



**PECHANGA INDIAN RESERVATION**  
*Temecula Band of Luiseño Mission Indians*

General Manager  
Pi-Ta Pitt

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November 3<sup>rd</sup>, 2022

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 AND U.S. CERTIFIED MAIL*

**RE: Pechanga Band of Indians Comments on Notice 2022-51 – Credit Enhancements as Amended or Added by the Inflation Reduction Act of 2022**

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 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 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 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)

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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; and (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. 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.

## II. COMMENTS ON CREDIT ENHANCEMENTS

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

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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 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.

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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."

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

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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> 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.

Sincerely,



Pi-Ta Pitt

General Manager

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<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>.

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