
Tribal Climate Crisis Tax-Exempt Bonds

Dean B. Suagee

America needs to move toward a post-fossil fuels economy, an economy that is energy efficient and in which we provide for most of our energy consumption with renewable resources. I believe this proposition is axiomatic. I think it is self-evident that we need to achieve dramatic reductions in carbon dioxide (CO₂) emissions and that our best and most realistic hope for achieving dramatic reductions is a genuine commitment to energy efficiency and renewable energy. Of course, I recognize that the self-evident nature of this proposition is not universally acknowledged. If it were we would already have a national commitment to bring about the renewable energy future.

The fact that my basic proposition is not universally accepted makes me wonder what it would take for us, as a country, through some combination of public opinion and political leadership, to reach a tipping point in awareness of the need to move beyond fossil fuels. To my way of thinking, which has been influenced by certain tribal cultural values, including the principle that calls for considering the welfare of the seventh generation, the opportunity to avoid some of the more catastrophic impacts of global warming is reason enough. Apparently, however, the possibility of avoiding the climate crisis doomsday scenario is not a big-selling item in the idea marketplace of America these days.

Fortunately, aside from saving the planet, there are ways to put a positive spin on the transition to a post-fossil fuels economy. One line of reasoning has to do with leadership. Reducing our CO₂ emissions in the United States is not enough because the rest of the world also needs to move toward a post-fossil fuels economy, which will be more likely to happen if America helps lead the way. Besides, helping to lead is probably the best way to make sure that, as green energy jobs and business opportunities happen, we Americans will get our fair share.

Another line of reasoning posits that in a post-fossil fuels economy we might actually enjoy a better quality of life: Net-zero homes with passive solar architecture for everyone, not just the fortunate few. Lots more rooftop photovoltaics, connected to the smart grid but also designed for disconnected mode, providing resilience during power outages. Transit-oriented land use planning, with walkable neighborhoods and plenty of bike paths. Plug-in hybrid electric vehicles, that don't cost much to operate and don't pollute much because they are mostly powered with solar and wind energy. More locally grown food, with less embedded transportation energy and that by being fresher tends to taste better. And then there are the jobs, the possibility, perhaps likelihood, that investments in energy efficiency and renewable energy will create more jobs than comparable investments in the fossil fuel economy.

In addition to the question about what it would take for us as a society to get to the tipping point at which we become committed to a renewable energy future, another big question, of course, is "How do we get there from here?" This question

is packed with many issues, such as what the mix of renewable energy technologies should be and how to overcome the many obstacles to investments in energy efficiency measures. As an Indian lawyer, I am particularly interested in a related question: "How can we make sure that the people who live in Indian country and Native Alaska don't get left behind?"

It seems fairly obvious that the transition toward a post-fossil fuels economy will require actions by all levels of government. See generally *THE LAW OF CLEAN ENERGY: EFFICIENCY AND RENEWABLES* (Michael B. Gerrard, ed., 2011) (including discussions of federal, state, and local laws). The marketplaces in which energy goods and services are bought and sold have been shaped by policies adopted in laws and regulations and by various kinds of governmental subsidies. Some marketplaces have been shaped mostly by federal law and policy and others mostly by state and/or local law and policy. While we may say that we value a "free" market, we continue to fail to capture much of external costs of fossil fuels in prices, and such failings can be seen as hidden subsidies. See, e.g., NATIONAL ACADEMY OF SCIENCES, *HIDDEN COSTS OF ENERGY: UNPRICED CONSEQUENCES OF ENERGY PRODUCTION AND USE* 6, 12 (2010) (estimating the costs of environmental and health impacts (not including climate change impacts) of coal-fired power plants at \$62 billion annually and of motor vehicles at \$56 billion annually).

Because governmental policies to incentivize investments in efficiency and renewables can be adopted at state and local levels, we need not wait for the national polity to reach a tipping point in public opinion. Rather, as we reach tipping points at local and regional levels, we can adopt policies to accelerate the dawning of the renewable energy future. In fact, many states and local governments have adopted various kinds of programs and incentives. And so, while we do not have a comprehensive national policy, we do have a patchwork of mandates and incentives that are intended to support the deployment of various renewable energy technologies: policies adopted at federal, state, and local levels.

What about the third kind of sovereign in our federal system—Indian tribal governments? While historically they have not had much influence on the energy marketplaces that now exist, there are steps that tribal governments can take to help bring about the renewable energy future. As the primary government serving their reservations, tribal governments can take many of the kinds of steps that some states and local governments have taken. For example, tribes can reduce fossil fuel consumption by implementing building codes with stringent standards for efficiency, they can adopt land use planning strategies to reduce reliance on motor vehicles, and they can establish their own electric utilities. See Dean B. Suagee, *The Climate Crisis, the Renewable Energy Revolution, and Tribal Sovereignty*, Chapter 3 in *TRIBES, LAND, AND THE ENVIRONMENT* (Sarah A. Krakoff and Ezra Rosser, eds., Ashgate, 2012) (suggesting options for tribal governments to help reduce carbon emissions). The U.S. Department of Energy and Department of the Interior provide a range of financial and technical assistance programs for tribal governments, and quite a number of tribes have become involved in renewable energy development.

Grants and technical assistance from the federal government are steps in the right direction, but if tribes are going to have real opportunities to develop their renewable energy potentials they will need to attract private investment capital.

Some of the existing incentives, particularly tax incentives, just don't work well for projects sponsored by tribal governments, and this has the practical effect of putting tribal projects at a disadvantage compared to other projects. For example, the production tax credit (PTC), 26 U.S.C. § 45, is a key incentive for utility-scale wind power projects. In order to be able to use this tax credit, the owner of a project must be a taxable entity. Indian tribes, as governmental entities, are not subject to federal income tax. Rev. Rul. 67-284, 1967-2 C.B. 55; see generally COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 8.02[1][2][a] (2012 ed.). It is possible for a tribe to enter into a complicated arrangement known as a "partnership flip," in which the tribe partners with a taxable entity to build a project, with the taxable partner holding most or all of the equity at the outset and then flipping it over to tribal ownership years later after the tax benefits have been exhausted and the partner has realized its share of return on the investment. See DOUGLAS C. MACCOURT, RENEWABLE ENERGY DEVELOPMENT IN INDIAN COUNTRY: A HANDBOOK FOR TRIBES 80-83 (2010), www.nrel.gov/docs/fy10osti/48078.pdf.

While the partnership flip is an option, it is not an ideal one. One drawback is that it is a complicated arrangement with substantial transaction costs. Another is that a tribe must be willing to let its taxable partner(s) exercise substantial control over the project until the equity flips. Lack of tribal control with a major cut of the return on investment leaving the reservation economy is reminiscent of the exploitation of fossil fuels on many reservations during much of the twentieth century. If very many tribes are going to be able to develop a substantial part of their renewable energy resources, and do so in a way that delivers substantial benefits to tribal communities, and do so sooner rather than later, then tribes are going to need other ways to attract private investment capital.

One option available to states and local governments for financing public infrastructure projects, which may include renewable energy and energy efficiency components, is to issue tax-exempt governmental bonds. Since the enactment of the Indian Tribal Governmental Tax Status Act of 1983, 26 U.S.C. § 7871, tribes have been treated like states for many purposes under federal tax law. Pursuant to this law, tribes can issue governmental bonds, but only to finance activities that are considered "essential governmental functions." 26 U.S.C. § 7871(c). In contrast, governmental bonds issued by states and local governments are not held to such a standard. State and local governmental bonds can be used to finance projects that include a limited amount of private business use or that

provide for a limited amount of repayment from a private business source. In addition, states and local governments may issue tax-exempt "private activity" bonds to finance certain types of projects and activities carried out by private businesses, including several kinds of projects and activities that feature energy efficiency and renewable energy. 26 U.S.C. §§ 141, 142. The "essential governmental functions" test puts private business activity off-limits for tribal governmental bonds, and tribes are simply not allowed to issue private activity bonds.

Repealing the essential governmental functions test would be a major step in empowering tribal governments to raise capital for investments in energy efficiency and renewable energy. A case can be made for repealing the essential governmental functions test without linking repeal to renewable energy development. In fact, the U.S. Department of the Treasury has already made that case in a report to Congress. DEPARTMENT OF THE TREASURY, REPORT AND RECOMMENDATIONS TO CONGRESS REGARDING TRIBAL ECONOMIC DEVELOPMENT BOND PROVISION UNDER SECTION 7871 OF THE INTERNAL REVENUE CODE (Dec. 2011) (*Treasury Report*). This report was mandated by the American Reinvestment and Recovery Act of 2009. Pub. L. No. 111-5, Division B, Title I, § 1402. That Act also authorized tribes to issue a limited amount of "Tribal Economic Development Bonds" that are not subject to the essential governmental functions test. Of the tribes that issued bonds under the 2009 Act, quite a few dedicated the proceeds to renewable energy facilities. *Treasury Report* Appendix B. If Congress were to repeal the essential governmental functions test, bond financing could become what might be called a "standard option" for tribes to finance renewable energy development. Tribal private activity bonds could be used to support the development of private enterprise in reservation economies. Tribes could join forces and use bonds to capitalize a financial institution to make loans for investments in energy efficiency and renewables, perhaps modeled on the Solar Energy and Energy Conservation Bank. See Pub. L. No. 96-294.

To my way of thinking, taking well-reasoned steps to avoid the climate crisis doomsday scenario is an essential function of government. Many tribal governments are trying to step up and be part of the solution. It would be a big help for Congress to get rid of the essential governmental functions test. 🌳

Mr. Suagee is of counsel to Hobbs, Straus, Dean & Walker, LLP, in Washington, D.C., and a member of the editorial board of *Natural Resources & Environment*. He is a citizen of the Cherokee Nation. He may be reached at dsuagee@hobbsstrauss.com.