Rincon Band of Luiseño Indians

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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

RE: 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

The Rincon Band of Luiseño Indians ("Rincon" or the "Tribe") is pleased to submit these comments on a government-to-government basis regarding the guidance that the Treasury Department and Internal Revenue Service are preparing to help implement provisions of the Inflation Reduction Act. Rincon is a federally recognized Indian tribe that occupies a 4,665-acre reservation in northeastern San Diego County within the San Luis Rey Watershed. Established in 1875, the Rincon Band is one of six federally recognized Southern California tribes comprised of Luiseño people, which are considered one of the groups of the California Mission Indians.

The Rincon Band has established a series of strategic energy and resiliency goals, addressing the Band's energy sovereignty, self-sufficiency, sustainability, resiliency, and affordability. The Rincon Strategic Energy and Resiliency Plan describes a series of planning objectives that guide the Band's progress toward reliance on renewable energy for 80 percent of its requirements, half of which is to be from energy sources located on the Rincon Reservation.

Pursuant to its strategic energy and resiliency goals and Strategic Energy and Resiliency Plan, the Tribe is working to develop and implement several solar and energy storage microgrids that will serve several buildings and drinking water wells owned and operated by the Tribe on the Rincon Reservation and that help it serve its Tribal members. Because of its work in developing and implementing these clean and resilient energy projects for the benefit of its members, Rincon has a strong interest in ensuring that the guidance prepared under the Inflation Reduction Act adequately reflects its concerns as a federally recognized tribe that is attempting to cost-effectively implement these important projects.

To that end, when developing guidance related to the Inflation Reduction Act, the Treasury Department and IRS should be mindful of what the US Supreme Court calls the "undisputed existence of a general trust relationship between the United States and the Indian people" and the

"distinctive obligation of trust incumbent upon the Government in its dealings" with them. *United States v. Mitchell*, 463 US 206, 225 (1983). In Section 3 of the Tribal General Welfare Exclusion Act of 2014, P.L. 113-168, Congress explicitly recognizes that the obligation to uphold the federal government's "unique legal treaty and trust relationship with Indian tribal governments" extends to the IRS. Tribal General Welfare Exclusion Act of 2014, Pub. L. No. 113-168, § 3. The Treasury Department and IRS guidance should reflect that trust obligation.

For convenience and clarity, below are Rincon's comments related to 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. By separate letter, the Tribe is also submitting comments on Notice 2022-49 and Notice 2022-50.

.03 Domestic Content Requirement

> Question (1)(a): What regulations, if any, under 49 C.F.R. 661 (such as 49 C.F.R. 661.5 or 661.6) should apply in determining whether the requirements of §§ 45(b)(9)(B) and 45Y(g)(11)(B) are satisfied? Why?

The Secretary should exercise the authority granted under 49 CFR §§ 661.7(b) and (c) to provide waivers of the domestic content requirement in cases where either the domestic content requirement would be inconsistent with the public interest or where manufactured products are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality.

A primary goal of the Inflation Reduction Act is to encourage and incentivize rapid deployment of clean energy projects and to provide bonus incentives for constructing such projects with products manufactured in the United States. Currently, certain critical components of solar microgrid facilities, such as batteries and solar panels, are primarily manufactured outside of the United States and are in short supply from domestic sources. Taxpayers have a strong incentive to meet the domestic content requirement in order to receive the bonus credit and may be incentivized to delay projects until they can be confident that they will be able to satisfy this domestic content requirement and receive the bonus credit. The current shortage of critical solar products that are made in the United States could therefore result in taxpayers delaying projects, which would frustrate the goal of the Inflation Reduction Act to encourage rapid deployment of clean energy projects.

Providing waivers for a limited period of time for products that are not manufactured in the United States in sufficient quantities or quality would incentivize taxpayers to begin construction on clean energy projects immediately. If a limited-time-period waiver for a certain type of product is granted, the product described in the waiver should either be treated as produced in the United States or, assuming a taxpayer does not obtain some of the limited supply of that product for its project, at a minimum be excluded from the determination under Section 45(b)(9)(B)(iii) as to whether the applicable percentage of manufactured products of a facility are

produced in the United States. The authority to grant such waivers is already embedded within 49 CFR §§ 661.7(b) and (c), and because 49 CFR § 661 is generally made applicable to the domestic content requirement described in Section 45(b)(9)(B), the Secretary should have authority to grant waivers to the domestic content requirement for purposes of Section 45(b)(9) and corresponding provisions of other tax credit statutes that incorporate these domestic content requirements by reference. Such waivers would further the public interest within the meaning of 49 CFR § 661.7(b) because they would incentivize clean energy projects to be placed into service sooner than would be the case if the domestic content requirement were enforced without any waivers. Waivers would also be appropriate under 49 CFR § 661.7(c) because many critical materials are not currently produced in the United States in sufficient and reasonably available quantities that are of a satisfactory quality.

> Question (1)(c): Should the definitions of "steel" and "iron" under 49 C.F.R. 661.3, 661.5(b) and (c) be used for purposes of defining those terms under §§ 45(b)(9)(B) and 45Y(g)(11)(B)? If not, what alternative definitions should be used?

49 CFR §§ 661.3, 661.5(b) and (c) do not contain definitions of "steel" or "iron" but do contain important information regarding proper application of the domestic content requirements.

49 CFR § 661.3 does not contain a definition of either steel or iron but its Appendix A provides a definition of "steel and iron end products" that makes clear that when steel or iron is incorporated into specific items, those items are then end products and therefore manufactured products. In particular, 49 CFR § 661.3 Appendix A provides:

> (2) Steel and iron end products: Items made primarily of steel or iron such as structures, bridges, and track work, including running rail, contact rail, and turnouts.

49 CFR § 661.3 has definitions of manufactured product and manufacturing process that make clear that new end products such as steel and iron end products are manufactured products.

> Manufactured product means an item produced as a result of the manufacturing process.
>
> Manufacturing process means the application of processes to alter the form or function of materials or of elements of the product in a manner adding value and transforming those materials or elements so that they represent a *new end product* functionally different from that which would result from mere assembly of the elements or materials. "*Emphasis added".*

Accordingly, steel and iron end products, which for solar would include but not be limited to racking, carport system equipment and rebar for foundations, should be treated as manufactured products subject to the 40% test.

Similarly, 49 CFR § 661.5(b) does not contain a definition of steel and iron. Instead, it provides a statement regarding steel and iron manufacturing processes taking place in the United States.

49 CFR § 661.5(c) then makes clear that the steel and iron requirements do not apply to steel or iron used as components or subcomponents of manufactured products. 49 CFR § 661.5(c) provides.

> The steel and iron requirements apply to all construction materials made primarily of steel or iron and used in infrastructure projects such as transit or maintenance facilities, rail lines, and bridges. These items include, but are not limited to, structural steel or iron, steel or iron beams and columns, running rail and contact rail. *These requirements do not apply to steel or iron used as components or subcomponents of other manufactured products* or rolling stock, or to bimetallic power rail incorporating steel or iron components. "*Emphasis added".*

Accordingly, the steel and iron that are components or subcomponents of manufactured products, such as racking, carport system equipment and rebar for foundations, should not be subject to the test for steel and iron but instead should be included in the 40% test for manufactured products.

> Question (1)(d): What records or documentation do taxpayers maintain or could they create to substantiate a taxpayer's certification that they have satisfied the domestic content requirements?

Taxpayers should be able to rely on certifications provided by contractors, suppliers, or manufacturers regarding the origin of steel, iron, or manufactured products purchased by the taxpayer, without requiring the taxpayer to make any further inquiry. If a taxpayer receives a certification from a contractor, supplier, or manufacturer that certifies that any steel, iron, or manufactured product sold by such person to the taxpayer was produced in the United States within the meaning of Section 45(b)(9) and the guidance under that section, the taxpayer should be able to rely on such certification for purposes of determining whether the domestic content requirement of Section 45(b)(9) has been met. The form of the certification from the contractor, supplier or manufacturer should clearly indicate to the recipient that the steel, iron, or manufactured products described in the certification were produced in the United States within the meaning of Section 45(b)(9) and the guidance under that section. The guidance issued by the Treasury Department should provide a form certification that contractors, suppliers, or manufacturers can use to ensure compliance with these requirements, potentially similar to the form certification set forth in 49 CFR § 661.6.

> Question(2)(a): Does the term "component of a qualified facility" need further clarification? If so, what should be clarified and is any clarification needed for specific types of property, such as qualified interconnection property?

Components of a qualified facility should include an appropriate optional *de minimis* exception that allows the exclusion of manufactured products below a certain threshold (e.g., 3 percent or 1 percent) to reduce the burden of collecting domestic content information on small component products.

Likewise, the components of a manufactured product should include an appropriate optional *de minimis* exception that excludes components of the manufactured product below a certain threshold (e.g., 3 percent or 1 percent) to reduce the burden of collecting domestic content information on small components.

> Question(2)(c): Does the term "manufactured product" with regard to the various technologies eligible for the domestic content bonus credit need further clarification? If so, what should be clarified? Is guidance needed to clarify what constitutes an "end product" (as defined in 49 C.F.R. 661.3) for purposes of satisfying the domestic content requirements?

Manufactured product is defined in 49 CFR § 661.3 and that definition appears to be relevant to the Inflation Reduction Act. As noted above, 49 CFR § 661.3 defines manufactured product and manufacturing process as used in the definition of manufactured product as follows:

> Manufactured product means an item produced as a result of the manufacturing process.
>
> Manufacturing process means the application of processes to alter the form or function of materials or of elements of the product in a manner adding value and transforming those materials or elements so that they represent a *new end product* functionally different from that which would result from mere assembly of the elements or materials. *"Emphasis added*".

The Appendix A to 49 CFR § 661.3, in turn, provides definitions of representative end products, including steel and iron end products. As noted above, the definition of steel and iron end products is as follows:

> (2) Steel and iron end products: Items made primarily of steel or iron such as structures, bridges, and track work, including running rail, contact rail, and turnouts.

This definition includes basic components of transportation systems such as running rail and contact rail as part of track work. Similarly, steel and iron manufactured end products for solar include among others racking, carport system equipment and rebar for foundations. Accordingly, these end products should be properly treated as part of the 40% manufactured products test.

Question 2(d): Does the adjusted percentage threshold rule that applies to manufactured products need further clarification? If so, what should be clarified?

The adjusted percentage threshold rule should be clarified so that it can be satisfied using both the cost of manufactured products that are produced in the United States in accordance with 49 CFR § 661.5(d) and, for manufactured products that are not considered produced in the United States under 49 CFR § 661.5(d), the cost of the components of those manufactured products that are mined, produced or manufactured in the United States.

This interpretation is consistent with Section 45(b)(9)(B)(iii), which provides that "the manufactured products which are components of a qualified facility upon completion of construction shall be deemed to have been produced in the United States if not less than the adjusted percentage (as determined under subparagraph (C)) of the total costs of all such manufactured products of such facility are attributable to manufactured products (*including components*) which are mined, produced, or manufactured in the United States. *"Emphasis added"*.

In fact, unless components of a manufactured product can separately count toward the applicable percentage of what is considered mined, produced or manufactured in the United States, there would be no reason to include the language "including components" in Section 45(b)(9)(B)(iii). This is because 49 CFR § 661.5(d) already explicitly states that components are considered when determining whether a manufactured product is considered produced in the United States (stating that in addition to the requirement that "[a]ll of the manufacturing processes for the product must take place in the United States," there is a separate requirement that "[a]ll of the components of the product must be of U.S. origin"). Accordingly, in order to give meaning to all of the words in Section 45(b)(9)(B)(iii), it is necessary for the Treasury Department and IRS to include components that are part of manufactured products that are not considered produced in the United States under 49 CFR § 661.5(d) to count toward the adjusted percentage threshold.

For example, if a facility includes a $1,000 battery as one of its components, and the battery is comprised of both foreign and domestic components, the battery would not be considered to be produced in the United States under 49 CFR § 661.5(d) because less than all of its components are of U.S. origin. However, if $450 of the total cost of the battery is attributable to domestic components and $550 of the total cost of the battery is attributable to foreign components, the owner of the facility should be able to apply $450 of the battery costs toward the adjusted percentage threshold for purposes of Section 45(b)(9)(B)(iii). If the battery described in this example were the only component of the facility, and the applicable percentage for such facility is 40%, then the domestic content requirement should be satisfied for this facility because not less than 40% of the total costs of all manufactured products of the facility are attributable to manufactured products (*including components*) that are produced in the United States within the meaning of Section 45(b)(9)(B)(iii).

Question (2)(e): Does the treatment of subcomponents with regard to manufactured products need further clarification? If so, what should be clarified?

Consistent with Section 45(b)(9) and 49 CFR § 661, anything that is a subcomponent should be excluded from the domestic content evaluation.

Section 45(b)(9)(B) references 49 CFR §,661 with respect to determining whether production occurred in the United States and specifically cites to 49 CFR § 661.5, which provides in part:

> A component is considered of U.S. origin if it is manufactured in the United States, *regardless of the origin of its subcomponents. "Emphasis added"*.

Likewise, while Section 45(b)(9)(B) references manufactured products and components, it does not include subcomponents.

Accordingly, the origin of all subcomponents should be disregarded for purposes of determining whether a component is considered of U.S. origin.

Question (5): Please provide comments on any other topics relating to the domestic content requirements that may require guidance.

The guidance should clarify that the amount of the applicable credit under Section 6417 includes the full 10 percent bonus credit in the case of an applicable entity that meets the domestic content requirements under Section 45(b)(9) and makes an election under Section 6417 with respect to an investment tax credit under Section 48. Section 45(b)(10) provides rules for reducing the amount of a production tax credit eligible for elective payment under Section 6417 in cases where the domestic content requirement is not met. In the case of the investment tax credit, Section 48(a)(13) provides that "[i]n the case of a taxpayer making an election under section 6417 with respect to a credit under this section, rules similar to the rules of section 45(b)(10) shall apply." These rules should clarify that when the domestic content requirement is met, the full 10 percent domestic content bonus credit shall be allowable in determining the amount of the applicable credit under Section 6417 with respect to any investment tax credits under Section 48.

Thank you for your consideration of these comments, which are very important to the Tribe's clean energy and resiliency efforts on its Reservation.

Sincerely yours,

RINCON BAND OF LUISEÑO INDIANS

Bo Mazzetti
Tribal Chairman

cc: Denise Turner Walsh, Attorney General, Rincon Band of Luiseno Indians
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