



USET

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Transmitted Electronically
To tribal.consult@treasury.gov

August 18, 2023

The Honorable Chief Lynn Malerba
Treasurer of the United States
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Dear Chief Malerba,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we submit these comments to Treasury in response to the Tribal consultation held on July 17, 2023 on the elective payment (also known as direct payment) of applicable tax credits under the Inflation Reduction Act (IRA). Under Section 6417 of the IRA, certain tax-exempt governmental entities, including Tribal governments, were authorized to access certain clean energy tax credits as payments from the Internal Revenue Service (IRS). For the first time, Tribal governments will be able to make a direct payment election using twelve applicable credits, which include the major clean/green energy production tax credits and investment tax credits, as well as credits for qualified clean commercial vehicles, alternative fuel vehicle refueling property, and carbon oxide sequestration. USET SPF appreciates Treasury's efforts to continually consult with and gather input from Tribal Nations to structure new programs, funds, and services that have been made available through recent laws, such as the IRA. While accessing these credits provides new opportunities for Tribal Nations to pursue and offset the costs of clean energy development projects, Treasury must ensure that necessary guidance, technical assistance, and other resources are readily available and accessible to Tribal Nations to leverage these credits using the direct payment method.

USET Sovereignty Protection Fund (USET SPF) is a non-profit, inter-tribal organization advocating on behalf of thirty-three (33) federally recognized Tribal Nations from the Northeastern Woodlands to the Everglades and across the Gulf of Mexico.¹ USET SPF is dedicated to promoting, protecting, and

^[1] USET SPF member Tribal Nations include: Alabama-Coushatta Tribe of Texas (TX), Catawba Indian Nation (SC), Cayuga Nation (NY), Chickahominy Indian Tribe (VA), Chickahominy Indian Tribe–Eastern Division (VA), Chitimacha Tribe of Louisiana (LA), Coushatta Tribe of Louisiana (LA), Eastern Band of Cherokee Indians (NC), Houlton Band of Maliseet Indians (ME), Jena Band of Choctaw Indians (LA), Mashantucket Pequot Indian Tribe (CT), Mashpee Wampanoag Tribe (MA), Miccosukee Tribe of Indians of Florida (FL), Mi'kmaq Nation (ME), Mississippi Band of Choctaw Indians (MS), Mohegan Tribe of Indians of Connecticut (CT), Monacan Indian Nation (VA), Nansemond Indian Nation (VA), Narragansett Indian Tribe (RI), Oneida Indian Nation (NY), Pamunkey Indian Tribe (VA), Passamaquoddy Tribe at Indian Township (ME), Passamaquoddy Tribe at Pleasant Point (ME), Penobscot Indian Nation (ME), Poarch Band of Creek Indians (AL), Rappahannock Tribe (VA), Saint Regis Mohawk Tribe (NY), Seminole Tribe of Florida (FL), Seneca Nation of Indians (NY), Shinnecock Indian Nation (NY), Tunica-Biloxi Tribe of Louisiana (LA), Upper Mattaponi Indian Tribe (VA) and the Wampanoag Tribe of Gay Head (Aquinnah) (MA).

advancing the inherent sovereign rights and authorities of Tribal Nations and in assisting its membership in dealing effectively with public policy issues.

Section 6417 of the IRA provides Tribal governments with a new opportunity to elect a direct payment of certain clean energy tax credits. Since Tribal governments generally do not pay taxes to the federal government, Tribal governments are now eligible to apply for the direct payment of these clean energy tax credits to recoup or offset the costs of constructing and putting into service a clean energy project. To ensure that Tribal governments can appropriately and sufficiently utilize this opportunity, Treasury must continue to support our ability to leverage multiple sources of federal funds (e.g., grants and loans) with the applicable credits to fulfill a project's costs or use the credits to attract private capital and investors to finance the build out of these clean energy projects on Tribal Lands. However, we request additional consultation, guidance, and clarification on the annual tax reporting requirements for electing direct payment of the applicable clean energy tax credits since Treasury and the IRS are requesting that Tribal applicants submit a Form 990-T for the taxable year.

Ensure the Direct Payment Pre-Filing Registration Process and Claiming of Applicable Tax Credits is Streamlined for Tribal Nations

On June 21, 2023, Treasury adopted temporary pre-filing regulations for Tribal Nations and entities to obtain direct payment of applicable clean energy tax credits authorized by the IRA. During the July 17th Tribal consultation, Treasury stated that as it is standing up its pre-filing registration portal it is looking to only request basic information for the pre-filing process, which would include information about the filer and the proposed project an applicable credit would be used for. Treasury also stated that there was going to be nothing preventing a Tribal Nation from pre-registering before the tax credit is generated, which we support since it will assist Tribal Nations in meeting the pre-filing registration deadline(s) to apply for direct payment of applicable tax credits. While we appreciate and support Treasury's efforts to make the pre-filing registration process as simple as possible, questions remain regarding this process and how Treasury intends to execute it. For instance, there is not clear distinction as to whether a Tribal government will have to obtain multiple registration numbers for multiple projects or segments of a single project. Different applicable tax credits could be used for a single project and be "placed into service" at different periods and timeframes of the project's development. Therefore, we request additional clarification on the definition of "placed into service" since direct payment of certain credits only applies to when a "single process train is placed into service", rather than an entire, completed project or facility being placed into service. Furthermore, if a Tribal government will have to obtain multiple registration numbers for multiple projects or segments of a project this could create confusion and be burdensome to Tribal governments when it comes time to claim the applicable tax credit each taxable year. This could be especially problematic if these registration numbers must be renewed annually or if an applicable credit is being claimed for a certain segment of a project that is not completed within the taxable year (therefore requiring an extension).

Since a Tribal government or entity must identify what type of year (e.g., a calendar or fiscal year) that a project registration number will be used to claim direct payment of an applicable credit, this could result in multiple credits being used for multiple segments of a project that do not fall within the same taxable year or require extensions into the following taxable year. This process should be streamlined to enable Tribal governments and entities to have a single registration number with some sort of identifier system of projects, the applicable credits, and the registration expiration dates housed under the Tribal government or entity registration number. Further, since the registration numbers and tracking of projects will be conducted through an online portal managed by IRS, Treasury must ensure that any issues with broadband connectivity or other issues arising with access to the online portal do not outright exclude or make Tribal governments and entities ineligible to claim the applicable credits for a clean energy project. Additionally, it

would be helpful for Treasury to provide Tribal governments and entities with confirmation that the direct payment of an applicable credit will be awarded during the taxable year that the project or facility is placed into service. This confirmation should include an estimate of the amount of the applicable clean energy tax credit(s) a Tribal government or entity will receive once we elect a direct payment of the applicable credit(s). This would assist Tribal governments and entities in our efforts to seek or attract additional financing and capital for project or facility completion, as well as indicate whether we should leverage additional federal funds to complete the clean energy project and claim the applicable tax credit(s).

Further Consultation and Guidance Required on Regulations for Tribal Nations and Entities Filing Annual Tax Returns to Claim Direct Payment of Applicable Tax Credits

Under the proposed regulations for implementing Section 6417 of the IRA, Section 1(F) outlines the process for filing annual tax returns to the IRS for purposes of claiming direct payment of a clean energy project's applicable tax credits. Specifically, the IRS is requiring that a tax-exempt entity would have to file a Form 990-T for purposes of an annual tax return to claim a project's applicable tax credits. Section 1(F) provides examples for territorial governments in the instances they would be required to file a Form 990-T or Form 1040, but no examples are provided for Tribal governments and entities. Since Tribal governments do not have experience filing these types of forms, additional guidance is required, and technical assistance must be provided to ensure that Tribal governments and entities are able to appropriately meet the requirements of obtaining applicable tax credits within the taxable year deadline timeframes for claiming direct payment for these credits. Additionally, the proposed rules are vague on what types of "instrumentalities" of a Tribal government are eligible to obtain the applicable tax credits. If this terminology is to remain, then Treasury, and in particular the IRS, must interpret it as broadly as possible. This interpretation must include Tribally owned, operated, or chartered corporations or utilities companies and Section 17 Tribal corporations to ensure that the intent of Direct Pay is realized in Indian Country via the diversity of instrumentalities that derive revenue for our governments.

Ensure Technical Assistance is Readily Available to Tribal Nations Electing Direct Payment of Applicable Tax Credits for Clean Energy Projects

Since passage of the IRA, as well as the Bipartisan Infrastructure Law (BIL), Tribal governments and entities have become eligible to receive historic investments for critical infrastructure projects. While these investments are long overdue and we appreciate the renewed focus on allocating these essential dollars to Indian Country, we still require significant investment and allocation of resources for technical assistance as well as the hiring of additional personnel to apply for these funds and manage these projects. In addition to these capacity challenges, we are also dealing with issues where these laws have made Tribal Nations eligible for certain programs and services that were initially created for state and local governments and, therefore, place burdensome and non-applicable eligibility and compliance and reporting requirements on Tribal Nations. These issues, in addition to the years long COVID-19 public health emergency response and recovery work, has contributed to fatigue among our personnel and further highlighted the disparities and inequities Tribal Nations experience compared to other units of government. We appreciate Treasury's ongoing focus to assist Tribal Nations and issue appropriate guidance and regulations for new Treasury programs and services that have been authorized or created through the COVID-19 relief laws as well as the recent BIL and IRA laws. USET SPF encourages Treasury to continue these practices, especially in developing further guidance and regulations for Tribal Nations and entities as well as technical assistance for Tribal Nations applying for direct payment of applicable tax credits.

In preparation for the upcoming pre-filing deadline(s) to register for direct payment of applicable tax credits, Treasury, and its agencies, must provide Tribal Nations with technical assistance throughout the pre-registration and reporting processes when we elect direct payment of these applicable clean energy tax

credits. This technical assistance and support should be carried out similar to the “Office Hours” Treasury held during implementation of programs under the American Rescue Plan Act. Further, Treasury should work with its federal partners to assist Tribal Nations in identifying additional resources to facilitate project and facility completion. In issuing guidance and regulations on the direct payment of applicable clean energy credits, Treasury should also identify specific points of contacts within the department and its agencies that Tribal Nations can approach to obtain technical assistance as well as other Treasury or other federal agency programs that can support Tribal Nations in developing and managing these projects. We hope to see an all of government approach to provide Tribal Nations with the technical assistance and additional resources required to ensure project success and sustainability.

Conclusion

USET SPF firmly believes that one of the foundational principles of economic sovereignty and self-sufficiency are core investments in sustainable infrastructure for our communities. As we continue our pursuits of Nation rebuilding, we look forward to continued dialogue and engagement with Treasury to ensure that Tribal Nations can fully utilize this opportunity to elect direct payment of tax credits to offset the costs of constructing clean energy projects on our lands. As a matter of its trust and treaty obligations to Tribal Nations, we anticipate Treasury will issue further Tribal-specific guidance and regulations that will support our efforts to fully leverage the applicable tax credits for clean energy development on Tribal Lands. These actions are necessary to ensure the success of the direct payment of these credits to Tribal Nations and fulfill the intent of the IRA and the economic and clean energy development goals of this Administration. We look forward to continued dialogue and coordination on these issues and reiterate our appreciation for Treasury’s efforts to work with, and provide technical assistance to, Tribal Nations so that we may fully utilize these new programs, services, and other opportunities to rebuild our Nations and Tribal economies. Should you have any questions or require further information, please contact Ms. Liz Malerba, USET SPF Director of Policy and Legislative Affairs, at LMalerba@usetinc.org or 615-838-5906.

Sincerely,



Chief Kirk Francis
President



Kitcki A. Carroll
Executive Director