY – CASE STUDIES: THE CONVERSION OF ON-RESERVATION ELECTRIC UTILITIES TO TRIBAL OWNERSHIP AND OPERATION 86-87 (last updated Sept. 2010), https://www.energy.gov/sites/prod/files/2016/04/f30/tribal_authority_case_studies_report.pdf (explaining that federal and state power to regulate tribal electric businesses is limited).

can carefully develop additional tribal laws related to its tribal utility to clarify and forestall any issues of jurisdiction or dispute resolution.

V. TRIBAL JURISDICTION IN "INDIAN COUNTRY" ON INDIAN-OWNED LANDS OVER NON-TRIBAL UTILITIES

Most Indian tribes do not have utility codes or regulations which could be applied to determine utility rates and service standards.[52] Just as some utilities provide service in more than one state, and have separate rates and tariffs for each state, utilities *could develop separate rates for tribal jurisdictions* if required and enforced by Indian tribes.[53]

Case law related to tribal regulatory authority over non-Indians has continually shifted over time and in different jurisdictions and over different applications. Assuming there is not a specific federal law that applies to an Indian tribal utility service[54] or a provision in a tribal treaty that applies, the seminal standards to apply to determine the limits of tribal regulatory authority over non-Indians in Indian Country is the two-part test set forth in *Montana v. United States*.[55] In *Montana*, the court held that absent a treaty or federal law, a tribe has no civil regulatory authority over non-members, with two exceptions: (1) a tribe may regulate the activities of non-members who enter consensual relationships with a tribe or its members through commercial dealing, contracts, leases, or other arrangements;

52. Generally, tribes have only utilized their very limited governmental resources to focus on electric energy issues beginning in the years since the Energy Policy Act of 1992 included title XXVI, "Indian Energy" to create the United States Department of Energy's Office of Indian Energy Policy and Programs. Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (prior to 2005 amendment). The office had some authorities to assist tribes in addressing the alarmingly disproportionate number of Indian reservation homes that were without electricity and other energy services. *Id.* In 2005, the office's role expanded "to direct, foster, coordinate, and implement energy planning, education, management, conservation, and delivery of programs that assist tribes with energy and natural resource development and efficiency, capacity building, energy infrastructure, reducing or stabilizing energy costs, and electrification of Indian lands and homes . . . ." U.S. DEP'T OF ENERGY OFFICE OF INDIAN ENERGY POLICY AND PROGRAMS, STRATEGIC ROADMAP 2025, https://www.osti.gov/servlets/purl/1243029; Energy Policy Act of 2005, Pub. L. 109-58, 119 Stat. 594. Even with federal assistance, many tribes simply do not have the financial or technical capacity to create and enforce highly specialized energy regulations, or to educate their utility providers on tribal laws. However, when circumstances require regulations, tribes will pass energy codes and regulate their local utilities, for example, the Rosebud Sioux Tribe has instituted an energy code and operates an active Tribal Utility Commission. Rosebud Sioux L. and Order Code. tit. 20 (2016).

53. A reverse example of a special tribal rate is the Jemez Mountain Electric Cooperative, Inc.'s "Rate 19" which allows the Cooperative to recover costs from Pueblo customers for the Pueblo's right of way charges. N.M. Pub. Regulation Comm'n, Jemez Mountains Electric Cooperative, Inc. Original Rate No. 19, Native American Access Cost Recovery (2012). The rate was approved by the New Mexico Public Regulation Commission and effective on August 17, 2012 despite applying specifically in Indian Country. *Id.* In some cases, a separate tribal rate would be very complicated on many reservations due to the complex tribal jurisdictional issues described here. Utilities generally do not know if their customers are Indians, non-Indians or if a household or business is both. Further, changing utility rules and policies for each customer when the customer moves to a new house could be an administrative burden for utilities.

54. For example, different rules apply in Alaska under the Alaska Native Claims Settlement Act of 1971, 43 U.S.C. Chapter §§ 1601-1624. Some tribes have water rights settlements that impact their water utilities, such as the Aamodt Indian Water Rights Settlement, Pub. L. No. 111-291, tit. VI, 124 Stat. 3064, 3134 (2010), which provides certain water services to the Pueblos of Pojoaque, Nambé, San Ildefonso and Tesuque.

55. Montana v. United States, 450 U.S. 544 (1981).

and (2) a tribe may retain inherent power to exercise civil authority over the conduct of nonmembers when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.[56]

One factor in the decision as to whether tribes have regulatory authority concerns *where* the regulatory activities take place.[57] *Montana,* which related to hunting and fishing rights of non-Indians, preliminarily determined, at least in part, that the activities took place on what the court decided were fee lands within Indian Country.[58] However, in the case of *Nevada v. Hicks*, which took place on tribal trust land, the Court stated that tribal "ownership [] of land . . . is only one factor to consider in determining whether [an exercise of tribal governance] of nonmembers is necessary to protect tribal self-government or to control internal relations," but land status "may sometimes be a dispositive factor."[59] Lower courts, however, have determined that the tribal power to exclude non-members from tribal lands encompasses the power to regulate nonmember conduct, which provides tribes regulatory jurisdiction[60] over non-members engaging in activities in Indian Country, in the absence of countervailing state interests.[61]

A related core aspect of tribal sovereignty and regulatory authority is the tribal *right to tax* non-tribal entities in Indian Country.[62] It is settled that tribes can impose energy taxes on third party activities on trust lands in Indian Country.[63] However, the taxing authority has been limited just as the regulatory authority has been limited when tribes seek to tax non-Indians doing business on lands owned by non-Indians in Indian Country, known as "fee lands";[64] on highway rights-of-ways;[65] and in Alaska on lands not considered a "dependent Indian community."[66] In *Big Horn Electric. Cooperative, Inc. v. Adams*, one of the few federal cases concerning the taxation of utility facilities, a preliminary determination was made that the tribe's grant of rights of ways equated the property to non-Indian fee land, and then the court applied the *Montana* tests to determine that a railroad and a

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56. *Montana*, 450 U.S. at 565-66.

57. *Id.*

58. *Id.* at 549, 556-567.

59. Nevada v. Hicks, 533 U.S. 353, 360 (2001).

60. Different rules apply to tribal adjudicatory jurisdiction (when a tribal court can hear a matter). *See* Strate v. A-1 Contractors, 520 U.S. 438, 442 (1997).

61. Wheel Camp Recreational Area, Inc. v. Larance, 642 F.3d 802, 812-813 (9th Cir. 2011).

62. *See* Morris v. Hitchcock, 194 U.S. 384 (1904) (related to grazing of non-Indian cattle;); Buster v. Wright, 135 F. 947 (8th Cir. 1905) (related to a permit tax authorizing non-Indian businesses to do business on the reservation); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) (related to cigarette taxes); Kerr-McGee Corporation v. Navajo Tribe, 471 U.S. 195 (1985) (related to business activity and possessory interest taxes).

63. *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) ("[n]on-Indians who lawfully enter tribal lands remain subject to a tribe's *power* to exclude them, which power includes the lesser power to tax or place other conditions on the non-Indian's conduct or continued presence on the reservation.").

64. Atkinson Trading Co. v. Shirley, 532 U.S. 645, 647, 655-56, 659 (2001) (related to a hotel occupancy tax in a non-Indian owned hotel within "Indian Country").

65. *Strate,* 520 U.S. 438 (1997).

66. Alaska v. Native Vill. Of Venetie, 522 U.S. 520, 530-33 (1998).

utility tax of 3% on the full fair market value of all utility property was invalid.[67] The court also relied on the language of the granting instrument, stating that in the rights-of-way documents, "the Tribe did not reserve any right to exercise dominion or control over Big Horn's rights-of-way."[68]

While the United States Supreme Court has not specifically addressed tribal jurisdiction over electrical utility matters within a reservation, a strong case is made that both *Montana* exceptions apply. First, utility companies have consensual relationships on the reservation by providing service and by real and personal property rights agreements with the tribe and tribal members.[69] They can be required by tribal law to submit to tribal jurisdiction.

Where a tribe is prepared to show how the conduct of a utility "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe," the second *Montana* exception would apply.[70] One of the few federal cases to directly address this issue is *Devils Lake Sioux Indian Tribe v. North Dakota Public Service Comm'n*.[71] The District Court for the District of North Dakota determined that the tribe did not have exclusive authority to regulate the provision of electrical services within the exterior boundaries of the reservation, however, where the service sought is to a *tribal business located on trust land*, the necessary nexus between Tribal interests and inherent sovereignty is present.[72] The ruling was not appealed, but a request to modify the ruling to extend the ruling to cover service to any utility service to tribal members on trust lands, which was denied by the district court, was appealed to the 8th Circuit in *In re Otter Tail Power*.[73] There, it was held that the issue of tribal jurisdiction over utilities on reservations is a federal question, and the question was remanded back to the district court.[74] After discussing the district court's statements of dicta in a footnote, the Circuit Court stated:

> If we were similarly permitted to muse, also as a matter of pure dicta, we would note that the ability of an Indian Tribe to generate revenues is vital to Tribal interests—and thus an area of heightened sovereignty—because such revenues are necessary for the provision of Tribal services. *Cf. Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137(1982) ("The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management. The power enables a tribal government to raise revenues for its essential services.") Baker's apparent argument that an Indian Tribe would have a greater sovereignty interest in exclusively regulating the provision of electrical services to a Tribal business—which generates income which allows the distribution of Tribal services—than

67. Big Horn Cty. Elec. Co-op., Inc. v. Adams, 219 F.3d 944, 948-951 (9th Cir. 2000) ("[a]n ad valorem tax on the value of Big Horn's utility property is not a tax on the activities of a nonmember, but is instead a tax on the value of property owned by a nonmember, a tax that is not included within *Montana* 's first exception.").

68. *Id*. at 950.

69. Wayne Shammel & Margaret M. Schaff, The Affiliated Tribes of Nw. Indians Econ. Dev. Corp., Case Study On the Formation of Umpqua Indian Utility Cooperative 00~00: A Tribal Utility Formed by the Cow Creek Band of Umpqua Tribe of Indians 7 n.8 (2002).

70. *Big Horn*, 219 F.3d 944 at 951 (citing *Montana*, 450 U.S. at 565).

71. Devils Lake Sioux Indian Tribe v. North Dakota Pub. Serv. Comm'n, 896 F. Supp. 955 (D. N.D. 1995).

72. *Id.* at 961.

73. In re Otter Tail Power Co. v. Otter Tail Power Co., 116 F.3d 1207, 1210-11 (8th Cir. 1997).

74. *Id*. at 1214, 1216.

> to a Tribal housing agency—which directly provides Tribal services—therefore strikes us as somewhat counterintuitive.[75]

The case appears to have then settled, as there is no further ruling on the matter by the District Court.

In 2013, citing *Devils Lake*, the North Dakota Supreme Court later agreed that the North Dakota Public Service Commission did not have jurisdiction over the Turtle Mountain Chippewa's decision under their "long standing tribal utility code" of who should provide electric service to their casino.[76]

Assuming there are no applicable treaty provisions related to regulations of services, or written agreements in which the utility agreed to submit to tribal jurisdiction that would invoke the first *Montana* exception, in addressing the *Montana* exceptions related to utility service, a tribe must be prepared to document how the utility activities impact the political integrity, the economic security, or the health or welfare of the tribe.

Some examples of such impacts are as follows. A tribe must have the ability to regulate the utility services to its own members and on a checkerboarded reservation, this means that those regulations will naturally also govern the non-member facilities. Tribal political integrity is also impacted when particular tribal goals, such as tribal sustainability goals, are impaired by utility policies.[77] A tribe's economic security depends on basic infrastructure and services, such as utility services, as utilities provide key elements to the ability of a tribal economy to be successful.[78] Tribes have found that utility services are vitally important to the economy and general welfare of the tribe, tribal members, and reservation residents.[79] Utility services have been found to have a direct effect on the health and welfare of the tribe through the provision of essential power, communications, and other utility services.

Tribes can document how utility policies and services provided on the reservation could interfere with the tribe's right to develop its energy infrastructure and

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75. *Id*. at 1216 n.9.

76. N. Cent. Elec. Coop. v. N.D. Pub. Serv. Comm'n, 837 N.W.2d 138, 145-146 (N.D. 2013).

77. Tribes may find a utility's economic goals to be at odds with their cultural identity. N. Ariz. U., W. REGION AIR P'SHIP, *Generating Electricity from Renewable Resources in Indian Country: Recommendations to Tribal Leaders from the Western Regional Air Partnership*, at 29 (July 2003), https://www.wrapair.org/forums/ap2/projects/tribal_renew/Tribal_Renewables_Report_7-03.pdf.

78. *See, e.g.*, Laurel Morales, *For Many Navajos, Getting Hooked Up to the Power Grid Can Be Life-Changing*, NPR (May 29, 2019), https://www.npr.org/sections/health-shots/2019/05/29/726615238/for-many-navajos-getting-hooked-up-to-the-power-grid-can-be-life-changing.

79. *Id.*

improve the cost efficiency of services. Utility policies can also stymie the development of tribal resources through unfriendly utility net metering policies,[80] refusals to provide services,[81] high connection fees,[82] or short shut-off notices.[83] Public safety is also impacted by utility policies, procedures, and practices. Tribes can document ways in which their citizens' safety is impacted during extreme weather, planned power outages, or when critical buildings like hospitals, fire departments or other facilities do not have reliable service. The tribe should be ready and able to show how specific utility policies impact the goals, culture, economic wellbeing, resource development, safety, and other tribal interests.

Again, a consideration of the jurisdictional statements in any treaty, the Tribal Constitution, or other governance documents can be helpful to clarify the tribe's jurisdiction. Under principles of inherent sovereignty, tribes can carefully develop tribal laws with statements reflecting the tests in these court cases which govern third party utility service or utility service to third parties on tribal lands in order to clarify any issues of jurisdiction or dispute resolution.[84] To further improve their enforcement of tribal law, Tribes can require their utilities to agree to full tribal jurisdiction: either as part of their right to provide service to the tribe or as part of other utility related contracts.[85] There is precedent for a Tribe prevailing

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80. For example, a tribe in South Dakota received a grant for installation of a solar facility to serve a new housing project. The local utility, which is a full requirements customer of Basin Electric Cooperative, applied restrictive local limits on net metering which required a scaling back of the tribe's free solar system. While net metering policies can encourage renewable development, some net metering policies discourage renewables or subsidize higher-income consumers at the expense of lower-income consumers, and these subsidies may eventually lead to more increased costs which can be contrary to tribal policy. THE AM. CONSUMER INST. CTR. FOR CITIZEN RESEARCH., *The Unintended Consequences of Net Metering*, at 3, 8-9, https://www.theamericanconsumer.org/wp-content/uploads/2019/08/ConsumerGram-Net-Metering.pdf.

81. For example, a tribe in the state of Washington was considering a tribal utility. During negotiations, the serving utility refused to add new services on the reservation as leverage to discourage pursuit of a tribal utility, which impaired the tribe's ability to pursue economic development opportunities or to add new housing on the reservation. The Tribal Council passed a resolution making such a refusal to provide service contrary to tribal law.

82. Many Indian homeowners live in remote areas, which often makes the utility's cost to extend service (which is passed on to the homeowner) very high. Many Indians live below the poverty line making payment of up-front utility extension costs out of the question. On the Navajo Nation, significant numbers of tribal homes had no electricity until the Navajo Tribal Utility Authority (NTUA) sought various forms of funding such as U.S. Department of Housing and Urban Development Indian Community Development Block Grants, loans, and other assistance to assure that line extensions could be provided to remote Navajo homes without full payment of the extension fees by the customer. For example, NTUA called on other public power utilities for help. Over 28 utilities from 13 states and over 150 visiting line workers donated time and materials in the "Light Up Navajo" campaigns to bring basic electrical services to remote areas of the reservation. *See* https://www.ntua.com/light-up-navajo.html.

83. *See, e.g.*, Rosebud Sioux L. and Order Code 20-5-107. The Rosebud Sioux Tribal Utility Commission passed regulations related to the notice and activities surrounding shutting off electricity for non-payment during cold weather months. Many tribes assist their elderly and impoverished tribal members with utility bills during cold weather.

84. One of the most basic principles of Indian law is that power vested in an Indian nation are not, in general, delegated powers granted by acts of Congress of the Constitution, but rather are "inherent powers" of a limited sovereignty which has never been extinguished. *See, e.g.*, United States v. Wheeler, 435 U.S. 313, 322-23 (1978).

85. Tribes generally have not required their utility service providers to submit to their jurisdiction in writing as part of standard utility service. Tribes have generally simply requested local service and been hooked up

on such an argument when it has a comprehensive set of utility regulations of its own.[86]

VI. STATE JURISDICTION IN "INDIAN COUNTRY" OVER NON-TRIBAL UTILITIES

Almost all reservations have third party utility companies providing services to the tribe and to tribal members.[87] Most of the utility companies operating on reservations are under some type of state sanction and in many cases the utility's activities, rates, and service standards are governed or regulated by state public utility commissions.[88] There is a *de facto* application of state rules by the utilities to their tribal customers on Indian lands. In most cases, the tribal members and tribes have not questioned the payment of utility rates established under state rules and regulations and have paid the charges as an assumed condition of service.

The state jurisdictional issue becomes muddied especially when looking at how utility rates and tariffs are made. Because utility rates and tariffs are generally cost based, and the utility's costs are determined by their state-wide system, there is generally no mathematical separation between the costs to serve Indian Country and the costs to serve the rest of the utility service territory. Further, utility policies generally apply to the whole utility service territory, and not just to the part outside of Indian Country. Generally, Indian tribes and their members pay the utility rates published by the utility.

However, tribes are beginning to question whether a non-Indian utility can *require* the tribe or its members to participate in state mandated programs, contribute to state energy policy goals, or pay the state approved rates. As tribes develop renewable energy projects to serve their buildings and customers, they do not want to be limited by their utility's state-approved policies, or by a utility's full-requirements contracts (which were not approved by the tribe) which limit customer generation.

VII. STATE REGULATION OF INDIANS IN INDIAN COUNTRY

In the 2020 case of *McGirt v. Oklahoma*, when discussing the application of the Major Crimes Act to "Indian Country," the U.S. Supreme Court stated:

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using utility forms. In some cases, tribes have created written agreements with their utilities, however these have often come about in the context of right of way agreements, and not simply for service. Tribes may also be concerned that the utility company will be unwilling or uninterested in providing services if the tribe demands that they submit to rules the utility may not want to honor. This is further complicated since many utilities are already regulated by the state, and since no state currently has clear rules on this matter, utilities often wish to file a request for a Declaratory Order with the state before they will agree to *exclusive* jurisdiction (or in some cases, any jurisdiction) by a tribe. *See* In re Otter Tail Power Co., 451 N.W.2d 95, 101-06 (N.D. 1990).

86. *See* North Cent. Elec. Coop., Inc. v. North Dakota Pub. Serv. Comm'n, 837 N.W. 2d 138 (N.D. 2013).

87. For example, on the Colville Reservation in Washington State, there are six operating electric utilities, each of whom has their own rate structure, none of which are officially approved by the tribe. *See* CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, FINAL REPORT FOR COLVILLE TRIBAL UTILITY DEVELOPMENT PROJECT TO OFFICE OF INDIAN ENERGY 7-8 (Sept. 30, 2016), https://www.energy.gov/sites/prod/files/2017/01/f34/OSTI%20Report.pdf.

88. For example, in California, Pacific Gas and Electric Company, Southern California Edison and San Diego Gas and Electric each serve more than one tribal reservation, and each has routinely applied their standard state approved tariffs to the tribe and tribal members on the reservations.

> The policy of leaving Indians free from state jurisdiction and control is deeply rooted in this Nation's history" *Rice v. Olson*, 324 U.S. 786, 789 (1945). Chief Justice Marshall, for example, held that Indian Tribes were "distinct political communities, having territorial boundaries, within which their authority is exclusive . . . which is not only acknowledged, but guaranteed by the United States" a power dependent on and subject to no state authority. *Worchester v. Georgia*, 6 Pet. 515, 557 (1832); see also *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 168-169 (1973). And in many treaties, like those now before us, the federal government promised Indian Tribes the right to continue to govern themselves. For these reasons, this Court has long "require[d] a clear expression of the intention of Congress" before the state or federal government may try Indians for conduct on their lands. *Ex parte Crow Dog*, 109 U.S. 556, 572 (1883).[89]

The court then found that the state did not meet that standard after looking at the applicable federal laws.[90]

In *White Mountain Apache Tribe v. Bracker*, the Supreme Court established a two-part test, either of which can make state civil regulations inapplicable to Indians in Indian Country.[91] First, the exercise of state authority may be preempted by federal law[92] and second, the application of state laws or regulations may "infringe on the right of reservation Indians to make their own laws and be ruled by them."[93] These cases are to be analyzed against a "backdrop of tribal sovereignty" giving rise to a presumption that state jurisdiction does not apply in Indian Country.[94]

An exclusive scheme of federal laws will preempt a state assertion of regulatory authority.[95] To determine whether state regulation of non-Indian activity on the reservation is preempted by federal law, "*Bracker* called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law."[96] This balancing test is specific to federal Indian law, *see Hoopa Valley Tribe v. Nevins*,[97] because "[t]he unique historical origins of tribal sovereignty and the federal commitment to tribal self-sufficiency

89. McGirt v. Oklahoma, 140 S. Ct. 2452, 2476 (2020).

90. *Id.* at 2482.

91. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142-43 (1980).

92. *See* Williams v. Lee, 358 U.S. 217, 220 (1959) (applying adjudicatory jurisdiction – the right to hear disputes).

93. *Bracker*, 448 U.S. at 142.

94. *Id.* at 136; *see also* Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Eng'g, P.C., 476 U.S. 877, 884, 893 (1986).

95. *See, e.g.*, Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of New Mexico, 458 U.S. 832 (1982) (regulatory scheme developed under the Indian Self-Determination and Education Assistance Act preempts state tax imposed on the gross receipts a non-Indian construction company receives from a tribal school board for building an on-reservation school); Warren Trading Post Co. v. Arizona State Tax Comm'n, 380 U.S. 685 (1965) (federal Indian trader statutes preempt state tax on non-Indian corporation making on-reservation sales to Indians); Cabazon Band of Mission Indians v. Wilson, 37 F.3d 430 (9th Cir. 1994) (Indian Gaming Regulatory Act preempts state tax on offtrack betting activities on tribal lands).

96. *Bracker*, 448 U.S. at 145; *see also* Seminole Tribe of Fla. v. Stranburg, 799 F.3d 1324, 1336 (11th Cir. 2015); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334 (1983).

97. Hoopa Valley Tribe v. Nevins 881 F.2d 657, 659 (9th Cir. 1989).

and self-determination make it treacherous to import . . . notions of preemption that are properly applied to other contexts."[98]

According to some cases coming after *Bracker*, this is a much more difficult argument for a tribe to prevail on, even if supported by an extensive federal scheme of laws, if the state has a strong interest in the regulation.[99] However, the language in *McGirt* which is quoted above may prove to change this balance, as there, the state argued that it had a strong interest in exercising jurisdiction.[100]

In the case of utility regulatory authority, no federal law expressly prohibits the State from asserting authority over a non-Indian utility's provision of retail electricity or natural gas sales to tribal trust lands. Further, the limits of federal energy regulations to interstate commerce lends credibility that no federal scheme of energy laws exists to preempt state laws in intrastate commerce. Therefore, it is possible a state could lawfully assert jurisdiction over utility activities within Indian trust lands *unless the state rule interferes with the rights of the Indian Tribe to make its own laws and be ruled by them.*[101] A tribe can therefore stand up against unwanted state regulations by expressing its sovereignty through tribal law, negotiations, and documentation.[102]

In making the decision whether there is preemption or infringement, the courts have used a balancing test in which they balance federal, tribal, and state interests related to the matter.[103] Due to the ever-changing nature and complexity of the jurisdictional issues, it is generally unclear where the balance falls.

The presence of tribal law is therefore an important ingredient in finding preemption of state law as applied to non-members.[104] Clear tribal laws related to utility services will also help the tribal utility business entity structure its agreements with appropriate sovereign immunity and dispute resolution provisions. A strong business organization coupled with a strong tribal regulatory structure will assist the tribe's efforts to secure contracts for infrastructure, power, and transmission.

Just as when analyzing the utility impacts to address the *Montana* balancing test, a tribe can also provide specific examples of how state approved utility regulations infringe on the rights of tribes to make laws and be ruled by them. For example, if a tribe passes a law requiring use of sustainable energy sources, but

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98. *Bracker*, 448 U.S. at 143.

99. *See* Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 109 (1989) (rejecting challenge to state severance taxes on the same on-reservation production of oil and gas by non-Indian lessees as was subject to the tribe's own severance tax where the state provided substantial services to the tribe and lessees); Gila River Indian Cmty. v. Waddell, 91 F.3d 1232, 1239 (9th Cir. 1996) (upholding state tax on the sale of tickets and concessionary items by a non-Indian in connection with on-Reservation events because the "State's interests are sufficient to justify the imposition of its tax on the entertainment events . . . [e]ven against a backdrop of Indian sovereignty").

100. The majority opinion in the *McGirt* case did not directly address the *Bracker* precedent, likely because the facts of the case were specific to the Creek Nation's Treaties and laws related to application of the criminal law, and *Bracker* relates to civil authority.

101. *Bracker*, 448 U.S. at 142.

102. *Id*.

103. *Bracker*, 448 U.S. at 145; Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 156-159 (1980).

104. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983).

the utility prohibits the development of renewable resources through its policies approved by a state, it is a clear impediment to the tribe's sovereignty. The tribe must also be prepared to understand and document the balance of the federal, tribal and state interests in each utility regulation.

A review of the relevant state laws, including the state constitutions, is also important.[105] Frequently, state law will have general statements about the state's ability to legislate in Indian Country or the application of their laws to federal entities or areas. A review of the applicable utility tariffs is also key. State approved utility tariffs may describe their applicability to state entities and may not mention tribes.

It is often unclear to utilities whether the utility is required to charge state approved rates and apply state approved utility policies to its tribal customers. A tribe or utility could seek a waiver of the utility's tariffs.[106] To avoid conflict with its state regulator, utilities may seek a state's approval of any negotiated arrangement with a tribe, or to charge different rates in Indian Country through a request for a declaratory order or other similar statement from the state body. Most states would likely prefer to avoid litigation of questions of federal Indian law in federal courts and are likely to approve a utility's petition for a waiver of a tariffed regulation if such approval would prevent a jurisdictional challenge by the Tribe.[107]

If a tribe can show that state utility regulations interfere with the right of the tribe to make its own laws and be ruled by them, they can assert that state approved utility rates do not apply on the reservation, allowing a tribe to 1) formally adopt only those state charges, rates, and policies as the tribe feels is appropriate, 2) regulate utilities serving the tribe and tribal members, and set tribal rates and policies, or 3) negotiate utility charges, policies, and rates.

VIII. STATE UTILITY TAXES ON INDIANS IN INDIAN COUNTRY

Generally, a tribe will desire to pay for the electricity a utility provides. However, when do payments for electricity turn into payments to achieve state mandated policy goals, which may or may not be consistent with tribal goals, or that may not benefit the reservation? When are utility charges impermissible taxes?

The purpose of intergovernmental tax immunities is to prevent one sovereign from interfering with the governmental functions of another; "[t]he power to tax" is the "power to destroy."[108]

It is clear that state utility taxes cannot be charged to Indians in Indian Country by utilities or other energy providers. "[A]bsent cession of jurisdiction or other federal statutes permitting it . . . a State is without power to tax reservation lands

105. For example, Article XX section 5 of the constitution of the state of Arizona prohibits taxation of property within an Indian reservation.

106. Final Rulemaking, *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities*, 75 F.E.R.C. ¶ 61,080 (1996).

107. A tribe may want to carefully consider whether to intervene in their serving utility's request at the state in order to avoid the tribe subjecting itself to the state's authority. Instead, this situation presents an opportunity for the tribe to engage in Government to Government political discussions at the highest level of state and tribal leaderships to come to an acceptable agreement between the two governments.

108. M'Culloch v. Maryland, 17 U.S. 316, 327 (1819).

and reservation Indians."[109] Congressional authorization is found only when Congress has made its intention to allow the state to tax "unmistakably clear."[110] Examples of prohibited state taxes include: excise taxes on motor fuels,[111] vehicle excise taxes and registration fees,[112] net income taxes,[113] personal property taxes,[114] vendor licensing fees,[115] and hunting and fishing licenses.[116]

Therefore, every tribe can review their (often numerous) electric bills to determine if state taxes are being charged. If they are being charged, the tribe can demand a refund of those charges going back so long as the tribal statute of limitation allows. This can amount to very large sums of money. Further, every tribe can pass a law prohibiting state taxes by utilities on their members. However, utilities generally do not know when an individual is a tribal member. Tribes can work with their utilities to establish a process allowing tribal member customers to submit a simple form requiring that state taxes be removed from their bills.[117]

Whether a particular utility charge is a tax is another legal question. Many states have created programs that are funded through utility charges.[118] A detailed analysis of utility bills and utility tariffs is needed to assess whether a charge is an inappropriate tax.

The determination of when charges are taxes or debts for voluntarily assumed obligations has been addressed by many courts.[119] Generally, a tax is "a pecuniary burden laid upon individuals or property for the purpose of supporting the government."[120] Debts are obligations for the payment of money founded upon contract,

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109. Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 458 (1995) (quoting County of Yakama v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 258 (1992)).

110. Coeur D'Alene Tribe of Idaho v. Hammond, 384 F.3d 674 (2004) (citing Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 765, 753 (1985).

111. *Chickasaw Nation,* 515 U.S. at 458.

112. Sac & Fox Nation v. Okla. Tax Comm'n, 967 F.2d 1425, 1430 (10th Cir. 1992), vacated, 508 U.S. 114 (1993).

113. *Sac & Fox Nation*, 967 F.2d at 1430.

114. Bryan v. Itasca County, 426 U.S. 373 (1976); Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976).

115. *Moe*, 425 U.S. 463.

116. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 330 (1983).

117. For example, the Washington State Department of Revenue has a form on its website to document the tribal sales tax exemption for utilities and other goods and services. *See* https://dor.wa.gov/sites/default/files/legacy/Docs/forms/ExcsTx/ExmptFrm/36-0001.pdf. Their website also provides basic information for all types of purchases and links to how to obtain sales tax refunds for improperly paid taxes. *See* https://dor.wa.gov/get-form-or-publication/publications-subject/tax-topics/information-tribal-memberscitizens. The State of California website also contains links to information and state tax exempt forms for tribal members. *See* https://www.cdtfa.ca.gov/industry/indianLandSales.htm. For New Mexico Public Utility Commission's form, *see* http://164.64.85.202/consumer-relations/docs/native-american-tax-exemption.pdf. For Wisconsin, *see* https://www.revenue.wi.gov/Pages/Tribes/Home.aspx.

118. U.S. DEP'T OF HEALTH AND HUMAN SERV., OVERVIEW OF UTILITY RATEPAYER-FUNDED PROGRAMS, https://liheapch.acf.hhs.gov/dereg/usfintro.htm.

119. Nat'l Cable Television Ass'n v. United States, 415 U.S. 336, 340-41 (1974).

120. New Jersey v. Anderson, 203 U.S. 483, 492 (1906).

express or implied.[121] Taxes are imposts levied for the support of the government, or for some special purpose authorized by it.[122]

Utility charges can also be avoided based on sovereign immunity. For example, at least one California statute acknowledges the right of Indian tribes to decline to pay certain utility (water) fees based on sovereign immunity.[123] In cases of federal sovereign immunity, when a state charge is either a "tax," a "fee," or a "cost," the charge is presumed to be prohibited unless a federal statute clearly allows the state charge.[124]

One federal case addresses a tribe's refusal to pay a local utility charge as a prohibited tax. In *Oneida Tribe of Indians of Wisconsin v. Village of Hobart*, the village attempted to charge the tribe storm water charges based on trust lands checker-boarded within the village.[125] Even though the village contended that the charges were fees for services performed, the court found the storm water charges to be a tax on tribal trust property prohibited by tribal sovereign immunity.[126] The court explained that:

> A tax is a monetary charge imposed by the government on persons, entities, or property to yield public revenue. A fee, on the other hand, is generally a charge for labor or services. Of course, governments can also impose fees. And 'the line between a tax and a fee, and a tax and a fine is sometimes fuzzy. . . .[127]

The court focused on three questions: "(1) What entity imposed the fee? (2) What parties are being assessed the fee? (3) Is the revenue generated by the fee expended for general public purposes or used for the regulation and benefit of the parties upon whom the assessment is imposed?"[128] Many cases discuss whether charges are taxes, but the analysis is for other purposes.[129]

A number of cases determine whether a tax is acceptable by considering its legal incidence.[130] The question here is whether the utility is taxed by the state or whether the tribe was taxed.[131] The legal incidence, and not the economic incidence of the tax, determines the categorical prohibition against state taxation of Indians in Indian country.[132] When the legal incidence of the tax falls upon the Indians, the tax is forbidden.[133] In many cases the tax is not even collected by the state from the utility as the utility is expected to use the tax to provide customer programs. In that case, the legal incidence clearly falls upon the Indians, especially

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121. *See* Norwich Pharm. Co. v. Barrett, 205 A.D. 749, 752 (N.Y. App. Div., 3d Dept. 1923).

122. Lane Cty. v. Oregon, 74 U.S. 71 (1868).

123. Cal. Wat. Code §§ 1540, 1560.

124. United States v. Idaho ex Rel. Director, Dep't of Water Res., 508 U.S. 1 (1993).

125. Oneida Tribe of Indians of Wis. v. Vill. of Hobart, 891 F. Supp. 2d 1058 (2012).

126. *Id*. at 1059-61.

127. *Id.* at 1064-1065 (internal citations omitted).

128. *Id.* at 1065 (internal citations omitted).

129. *See, e.g.*, Southern Cal. Edison Co. v. Pub. Util. Comm'n of Cal., 227 Cal. App. 4th 172, 173 Cal. Rptr. 3d 120 (2014) opn. mod. (June 18, 2014) which addressed the authority of CPUC to adopt EPIC surcharges under section 701 (see also section 740) of California Public Utility Code.

130. *Chickasaw Nation*, 515 U.S. at 453.

131. *See, e.g.*, *id*. at 452-53.

132. *Id.* at 459-60.

133. Mayo v. United States, 319 U.S. 441 (1943).

if the tribe or its members are not eligible for programs created. When the legal incidence of the tax falls upon the utility, the preemption and infringement tests[134] must be applied. [135] This requires the federal court to interpret the taxing statute as written and applied.[136] In many cases, a utility is required by state law to establish rates in ways that meet various state goals and the state utility commission is authorized to allow various charges under those laws to be passed on to customers. Therefore, a detailed review of all tariffs and schedules is needed to determine whether program charges should be considered a state "tax" on the utility or a state authorized (or required) impermissible charge on customers.

The determination of whether a given charge upon Indian property constitutes an impermissible tax is determined by federal, not state law.[137] However, state law can be used to provide evidence of state intent. For example, California law recognizes that "tax" has no fixed meaning and the distinction between a tax and a fee takes on different meanings in different contexts.[138] Under California law, generally, a fee may not exceed the reasonable cost of providing services necessary to regulate the activity for which the fee is charged.[139] Whether a charge is a fee or a tax under California law is not related to whether a federal (or tribal) entity is immune from paying the charge under a claim of sovereign immunity.[140]

A tribe can argue that certain charges in utility tariffs, which have been instituted based on state law, will have the effect, if permitted, of preventing an Indian tribe from exercising its governmental function of assuring reasonably priced utility services to its members.

IX. TRIBAL AND STATE UTILITY JURISDICTION ISSUES OUTSIDE OF "INDIAN COUNTRY"

If tribally owned lands held in fee are outside of the "reservation" and not held in trust, there are legal arguments about whether the tribe's regulatory authority is "exclusive" under above definition of "Indian Country." In that case, the tribal utility's ability to serve without state oversight is in question.[141] As stated in a leading legal treatise, "for jurisdictional purposes . . . tribal fee lands may be categorized as Indian Country if it is located within a reservation, although more complicated questions arise if it is outside reservation boundaries."[142]

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134. *Bracker*, 448 U.S. at 136.

135. Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95, 110-11 (2005) (the tax was specifically on fuel distributors).

136. California Bd. of Equalization v. Chemehuevi Tribe, 474 U.S. 9 (1985).

137. Carpenter v. Shaw, 280 U.S. 363, 368-69 (1930) (Oklahoma attempted to tax royalty interests of Choctaw allottees in contravention of a federal statute, which was held to be liberally construed).

138. Sinclair Paint Co. v. State Bd. Of Equalization, 937 P.2d 1350, 1353-54 (Cal. 1997); *see also* California Farm Bureau Fed'n v. State Water Resources Control Bd., 247 P.3d 112, 123 (2011).

139. *California Farm Bureau Fed'n*, 247 P.3d at 123.

140. *See* Northern California Water Association v. State Water Resources Control Bd., 20 Cal. App. 5th 1204 (March 2, 2018).

141. In some cases, the issue is not just whether the tribal utility is outside of Indian Country. Many states do not regulate cooperatives or other not-for-profit utilities so a tribal utility may not be overseen by the state public utility commission simply under application of state laws. *See, e.g.*, Or. Rev. Stat. §§ 757.005-757.994.

142. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §15.05[5] at 1015 (Nell Jessup Newton ed. 2012).

If any tribal utility loads or facilities are on non-Indian lands, the State, which currently exercises jurisdiction over and franchises the existing utility service, will likely require the tribal utility to appear before the state public utility commission to obtain the franchise for the service territory on non-tribal lands. Further, the state may require the tribal utility to otherwise subject all its terms of service to state regulation. Unless the state is fully supportive of a tribal utility and the tribal utility's take-over of existing state sanctioned service, the tribal utility may find this hurdle too high, especially when compounded by the negotiations that will be necessary with the existing service providers.

However, Tribes also have extensive powers over their own property, for example, courts have held that tribal communal ownership of property is analogous to the federal government's ownership of public lands,[143] which leads to a tribal government's broad power to regulate the use of their own property in matters such as zoning[144] and implementation of water codes.[145]

X. STRATEGIES FOR TRIBES AND UTILITIES TO WORK TOGETHER

There are a number of ways the tribe can exercise jurisdiction over and create appropriate governance over its loads or over utilities operating on tribal lands:

- Tribes can improve their chances of having jurisdiction by exercising their sovereignty through the establishment of tribal laws which express the energy goals and standards expected on tribal lands. The laws can be as extensive as establishing a utility regulatory code that regulates all utility companies serving tribal loads on tribal lands, or it can be as simple as prohibiting utilities from charging state taxes.
- Tribes can document energy impacts and interests within the reservation so that any application of balancing tests can use evidence and data to show impacts.
- Tribes can undertake those activities necessary to meet established tribal energy goals, such as developing renewable energy projects and energy efficiency audits. Tribes can utilize federal technical assistance and grants to develop energy plans. Any new facilities can incorporate energy (such as rooftop solar or energy efficiency) into initial designs and in finance and construction contracts.
- Regardless of the issues involved in a checkerboarded service territory, a tribe can avoid jurisdictional questions and issues by focusing its energy efforts only on the areas it has full control. The tribe can generally exercise jurisdiction on trust lands when tribal members or assets are on those lands.
- A tribe can negotiate or legislate a utility franchise requirement, with franchise rules or fees and requirements for a written acceptance of tribal jurisdiction.

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143. Cherokee Nation v. Journeycake, 155 U.S. 196, 211 (1894); Kleppe v New Mexico, 426 U.S. 529 (1976).

144. Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989).

145. Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195 (1985).

- The tribe may negotiate special rates or service provisions with serving utilities for the loads within their jurisdiction.
- Creating a tribal utility can be an important tool of tribal sovereignty. Creation of a utility can serve as a powerful mechanism for a tribe to deal with surrounding utilities, federal and state agencies as well as its own communities. An electric utility can also be formed to serve other electricity related functions of a tribe such as to provide renewable energy services. Just as municipalities can exercise the right of eminent domain to take utility facilities, Indian tribes may also exercise their inherent sovereignty to take property by condemnation under tribal law and in tribal courts.[146] The functions of a tribal utility are generally within the discretion of tribal government and as such can be planned to grow over time or take on added responsibilities as certain goals are met. Decisions on tribal utility formation rely on the overall goals of a tribe and the chosen separation of governmental and utility business functions.
- Any negotiated right of way documents should include a regulation of tribal regulatory and adjudicatory authority. Rights-of-way documents can contain terms and conditions that clarify all aspects of the relationship between the utility and the tribe, including requirements for regular meetings to resolve issues. Where possible, the Tribe could obtain ownership of any easements or rights-of-way that could potentially be treated as the equivalent of non-Indian fee land.
- Tribes can actively enforce their Tribal Employment Rights Ordinances to the utilities doing business on their reservations. Because an Indian preference in employment is a political rather than racial distinction,[147] tribes can require that utilities serving them exercise Indian preference, and work with utilities to assure job postings and training opportunities are offered first at the reservation.

As described above, the jurisdictional questions are a legal tangle that requires significant analysis and expense to clarify and resolve. To most tribes, however, the legal issues are worthy of resolution since reliable utility service is so key to the function of government and society. Further, the financial impact of building or upgrading utility facilities is a significant and long-term capital cost. The financial impact of the monthly costs of energy services is often one of the tribe's largest expenses and is a critical and life sustaining cost for tribal members on reservations, quite often a tribal household's largest monthly bill.[148] Therefore, the tribe (and the utility and state) must weigh the risks and benefits of resolving

146. If a tribe were to attempt to take *real property* interests from their utility (such as leases or rights of ways over trust lands) the United States may be a mandatory party in the taking, requiring the action to be moved to federal court. Most eminent domain actions for utility facilities have therefore been for the personal property interests only. In these cases, tribal law clearly defines when fixtures, such as utility poles, are deemed to be personal or real property.

147. Morton v. Mancari, 417 U.S. 535 (1974).

148. *See generally* U.S. COMM'N ON CIVIL RIGHTS, A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY, (July 2003), https://www.usccr.gov/pubs/na0703/na0204.pdf.

any legal questions. However, the ambiguities in the law also provide the opportunity for negotiations and agreements between the tribe, the utility, the state, and the various federal agencies in order to assure that all parties' interests are considered and met. For tribes that cannot, for financial or infrastructure reasons, or do not wish to operate tribal utilities, creating written agreements with their serving utilities that address each party's interest and resolve the jurisdictional issues and is a rewarding exercise of sovereignty that can lead to sustainability and energy security for tribes and which can be good business for utilities.

There are a number of steps utilities serving reservations can take to assure that they are providing good service to their tribal customers, and therefore to avoid disputes or the tribe taking over the service:

- Utilities can provide and advertise simple forms, or share state created forms, which allow tribal governments and tribal members to declare their tax-exempt status.
- Utilities can get involved in tribal activities. The utility must get to know the tribal laws, just as they know state laws, then be respectful of them by complying with notice provisions and other obligations such as when trimming trees or shutting off power for non-payment. The utility can also get to know tribal leadership and the designated person at the tribe that deals with energy issues. Participate in tribal events such as sponsoring pow-wows, or culture days or sponsor a local Indian sports team. Offer to give presentations at local schools on energy efficiency or renewable energy, or on simple electricity matters. Be a part of your tribal community just as you are a part of the non-Indian community.
- Utilities that have board member voting should encourage tribal voting by holding votes at convenient times and providing advance notice of open board positions with the tribe. Utility boards could also offer a tribal position (whether voting or not) on the board to assure that tribal interests are considered when utility decisions are made and to assure that tribal members have relevant communications about their services. Tribes with seats on utility boards effectively already have decision making ability at the utility and are less likely to need to establish a tribal utility or to legislate utility regulations.
- Utilities can provide jobs and trade training to tribal members and can advertise open positions on tribal websites using any available tribal Indian preference law. Utilities can also advertise open positions at tribal colleges. One of the biggest complaints related to utility service on many reservations is that all or most of the workers are non-Indian, even when unemployment is higher on the reservation. If utilities hired a representative number of tribal members to their customer base, the tribe would be less interested in removing the company from the reservation.
- Utilities can negotiate special tribal rates for tribal government customers on reservations. Because the principles of Indian law govern these commercial activities on reservations, and not the state

public utility commissions, utilities can offer lower or otherwise flexible rates or rates that meet tribal needs, rather than sticking only to state-approved tariffs. To keep a tribal customer, the utility can be flexible with services by offering direct access to power supplies, or net metering that permits larger tribal renewable projects than they permit in their state regulated areas.

- Tribes and utilities can negotiate and sign franchise agreements that clearly define utility rates and activities on reservations and which eliminate the utility's uncertainties in land or service issues.
- When utilities operate federally mandated programs, such as under the Low-Income Home Energy Assistance Program, consider the disproportionate tribal need for these programs and assure that tribal communities have needed information for accessing these federal funds and programs.
- When utilities operate energy efficiency or renewable energy programs, discuss the needs at the tribe and create appropriate provisions, which need not comply with state obligations, for engaging the tribe and its planned projects.
- Partner with your local tribe for grants and energy programs. Tribes have access to excellent funding sources but often need matching funds and partnerships for tax credits or other purposes. Utilities can meet renewable portfolio standards while creating good business opportunities with their local tribes.
- Share your short and long-term plans for any new resources, facilities or needs with your local tribes, whether or not they are your customers. Generation and transmission facilities often impact tribal resources or rights on or off reservations. Making the tribe your partner rather than your adversary is just good business.