



# OCETI SAKOWIN POWER AUTHORITY

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United States Department of the Treasury  
Internal Revenue Service

Re: Comments of the Oceti Sakowin Power Authority in Response to:  
Notice 2022-49 Request for Comments on Certain Energy Generation Incentives  
Notice 2022-50 Request for Comments on Elective Payment of Applicable Credits and  
Transfer of Certain Credits  
Notice 2022-51 Request for Comments on Prevailing Wage, Apprenticeship, Domestic  
Content, and Energy Communities Requirements Under the Act Commonly Known as  
the Inflation Reduction Act of 2022

## COMMENTS OF THE OCETI SAKOWIN POWER AUTHORITY

The Oceti Sakowin Power Authority (OSPA) thanks the U.S. Department of the Treasury and the Internal Revenue Service (IRS) (for ease of reference, jointly “Treasury”) for this opportunity to submit comments on the implementation of relevant provisions of the Inflation Reduction Act of 2022 (IRA).

OSPA was formed by, and is 100% owned by, seven Sioux Tribes that share territory with the States of South and North Dakota: the Cheyenne River, Crow Creek, Flandreau Santee, Oglala, Rosebud, Standing Rock and Yankton Sioux Tribes. The name given to our organization by its member Tribes is the Oceti Sakowin, pronounced O-CHET-ee Sha-KO-wee – a Lakota phrase that means “The Great Sioux Nation.”

OSPA’s mandate is to develop utility-scale and community-scale renewable energy projects on Tribal lands, and over the last five years, OSPA has been developing two utility-scale wind farms – a total of 570 MW – on the Oglala Pine Ridge and Cheyenne River Reservations. The U.S. Department of Energy recognizes companies like OSPA as Tribal Energy Development Organizations. OSPA is one of only a handful of Tribally-owned energy developer/operators. As such, we understand that most federal agencies have not seen our kind of organization before, and may not be aware of the unique characteristics of Tribally-owned organizations. OSPA submits the comments below to help ensure that Tribal entities are expressly included in Treasury’s guidance, in order to eliminate any uncertainty or confusion over the application of the IRA, and to fully implement the intent of Congress.

## **GENERAL COMMENTS**

### **1. The New Ability of Tax-Exempt Tribal Developer/Operators to Obtain Direct Payment of § 45 Renewable Energy Production Credits, § 45Y Clean Electricity Production Credits, § 48 Energy Investment Credits and § 48e Clean Electricity Investment Credits Will Dramatically Stimulate Development of Tribal Renewable Energy Resources**

Prior to the enactment of the IRA, Tribal developers of projects eligible for Wind and Solar Production tax credits had no option but to sell the projects to tax credit investors. This ensured that Tribes and Tribal Energy Development Organizations (TEDOs) could only realize a fraction of the value of the renewable energy resources being developed on Tribal lands. The IRA provisions for direct pay of Production and Investment Tax Credits corrects this injustice, and now allows Tribes and TEDOs to serve as tax equity investors, and for the first time maintain ownership and realize the full value of their resources.

OSPA has been developing its wind farms for five years, under the old tax regime, and is one of only a handful of Tribal entities developing Tribal renewable energy resources. The IRA will allow OSPA to expand its operations, and hopefully will encourage the entry of other Tribes and TEDOs in developing clean energy projects. But because there have been so few Tribal developer/operators in the past, there is little industry experience with them, and no guidance on Tribal use of the Production and Investment Tax Credits. For these reasons, OSPA asks Treasury to provide guidance that specifically addresses how the new IRA provisions can be implemented for TEDO developer/operators. In particular, OSPA requests that Treasury address the unique issues involved when the Tribal developer/operator is a “Section 17” corporation, as discussed in the next section.

### **2. “Section 17” Corporations Are Unique to Tribes, and Are Not Well Understood in the Energy Industry – Treasury Guidance Should Expressly Reference Tribal Section 17 Corporations and Clarify How the Relevant Provisions of the IRA Apply to Them**

OSPA is a “Section 17” Corporation – a federally chartered corporate form unique to Tribes, established in the Indian Reorganization Act of 1934. This New Deal legislation was enacted to enable all Indian Tribes to form corporate entities that could do business with non-Indian corporations. The Section 17 form was designed to establish stable corporate alter egos for the Tribes – separate businesses that were not subject to the vicissitudes of Tribal politics, and that could engage in business while insulating the Tribes from direct business risk. In this way, reliable Tribal business partners could be established, while maintaining the ownership and independence of the Tribes. There are numerous examples of Section 17 Corporations that have been used successfully for economic development by Tribes across the country. This form of corporate organization is codified in 25 U.S.C. § 5124.

The OSPA Charter has been adopted by the seven Sioux Tribes that are the 100% owners of OSPA, and control the organization through the seven voting members of the OSPA Board of Directors – one Director per Tribe. The OSPA Charter was certified by the Assistant Secretary of the Interior on June 24, 2015. Under federal law and established court precedent, as a Section 17 Corporation, OSPA has the following attributes:

- **Holds Authority to Operate as an Independent Corporation:** Section 17 Corporations are empowered by statute to “purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law . . . .” 25 U.S.C. § 5124
  - The U.S. Bureau of Indian Affairs (BIA) confirms that this statutory language confers to the Section 17 Corporation rights “otherwise held exclusively by tribes,” and allows the Section 17 Corporation to “enter into contracts and agreements . . . without the approval of the Secretary of the Interior, who must normally approve any ‘agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years.’” BIA, Office of Indian Energy and Economic Development: *Tribal Economic Development Principles at a Glance Series: Choosing a Tribal Business Structure*, <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/ieed/bia/pdf/idc1-032915.pdf> at page 5 (fns. omitted).
- **Waives Sovereign Immunity So the Tribes Don’t Have To:** The Section 17 Corporation is an extension of the Tribe, and holds the same sovereign immunity status as the Tribe.
  - Congress understood that sovereign immunity from lawsuits and enforcement actions could present an insuperable barrier to Tribes conducting business with outside entities, but that Tribes were understandably hesitant to waive such immunity.
  - The U.S. Department of the Interior commissioned a handbook describing various Tribal corporate structures, and the handbook is featured on the Internal Revenue Service website. The handbook states that the Section 17 Corporate structure was established by Congress “to provide tribes with the ability to compete in the private business world. Section 17 . . . gives tribes the power to incorporate and enables them to waive sovereign immunity to facilitate business transactions, thereby fostering tribal economic development and independence.” [https://www.irs.gov/pub/irs-tege/tribal\\_business\\_structure\\_handbook.pdf](https://www.irs.gov/pub/irs-tege/tribal_business_structure_handbook.pdf) at page III-10.
  - There are dozens of examples of successful Section 17 Corporations active in oil and gas development, ranching and herd management, and other ventures. Most are extensions of single Tribes, but several multi-Tribal Section 17 Corporations – like OSPA – exist.

- Shares the Same Tax-Exempt Status as the Tribe: A BIA Handbook, posted on the IRS website, explains that Section 17 Corporations share the same tax-exempt status as their Tribes:

The Internal Revenue Service has concluded that federally recognized tribes are not subject to federal income taxes. . . . The IRS has taken this same approach to the taxation of income earned by Indian tribes, their unincorporated businesses and their federally chartered corporations because they share the same tax status as the tribe and as such are not taxable entities. \*\*\* In Revenue Ruling 81-295 and Revenue Ruling 94-16, the IRS ruled that any income earned by a federal corporation organized under Section 17 of the Indian Reorganization Act shares the same tax status as the tribe and is therefore not subject to federal income tax regardless of the location of the activities that generated the income.

BIA, Office of Indian Energy and Economic Development: *Tribal Business Structure Handbook*, [https://www.irs.gov/pub/irs-tege/tribal\\_business\\_structure\\_handbook.pdf](https://www.irs.gov/pub/irs-tege/tribal_business_structure_handbook.pdf) at page III-15 (footnotes omitted).

- Can't Be Dissolved Except by Act of Congress: In order to ensure stability, Congress held that a Section 17 Corporation can't be dissolved without Congressional approval – “Any charter so issued [by the Secretary of the Interior] shall not be revoked or surrendered except by Act of Congress.” 25 U.S.C. § 5124.
- Empowered to Negotiate, Execute and Fulfill Contracts without Additional Tribal or Federal Approvals: The OSPA Charter makes clear that OSPA is pre-authorized by its member Tribes to take all actions relevant to the development, construction and operation of wind farms and other renewable energy projects, without further approvals by Tribal or Federal Governments:

#### **ARTICLE VI – CORPORATE PURPOSES . . .**

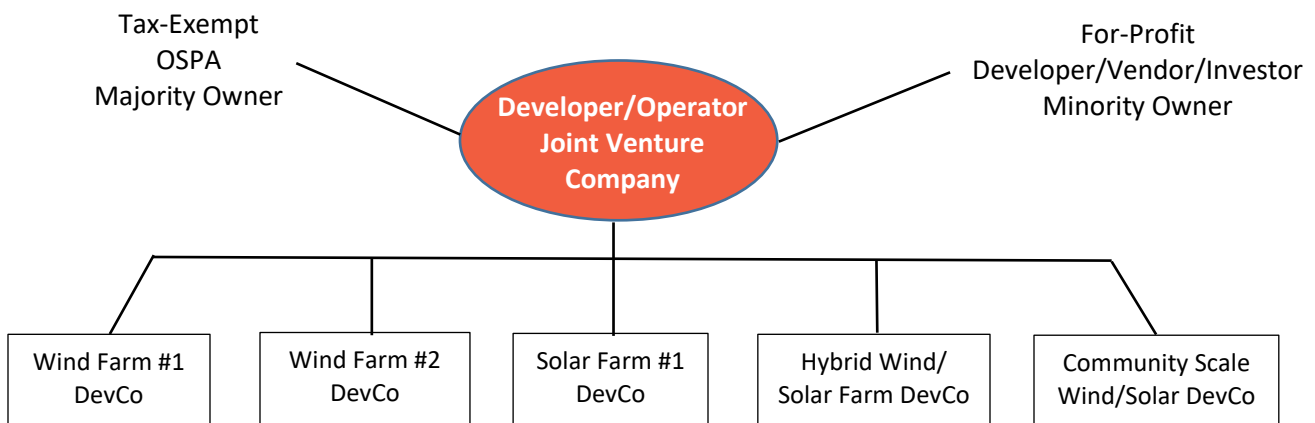
- B. To create a separate entity for the purpose of undertaking Projects that include the planning, financing, development, acquisition, construction, reconstruction, improvement, enlargement, betterment, operation or maintenance of power generation and transmission facilities; marketing and selling the generated power and related services; and other activities as directed by the Board of Directors on behalf of Member Tribes and their enrolled members in a manner consistent with the spiritual, environmental, social and cultural values of the Lakota, Dakota and Nakota Oyate; and
- C. To engage in any and all activities which may be necessary, useful or desirable for the furtherance, accomplishment, fostering or attainment of

the foregoing purposes, either directly or indirectly, either alone or in conjunction or cooperation with others, whether such others be persons or organizations of any kind or nature, including corporations, firms, associations, trusts, institutions, foundations or governmental bureaus, departments or agencies, Tribes or Tribally-created entities.

It has been OSPA’s experience that the industry at large – developers, vendors, banks and power buyers active in energy sector – are generally not familiar with the Section 17 corporate form.

**3. OSPA Shares the Same Tax-Exempt Status as Its Member Tribes, but Will Partner with For-Profit Co-Developers – Treasury Guidance Should Detail Which Corporate Structures Will Allow Tribal Developer/Operators to Elect Direct Payment of Production and Investment Tax Credits**

OSPA has considerable in-house expertise on issues regarding Tribal land use, Indian law, administrative law, Tribal, state and federal government relations, and community relations. OSPA benefits from the technical expertise of renewable energy developers, consultants and vendors – it has formed partnerships in the past, and will continue to do so in the future. A typical joint venture structure is depicted below:



OSPA anticipates that many TEDOs will form partnerships with for-profit developer/operators, vendors and/or investors. Tribes would benefit from Treasury guidance discussing how such partnerships can be formed while retaining the Section 17 corporation’s status as an applicable entity that can elect the direct pay provisions of § 6417.

#### **4. Six of OSPA's Seven Member Tribes – Like Approximately 300 Tribes Across the Country – Have Enacted Tribal Employment Rights Ordinances and Maintain Tribal Employment Rights Offices (TEROs)**

As sovereign nations, Tribes have the authority to regulate business activity and employment practices within the exterior boundaries of their reservations. Many Tribes have established business licensing requirements to conduct business activities on-reservation, including leasing property, providing services, and selling goods.

Approximately 300 Tribes, including six of the seven OSPA member Tribes, have passed Tribal Employment Rights Ordinances, which require all employers conducting work or doing business on the reservation to give preference to hiring qualified Native Americans and contracting to qualified Indian-owned businesses. See <https://cter-tero.org/tero-faq/> These Tribes have established TERO Offices to monitor and enforce the ordinance requirements (both use the acronym TERO).

TERO Offices have a general mission to create employment and training opportunities for Tribal members and other Native Americans living on reservation, and to eradicate discrimination against Native Americans in the workplace. Typical activities include:

- Setting Native American hiring and contracting targets for businesses and projects on-reservation;
- Maintaining a database of qualified Indian-owned businesses and individual Indians available for hiring;
- Requiring a minimum notification period for job openings to identify and refer qualified candidates;
- Monitoring a company's compliance with these requirements and collecting program fees;
- Holding recruiting events for large projects;
- Developing and running training programs to ensure Indian workers are prepared and qualified for upcoming job openings; and
- Providing ancillary support to Indian workers to ensure they can get to work sites and are properly attired and equipped.

While the specific requirements of each TERO program may vary, many were rooted in setting fair labor standards, including wage rates, and supporting workforce development for Tribal members and other Indians residing on and near reservations. It is not uncommon for TERO ordinances to reference the Davis-Bacon Act in establishing their wage standards.

TERO programs typically have rigorous compliance programs that require contractors to:

- Consult with the TERO Office and obtain approval on a compliance plan prior to initiating any work activity;
- Submit detailed reports on wage rates and hours, payrolls, training, hiring, terminations, and promotions and other key metrics on a weekly basis;
- Agree to periodic on-site inspections of the work site; and
- Participate in mandatory dispute-resolution processes, including procedures for filing complaints; hearings before TERO Commissions, Tribal Courts or other institutions; and appeals processes.

TERO Offices collect fees, generally ranging from 2% to 5% of construction contract amounts, to cover operational costs and program services. In addition, TERO Offices may require employee-specific work permits and impose monetary and administrative sanctions for violations of the TERO ordinance or regulations.

Tribal Employment Rights Ordinances are a very familiar concept to the U.S. Department of Labor. The Office of Federal Contract Compliance Programs (OFCCP) has a long history of working with TERO Offices and currently has a Memorandum of Understanding with the Council for Tribal Employment Rights (CTER) to foster cooperation and a mutually beneficial working relationship. The OFCCP and CTER also promote awareness of the employment rights for Native Americans who work for or seek job opportunities with federal contractors and sub - contractors. [https://www.dol.gov/sites/dolgov/files/ofccp/INAERP/files/INAERP\\_ESQA508c.pdf](https://www.dol.gov/sites/dolgov/files/ofccp/INAERP/files/INAERP_ESQA508c.pdf)

OSPA works closely with the TERO Offices of its member Tribes, as well as Tribal colleges. Worker training programs and internships with OSPA's technology partners have been and will continue to be established as a result of these consultations.

Tribes have enacted their TERO ordinances and maintain their TERO Offices in exercising their sovereignty and self-rule, and express the Tribe's determination in promoting the welfare of Tribal residents. TERO programs are well-established and compliance is rigorous.

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## **RESPONSES TO SPECIFIC NOTICE QUESTIONS**

### **NOTICE 2022-49: Request for Comments on Certain Energy Generation Incentives**

**QUESTION:** Notice 2022-49, pages 9-10:

*.01 IRA Changes to the Renewable Electricity Production Credit (§ 45)*

*(1)(b) The term “unrelated person” is used in section 45 (as well as other provisions discussed in this notice that were added or amended by the IRA). Is guidance needed to clarify the meaning of the term “unrelated person”? If so, how should that term be clarified?*

**OSPA COMMENT:** The two wind farms that OSPA currently has in development are utility-scale – 450 MW on the Cheyenne River Reservation and 120 MW on the Oglala Pine Ridge Reservation. OSPA intends to sell the power generated by these projects to large corporations or utilities, most likely out-of-state. However, OSPA would like to reserve the option of providing a small percentage of the power these wind farms generate to Tribal offices or other institutional or commercial buildings, which may be owned by the Tribe. The benefits of OSPA doing so are self-evident: these two Reservations are extremely isolated and grossly underserved by existing utilities.

OSPA notes, however, that the provision of such service would entail OSPA selling service to the Tribes that own it – which appears inconsistent with the “unrelated person” standard quoted above. OSPA asks if Treasury could provide guidance as to whether OSPA could provide a small portion of the power it will generate to a related buyer – its member Tribes – without jeopardizing its status as an applicable entity for purposes of electing direct pay of the Production and Investment Tax Credits.

### **NOTICE 2022-50: Request for Comments on Elective Payment of Applicable Credits and Transfer of Certain Credits**

**QUESTION:** Notice 2022-50, pages 15-16:

*.01 Elective Payment of Applicable Credits (§ 6417)*

*(1) What, if any, guidance is needed to clarify the meaning of certain terms in § 6417, such as applicable credit and excessive payment? Is there any term not defined in § 6417 that should be defined in future guidance? If so, what is the term and how should it be defined?*



**OSPA COMMENT:** It would be helpful to have further guidance regarding the meaning of “applicable credit.” A table showing examples of the “applicable credit” under different scenarios would be very helpful, including:

- Meeting and not meeting the prevailing wages and apprenticeship requirements;
- Meeting and not meeting the domestic content requirement for bonus credit; and
- Application of the elective pay phaseout when meeting and not meeting the domestic content requirement.

**QUESTION:** Notice 2022-50, pages 16-17:

.01 Elective Payment of Applicable Credits (§ 6417)

(5) *With respect to the definition of the term “applicable entity” in § 6417(d)(1):*

- a) *What, if any, guidance is needed to clarify which entities are applicable entities for purposes of § 6417(d)(1)(A), and which taxpayers may elect to be treated as applicable entities under § 6417(d)(1)(B), (C), or (D) for purposes of § 6417?*

**OSPA COMMENT:** As a Section 17 corporation that holds the same tax-exempt status as its owner Tribes, OSPA is an “applicable entity” under § 6417(d)(1)(A)(i). But as OSPA describes in Section 2 above, the industry is largely unfamiliar with the Section 17 corporate form, which is unique to Indian Tribes. It would be helpful if Treasury would confirm that Section 17 corporations such as OSPA, that share the same tax-exempt status as their Tribes, fully qualify as applicable entities for purposes of electing direct payment of the Production and Investment Tax Credits.

- b) *What types of structures are anticipated to be used by applicable entities, and taxpayers who have elected to be treated as applicable entities under § 6417(d)(1)(B), (C), or (D), when seeking to apply § 6417(a)?*

**OSPA COMMENT:** OSPA anticipates forming partnerships with investors and developers/operators for additional equity and technical expertise to develop, construct and operate utility-scale clean energy projects. OSPA would use the same or similar corporate structure to that illustrated in Section 3, page 5 above. In providing guidance on acceptable corporate forms, particularly involving tax-exempt companies like OSPA entering partnerships or joint ventures with for-profit companies, Treasury should provide ample flexibility for a Section 17 corporation to form a partnership that best suits its circumstances and needs, in order to develop and operate a qualified facility while maintaining its eligibility to elect direct pay of Production or Investment Tax Credits.

Because very few TEDOs have been developer/operators to date, flexibility is required

so that they can explore the best options with potential partners. However, OSPA strongly believes that in cases of corporate structures involving Tribes or TEDOs, the majority of both ownership and economic benefits must flow to the Tribes/TEDOs.

OSPA notes that at least one federal agency defines “majority Indian ownership” to include majority equity ownership and majority economic benefit, but also requires that, in the case of an LLC, the Tribe/TEDO must serve as the managing member. OSPA believes that this last requirement is unnecessary – because the managing member of an LLC is responsible for the day-to-day operation of the project, OSPA prefers that its expert technology partner serve in that capacity, at least in the immediate term while OSPA builds out its organizational capacity.

Finally, under the old tax regime, OSPA established several development companies as for-profit Delaware LLCs. Can OSPA convert these to tax-exempt LLCs in order to make them applicable entities for direct payment of Production Tax Credits under IRA § 6417?

- c) Is guidance needed to clarify the application of any Code provision other than § 6417 to an applicable entity, or a taxpayer electing to be treated as an applicable entity, that makes an election under § 6417(a)? If so, what is the Code provision and what clarification is needed?*

**OSPA COMMENT:** OSPA asks Treasury to provide guidance on the following question: If OSPA is partnered with a for-profit co-developer/operator or investor, and makes an election under § 6417(a), is it possible for the partnership to also seek to monetize depreciation under I.R.C. §§ 50, 168 or 470?

**QUESTION:** Notice 2022-50, page 19:

*.01 Elective Payment of Applicable Credits (§ 6417)*

- (13) Please provide comments on any other topics that may require guidance.*

**OSPA COMMENT:** As OSPA notes above, the § 6417 has opened the doors to a dramatic increase in Tribal/TEDO involvement in developing Tribal renewable energy resources. This is an incredibly exciting opportunity, but it is also unprecedented – we are basically starting from scratch. OSPA believes that the IRS Office of Indian Tribal Governments (ITG) can play an important role in helping Tribes/TEDOs create this new paradigm. If ITG is adequately staffed, it can also serve the vital role of conducting effective consultation with Tribes/TEDOs – the meaningful consultation required by the federal trust responsibility to Tribes necessarily entails timely and substantive engagement, tailored to the Tribes’ unique needs. It would be helpful if Treasury designated ITG as a point of contact for Tribes/TEDOs that wish to make the § 6417 election, either by

providing guidance themselves, or by facilitating the timely issuance of guidance from other offices within Treasury and IRS.

**NOTICE 2022-51: Request for Comments on Prevailing Wage, Apprenticeship, Domestic Content, and Energy Communities Requirements Under the Act Commonly Known as the Inflation Reduction Act of 2022**

**QUESTION:** *Notice 2022-51, page 12:*

**.01 Prevailing Wage Requirement**

*(5) Please provide comments on any other topics relating to the prevailing wage requirements for purposes of § 45(b)(7)(A) that may require guidance.*

**OSPA COMMENT:** As noted in Section 4, pages 6-7 above, six of OSPA’s seven member Tribes – including both Tribes with wind farms currently under development – have TERO ordinances and Offices, and those Offices actively review wages paid by companies doing business on the reservations. As OSPA discusses, Tribes have jurisdiction on their reservations, their TERO programs have goals that are consistent with the Prevailing Wage Requirement under the IRA, and the TERO programs are well-established and rigorously enforce compliance. OSPA proposes that, for any project or facility that is built on a reservation where a Tribal TERO ordinance and program are in place, if the TERO Office issues a written statement that compliance with TERO requirements has been achieved, Treasury will accept that statement as evidence that the project meets the prevailing wage rate standard under the IRA. OSPA would welcome Treasury guidance consistent with this proposal.

**QUESTION:** *Notice 2022-51, page 13:*

**.02 Apprenticeship Requirement**

*(4) Please provide comments on any other topics relating to the apprenticeship requirements in § 45(b)(8)(B) that may require guidance.*

**OSPA COMMENT:** As OSPA discusses in Section 4, pages 6-7 above, six of OSPA’s seven member Tribes – including both Tribes with wind farms currently under development – have TERO ordinances and Offices, and those Offices actively review compliance with training requirements by companies doing business on the reservations. As OSPA discusses, Tribes have jurisdiction on their reservations, their TERO programs have goals that are consistent with the Apprenticeship Requirement under the IRA, and the TERO programs are well-established and rigorously enforce compliance. OSPA proposes that, for any project or facility that is built on a reservation where a Tribal TERO ordinance and program are in place, if the TERO Office issues a written statement that compliance



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with TERO requirements has been achieved, Treasury will accept that statement as evidence that the project meets the Apprenticeship standards under the IRA. OSPA would welcome Treasury guidance consistent with this proposal.

The Oceti Sakowin Power Authority thanks the Department of the Treasury and the Internal Revenue Service for the opportunity to submit these comments.

Respectfully submitted,

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