

Cheyenne River Sioux Tribe  
Crow Creek Sioux Tribe  
Flandreau Santee Sioux Tribe  
Oglala Sioux Tribe



Rosebud Sioux Tribe  
Standing Rock Sioux Tribe  
Yankton Sioux Tribe

Before the  
U.S. GENERAL SERVICES ADMINISTRATION

GSA 2023 TRIBAL CONSULTATION COMMENTS SUBMISSION  
Submitted to [tribalaffairs@gsa.gov](mailto:tribalaffairs@gsa.gov)

**COMMENTS OF THE OCETI SAKOWIN POWER AUTHORITY**  
re  
**IMPLEMENTATION OF THE INDIAN ENERGY PURCHASE PREFERENCE**  
**AT FEDERAL FACILITIES**

May 1, 2023

**OCETI SAKOWIN POWER AUTHORITY**

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## **GSA 2023 TRIBAL CONSULTATION COMMENTS SUBMISSION**

# **COMMENTS OF THE OCETI SAKOWIN POWER AUTHORITY re IMPLEMENTATION OF THE INDIAN ENERGY PURCHASE PREFERENCE AT FEDERAL FACILITIES**

The Oceti Sakowin Power Authority (pronounced O-CHET-ee Sha-KO-wee) (OSPA) submits the following comments in response to the General Services Administration (GSA) outreach to Tribal leaders, made in a “Dear Tribal Leader” letter dated March 2, 2023 (3/2/23 Letter), which solicits input on several topics. In the following comments, OSPA addresses one of the three issues identified by GSA: a special GSA initiative around carbon pollution-free electricity procurement. OSPA welcomes GSA’s outreach and is grateful for this opportunity to submit its comments.

### **I. INTRODUCTION: DESCRIPTION OF THE OCETI SAKOWIN POWER AUTHORITY AND ITS MISSION**

The Oceti Sakowin Power Authority (OSPA) was formed by seven Sioux Tribes that share territory with the states of South and North Dakota: the Cheyenne River, Crow Creek, Flandreau Santee, Oglala, Rosebud, Standing Rock and Yankton Sioux Tribes. Oceti Sakowin 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 affect all of the Oyate (the People). Oceti Sakowin also means “The Great Sioux Nation.”

#### **A. OSPA Is a “Section 17” Tribal Energy Development Organization**

OSPA is a “Section 17” Corporation – a federally-chartered corporation established under the Indian Reorganization Act of 1934. The seven 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 on June 24, 2015. With this level of Tribal ownership and control, OSPA meets the definition of a “tribal energy development organization” (TEDO) under 25 U.S. Code § 3501(12)(A).

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, utility and governmental 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.

**B. OSPA Is Mandated by Its Charter to Develop Renewable Energy on the Reservations of Its Member Tribes to the Greatest Extent Possible**

The OSPA Charter states its mandate in expansive terms:

As Original Peoples of Earth, we feel it is our duty to guide the world back into balance in a manner that provides for our life needs without destroying the source – Unci Maka (Our Grandmother Earth).

Taku Skan Skan (Energy) is what moves the Universe. Taku Skan Skan is a gift to be respected and harnessed for the good of humanity and in a way that preserves Unci Maka. Thus, we are empowered to come together to begin healing Unci Maka and guaranteeing lasting success in the wellbeing of the Oyate (People) through the responsible development of renewable energy by the Oceti Sakowin Power Authority.

By drawing on the ancient foundations and wisdom of the past, and combining them with the technologies and methodologies of the present, the Oceti Sakowin will be embarking on a groundbreaking journey to recreate the renewable culture we once thrived in, as well as act as a beacon for the world to follow.<sup>1</sup>

This mandate is reflected in the Resolutions of the member Tribes when they adopted the OSPA Charter: “[The member Tribes] have joined together to form the Oceti Sakowin Power

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<sup>1</sup> OSPA Charter: Recitals at page 1. <https://www.ospower.org/wp-content/uploads/2016/05/Oceti-Sakowin-Power-Authority-Corporate-Charter-Ratified-as-of-May-2016.pdf>

Project, wherein these [seven] Tribes will combine their wind resources and other assets to build a utility-scale, 1-2 Gigawatt wind power generation and transmission system that will sell green power to out-of-state buyers . . .”<sup>2</sup> OSPA estimates that, with adequate investment in the national grid, its member Tribes have sufficient wind and solar resources to generate 5 GW or more of renewable energy.

### **C. OSPA’s First Two Utility-Scale Wind Farms Are Being Developed Now**

OSPA has its first two projects under development: 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. At 570 MW, 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 over \$1 Billion, will be one of the largest infrastructure development projects in the history of South Dakota. Even so, the size of these projects is limited by available transmission capacity, and OSPA is actively working to expand the size of both wind farms to the extent possible.

Over the last five years, OSPA has completed significant early-stage development work on both the Pass Creek and Ta’teh Topah Projects, including:

- Secured Tribal leases in 2017 and preliminary access agreements from other landowners in the project site areas to conduct early wind resource and environmental studies.
- Secured interconnection queue positions with the Southwest Power Pool (SPP) in 2017. OSPA had to surrender these queue positions in October 2022 because it could not raise the \$48M deposit imposed by SPP as a condition of interconnection within the time frame mandated by SPP. OSPA discusses this issue further in Section III(A) below. OSPA anticipates reapplying for interconnection access by the end of this year.
- Deployed initial meteorological towers and SODAR units in 2018 and has collected over four years of wind resource and climate data. Preliminary modeling for both projects indicate wind speeds of 8 to 9 m/s at 98 meters and net capacity factors of 49.8% (in nominal capacity).
- Conducted initial wildlife field studies including two years of eagle/avian use and two years of raptor nest aerial surveys completed in 2019 and 2020, and bat acoustic studies, sharp-tailed grouse aerial lek surveys and prairie dog colony aerial surveys in 2019.
- Negotiated for two years with the Bureau of Indian Affairs (BIA) Great Plains Regional Office to develop a model wind energy lease for Tribal and Allotted Trust lands, and the Department of the Interior Appraisal and Evaluation Services Office completed the

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<sup>2</sup> E.g., Oglala Sioux Tribe, Resolution No. 16-49 (May 18, 2016) at page 2.

required fair market valuation of the lease rates.

- OSPA was selected by Apple, Inc. into the Apple Impact Accelerator program for nurturing brown, black and indigenous businesses, in that program's inaugural year.<sup>3</sup>

This work was completed with the expert assistance of Apex Clean Energy, one of the largest and most experienced developers of renewable energy projects in the country, which acted as OSPA's co-developer from 2017 to late 2022.

## **II. THE INDIAN ENERGY PREFERENCE OF THE 2005 ENERGY POLICY ACT IS A PROMISE BY THE U.S. GOVERNMENT THAT HAS NEVER BEEN FULFILLED**

The U.S. Congress and the Administrations of Presidents George W. Bush, Barak Obama and Joe Biden have all supported the federal government's purchase of Indian Energy as a means of promoting Tribal welfare and renewable energy development. Yet to date – 18 years after legislation establishing the Indian Energy Preference was enacted into law, it has never been implemented.

### **A. In the 18 Years Since the Indian Energy Preference Has Been Enacted, It Has Never Been Implemented by Any Federal Agency or Office**

The U.S. Congress, and the George W. Bush and Obama Administrations, have recognized that the enormous purchasing power of the federal government can play an important role in facilitating the development of Indian Energy. In 2005, the Energy Policy Act (EPAcT) was enacted into law. Among many other things, the law established support for the development of Indian energy resources, and a preference for the federal government's purchase of Indian Energy as a primary means of accomplishing this. 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 . . . 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.<sup>4</sup>

In 2012, Energy Secretary Steven Chu issued a policy statement in support of the Indian

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<sup>3</sup> <https://www.apple.com/newsroom/2021/08/apple-selects-15-black-and-brown-owned-businesses-for-impact-accelerator/>

<sup>4</sup> 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.

Energy Preference, and on February 5, 2013 that policy was codified in DOE Acquisition Letter No. AL 2013-02, which confirmed the application of the Indian Energy Preference to all purchases of utility services by DOE. The Indian Energy Preference was never implemented under either of these Administrations.

**B. The Biden-Harris Administration Has Recognized this History of Reneging on the Indian Energy Preference Promise, and Has Committed to End It**

And the Biden/Harris Administration have made the strongest statement yet about the importance of implementing the Indian Energy Preference:

**Implementation of the Indian Energy Purchase Preference at Federal Facilities.** To ensure that investments in the clean energy economy reach Tribal lands, DOE . . . with involvement from DOD and the General Services Administration (GSA) — will launch a new initiative to increase federal agencies’ use of Tribal energy through purchasing authority established by statute. Title V of the Energy Policy Act of 2005 established for federal agencies a preference for purchasing electricity and other energy products from Indian Tribes and Tribal enterprises. That authority has been unused for over 17 years.<sup>5</sup>

OSPA’s Ta’teh Topah and Pass Creek wind farm projects have been under development for five years – funded entirely by private investment. Having completed early-stage development work, our projects are in a more advanced state than any Indian-owned utility-scale wind projects in the country. If the federal government is to finally make good on its long-overdue promise, and the Biden-Harris Administration’s commitment, these are the projects.

**C. The Indian Energy Preference Can Be a Critical Tool for Meeting the Biden/Harris Administration’s Ambitious Zero-Emission Goals**

On December 8, 2021, President Biden issued Executive Order No. 14057, a major announcement of policy goals to combat climate change. The White House Fact Sheet accompanying the Executive Order describes these “ambitious goals” as follows:

The President’s executive order directs the federal government to use its scale and procurement power to achieve five ambitious goals:

- 100 percent carbon pollution-free electricity (CFE) by 2030, at least half

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<sup>5</sup> White House FACT SHEET: Biden-Harris Administration Announces New Actions to Support Indian Country and Native Communities Ahead of the Administration’s Second Tribal Nations Summit, November 30, 2022.



of which will be locally supplied clean energy to meet 24/7 demand;

- 100 percent zero-emission vehicle (ZEV) acquisitions by 2035, including 100 percent zero-emission light-duty vehicle acquisitions by 2027;
- Net-zero emissions from federal procurement no later than 2050, including a Buy Clean policy to promote use of construction materials with lower embodied emissions;
- A net-zero emissions building portfolio by 2045, including a 50 percent emissions reduction by 2032; and
- Net-zero emissions from overall federal operations by 2050, including a 65 percent emissions reduction by 2030.<sup>6</sup>

The OSPA member Tribes own and occupy almost 20% of the land area within the State of South Dakota. The four largest Tribes are comprised of two pairs of contiguous reservations that cover more than 13,000 square miles.

The OSPA member Tribes contain some of the strongest and most reliable on-land wind resources in the country. In a nation-wide study, the DOE and National Renewable Energy Laboratory listed the “top five Tribal lands with wind capacity and generational potential.”<sup>7</sup> Of the five Tribes identified, four of them – Cheyenne River, Standing Rock, Oglala and Rosebud – are OSPA members, and the Cheyenne River and the Oglala Pine Ridge Reservations are the sites currently under development for the Ta’teh Topah and Pass Creek wind farms. Four years of wind resource data collection on both sites confirm Net Capacity Factors of 50%.

Finally, the OSPA member Tribes are located in and adjacent to some of the dirtiest regions of the National Power Grid. The OSPA Tribal reservations are located within the MRO West (MROW) subregion of the Emissions & Generation Resource Integrated Database (eGRID) maintained by the U.S. Environmental Protection Agency. The output emission rates for all the greenhouse gases and pollutants tracked by eGRID in the MROW subregion are above the national average, and MROW is adjacent to the dirtiest subregions in the continental United States (*i.e.*, MRO East, SERC Midwest). Thus, new renewable energy generation on the reservations of the OSPA member Tribes would displace significant harmful emissions and accelerate the decarbonization of the National Power Grid.

Given all these factors, there is no Tribal developer better positioned than OSPA to assist this Administration in meeting its climate goals.

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<sup>6</sup> White House FACT SHEET: President Biden Signs Executive Order Catalyzing America’s Clean Energy Economy Through Federal Sustainability, December 8, 2021 (emphasis added).

<sup>7</sup> DOE Office of Indian Energy, *Developing Clean Energy Projects on Tribal Lands: Data and Resources for Tribes*, December 2012, DOE/IE-0012. <https://www.nrel.gov/docs/fy13osti/57048.pdf>

#### **D. The Federal Trust Responsibility Requires Implementation of the Indian Energy Preference**

The federal trust responsibility to Indians literally goes back to the 1800's and is a direct outgrowth of this country's terrible history of taking Indian land and conducting genocidal war against Native Americans. The federal trust responsibility recognizes this tragic history, and tries to account for it in some small part, by holding land occupied by the 574 federally recognized Indian Tribes "in trust" for the benefit of Indians. Sally Jewell, Secretary of the Interior in the Obama Administration, issued a Secretarial order that includes this excellent summary of the federal Trust Responsibility to Indians:

**Legal Foundation.** The United States' trust responsibility is a well-established legal obligation that originates from the unique, historical relationship between the United States and Indian tribes. The Constitution recognized Indian tribes as entities distinct from states and foreign nations. Dating back as early as 1831, the United States formally recognized the existence of the Federal trust relationship toward Indian tribes. As Chief Justice John Marshall observed, "[t]he condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence ... marked by peculiar and cardinal distinctions which exist nowhere else." *Cherokee Nation v. Georgia*, 30 U.S. 1, 16 (1831). The trust responsibility consists of the highest moral obligations that the United States must meet to ensure the protection of tribal and individual Indian lands, assets, resources, and treaty and similarly recognized rights.<sup>8</sup>

The Government Accountability Office (GAO), which has published several reports on Indian energy, notes that the Indian Energy Preference in the 2005 Energy Policy Act is a direct expression of the federal trust responsibility:

In a 2016 law, Congress noted that "through treaties, statutes, and historical relations with Indian tribes, the United States has undertaken a unique trust responsibility to protect and support Indian tribes and Indians." The Energy Policy Act of 2005 (EPACT05) includes several mechanisms that can support tribes in developing their energy resources. For example . . . 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. However, we found in November 2016 that

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<sup>8</sup> Secretary of the Interior Sally Jewell, Order 3335, August 20, 2014 at page 1 (citations omitted). <https://www.doi.gov/sites/doi.gov/files/migrated/news/pressreleases/upload/Signed-SO-3335.pdf>

no agencies had used the tribal energy preference, partly because no government-wide guidance existed on when and how federal agencies should use the preference.<sup>9</sup>

The fact that the federal government has reneged on its promise to promote Indian Energy through a procurement preference for 18 years – a full generation – is yet another instance of the federal government abandoning its “highest moral obligations” toward Indians. The Indian Energy Preference must be implemented without further delay.

### **III. FEDERAL PURCHASES OF INDIAN ENERGY ARE UNIQUELY IMPORTANT AND CRITICALLY NEEDED AT THIS TIME**

Since 2017, OSPA has been developing the Ta'teh Topah and Pass Creek wind farms, with the assistance of expert wind development companies, and with millions of dollars in private funding. Late last year, however, OSPA hit a roadblock – and it is entirely of the federal government's own making. A combination of generations of chronic underinvestment in the National Power Grid in and around the OSPA Tribes' Reservations, and a series of decisions made over years by the Western Area Power Administration and the Federal Energy Regulatory Commission – federal organizations under the U.S. Department of Energy – have imposed unreasonable and grossly excessive costs for interconnection to the National Power Grid on OSPA's projects.

#### **A. Interconnection to the National Power Grid Is Governed by Unreasonable Tariffed Terms and Conditions that Are an Absolute Barrier to Tribes' Developing Their Renewable Energy Resources on Their Own Land**

OSPA's member Tribes are located within the service area of the Western Area Power Administration (WAPA), a federal organization under DOE. All of OSPA's member Tribes interconnect directly to WAPA, or to another utility that is part of the WAPA Integrated Network, and normally would obtain access to the National Power Grid through WAPA, paying WAPA's tariffed rates and fees. Under WAPA's tariffs, obtaining a position on the interconnection “queue” – a waiting list pending a grant of interconnection – would cost OSPA under \$1 million for both the Ta'teh Topah and Pass Creek wind farms.

However, in 2015 the WAPA Upper Great Plains Region (where the OSPA Tribes are located) joined the Southwest Power Pool and started providing Grid interconnection through the SPP tariff. OSPA obtained its SPP queue positions in November 2017, and waited on that queue until September 2022 – more than five years. At the time OSPA obtained its SPP queue

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<sup>9</sup> U.S. Government Accountability Office, *Tribal Energy: Opportunities Exist to Increase Federal Agencies' Use of the Tribal Preference Authority*, GAO 19-359, at page 2 (April 2019) (footnote omitted).

position, OSPA's queue cost was set at about \$2.5 million. But in 2019, SPP revised its tariff, which increased OSPA's queue costs to an estimated \$9.5 million. Moreover, these costs were subject to change, as SPP conducted a series of studies – under the SPP tariff, the final queue costs would not be known until SPP completed its “Phase II System Impact Study.” SPP completed this study in August 2022, and announced that OSPA's interconnection queue costs were now \$48 million. And under SPP's tariff, after that final number was published, OSPA had 15 business days to post the money, or else it would lose its queue position. Of course, OSPA could not meet these demands, and was forced to give up its queue positions in September 2022.

And these queue costs are just deposits to apply for interconnection – a fraction of the cost of estimated network upgrades SPP predicts. Under its Phase II study, SPP estimated the costs of those upgrades needed to handle the power produced by the two OSPA wind farms will be in excess of \$230 million – of which more than half is for rebuilding WAPA-owned facilities.

OSPA is continuing its development work on both wind farms and anticipates re-applying for interconnection at the end of this year. As discussed below, OSPA anticipates significant changes to the patently unreasonable and excessive SPP interconnection practices and costs, although the timing of such relief is uncertain.

**B. The Administration Is Taking Steps to Cure the Problems with Grid Interconnection, and Has the Authority and Tools to Do So, but Cannot Adopt Them in Time to Prevent Irreparable Harm to OSPA and Its Member Tribes**

Federal Energy Regulatory Commission (FERC): In 2021 and 2022, FERC issued two Notices of Proposed Rulemaking that promise to modernize the National Power Grid. Docket No. RM21-17-000<sup>10</sup> promises to reform the way transmission planning for the National Power Grid is done, and how the costs of upgrades and new transmission are allocated. Docket No. RM22-14-000<sup>11</sup> promises to reform the interconnection process, including rates and terms for obtaining interconnection. Together, these rulemaking proceedings hold the promise of dramatically reducing the costs of interconnection (they may eliminate the “queue” system altogether), and the cost of transmission upgrades borne by new energy producers. Both proceedings received hundreds of comments from interested parties (OSPA submitted comments and replies in RM22-14-000), and the comment cycle was closed at the end of last year.

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<sup>10</sup> FERC, Advance Notice of Proposed Rulemaking, *Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection*, Docket No. RM21-17-000, issued July 27, 2021.

<sup>11</sup> FERC Notice of Proposed Rulemaking, *Improvements to Generator Interconnection Procedures and Agreements*, Docket No. RM22-14-000, issued July 5, 2022.

DOE Office of Grid Deployment and DOE Office of Electricity in Partnership with National Laboratories: DOE is currently conducting its latest Transmission Planning Study and Transmission Needs Study. Both efforts are led by DOE in partnership with multiple National Laboratories and are soliciting extensive comment from the industry and the general public. (OSPA has submitted comments in both.) These studies are focused on mid- and long-term planning of improvements to the National Power Grid, including the creation of new transmission corridors specifically designed to transmit renewable energy from the areas of greatest potential development (upper Great Plains for wind, desert Southwest for solar) to load centers across the country, and transmission “hubs” to collect and route the energy.

DOE Interconnection Innovation e-Xchange (i2X) Program: This program was initiated by the DOE Wind and Solar Energy Technical Offices and three of the National Laboratories last year. The i2X team is actively involved in data-gathering and has created a unique “Stakeholder Engagement Center” that brings industry participants together to attempt to achieve solutions to problems regarding transmission and interconnection. (OSPA has been an active participant since its inception.) One of the stated goals of the program is: “Providing Equitable Access to Clean Energy – Reducing interconnection delays and their associated costs can increase deployment of affordable clean energy projects.”<sup>12</sup>

These initiatives by FERC, DOE and the National Laboratories are extremely promising, and OSPA is very encouraged by the common focus on reducing the costs and delay of interconnection, and in sharing the costs of network upgrades equitably across industry beneficiaries. While OSPA is optimistic that relief is forthcoming from these initiatives, they will all take time – FERC rulemakings often conclude within a year, but can take longer, while the DOE grid modernization initiatives typically have a five-year planning horizon.

But OSPA can’t wait that long – such delay will impose significant new costs on its wind farm projects – and has already forced OSPA to repeat environmental studies and reapply for the SPP interconnection queue at a cost of millions of dollars. OSPA believes that a federal PPA is an elegant solution to providing the immediate relief OSPA requires, while responsibly managing any risk to the federal government.

**C. A Federal PPA Is an Elegant and Effective Way to Provide the Relief OSPA Needs, and to Meet the Administration’s Social and Energy Justice Goals**

In the five-year history of developing its first two wind farms, OSPA has had to overcome one obstacle after another – federal regulatory approvals, private financing from foundations and equity partners and engaging with co-developer partners. OSPA met all of

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<sup>12</sup> <https://www.energy.gov/eere/i2x/about-interconnection-innovation-e-xchange-i2x>

these challenges, without government assistance, and has accomplished more than any utility-scale wind TEDO in the country. But this latest obstacle – facing patently unreasonable and excessive costs to gain access to the National Power Grid – forces us to seek federal help. As noted above, OSPA is actively engaged in every forum DOE and FERC have established to modernize the National Power Grid and to reform the interconnection process, but all these initiatives will take a long time to implement – time that OSPA does not have.

A federal offtake agreement for the production of the Ta'teh Topah and Pass Creek wind farms would allow OSPA to overcome this barrier by pricing the cost of interconnection and transmission into the agreement. This would allow OSPA immediately to renew its interconnection application and proceed to complete the development of the wind farms, for which OSPA has already secured funding.

Moreover, the risk to the federal government can be minimized by including contract provisions that will allow reduction in the PPA<sup>13</sup> price if interconnection/transmission costs decline prior to the commercial operations date. OSPA will require approximately three years to complete the NEPA process and engineering design for its wind farms – time during which the industry should see the implementation of the FERC and DOE reform initiatives. If these initiatives result in a reduction of costs of interconnection and/or transmission that are borne by the OSPA wind farms, these reductions would be reflected in the final PPA pricing. In the unlikely scenario that no such relief is forthcoming from FERC or DOE, the federal government will have relieved OSPA and its member Tribes from the unjust burden imposed by generations of underinvestment, and the approval of SPP's patently unreasonable tariffed rates and terms. As discussed above, the federal trust responsibility and the Biden-Harris Administration's commitment to social and energy justice demands no less.

#### **D. There Is One Example of a Federal PPA for Energy Produced by an Indian-Owned Company**

The federal government has only one example of a PPA for Indian-produced energy: On September 24, 2014, the General Services Administration executed a Renewable Energy Contract (*MG2 PPA*) with MG2 Tribal Energy, LLC. (MG2).<sup>14</sup> MG2 was a Delaware LLC 51% owned by the Mesa Grande Band of Mission Indians located in southern California, with

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<sup>13</sup> OSPA uses the generic term "PPA" to encompass all forms of renewable energy purchases, including Power Purchase Agreements, Virtual Power Purchase Agreements, and Environmental Attribute Certificates (a.k.a. Renewable Energy Certificates).

<sup>14</sup> Renewable Energy Contract No. GS-OOP-14-BSD-1016, executed September 24, 2014 (*MG2 PPA*).

development partner Geronimo Energy.<sup>15</sup> The renewable energy project, Walnut Ridge Wind Farm, is located in western Illinois on private fee land.<sup>16</sup>

The *MG2 PPA* apparently was awarded without reference to the Indian Energy Preference. The PPA was issued early in the development process – a point of interconnection to the National Power Grid had not yet been determined or secured, a point of delivery had not yet been identified, and financing had not been secured.<sup>17</sup>

The *MG2 PPA* was a full power purchase agreement in which GSA acquired both brown power and Renewable Energy Certificates.<sup>18</sup> The power was sold at a price defined in a yearly schedule from 2016 (the anticipated commercial operation date) to 2026 and included a 2% escalator.<sup>19</sup>

While this is only a single example, and was issued by GSA without reference to the Indian Preference provision of the Energy Policy Act of 2005, it nevertheless demonstrates that the OSPA projects are eligible for a full PPA at this stage of their development.

#### **IV. IMPLEMENTATION OF THE INDIAN ENERGY PURCHASE PREFERENCE AT FEDERAL FACILITIES**

The positions OSPA offers below have also been included in OSPA's written submissions in response to Indian outreach initiatives conducted by the Department of Energy (Roundtable Discussion on Funding and Financing Tribal Energy Projects; Session on Tribal Consultation Policy) and the Department of the Interior (Proposed Revisions to Regulations Implementing the Buy Indian Act). OSPA would be pleased to provide full copies of these comments upon request.

##### **A. Defining Indian Energy**

OSPA feels strongly that standards should be developed to ensure that the Indian Energy Preference is issued solely for the benefit of Indian Tribes and Tribal Energy Development Organizations. OSPA offers the following proposals for establishing these standards to define Indian Energy:

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<sup>15</sup> GSA, GSA Renewable Energy Purchasing Update, Indian Country Energy & Infrastructure Working Group, June 23, 2016.

<sup>16</sup> <https://www.power-technology.com/news/newsus-gsa-signs-140mw-ppa-with-mg2-tribal-energy-for-illinois-wind-farm-4415743/>

<sup>17</sup> See *MG2 PPA* at §§ 5.1 and 6.1.

<sup>18</sup> *MG2 PPA* at § 10.5.

<sup>19</sup> *MG2 PPA* at Exhibit D.



## 1. Tribal/TEDO Ownership

Various federal Indian programs define Indian ownership as 51% or more of the equity or member share of an entity, and a 51% or more share of the profits generated by the entity. This is a widely accepted definition of “Indian-owned” and should be applied here. OSPA is 100% owned by its member Tribes and will secure a minimum 51% ownership in any joint venture.

## 2. Tribal/TEDO Control

The Energy Policy Act’s Indian Energy Preference requires that the organization selling the power is “owned and controlled” by one or more Indian Tribes.<sup>20</sup> “Control” is not defined in the statute. At least one agency – DOE – has issued an Acquisition Letter that interprets the EAct Indian Energy Preference to require that, in the case of a joint venture, the Indian entity must be the managing partner.<sup>21</sup> GSA should not impose a similar requirement.

In a highly technical industry such as wind power generation and transmission, it is neither necessary nor desirable to make Indian proficiency in the technical aspects of the business a precondition to obtaining the Indian Energy Preference. In OSPA’s case, it will partner with a nationally recognized, experienced developer of wind farms, and both parties will act as co-developers. OSPA will provide the expertise on community outreach and public relations, cultural/historic preservation matters, land lease management, Tribal and federal regulatory matters and Indian law, and will share expertise on NEPA permitting. OSPA’s partner will provide the expertise in designing and developing the wind farms, engineering, transmission planning, interconnection, and financial modeling, including PPA structuring and pricing. Given that the managing partner of the joint venture has responsibility for the day-to-day operations of the company, OSPA prefers that the entity with the greater technical knowledge serves in that capacity.

A regulatory prescription of how a TEDO must structure its joint venture with its technical co-developer shows a lack of understanding of industry practice and is an unwelcome governmental overreach. Indeed, at this point in time, a managing partner requirement likely would disqualify most Tribes and TEDOs from qualifying for the Indian Energy Preference.

To the extent that this issue may present an impediment to OSPA’s sale of power to DOE or WAPA, OSPA will ask the Secretary of Energy to waive this provision of DOE Acquisition Letter AL 2013-02. The Secretary has ample authority to do so.

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<sup>20</sup> 25 U.S.C. § 3502(d)(1).

<sup>21</sup> DOE, Acquisition Letter No. AL 2013-02 (February 5, 2013) at page 5, Answer 2.  
<https://www.energy.gov/sites/default/files/2016/02/f29/AL%202013-02.pdf>



### 3. Duration of Ownership

In a case similar to the “managing partner” requirement discussed above, the EAct is silent as to the duration of Tribal ownership for sales of Tribal Energy, and this issue should be clarified. One agency – again the Department of Energy – has interpreted the EAct ownership requirement in a manner that is at odds with industry practice. The 2013 DOE Acquisition Letter states that “[t]he degree of Indian ownership shall be at least 51 percent during the period covered by the contract,”<sup>22</sup> which of course ranges from 10 to 30 years.

If such a requirement were strictly enforced, it would disqualify most, if not all, Tribal/TEDO-developed wind and solar farms from qualifying for the Indian Energy Preference. At the time the DOE Acquisition Letter was issued in 2013, the statutory provisions establishing the Wind Production Tax Credit (WPTC) required that the tax credit investor own the project.<sup>23</sup> All utility-scale wind farms are financed using the WPTC – it is not economically feasible today to finance a wind farm without it.

Typically, the developer of the wind farm negotiates and executes the PPA as part of the development process. The developer then sells the wind farm projects to the WPTC investor at the end of the construction phase of the project, and as required by the tax code, the tax credit investor assumes ownership of the wind farm.

Congress changed the WPTC rules in the Inflation Reduction Act (IRA), which was enacted in August 2022. In an excellent development, Clean Electricity Production Tax Credits may now be transferred by the developer, or may be elected for “direct pay” to the developer if it is a tax-exempt organization. OSPA is very excited about this change in the law, and is actively exploring ways it may use the “direct pay” feature of the IRA to secure long-term ownership of the clean energy projects it develops. But there is no guarantee it can do so, or that the direct pay election is optimally beneficial to the OSPA member Tribes – the Internal Revenue Service has not yet issued guidance on the direct pay provisions, and the industry has yet to figure out how this provision will work in practice. So, OSPA must assume that it will develop its wind farms the way all wind farms have been developed to date – it will sell its ownership of the wind farms – along with the PPAs it executes – to a tax credit investor after construction of the wind farms is completed. If that is the case, OSPA will not be majority owner “during the period covered by the contract.”

In short, GSA must exclude any requirement for a Tribe or TEDO to “own for the

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<sup>22</sup> DOE, Acquisition Letter No. AL 2013-02 (February 5, 2013) at page 4, Answer 1.

<sup>23</sup> 26 U.S. Code § 45(a)(2) – Production Tax Credit; See also U.S. Code § 48(a)(3)(B) – Investment Tax Credit for similar ownership requirement – these provisions were modified by the “transferability” and “direct pay” provisions established in the Inflation Reduction Act of 2022.

duration of the contract” in its PPAs issued pursuant to the Indian Energy Preference.<sup>24</sup>

#### 4. Site Control

Development of renewable energy resources on Tribal land is more challenging than off-reservation development for a number of reasons. First, the reservations of all the OSPA member Tribes are comprised of three different classes of land, each with a different regulatory profile. “Tribal” land is land owned 100% by a Tribe. It is a class of “Trust” land, technically held by the federal government in trust for the Tribe. Such Trust land is regulated – it cannot be conveyed without Tribal or General Council approval, and other types of encumbrances may be regulated by the Bureau of Indian Affairs (BIA). “Allotted” land is land owned by one or more individual Indians, and can also be owned in part by Tribes. It is also Trust land, and it is more heavily regulated by the BIA – for example, all leases of Allotted land must be approved by the BIA. “Fee” land within a reservation is privately owned land held in fee simple, and its use and conveyance is not regulated by BIA, but instead by the state and county. All OSPA member Tribes’ reservations are “checker-boarded” into combinations of these three classes of land, and each has different regulations regarding how they are leased. Large wind farms developed entirely within reservation boundaries will necessarily encompass all three land classes.

BIA approval of leases of Trust land involves substantial delay. BIA will not grant final approval of such a lease until full NEPA compliance is obtained, and an environmental impact statement or environmental assessment is issued. Of course, this process can take years and is dependent on many factors, including federal agency responsiveness, that are not within the control of a Tribe or TEDO.

In addition, there are idiosyncratic factors that complicate land use on Reservations. For example, the ownership of many Allotted land tracts is “fractionated.” This means that ownership of a parcel of land handed down from parents to children over generations may grow into dozens or even hundreds of owners. The BIA has complicated rules for providing notice and obtaining consent to lease such tracts, and compliance with these rules takes time. These federal regulatory burdens make leasing more difficult on-reservation than off.

OSPA agrees that site control can be an important qualifier for issuance of a federal PPA, but for the reasons discussed above, a requirement of 100% site control would erect a fatal barrier to the development of Indian Energy on Tribal lands. OSPA posits that a lease signed

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<sup>24</sup> OSPA notes that even the DOE Acquisition Letter does not invalidate a PPA issued per the Indian Energy Preference if Tribal ownership changes during the term of the contract. Instead, the Letter simply states: “If the degree of Indian ownership is no longer at least 51 percent during any period covered by the contract, the offeror agrees to notify the Contracting Officer immediately in writing.” DOE, Acquisition Letter No. AL 2013-02 at page 5.

with a Tribe is adequate for purposes of determining site control, even if BIA has not issued a final approval. This will guarantee substantial site control, and more importantly will demonstrate the Tribe's support of the project, without becoming a barrier to Indian Energy sales.

## **5. Preference for Development Within Tribal Reservation Boundaries**

The definition of "Indian-owned" does not limit the development of Indian Energy to Tribal lands, and most of the few Indian-owned developers active today conduct their operations both on- and off-reservation. OSPA, however, is focused exclusively on developing renewable energy projects within the reservation boundaries of its member Tribes. This provides considerable benefits that off-reservation development does not. OSPA's Ta'teh Topah and Pass Creek wind farms are projected to generate tens of millions of dollars in sales tax and fee revenues to the Tribes during the construction phase of the wind farms, and tens of millions more in lease revenues during the 25-to-30-year operating life span of the wind farms. In addition, the wind farms will generate hundreds of construction and related jobs during the construction phase, and dozens of permanent operations and maintenance jobs during the operating life of the projects. These benefits are maximized when development occurs within reservation boundaries, and should be factored into PPA pricing for power produced on-reservation. If there are competing bids from Indian Energy producers, preference should be given to the on-reservation producer.

## **6. Respect TEDO Authority**

It is OSPA's experience that some financial institutions and the law firms that represent them want to take a "belt and suspenders" approach when dealing with OSPA, and seek to obtain Tribal Council approvals in addition to obtaining OSPA's signature. While this approach is understandable for companies that do not have experience in working with Indians, OSPA always resists such requests, because it fundamentally undermines the authority of OSPA. As a "Section 17" federally chartered corporation, OSPA obtained full Tribal authority to negotiate, execute and fulfill contracts when its member Tribes adopted the OSPA Charter. The U.S. Department of the Interior acknowledged this when it certified the OSPA Charter in 2015 – indeed, empowering the Section 17 corporation to act independently of Tribal politics and federal regulatory delay is the stated purpose of the legislation establishing the Section 17 corporate form. Further Tribal Council approvals should not be sought for contracts executed by Section 17 corporations or other forms of TEDOs that have already secured Tribal authority.

## **B. Defining the Geographic Scope of Federal Purchases of Indian Energy Without Limits**

Federal agencies have long understood that “many of the best wind resources are in areas far away from load centers. . . .”<sup>25</sup> Congress, the Administration and multiple agencies and national laboratories have all taken steps to design and fund new transmission infrastructure so that wind energy from the Midwest can be delivered to users across the country.<sup>26</sup> Expanding the reach of renewable energy producers, and making clean energy available to power buyers all across the country is a central tenet of the President’s Climate Action Plan.

While the Biden-Harris Administration has been absolutely clear in its commitment to fight climate change by supporting the development of wind and solar energy, and equally clear in its commitment to promote Indian Energy, some of the language the Administration has used needs to be clarified. Specifically, the Administration sometimes makes reference to promoting locally-produced power:

**Achieve 100 percent carbon pollution-free electricity use by 2030, including 50 percent on a 24/7 basis.** The federal government will work with utilities, developers, technology firms, financiers and others to purchase electricity produced from resources that generate no carbon emissions, including solar and wind, for all its operations by 2030. Half of the federal government’s 100 percent carbon pollution-free annual electricity demand will be procured on a 24/7 basis, meaning that the federal government’s real-time demand for electricity will be met with clean energy every hour, every day, and produced within the same regional grid where the electricity is consumed. With the scope and scale of this electricity demand, the federal government expects it will catalyze the development of at least 10 gigawatts of new American clean electricity production by 2030, spurring the creation of new union jobs and moving the country closer to achieving a carbon pollution-free electricity sector by 2035.<sup>27</sup>

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<sup>25</sup> Environmental Protection Agency, *Integrating Remote Wind Resources: An Environmental and Economic Analysis of Technology and Siting Options*,

[https://cfpub.epa.gov/ncer\\_abstracts/index.cfm/fuseaction/display.abstractDetail/abstract\\_id/10402/report/0](https://cfpub.epa.gov/ncer_abstracts/index.cfm/fuseaction/display.abstractDetail/abstract_id/10402/report/0)

<sup>26</sup> A thorough discussion of the issue, and the all-of-government approach to addressing it, can be found in DOE’s National Transmission Needs Study, Draft for Public Comment, February 2023;

<https://www.energy.gov/sites/default/files/2023-02/022423-DRAFTNeedsStudyforPublicComment.pdf>.

<sup>27</sup> White House FACT SHEET: President Biden Signs Executive Order Catalyzing America’s Clean Energy Economy Through Federal Sustainability, December 8, 2021 (accompanying Executive Order 14057)(emphasis added).

The reference to “produced within the same regional grid where the electricity is consumed” could be read as a limitation on the ability of some federal agencies and offices, military bases, and other federal facilities in some areas of the country to purchase power produced on the reservations of OSPA Tribes in the Upper Great Plains. OSPA asks GSA to clarify that this is not the case.

Nothing in the President’s voluminous statements on climate policy supports a restrictive definition of federal agencies’ ability to purchase wind power from the Upper Great Plains, no matter where they are located. To the contrary, the Administration’s “whole-of-government” approach to fighting climate change is expansive. OSPA asks that, for purposes of purchasing Indian Energy, federal demand will not be limited by ISO or RTO service area, balancing authority territory, sub-grid or grid region.

Even if GSA were to find that the language from the Presidential Fact Sheet quoted above does apply to PPAs for Indian Energy, OSPA notes that the Fact Sheet expressly states that the “produced within the same grid” language only applies to half of the federal government’s energy procurements. Given that the federal government is “the nation’s largest energy consumer,”<sup>28</sup> this should not be a meaningful restriction.

Finally, if GSA determines that a PPA for OSPA energy is limited to serving federal power needs within a restricted geographic area – and for the reasons discussed above, it should not – the “regional grid” should be defined in the broadest possible terms. OSPA posits that the definition of “U.S. Grid Regions” used by the U.S. Environmental Protection Agency should be adopted. According to the EPA: “The U.S. grid is divided into three major regions: The Eastern Interconnection, which operates in states east of the Rocky Mountains. The Western Interconnection, which covers the Pacific Ocean to the Rocky Mountain states. The Texas Interconnected system.”<sup>29</sup> OSPA would then be able to provide service to federal facilities in all states east of the Rocky Mountains, except parts of Texas.

### **C. Defining “Prevailing Market Rates” as Referenced in the Energy Policy Act of 2005, and Pricing PPAs**

The EAct provides all federal agencies and offices with authority to implement the Indian Energy Preference. As DOE legal Staff describe it: “Section 2602(d)(1) of EAct (codified

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<sup>28</sup> “With more than 350,000 energy-utilizing buildings and 600,000 vehicles, the federal government is the nation’s largest energy consumer.” Federal Energy Management Program, <https://www.energy.gov/femp/about-federal-energy-management-program#:~:text=With%20more%20than%20350%2C000%20energy,the%20nation's%20largest%20energy%20consumer.>

<sup>29</sup> <https://www.epa.gov/green-power-markets/us-grid-regions#:~:text=The%20U.S.%20grid%20is%20divided,The%20Texas%20Interconnected%20system.>

at 25 U.S.C. § 3502(d)(1)) authorizes a Federal agency or department to provide preference to qualified Indian owned organizations, corporations, etc. for the purchase of electricity or any other energy product or byproduct.”<sup>30</sup> The EAct requires that such purchases be made at “prevailing market rates.”<sup>31</sup>

## 1. Defining “Prevailing Market Rates” for Indian Energy

How “prevailing market rates” are defined is significant. The largest utilities in the areas where the Ta’teh Topah and Pass Creek wind farms are located provide the majority of their power by hydropower from federal dams and from coal plants built decades ago by some of the biggest polluters in the country. These old-technology power generators were built with direct federal funding or subsidies, and have imposed extraordinary hardships on the Tribes in the area. This allows the utilities to produce power at some of the cheapest rates in the country – forcing Tribes developing new, renewable energy facilities to compete at these rates would be a gross injustice.

Fortunately, the EAct does not require such an outcome. As DOE has recognized, the EAct allows the “prevailing market” to be defined as similarly situated Indian power producers generating the same type of power:

To ensure preference is given to a tribe or tribal majority owned business organizations, a DOE Site may conduct a limited competition that includes only tribes and tribal enterprises. For example, a DOE Site may issue a limited competition RFP (limited to tribes and tribal majority owned business organizations) for the purchase of electricity, energy products, or byproducts.<sup>32</sup>

## 2. Pricing PPAs to Include Social/Energy Justice Valuations

President Biden has repeatedly emphasized the importance of pursuing social and energy justice at every opportunity: “Communities with environmental justice concerns face entrenched disparities that are often the legacy of racial discrimination and segregation,

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<sup>30</sup> DOE Staff, *The Competition in Contracting Act (CICA) and Indian Preference Statutes and Preferences*, August 5, 2011. [https://www.energy.gov/sites/default/files/2016/02/f29/AL%202013-02%20-%20Bckgrnd\\_Memo%20on%20Indian%20Preference%20Statutes%20and%20CICA%20%28c%29%285%29Final.pdf](https://www.energy.gov/sites/default/files/2016/02/f29/AL%202013-02%20-%20Bckgrnd_Memo%20on%20Indian%20Preference%20Statutes%20and%20CICA%20%28c%29%285%29Final.pdf); <https://www.energy.gov/management/articles/acquisition-letter-no-al-2013-02>.

<sup>31</sup> EAct § 2602(d)(2).

<sup>32</sup> Secretary of Energy Steven Chu, MEMORANDUM FOR SENIOR PROCUREMENT EXECUTIVES: Department of Energy Procurement Policy Guidance - Purchase of Electricity, Energy Products and Energy By-Products from Indian Tribes, December 4, 2012, at page 3. See also DOE, Acquisition Letter No. AL 2013-02 (February 5, 2013) at pages 3-4. [https://www.energy.gov/sites/default/files/2016/02/f29/AL%202013-02%20-%2002%2001%2013%20-%20Attch\\_Secretarial%20Policy%20Memo.pdf](https://www.energy.gov/sites/default/files/2016/02/f29/AL%202013-02%20-%2002%2001%2013%20-%20Attch_Secretarial%20Policy%20Memo.pdf)

redlining, exclusionary zoning, and other discriminatory land use decisions or patterns. . . . It is the policy of my Administration to pursue a whole-of-government approach to environmental justice.”<sup>33</sup>

As discussed above in Section II(D), the OSPA Tribes’ biggest challenges to developing their wind resources stem from federal policies that took Tribal land and neglected investments in transmission infrastructure for generations. As a matter of social and energy justice, these injustices should be factored into pricing for Indian Energy PPAs:

- Compensating for the generations-long failure to invest in energy transmission infrastructure, which is now resulting in unjust and unreasonable charges for interconnection to the National Power Grid. See discussion at Section III(A), above.
- The value of offsetting pollution caused by coal-fired power plants in the dirtiest areas of the National Power Grid. See discussion in Section II(C), above.
- The value of the double energy credit provided to federal offices that purchase Indian Energy under EPCAct § 203(c)(3).

#### **D. The Term of PPA Should Reflect the Production Lifespan of the Wind/Solar Production Facility**

The productive life span of a wind farm is 25-30 years. A PPA for the productive life of the wind farm offers the greatest security and value to Tribal energy producers. However, GSA is limited to 10-year terms in contracts for utility services.<sup>34</sup> Is there a way for Indian Energy PPAs to provide coverage for the life of the wind farm?

OSPA believes there is – it has addressed a similar restriction on contracting with the Oglala Sioux Tribe. That Tribe’s constitution limits contract terms to five years. Of course, contracts relating to the wind farms – including the regulated leases of Tribal lands – require contracts of 25-year duration or longer. The Tribe has also encountered this problem in other commercial contracts, from school buildings to supermarkets, and has developed a simple solution: It structures its contracts as an initial five-year contract, followed by successive five-year renewals for as long a period as needed. The renewals take place automatically, as long as the terms of the original contract remain unchanged. This approach has been approved by the federal Bureau of Indian Affairs, and is accepted as a matter of course by vendors and banks.

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<sup>33</sup> Executive Order on Revitalizing Our Nation’s Commitment to Environmental Justice for All, April 21, 2023, at pages 2- & 3.

<sup>34</sup> 40 U.S.C. § 501(b)(1)(B).

## **E. The Preference for Bundled Power Purchase Agreements over Environmental Attribute Certificates**

OSPA asks GSA to focus its attention on bundled Power Purchase Agreements instead of Environmental Attribute Certificates. PPAs will eliminate the need for OSPA to market and sell the brown power, saving substantial transactional and consultant costs. PPAs are also a more appropriate vehicle to price in the social and energy justice factors discussed in Section IV(C)(2) above.

## **F. GSA Should Coordinate Purchases of Indian Energy with Other Federal Agencies**

The GSA Consultation Action Plan states that “GSA’s end goal centers on implementing an improved Administration-wide Tribal consultation policy” and lists one of its Guiding Principals as “GSA will identify Federal partners with similar policy objectives to reduce redundancy and streamline efforts on Tribal consultation, thereby lessening burdens on Tribes.”<sup>35</sup> OSPA welcomes this commitment – given the federal government’s enormous power-buying capacity, the role of coordinating among multiple agencies to arrange the sale of Indian Energy on a meaningful scale presents a really exciting opportunity for Tribes.

In addition to GSA, DOE and the Department of Defense are the main federal agencies authorized to purchase power for the federal government. Of these, DOE’s Western Area Power Administration expressly is tasked with helping all federal agencies meet their energy needs: 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.”<sup>36</sup> In addition, the OSPA member Tribes are all located within WAPA’s service territory, and most have WAPA transmission facilities within their Reservation boundaries. WAPA, in particular, could therefore play an important role in the purchase of OSPA power for all federal agencies.

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<sup>35</sup> GSA Tribal Consultation Action Plan, Last Updated October 5, 2021.

<sup>36</sup> See <https://www.wapa.gov/Renewables/ForFederalAgencies/Pages/federal-agencies.aspx>



**V. CONCLUSION**

OSPA very much appreciates the GSA outreach, and this opportunity to submit its comments. OSPA is at your disposal if we can provide additional information or materials.

Respectfully submitted:

THE OCETI SAKOWIN POWER AUTHORITY

By: /s/ 

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May 1, 2023