

Cheyenne River Sioux Tribe  
Flandreau Santee Sioux Tribe  
Oglala Sioux Tribe



Rosebud Sioux Tribe  
Standing Rock Sioux Tribe  
Yankton Sioux Tribe

**COMMENTS OF  
THE OCETI SAKOWIN POWER AUTHORITY  
ON THE U.S. DEPARTMENT OF ENERGY'S  
SESSION ON TRIBAL CONSULTATION POLICY**

April 19, 2021

**OCETI SAKOWIN POWER AUTHORITY**

Lyle Jack, Chairman

[lylejack\\_01@yahoo.com](mailto:lylejack_01@yahoo.com)

Jon Canis, General Counsel

[jon.canis@ospower.org](mailto:jon.canis@ospower.org)



## TABLE OF CONTENTS

I. BACKGROUND.....	2
1. The Oceti Sakowin Power Authority.....	2
2. The Country’s First Two On-reservation Utility-Scale Wind Farm Projects Are Now Under Development by OSPA and Its Partner, Apex Clean Energy.....	2
3. OSPA has Six Years of Extensive Experience with Industry and the Federal Bureaucracy.....	3
II. SPECIFIC RECOMMENDATIONS FOR THE CONSULTATION PROCESS.....	4
1. Just Because a Company Is Indian-owned, Don’t Automatically Restrict It to Programs Run by the Agency’s Indian Office.....	4
2. Set Specific Goals to Ensure Effective and Coordinated Multi-Agency Support.....	5
3. Designate Point Persons, Responsible for Specific Outcomes, at Both the Lead Agency and Supporting Agencies.....	6
4. Establish Issue-Specific Lead Contacts at Tribes and Tribal Organizations.....	8
5. Do As Much In-person Consultation As Possible.....	8
III. AREAS WHERE OSPA, AND OTHER IMPACTFUL PROJECTS ON INDIAN LAND, NEED FEDERAL SUPPORT..	8
1. Fund the Cost of “Security Deposits” Charged by Regional Transmission Organizations and Independent System Operators for Interconnection to the National Power Grid.....	9
2. Build Transmission Infrastructure.....	10
3. Expedite NEPA Review.....	10
4. Fix Overly Restrictive Terms for Issuing Federal Grants, Loans and Loan Guarantees.....	11
5. Honor the Federal Government’s Repeated Commitments to Indian Preferences in Federal Power Purchase Agreements.....	12
6. Change Tax Policy So That Tribes Can Benefit.....	13
IV. CONCLUSION.....	14

Attachment 1: The Oceti Sakowin Power Authority – Leadership and Staff

Attachment 2: Secretaries Moniz and Jewell Joint Letter of Support for OSPA

## EXECUTIVE SUMMARY

The Oceti Sakowin Power Authority (OSPA) thanks Secretary Granholm and the Department of Energy Staff for initiating this Session on Tribal Consultation Policy. As a Tribally-owned company dedicated to developing utility-scale renewable energy projects on Tribal lands, OSPA welcomes this opportunity to share its experience with the Department.

OSPA is a unique organization:

- It was formed and is owned 100% by six Sioux Tribes that share territory with North Dakota and South Dakota.
- It is the only Indian-owned wind farm developer in the U.S., with a mandate to build wind and solar renewable energy projects exclusively on Tribal lands.
- It is a federally-chartered “Section 17” corporation, pre-authorized to negotiate, execute and fulfill contracts without further approval by the Tribes or the federal government.

Starting in 2017, OSPA partnered with Apex Clean Energy, one of the country’s most experienced developers of wind and solar energy projects. We are now developing the 450 MW Ta’teh Topah wind farm on the Cheyenne River Reservation, and the 120 MW Pass Creek wind farm on the Oglala Pine Ridge Reservation. Together, OSPA and Apex have invested over \$3M – and many times that in sweat equity – in early-stage development of the projects, and are now in the process of closing on \$15M in funding to fund late-stage development.

These two utility-scale wind power projects could be much bigger – the Tribes have the wind resources and desire to produce more – but both projects are constrained by the lack of available transmission. Even so, these projects will raise \$850 million to build and operate the wind farms, constituting one of the largest renewable energy complexes in the country, and one of the largest infrastructure projects in the history of South Dakota. These projects will create hundreds of construction jobs and dozens of permanent jobs, and will drive literally tens of millions of dollars in taxes and fees to the Tribes, tens of millions of dollars in lease revenues to the Tribes and individual Indians over the projects’ 25-year lifespans, and millions of dollars in development fees to OSPA. The OSPA Board will re-invest these revenues into developing the next series of renewable energy projects on the reservations of OSPA’s six member Tribes.

Over the last six years, OSPA has interacted extensively with the industry, with the Obama and Trump Administrations, and with federal agencies – in particular the Departments of Energy (DOE), the Interior (DOI), and Agriculture (USDA). In doing so, OSPA has learned what effective governmental Consultation can accomplish, and the costs of unsuccessful Consultation.

From this experience, OSPA offers the following recommendations:

- Don't limit Indian-owned companies to programs administered by the Indian Offices of the various agencies – larger, more effective programs may be available from other offices.
- Use the Consultation Process to identify specific programs that can advance Indian projects, and set specific goals among agency personnel to put those programs into effect.
- Designate specific point persons among agency Staff that have decision-making authority to evaluate unique projects with big impact potential.
- Establish multiple contacts at Tribes – Lakota culture features highly distributed decision-making among Administrations, Tribal Councils and Offices, and groups of elders and other influential individuals.
- Do as much in-person Consultation as possible at the Tribes.

OSPA also wishes to take this opportunity to identify some of the most significant challenges it has confronted in the process of developing its first two wind farms – more effective Consultation will be instrumental in removing these barriers to development.

- Fund the cost of “security deposits” charged by the Southwest Power Pool (SPP). Two years ago, SPP changed its tariff to increase such deposits from just over \$2M to well over \$9M. This will increase OSPA's development budget for its wind farms by almost 50%.
  - The only reason OSPA is affected by this is because the OSPA Tribes will interconnect with the Western Area Power Administration (WAPA), and WAPA's Upper Great Plains region (UGP) has joined SPP. Thus, WAPA's tariff in UGP was replaced by SPP's.
  - For other regions still served by the WAPA tariff, the same interconnection would require security deposits of less than \$1M.
  - WAPA cannot circumvent its – and the Department of Energy's – trust responsibility to the Tribes by adopting the tariff of a private company that does not bear trust obligations. WAPA's decision to join the SPP has imposed this crippling cost on OSPA, and other Tribal renewable energy projects in the WAPA UGP region – WAPA is bound by its trust responsibility to ameliorate the problem it has caused.
- Build more transmission infrastructure – WAPA, which runs the Transmission Infrastructure Program – can be an important partner for this.
- Oversee coordination among the various federal agencies that administer environmental permitting under the National Environmental Policy Act (NEPA) and expedite the review process for projects on Indian land.
- Fix overly restrictive terms for issuing federal grants, loans and loan guarantees for Indian energy projects. These programs have been made unavailable to support development.
  - OSPA sought federal funding support, and filed seven applications with the DOE, DOI and USDA – all seven were rejected.

- Over the last six years, OSPA has found \$18M in private sector funding. But it has been extremely hard and extremely expensive for Tribes with very few resources to raise such early-stage capital from private sources.
- Honor the federal government’s repeated, but unrealized commitments to Indian preference in the purchase of renewable energy. Congress established the preference in the Energy Policy Act of 2005, and DOE adopted it for DOE energy purchases in 2012. Yet the Government Accountability Office found that no federal agency has used the Indian preference since its inception.
- Advocate for changes in tax policy so that renewable energy tax incentives can benefit Indian Tribes.
  - OSPA does not hold a position on whether the federal Wind Production Tax Credit (WPTC) should be renewed or extended, but if it is, it should be modified to benefit Tribes.
  - Tribes generally do not pay federal income taxes, and so tax credits are not useful to them – no Tribes have benefitted from the WPTC to date.
  - Renewable energy tax credits should be made transferrable and issued through Tribes or Tribal organizations – this would provide a significant source of revenues to Tribes, and would provide tax credit investors with incentives to build on Tribal land.
  - A number of parties advocate for refundable tax credits, and OSPA does not object. But if this policy is adopted, the legislation must include specific provisions so that Tribes – and Tribal organizations like OSPA – that don’t file tax returns can participate.

OSPA thanks the Secretary and Department Staff for this opportunity to share its story. Over the last six years, OSPA has become acutely aware of the critical importance of effective Consultation with the federal government. OSPA is inspired that the Department of Energy shares this awareness.

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**April 19, 2021**

The Oceti Sakowin Power Authority (OSPA) submits these Comments in response to Secretary Granholm's letter of March 26, 2021. OSPA wishes to thank Secretary Granholm and the Department of Energy Staff for reaching out to Tribes regarding the implementation of effective Consultation Policy procedures, and for providing this opportunity to submit written comments.

These Comments are being submitted after the date for comments stated in the Secretary's letter – OSPA representatives only learned of the Department of Energy's initiative last week, and have worked to submit these responsive comments in as timely a manner as possible. OSPA respectfully requests that the Department accept these Comments as timely filed, and consider them as part of its Session on Tribal Consultation Policy.

As described below, for the last six years, OSPA has been actively developing utility-scale wind farms on the reservations of two Sioux Tribes – an \$850 million renewable energy infrastructure project that will substantially advance the Biden/Harris Administration's climate initiatives, and that will profoundly advance the economic interests of the Tribes and their Oyate (the People). OSPA and its partner have invested over \$3 million in early-stage development to date, and many times that amount in sweat equity, and are currently in the process of closing on \$15 million to fund the next phase of development – all funds raised from the private sector, without federal financial assistance.

During these last six years, OSPA has interacted extensively with the Departments of Energy, the Interior and Agriculture (DOE, DOI, USDA), under both the Obama and Trump Administrations, and this experience has provided OSPA with first-hand insights as to the types of Consultation that have been effective, and those that have not been. In these Comments, OSPA recounts this recent experience, and provides specific recommendations on how to achieve effective Agency/Tribal Consultation.

## I. BACKGROUND

### 1. THE OCETI SAKOWIN POWER AUTHORITY

The Oceti Sakowin Power Authority (OSPA) was formed by six Sioux Tribes that share territory with the states of South and North Dakota: the Cheyenne River, Flandreau Santee, Oglala, Rosebud, Standing Rock and Yankton Sioux Tribes. Oceti Sakowin (pronounced O-CHET-ee Sha-KO-wee) is a Lakota term meaning “the Seven Council Fires” and refers to the way the Tribes got together since time immemorial to make big decisions and plans that affected all of the Oyate (the People). Oceti Sakowin also means “The Great Sioux Nation.”

OSPA is a “Section 17” Corporation – that means it is a federally-chartered corporation established under the Indian Reorganization Act of 1934. The six Sioux Tribes listed above all adopted the Charter by unanimous or super-majority votes of their Tribal or General Councils. The member Tribes are the sole, 100% owners of OSPA. OSPA is led by a Board of Directors (each member Tribe has one Board member and one vote) and is advised by a Council of Elders selected by the Tribes, and by a professional staff. The OSPA Charter was certified by the U.S. Department of the Interior in June 2015. The full list of OSPA Board members, Elder Council members and staff is appended at Attachment 1.

By forming a Section 17 Corporation and adopting and approving its Charter, the OSPA member Tribes and the U.S. Department of the Interior empowered OSPA to negotiate, execute and fulfill contracts with developers, financiers, and contractors without further Tribal and federal approvals. This establishes OSPA as a reliable business partner, insulated from Tribal politics and federal regulatory delay. And by banding together and pooling their resources, the member Tribes can achieve the large-scale production needed to attract world-class industry partners and the largest corporate and utility power buyers. We believe that the OSPA model is an effective structure for large-scale economic development projects for Tribes and on Tribal lands across this country.

### 2. THE COUNTRY’S FIRST TWO ON-RESERVATION UTILITY-SCALE WIND FARM PROJECTS ARE NOW UNDER DEVELOPMENT BY OSPA AND ITS PARTNER, APEX CLEAN ENERGY

In August 2017, OSPA partnered with Apex Clean Energy to be its technical partner and co-developer. Apex is one of the largest developers of wind and solar energy projects in the U.S., and has successfully developed over 5,000 MW of wind and solar energy capacity that is in financing, under construction, or currently operating, representing over \$7 billion of investment. Apex’ website can be found at <https://www.apexcleanenergy.com/>.

Over the last three years, OSPA and Apex have completed early-stage development of their first two projects: the 450 MW Ta’teh Topah (Four Winds) wind farm on the Cheyenne River Reservation, and the 120 MW Pass Creek wind farm on the Oglala Pine Ridge Reservation. Both wind farms could be larger – more than two years of wind measurements have confirmed that the sites contain some of the most powerful and reliable wind resources in the country – but the size of both projects is constrained by currently available transmission capacity. Even with these limitations, the two wind farms will be one of the largest renewable energy complexes in the country – and at an estimated construction and operations cost of \$850 million, will be one of the largest infrastructure development projects in the history of South Dakota.

When these projects are fully funded and construction begins – now planned for 2023 or 2024 – these projects will drive literally tens of millions of dollars in tax and fee revenues to the Tribes, tens of millions more in lease revenues to the Tribes and individual Indian landowners over the 25-year life of the project, and millions of dollars in development fee revenues to OSPA, which has voted to reinvest those fees in developing the next round of wind and solar energy projects on the reservations of the OSPA member Tribes.

In addition, these projects are expected to generate 400-500 construction jobs and 28-35 permanent jobs. And OSPA has committed to using local and Tribal resources, including sand, gravel, cement, trucking and skilled and unskilled labor, to the greatest extent possible. Pre-construction, OSPA will identify partners and funding for developing and conducting job training in conjunction with the Tribal Employment Rights Offices, and Apex has already included Native American students in its internship program.

### 3. OSPA HAS SIX YEARS OF EXTENSIVE EXPERIENCE WITH INDUSTRY AND THE FEDERAL BUREAUCRACY

The concept of the Oceti Sakowin Power Authority was being shaped among its member Tribes as far back as 2013. All of the Tribes that share territory with South and North Dakota have made multiple attempts to develop their wind resources, but none had been successful. OSPA was specifically designed to address the problems previously encountered by the Tribes: As a federally-chartered “Section 17” corporation, OSPA obtained the necessary Tribal and federal agency approvals needed to negotiate, execute and fulfill contracts without additional Tribal or federal approvals. By banding together in a multi-Tribal organization, the Tribes can pool their resources to jointly develop large-scale wind farms and transmission systems that will attract large out-of-state corporate and utility power buyers.

The OSPA structure has been successful in addressing the barriers to wind farm development that have plagued the Tribes in the past. It also makes OSPA unique – OSPA is the first multi-Tribal wind farm developer; the first 100% Indian-owned wind farm developer; and the only developer focused exclusively on developing utility-scale wind and solar farms on Indian reservations. But it has become clear to OSPA that its unique structure has a downside: federal agencies have not seen anything like it before, and many don’t know how to react to OSPA’s applications for federal support.

As OSPA discusses below, over the last six years, it has experienced wonderful success with some federal agencies and disappointing failures with others. In particular, OSPA has been unable to secure funding for its development efforts from any government agency – OSPA submitted seven applications for grant, loan and loan guarantee programs run by DOE, DOI and USDA, and all were rejected. OSPA has come to understand that these rejections resulted from OSPA’s unique structure, and the fact that it did not fit within any of the preconceived check boxes designed for those federal programs.

As a result, OSPA’s development work has been funded to date exclusively by private sector financing – OSPA is now in the process of closing on its third tranche of private funding, and will have raised a total of \$18 million for the development of its first two wind farms. But this process has taken years, and has been extremely expensive – early-stage development capital is some of the most expensive capital available from private sources.



OSPA has been singularly focused on raising development capital for a simple reason: If OSPA provides the funding, it exercises control over the planning and development of the wind farms, and shares in the economic benefit of the projects. If OSPA cannot provide such funding, its member Tribes are reduced to passive lessors of land to a developer that exercises total control over the projects and keeps all of the revenues from development for itself.

OSPA's experience shows the importance of effective federal Consultation with Tribal entities, and the consequences when such Consultation fails. It also illustrates the critically important role that the federal agencies could play in supporting early-stage development of large-scale infrastructure projects on Indian reservations. OSPA is grateful for this opportunity to share specific examples of successful and unsuccessful federal Consultation with DOE, DOI and USDA.

## II. SPECIFIC RECOMMENDATIONS FOR THE CONSULTATION PROCESS

As noted above, OSPA began developing the Ta'teh Topah and Pass Creek wind farms six years ago. During this process, OSPA has had extensive experience in interacting with, and seeking assistance from, DOE, DOI and USDA. In these extensive federal contacts, OSPA experienced highly successful and meaningful Consultations. Unfortunately, OSPA also experienced proforma, "check the box" meetings with Agency Staff that did not constitute a meaningful exchange and resulted in no action. Based on these experiences, OSPA offers its views on what steps can be taken to effect meaningful Consultation.

### 1. JUST BECAUSE A COMPANY IS INDIAN-OWNED, DON'T AUTOMATICALLY RESTRICT IT TO PROGRAMS RUN BY THE AGENCY'S INDIAN OFFICE

**Unfortunate Example: Mismatch Between Applicant and Agency Office.** When OSPA contacts a federal agency regarding a program or policy, as an Indian-owned company, it is automatically routed to that agency's Indian Office – which is great, because OSPA has found the Indian Offices at DOI, DOE, USDA and other agencies to be staffed by talented, dedicated and caring public servants. But OSPA has found that this referral can have a downside – programs run out of Indian Offices tend to focus on smaller, community-scale projects, and have correspondingly small budgets. So when OSPA discussed with Indian Office Staff at several agencies its need for development funding in the millions of dollars, we were routinely told that our request would exhaust the Office's full annual budget, and the conversation generally stopped there.

OSPA has found that different offices within federal agencies are often "siloes," meaning that the Staff are experts in the policies and programs run out of that office, but are not necessarily knowledgeable about policies, programs and Staff expertise outside that given area. This problem is not limited to government – it is endemic across private industry as well, even in the most innovative and sophisticated companies. Managing complex bureaucracies is a difficult challenge that requires constant tending.

**OSPA's Recommendation:** Train Indian Office Staff so that the Indian Office can act as a clearinghouse for the agency, steering Indian-owned companies and Tribal representatives to other offices within the agency that run programs or oversee policies that may better fit the company's or

Tribe's needs. Indian Office Staff should also be able to provide introductions to the decision-making Staff at the other agency offices, and, if the Indian Office deems it appropriate, even advocate for the company within the agency.

## 2. SET SPECIFIC GOALS TO ENSURE EFFECTIVE AND COORDINATED MULTI-AGENCY SUPPORT

**Unfortunate Example: Promising Multi-Agency Meeting, but No Follow-Up.** President Obama became aware of OSPA when he visited one of its member Tribes – the Standing Rock Sioux Tribe – in 2014. Subsequently, the Secretaries of Energy, Ernest Moniz, and the Interior, Sally Jewell, sent a joint letter applauding OSPA's aspirations and pledging the support of their respective agencies. A copy of the Moniz-Jewell letter is appended at Attachment 2.

Not long afterward, senior Staff of DOE, DOI and USDA convened an unprecedented multi-agency meeting to meet with OSPA and representatives of its member Tribes. The meeting was held in Washington DC, and included representatives of over a dozen federal agencies and offices. The half-day meeting included extensive discussions of PPAs with representatives of the General Services Administration and Department of Defense, and discussions of various grant, loan and loan guarantee programs from DOE, DOI and USDA. The OSPA and Tribal representatives left that meeting elated, and expecting substantial support from various federal agencies.

And then, nothing happened. We learned later that the federal agency attendees did not leave with any specific "to-dos" – attending the meeting was their designated function. Afterward, OSPA was handed off from DOI to DOE to USDA. Over the course of three years, OSPA submitted seven applications for grants, loans and loan guarantees among the three agencies – all were rejected.

In hindsight, it is clear that OSPA became lost in the federal bureaucracy. While we attracted attention and expressions of support from the very highest levels of the Administration, no specific directives were given to support Staff. While obviously great effort was involved in putting together that multi-agency meeting, it became a simple "check the box" exercise for most attendees, and OSPA was handed off to mid-level Staff with no directions. We then went through the standard application review process by mid-level Staff, and because our projects are unique, OSPA did not fit into any of the prescribed categories for successful applicants, and reviewing Staff did not have authority to address the specific needs of our unique organization.

**OSPA's Recommendation:** Meaningful Consultation must be conducted by agency management or Staff who are empowered to analyze the unique needs of the Tribe or Indian-owned company, and to recommend specific courses of action. Once it is determined that support is warranted, agency management must identify specific programs or policies that will be employed and instruct Staff what needs to be accomplished, and within what timeframe.

**Great Example: Technical Assistance Grants from DOE.** Shortly after its formation, OSPA approached the DOE Office of Indian Energy and Programs with a request for technical assistance. The Office issued two DOE Technical Assistance grants: the first funded an analysis by the National Renewable Energy Laboratory (NREL) of the wind resources on the reservations of the OSPA member Tribes; the second funded a study by the Western Area Power Administration (WAPA) of available transmission capacity serving those Tribes. These two studies were foundational to OSPA's success – they provided expert validation for OSPA's proposed wind farm development plans, and they were

crucial to OSPA's subsequent ability to attract funding from private foundations, and to partner with an established renewable energy developer.

**OSPA's Recommendations:** DOE Office of Indian Energy and Programs – keep doing what you're doing! OSPA's request for assistance fit squarely within the parameters of the Office of Indian Energy programs, and the expert Staff of the Office handled OSPA's request for assistance efficiently and effectively. This example demonstrates how effective an agency office can be when the request for assistance unambiguously falls within the Staff's scope of authority.

### 3. DESIGNATE POINT PERSONS, RESPONSIBLE FOR SPECIFIC OUTCOMES, AT BOTH THE LEAD AGENCY AND SUPPORTING AGENCIES

Large federal agencies can be overwhelming for Indians and non-Indians alike. Large corporations have the ability to hire law firms, economists and other consultants to help them navigate the agencies, but this is not an option for many Indian-owned companies. Fortunately, OSPA has experience with several practices put in place by the Obama Administration that were extraordinarily successful in providing meaningful and effective Consultation, and we are pleased to offer these as examples that DOE and other agencies may consider employing:

**Great Example #1: Expedited Charter Review and Approval.** One of the most important early developments for OSPA was the establishment of its Charter. Initial drafting was done through a series of meetings on the reservations of the OSPA member Tribes, and included input from Tribal leaders and elders, Tribal attorneys and outside counsel, and industry organizations. Once the initial document was prepared, OSPA submitted it for review to the Department of the Interior.

Secretary Sally Jewell was made aware of OSPA and its aspirations by the Obama White House, and the Secretary assigned the role of reviewing the OSPA Charter to two senior DOI Staff – the Senior Counsel to the Deputy Secretary and Principal Deputy Assistant Secretary. In addition to providing valuable insights and revisions that made for a better document, the DOI Senior Staff approved a short-cut in the approval process. The result: an approval process that normally can take 6-12 months or more was completed in six weeks.

The Charter was adopted by the OSPA member Tribes' Tribal or General Councils – four by unanimous vote, two by supermajorities. The OSPA Charter was certified by the Assistant Secretary – Indian Affairs (AS-IA) on June 24, 2015. It's hard to express the full measure of OSPA's appreciation for the attention, sense of urgency, and respect shown to us by DOI's actions.

**Great Example #2: Creation of an Innovative Model Trust Land Lease.** Three years ago, OSPA began to focus on drafting a lease that could be used for Indian owners of Trust land – Bureau of Indian Affairs (BIA) approval for such leases is required. OSPA faced a unique challenge: our first project was the development of two wind farms, on two different reservations, simultaneously. Moreover, OSPA's mandate is to continue to develop additional wind farms in the future, on the reservations of all our member Tribes. In order to achieve consistency among our projects, and to minimize transaction costs, OSPA sought to draft a model lease, which could be used for future applications, across multiple Tribes, with minimal regulatory involvement.

OSPA first sought guidance from AS-IA and BIA leadership, and they referred us to the BIA Regional Office in Aberdeen, SD. That initiated an extended, labor-intensive process, led by the Regional Office Senior Staff, of detailed negotiations over provisions and terms. The Regional Office Staff then brought in attorneys from DOI's Office of the Solicitor to perform a legal review. Finally, the Regional Office Staff coordinated with the Agency Staff at the Cheyenne River and Pine Ridge Agencies. The result: a first-of-its-kind model lease that will be used by OSPA across projects and reservations. OSPA will still need BIA approval when the individual leases are executed, but this process has given us confidence that we have a document that will meet the BIA's statutory and regulatory requirements.

OSPA is grateful for the hard work, commitment and expertise of the Aberdeen Regional Office Staff. We see this as a great example of how inter-office coordination should be done.

**Great Example #3: USDA Staff Dedicated to a Single Tribe.** This example does not involve OSPA but the Oglala Sioux Tribe, one of the OSPA member Tribes. The Obama Administration designated the Pine Ridge Reservation as a "Promise Zone" and dedicated special resources to pursue more effective Consultation with the Tribe. As part of this commitment, the USDA designated a Staff member who resided in Rapid City – 90 minutes away from the Pine Ridge Reservation – as a dedicated resource to the Oglala Sioux Tribe. Her job was to be present on the reservation on a weekly basis, and to work with Tribal leadership and all relevant Tribal offices to identify federal programs that could address specific needs of the Tribe, and to assist the Tribe in applying for them. In addition, the USDA Staffer also made introductions to private sector foundations, schools and consultants that offered assistance to the Tribe.

This arrangement was extremely successful in addressing the Oglala Sioux Tribe's needs across a number of categories. This success is a testament to the hard work and skill of the USDA Staffer, and also illustrates how effective a highly-targeted dedication of resources can be.

**OSPA's Recommendations:** The above examples are real success stories that OSPA has experienced or seen in action. OSPA understands the demands on the Staff of federal agencies, and that resources are necessarily constrained, and so it may not always be possible to deploy the level of dedicated Staff resources described above. Nevertheless, there are some generally applicable lessons that can be taken from these examples:

- Unique solutions require direction from agency management. OSPA is unique: it's multi-Tribal; the first Indian-owned wind farm developer; the first company to develop utility-scale wind farms exclusively on reservations. Agency Staff, no matter how senior or experienced, are not authorized to consider applications that may constitute new policy. Agency offices – including agency Indian Offices – should be empowered to bring unique proposals to agency management, and lines of intra-agency communications should be established for this purpose, so that unique projects can be properly evaluated.
- BIA Regional Offices are effective in implementing new policies. OSPA's experience with the BIA Regional Office at Aberdeen, SD demonstrates that the Regional Offices can be highly effective in addressing unique challenges and coming up with creative solutions.
- Personal attention, administered consistently over time, is incredibly effective. As the Oglala Pine Ridge Reservation Promise Zone example shows, the more an agency Staffer gets to know a specific Tribe, the more effective she can be in identifying Tribal needs, navigating Tribal

bureaucracies, and identifying federal programs that can help. While it may not be possible to dedicate a Staffer full-time to any given Tribe, it may be possible to designate one or more Staffers to be subject matter experts for a group of Tribes, with regular, ongoing, in-person contacts.

#### 4. ESTABLISH ISSUE-SPECIFIC LEAD CONTACTS AT TRIBES AND TRIBAL ORGANIZATIONS

OSPA has been successful because it has learned the unique management and decision-making processes of each of its member Tribes. In Lakota culture, decision-making is highly distributed among both formal and informal groups. While many decisions are made by the Tribal Administrations, Tribal or General Councils, and specific committees, important decisions are also made by directors of Tribal offices and by informal groups of elders or other influential individuals. This structure can be daunting to those unfamiliar with specific Tribal practices.

**OSPA's Recommendation:** Meet with the Tribes in person – both Administration and Tribal Council – to identify decision-makers to act as the agency contact persons on a subject matter basis (economic development, cultural/environmental issues, Tribal employment rights, Tribe/State relations, women's rights, children's rights, education, law enforcement, etc.). Be aware that contact lists on these subjects may change over time, so these should be revisited on an annual basis.

#### 5. DO AS MUCH IN-PERSON CONSULTATION AS POSSIBLE

OSPA has been successful because, since its inception, its Board members, Elder Council members and staff have been in constant contact with each other and with the member Tribes. Lakota culture, like many Indian and non-Indian cultures, places a high value on in-person communication. In addition to quarterly Board meetings, OSPA representatives hold meetings with the Tribal Councils and other Tribal leadership of the OSPA member Tribes on at least a monthly basis. The coronavirus pandemic disrupted this in-person communication over the last year, but we fully expect to resume our activities in an appropriately safe masked and socially distanced manner as vaccination rates continue to climb and normal activity picks up again.

**OSPA's Recommendation:** Many agencies visit with Tribes, or groups of Tribes, in meetings led by agency management or high-level Staff. These meetings are valuable, but by necessity can only be done infrequently. Based on the Oglala Pine Ridge Promise Zone example, it may also be valuable to assign mid-level staff to hold "listening sessions" at the Tribes on a more regular basis. Consistently assigning the same Staffers to the same Tribes will build mutual familiarity and trust, and provide agencies with a better understanding of Tribal needs.

### III. AREAS WHERE OSPA, AND OTHER IMPACTFUL PROJECTS ON INDIAN LAND, NEED FEDERAL SUPPORT

In addition to specific recommendations on how to improve the federal Consultation Process with Tribes and Tribal entities, OSPA would like to take this opportunity to identify some of the critical challenges facing development of renewable energy on reservations. Each of the following issues requires innovative approaches that requires effective Consultation.

1. FUND THE COST OF “SECURITY DEPOSITS” CHARGED BY REGIONAL TRANSMISSION ORGANIZATIONS AND INDEPENDENT SYSTEM OPERATORS FOR INTERCONNECTION TO THE NATIONAL POWER GRID

A recent development regarding interconnection to the national power grid has presented a significant challenge to OSPA, and to other energy projects on Tribal lands in the Upper Great Plains. Access to the national grid is controlled by Regional Transmission Organizations (RTOs) and Independent System Operators (ISOs). The Southwest Power Pool (SPP) is the RTO that manages the grid for the Upper Great Plains area where the OSPA member Tribes are located.

RTOs and ISOs have complex processes for bringing new sources of energy production onto the national grid, and SPP’s process is typical. It involves a three-stage study process that takes place over a period of years. These studies identify existing transmission capacity on the grid, and determine what network changes – upgrades, new construction – may be needed to interconnect with the new power generator and transmit its power, and the associated costs of such network changes. Each study requires a “security deposit” that covers the costs of the studies, and that places a down-payment on the estimated cost of network changes.

In the case of SPP, OSPA and its development partner secured a position on the SPP “interconnection queue” in November 2017, and paid the security deposit for both projects. At that time, the total security deposit required for the full interconnection process was under \$2.5 million and fully refundable. But in July 2019, SPP changed its interconnection tariff and procedures, and increased the cost of interconnection to over an estimated \$9.5 million. This one action had the effect of increasing OSPA’s total wind farm development budget by almost 50%, and these deposits will now be at risk (*i.e.*, non-refundable) if OSPA cannot complete the projects for any reason. Complicating things further, the deposits are variable and based on SPP’s estimates of network upgrade costs and allocations to new generation projects. The deposit amounts required by SPP could be higher, depending on the outcomes of SPP studies, and OSPA would only have 15 business days to post the deposits once informed of the amount.

The reason the SPP interconnection cost increases affect OSPA is because the OSPA member Tribes are interconnected with WAPA, and the WAPA Upper Great Plains region decided to join the SPP in 2015, and now is subject to the SPP tariff. In contrast, the WAPA interconnection tariff – which continues to apply to all WAPA interconnection customers except for those within the SPP service area – requires a total set of security deposits of less than \$1 million. See WAPA Open Access Transmission Tariff at §§ 3.3.1, 6.1, 7.2, 8.1, 10.1, 11.3, 13.3, and 29.2.  
<http://www.oatioasis.com/WAPA/WAPAdocs/WAPA-Tariff-Docs.htm>

But WAPA differs from SPP in one critical aspect – because WAPA is an agency of DOE, it shares the federal trust responsibility to protect and support Indian Tribes and Indians. WAPA’s – and DOE’s – trust obligations to Indians cannot be circumvented by the act of adopting the tariff of a private entity that does not share that responsibility. OSPA asks DOE to provide OSPA, and other Tribes and Tribal entities in the WAPA/SPP service territory, relief from the crippling interconnection cost increases imposed by SPP. OSPA is preparing a detailed position paper on this issue, and will be pleased to share it with DOE and WAPA in the near future.

## 2. BUILD TRANSMISSION INFRASTRUCTURE

Reports from many sources – including NREL, WAPA, SPP, academics and industry groups – have detailed the need for more energy transmission infrastructure to bring power from the best generating sources to places with the greatest demand for power. In particular, there is broad agreement that new transmission is required to bring wind energy from the Upper Great Plains – indisputably the source of the strongest and most reliable on-land wind resources in the country – to more populated load centers in neighboring regions.

OSPA can speak to the real-life effects that such limited transmission options have had on the OSPA wind farms. As noted above, OSPA is now developing 570 MW of power – 450 MW on the Cheyenne River Reservation and 120 MW on the Oglala Sioux Pine Ridge Reservation. Both Tribes have the wind resources and the desire to develop much more, but the size of these initial projects has been limited by the transmission capacity that is available on the existing transmission system, including WAPA.

The Southwest Power Pool, which manages the energy grid in 14 states – including most of South and North Dakota – recently issued a report describing the need for more transmission and showing that, in its service area, investments in new and upgraded transmission pay for themselves. Moreover, such investments have resulted in lower retail energy costs, because local energy companies use the new transmission capacity to gain access to cheaper power sources, including renewable energy producers. <https://www.spp.org/value-of-transmission/>.

WAPA's Transmission Infrastructure Program (TIP) can be a ready source of funding to increase transmission capacity to reach Tribes within its service area. Most of the OSPA member Tribes are connected to, or are located in close proximity to, WAPA transmission facilities. OSPA wants to commend the TIP program, which seeks to leverage long-term, low-cost federal loans and technical assistance to incent private investment to expand, upgrade and modernize the U.S. electric grid, particularly in rural areas. Moreover, TIP's current loan and investment standards can be modified by administrative order to fund improvements to existing infrastructure in order to bring more transmission capacity to Tribes to support wind and solar farm development. OSPA believes that TIP, and other programs like it, can play an important role in developing transmission capacity that will support renewable power generation on reservations.

## 3. EXPEDITE NEPA REVIEW

OSPA is developing its wind farms on reservations and interconnecting with WAPA – activities that constitute a “federal nexus” that requires compliance with the National Environmental Policy Act (NEPA). OSPA does not consider this a problem – to the contrary, being able to tell the OSPA member Tribes that the wind farms developed on their reservations will meet the comprehensive NEPA guidelines for protection of the environment has been an important contributor to OSPA's success.

But the NEPA process can be very costly, and worse, can take years. This can be a disincentive for developers of wind farms to choose sites on Tribal land. In order to incent the development of renewable energy projects on reservations – and the millions of dollars in tax and fee revenue that such projects will generate for the Tribes – OSPA urges the Biden/Harris Administration to expedite the NEPA process on reservations. One way to do this is to make extensive use of the Programmatic

Environmental Impact Study established for the Upper Great Plains by WAPA and the U.S. Fish and Wildlife Service (USFWS). Another important step would be for the Administration to direct the federal agencies that have input into the NEPA process – WAPA, BIA, USFWS, the Army Corps of Engineers – to coordinate and expedite their review of projects on Indian reservations.

#### 4. FIX OVERLY RESTRICTIVE TERMS FOR ISSUING FEDERAL GRANTS, LOANS AND LOAN GUARANTEES

Below, OSPA lists a series of conditions that are common in the grant, loan and loan guarantee programs operated by the DOE, DOI and USDA that have rendered OSPA ineligible for assistance:

- Not Funding Development Work; Requiring Completed NEPA Studies; Requiring PPAs; Requiring High Bond Ratings. These restrictions all have the same effect – they disallow federal support for pre-construction work. By definition, this means that federal funds only go to companies that have already spent millions of dollars on completing development work – which by definition excludes cash-poor Tribes.
  - Example: In July, 2018, the Department of Energy announced that up to \$2 Billion in partial loan guarantees was available through the Tribal Energy Loan Guarantee Program, in order “to support economic opportunities for Native American and Alaska Native communities through energy development projects and activities.”  
<https://www.energy.gov/articles/departement-energy-issues-2-billion-tribal-energy-loan-guarantee-program-solicitation>

OSPA was hopeful it could finally obtain financial support to complete its development work – until we read the terms for the available loan guarantees. They are limited to funding construction projects only – pre-construction activities are not available for support. That means that loan guarantees will be available to the big banks, tax credit investors, and construction companies who come in at the construction phase, but will not be available to help poor Tribes develop their assets in a way that will ensure significant equity ownership and economic participation.
- Restricting Funding to Small-Budget Programs and Small-Dollar Projects. The practice among the agencies administering Indian programs is to fund small-dollar projects. Halfway through the Obama Administration, the Administration changed its policies and no longer allowed DOE, DOI and USDA Indian energy programs to fund development of utility-scale projects. We can understand the motivation – it stretches available dollars. But it excludes support for large-scale, potentially transformational projects.
- Preference for Matching Funds. Generally, if agencies have competing applications for support, they favor the application that matches the grant or loan funds with funds from other sources. Again, an understandable restriction, but it has the effect of eliminating the poorest Tribes, which are in most need of support.
- No Credit for Multi-Tribal Projects. OSPA has actually been disqualified for a grant from DOI because the application involved multiple Tribes. This is a profoundly perverse result – multi-Tribal projects benefit more Indians, encourage efficient cooperation, and eliminate zero-sum



competition over limited federal resources.

- Preference for Projects that Look Like Past “Success Stories”. This seems like a reasonable ground for awarding support. However, in energy, all of the past Tribal success stories involve coal, oil and gas projects. There is no history of successful Tribally-developed wind farms because OSPA is the first. This metric prevents innovation and funding of new business plans and technologies.

Fixing these restrictions in current and future grant, loan and loan guarantee programs would enable a whole new class of high-impact projects on Tribal lands.

## 5. HONOR THE FEDERAL GOVERNMENT’S REPEATED COMMITMENTS TO INDIAN PREFERENCES IN FEDERAL POWER PURCHASE AGREEMENTS

In 2005, the Energy Policy Act was enacted into law. Among many other things, the law established support for Indian energy and preference for the federal government’s purchase of Indian energy. As described by the Government Accountability Office (GAO):

The Energy Policy Act of 2005 (EPACT05) includes several mechanisms that can support tribes in developing their energy resources. For example, the act provides for federal grants, loans, and technical assistance to tribes and tribal energy resource development organizations to carry out energy projects and to process, use, or develop tribal energy resources. Furthermore, EPACT05 authorizes federal agencies and departments to meet their own considerable energy needs by giving preference to majority tribally owned energy suppliers, with certain requirements, and provides an incentive for using renewable energy produced on tribal lands.

U.S. Government Accountability Office, “Report to the Vice Chairman, Committee on Indian Affairs, U.S. Senate,” GAO-19-359, April 2019, at p. 2. Subsequently, in 2012, Energy Secretary Steven Chu issued a policy statement and guidance that expressly extended the Indian Preference for energy purchases from the Energy Policy Act of 2005 to DOE energy purchases. <https://www.energy.gov/articles/energy-department-issues-tribal-renewable-energy-purchase-guidance-and-project-development>

Yet, despite these express directives, when GAO researched the issue, it concluded that “None of the three primary federal agencies with authority to enter into energy contracts – the General Services Administration (GSA), and the Departments of Defense (DoD) and Energy (DOE) – have used the tribal energy preference since it was established in the Energy Policy Act of 2005.” GAO-19-359 at p. i (Highlights).

In fact, the federal government has only one example of a PPA for Indian-produced energy: On September 24, 2014, the General Services Administration executed a PPA with MG2 Tribal Energy, LLC. (Renewable Energy Contract No. GS-OOP-14-BSD-1016). That PPA apparently was awarded without reference to the Indian preference.

PPAs are important to renewable energy developers because they can be used to finance late-stage development: Commercial and investment banks routinely lend against energy PPAs. And of course, the U.S. government has the highest credit rating, and so a federal PPA would secure the most

favorable loan terms available. A federal PPA for energy from OSPA, or its development affiliates, would accomplish two goals simultaneously – it would meet the Biden/Harris Administration’s renewable energy procurement goals, and would generate private sector funding for the completion of OSPA’s development work.

Because WAPA “works with the Department of Energy’s Federal Energy Management Program to help federal agencies meet renewable energy goals, reduce emissions and foster markets for emerging technologies,” WAPA could play an important role in the purchase of Indian-produced power. See <https://www.wapa.gov/Renewables/ForFederalAgencies/Pages/federal-agencies.aspx>

For the federal government to become a significant player in buying renewable energy, Congress should consider amending 40 U.S.C. § 501(b)(1)(B), which limits GSA’s ability to contract for utility services for periods not exceeding ten years. Because the typical lifespan of a wind farm is 25-30 years, it is optimal for both the wind farm developer and the federal government to establish long-term contracts of up to 30 years.

The necessity for long-term contracts was recognized in the National Defense Authorization Act of 2007, when a new goal was set for the Department of Defense to produce or procure 25% or more of the electricity it consumes with renewable energy sources by 2025. DoD’s contracting authority for up to 30-years for energy production facilities on-site or for the purchase of energy from facilities off-site was expanded to include renewable energy facilities. Unfortunately for Tribes, the DoD authority is specific to facilities built on DoD real property or private property. Congress should consider amending 10 U.S.C. § 2922(a), to include facilities sited on Tribal lands.

[https://www.acq.osd.mil/eie/Downloads/IE/Guidance%20on%20Development%20of%20Energy%20Projects\\_3Nov2016.pdf](https://www.acq.osd.mil/eie/Downloads/IE/Guidance%20on%20Development%20of%20Energy%20Projects_3Nov2016.pdf)

## 6. CHANGE TAX POLICY SO THAT TRIBES CAN BENEFIT

OSPA does not take a position on whether the Wind Production Tax Credit should be re-established, or whether a new variation of it should be adopted. OSPA notes, however, that the existing tax credits, while very effective for many segments of the market, have not benefitted Tribes at all. If Congress does decide to take new measures to incent the deployment of wind and solar energy, OSPA believes that such programs must include provisions specifically designed to benefit Indian Tribes.

Indian Tribes are generally exempt from federal income taxes, and OSPA, as a Section 17 corporation, shares that Tribal exemption. As a result, Tribes cannot benefit directly from tax credits. One way to ensure that Tribes can benefit financially from tax incentives for renewable energy produced on Tribal lands is to make production tax credits transferable, and issue them through the Tribes. A number of states have enacted transferable tax credits as a means of financing high-cost projects, from film production to renewable energy, and these have become an important means of raising capital. <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2012/12/14/tax-breaks-for-sale-transferable-tax-credits-explained>

A number of industry participants promote refundable tax credits, and the Obama Administration proposed that the wind production tax credit be made permanent and refundable. <https://fas.org/sgp/crs/misc/R43453.pdf>, at p. 11. But because Tribes and Tribal entities do not file tax



returns, to make refundable tax credits available to Tribes and other entities with no tax liability, specific provisions in the legislation would be required.

#### IV. CONCLUSION

OSPA thanks Secretary Granholm and DOE Staff for this opportunity to share our story with the Department of Energy. As a Tribally-owned corporation that is unique in structure and business plan, OSPA is keenly aware of the critical importance of effective Consultation with federal agencies. OSPA is inspired that DOE shares this awareness, and is grateful for the Department's outreach.

We are at your disposal if we can provide any additional information.

Respectfully submitted,

Lyle Jack  
Chairman of the OSPA Board of Directors  
[lylejack\\_01@yahoo.com](mailto:lylejack_01@yahoo.com)  
605-407-9305

A handwritten signature in cursive script that reads "Lyle Jack". The signature is written above a solid horizontal line.

Jon Canis  
OSPA General Counsel  
[jon.canis@ospower.org](mailto:jon.canis@ospower.org)  
202-294-5782

A handwritten signature in cursive script that reads "Jonathan Canis". The signature is written above a solid horizontal line.

ATTACHMENT 1

THE OCETI SAKOWIN POWER AUTHORITY – LEADERSHIP AND STAFF

**CHEYENNE RIVER SIOUX TRIBE**

Ryman LeBeau  
OSPA Board Director  
and Tribal Council Representative of the  
Cheyenne River Sioux Tribe

**OGLALA SIOUX TRIBE**

Lyle Jack  
OSPA Board Chairman  
and former Tribal Council Representative and  
Economic Development Director of the  
Oglala Sioux Tribe

**STANDING ROCK SIOUX TRIBE**

Warren Hawk  
OSPA Board Director  
and Tribal Council Representative of the  
Standing Rock Sioux Tribe

**STAFF**

Caroline Herron  
Project Manager  
Washington, DC

**FLANDREAU SANTEE SIOUX TRIBE**

Board Member Nomination Pending

**ROSEBUD SIOUX TRIBE**

Daniel Gargan  
OSPA Treasurer  
and President of the Rosebud Sioux Tribe  
Utilities Commission

Ronald Neiss  
OSPA Elder Council Member  
and Leader, Oyate for Fairness and Equal  
Representation

**YANKTON SIOUX TRIBE**

Thurman Cournoyer  
OSPA Board Vice Chair  
and former Chairman of the  
Yankton Sioux Tribe

Faith Spotted Eagle  
OSPA Elder Council Member  
and Co-Founder and Executive Director  
of the Brave Heart Society

**STAFF**

Jon Canis  
Secretary and General Counsel  
Washington, DC

ATTACHMENT 2

SECRETARIES MONIZ AND JEWELL JOINT LETTER OF SUPPORT FOR OSPA



OCT 17 2014

The Honorable Dave Archambault II  
Chairman, Standing Rock Sioux Tribe  
Building 1, North Standing Rock Avenue  
P.O. Box D  
Fort Yates, North Dakota 58538

Dear Chairman Archambault:

As Co-Chairs of the Tribal Energy Subgroup of the White House Council on Native American Affairs, we write in response to your letters of July 1, 2014, to President Barack Obama, and July 14, 2014, to Secretary Vilsack and us regarding the Oceti Šakowin Wind Power Development Project (Oceti Šakowin Project).

Our Departments are familiar with the Oceti Šakowin Project proposal. We are pleased to have provided funding to the Standing Rock Sioux Tribe, the Rosebud Sioux Tribe, and the Crow Creek Sioux Tribe to support feasibility studies, technical studies for wind project development, and other efforts relevant to the Oceti Šakowin Project.

You have requested that the White House Council on Native American Affairs to be a mechanism for providing assistance to the Oceti Šakowin Project. Within the White House Council, the Tribal Energy Subgroup is designed to improve inter-agency coordination on Federal programs that support tribal energy projects, and is one venue for overseeing and coordinating the efforts of the various agencies that can provide the Tribes with information and assistance relevant to the Oceti Šakowin Project. We believe that your inter-tribal collaborative project provides a unique factual context that touches upon, and will help inform, nearly every aspect of the Tribal Energy Subgroup's interagency work. As co-chairs of the Tribal Energy Subgroup, we agree that the Tribal Energy Subgroup is the appropriate venue through which this Administration should provide the Sioux Tribes with coordinated multi-agency information and assistance relevant to the Oceti Šakowin Project.

We have directed our staff to follow up with you on this matter. Should you have any further questions, please feel free to contact the following individuals: for the Department of Energy, Ms. Pilar Thomas, Acting Director, Office of Indian Energy ([pilar.thomas@hq.doe.gov](mailto:pilar.thomas@hq.doe.gov) or by phone (202) 287-6566); Department of the Interior, Ms. Letty Belin, Senior Counselor to the Deputy Secretary ([letty\\_belin@ios.doi.gov](mailto:letty_belin@ios.doi.gov) or by phone (202) 208-6291); and Department of Agriculture, Ms. Patrice Kunesh, Deputy Under Secretary, Rural Development ([patrice.kunesh@osec.usda.gov](mailto:patrice.kunesh@osec.usda.gov) or by phone (202) 690-3543).

We applaud you for bringing your seven tribes together to advance this ambitious wind energy project. We look forward to assisting you on this initiative.

Sincerely,



Ernest J. Moniz  
Secretary of Energy



Sally Jewell  
Secretary of the Interior

cc: Eileen Briggs, President, Ta-tè Topa Energy, Inc.  
Senator Byron Dorgan, Arent Fox  
Jon Canis, Arent Fox