



PECHANGA INDIAN RESERVATION
Pechanga Band of Indians

General Manager
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November 3rd, 2022

Internal Revenue Service
CC: PA: LPD: PR (Notice 2022-50)
Room 5203
P.O. Box 7604, Ben Franklin Station
Washington, DC 20044

SUBMITTED VIA THE FEDERAL eRULEMAKING PORTAL AND U.S. CERTIFIED MAIL

RE: Pechanga Band of Indians Comments on Notice 2022-50 – Elective Payment of Applicable Credits and Transfer of Certain Credits

The Pechanga Band of Indians (“Tribe”) formed a tribal utility, Pechanga Western Electric (“PWE”), to serve tribal commercial, residential and governmental loads in 2017. The Tribe and PWE anticipate participating in the opportunities under the Inflation Reduction Act to assist the Tribe in meeting its goal to maximize its self-determination as a sovereign tribal government by, among other things, being energy self-sufficient. Implementation of the law in a manner that honors the federal trust responsibility to Indian Tribes and is sensitive to unique tribal issues and governmental status will be key to whether the Act can successfully help us achieve our goal.

PWE, in coordination with the Tribe, respectfully submits the following preliminary comments in response to the United States Department of Treasury (“Treasury”) and the Internal Revenue Service’s (“IRS”) request for public input on certain energy generation incentives as amended or added by the Inflation Reduction Act of 2022 (“IRA”). The purpose of these comments is to help inform development of future guidance in a way that our Tribe has determined will help fulfill the federal government’s trust responsibility to our Nation. We encourage Treasury and the IRS to consider and implement our comments as a major stakeholder prior to issuing any proposed rules or regulations pertaining to energy generation incentives under the IRA. We look forward to submitting additional comments as proposed rules, regulations, and guidance are published.

Our high-level comments in response to Notice 2022-50 are as follows: (1) Treasury and the IRS should issue tribal-specific guidance to provide tribal governments with a clear understanding of how to utilize the new direct pay portions of the tax code; (2) Treasury and the IRS should issue guidance which clarifies tribes may obtain temporary financing to bridge the period between the purchase of the project and the direct payment (particularly as it relates to federal loan programs such as the Tribal Energy Loan

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Guarantee Program); and (3) direct pay elections and credit transfer applications or related tax materials should be easily accessible and drafted as simply as possible to help ensure broad participation by tribes and other eligible taxpayers. We reserve the right to submit additional comments in response to future Treasury and IRS guidance and regulations.

I. BACKGROUND

Like many other California Indian Tribes, the Pechanga Band of Indians is located in an area of unreliable electric service and has a pressing need for improved, resilient, and value-added energy infrastructure in its community. The Pechanga Indian Reservation, is located in Southern California near the city of Temecula. We experience threats from wildfires and frequent grid outages. The gross total land area of the Pechanga Indian Reservation stands at approximately 7,250 acres, and the Band has approximately 1,850 enrolled members.

PWE is the first tribally owned and operated wholesale and distribution electric utility in the State of California. Operated as a department of the Pechanga Tribal Government, Pechanga Western Electric currently serves all tribal commercial and government loads on the Pechanga Indian Reservation, including the medical facility, water department, law enforcement facility, fire station, and emergency gathering center at the recreation facility. The Band's electrical system currently includes a 4.6MW cogeneration plant, 1MW of battery storage, 1MW of solar, a SCADA system, electric-car fueling stations, and a distribution system. With this basic framework in place, the Band's goal and vision is to continue developing its electric infrastructure for increased tribal community resilience and self-reliance. We have progressive plans to achieve our goal, utilizing options that have not previously been done in Indian Country.

These tribal energy projects will be complex. For example, we foresee our tribe paying for energy projects, the benefit of which is provided to our membership under 139E of the Internal Revenue Code which states that these general welfare benefits are not counted as income to the members. However, because the tribe will pay for an own the generation and potentially storage we request that the tribe be eligible to monetize the tax credit for the capital cost of the project, regardless of its delivery to tribal members as a general welfare benefit.

As another complexity, our tribal utility is connected to a low voltage wholesale distribution system within the much larger system owned by Southern California Edison (SCE). Before we can do upgrades on our system, SCE requires system studies and capital upgrades on their distribution systems to accommodate our upgrades. We request that all the costs of the upgrades, including systems study costs, and wholesale distribution system upgrades at substations or further along the distribution system, should be included in the direct payments/tax credits. These upgrades are conditions to the tribe's ability to build many of its planned energy projects.

II. COMMENTS ON ELECTIVE PAYMENTS OF APPLICABLE CREDITS AND TRANSFER OF CERTAIN CREDITS

General Comments

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As Treasury and the IRS are aware, tribal governments are uniquely situated in our federal system under the U.S. Constitution, numerous federal laws, treaties, and federal court decisions. As a sovereign government, our Tribe has broad authority over our governmental structure and the ability to enact and enforce civil and criminal laws which regulate the activity of our members and others on the Reservation. Similar to the revenue of states and local governments, tribal revenues are typically treated as revenues of a distinct and unique sovereign government rather than as taxable income. However, unlike the federal government's relationship with states and local governments, the federal government has a unique trust obligation to tribes which gives rise to separate and distinct duties which are required to fulfill the trust responsibility.

At a minimum, in order to satisfy the federal government's trust responsibility to tribes, a continuous dialogue must exist via meaningful and robust government-to-government consultation during and after the rulemaking process. In this situation, consultation and tribal-specific guidance will help ensure tribes have a clear understanding on how to monetize or transfer tax credits made available or amended by the IRA, particularly if different standards or processes apply to tribes compared to other eligible taxpayers such as states and localities.

Like the tribal-specific guidance made available by Treasury for the American Rescue Plan Act State and Local Fiscal Recovery Funds,¹ Treasury should develop tribal-specific guidance to provide tribal governments with a clear understanding of how to utilize the new portions of the tax code as amended by the IRA, including elective payment of applicable credits and transfer of certain credits. Guidance could include tribal-specific fact sheets, general correspondence to tribes, frequently asked questions, compliance and reporting requirements, and contact information for a tribal liaison or help desk.

As part of the tribal-specific guidance, Treasury and the IRS should clarify that tribes may obtain temporary financing to cover the period between the purchase of the project and when the direct payment is received. In our interpretation of the law, Tribes or other eligible taxpayers must provide up-front costs for a qualifying project, and then wait to receive a direct payment from the federal government after taxes are filed in the following year. This payment structure presents an opportunity for tribes and other eligible taxpayers to seek temporary financing from an outside lender to help "bridge" the gap between the purchase of the project and the receipt of the direct payment.

Interconnection

We request a broad interpretation of "interconnection property", to include equipment and construction costs for new substations, equipment and construction costs for additions or modifications to substations, all related metering equipment and installation costs, and the equipment and construction costs for transmission and distribution upgrades which are necessary to facilitate new energy storage, related renewable energy projects or microgrids. Without a broad interpretation, most of these projects will not be constructed, as interconnection is a critical piece of the project, and often one of the high expense aspects. As interconnection of new facilities to a transmission facility requires utility studies, we propose that documentation for the interconnection at the transmission level includes utility studies, interconnection agreement and utility management certification of the installations and costs. Interconnection at the

¹ See <https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments/state-and-local-fiscal-recovery-fund/tribal-governments>.

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distribution level should include a utility management certification of the installations, and costs. Other documentation should be provided only if available

Bridge Loans

For planning purposes, we request additional and expedited guidance from Treasury on what restrictions exist on obtaining a bridge loan or temporary financing, particularly in relation to how this would interact with a government loan program. We request that tribes be eligible to utilize direct loans or partial guarantees as made available by the Tribal Energy Loan Guarantee Program to help temporarily finance an eligible project. We ask Treasury and the IRS to confirm whether and how the TELGP and other federal loan programs can assist tribes in this regard. Specifically, clarify that use of a bridge loan from a federal or other program does not affect the eligibility for monetizing a tax credit.

Application and Documentations

Ultimately, direct pay elections and credit transfer applications or related tax materials should be easily accessible and drafted as simply as possible to help ensure broad participation by tribes and other eligible taxpayers. The application process for the direct payment of tax credits should have reasonable time periods for submission. As this will be a new process, especially for many non-taxable entities, after the first year, we request a review be made with requests for comments to improve the submission process in later years.

As the Secretary has statutory discretion to determine the time and manner for making an election under § 6417(a), we remind Treasury and the IRS that many tribes lack the dedicated resources to complete extensive and technically detailed applications and therefore ask that applications requirement be minimal (while meeting statutory requirements), and adequate resources be deployed to assist those tribes with the application process.

As funding for the available IRA tax credits is limited, and funding appears to be on a first come-first serve basis, tribes will have to compete with other eligible taxpaying entities with greater resources to receive tax credits. Treasury and the IRS need to establish criteria for tribes who are at a disadvantage, particularly when tribal-specific guidance does not currently exist. Applications or associated tax forms for direct payment of applicable credits should be drafted as simply as possible and require as little information possible to increase participation among tribes and tribal organizations in the direct pay option.

Section 6418 of the IRC was enacted by §13801(b) of the IRA to permit eligible credits to be transferred from eligible taxpayers to an unrelated taxpayer. Section 6418 is a critical addition to the IRC because of the impact that will take place on the renewable energy market, particularly for tribes that are interested in lowering their transactions costs but may currently lack the administrative resources to manage a new energy project. Similar to §6417, an election under §6418 must be made at such time and in such manner as the Secretary may provide. Similar to the general comments above, the Secretary should develop a simple application and related tax forms to transfer eligible credits. As this will be a new process, especially for many non-taxable entities, after the first year, we request a review be made with requests for comments to improve the submission process in later years

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Applicable Entities

Section 6417 of the IRC was enacted by §13801(a) of the IRA to allow tribal governments and other applicable entities to elect to treat certain credits as a direct payment rather than a credit against their federal income tax liabilities. Section 6417(d)(1)(A) defines the term “applicable entity” to include “...(iv) an Indian tribal government...” We request that it be confirmed that this definition includes tribally owned enterprise (with at least 51% ownership by a tribe) or a tribally owned utility. As extensions of a tribal government, tribal enterprises and tribally owned utilities should be eligible to receive direct payments and we ask Treasury and the IRS to issue further guidance clarifying this point.

General Welfare Exclusion

Tribes or tribal utilities that develop energy projects and deliver the project benefits as a general welfare benefit under Section 139E of the Internal Revenue Code, should be eligible to monetize the tax credit for the capital cost of the project, regardless of its method of delivery to tribal members.

Conclusion

We appreciate the opportunity to submit comments in response to Notice 2022-50 prior to the issuance of any guidance or proposed regulations. Direct pay and credit transfer options represent a critical opportunity for tribes to strengthen their energy resiliency and deploy qualifying energy projects in a way that will most benefit the tribe and its respective members.

Sincerely,



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