

Insights: Alert

The DOE, LPO, and Inflation Reduction Act Incentivize Significant Tribal Energy Development

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Pound-for-pound, Tribes have the potential to be among the United States' most prolific clean energy developers. Tribal lands, which compose approximately 5.8% of the total land area in the contiguous United States, have the potential to produce 6.5% of the entire country's renewable utility-scale technical energy, with Alaska Native Villages poised to generate significant additional energy.¹ Stated a different way, the total utility-scale technical potential for renewable energy on Tribal lands in the contiguous 48 states is 20,912 terawatt-hours (TWh) annually, roughly five times higher than **ALL** energy produced in the U.S. in 2021 (the U.S. produced a total of 4,116 TWh of electricity last year).²

Despite prolific energy development potential, Tribes face significant obstacles in leveraging these resources. While these obstacles vary from Tribe to Tribe, they primarily center around: a lack of access to capital, insufficient grid infrastructure, burdensome federal oversight, and undeveloped relationships with established energy developers and financial institutions.

With the passage of the \$1.2 trillion Bipartisan Infrastructure Law (BIL) in November of 2021, and the +\$450 billion Inflation Reduction Act (IRA) in August of 2022, Congress, the Biden Administration, the Department of Energy (DOE), and various other federal agencies have made a concerted and herculean effort to address the obstacles hindering Tribal clean energy development and incentivize the establishment of a \$100 billion Tribal energy industry.

I. Financing

a. DOE Loan Programs Office

The DOE Loan Programs Office (LPO) is, in many ways, the unsung hero of federal U.S. energy development. Broadly, the LPO finances large-scale energy infrastructure projects in the United States. The LPO provides loans to energy projects that, otherwise, would have difficulty being funded by the market. This includes projects utilizing innovative technologies (TESLA was funded by the LPO), and projects in markets that have difficulty accessing capital, like Tribal communities.³

To date, the LPO has been a stunning success. Since 2009, the LPO “has issued more than \$35 billion in loans and loan guarantees to more than 30 projects across the United States, catalyzing new energy

technologies, creating jobs, and building on its deep sector expertise.”⁴ Not only has the LPO driven U.S. energy development, but it has done so in a sustainable and fiscally responsible manner. As LPO reports in its quarterly portfolio performance summary, over its history interest paid exceeds losses and LPO maintains a default rate of less than 4%.⁵

The IRA significantly broadened the reach and capacity of the LPO. The IRA appropriated “approximately \$11.7 billion in total for LPO to support issuing new loans[,]” thereby increasing the “LPO’s existing loan programs by approximately \$100 billion in new loan authority.”⁶ The IRA also expanded the LPO’s reach with the establishment of the LPO Energy Infrastructure Reinvestment (EIR) Program. Through the EIR Program, which provides \$5 billion in funding and a total cap of \$250 billion in loan authority, the LPO can finance projects that repurpose or replace energy infrastructure to avoid, reduce, utilize, or sequester air pollutants or anthropogenic emissions of greenhouse gases as well as those projects that utilize innovative technologies.⁷

b. LPO Tribal Energy Loan Guarantee Program

The LPO’s Tribal Energy Loan Guarantee Program (TELGP) “supports tribal investment in energy-related projects by providing direct loans or partial loan guarantees to a federally recognized tribe, including Alaska Native village or regional or village corporations; or a Tribal Energy Development Organization (TEDO) that is wholly or substantially owned by a federally recognized tribe federally recognized Indian tribe or Alaska Native Corporation.”⁸

As stated, the IRA provided significant new funding authority to the LPO. Of greatest significance to Tribes, the IRA increased the “aggregate amount of loans available [under the TELGP] from \$2 billion to \$20 billion.”⁹ This staggering increase in lending authority has primed the TELGP to drive comprehensive Tribal energy development across the United States.

Matt Ferguson, Senior Advisor and Consultant for the LPO, addressed the TELGP’s objectives at the recent Tribal Clean Energy Summit of 2022. The summit, which was led by various DOE representatives including Secretary Granholm, provided an opportunity for Tribal leaders and key energy partners to discuss how to make progress toward Tribal clean energy goals.¹⁰

At the summit, Mr. Ferguson explained that, as a rule of thumb, establishing \$100 billion in scale in a given energy industry establishes the necessary economies of scale, reduced energy costs, and necessary infrastructure, supply chains, and workforce development to ensure continued self-sufficient growth of that sector. With the additional lending authority provided by the IRA, the LPO has targeted catalyzing \$100 billion in scale for DOE focus sectors, including Tribal clean energy development.

i. TELGP Eligible Projects and Financing

The TELGP can “support a broad range of projects and activities for the development of energy resources, products, and services that utilize commercial technology (innovative technology is permitted but not required).”¹¹ These projects include, but are not limited to

- Electricity generation, transmission and/or distribution facilities, utilizing renewable or conventional energy sources

- Energy storage facilities, whether or not integrated with any of the above
- Energy resource extraction, refining or processing facilities
- Energy transportation facilities, including pipelines
- District heating and cooling facilities
- Cogeneration facilities
- Distributed energy project portfolios, including portfolios of smaller distributed generation and storage facilities employed pursuant to a unified business plan¹²

The TELGP provides two types of financing. It can provide partial loan guarantees from eligible lenders (i.e., a federally regulated commercial bank, other financial institution, or a Tribe satisfying requirements established by DOE), 90% of which is guaranteed, based on full faith and credit of the U.S. Government, by the LPO.¹³ The TELGP can also provide “direct loans for eligible energy projects through the U.S. Treasury’s Federal Financing Bank.”¹⁴ This direct loan authority is particularly significant in that it allows Tribes to enjoy extremely competitive terms and interest rates through the Federal Financing Bank.

ii. TELGP Tribal Consultations and the Application Evaluation Process

The LPO TELGP evaluates application in two parts. In part one, the LPO will review a potential project “to determine eligibility and readiness to proceed.”¹⁵ In part two, the “LPO will review the project to evaluate reasonable prospect of repayment.”¹⁶ If the LPO makes a favorable determination of the project, “DOE will commence due diligence, structuring, negotiation, credit approval, documentation and closing processes that are similar to those of commercial lenders.”¹⁷

As Mr. Ferguson made clear at the Tribal Clean Energy Summit, a Tribe may consult with the TELGP for **free and as many times as it would like**, to discuss potential energy development projects prior to applying. As such, Tribes interested in developing energy projects should reach out to the TELGP by emailing TELGP@hq.doe.gov.

II. Tax Incentives

In addition to the increased LPO financing authority, the IRA provides significant tax incentives to galvanize U.S. energy development. These tax incentives include, but are not limited to, the

- 45Q – Carbon Oxide Sequestration Credit
 - A tax credit, quantified on a per ton basis, for carbon capture, utilization, and storage (CCUS)
- 45V – Clean Hydrogen Production Credit
 - A tax credit, based on carbon intensity, for clean hydrogen production
- 45W – Commercial Clean Vehicles
 - A tax credit for light- and heavy-duty electric vehicles or otherwise qualifying clean vehicles
- 45X – Manufacturing Production Credit
 - A tax credit supporting the production of components involved in solar, wind energy, energy storage, and other relevant clean energy industries
- 45Y – Clean Electricity Production Credit
 - A tax credit for qualifying energy production and storage facilities

- 45Z – Clean Fuel Production Credit
 - A tax credit, for transportation fuels and sustainable aviation fuels, to support U.S. fuel development
- 48C – Advanced Energy Project Credit
 - A tax credit for qualifying renewable energy and manufacturing equipment
- 48E – Clean Electricity Investment Credit
 - A tax credit, quantified based on emissions, for qualifying clean energy technologies¹⁸

Historically, Tribes have had difficulty leveraging federal tax incentive programs because they are not required to pay certain federal taxes. Congress and the Administration addressed this issue by ensuring that each of the above tax credits qualify for “direct pay.” Through direct pay, qualifying entities, like Tribes, are treated as taxpayers having paid tax equal to the credit and are thereby directly allocated 100% of the value of the credit amount.¹⁹

III. Grants

The BIL provided over \$65 billion to support power and grid development throughout the United States. While some of the BIL programs have already run, there remain significant active programs supporting Tribal energy development. These programs include:

- Deployment of Technologies to Enhance Grid Flexibility Program – \$3 billion
 - The program deploys technology solutions that will increase the flexibility, efficiency, reliability, and resilience of the electric power system by increasing the capacity and capability of transmission facilities, preventing natural disaster faults, incorporating variable renewable energy resources at the transmission and distribution level, and facilitating edge-computing of electric vehicles along with other grid-edge devices or electrified loads.²⁰
- Program Upgrading Our Electric Grid and Ensuring Reliability and Resiliency – \$5 billion
 - The program provides financial assistance to facilitate coordination and collaboration with electric sector owners and operators. The DOE will award projects that contribute to one or more of the following objectives: (1) ensuring reliable grid operations, (2) improving overall grid resilience, (3) enhancing collaboration between and among eligible entities and private and public sector owners and operators on grid resilience, (4) contributing to the decarbonization of the electricity and broader energy system, and (5) providing enhanced system value, improving current and future system cost-effectiveness, and delivering economic benefits.²¹
- Carbon Storage Validation and Testing Program – \$2.25 billion
 - The program supports the Carbon Storage Assurance Facility Enterprise (CarbonSAFE) Initiative and provides funding for the development of new and expanded large-scale, commercial carbon storage projects with capacities to store 50 or more million metric tons of CO₂, along with associated CO₂ transport infrastructure.²²

In addition to those programs developed by the BIL, the IRA also establishes financing and grant programs to support Tribal energy development. These programs include the: \$27 billion Greenhouse Gas Reduction Fund, \$5 billion Climate Pollution Reduction Grants, \$760 million Interstate Electricity Transmission Lines program, and \$150 million Tribal Electrification Program. More information on these programs will become available as

the administering agencies release pertinent regulations.²³

The broad financing, tax, and grant incentives established by the BIL and IRA will drive significant U.S. clean energy development. Tribes should strongly consider contacting the DOE and other relevant federal agencies to determine which programs, tax incentives, and other federal initiatives can benefit their Tribal energy development objectives. Clean energy development not only supports U.S. energy security, independence, and climate change goals, it also has the potential to drive significant Tribal economic diversification and sustainability outcomes.

If you have any questions concerning the DOE, LPO, BIL, or IRA, please do not hesitate to reach out to: Stephen Anstey – sanstey@kilpatricktownsend.com, Mark Riedy – mriedy@kilpatricktownsend.com, or John Loving – jloving@kilpatricktownsend.com.

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Footnotes

¹Milbrandt, Anelia, Donna Heimiller, and Paul Schwabe, *Techno-Economic Renewable Energy Potential on Tribal Lands*, National Renewable Energy Laboratory (2018), <https://www.nrel.gov/docs/fy18osti/70807.pdf>.

²Frequently Asked Questions - What is U.S. electricity generation by energy source?, U.S. Energy Information Administration (last visited November 11, 2022), <https://www.eia.gov/tools/faqs/faq.php?id=427&t=3>.

³History, DOE Loan Program Office (last visited November 11, 2022), <https://www.energy.gov/lpo/history>.

⁴Financing Options for Energy Infrastructure, DOE Loan Program Office (last visited November 11, 2022),

<https://www.energy.gov/sites/default/files/2020/05/f74/DOE-LPO-Brochure-May2020.pdf>.

⁵Portfolio, DOE Loan Programs Office (last visited November 17, 2022), <https://www.energy.gov/lpo/portfolio>.

⁶Inflation Reduction Act of 2022, DOE Loan Program Office (last visited November 11, 2022), <https://www.energy.gov/lpo/inflation-reduction-act-2022>.

⁷*Id.*

⁸Tribal Energy Loan Guarantee Program, DOE Loan Program Office (last visited November 11, 2022), <https://www.energy.gov/lpo/tribal-energy-loan-guarantee-program>.

⁹Inflation Reduction Act of 2022, DOE Loan Program Office (last visited November 11, 2022), <https://www.energy.gov/lpo/inflation-reduction-act-2022>.

¹⁰Tribal Clean Energy Summit 2022, DOE Loan Program Office (last visited November 11, 2022), <https://www.energy.gov/indianenergy/tribal-clean-energy-summit-2022>.

¹¹Tribal Energy Loan Guarantee Program, DOE Loan Program Office (last visited November 11, 2022), <https://www.energy.gov/lpo/tribal-energy-loan-guarantee-program>.

¹²Tribal Energy Loan Guarantee Program, DOE Loan Program Office (last visited November 11, 2022), <https://www.energy.gov/lpo/tribal-energy-loan-guarantee-program>.

¹³Lending Reference Guide Tribal Energy Financing, DOE Loan Program Office (last visited November 11, 2022), https://www.energy.gov/sites/default/files/2022-07/LPO_Lending_Reference_Guide_Tribal_July2022.pdf.

¹⁴Supplement to Amended and Restarted Loan Guarantee Solicitation Announcement Federal Loan Guarantees for Tribal Energy Development Projects (last visited November 11, 2022), https://www.energy.gov/sites/default/files/2022-10/DOE-LPO_TELGP_Supplement-30Sept22-Final.pdf.

¹⁵Tribal Energy Loan Guarantee Program, DOE Loan Program Office (last visited November 11, 2022), <https://www.energy.gov/lpo/tribal-energy-loan-guarantee-program>.

¹⁶*Id.*

¹⁷*Id.*

¹⁸Pub. L. No. 117-169.

¹⁹*Id.*

²⁰Request for Information: Grid Resilience and Innovation Partnerships Program, DOE Grid Deployment Office (last visited November 11, 2022), <https://www.fedconnect.net/FedConnect/default.aspx?ReturnUrl=%2ffedconnect%2f%3fdoc%3dDE-FOA-0002827%26agency%3dDOE&doc=DE-FOA-0002827&agency=DOE>.

²¹*Id.*

²²*Bipartisan Infrastructure Law (BIL): Storage Validation and Testing (Section 40305): Carbon Storage Assurance Facility Enterprise (CarbonSAFE): Phases III, III.5, and IV, DOE Office of Fossil Energy and Carbon Management (last visited November 11, 2022), <https://www.fedconnect.net/FedConnect/default.aspx?ReturnUrl=%2ffedconnect%3fdoc%3dDE-FOA-0002711%26agency%3dDOE&doc=DE-FOA-0002711&agency=DOE>.*

²³Pub. L. No. 117-169.

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