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Internal Revenue Service

CC: PA: LPD: PR (Notice 2022-51)

Room 5203

P.O. Box 7604, Ben Franklin Station

Washington, DC 20044

*SUBMITTED VIA THE FEDERAL eRULEMAKING PORTAL*

## **RE: BlackHawk Energy Corporation Comments on Notice 2022-51 – Credit Enhancements as Amended or Added by the Inflation Reduction Act of 2022**

Please allow this law firm to submit these comments on behalf of our client, the BlackHawk Energy Corporation, (“Company”) a company wholly owned by the Jicarilla Apache Nation (“Nation”), a federally recognized Indian Tribe located in Northern New Mexico. The company anticipates participating in the opportunities under the Inflation Reduction Act to assist the Company and the Nation in meeting its goal to maximize its self-determination as a sovereign tribal government. 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 the Company and the Nation’s goal.

The Company 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 prevailing wage, apprenticeship, domestic content, and energy community requirements for increased bonus credit amounts under those respective provisions of the Internal Revenue Code (“IRC”) as added or amended 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 we have 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 final rules or regulations pertaining to credit enhancements under the IRA. We look forward to submitting additional comments as proposed rules, regulations, and guidance are published.

Our requests to the Department of the Treasury in response to Notice 2022-51 are as follows: (1) expedited guidance should clarify that tribes may utilize “tribal prevailing wages” when the tribe works with tribally owned companies and employees to qualify for credit enhancements under the IRA; (2) Treasury and/or the IRS should encourage tribes to work with their Tribal Employment Rights Offices (“TERO”) to ensure tribal law requirements are met to the extent it is not superseded

by federal requirements; (3) Treasury should develop separate guidance and a help desk specifically for tribes, as certain requirements (i.e., prevailing wage requirements) apply to tribes differently than states and localities; and (4) “Energy Community” definitions should have specific designations for Indian Reservations; allowing any Indian Reservation with significant oil and gas, coal, uranium, and other energy extractive operations on the Reservation, as determined by tribal income, to qualify as an “Energy Community”. We reserve the right to submit additional comments in response to future Treasury and IRS guidance and regulations.

## I. BACKGROUND

BlackHawk Energy Corporation is a federal Section 17 corporation wholly owned and operated by the Jicarilla Apache Nation. The Company and the Nation have made significant investments in the energy economy and have contributed to the United States’ energy economy through their rich deposits of extraction of oil and gas. Both the Company and the Nation are considering additional opportunities in the renewable energy industry, either to support existing projects or as new projects.

## II. COMMENTS ON CREDIT ENHANCEMENTS

### Prevailing Wage

Section 45(b)(7)(A) of the IRC provides in general that a taxpayer must ensure that any laborers and mechanics employed by the taxpayer, or any contractor or subcontractor, are paid “wages at rates not less than the prevailing rates for construction, alteration, or repair of a similar character in the locality in which such facility is located as most recently determined by the Secretary of Labor in accordance with subchapter IV of chapter 31 of title 40, United States Code.”

Presently, there is confusion in Indian Country as to which prevailing wage requirements apply to projects that are administered by tribes. For example, in multiple tribal-specific meetings we have attended on the Inflation Reduction Act, a common recurring question among tribal leaders is *which* prevailing wage rate requirements should be applied (i.e., federal, state, tribal, local, etc.) to qualify for the full tax credit benefit. As a result, clarifying guidance on this question is necessary to help tribes ensure their projects are designed to maximize available tax credits.

As Treasury and the IRS are aware, Subchapter IV of chapter 31 of title 40 is commonly known as the Davis-Bacon Act, which may not be commonly known or immediately apparent to an individual planning a project that would qualify for enhanced tax credits. Importantly, federal regulations are clear that wage and labor standards of the Davis-Bacon Act do not apply to employees of Tribes and Tribal consortia.<sup>1</sup> However, the prevailing wage standards do apply to all other laborers and mechanics employed by contractors and subcontractors in the construction, alteration, and repair (including painting and redecorating of buildings and other facilities) in connection with an annual

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<sup>1</sup> 25 CFR § 1000.407; See also 42 CFR § 137.379 interpreting the application of the Davis-Bacon Act wage requirements to public health projects, “Davis-Bacon Act wage rates only apply to laborers and mechanics employed by the contractors and subcontractors (excluding Indian Tribes, inter-Tribal consortia, and Tribal organizations) retained by Self-Governance Tribes to perform construction. The Davis-Bacon Act and wage rates do not apply when Self-Governance Tribes perform work with their own employees.”

funding agreement.<sup>2</sup> Because of this distinction between tribal employees and employees of a contractor that is working with an tribe, please supply specific guidance that when tribes use tribal employees or tribal consortia to perform work, tribal wage rules meet the prevailing wage standard for this portion of the tax credit. Because tribes often separate their governmental and business functions by forming business entities, then hire these entities to perform necessary work, these entities should be held to the tribal standards, not other standards, since use of their own companies is preferred and contracting costs are retained within the tribal community. This guidance would assure tribes may accurately plan their credits when doing covered projects and will prevent costly mistakes.

A tribe's authority to enact and enforce employment preferences and wage standards is grounded in its inherent status as a sovereign government. This legal doctrine is a foundational principle of Federal Indian law and is supported by Supreme Court precedent. As an extension of this sovereign right, many tribes have established Tribal Employment Rights Offices ("TEROs") to help identify and protect the rights, resources, and opportunities of the tribe and its members as they apply to employment. As a result, Treasury and the IRS should accept documentation from a tribe's TERO to show compliance with any credit enhancement requirements that apply to tribes, and should assure any outside companies comply with tribal laws. Further, Treasury and the IRS should issue expedited guidance during this early planning stage to encourage the coordination between tribal governments, their respective TEROs and contractors to ensure projects are developed in a way that is most beneficial for the tribe.

Projects that are eligible for credit enhancements under the IRA will require significant and careful planning. Part of the planning process for tribes will include a determination of a project's financial feasibility, which factors in the application or availability of enhanced credits to ultimately reduce the overall cost. As acknowledged by Treasury, robust public engagement, clarity and certainty, and sound stewardship with tribes is necessary to ensure as many tribes benefit from the incentives provided by the IRA.

One of the overriding themes for the new tax credit incentives is the ability to "stack" credits. Generally, the amount of an enhanced tax credit is reduced substantially if Davis-Bacon wages are not paid during construction and operations for projects that are larger than 1MW. For example, section 45(b)(7)(B)(i) of the IRC provides a correction and penalty mechanism for failure to satisfy prevailing wage requirements. Because these potential penalties or credit reductions may disincentivize many tribes from participating, and there is presently confusion as to which prevailing wage rate requirements apply for tribes, Treasury and the IRS should consider developing separate guidance for tribes as Davis-Bacon wage requirements apply to tribes differently than states and other localities.

Because certain requirements (i.e., Davis-Bacon Act prevailing wage requirements) apply to tribes and their employees differently than states and localities, tribes should be afforded tailored guidance respecting tribal sovereignty and tribal law to reduce confusion and to ultimately promote the development of energy infrastructure in Indian Country. Like the guidance provided by Treasury on the State and Local Fiscal Recovery Funds made available under the American Rescue Plan Act,<sup>3</sup>

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<sup>2</sup> *Id.*

<sup>3</sup> See <https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments/state-and-local-fiscal-recovery-fund/tribal-governments>.

## Energy Community

Sections 45(b)(11), 48(a)(14), 45Y(g)(7), and 48E(a)(3)(A) provide energy community requirements that taxpayers must satisfy to qualify for increased credit amounts under those provisions of the Code. Section 45(b)(11)(2), defines the term energy community as “A metropolitan statistical area or non-metropolitan statistical area that has (or had, at any time after December 31, 2009) 0.17 percent or greater direct employment or 25 percent or greater local tax revenues related to the extraction, processing, transport, or storage of coal, oil, or natural gas (as determined by the Secretary), and has an unemployment rate at or above the national average unemployment rate for the previous year (as determined by the Secretary)”.

We believe that most Indian Reservations with energy extractive industries meet these definitions, if the whole Reservation is deemed an “area”. Allowing Indian Reservations to be divided up (or gerrymandered) and lumped into other non-metropolitan areas, will make determining which parts of Reservations are eligible difficult and will create confusion with off-reservation communities. As Reservations often bear the most extractive industries, off-reservation communities should not be eligible only because a portion of a reservation is included in the boundaries of a particular mixed reservation and non-reservation “area”.

We request that all Indian Reservations be deemed individual “non-metropolitan statistical areas” (as it is unlikely there is a metropolitan Indian Reservation with significant extractive energy industries). Then if a *tribal government* on an Indian Reservation has, over the past 5 years, derived 25% or greater tribal income from all combined energy industries on the Reservation; or if, reservation-wide, the energy industry employment is at least *0.17% of employed persons on the Reservation* related to the extraction, processing, transport, or storage of coal, oil, or natural gas; and the Reservation as a whole has an unemployment rate at or above the national average, we request that the entire Reservation be deemed an “energy community” which is eligible for the increased tax credit.

## Conclusion

Treasury and the IRS should issue tribal-specific guidance as it pertains to credit enhancements as amended or added by the IRC. Tribal-specific guidance could include a living frequently asked questions document, a distinct page for tribes online which houses up-to-date guidance and applications, and a help desk for tribes to call or send emails to. Simplified guidance which directly addresses tribal concerns will reduce confusion and help eliminate mistakes in project planning.

We remind Treasury and the IRS that the federal government has a trust obligation to tribes and that tribal consultation does not stop after we submit these written comments. In order to fulfill the federal government’s trust obligation to tribes, a continuous dialogue must exist via meaningful and robust government-to-government consultation to ensure tribes have a clear understanding on how to take advantage of tax credit enhancements, particularly when not all guidance applies to tribes.

We appreciate the opportunity to submit comments in response to Notice 2022-51 prior to the issuance of any guidance or proposed regulations. These tax credit enhancements represent a critical opportunity for the federal government to not only uphold its trust and treaty obligations to tribes, but to strengthen and modernize our Nation’s electric grid while promoting tribal energy resiliency and sovereignty.

Thank you for your consideration!

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Attorney