



Department of Energy

Washington, DC 20585

May 3, 2011

MEMORANDUM FOR THE SECRETARY

THROUGH:

ARUN MAJUMDAR

SENIOR ADVISOR/DIRECTOR, ARPA-E

FROM:

TRACEY LEBEAU

DIRECTOR, INDIAN ENERGY

WILLIAM J. VALDEZ

ACTING DIRECTOR, ECONOMIC IMPACT AND DIVERSITY

SUBJECT:

Department of Energy Policy on Indian Energy Purchase Preference under the Energy Policy Act of 2005

ISSUE: The Department of Energy does not have a policy in place implementing the statutory authority under section 2602(d) of the Indian Tribal Energy Development and Self-Determination Act of 2005 (Title V of the Energy Policy Act of 2005) to give preference in purchasing electricity or any other energy product or by-product from Indian tribes or tribal enterprises. We propose that the Department adopt a policy to implement this statutory preference in the Department's procurement of renewable energy and renewable energy by-products (including renewable energy credits (RECs)).

A commitment to exercise this authority would further the Administration's and the Department of Energy's policy goals of promoting Indian energy development and achieving Federal government sustainability targets. Adopting policy guidance will provide clarity to departmental programmatic and procurement officials and its contractors with respect to the purchase of electricity and other energy products or by-products for departmental facilities. In addition, policy guidance will establish the Department's leadership role with respect to electricity and other energy products or by-products purchases from Indian tribes that could encourage the utilization of this authority by other Federal agencies.

BACKGROUND: The Indian Tribal Energy Development and Self-Determination Act of 2005 was enacted, in part, to promote, assist, and encourage energy development by Indian tribes or tribal enterprises on Indian lands. Included in both Title II and Title V of the Energy Policy Act of 2005 (EPACT 2005) are certain provisions intended to incentivize Federal agency purchases of electricity or any other energy products or by-products produced by Indian tribes or tribal enterprises. These provisions are intended to give tribes access to one of the largest energy buyers in the country — the United States Government.

There are two relevant provisions (see Attachment B):



- (1) Section 2602(d), in Title V, is an authorization to give preference to a tribe or tribal enterprise when “purchasing electricity or any other energy or energy by-product.” The Federal agency, however, shall not “pay more than the prevailing market prices . . . or obtain less than prevailing market terms and conditions.”
- (2) Section 203, in Title II, provides another incentive to purchase Indian energy. This section requires the Federal government to obtain a certain percentage of its energy from renewable resources. Credit toward this goal will double if the renewable energy resources are obtained from renewable energy produced on Indian land.

Currently, we know of no Federal agency that is using the authorities in EPACT 2005 to give preference to a tribe or tribal enterprise when purchasing electricity from renewable energy or renewable energy by-products. However, several tribes have approached the Department and other Federal agencies to negotiate the sale of electricity from tribal renewable energy generation facilities. Those negotiations have not resulted in Federal purchases for a variety of reasons, including a lack of policy support and implementing guidance for Section 2602(d). A Department policy supporting the Section 2602(d) tribal preference would better enable the Department’s utilization of the preference and potentially encourage the utilization of this authority by other Federal agencies. This policy does not apply to purchases of power for re-sale.

It is BPA's understanding that this policy will apply to an agency's own use of energy, so it would not apply to power BPA may need to purchase in order to meet the needs of its customers. That is consistent with section 2605(c) of Title V, which provides how the Administrators of Power Marketing Administrations shall encourage Indian tribal energy development in accordance with laws in existence on the date of enactment of the Energy Policy Act of 2005. As a practical matter, facilities are constrained in their power purchase mix by the fact that they are served by a third-party distribution utility.

OPTIONS: One option is for the Department to issue policy guidance to promote the use of the preference for renewable energy and renewable energy by-product purchases from Indian tribes or tribal enterprises. In conjunction with that policy guidance, the Department would begin an internal consultation to determine the appropriate mechanism for implementing this policy guidance in an expeditious and sustainable manner.

A second option is to not adopt policy guidance to give tribal renewable energy preference. The Department would continue its current practice with respect to the tribal preference authorized under Section 2602(d).

RECOMMENDATION: We recommend the Department issue policy guidance to promote the utilization of the Section 2602(d) preference for the purchase of electricity from renewable energy or other renewable energy or by-products produced by tribes or tribal enterprises on Indian lands in its renewable energy procurement decisions. We also recommend the Secretary announce the Department’s policy at the Secretary’s Tribal Summit on May 5, 2011. Lastly, we recommend that the Department initiate an

internal review and consultation process to establish a process for implementing and executing the policy guidance.

APPROVE:  DISAPPROVE:  DATE: MAY - 4 2011

MEMORANDUM
INDIAN RENEWABLE ENERGY PURCHASE PREFERENCE

OPPORTUNITY:

The Department of Energy (DOE) has existing authority, enacted in the Energy Policy Act of 2005, to give preference in its energy procurement decisions to production owned by tribes. The law requires that DOE pay tribes no more than the prevailing market price for energy and energy byproducts (such as renewable energy credits). By utilizing this authority for renewable energy purchases, DOE would be demonstrating Federal leadership that could encourage other Federal agencies to use this existing authority.

POLICY OBJECTIVES:

The development of renewable energy by tribes on Tribal lands is a clear Administration policy objective. In the President's December 2010 speech at the White House Tribal Nations Conference of Tribal Government Leaders, the President unequivocally stated, "We're also breaking down bureaucratic barriers that have prevented tribal nations from developing clean energy like wind and solar power. It's essential not just to your prosperity, but to the prosperity of our whole country."¹

To realize this policy objective, the Federal government must promote the development of renewable energy resources on Indian lands. Currently, the technically feasible renewable energy potential on Tribal lands is consequential. In addition to the benefits of developing domestic clean energy, these resources present significant economic benefits for Tribal nations.²

DOE has an opportunity, through the implementation of Section 2602(d) of the Energy Policy Act of 2005 (EPACT05), to accomplish several renewable energy development goals, including:

- Spurring the development of untapped renewable energy resources to advance the Administration's goal of developing renewable resources by tribes on Indian lands;
- Fulfilling Executive Order 13514 sustainability goals and GHG emission reduction targets;³ and
- Fulfilling its statutory obligations under Section 203(a) of the Energy Policy Act of 2005.

In addition, implementing Section 2602(d) would reinforce the good relationship that the Department has with Tribal nations and build on recent positive developments, such as the establishment of the Office of Indian Energy Policy and Programs and the Secretary's upcoming Tribal Summit on May 5, 2011.

DISCUSSION OF PROVISION:

EPACT §2602(d) allows Federal agencies to give preference to the purchase of energy or energy by-products produced by entities in which tribes have a majority ownership interest.⁴ The Department has discretion to choose which energy or energy by-products will be subject to the preference. Nearly all of

the renewable energy currently purchased by the Department is procured in the form of renewable electricity credits outside of the standing relationships with utility providers of electricity and natural gas. For this reason, the implementation of Section 2602(d) preference provision for renewable energy purchases would likely be the most manageable part of the energy purchase portfolio to prioritize. Focusing the purchase preference on renewable energy purchases would also advance economic development objectives shared by the Administration, the Department and Indian tribes.

The purchase preference can only be utilized if a Tribal nation holds a majority ownership position in a renewable project—a requirement that enables Tribes to develop, own, and realize the benefits of their own resources. Section 2602(d) provides that government not pay more than the prevailing market price for an energy product or by-product or obtain less than prevailing market terms and conditions.

REQUESTED ACTIONS:

1. For the Secretary to make a policy commitment, and to announce that policy guidance at the upcoming Tribal Summit on May 5, 2011, that the Department will promote the utilization of the Section 2602(d) preference for its renewable energy purchase decisions,⁵
2. For the Department of Energy, through the Office of Management and the Office of Indian Energy Policy and Programs, to establish a review process for implementing and executing this policy commitment.

PROPOSED NEXT STEPS:

1. A Secretarial announcement of Indian renewable energy purchase preference policy, possibly at May 5, 2011, conference.
2. Consultation between the Office of Management and the Office of Indian Energy Policy and Programs to establish a mechanism for implementing EPACT §2602(d).
3. Incorporate Indian clean energy procurement preference in DOE's Strategic Sustainability Performance Plan (SSPP) which would, by reference, be included in DOE Directive governing implementation of E.O. 13514.
- 4.

¹ <http://www.whitehouse.gov/the-press-office/remarks-president-during-opening-tribal-nations-conference-interactive-discussion-w>

² NREL, Renewable Energy on Tribal Lands, *available at* <http://www.nrel.gov/analysis/pdfs/42354.pdf>

³ Energy Policy Act of 2005, Pub. L. No. 109-58, §§231-236, 119 STAT. 594, 768.

⁴ 30 U.S.C. §3502(d).

⁵ Section 203(b) of EPACT 2005 defines the term “renewable energy” to mean electric energy generated from solar, wind, biomass, landfill gas, ocean (including tidal, wave, current, and thermal), geothermal, municipal solid waste, or new hydroelectric generation capacity achieved from increased efficiency or additions of new capacity at an existing hydroelectric project (42 U.S.C. §15852(b)).

ATTACHMENT B

Excerpts from Energy Policy Act of 2005 (PL 109-58)

Title V – INDIAN ENERGY, Sec. 503

Sec. 2602(d) PREFERENCE

- (1) In purchasing electricity or any other energy product or byproduct, a Federal agency or department may give preference to an energy and resource production enterprise, partnership, consortium, corporation, or other type of business organization the majority of the interest in which is owned and controlled by 1 or more Indian tribes.
- (2) In carrying out this subsection, a Federal agency or department shall not—
 - (A) pay more than the prevailing market price for an energy product or byproduct; or
 - (B) obtain less than prevailing market terms and conditions.

Title II – RENEWABLE ENERGY

Section 203 sets renewable energy portfolio standards for the federal government, starting in fiscal year 2007. Subsection (c) reads:

(c) CALCULATION- For purposes of determining compliance with the requirement of this section, the amount of renewable energy shall be doubled if –

- (3) the renewable energy is produced on Indian land as defined in title XXVI of the Energy Policy Act of 1992 (25 U.S.C. 3501 et seq.) and used at a Federal facility.