Federal Response to Tribal Consultation Summary
Prevailing Wage and Apprenticeship Requirements under the Inflation Reduction Act of 2022
June 18, 2024

Introduction

On September 25, 2023, the Department of Treasury (Treasury) held a consultation on a Notice of Proposed Rulemaking (NPRM) for the Increased Credit or Deduction Amounts for Satisfying Certain Prevailing Wage and Registered Apprenticeship Requirements under the Inflation Reduction Act of 2022 (IRA). The proposed regulations cover certain prevailing wage and registered apprenticeship (collectively, PWA) requirements under section 45 of the Internal Revenue Code (Code) applicable to the renewable electricity production tax credit under section 45 (section 45 credit), as well as other clean energy tax incentives under the Code as amended or added by the IRA. Several of these clean energy tax incentives are increased 5 times if PWA requirements are met.

Specific questions can be found in the Dear Tribal Leader Letter that was published on August 29, 2023. Treasury held the consultation virtually to maximize Tribal participation across Indian Country. Approximately 65 attendees joined the consultation. The comment period ended on October 30, 2023. Treasury received 10 written comments.[1] On June 18, 2024, Treasury published the Final Rule.[2]

Pursuant to Treasury's Tribal consultation policy, below is a summary of the feedback received in Tribal consultation and the federal response to this feedback.

Broad Feedback

1. Cost of Clean Energy Development

Commenters explained that their interest in IRA tax credits is driven by the need for energy reliability in the face of climate change which is significantly impacting Tribal communities. Implementing this energy transition is costly and the IRA tax credits would provide critical funding to make clean energy adoption affordable. Because clean energy projects are costly and time-consuming to design and implement, Tribes asked for as much forward guidance and clarity as possible to avoid situations where a developed project that depends on IRA tax incentives, including incentives tied to the PWA requirements, does not meet the requirements. Commenters

[1] Note: Some Tribes submitted PWA comments during the elective pay consultation period. Their PWA feedback is incorporated into this summary.

[2] *See* "Increase Amounts of Credit or Deduction for Satisfying Certain Prevailing Wage and Registered Apprenticeship Requirements" Federal Register 2024-13331 (June 25, 2024). https://www.federalregister.gov/public-inspection/2024-13331/increased-amounts-of-credit-or-deduction-for-satisfying-certain-prevailing-wage-and-registered

also noted that the rural locations and size of Tribal clean energy projects mean that the projects do not benefit from economies of scale and face high transportation and transaction costs compared with qualifying projects in urban settings.

Federal Response: We appreciate commenters sharing feedback regarding the challenges Tribes and rural communities encounter in clean energy development. We also understand the importance of guidance certainty and have strived to provide initial guidance while also receiving Tribal and public feedback to inform final guidance.

2. Equity

Commenters further expressed the importance of IRA tax credits in building energy and economic equity on Tribal lands, which have experienced natural resource extraction, land diminishment, and hazardous waste disposal. Commenters highlighted that clean energy development includes economic development and that Tribal apprenticeship programs will be driven by Tribal incentives to build workforces both for clean energy development and Tribal economies more broadly. Like other governments, Tribes aim to exercise sovereignty by establishing wage and apprenticeship standards that are aligned with Tribal economic development goals and appropriate for Tribal economies. Building a workforce is a significant focus for many Tribes, with apprenticeship programs and wage standards serving as two tools toward that end.

Federal Response: We appreciate Tribes sharing their goals for clean energy workforce development and our response below seeks to incorporate Tribal requests to the extent permitted by the statute.

3. Tribal Sovereignty

Commenters emphasized the importance of Tribal sovereignty in the ability to set prevailing wage and apprenticeship requirements in Tribal areas rather than depend on rates and requirements set by the Department of Labor (DOL) or other local jurisdictions. Commenters expressed interest in establishing Tribal apprenticeship programs as a way to exercise Tribal sovereignty, support Tribal economic development, and to make the most of IRA tax incentives. Commenters were interested in establishing Tribal programs rather than working through federal or state processes.

Rates set by other jurisdictions may not take Tribal economies into consideration. Commenters noted that rural Tribes may find themselves subject to DOL standards that are based on regional urban centers with very different economic conditions compared with Tribal lands. These added costs exacerbate the high labor costs for the kinds of smaller clean energy projects that the IRA incentivizes for Tribal communities.

Federal Response: We understand the importance of Tribal sovereignty for Tribal self-governance and self-determination and, where statutorily possible, incorporated those principles into our final rule as described below.

Tribal Responses to Consultation Questions

1. **To the extent that Indian Tribes request the application of Tribal prevailing wage standards rather than Davis-Bacon prevailing wage standards, please explain the reason for this request and the challenges, if any, experienced by Indian Tribes in complying with Davis-Bacon standards.**

Commenters emphasized that as sovereign nations, Tribes have the right to determine wage and labor standards on their own lands just as other sovereigns can make such determinations in their own territory. Commenters expressed that requiring Tribes to comply with local standards or federal standards impedes such sovereignty. Some Tribes shared that they have Tribal Employment Rights Offices (TERO) which already set prevailing wages for construction employment on Tribal lands and requested that these offices be able to set prevailing wages for the IRA. Commenters expressed that proposed PWA record-keeping requirements will impose additional costs on Tribes and highlighted that Tribes have limited staff resources and will not have an avenue to obtain technical assistance for this tax credit. Commenters also expressed that Davis-Bacon wage scales, as defined at the county level, are ill-fitting for Tribal workforces that typically are in more rural settings than county-level population centers.

Federal Response: We appreciate commenters sharing the reasons for Tribe's adoption of their own wage standards and their administrative resource constraints. This feedback was taken into consideration in Treasury's PWA Final Rule which provides two Tribal special rules which are described in the below sub-section.

(a) To your knowledge, do other federal programs that statutorily require application of Davis-Bacon prevailing wage standards permit Indian Tribes to set their own prevailing wage standards?

As examples of federal programs recognizing prevailing wage standards set by Tribes, commenters cited these examples where a statute directs the federal government to acknowledge a Tribal right to set prevailing market wage for construction projects funded with federal dollars:

- The Department of the Interior, as authorized under the Indian Self-Determination Act, 25 USC 450(e);
- The Department of Housing and Urban Development, through the Native American Housing Self-Determination Act (NAHASDA), 25 USC 4114(b); and
- The Indian Health Service, through 42 CFR § 137.379.

Commenters cited the Department of Commerce, Economic Development Administration and the National Telecommunications and Information Administration as examples of federal agencies acknowledging the rights of Tribal Employee Rights Office ordinances to set preference requirements and Tribal prevailing market wage for employment on Tribal lands.

Commenters also highlighted that both the Department of Labor and the Department of Transportation clarify that Davis-Bacon wages do not apply to employees of the Tribe under 49 CFR 29.524 and 49 CFR § 29.524.

Commenters highlighted that DOL has published proposed rules for wage determinations that will use urban areas in counties when making determinations for surrounding rural areas. They expressed concern that this rule will work against rural Tribes and could result in higher prevailing market wages for Tribes that are not consistent with, or are out of market for, other federally funded projects on Tribal lands. This may also result in substantially higher costs to build smaller-scale renewable energy projects on Tribal lands, potentially making these projects economically non-viable (even with the increased tax credit) as the labor costs could exceed that of utility-scale projects.

To address these issues, commenters proposed in the alternative, that if the IRS lacks legal authority to allow compliance with Tribal prevailing market wages to meet IRA requirements, the IRS should define the term "locality" to include Tribal lands (reservation lands, trust lands, and allotted lands). Commenters explained that this would allow Tribes to submit a request to DOL for a supplemental wage determination to set appropriate prevailing market wages for a Tribe.

Federal Response: In response to Tribal consultation requests, we extensively reviewed the practices of other agencies regarding the adoption of Tribal prevailing wage standards for federally funded projects. This review highlighted that where Tribal prevailing wage standards have been authorized, the applicable statute ordinarily contains this authorizing authority. Here, in contrast, the applicable PWA statute requires taxpayers to comply with the application of prevailing wage and apprenticeship requirements to qualify for an increased credit amount. The term "taxpayer" includes elective pay-eligible entities such as Tribes. As a result, Treasury does not have the statutory authority to substitute the application of Tribal prevailing wages for compliance with Davis Bacon Act (DBA) prevailing wage requirements.

However, in response to Tribal consultation feedback and in accordance with Executive Order 14112, the final regulations provide two special rules that apply to Indian Tribal governments (including a subdivision, agency, or instrumentality of an Indian Tribal government).

Force Account Exception: First, the final regulations provide that an Indian Tribal government, as defined in section 30D(g)(9) of the Code, is excepted from the Prevailing Wage Requirements under the IRA with respect to laborers and mechanics that are employees, within the meaning of section 3121(d)(2), of the Indian Tribal government. As stated in some comments from Tribes, the DOL provides an exception from the DOL prevailing wage rates for work done by Tribal governments using their own employees. Specifically, under the DBA, a government agency may perform construction work in-house with its own employees rather than contract out the work. Work performed by these employees generally is not subject to the DBA requirements because governmental agencies are not considered contractors or subcontractors under the DBA.

This is known as the force account exception. The DOL has explained that in cases in which an Indian Tribal government performs work with its own employees, the force account exception to the DBA applies and the Tribal government is not required to pay DOL-determined prevailing wages for work done by its own employees. Tribes historically have relied on this exception. Under these final regulations, Tribes may continue that practice for purposes of the Prevailing Wage Requirements under the IRA.

Adoption of Single Rate on Indian Lands: Second, the Treasury Department and the IRS recognize that Tribal lands generally are not coextensive with a single geographic area for which the DOL may have made an applicable wage determination. Comments from Tribes requested that the final regulations define the term "locality" to include Tribal lands as a separate category to allow Tribes to submit a request to the DOL for a supplemental wage determination for specified Tribal lands. However, defining locality in this way would require that the DOL establish a new administrative process to implement a unique wage determination for Tribal lands; that process is outside of the authority of the Treasury Department and the IRS. Thus, these final regulations do not change the definition of locality to include Tribal lands as a separate category. However, recognizing that Tribal lands are sovereign territories that may encompass or overlap with numerous geographic areas, the final regulations provide a special rule for Indian Tribal governments that perform construction, alteration, or repair of a facility on Indian land, as that term is defined in 25 U.S.C. 3501(2).

Specifically, if the Indian land encompasses or overlaps more than one geographic area with respect to which the DOL has made an applicable wage determination, then the Indian Tribal government may choose the applicable wage determination for any one of those geographical areas and apply that applicable wage determination for work performed on any qualified facility that is located on the Indian land. If the Indian Tribal government chooses to use this alternative applicable wage determination, it must maintain and preserve records sufficient to document the applicable prevailing wage for each laborer, contractor, or subcontractor with respect to each qualified facility on Indian land. This rule applies to a qualified facility on Indian land that is directly owned by an Indian Tribal government (including a subdivision, agency, or instrumentality of an Indian Tribal government), as well as a qualified facility owned through joint ownership arrangements that involve an Indian Tribal government (including a subdivision, agency, or instrumentality of an Indian Tribal government).

This rule is intended to ease the administrative burden on Indian Tribal governments because they can use a single applicable wage determination for all projects on Indian land. In addition, this rule is intended to address Tribal concerns that the DOL prevailing wage rates are often defined at the county level, which may include higher-cost urban areas and otherwise could negatively impact projects on Indian land.

2. Under section 45(b)(8)(B), the labor hours requirement is subject to the requirement

for apprentice-to-journeyworker ratios of the DOL or the applicable State apprenticeship agency (ratio requirement), as well as the requirement to employ a certain number of apprentices in relation to journeyworkers (participation requirement).

(a) Do Indian Tribes presently participate with either the DOL or State apprentice programs?

Commenters expressed that most Tribes do not participate in DOL or state apprenticeship programs. This is because state programs impact Tribal sovereignty and are usually geographically inaccessible. For example, one Tribe shared that their Tribal lands are over 100 miles away from the closest state apprenticeship program. This distance means Tribal members are unable to travel to participate in off-reservation programs.

Another commenter shared that their Tribe has a TERO program that is responsible for identifying workforce needs and recruiting workers of all skill levels for construction projects on the Tribe's lands. This Tribe is located over 50 miles from the closest state apprenticeship program for construction laborers or electricians, and the Tribal members are unable to travel over 100 miles roundtrip to participate in these off-reservation programs.

Federal Response: Treasury appreciates Tribal feedback regarding the importance of Tribal sovereignty to apprenticeship programs. The National Apprenticeship Act (NAA) of 1937 (29 U.S.C. 50) authorizes the Secretary of Labor to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices. The Treasury Department and the IRS have consulted with the DOL OA and understand based on that consultation that although neither the text of the NAA nor the content of the NAA's implementing regulations at 29 CFR parts 29 and 30, explicitly addresses Indian Tribes, Indian Tribal governments may sponsor registered apprenticeship programs and obtain registration of such a Tribal apprenticeship program directly from DOL. Accordingly, Indian Tribal governments may register their own apprenticeship programs through the Department of Labor's Office of Apprenticeships. Taxpayers, contractors, and subcontractors can find more information on guidance issued by the DOL OA at *https://www.apprenticeship.gov/about-us/legislation-regulations-guidance*. For information on the apprenticeship system, please visit: *https://www.apprenticeship.gov/about-us/apprenticeship-system*.

(b) Do Indian Tribes have their own apprenticeship programs that integrate DOL standards?

The majority of Tribes expressed that they do not have registered apprenticeship programs because they do not have the resources to develop such programs. Other Tribes noted that it was unclear whether Tribes, like states, can develop and certify their own apprenticeship programs rather than being required to utilize the DOL approval process. These commenters requested that Treasury and IRS review DOL apprenticeship processes that relate to Tribal apprenticeship

programs and report on any administrative burdens and/or other barriers that may disproportionately prevent Tribes from fulfilling apprenticeship requirements.

Federal Response: Our understanding is that under existing law, registered apprenticeships are either certified through a state program or the federal government. As explained above, our Final Rules confirm that Tribes may seek federal certification through DOL.

(c) Subject to the statutory requirements of section 45, which requires compliance with DOL apprenticeship requirements, what questions or comments do you have regarding the apprenticeship requirements proposed in the NPRM?

Commenters expressed that many Tribes have their own Tribal employment preference programs to support Tribal members in employment. They highlighted that it would be unreasonable to rely on state or federal apprenticeship programs that have no ties to a Tribal community and require travel for long distances.

Commenters also stated that the proposed rule imposes unnecessary burdens that will disproportionately impact Tribes that have limited staffing capacity. Commenters highlighted that the proposed rule states that a taxpayer will be required to submit written requests to registered apprenticeship programs - and acknowledges that it could be required to submit requests to multiple apprenticeship programs based on the type of occupations that are involved in the project. They highlighted that this level of apprenticeship coverage is challenging and asserted that it is beyond what is required by the statute. Commenters stated that the law only requires a certain number of apprentices based on the total labor force and does not require an apprentice for each position, which they stated is implied by the IRS requiring the taxpayer to submit multiple requests.

Commenters stated that the IRS acknowledges that "it may be possible for a taxpayer to meet all of its Labor Hours Requirement from one apprenticeship program" but then asserts that "it is likely that given the multiple occupations involved in the construction, alteration, or repair of a qualified facility, the taxpayer would need to request apprentices from more than one apprenticeship program in order to satisfy the Labor Hours Requirement and the Participation Requirement with respect to that facility."

Commenters stated that if a Tribe can meet all of its statutory requirements using one or two apprenticeship programs, that should be sufficient. The Tribe should not have to search across non-Tribal areas of their regions, in many cases large distances away from the location of the Tribal project(s), to meet the Good Faith Exception.

Commenters also stated that the IRS' position that the Good Faith Exception will not be met if an apprenticeship program can meet some but not all apprenticeship needs is extremely unreasonable for Tribes in rural areas that may have no/limited access to a single apprenticeship program, let alone multiple apprenticeship programs. Commenters requested that the IRS allow a Tribe to meet the Good Faith Exception so long as they make a good faith effort to work with local apprenticeship program(s). If the local apprenticeship program(s) cannot provide more than 50% of the requisite number of apprentices, then this Good Faith Exception should be met.

Commenters requested that if the Tribe makes a good faith effort to contact the apprenticeship program, and there is no substantive response, then the Good Faith Exception should also be met. The Tribe should not have to repeatedly attempt to engage said apprenticeship program(s) for support.

Federal Response: With respect to the Apprenticeship Requirements, the Treasury Department and the IRS recognize that there may be a limited number of registered apprenticeship programs with an area of operation that includes the geographic location of a facility located on Tribal lands. The final regulations confirm that if there is no registered apprenticeship program with a geographic area of operation that includes the location of the facility, taxpayers will be deemed to satisfy the Good Faith Effort Exception for the apprentices they (or the contractor or subcontractor) would have requested for that occupation. Additionally, as explained in Section VIII.B.1. of the final regulations' Summary of Comments and Explanation of Revisions, Treasury has clarified the scope of the Good Faith Effort Exception with respect to situations in which only part of the request is denied.

3. What other questions or comments, if any, do Indian Tribes have regarding any of the other proposed rules in the NPRM?

One Megawatt Exception and Exclusion of Energy Storage: A commenter noted that under IRC § 48(a)(9)(B)(i) and subsequent IRS guidance, a project is eligible for the 30 percent investment tax credit ("ITC") if the project has a "maximum net output of less than one megawatt of electrical (as measured in alternating current) or thermal energy" (the "1 MW Exception"), the project began construction prior to January 29, 2023, or if the project satisfies requirements related to prevailing wage and registered apprenticeships. Proposed § 1.48-13(b)(1) states that a qualified energy project satisfies the requirements for the 30 percent ITC if the project is one with a "maximum net output of less than one megawatt (as measured in alternating current)" ("AC").

The commenter expressed that there is no definition within proposed § 1.48-13 as to what "maximum net output" means for purposes of the ITC. The NPRM states that "[a] qualified facility's nameplate capacity determines whether the facility meets the One [MW] Exception." The commenter expressed that proposed § 1.48-13(b) does not clarify how that nameplate capacity is calculated, especially with regards to microgrids that combine solar generation with energy storage.

The commenters also stated that while proposed § 1.45 of the NPRM provides clarity regarding how to determine the maximum net output under IRC § 45(b)(6)(B)(i) (see proposed § 1.45-6(c)), § 1.48 provides no such clarity under IRC § 48(a)(9)(B)(i).

The commenter requested that this clarity be provided in the solar microgrid context, where solar generation produces electrical output to feed an energy storage device(s) as well as an electric load(s). This is because, in the solar microgrid context the solar generation is the only electrical generation that is part of the microgrid. For that reason, solar generation is the limiting factor for determining the system's maximum net output. The energy storage device(s) does not generate

any electrical or other energy itself but rather holds and releases energy produced by the associated solar generation. In summary, the commenter requested that the IRS clarify that for solar microgrid systems, the maximum net output is the AC capacity of the solar generation system that is a part of the microgrid.

Federal Response: The NPRM was published on August 30, 2023 and included proposed rules for section 48. On November 22, 2023, a proposed rulemaking, Definition of Energy Property and Rules Applicable to the Energy Credit (88 FR 82188), withdrew and re-proposed the §1.48-13 for the PWA rules (the November Proposed Regulations). The November Proposed Regulations propose rules on the definition of energy project and how to measure a project's maximum net output for the purposes of the One Megawatt Exception.

Section 48(9)(A)(i) provides the general rule that the PWA increase applies to any "energy project" that satisfies the PWA requirements or meets one of the statutory exceptions, such as the One Megawatt Exception. The November Proposed Regulations propose a definition of the term *energy project*. The proposed definition of energy project is described as ownership plus two factors. Specifically, the term *energy project* means one or more energy properties (multiple energy properties) that are operated as part of a single energy project. Multiple energy properties will be treated as one energy project if, at any point during the construction of the multiple energy properties, they are owned by a single taxpayer and any two or more factors are present, such as: the energy properties are constructed on contiguous pieces of land; the energy properties are described in a common power purchase agreements; or the construction of the energy properties are financed pursuant to the same loan agreement.

Proposed §1.48-13(e) provides how to measure nameplate capacity of an energy project for the purposes of the One Megawatt Exception. Under the November Proposed Regulations, electrochromic glass property, fiber-optic solar energy property, and microgrid controllers are not eligible for the One-Megawatt Exception because these properties do no not generate electricity or thermal energy.

Tribal Indirect Costs: A commenter asked how the proposed regulations would impact indirect funds and negotiated indirect rates for Tribal governments. The commenter was concerned about additional documentation burdens placed on Tribes by the PWA requirements.

Federal Response: Tax credits that are eligible for the PWA increase are received after a recipient has placed a project into service and filed for their tax credit. This process is separate and distinct from federal finance assistance and grants that may involve indirect cost calculations.

Enforcement: Commenters asked about which agency (IRS or DOL) has enforcement authority over the PWA requirements. Because of the involvement of two agencies Tribes expressed concerns that their administrative costs would increase if reporting were required for both entities.

Federal Response: The DOL has sole enforcement authority over the prevailing wage and apprenticeship requirements under the Davis-Bacon Act (DBA), which preexisted the IRA. The DBA imposes certain recordkeeping and reporting requirements. In contrast, the PWA requirements under the IRA are included in section 45 of the Internal Revenue Code and are enforced solely by the Internal Revenue Service. Section 45 specifically authorizes the Treasury Department and the IRS to issue regulations or other guidance that provide requirements for recordkeeping or information reporting for purposes of administering the PWA requirements in the Code. The IRS must have adequate information to determine taxpayer compliance with the PWA requirements once a tax return is filed claiming an increased amount of credit or deduction.

The Treasury Department and the IRS recognize the costs involved with recordkeeping and reporting requirements and want to avoid imposing unnecessary administrative work on taxpayers, especially Tribes. We also understand that not all of the DBA recordkeeping and reporting requirements are relevant or necessary for the IRS to determine taxpayer compliance with the PWA requirements. Thus, the final regulations strike an appropriate balance by providing recordkeeping and reporting requirements that are consistent with the DBA, but limited to those requirements that are relevant for, necessary for, and consistent with, sound tax administration.

Applicable Workers: A commenter asked which workers need to be considered for PWA requirements. They noted that while the guidance does indicate some workers where the PWA requirements definitely apply, it would be helpful for guidance to indicate which workers are not subject to PWA requirements. For example, the commenter asked for a delineation between construction workers and operational staff for a given facility.

One commenter asked about the ratio of four skilled workers to each apprentice, wondering where that requirement came from and how Treasury settled on that ratio, which they expressed would be difficult to meet.

Federal Response: The final regulations incorporate the definitions of laborer and mechanic from the proposed regulations, which are largely consistent with the definitions of those terms for DBA purposes. The DOL Field Operations Handbook provides some guidance on whether an individual is a laborer or mechanic. See FOH Chapter 15 (dol.gov). The final regulations also adopt the rule that persons employed in a bona fide executive, administrative, or professional capacity as defined in 29 CFR part 541 are not deemed to be laborers or mechanics.

With regard to the question about the origin of the requirement of employing four skilled workers for each apprentice, section 45(b)(8)(C) of the Code provides that each taxpayer, contractor, or subcontractor who employs four or more individuals to perform constructions, alteration, or repair work on a qualified facility must employ one or more qualified apprentices to perform that work. Thus, this requirement is statutory.

Directory of Tribal Apprenticeship Programs: A commenter asked how companies will be able to identify Tribal apprenticeship programs because there are no online resources mapping Tribal apprenticeship programs in the same way as state programs.

Federal Response: Treasury has shared this request with DOL.