



USET

SOVEREIGNTY PROTECTION FUND

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Chief Lynn Malerba
Treasurer
Point of Contact for Tribal Consultation
U.S. Department of the Treasury
1500 Pennsylvania Avenue
Washington, DC 20220

Dear Chief Malerba,

On behalf of United South and Eastern Tribes Sovereignty Protection Fund (USET SPF) we write in response to the Department of Treasury's (Treasury or the Department) "Dear Tribal Leader" letter initiating Tribal consultation on a Notice of Proposed Rulemaking (NPRM) entitled "Election to Exclude Certain Unincorporated Organizations Owned by Applicable Entities from the Application of Subchapter K" (REG-101552-24). The NPRM contains proposed amendments to the Income Tax Regulations (26 CFR part 1) under section 761(a) of the Internal Revenue Code (Code) to carry out the purposes of elective payment of applicable credits (Elective Pay) provisions under the Inflation Reduction Act of 2022 (IRA) under section 6417 of the Code. Treasury has issued this NPRM in response to comments requesting that partnerships owned either in whole or in part by applicable entities be eligible for elective pay. Through the NPRM, Treasury is proposing a process that will facilitate access to elective pay tax credits for applicable entities in a joint ownership arrangement while excluding from the benefit any non-applicable entities.

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

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).

Because there is Strength in Unity

Significance of NPRM

USET SPF is appreciative of additional clarity and a proposed process for permitting applicable entities within partnership arrangements to make elective payment elections for some tax credits. This clarification is important for Indian Country's access to elective pay, as many Tribal Nation entities engaging in the energy sector are partnership entities and often, it makes economic sense for a Tribal Nation to structure our enterprises in this manner. However, we are concerned that this process will add further complications for Indian Country on top of the detailed and novel process laid out under the elective pay final rule. As we have indicated in previous comments, in order for Tribal Nations to benefit from this IRA provision generally, processes for access must be streamlined and additional technical assistance offered. The proposed rule for partnerships would only exacerbate difficulties Tribal Nations are likely to have with the pre-filing process. This would run counter to the White House's directives in Executive Order (E.O.) 14112, which requires federal agencies to, "design application and reporting criteria and processes in ways that reduce administrative burdens, including by consolidating and streamlining such criteria and processes within individual agencies" and "take into account the unique needs, limited capacity, or significant barriers faced by Tribal Nations by providing reasonable and appropriate exceptions or accommodations where necessary." With this in mind, Treasury must ensure that it is extending maximum flexibility and facilitating Tribal Nation access to the funds it administers.

Need to Address Tax Status of Tribally Chartered Corporations

In lieu of another onerous process imposed upon Tribal Nations in order to access the benefits intended for us, we reiterate the need for Treasury to clarify the tax status of Tribally chartered corporations (TCCs). We continue to urge Treasury to issue guidance affirming that TCCs (whether wholly, jointly or majority owned) share the same tax status as the Tribal government, and therefore, are not subject to federal tax on earned income regardless of the location where that income is earned. This will not only facilitate access to elective pay tax credits, but it will also provide certainty in Tribal economic development and nation rebuilding, priorities long espoused by the Department.

For over 30 years, Tribal Nations have been awaiting confirmation that TCCs, as instrumentalities of Tribal governments, are not subject to income taxes. Uncertainty regarding the tax status of TCCs is one of the federal policy barriers faced by Tribal Nations as we seek to rebuild economies and generate governmental revenues. For well over two decades, Treasury and the IRS have stated their intent to issue formal guidance on the tax status of TCCs, but have not done so.

The issuance of this guidance is a matter of governmental parity. Tribal Nations should no longer be treated differently than state and local governments that regularly engage in business activities, which the IRS deems exempt, to fund programs and services. Indeed, the unique government-to-government and trust relationship that Tribal Nations have with the federal government—and now E.O. 14112—demands that the solution not limit, in any way, but rather expand the tax exemption for Tribal economic activity.

Inclusion of Additional Types of Partnership Activities

If Treasury intends to move forward with this NPRM, we urge the Department to expand eligible credit properties beyond those that are electricity generating. As was indicated during the Department's April Tribal consultation, Tribal Nations are interested in non-electricity generating projects, as well, including electric vehicle charging stations. Promoting all opportunities for Tribal Nations to access elective pay involves taking a broad approach to the application of this provision, such as accounting for circumstances in which Tribal Nations may seek partnership where other applicable entities may not.


Conclusion

We appreciate the opportunity to provide comment on this NPRM. 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. 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. 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