



April 2019

TRIBAL ENERGY

Opportunities Exist to Increase Federal Agencies' Use of the Tribal Preference Authority

GAO Highlights

Highlights of [GAO-19-359](#), a report to the Vice Chairman, Committee on Indian Affairs, U.S. Senate

Why GAO Did This Study

Tribal lands hold considerable energy resources—oil, gas, coal, wind, solar, geothermal, and biomass. Tribal energy projects can help tribes fund programs and services that improve tribal members' quality of life. Federal agencies are large consumers of energy in the United States, spending about \$6 billion in 2017 on energy for their facilities. Congress has provided a mechanism for agencies to support development and use of tribal energy by authorizing agencies to give preference to majority tribally owned suppliers when purchasing energy. GAO was asked to review federal efforts to use the preference.

This report examines, among other objectives, the extent to which GSA, DOD, and DOE have used the tribal energy preference. GAO reviewed available agency information on use of the preference and interviewed federal agency officials to understand how agencies would use the preference when entering into contracts with tribal suppliers.

What GAO Recommends

To the extent that Congress wants to further encourage use of tribally owned energy sources, it should consider amending EPACT05 to provide more specific direction to federal agencies for implementing the tribal energy preference, to include consideration of additional incentives or requirements.

View [GAO-19-359](#). For more information, contact Frank Rusco at (202) 512-3841 or ruscof@gao.gov.

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What GAO Found

None of the three primary federal agencies with authority to enter into energy contracts—the General Services Administration (GSA) and the Departments of Defense (DOD) and Energy (DOE)—have used the tribal energy preference since it was established in the Energy Policy Act of 2005 (EPACT05). The section of the act that includes the preference provides federal agencies with mechanisms that can support development and use of tribal energy resources. The mechanisms include grants to assist tribes in developing their energy resources and authorization for agencies to give preference to majority tribally owned sources in federal energy purchases, so long as they pay no more than prevailing market prices and obtain no less than prevailing market rate terms and conditions. According to DOE, tribal lands account for 2 percent of U.S. land but contain about 6.5 percent of all utility-scale U.S. renewable energy potential.

GSA, DOD, and DOE officials identified five instances in the past when a tribe bid for a federal energy contract, and the agencies did not use the preference in any of those instances. GSA awarded a contract to tribes in two of the instances. In the first instance, the tribe submitted the best bid. In the second, GSA officials attempted to use the preference by limiting the energy contract solicitation solely to tribal sources, according to a stakeholder that worked on the project, but the GSA Administrator expressed concern about limiting competition in that manner. GSA instead used the small business preference authority, through which the tribe ultimately won the contract. DOD and DOE received the other three bids, which did not lead to contracts because either the cost was too high or the bid was not needed by the agency, according to agency officials. Federal officials noted that use of the preference is discretionary. EPACT05, which says agencies “may give preference,” does not require use of the preference, and the Federal Acquisition Regulation does not specifically address the preference.

In November 2016, GAO reported that one reason federal agency officials cited for not using the preference was uncertainty about how to do so. GAO recommended that GSA develop guidance to clarify use of the preference across the federal government. GSA agreed that such guidance would be beneficial but stated that the Federal Acquisition Regulatory Council is the regulatory body empowered to address this issue. In April 2017, GSA presented the council with a business case on the issue. However, GSA officials told GAO that the council determined that the preference has limited application government-wide because it mainly affects GSA, DOD, and DOE, and that, accordingly, the council declined to issue regulations and recommended GSA consider nonregulatory paths. GSA then added the preference language to the form it will use if it delegates purchasing authority in the future.

In 2018, federal agency officials told GAO they were uncertain how to use the preference. According to GSA and DOD officials, other statutes that authorize agencies to apply preferences for acquisition of goods and services from specific sources include more specific requirements in their statutory language, making them easier to apply. GSA officials noted that the Small Business Act, as amended, contains specific requirements and measurable goals that increase contracts awarded to small businesses. DOD officials stated that the agency might use the tribal energy preference if EPACT05 had similar requirements.

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Abbreviations

DOD	Department of Defense
DOE	Department of Energy
EPACT05	Energy Policy Act of 2005
FAR	Federal Acquisition Regulation
FAR Council	Federal Acquisition Regulatory Council
GSA	General Services Administration

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April 19, 2019

The Honorable Tom Udall
Vice Chairman
Committee on Indian Affairs
United States Senate

Dear Senator Udall:

Development of energy resources can be vital for the livelihood, well-being, and long-term economic sustenance of some tribes and their members, in part because energy development provides opportunities to improve living conditions and decrease high levels of poverty. Tribal lands have considerable mineral energy resources, such as oil, gas, and coal. These lands also have resources with significant potential for the development of renewable energy, such as wind, solar, geothermal, and biomass. Tribes may seek opportunities to use these resources to provide revenue for their government operations and social service programs, create high-quality jobs, and increase access to reliable and affordable energy for tribal buildings and individual homes. According to the Department of the Interior, oil and gas resources are among the largest revenue generators for tribal lands.

Tribes are also developing renewable energy projects that range from facility- and community-scale production, such as rooftop solar panels or a wind turbine to power a community center, to utility-scale production of hundreds of megawatts of electricity. However, tribes pursuing utility-scale projects need a customer to purchase their power for such projects to be economically feasible. According to the Department of Energy (DOE), in fiscal year 2017, the government spent about \$6 billion on energy for roughly 3.2 billion square feet of buildings and facilities, with the Department of Defense (DOD) accounting for over half of that spending. By statute, the General Services Administration (GSA) has primary authority for entering into energy contracts for federal agencies.¹

¹Under 40 U.S.C. § 501, GSA has general statutory authority to enter into utility services contracts with public utilities for up to 10 years.

GSA has delegated this authority to DOD and DOE so that they may also enter into energy contracts.²

In a 2016 law, Congress noted that “through treaties, statutes, and historical relations with Indian tribes, the United States has undertaken a unique trust responsibility to protect and support Indian tribes and Indians.”³ The Energy Policy Act of 2005 (EPACT05) includes several mechanisms that can support tribes in developing their energy resources. For example, the act provides for federal grants, loans, and technical assistance to tribes and tribal energy resource development organizations to carry out energy projects and to process, use, or develop tribal energy resources. Furthermore, EPACT05 authorizes federal agencies and departments to meet their own considerable energy needs by giving preference to majority tribally owned energy suppliers, with certain requirements, and provides an incentive for using renewable energy produced on tribal lands. However, we found in November 2016 that no agencies had used the tribal energy preference, partly because no government-wide guidance existed on when and how federal agencies should use the preference. We recommended that GSA develop such guidance for contracting officials purchasing energy, as discussed later in this report.⁴

You asked us to provide information on federal energy purchases from tribes and federal agency efforts to implement the tribal energy preference. This report examines (1) potential limiting factors for federal energy purchases from tribal sources, and suggestions for addressing them, that federal officials, tribal representatives, and stakeholders have identified; and (2) the extent to which GSA, DOD, and DOE have used the tribal energy preference to meet federal energy needs.

To identify potential limiting factors associated with federal energy purchases from tribal sources and suggestions to address those factors,

²GSA has also delegated its authority, for connection charges only, to the Department of Veteran Affairs. Other agencies requiring utility service contracts for periods over a year, but not exceeding 10 years, may request a delegation of authority from GSA (see 48 CFR § 41.103(b)); currently, GSA has delegated authority to several other agencies for specific facilities occupied by those agencies, according to GSA documentation.

³Indian Trust Asset Reform Act, Pub. L. No. 114-178, § 101(3) (2016).

⁴GAO, *Indian Energy Development: Additional Actions by Federal Agencies Are Needed to Overcome Factors Hindering Development*, [GAO-17-43](#) (Washington, D.C.: Nov. 10, 2016).

we interviewed 22 officials who GSA, DOD, and DOE identified as knowledgeable of their respective agencies' energy purchases, and a non-generalizable sample of five representatives of tribes or tribal entities and eight other stakeholders using standard question sets. We selected our sample of interviewees based on their knowledge of and experience with tribal energy development, federal energy purchases, and tribal interactions with federal agencies. Specifically, we selected representatives of tribes that have sought partnership with the federal government, have current utility-scale energy projects, or are working to develop tribal energy projects, as well as representatives that other interviewees recommended. In addition, we selected other stakeholders to interview that worked with or assisted tribes with energy projects (e.g. legal counsel, private energy developers). Information from tribal representatives and stakeholders we interviewed presents a range of informed views but cannot be generalized to other tribal representatives or stakeholders.

To examine the extent to which GSA, DOD, and DOE have used the tribal energy preference to meet federal energy needs, we reviewed available agency information and interviewed agency officials concerning the use of the preference since its establishment in 2005. We also reviewed the status of our past recommendation to GSA to develop guidance on how to use the preference, as well as any guidance available from other agencies with purchasing authority. If an agency had guidance on how to use the preference, we compared agency actions to communicate this guidance with federal internal control standards for information and communication.⁵ In addition, we interviewed agency officials to understand how agencies would use the preference when entering into federal energy contracts with tribal sources.

We conducted this performance audit from November 2017 to April 2019 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

⁵GAO, *Standards for Internal Control in the Federal Government*, [GAO-14-704G](#) (Washington, D.C.: September 2014).

Background

This section describes tribal energy resources, EPACT05, and federal agencies' authority and processes to purchase energy.

Tribal Energy Resources

Tribal lands have untapped energy resources that, if developed, could help to alleviate economic hardships among tribal populations. According to DOE, while tribal lands account for only 2 percent of all U.S. land, tribal land contains an estimated 50 percent of potential uranium reserves, 30 percent of coal reserves west of the Mississippi, and 20 percent of known oil and gas reserves. Furthermore, DOE's National Renewable Energy Laboratory also reports that these tribal lands contain about 6.5 percent of all utility-scale potential U.S. renewable energy resources.⁶ Ninety percent of this potential renewable energy capacity is for solar energy. According to the laboratory, tribal lands have the potential for over 6,000 gigawatts of utility-scale solar photovoltaic capacity. To put this in perspective, a single gigawatt of power running at full capacity has approximately enough energy potential to power over 800,000 homes.⁷ However, 86 percent of tribal lands with energy potential are undeveloped, according to DOE.⁸

In July 2018, DOE announced the release of its Tribal Energy Atlas and an accompanying report on the renewable energy potential on tribal lands.⁹ The atlas, developed by the National Renewable Energy Laboratory, is an interactive, web-based geospatial application that provides information about energy resource potential on tribal lands (see fig. 1). According to DOE, the atlas is the first of its kind; further, it is available to tribal energy project planners, technicians, and investors to assist with analyzing energy options on tribal lands.

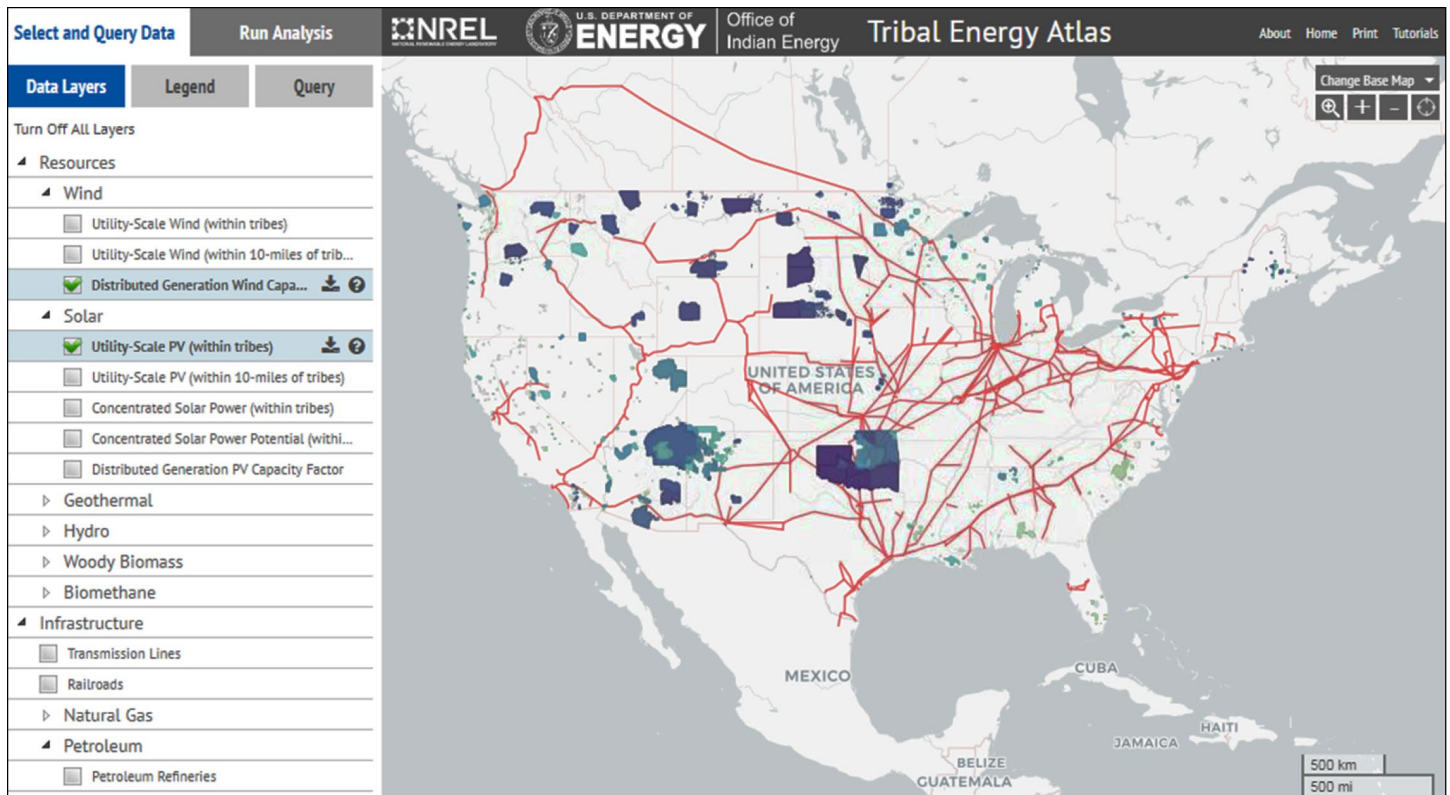
⁶Ernie Tucker and Heather Lammers, "NREL Supports Native American Tribes in Clean Energy Transformational Leadership," Department of Energy, National Renewable Energy Laboratory, March 30, 2016, <https://www.nrel.gov/news/features/2016/24665.html>.

⁷Currently, about 60 gigawatts of solar photovoltaic capacity is installed in the United States, according to the Solar Energy Industries Association.

⁸U. S. Department of Energy, "Department of Energy Makes Up to \$11.5 Million Available for Energy Infrastructure Deployment on Tribal Lands," February 16, 2018, <https://www.energy.gov/articles/department-energy-makes-115-million-available-energy-in-frastructure-deployment-tribal-lands>.

⁹For the accompanying report, see Department of Energy, National Renewable Energy Lab, *Techno-Economic Renewable Energy Potential on Tribal Lands*, NREL/TP-6A20-70807 (Golden, CO: 2018).

Figure 1: Example Query About Potential Wind and Solar Resources Available Using the Tribal Energy Atlas, Developed by the National Renewable Energy Laboratory



Source: NREL.gov. | GAO-19-359

Previously, DOE had identified multiple tribal lands with undeveloped energy resources that could potentially meet DOD energy needs. Specifically, in a May 2013 report, DOE identified 15 reservations that had, among other things, the potential to meet DOD energy needs and were near existing transmission lines that could be used to transport the energy from the reservation to the installation.¹⁰ The report was based on a DOE survey of DOD installations that could have an interest in purchasing energy from tribal sources based on the tribes' proximity to the installations and the tribal energy sources' potential to meet installation energy needs, among other factors.

¹⁰Department of Energy, Office of Indian Energy, *Military Base Off-taker Opportunities for Tribal Renewable Energy Projects*, DOE/IE-0018 (Washington, D.C.: 2013)

Energy Policy Act of 2005

EPACT05 has several provisions related to tribal energy resource development. As previously noted, one of these provisions authorizes federal agencies to give preference to majority tribally owned energy suppliers over other potential energy suppliers when purchasing energy. More specifically, EPACT05 specifies that federal agencies “may” give such a preference as long as the agencies do not pay more than prevailing market prices or obtain less-than-prevailing-market terms and conditions. In addition, EPACT05 doubles the credit that agencies receive toward their mandated renewable energy goals if the renewable energy that agencies contract for is produced on tribal lands.¹¹

GSA, DOD, and DOE Authorities and Processes for Entering into Federal Energy Contracts

As noted earlier, GSA has primary authority to enter into energy contracts for federal agencies, and it has delegated this authority to DOD and DOE as well, by regulation. In addition to these statutory and regulatory authorities, the acquisition and supply of energy for federal agencies is governed by the Federal Acquisition Regulation (FAR),¹² which is issued and maintained by the Federal Acquisition Regulatory Council (FAR Council).¹³ The process GSA has prescribed for entering into federal energy contracts varies by location, depending on market conditions and state law.¹⁴ In traditional energy markets, retail customers such as GSA, DOD, and DOE are typically required to contract with the local utility

¹¹EPACT05 sets a statutory goal for the federal government to acquire 7.5 percent of its electricity through renewable energy, to the extent economically feasible and technically practicable. Under EPACT05, the amount of renewable energy credited for the purpose of complying with that requirement shall be doubled if (1) the renewable energy is produced and used on-site at a federal facility; (2) the renewable energy is produced on federal lands and used at a federal facility; or (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 (42 U.S.C. § 15852).

¹²The Federal Acquisition Regulations System consists of the FAR and agency-specific acquisition regulations that implement or supplement the FAR. Agencies may also have internal guidance, which is not included among the regulations in the FAR System.

¹³The FAR Council comprises the Administrator for Federal Procurement Policy, the Administrator of General Services, the Secretary of Defense, and the Administrator of National Aeronautics and Space. The FAR Council was established to assist in the direction and coordination of government-wide procurement policy and government-wide procurement regulatory activities in the federal government.

¹⁴General Services Administration, *Procurement Guide for Public Utility Services: A Practical Guide to Procuring Utility Services for Federal Agencies* (August 2015).

operating in the area for energy.¹⁵ In deregulated markets, these agencies publicly issue requests for proposals for energy, and energy providers engage in a competitive bidding process for federal energy contracts. Federal officials seeking to enter into energy contracts may specify energy of certain types (for example, renewable sources may be given priority) in the requests for proposals, and the energy contracts are typically awarded to the best-value provider who meets the requirements of the request for proposal.¹⁶

¹⁵Electricity systems can be traditional or deregulated. In the traditional system, the local electric utility is primarily responsible for generating, transmitting, and distributing power to all of the retail customers in its service areas. In the deregulated system, these components are not necessarily handled by a single utility, and customers can purchase power from any supplier on the electricity grid. See U.S. Department of Energy, Federal Energy Management Program, *A Primer on Electric Utilities, Deregulation, and Restructuring of U.S. Electricity Markets* (Washington, D.C.: May 2002).

¹⁶GSA's *Procurement Guide* notes that the best-value option depends on many factors, including the needs of the facility, state laws, and federal regulations, as well as the total price, which includes both rate schedules and lifecycle costs. General Services Administration, *Procurement Guide for Public Utility Services*.

Federal Officials, Tribal Representatives, and Stakeholders We Interviewed Identified Potential Limiting Factors and Suggestions for Federal Energy Purchases from Tribes

Federal officials, tribal representatives, and stakeholders we interviewed identified a number of factors that have the potential to limit federal government energy purchases from tribal sources, and they offered suggestions to address some of these factors. The factors, which sometimes overlapped, included requirements to purchase from monopoly utilities, difficulty entering the market at the prevailing rate, access to transmission infrastructure, access to capital, and technical capacity.

Requirements to purchase from monopoly utilities. In traditional regulated energy markets, retail customers, including federal agencies, generally can only purchase energy from the local monopoly utility in that region.¹⁷ According to officials from GSA, DOD, and DOE, this requirement prevents agencies from purchasing from tribes. A representative we interviewed from one tribal energy corporation concurred with the agency officials' assessment. That tribal energy corporation currently sells energy in wholesale markets and is interested in selling energy to federal agencies, but it has not succeeded in doing so because agencies typically make purchases as retail, not wholesale, customers, according to the tribal representative.¹⁸ Nonetheless, according to the tribal representative, retail customers, including federal agencies, may have the option to purchase electricity as wholesale

¹⁷The Public Utility Holding Company Act of 1935 allowed utilities to operate as the sole provider in a given area as a legal monopoly, while forcing them to become more subject to regulation. Although the act was subsequently repealed, this model remains in some electricity markets. In such markets, because the utility is a legal monopoly and there are no other permissible options available to facilities in the given area, federal agencies need to procure services from that utility. General Services Administration, *Procurement Guide for Public Utility Services*.

¹⁸Electricity is bought, sold, and traded in wholesale electricity markets by companies that own power plants, as well as by utilities and other companies. Wholesale buyers may purchase electricity at prices that vary throughout the day and year and that are largely determined by the interaction of supply and demand. Wholesale buyers then sell electricity directly to retail consumers, such as federal agencies, households, and businesses. GAO, *Electricity Markets: Demand-Response Activities Have Increased, but FERC Could Improve Data Collection and Reporting Efforts*, [GAO-14-73](#) (Washington, D.C.: Mar. 27, 2014).

customers in traditional markets if the entity is large enough, which would allow them to purchase from sources such as the tribal corporation.¹⁹

GSA officials told us that purchasing energy as a wholesale customer may not be in the best interest of the federal government, given the associated technical requirements, including connecting to the grid in ways GSA is not currently equipped for, and regulatory risk, such as managing power in a way not required of retail customers. In particular, GSA officials expressed concern about the regulatory requirements associated with reselling any potential excess energy that may come with a wholesale purchase. Additionally, DOE officials said there might be cost considerations related to achieving and maintaining status as a wholesale customer, as well as risks in giving up retail customer status, including the loss of the utility's obligation to service the agency's facilities because it is no longer a retail customer. In addition, according to DOE officials, switching from retail to wholesale purchasing has historically presented significant litigation risk, such as the utility challenging the legal and technical basis for the government's change from retail to wholesale customer.

Difficulty entering the market at the prevailing rate. According to GSA procurement guidance, the contracting process for public utility services should obtain the best-value product for the government,²⁰ which GSA officials said typically awards the contract to the lowest-cost provider that also meets technical requirements, potentially limiting federal agency opportunities to purchase energy from tribes. In particular, tribes may find it difficult to enter the energy market at competitive rates, according to four federal officials and one stakeholder. For example, two DOE officials provided examples of DOE receiving bids from tribes for federal energy contracts but stated that both bids were unsuitable because their price was higher than the market rate. One DOE official said that tribes developing renewable energy projects would have to compete with lower-

¹⁹An example cited by the tribal representative is that of a large company in Washington State—a traditional energy market—receiving approval from state regulators in 2017 to purchase renewable energy from suppliers other than the monopoly utility provider. According to the state administrative order approving the arrangement, the approval was conditioned on the payment of an exit fee to the utility and commitments, such as exceeding state renewable energy standards and purchasing 100 percent carbon-free power, to secure approval from the state regulator. The company was permitted to continue using the monopoly utility's distribution system to transmit the energy from the supplier to the company's facilities.

²⁰General Services Administration, *Procurement Guide for Public Utility Services*.

cost natural gas and hydroelectric energy, which could prevent tribes from meeting the prevailing market rate. To help foster the success of such tribal projects, one DOE official and one stakeholder suggested allowing federal agencies to purchase energy from tribes at rates that exceed the prevailing market rates.

However, some tribes have successfully entered the energy market and have sold energy at competitive rates. For example, representatives we interviewed from one tribe and a renewable energy development corporation owned by several tribes said they anticipate that their current or future projects will allow them to sell energy at competitive rates, and at least two tribes have entered into contracts with the federal government. Moreover, since the beginning of 2017, DOE has seen an increased interest from tribes in renewable energy projects because the price of renewable energy has become more competitive with other, lower-cost forms of energy, according to DOE officials. As tribes develop more renewable energy projects, there may be additional opportunities for federal agencies to purchase from tribes, which will also help these agencies meet federal renewable energy goals.

Access to transmission infrastructure. Lack of access to energy transmission infrastructure may prevent tribes from transmitting their energy off tribal lands, according to 10 federal officials, tribal representatives, and stakeholders whom we interviewed. One DOE official said the biggest challenge in contracting for energy with tribes can be getting a physical connection to transmit power between the tribal energy providers and a federal building. Federal officials from GSA and DOE noted that there are few federal buildings close to tribal lands, making transmission from those lands to federal buildings more complex and expensive. A 2013 Edison Electric Institute report said that the cost of new construction of overhead transmission lines can range from \$174,000 to \$11 million per mile.²¹ DOE's Tribal Energy Atlas may assist tribes in overcoming this factor because it provides information on existing infrastructure, including transmission lines, giving tribes access to data they need to make informed decisions about their energy development options. Further, tribes are not limited to developing energy projects on their own lands, which can eliminate issues with proximity to federal purchasers. For example, one tribe near San Diego partnered with a private developer to build a wind farm in Illinois to sell energy to GSA.

²¹Edison Electric Institute, *Out of Sight, Out of Mind 2012* (Washington, D.C.: 2013).

The purchase was the largest wind energy purchase from a single source in federal contracting history, according to GSA officials.

Access to capital. Tribal energy development may be hindered because of difficulty obtaining access to capital, potentially limiting federal energy purchases from tribes. For example, one industry official we interviewed who worked with a tribe in the process of developing a wind farm on its reservation said the tribe does not have the necessary capital to connect to the local transmission infrastructure. As a result, it cannot provide power beyond the reservation. Likewise, nine federal officials and stakeholders whom we interviewed said securing financing for energy development could be difficult for some tribes. To overcome this potential limitation, one group of tribes combined their resources and formed a multi-tribal power authority, which allowed them to raise the necessary capital to take on a larger-scale project while maintaining tribal ownership and creating jobs in the tribal communities. The multi-tribal authority plans to develop one of the largest wind farms in the country and sell the energy at a competitive price, according to representatives from a renewable energy development corporation owned by several tribes.

Another option for tribes to address this limitation is tribes leasing their land to private developers to operate and maintain energy projects, thereby benefiting from their energy resources without having to raise the capital needed to develop them but still receiving additional benefits for the tribal community. For example, one tribal representative and one stakeholder mentioned that training and educational programs for tribal members could be part of these agreements between private developers and tribes.

Technical capacity. Some tribes may not have the technical capacity to develop their energy resources, which can also limit federal energy purchases from tribal sources, according to tribal representatives and stakeholders we interviewed. For example, one tribal representative and four stakeholders we interviewed said that some tribes lack experience with energy development, which potentially limits their ability to take on large-scale projects that could meet federal energy needs. Two stakeholders noted the importance of tribes having access to professionals with experience in running energy development projects to help overcome this potential limitation.

Federal agencies offer programs that could assist tribes with building technical capacity. For example, the Department of the Interior provides technical and financial assistance to tribes for the exploration,

development, and management of tribal energy resources.²² In addition, DOE offers grants and education through webinars, forums, and workshops. For example, DOE in August 2018 selected 15 tribal projects to receive funding for developing their energy resources to reduce or stabilize energy costs, as well as to increase energy security and resilience on tribal lands. DOE has also provided technical assistance, technology and market analysis, and capacity building for tribes, as well as webinars on utility-scale energy development, fundamentals of energy markets for tribes, and effective tribal project partnerships. However, DOE's efforts have focused primarily on reducing tribal energy costs and assisting tribes in developing energy for use on reservations, rather than on selling energy to outside sources, according to DOE officials.

GSA, DOD, and DOE Have Not Used the Tribal Energy Preference Since Its Establishment, and EPACT05 Is Not Specific about Its Use

Since the establishment of the tribal energy preference, GSA, DOD, and DOE have not entered into an energy contract with a tribe using the preference. The preference and other tribal energy resource development provisions added in the tribal energy section of EPACT05 provide federal agencies with mechanisms to support tribal energy development and use. As noted previously, the section provided for grants to assist tribes in developing their energy resources, authorization for federal agencies to give preference to tribal energy sources when contracting for energy, and double credit towards mandated renewable energy goals when federal agencies contract for energy produced on tribal lands. GSA, DOD, and DOE officials we interviewed identified five instances in the past when a tribe bid on a federal energy contract, and agencies did not use the tribal energy preference in any of these instances. Two of the instances led to contracts with GSA because, in one of those instances, officials said that the tribe submitted the best bid, and in the other, GSA used the small business preference authority instead, as discussed further below. The other three instances were bids to DOD and DOE; these instances did not lead to contracts because either the cost was too high or the proposal was unsolicited and not needed by the agency, according to agency officials.

Officials from GSA and DOD noted that EPACT05 makes use of the preference discretionary because it says that federal agencies "may give preference" to a majority tribally owned energy source. Officials from DOD said they cannot authorize agency officials to use the preference

²²[GAO-17-43](#)

without a policy or FAR requirement to use the preference. DOD officials said they follow FAR regulations and guidance when implementing policy and guidance for the agency, but the FAR has no provisions specifically addressing the preference. Similarly, GSA officials told us they would be hesitant to use the preference because they believe it limits competition solely to tribal sources, which may not be in the best interest of the federal government. GSA officials attempted to use the preference to limit an energy contract solicitation solely to tribal sources in 2014, according to a stakeholder that worked on the project, but the GSA Administrator expressed concern about limiting competition in that manner. The stakeholder noted that GSA instead decided to open the solicitation to small businesses, and the tribe ultimately won the contract through the small business preference authority.

When we reported on implementation of the tribal energy preference in November 2016, we found that federal agencies had not used the preference because of uncertainty about how to do so and lack of guidance.²³ Because GSA has primary energy purchasing authority for the federal government, we recommended that GSA develop implementing guidance to clarify how contracting officials across the federal government should use the preference. GSA partially agreed with the recommendation, stating that guidance would be beneficial, but GSA officials stated that government-wide rulemaking from the FAR Council, of which GSA is a member, is necessary to clarify how agencies should use the preference. Subsequently, GSA officials told us that in April 2017, GSA presented the FAR Council with a business case that included an analysis of the problem we identified. After reviewing the business case, the FAR Council determined the preference has limited application government-wide. GSA officials told us that the FAR Council declined to pursue regulatory changes to the FAR because, according to the council, the preference only impacts agencies responsible for entering into federal energy contracts, mainly GSA, DOD, and DOE. Further, the FAR Council recommended that GSA consider nonregulatory paths, in keeping with Executive Order 13771, which aims to reduce costs associated with regulatory compliance.²⁴ In response to the FAR Council's recommendation, GSA added the preference language from EPACT05 to

²³[GAO-17-43](#)

²⁴The President issued Executive Order 13771 in January 2017, and the order, among other elements, directs executive departments or agencies, when proposing or promulgating a new regulation, to identify at least two regulations to be repealed, unless prohibited by law.

the form it uses to delegate purchasing authority to other federal agencies that may seek this authority in the future.

As we reported in November 2016, DOE in 2013 issued agency-specific guidance on use of the preference, such as for limiting competition to qualified majority tribally owned suppliers for the purchase of renewable energy and energy by-products.²⁵ DOE distributed the tribal energy preference guidance through a February 2013 acquisition letter.²⁶ However, in our interviews with officials responsible for purchasing energy in nine DOE offices, we found that officials in five of these nine offices were unaware of the DOE guidance or unaware of the preference. DOE headquarters officials stated that the agency did not take further action to communicate the guidance or ensure relevant officials were aware of it after its initial distribution. Under federal standards for internal control, management should internally communicate the necessary quality information to achieve the entity's objectives.²⁷ According to DOE documentation, the objectives of the guidance are to promote tribal renewable energy development, reaffirm the federal government's trust responsibility to tribes, and reinforce key national policy objectives such as the acquisition and use of clean energy products. DOE officials agreed that officials responsible for purchasing energy should be aware of the agency's guidance and the preference. For example, officials from one DOE office stated that its contracting officials are aware of the preference because it has included the preference language in its requests for proposals. By taking steps to communicate the guidance to all DOE officials responsible for purchasing energy, DOE will be better positioned to ensure that these officials are aware of the preference, which may increase its use.

In addition, officials from GSA, DOD, and DOE who are responsible for purchasing energy told us they are still uncertain about how they would use the preference. For example, officials from GSA stated that they would use the preference as a tiebreaker at a minimum, but they also noted that ties are unlikely and they had not seen any ties in bids to provide energy in the last 4 years. They also noted that they would rely on GSA's legal and acquisition policy offices for any instruction regarding

²⁵[GAO-17-43](#)

²⁶Department of Energy, *Implementation of Indian Energy Preference Provision in EPL Act 2005*, AL 2013-02 (February 5, 2013)

²⁷[GAO-14-704G](#)

using the preference. Similarly, DOD officials responsible for energy purchases stated they would have to consult with DOD's acquisition policy office, which stated that DOD does not have guidance and could not authorize use of the preference without a requirement in the FAR, as discussed previously. Likewise, DOE officials were unclear about how they would use the preference, stating that they would use the preference by awarding the energy contract to a tribe if the tribe had the lowest bid. However, the agency would not need to use the preference in such situations because the agency generally awards contracts to the lowest bidder, according to DOE officials.

According to officials from GSA and DOD, other statutes that authorize agencies to apply preferences for acquisition of goods and services from specific sources include more specific requirements in their statutory language, making the requirements easier to apply. For example, GSA officials explained that the specific requirements and measurable goals set under the Small Business Act, as amended,²⁸ increases contracts awarded to small businesses. In contrast, EPACT05's tribal energy provision does not contain analogous specific requirements for how agencies should use the preference. DOD officials stated that the agency would potentially pursue using the tribal energy preference if EPACT05 required a certain amount of energy contracts to go to tribes, similar to the Small Business Act's requirements for small businesses.

Conclusions

Energy resources on tribal lands present an opportunity for individual tribes that pursue development of these resources to improve their socioeconomic status by generating income, jobs, and associated economic development. The federal government, as a significant energy consumer, is in a position to support energy development on tribal lands. Through EPACT05's tribal energy resource development provisions, including the tribal energy preference, Congress has provided federal agencies with mechanisms for such support. GSA and DOE have taken steps intended to promote use of the preference—GSA by adding the preference language when delegating energy contracting authority in the future, and DOE by issuing guidance. However, no federal agency has used the preference since its establishment in 2005, in part because EPACT05 does not require its use or include goals specifying how agencies should use it. Further, officials we interviewed at GSA, DOD,

²⁸P.L. 85-536, 72 Stat. 384 (enacted July 18, 1958)

and DOE told us they were uncertain about how to use the preference. Specific incentives or requirements for the use of the tribal energy preference could help create additional opportunities for federal energy purchases from tribes as they develop more renewable energy projects.

DOE's issuance of agency-specific guidance for implementing the preference is an important positive step. However, some DOE officials responsible for purchasing energy were unaware of the DOE guidance. By taking steps to communicate the guidance to all DOE officials responsible for purchasing energy, DOE will be better positioned to ensure that these officials are aware of the preference, which may increase its use.

Matter for Congressional Consideration

To the extent that Congress wants to further encourage federal agencies to use tribal energy sources, it should consider amending the Energy Policy Act of 2005 to provide more specific direction to federal agencies for implementing the tribal energy preference, to include consideration of additional incentives or requirements to use these energy sources. (Matter for Consideration 1)

Recommendation for Executive Action

The Secretary of Energy should communicate DOE's tribal energy preference guidance to all DOE officials responsible for purchasing energy. (Recommendation 1)

Agency Comments

We provided a draft of this report for review and comment to DOE, DOD, and GSA. In its written comments, reproduced in appendix I, DOE concurred with our recommendation and outlined planned action to implement it. Specifically, DOE plans to issue and disseminate a new policy flash to its acquisition personnel to draw renewed attention to its tribal energy preference guidance. DOD and GSA stated that they did not have any comments.

As agreed with your office, unless you publicly announce the contents of this report earlier, we plan no further distribution until 30 days from the report date. At that time, we will send copies to the appropriate congressional committees, the Administrator of General Services, the Secretary of Defense, the Secretary of Energy, and other interested parties. In addition, the report will be available at no charge on the GAO website at <http://www.gao.gov>.

If you or your staff members have any questions about this report, please contact me at (202) 512-3841 or ruscof@gao.gov. Contact points for our Office of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made key contributions to this report are listed in appendix II.

Sincerely yours,

A handwritten signature in black ink that reads "Frank Rusco". The signature is written in a cursive style with a long, sweeping horizontal line extending to the right from the end of the name.

Frank Rusco
Director, Natural Resources and Environment

Appendix I: Comments from the Department of Energy



Department of Energy
Washington, DC 20585

March 29, 2019

Mr. Franklin Rusco
Director
Natural Resources and Environment
U.S. Government Accountability Office
441 G Street, N.W.
Washington, D.C. 20548

Dear Mr. Rusco:

The Department of Energy (DOE) welcomes the opportunity to respond to the Government Accountability Office (GAO) draft report titled "Tribal Energy: Opportunities Exist to Increase Federal Agencies' Use of the Tribal Preference Authority" (GAO-19-359, April 2019).

The draft report included one recommendation for the Secretary of Energy to communicate DOE's tribal energy guidance to the DOE officials responsible for purchasing energy. The Department concurs with GAO's recommendation.

DOE appreciates the contribution GAO has made to the understanding and use of the Indian Tribal Energy Preference Policy. GAO should direct any questions regarding this response to Mr. Jason Taylor at (202) 287-1560 or jason.taylor@hq.doe.gov.

Sincerely,

John R. Bashista
Director
Office of Acquisition Management

Attachment



Department of Energy (DOE)

Management Response

GAO Draft Report "Tribal Energy: Opportunities Exist to Increase Federal Agencies' Use of the Tribal Preference Authority" (GAO-19-359)

Management Response

Recommendation 1: The Secretary of Energy should communicate DOE's tribal energy guidance to all DOE officials responsible for purchasing energy.

Management Response: Concur. On August 17, 2017, the Office of Acquisition Management issued an update to Acquisition Guide Chapter 41.2, "*Utilities*", which integrated the Indian Energy Preference guidance that had been previously conveyed in Acquisition Letter No. AL 2013-02 titled, "*Implementation of Indian Energy Preference Provision in EPAct 2005*" and mentioned in this GAO draft report.

DOE Acquisition Guide Chapter 41.2, "*Utilities*" is accessible using the link provided below: https://www.energy.gov/sites/prod/files/2017/08/f35/FY17%20Acquisition%20Guide_3.pdf

In order to draw fresh attention to this topic, the Director of the Office of Acquisition Management will issue and disseminate to Departmental acquisition personnel, a new policy flash that re-emphasizes the guidance in Acquisition Letter No. AL 2013-02 and Acquisition Guide Chapter 41.2. .

Estimated Completion Date:
DOE estimates completion of this action by June 30, 2019.

Appendix II: GAO Contact and Staff Acknowledgments

GAO Contact

Frank Rusco, (202) 512-3841 or ruscof@gao.gov

Staff Acknowledgments

In addition to the individual named above, Karla Springer (Assistant Director), Andrew Moore (Analyst in Charge), Justin Bolivar, William Gerard, Cindy Gilbert, Cynthia Norris, and Caroline Prado made key contributions to this report.

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