

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

**THE UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

**Innovations and  
Efficiencies in  
Generator Interconnection**

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**Docket No. AD24-9-000**

**COMMENTS OF THE  
OCETI SAKOWIN POWER AUTHORITY**

**DOE POLICIES AND THE SLOW PACE OF FERC INTERCONNECTION REFORM  
HAVE CREATED AN ABSOLUTE BARRIER TO  
UTILITY-SCALE RENEWABLE ENERGY PROJECTS ON TRIBAL LANDS —  
INNOVATIVE, INDIAN-SPECIFIC PRACTICES ARE REQUIRED  
TO ENABLE CLEAN INDIAN ENERGY**

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The Oceti Sakowin (pr. O-CHET-ee Sha-KO-wee) Power Authority (OSPA) submits its comments in response to the Federal Energy Regulatory Commission (FERC or Commission) Supplemental Notice of Staff-led Workshop, issued in the above-captioned docketed proceeding.<sup>1</sup> The Biden/Harris Administration has established the most progressive and effective policies and programs in modern history to combat the climate crisis, fix the country’s broken power grid, and promote social and energy justice. FERC has responded by initiating several docketed rulemaking proceedings that promise to reform the grid interconnection process, rates and practices, and to reform the way interregional and regional transmission planning is conducted. The U.S. Department of Energy (DOE), under the Granholm Administration and through multiple offices and organizations within the Agency, has conducted

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<sup>1</sup> FERC, *Supplemental Notice of Staff-led Workshop*, Docket No. AD24-9-000, Innovations and Efficiencies in Generator Interconnection (June 27, 2024).

extensive research and public outreach to establish and implement policies consistent with the Administration's directives.

However, in one area — the promotion of utility-scale Indian Energy<sup>2</sup> projects — these DOE efforts have failed, and this failure has had, and is having, devastating impacts on the nascent effort by Tribes to develop their wind and solar resources for commercial purposes. The Oceti Sakowin Power Authority has been leading the effort to develop Tribal renewable energy resources among Sioux Tribes in the Upper Great Plains for a decade, and can speak from direct experience on the shortcomings of federal interconnection regulation and policy. These comments note the excellent reform proceedings being conducted by FERC, but discusses how the pace of regulatory reform is necessarily slow, and that Tribal energy projects require immediate waiver or suspension of tariffed rates and terms that are unreasonable as applied to Indian Energy projects, and that are causing demonstrable, immediate harm. These comments also discuss related failings in policies and programs administered by DOE, because the solution to the problems that are preventing the development of Indian Energy require a coordinated effort between this Commission and DOE.

## **I. THE PROBLEM**

### **A. Background: The Oceti Sakowin Power Authority and Green Indian Energy Projects in the Upper Great Plains**

The Oceti Sakowin Power Authority was formed by, and is owned 100% 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.

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<sup>2</sup> For purposes of these comments, the term “Indian Energy” refers to utility-scale, grid-interconnected wind and solar generation projects developed by Tribes or Tribal Energy Development Organizations (TEDOs), within the exterior boundaries of Tribal reservations.

OSPA's Charter states its corporate mandate: develop, finance, construct, and operate utility-scale and community-scale renewable energy projects on the reservations of its member Tribes. OSPA is a federally chartered "Section 17" corporation, formed under 25 U.S.C. § 5124, and certified by the U.S. Department of the Interior (DOI) on June 24, 2015. OSPA meets the definition of Tribal Energy Development Organization (TEDO) in 25 C.F.R. § 224.30.

Since 2018, OSPA has teamed with expert industry partners to develop its first two utility-scale wind farms on two reservations — 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. Five years of wind measurement studies confirm that the Tribes possess some of the strongest and most reliable on-land resources in the country, with wind speeds of 8-9 m/s and net capacity factors in excess of 50%. As OSPA discusses below, it was forced to withdraw these first two projects from the SPP interconnection queue because SPP assigned a quarter-billion dollars of interconnection and network upgrade costs to them. OSPA is continuing to develop these two wind farms — in fact, with its expert development partner, OSPA is re-designing those two wind farms to generate 500 MW apiece, and is adding a third 500 MW wind farm on the Rosebud Reservation.

In addition to the OSPA projects, a separate group of Oglala Sioux Tribal members formed Lookout Solar Park I, LLC to develop a 110 MW solar farm on the Pine Ridge Reservation, but like OSPA, was forced off the SPP queue due to excessive and unreasonable interconnection costs. On the Standing Rock Reservation, SAGE Development Authority (SAGE) is developing its own independent project — a 235 MW wind farm. SAGE obtained a waiver of the deadline for paying the SPP interconnection deposits from this Commission, and as SAGE explains, it "would

have been unable to advance in the queue, significantly delaying or terminating otherwise viable projects at their outset.”<sup>3</sup> That’s 915 MW of renewable Indian Energy in the Upper Great Plains, predominantly privately funded and in advanced stages of development, that have been terminated, suspended, or put at risk by the fees, costs and practices of SPP governing interconnection to the national power grid.

## **B. The Transmission Desert of Western South Dakota and Surrounding Areas**

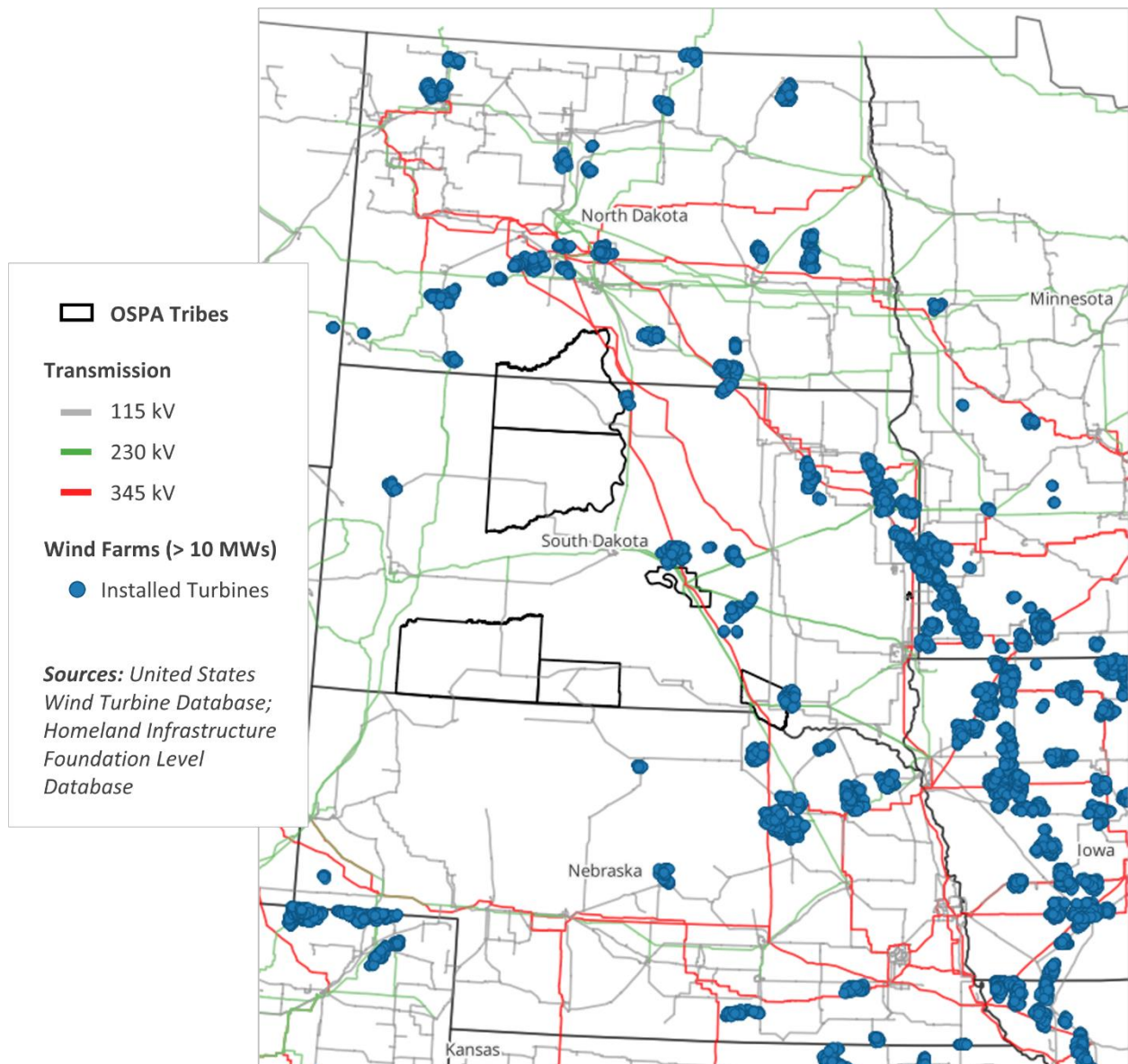
The OSPA Tribal reservations, located in the Upper Great Plains, possess some of the strongest wind resources in the United States, but sit within the Transmission Desert of western South Dakota, which extends north into North Dakota, west into Wyoming and Montana and south into Nebraska. This area covers over 40,000 square miles, and has no extra high voltage (EHV) transmission — the transmission networks across the reservations are only 115 kV. The dearth of EHV transmission lines results in extreme transmission costs for new utility-scale projects looking to connect to the grid because increased power generation overloads the system and requires extensive upgrades to be mitigated. To date, the lack of transmission investment in the region has allowed only one wind farm installation in the western half of South Dakota — just 103 MW (or 3%) of the 3.2 GW installed in the entire state.<sup>4</sup> The map below shows significant wind farm development in South Dakota east of the Missouri River, but almost none west of the river where most of the OSPA member Tribes are located.

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<sup>3</sup> Alliance for Tribal Clean Energy, *Petition for Expedited Rulemaking to Adopt Commercial Readiness and Withdrawal Penalty Rules for Tribal Energy Development Organizations*, Docket No. RM24-9-000 at 24 (filed August 9, 2024) (on behalf of Sage and the Hopi Utilities Commission (HUC), requesting adoption of new interconnection rules, and describing the interconnection experience of SAGE and HUC) (citations to FERC orders granting SAGE waiver omitted) (*Alliance Petition*).

<sup>4</sup> <https://puc.sd.gov/commission/Energy/Wind/winddevelopment%20map.pdf>

**Figure 1: The Transmission Desert of Western South Dakota and Its Impact on Wind Farm Development**

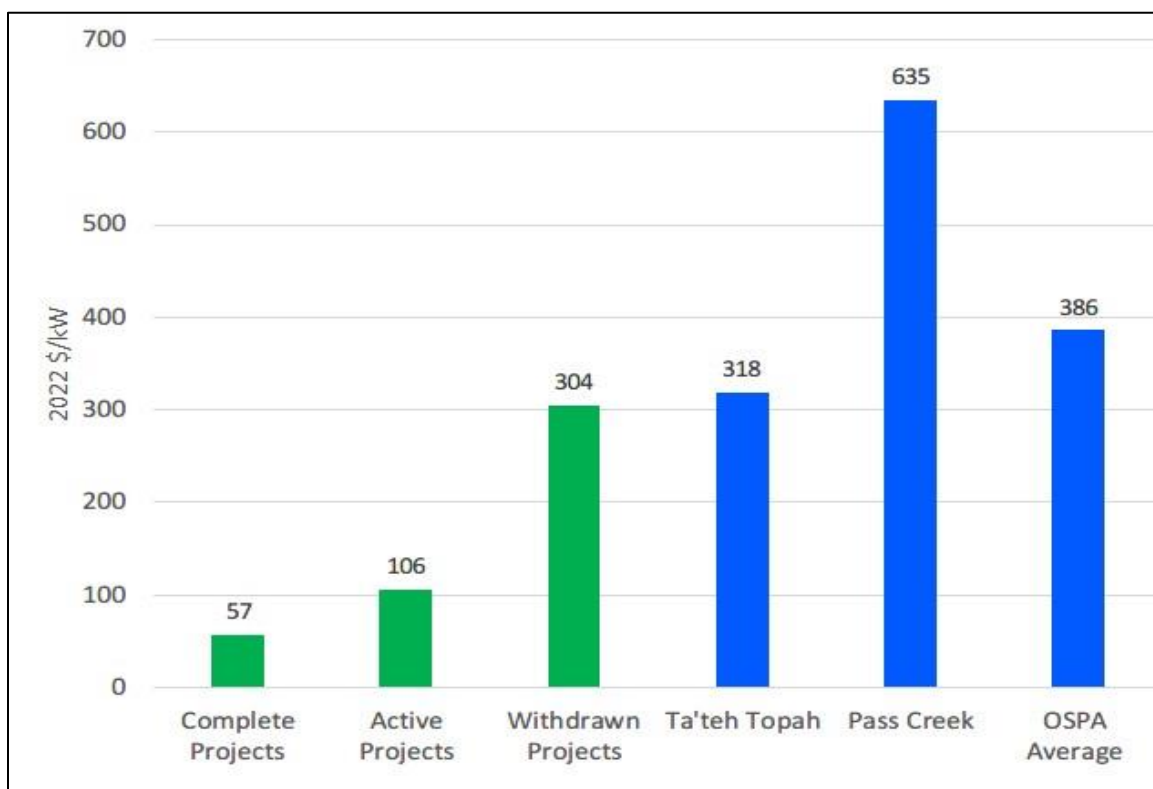


Both of the wind farms OSPA has been developing were forced to withdraw from the SPP queue due to prohibitively high network upgrade costs and their related “security deposit” requirements. The SPP DISIS-2017-002 Phase 2 Study results, issued in 2022, yielded a \$635/kW network upgrade cost for the Oglala Pass Creek wind farm and a \$318/kW upgrade



cost for the Cheyenne River Ta'teh Topah wind farm.<sup>5</sup> The result is an average of \$386/kW interconnection cost across OSPA's projects. This is well above the ceiling for a successful wind project in the SPP region. Lawrence Berkeley National Laboratory's "Generator Interconnection Cost Analysis in the Southwest Power Pool (SPP) Territory" concluded that from 2020-2022, completed electricity generation projects in the SPP region had an average interconnection cost of \$57/kW. As Figure 2 illustrates, withdrawn projects over the same period faced an average interconnection cost of \$304/kW. The two OSPA wind farms were assigned costs by SPP that are 5 and 11 times the average interconnection cost of a successful wind farm.<sup>6</sup>

**Figure 2: OSPA Interconnection Costs vs SPP Average**



<sup>5</sup> [https://opsportal.spp.org/documents/studies/files/2017\\_Generation\\_Studies/DISIS\\_Results\\_Workbook\\_DIS1702P2-PowerFlow\\_Stability\\_SC\\_FinalReport\\_08292022.xls](https://opsportal.spp.org/documents/studies/files/2017_Generation_Studies/DISIS_Results_Workbook_DIS1702P2-PowerFlow_Stability_SC_FinalReport_08292022.xls)

<sup>6</sup> [https://eta-publications.lbl.gov/sites/default/files/berkeley\\_lab\\_2023.04.20-\\_spp\\_interconnection\\_costs.pdf](https://eta-publications.lbl.gov/sites/default/files/berkeley_lab_2023.04.20-_spp_interconnection_costs.pdf)

**C. The Rates, Terms and Planning Practices for Interconnection Contained in the Southwest Power Pool Tariff Have Become an Insuperable Barrier to Indian Energy Projects in the Upper Great Plains**

*1. Comments Filed by Indian Developers in FERC Proceedings Detail Unjust and Unreasonable Rates and Terms for Interconnection, and the Devastating Impact They Are Having on Indian Energy Projects*

As OSPA shows above, the interconnection fees and cost allocations imposed by SPP have delayed, terminated or threatened 915 MW of utility-scale renewable Indian Energy in the Upper Great Plains alone. OSPA has submitted comments in Docket No. RM22-14-000 that provide extensive detail, and will not repeat them here. However, comments filed with this Commission by other Tribes and TEDOs demonstrate that this problem is not limited to SPP or to the Upper Great Plains region — similar concerns have been demonstrated by the Hopi Utilities Corporation,<sup>7</sup> and the Navajo Tribal Utility Authority<sup>8</sup> in the Desert Southwest and the Energy Keepers, Inc.<sup>9</sup> in the Northern Rockies.

OSPA commends FERC for conducting rulemaking proceedings that are identifying the problems and taking steps to address them, including finding the rates and terms for SPP interconnection to be unjust and unreasonable,<sup>10</sup> and requiring reforms of the Regional Transmission Organization (RTO) planning processes, including SPP's Integrated Transmission Planning (ITP) process.<sup>11</sup> But these reforms will take years, and multiple planning cycles, to

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<sup>7</sup> *Alliance Petition*, Docket No. RM24-9-000; and Hopi Utilities Corporation, *Request of Hopi Utilities Corporation for Prospective Tariff Waiver, Shortened Comment Period and Expedited Action*, Docket No. ER24-396-000.

<sup>8</sup> Comments of the Navajo Tribal Utility Authority, filed in Docket No. RM22-14-000.

<sup>9</sup> Comments of Energy Keepers, Inc., filed in Docket No. RM22-14-000.

<sup>10</sup> FERC, *Improvements to Generator Interconnection Procedures and Agreements*, Order No. 2023, 184 FERC ¶ 61,054 at ¶ 37 (2023), *order on rehearing*, Order No. 2023-A, 186 FERC ¶ 61,199 (2024).

<sup>11</sup> FERC, *Building for the Future Through Electric Regional Transmission Planning and Cost Allocation*, Order No. 1920, 187 FERC ¶ 61,068 (2024).

implement, and OSPA and other Tribes and TEDOs need immediate relief, and relief that is uniquely tailored to the needs of the Tribes. As OSPA demonstrated in previous comments to the Commission, it waited on the SPP queue for five years before SPP finally completed its DISIS Phase 2 Study and forced OSPA off the interconnection queue in late 2022.<sup>12</sup> And while FERC is taking conscientious steps to reduce the cost of interconnection — and particularly the allocations of network upgrade costs to interconnectors — under the rules adopted in Order 2023 and SPP’s currently effective tariff, the interconnection fees and costs that OSPA will have to pay to get back on the queue have virtually stayed the same, or increased substantially.<sup>13</sup> This is because the new Commercial Readiness Deposit (CRD) system adopted by FERC is computed as a percentage of network upgrade costs — and any fee computed as a percentage of a quarter-billion-dollar network upgrade charge will be unjust and unreasonable. In her concurring statement in Order 2023, Commissioner Clements noted that the CRD rules adopted by the Commission could prove as much of a barrier to Indian Energy projects as the security deposits they replaced: “While the commercial readiness deposit and withdrawal framework adopted in this final rule hold the potential to make interconnection processes more efficient,

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<sup>12</sup> OSPA, *Comments of the Oceti Sakowin Power Authority: The Commission Is Required to Adopt Rules and Practices Tailored to the Unique Needs of Tribes and Tribal Energy Development Organizations*, filed in Docket No. RM22-14-000 on October 13, 2022, at 8-9 (*OSPA RM22-14 Comments*).

<sup>13</sup> Since the publication of Orders Nos. 2023 and 2023-A, SPP has added an Application Fee and increased its Study Deposits — instead of paying \$90,000 for each wind farm project to enter the queue, OSPA will have to pay \$260,000 for each project — and is requesting to maintain its current Financial Security Deposit structure — including an initial \$4,000/MW deposit and an \$80,000/mile generation tie line deposit. SPP, *Southwest Power Pool, Inc. Docket No. ER24-1362-000, Submission of Tariff Revisions to the Generator Interconnection Procedures to Increase Study Deposits*, Letter to Acting Secretary Debbie-Anne Reese, dated February 29, 2024; SPP, *Southwest Power Pool, Inc. Docket No. ER24-2026-000, Orders Nos. 2023 and 2023-A Compliance Filing*, Letter to Acting Secretary Debbie-Anne Reese, dated May 16, 2024

they may act as a barrier to projects serving or developed by Tribes in cases where such projects adopt unique ownership and financing structures.”<sup>14</sup>

## *2. SPP’s ITP Practices Create a “Catch 22” That Ensures Tribal Energy Projects Will Not Be Included in Regional Planning*

SPP’s Integrated Transmission Plan (ITP) process starts with projects that have obtained a position on the SPP interconnection queue.<sup>15</sup> Wind projects that were on the queue but were forced off by excessive interconnection fees are expressly excluded from consideration in the ITP: “Due to the large quantity of wind sites requested in the SPP GI queue, the initial set of wind sites to be considered are those requested in the queue that are not withdrawn or on suspension . . . .”<sup>16</sup> Finally, SPP’s Siting Manual makes clear that project selection for the ITP portfolio is determined by SPP’s Transmission Owner (TO) members, whose selection criteria is their own economic interest:

The final resource siting plan should result in a practical balance of resource additions across SPP in such a way that the study can investigate and solve transmission limitations to best benefit the region. The prioritization and ranking criteria is based on both objective and subjective information and approved by the ESWG [the SPP Economic Studies Working Group, an internal advisory group made up of representatives from SPP member organizations].

It's apparent that network upgrades that benefit the poorest and most remote areas of South Dakota do not “best benefit” the TOs throughout SPP’s 14-state region, who evaluate the application using subjective standards.

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<sup>14</sup> Order No. 2023, 184 FERC ¶ 61,054, Clements, Commissioner, *concurring*, at ¶ 38 (July 28, 2023) (citing OSPA comments).

<sup>15</sup> SPP, *Integrated Transmission Plan Resource Siting Manual* at 5, Section 1: Introduction and *passim*. <http://spp.org/Documents/59932/ITP%20Resource%20Siting%20Manual.docx> (SPP Siting Manual). OSPA has email correspondence from SPP confirming this is the reason OSPA’s wind farms were excluded from consideration in the 2024 ITP process and will be excluded again in the 2025 ITP. OSPA will furnish the email upon request.

<sup>16</sup> SPP Siting Manual at 11, Section 5: Site Prioritization By Technology, § 5.2: Wind.

So this is the position that SPP's ITP process imposes on OSPA: OSPA was forced off the queue, after a wait of five years, in late 2022 because SPP imposed security deposits of about \$50,000,000, calculated on the basis of network upgrade costs of a quarter-billion dollars, which made OSPA's two wind farms economically inviable. In order for its projects to be considered for future upgrades to the power grid, OSPA has to pay the new, FERC-prescribed Commercial Readiness Deposits (CRDs), which are also calculated on the basis of estimated network upgrade costs, and so are expected to remain at or above \$50,000,000. OSPA has to pay these interconnection deposits knowing that SPP will again assign network upgrade costs to it that will make its wind farms economically inviable. Under this system, planned network upgrades that may serve to reduce the amount of network upgrade costs assigned to the OSPA wind farms will never be considered.<sup>17</sup> OSPA's concern is not speculative — in the next section we show how the SPP ITP process this year functioned to exclude the OSPA Tribes from the 2024 project portfolio, despite efforts by WAPA and Basin Electric to have them included.

*3. SPP's Tariffed Interconnection Rates and ITP Process Are Perpetuating the EHV Transmission Desert Across Tribal Lands in the Upper Great Plains*

*a) The SPP ITP Process Excluded All the Tribal Lands from a Proposed Comprehensive Grid Upgrade Plan*

In late 2023, OSPA helped form a team consisting of WAPA, Basin Electric Power Cooperative, OSPA and three of its member Tribes, IBEW Local 1250, and Steelhead Americas — the development arm of Vestas, the largest wind turbine manufacturer and leading service provider in the world. OSPA, WAPA and Basin Electric together designed an EHV transmission

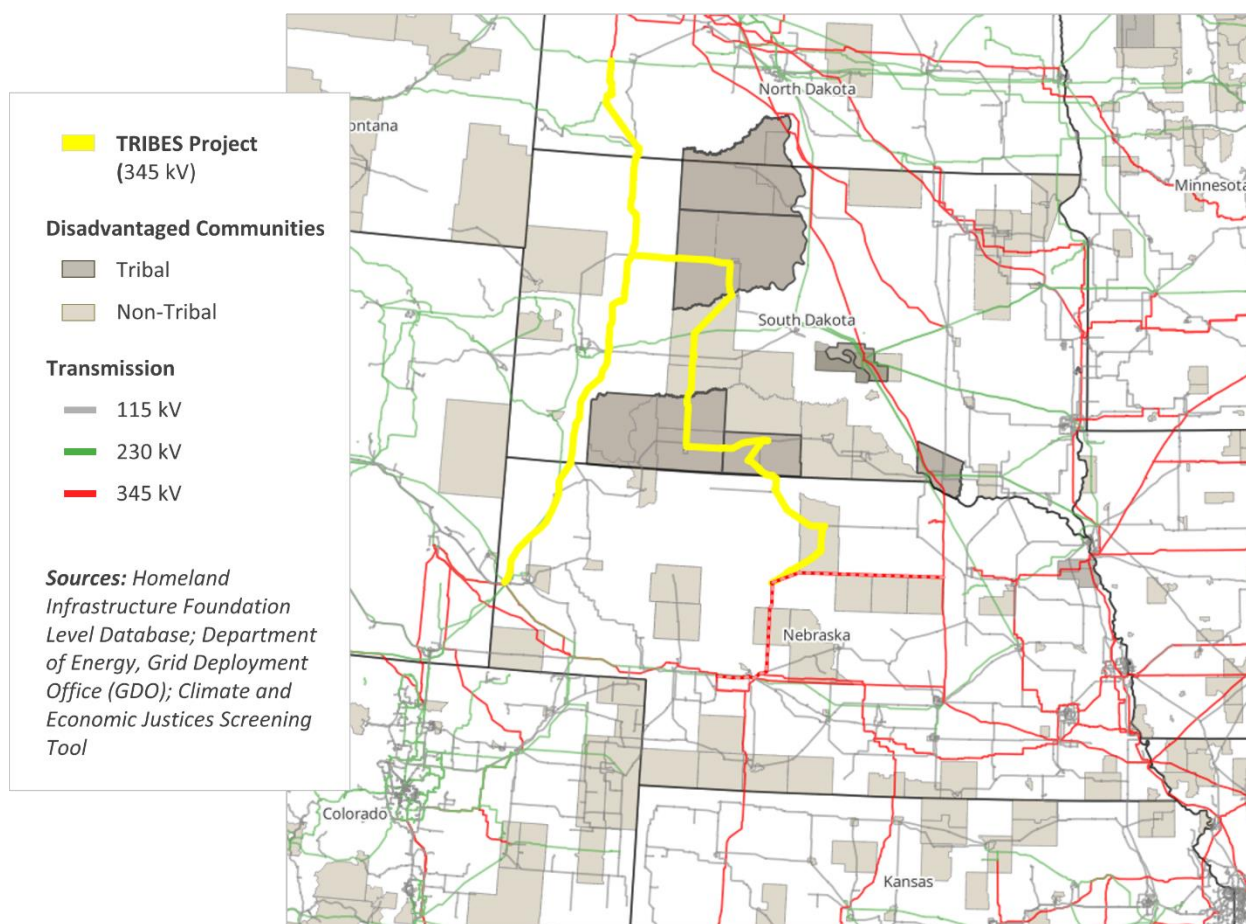
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<sup>17</sup> FERC's recent Order 1920 requires RTOs to incorporate new Tribal generation projects into their transmission planning processes, but these changes will take multiple planning cycles to implement.

upgrade covering an area from southwest North Dakota, across western South Dakota and three of the largest Indian reservations in the country, and into north central Nebraska. Called the Transmission and Renewables Interstate Bulk Electric Supply (TRIBES) Project, it proposes to introduce a 345 kV transmission backbone for the first time to the area, eliminating the Transmission Desert of western South Dakota. The TRIBES Project team applied for Round 2 Grid Resilience and Innovation Partnerships (GRIP) grant funding in April 2024 — 790-miles of state-of-the-art carbon core conductor, flexible AC transmission system (FACTS) control devices and static synchronous compensator (STATCOM) regulating technology, utilizing existing rights of way for 90% of the transmission path, with a minimum 65% of costs paid for by privately-raised funds.

The Tribes Project plan consists of two transmission routes: 1) the western branch starting in North Dakota, traversing South Dakota, and terminating in Nebraska that relieves congestion but does not bring EHV directly to Tribal or other disadvantaged communities (DACs); and 2) the eastern branch specifically designed to bring EHV to the Cheyenne River, Oglala Pine Ridge and Rosebud Reservations. The eastern branch also transits three other DACs before terminating in central Nebraska. The TRIBES Project route is depicted in Figure 3 below.

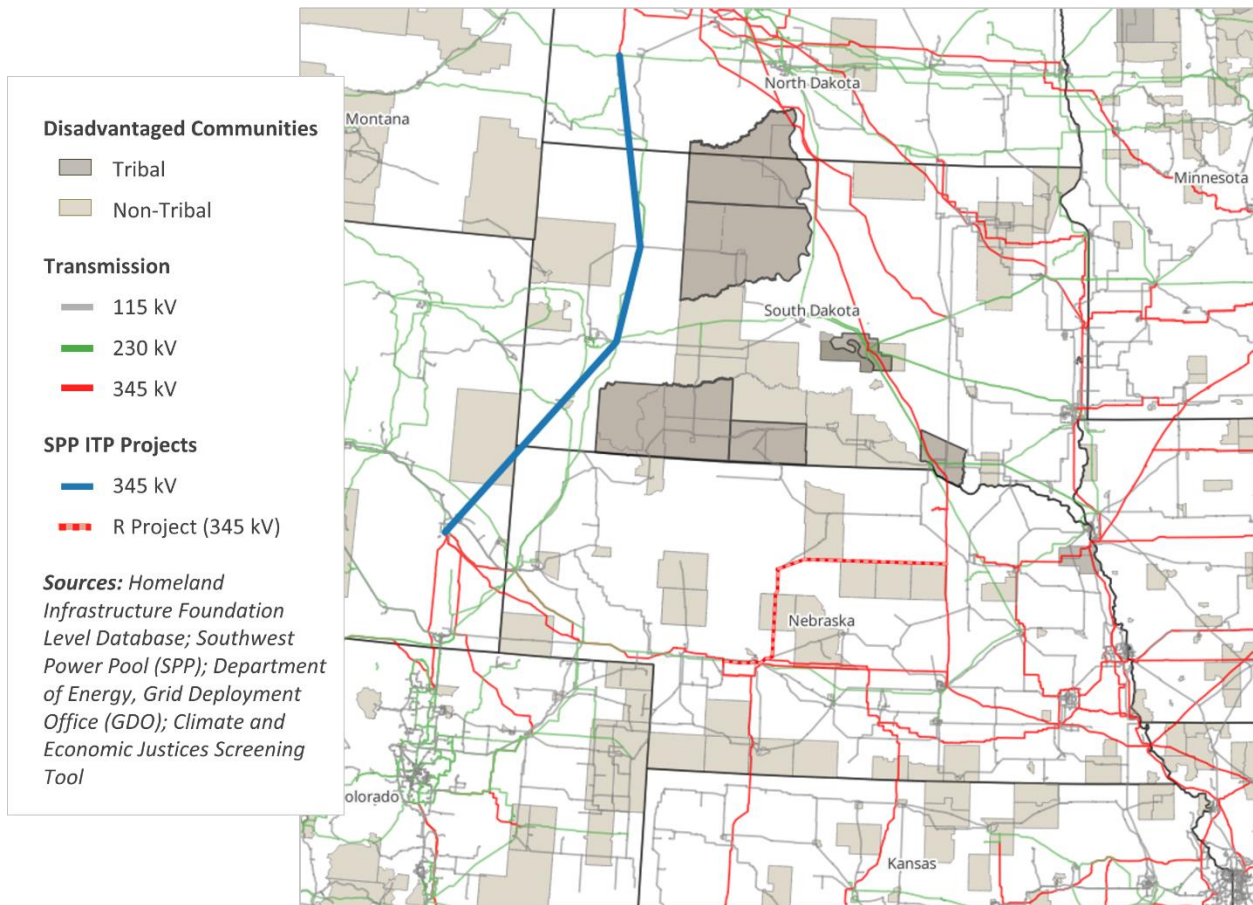
**Figure 3: The TRIBES Project Route**



WAPA and Basin Electric submitted the entire TRIBES Project to SPP for its 2024 ITP process at the beginning of this year, and strongly supported adoption of the full project. The result? SPP included the western branch in its analysis and has recommended it for inclusion in its 2024 ITP project portfolio. SPP rejected the eastern branch, cutting off upgrades to the national power grid in areas that serve Tribes and other DACs with almost surgical precision. This is not a coincidence or an accident — SPP’s ITP practices are designed to exclude high-cost and remote areas, which is where the Tribes are.



**Figure 4: The Diminished Part of the TRIBES Project That Survived the SPP ITP Process**



*b) The SPP ITP Process Is Vitiating the One DOE Program that Is Attempting to Promote Transmission Investment in the Upper Great Plains*

In May of this year, the DOE Grid Deployment Office (GDO) issued one of DOE's most consequential initiatives — the National Interest Electric Transmission Corridor (NIETC) program. GDO describes the program as:

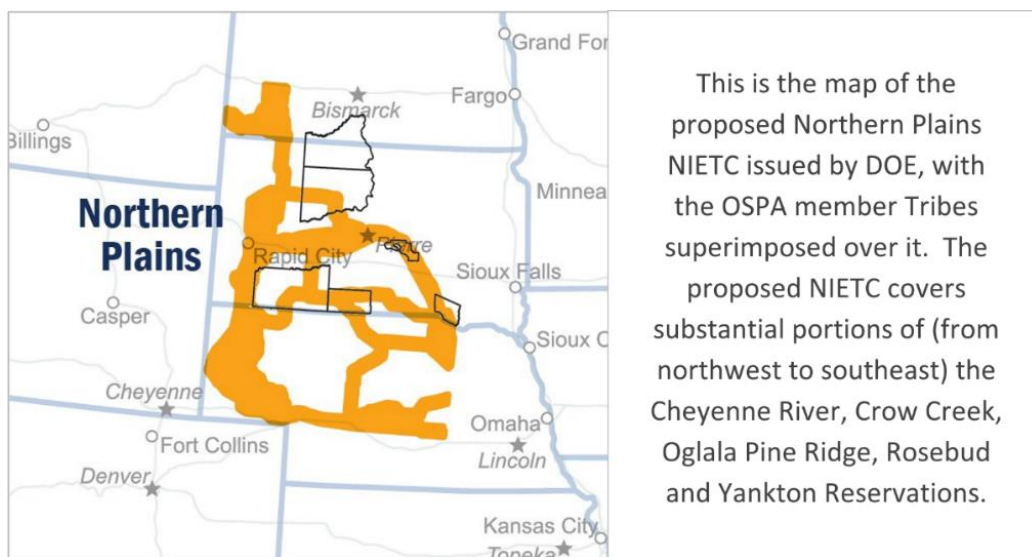
A NIETC is an area of the country where DOE has determined the lack of adequate transmission harms consumers and that the development of new transmission would advance important national interests in that area, such as increased reliability and reduced consumer costs. A NIETC designation can unlock Federal financing tools, specifically public-private partnerships through the \$2.5 billion Transmission Facilitation Program under the Bipartisan Infrastructure Law (BIL) and the \$2 billion Transmission Facility Financing



Program under the Inflation Reduction Act (IRA).<sup>18</sup>

The May announcement proposed 10 NIETCs in different areas across the country, and was the culmination of over a year of public outreach, fact-gathering and analysis. GDO has sought additional public comment, and is expected to confirm the final list of NIETCs by the end of the year. The Northern Plains NIETC adopts in large part the recommendations of OSPA and identifies a large area within the EHV Transmission Desert of South Dakota. It is the only proposed NIETC that encompasses Tribal reservations and specifically addresses Tribal needs and clean energy goals.

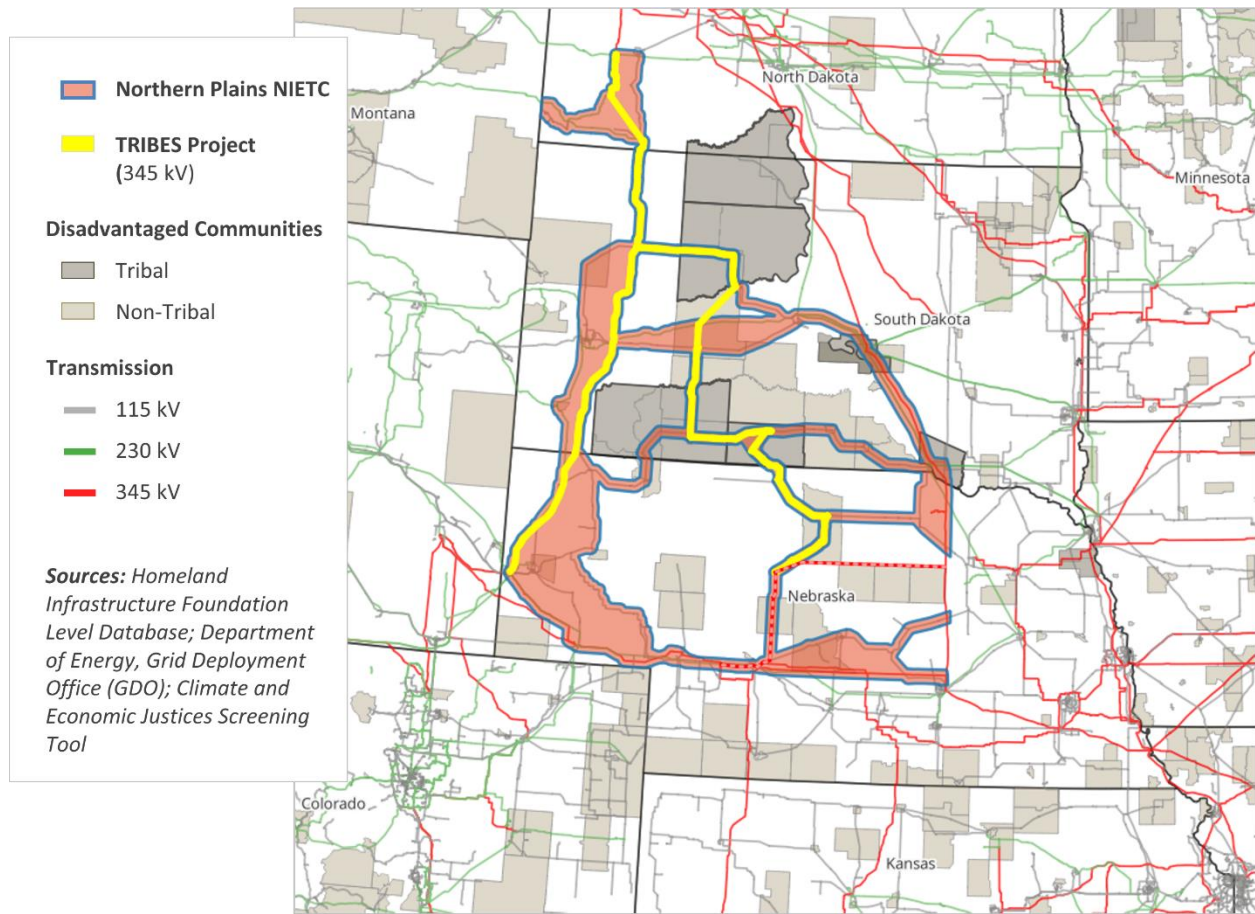
**Figure 5: DOE's Proposed Northern Plains NIETC, with OSPA Member Tribes**



The OSPA proposal also follows the route design of the OSPA/WAPA/Basin Electric proposed TRIBES Project, described in Section I(C)(3)(a) and Figure 3 above. When the final NIETCs are announced, transmission projects constructed within the NIETC areas will not only qualify for the \$4.5 billion in unique federal financing, they will also be eligible for assistance and expedited federal permitting.

<sup>18</sup> <https://www.energy.gov/gdo/national-interest-electric-transmission-corridor-designation-process>

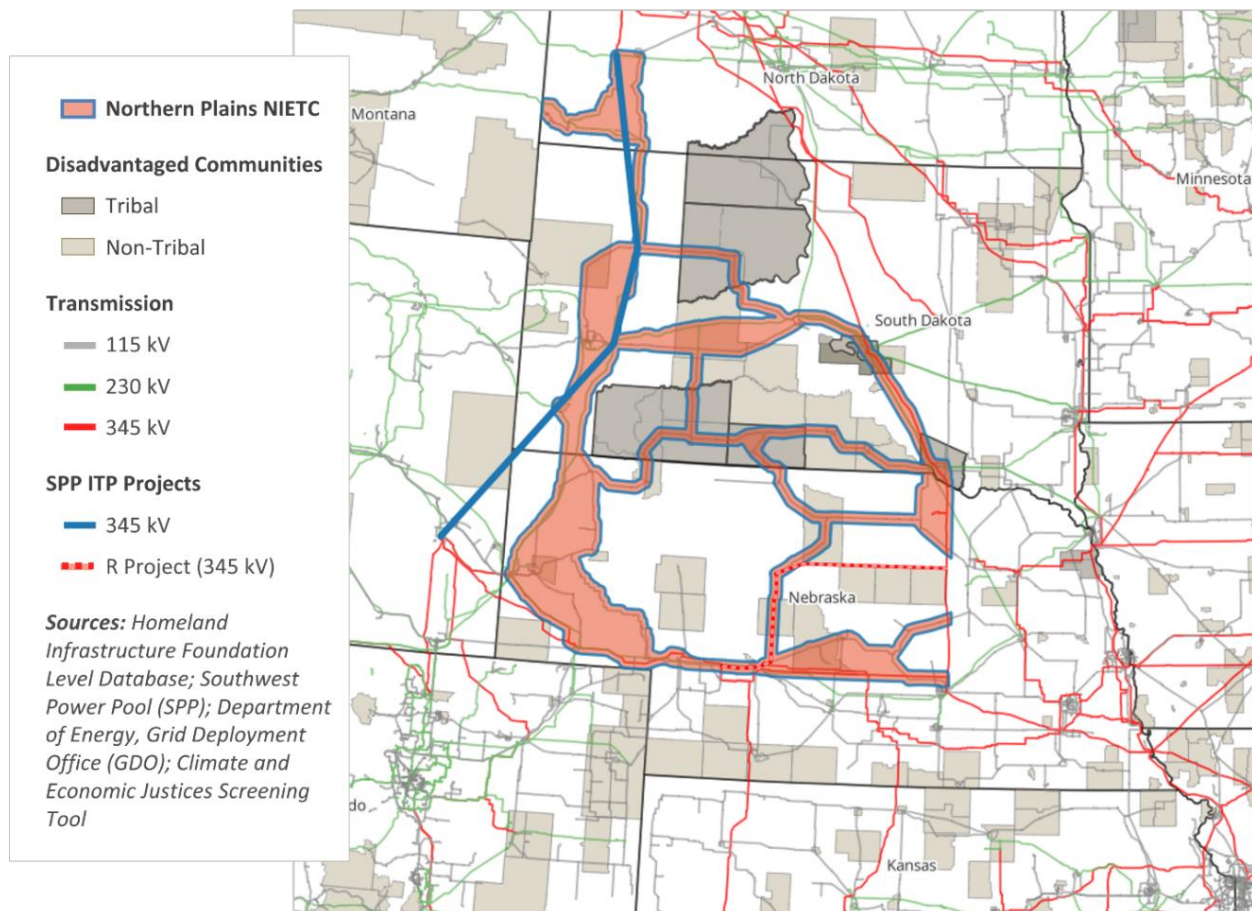
**Figure 6: The TRIBES Project Was Designed to Fit Within the Northern Plains NIETC**



The Northern Plains NIETC has enormous potential to benefit some of the poorest and most underserved areas of the country, and we hope that GDO confirms it as a final NIETC. However, SPP's actions in splitting the TRIBES Project route in two, and rejecting that part of the route that delivers EHV to the Tribes, promises a horribly perverse result. The only transmission route within the NIETC that can be developed, per SPP's 2024 ITP Portfolio, is the western branch — the one that does not touch a single Tribal reservation or other disadvantaged community. That area still has great wind, though, so building an EHV line along the western border of South Dakota will attract wind farm development by the usual suspects — Invenergy, NextEra Energy, Berkshire Hathaway Energy, etc. So the financing and permitting

benefits of the NIETC — which was selected because of the benefits it promised to Tribes and TEDOs — will go exclusively to a transmission project that will benefit billion-dollar corporations whose generation projects never touch a reservation or other DAC.

**Figure 7: After Stripping Out the Tribal Segment of the TRIBES Project, the Remaining Part Included in the SPP Portfolio Still Can Claim the Advantages of NIETC Designation**



The potential for abuse of the NIETC program is illustrated above — the blue line shows that portion of the TRIBES Project that survived the SPP ITP process and was recommended for inclusion in the SPP 2024 portfolio. Substantial amounts of this route are located within NIETC boundaries, even though they never touch a Tribal reservation or other DAC. Off-reservation

generation projects will be able to benefit from the federal funding and permitting support attached to the EHV transmission approved by SPP.

*c) SPP's ITP and Interconnection Processes Are an Obstacle to Tribes/TEDOS Securing Federal Grant Funding*

Finally, SPP's interconnection and planning processes were identified by the DOE Grid Deployment Office as a "weakness" and a basis for rejecting the application for a GRIP grant, submitted by OSPA and the full TRIBES Project team. The GDO critique states: "It is unclear how selection by SPP would work with GRIP funding/cost recovery via SPP's tariff."<sup>19</sup>

Of course, this is the same "weakness" that will affect any Tribal or TEDO developer working with a transmission owner that is subject to an RTO planning process. Unless some level of certainty is achieved through the actions by FERC and DOE that OSPA proposes in these comments, Indian Energy projects will face yet another obstacle.

**D. OSPA Has Tried to Obtain DOE Funding for Interconnection Repeatedly Throughout the Granholm Administration, and Has Been Rejected Every Time**

1. *OSPA has applied for funding for four different programs administered by DOE, and has been rejected for all of them*

OSPA got an indication of the magnitude of SPP's interconnection deposits and network upgrade costs when SPP issued its draft DISIS Phase 1 Study in 2021. OSPA immediately engaged with DOE's Loan Programs Office, seeking funding for the anticipated SPP security deposits, ultimately submitting an application for a Tribal Energy Loan Guarantee Program (TELGP) loan guarantee from the DOE Loan Programs Office in 2022. The OSPA application was not accepted, and because OSPA could not secure the almost \$50 million deposit, its two wind

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<sup>19</sup> DOE, Grid Deployment Office, *Strengths and Weaknesses*, BIL — Grid Resilience and Innovation Partnerships (GRIP) DE-FOA-0003195, Application Control Number 3195-1540, at 3 (undated, issued July 2024) (*GRIP Analysis*).

farm projects were forced off the SPP interconnection queue. OSPA then sought funding from various DOE programs to get back on the SPP queue: partial funding through a grant under the Energy Improvements in Rural or Remote Areas program from the DOE Office of Clean Energy Demonstrations in 2023 and an Unsolicited Grant administered by the DOE National Energy Technology Laboratory and the DOE Office of Indian Energy in 2024. DOE rejected both applications.

Finally, OSPA and the Oglala Sioux Tribe applied for a grant under the Round 2 GRIP funding announcement. The application was submitted to the DOE Grid Deployment Office on behalf of the full team that designed the TRIBES Project: WAPA, Basin Electric Power Cooperative, three Tribes and OSPA, IBEW Local 1250, and Steelhead Americas. As discussed in Section I(C)(3)(a) and Figure 3 above, the TRIBES Project was designed to eliminate the EHV Transmission Desert in western South Dakota, and for the first time, bring 345 kV transmission facilities to three of the largest Indian Reservations in the country. GDO rejected our application earlier this month.

Rejection of a grant or loan application can happen for a lot of reasons — better-drafted applications, competition from more deserving projects. But when OSPA receives a 100% rejection rate, for different levels of funding, from four separate programs administered by DOE, all for the same project, with applications co-drafted and supported by some of the largest and most experienced transmission owners and wind farm developers in the country, it reflects a policy — under the Granholm Administration, DOE has refused to support utility-scale Indian Energy in the Upper Great Plains.



2. *DOE's Refusal to Fund the Plains Tribes' Access to the National Power Grid Violates the Biden/Harris Administrations' Policies on Grid Reform and Energy Justice, Ignores the Recommendations of the National Laboratories, and Belies Commitments Made by DOE Management*

a) *The Biden/Harris Administration Has Been Absolutely Clear in Announcing Its Policies, and They Have Been Embraced by the National Laboratories*

The Biden/Harris Administration has made clear its commitment to build grid transmission that connects the often remote areas of the country that possess the greatest renewable energy resources with load centers, and its support of Tribal sovereignty and economic development. These same goals have been stated by DOE offices and by Secretary Granholm:

- John Podesta, Senior Advisor to the President for International Climate Policy, described an Administration priority: "In order to reach our clean energy and climate goals, we've got to build out transmission as fast as possible to get clean power from where it's produced to where it's needed."
- DOE released its 2023 Transmission Needs Study<sup>20</sup> in October of last year, which includes these statements: "The greatest transmission value is found by connecting regions in the middle of the country with their more eastern or western neighbors<sup>21</sup> \* \* \* Indian country contains vast untapped energy resources. . . . Transmission is key in accessing these potential generation resources."<sup>22</sup>
- DOE's Interconnection Innovation e-Xchange (i2X) initiative is led by several of the national laboratories, and is dedicated to finding innovative solutions to fixing our broken national power grid. Regarding one such solution, i2X states: "An IREZ [interregional renewable energy zone] is a transmission hub identified as being a low-cost connection point for a large quantity of potential wind and solar generation. . . . Siting one or more IREZ hubs on or near Tribal locations

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<sup>20</sup> DOE, Grid Deployment Office, National Transmission Needs Study (October 30, 2023). <https://www.energy.gov/gdo/national-transmission-needs-study> (Needs Study).

<sup>21</sup> *Id.* at 51.

<sup>22</sup> Needs Study at 84.

that have a desire to develop their renewable energy resources can help ensure that Tribal communities are able to benefit from federal investment in building out the infrastructure needed to decarbonize the grid.”<sup>23</sup>

- In Executive Order 14112, President Biden stated: “We must ensure that Federal programs . . . provide Tribal Nations with the flexibility to improve economic growth, address the specific needs of their communities, and realize their vision for their future.”<sup>24</sup>
- In addressing Tribal gatherings, Secretary Granholm has said: “Tribal communities are at the heart of President Biden’s vision of a more equitable, resilient, and inclusive America . . . .”<sup>25</sup> \* \* \* “DOE intends to implement the Justice40 Initiative throughout all its BIL [Bipartisan Infrastructure Law] efforts, wherever authorized by law, and within well-established DOE programs that fall within the climate and clean energy investment categories covered by Justice40. Together these efforts comprise part of the agency’s effort to ensure that communities historically left behind in Federal programs and spending are able to access the benefits of this energy transition.”<sup>26</sup>

*b) But the Real Policy Being Implemented by DOE’s Management Is Illustrated by Where It Puts BIL Money*

Of course, words can be cheap, and where the money goes is the real test of commitment. DOE has shown us its priorities in its rejection of every OSPA funding/financing request over the last 3 years, and in its administration of the GRIP grant program. Last October, the Grid Deployment Office awarded \$464 million to SPP and the Midcontinent Independent System Operator for their Joint Targeted Interconnection Queue (JTIQ) project — financing a number of transmission links, with the majority along the eastern borders of South Dakota and

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<sup>23</sup> Interconnection Innovation e-Xchange, *Transmission Interconnection Roadmap, Transforming Bulk Transmission by 2035* (April 2024), at 38 (footnote deleted).

<sup>24</sup> E.O. 14112, *Reforming Federal Funding and Support for Tribal Nations to Better Embrace Our Trust Responsibilities and Promote the Next Era of Tribal Self-Determination* (December 6, 2023).

<sup>25</sup> <https://www.energy.gov/articles/secretary-granholm-announces-7th-tribal-energy-summit>

<sup>26</sup> <https://www.energy.gov/sites/default/files/2022-07/EXEC-2022-004682%20-%20FINAL%20S1%20J40%20Letter%207-25-2022.pdf>

Nebraska. See Figure 5 below. Compare this with the map of existing EHV lines and wind farm development in South Dakota and surrounding states — the JTIQ program is expanding capacity in the same area. So DOE is providing a half-billion GRIP dollars to increase capacity in an area that already has extensive EHV networks, and that has extensive wind farm development by Invenergy, NextEra, Berkshire, and the other mega-developers. That’s all on the “East River” side of the state. “West River” — where the largest Tribes reside — has no EHV, and was denied GRIP funding (and funding/financing from other DOE programs). Obviously, DOE has no concerns about tariff compliance and Transmission Owner commitment when SPP is the recipient, but those same concerns prove fatal to a GRIP award when WAPA is the co-applicant. See discussion at Section III(B) below. Similarly, GDO awarded \$700 million to the North Plains Connector, an east-west transmission project that runs from North Dakota into Montana, far from the wind farm projects being developed by the Plains Tribes. While both these projects have merit, neither provides direct benefits to Tribes. GDO is directing its GRIP grant funding in the Upper Great Plains to the largest utilities and independent transmission developers, serving the largest renewable generation developers and fossil fuels interests.

DOE recognizes the unique benefits that the OSPA/WAPA/Basin Electric TRIBES Project offers — the post-mortem analysis of the application states the “strengths” of the application as:

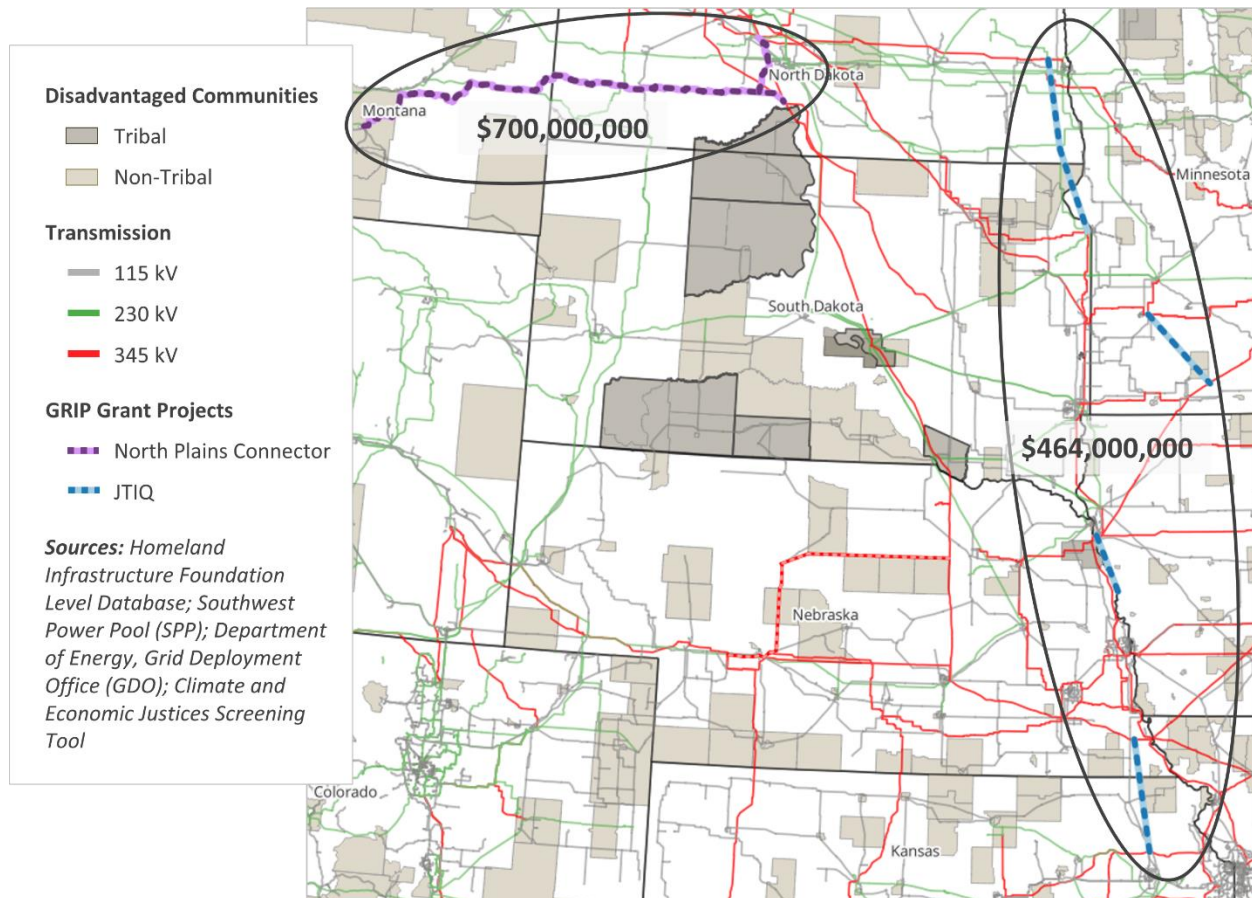
- Innovative and novel collaboration among a multi-Tribe renewable development entity, multiple transmission owners (one of which is a federal power marketing administration), and a large renewable developer, with potential for support from an RTO.
- This project would improve the regional resilience of the grid in a monumental way. The transmission line technology is cutting edge and highly esteemed in the industry.



- The grid extension would open up a large amount of previously untapped wind energy spurring downstream investment and clean energy expansion.<sup>27</sup>

But the funding went to mega-corporations adding capacity to already-developed areas, and leaving the Tribes in western South Dakota in an EHV Transmission Desert, as shown below:

**Figure 8: Where DOE Put Its BIL Money in the Dakotas**



The result: after a \$1.2 billion GRIP grant investment, the Sioux Tribes in the Upper Great Plains, with some of the largest reservations in the country that cover about one-fifth of the land area of South Dakota, remain served by only a 115 kV transmission system.

<sup>27</sup> GRIP Analysis, *op. cit.* n. 23, at 2.

## II. THE SOLUTIONS

### **A. FERC and DOE Have All the Tools They Need to Fix the Problem and Save Utility-Scale Indian Energy, but They Have to Coordinate and They Have to Act Now**

The current problems with the interconnection of utility-scale Indian Energy projects to the national power grid, while existential threats to Tribes and TEDOs, are surprisingly straightforward and easy to fix: 1) FERC can use its existing waiver authority to issue a blanket waiver of tariffed interconnection fees and cost allocations, eliminating the immediate barrier to Tribal Energy projects, and allowing them to enter the interconnection queue immediately. 2) DOE must use the funds that the Biden/Harris Administration and Congress have provided to it to fund the upgrades to the national power grid that are required to enable the development of utility-scale Tribal Energy projects. These two actions immediately remove the barriers to renewable utility-scale Indian Energy — additional, longer-term solutions can then be implemented in the normal course of the regulatory and legislative processes.

### **B. The FERC Role: Use Waiver Authority to Provide Immediate Relief to Tribes That Are Currently Being Harmed by Unjust and Unreasonable Interconnection Charges and Practices**

1. *Issue a Blanket Waiver of SPP Tariffed Interconnection Fees and a Waiver or Suspension of Network Cost Allocations for Indian Energy Projects Developed on Reservations*

In its initial and reply comments submitted in Docket No. RM-22-14-000, OSPA argued for waiver of interconnection fees upon Tribal/TEDO request on a case-by-case basis.<sup>28</sup> In light

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<sup>28</sup> *OSPA RM22-14 Comments, op. cit.* n. 12, at 12-13. OSPA notes that it, and the two other Indian groups that submitted comments in Docket No. RM-22-14-000 — the Navajo Tribal Utility Authority and Energy Keepers, Inc. — advocate for exemption of Tribes and TEDOS from the interconnection queue process. OSPA maintains this position, but for purposes of these comments, is proposing actions that can be taken immediately to provide relief for Tribal Energy projects, under well-established Commission practices, without the need for further rulemaking proceedings.

of recent developments, however, OSPA believes that a blanket waiver of SPP Commercial Readiness Deposits, and the waiver or suspension pending investigation of SPP network upgrade cost allocations to Tribal Energy projects is appropriate, for the following reasons.

First, more evidence has been submitted showing that Tribes are not responsible for the speculative interconnection applications that the Commercial Readiness Deposits were designed to disincentivize. OSPA demonstrated this in its initial and reply comments in Docket No. RM-22-14-000,<sup>29</sup> and other parties made similar showings.<sup>30</sup> More recently, the Alliance for Tribal Clean Energy (ATCE) made an extensive case that Tribes do not submit speculative interconnection requests, and the CRD regime established by the Commission is overly burdensome.<sup>31</sup> Indeed, nowhere in the record of RM22-14-000 or anywhere else is there evidence that Tribes or TEDOS developing Indian Energy projects on Tribal lands have ever submitted speculative interconnection requests.

Finally, there is substantial evidence that a case-by-case evaluation of petitions to waive security deposits leads to frivolous litigation that is unduly burdensome to Tribes and TEDOS. Tribes/TEDOs that have sought a waiver to delay payment of RTO security deposits routinely have been opposed by the RTO.<sup>32</sup> In each case, the RTO argued against the waiver, and while it was ultimately unsuccessful in each case, it subjected the Tribe or TEDO to substantial delay and litigation costs. As ATCE explains: “FERC waivers generally require hiring specialized attorneys

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<sup>29</sup> *Id.*, and OSPA, *Reply Comments of the Oceti Sakowin Power Authority*, filed in Docket No. RM22-14-000 on December 14, 2022, at 10-11 (OSPA RM22-24-000 Reply).

<sup>30</sup> *OSPA RM22-14-000 Reply* at 8-9, citing comments of the California ISO, Google and Sierra Club.

<sup>31</sup> *Alliance Petition*, *op. cit.* n. 5, at 21-28 and *passim*.

<sup>32</sup> *Alliance Petition*, *ob. cit.* n. 5, at 24 n.70, citing *SAGE Development Authority*, 182 FERC ¶ 61,180 (2023); *SAGE Development Authority*, 186 FERC ¶ 61,006 (2024); *Hopi Utilities Corporation*, 185 FERC ¶ 61,149 (2023); *Hopi Utilities Corporation*, 186 FERC ¶ 61,100 (2024). See also *Lookout Solar Park I, LLC*, 176 FERC ¶ 61,100 (2021); *Lookout Solar Park I, LLC*, 177 FERC ¶ 61,127 (2021).

at a time when Tribal funds could and should be spent completing pre-development activities, not seeking waivers from FERC. It is simply not practical to expect, or require, Tribal energy developers to apply for tariff waivers *each time* a new project enters the queue.”<sup>33</sup> Given the overwhelming support in the record that Tribes are not responsible for the speculative interconnection applications that the CRDs are expressly designed to deter, and that the waiver process has been used by RTOs to pursue vexatious and unduly burdensome litigation against Tribes/TEDOS, the Commission should issue a blanket waiver of the Commercial Readiness Deposits that applies to all Tribes/TEDOs developing Indian Energy on Tribal lands.

Similarly, the Commission should waive network upgrade cost allocations that are imposed upon Indian Energy projects in the interconnection process. As illustrated above in Section I(C)(1) and Figure 2, the network upgrade costs imposed by SPP on the first two OSPA wind farms and a nearby solar farm are so excessive as to shock the conscience, and have caused severe or irreparable damage to the projects. Moreover, fundamental questions, including how “cost causation” is to be defined in the case of Tribal Energy projects; what role do federal treaties and the federal trust responsibility play in the interconnection process; and whether federal agencies or private corporations can force sovereign Tribal Nations to pay for upgrades to the national power grid, have never been the subject of FERC inquiry, much less resolution. It would be grossly unfair to prevent Tribal Energy projects access to the national power grid while these issues are litigated, and so a blanket waiver of these cost allocations is appropriate. In the alternative, suspension of such cost allocations, pending Commission investigation, and without delaying interconnection of Indian Energy projects, is required.

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<sup>33</sup> *Alliance Petition* at 25 (footnote omitted) (emphasis in original).

## 2. *Prioritize Indian Energy Projects for Inclusion in the SPP Interconnection Queue*

In Docket No. 22-14-000, there is significant support for providing interconnection on an “as ready” basis. In addition, all the Tribal commentors, and numerous other commentors, support prioritization of Tribal Energy projects. Given the burdens of excessive delay and litigation costs that RTO interconnection queue fees and practices have imposed on Tribes/TEDOs, such prioritization is required by considerations of energy and social justice.

It is also required because SPP has just sought a waiver for a multi-year delay in its interconnection process. Just three days prior to these comments being filed, SPP submitted a petition for waiver to the Commission.<sup>34</sup> The SPP request notes an unprecedented number of pending interconnection requests, and posits that these “necessitate putting a temporary ‘pause’ on future, yet-to-be-queued interconnection clusters”<sup>35</sup> and asks that the 2025 queue window be extended into 2026.<sup>36</sup>

OSPA was stuck on the SPP queue for five years — from late 2017 to late 2022 — before SPP completed its Phase 2 study and forced OSPA to withdraw its two projects. And OSPA is now being kept from returning to the queue due to the pendency of the same unjust, unreasonable and unreasonably discriminatory fees that forced it to withdraw in 2022. The waiver of these fees must be accompanied by granting OSPA an immediate queue position, or the OSPA wind farms will ultimately spend a decade or more waiting for interconnection to the national power grid.

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<sup>34</sup> SPP, *Request of Southwest Power Pool, Inc. for Waiver of Tariff Provisions and Expedited Consideration*, filed August 23, 2024.

<sup>35</sup> *Id.* at 3.

<sup>36</sup> *Id.* at 4.

### 3. *The Commission Has Ample Authority and Ample Evidence to Accord Special Treatment to Indian Energy Projects*

OSPA and many other parties have detailed the sources of Commission authority to provide the prospective relief sought by OSPA in these comments and by the Alliance for Tribal Clean Energy in its Petition,<sup>37</sup> and we won't repeat those showings here. In addition, FERC has expressly found that blanket waivers are appropriate when addressing issues not dissimilar from those raised here. In Order No. 807,<sup>38</sup> the Commission adopted a blanket waiver of Open Access Transmission Tariff requirements and other requirements for the ownership, control or operation of Interconnection Customer's Interconnection Facilities because it served to "meet[] our purpose of reducing unnecessary burden and providing clarity and certainty to developers."<sup>39</sup> The Commission found a blanket waiver particularly appropriate when the application was "limited and discrete" and did not "present the concerns about discriminatory conduct."<sup>40</sup> In the instant case, we have shown that the current interconnection charges and practices are extremely burdensome — to the extent of causing severe or irreparable damage. We have also shown that the instances of the blanket waiver's application are extremely limited — in all the proceedings that have discussed the issue, a grand total of six Tribal/TEDO developers and seven generation projects have been identified. And the unique status of Tribes/TEDOs — involving the federal trust responsibility, and Indian preference provisions that Congress inserted into the 2005 Energy Policy Act, the special provisions for Tribal energy

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<sup>37</sup> *OSPA RM22-24-000 Reply*, *op. cit.* n.33, at 13-14; *Alliance Petition*, *op. cit.* n.5, at 9-13.

<sup>38</sup> *Open Access and Priority Rights on Interconnection Customer's Interconnection Facilities*, Order No. 807, 150 FERC ¶ 61,211 (2015).

<sup>39</sup> *Id.* at ¶ 55.

<sup>40</sup> *Id.*

promulgated in the Bilateral Infrastructure Law and the Inflation Reduction Act, and treaty rights reserved by the OSPA Tribes and other treaty Tribes — fully justify discrimination in favor of a disadvantaged community that is demonstrably and uniquely harmed by current interconnection rates and practices.

**C. The DOE Role: Fulfill the Federal Government’s Obligations to Tribes Under Treaties and the Federal Trust Responsibility to Fund the National Power Grid Serving Reservations**

1. *DOE Has Two Alternative Means of Funding Tribal Energy Interconnection — Throughout the Granholm Administration, It Has Refused to Do Either, Despite Multiple Requests*

There are two different approaches DOE can take to remove the existential threat to Indian Energy presented by unjust and unreasonable interconnection fees and costs:

- 1) Preferred Solution: DOE can fund construction of adequate transmission on Tribal lands and in the parts of the national power grid serving Tribes, directly through Power Marketing Administrations and/or other Transmission Owners

DOE can fund the construction of upgrades to the national power grid, specifically designed to meet the needs of Tribes and other disadvantaged communities, through partnerships that include Tribes, TEDOs, PMAs, and other TOs and interested parties. The TRIBES Transmission Project described in Section I(C)(3)(a) above is an example. This approach has the advantage of directly and permanently addressing the lack of capacity in the national power grid that is preventing Tribes from developing their renewable energy resources, both utility-scale and community-scale. It also supports unique public-private partnerships among Tribes and TEDOs, PMAs, and other TOs.

- 2) Alternative Solution: DOE can directly pay for the fees imposed by SPP and other RTOs under their generator interconnection tariffs.

DOE can directly pay the interconnection fees and cost allocations as they become due under RTO tariffs and Generator Interconnection Agreements. This approach has the advantage of rolling out payments over a period of several years. However, this approach is not preferred because it is highly inefficient: In the case of SPP's DISIS Phase 2 Study of the OSPA wind farms, SPP would spend hundreds of millions of dollars rebuilding 115 kV networks across Tribal lands — networks that are already inadequate to accommodate load growth from future energy development on the reservations.

*2. DOE Is Obligated Under the U.S. Treaties with the OSPA Member Tribes and the Federal Trust Responsibility to Fund the Upgrades to the National Power Grid Necessary to Enable Tribes to Develop their Renewable Energy Resources*

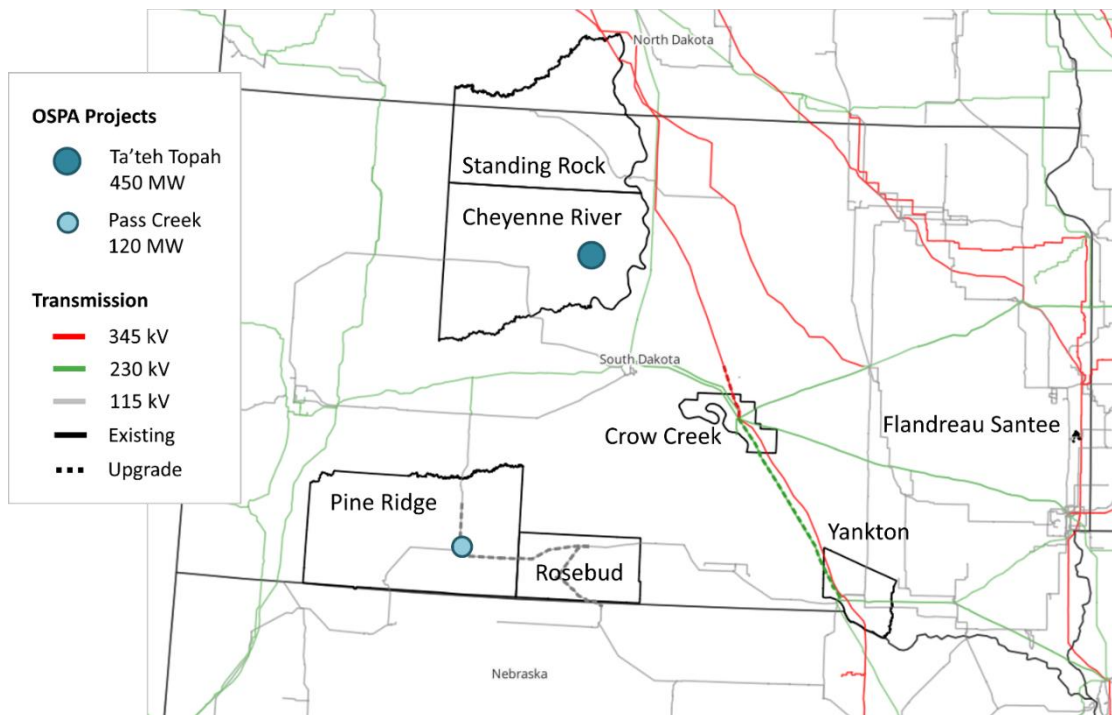
Under FERC's interconnection rules — established by and for an industry dominated by giant RTOs and billion-dollar utilities and developers — new generation projects are defined as “cost causers” because they seek to place additional load onto the national power grid, and so are responsible for the costs of upgrading the grid (the extent to which network upgrade costs are borne solely by developers of new generation projects, or shared among other beneficiaries of network upgrades, is currently being debated before FERC in multiple open rulemaking proceedings). Of course, these rules evolved without significant input from Tribes or TEDOs — the development of utility-scale clean energy on Tribal lands is a relatively new phenomenon.

In the case of OSPA's first two wind farms, SPP applied these established rules and determined that, as the “cost causers,” the Tribal projects were required to pay a quarter-billion dollars in network upgrade costs and associated fees. The bulk of these costs were for upgrades to the WAPA network, both on the Tribal lands and across off-reservation areas of South Dakota and Nebraska — upgrades to the networks of the Basin Electric Power Cooperative and the



Nebraska Public Power District were also required. A map of the network upgrades assigned to the OSPA wind farm projects in the SPP DISIS Phase 2 Study are depicted below in Figure 9.

**Figure 9: Network Upgrades SPP Allocated to OSPA Wind Farms**



The interconnection, ITP and long-term planning processes developed by SPP and other RTOs prioritizes the minimization of costs, so all network design decisions start with existing capacity and seek to drive development to areas where capacity is available, or can be added most economically. This is what JTIQ is about. These goals are all reasonable, but they also absolutely exclude Tribes. For Tribes, the goal is to develop resources within fixed geographic boundaries — the reservations — and to build out to the level of capacity needed, not only to serve immediate needs, but future expansion and generation projects. This necessarily requires new capacity in underserved areas — a goal diametrically opposed to the goals pursued by RTOs through their existing interconnection, ITP and long-term planning processes. Indeed, for Tribes, the concept of “cost causation” is fundamentally different — the need for grid upgrades

is not caused by the Tribes' development of their renewable energy resources, it is caused by generations of under-investment in infrastructure on Tribal lands and in the areas surrounding them.

Does anyone take the position that, as a precondition to allowing Tribes to develop their renewable energy resources, a private corporation like SPP, or the federal government, can force sovereign Tribal Nations to fund construction of the national power grid, including the facilities of WAPA, a federal utility, and out-of-state utilities? In fact, under many decades of Supreme Court precedent, Congressional action and Presidential executive orders, it goes the other way — the federal government is required to provide the infrastructure necessary for Indians to prosper on the reservations on which they have been forced to reside. The federal trust responsibility is defined by the U.S. Department of the Interior as:

The federal Indian trust responsibility is a legal obligation under which the United States “has charged itself with moral obligations of the highest responsibility and trust” toward Indian tribes. . . . The federal Indian trust responsibility is also a legally enforceable fiduciary obligation on the part of the United States to protect tribal treaty rights, lands, assets, and resources, as well as a duty to carry out the mandates of federal law with respect to American Indian and Alaska Native tribes and villages.<sup>41</sup>

DOE has identified the federal trust responsibility as cornerstone of its Tribal Government Policy: “The most important doctrine derived from this relationship [with Tribes] is the trust responsibility of the United States to protect tribal sovereignty and self-determination, tribal lands, assets, resources and treaty and other federally recognized and reserved rights.”<sup>42</sup>

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<sup>41</sup> U.S. Department of the Interior, Bureau of Indian Affairs: *What is the federal Indian trust responsibility?* <https://www.bia.gov/facts/what-federal-indian-trust-responsibility> (citations omitted, emphasis added).

<sup>42</sup> DOE, *U.S. Department of Energy American Indian & Alaska Native Tribal Government Policy* (January 20, 2006), at page 1 (emphasis added). <https://www.energy.gov/nepa/articles/us-department-energy-american-indian-and->

The federal trust responsibility does not require a Treaty, but the OSPA member Tribes are signatories to the Fort Laramie Treaties of 1851 and 1868. The treaties provide statements regarding the purpose of forming the reservations, and are read broadly in favor of the Tribes. Treaties define the rights of the federal government, not the Tribes — Tribes’ “reserved rights” under the treaty include everything the Tribe did not specifically give away, and those reserved rights are defined broadly: “In other words, the treaty was not a grant of rights to the Indians, but a grant of right from them — a reservation of those [rights] not granted.”<sup>43</sup> In the case of the Fort Laramie Treaty of 1868, the U.S. government committed to provide carpenters, blacksmiths and engineers, and steam circular saws, grist mills and shingle machines, to the signatory Tribes, among other obligations.<sup>44</sup> This language demonstrates that the purpose of the reservations established by the 1868 Fort Laramie Treaty was to ensure that the Tribes could gain economic self-sufficiency, not just in ranching and farming, but in industry. And this demonstrates the federal intent, and obligation, to support the full range of economic development and development of resources on the reservations.

Under the federal trust responsibility, the federal government is obligated to ensure that a reservation is managed to fulfill its purpose, even if the rights at issue are not specified in the treaty or statute.<sup>45</sup> Moreover, the government must do so in a way that provides the fullest

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*alaska-native-tribal-government-policy-*

*#::~text=The%20DOE%20is%20committed%20to,Alaska%20Native%20governments%20and%20peoples.*

<sup>43</sup> *U.S. v. Winans*, 198 U.S. 371, 381 (1905); see also *Winters v. U.S.*, 207 U.S. 564 (1908).

<sup>44</sup> Fort Laramie Treaty of 1868: Treaty with the Sioux-Brule, Oglala, Miniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, San Arcs, and Santee-and Arapaho, April 29, 1868; General Records of the United States Government; Record Group 11; National Archives; at Article 4, see also Articles 8 and 13.

<sup>45</sup> *Winters v. U.S.*, 207 U.S. 564, 576 (1908) (finding water rights of Tribe were “reserved” even though the statute creating the reservation contained no specific reference to them); *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981) (“An implied reservation of water for an Indian reservation will be found where it is necessary to fulfill the purposes of the reservation.”); *Grant Traverse Band of Ottawa, and Chippewa Indians v. Director, Michigan Department of Natural Resources*, 141 F.3d 635 (6th Cir. 1998) (water rights imply access to marinas

benefits of the reservation's resources to the Tribal members — if the federal government fails to do so, it is liable for economic damages.<sup>46</sup> The responsibility of the federal government — and its exposure to liability if it fails in executing this responsibility, is greatest where the resources at issue are regulated and controlled by the government. In *U.S. v Mitchell*, in which the Supreme Court upheld a damages award against the Department of the Interior for mismanagement of a Tribe's timber resources, the Court found that:

[T]he statutes and regulations upon which respondents have based their money claims clearly give the Federal Government full responsibility to manage Indian resources and land for the Indians' benefit. They thereby establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities. Moreover, a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians.<sup>47</sup>

Because the statutes and regulations at issue in this case clearly establish fiduciary obligations of the Government in the management and operation of Indian lands and resources, they can fairly be interpreted as mandating compensation by the Federal Government for damages sustained. Given the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties.<sup>48</sup>

In the instant case, everything relating to the Tribes' requirements for transmission capacity is comprehensively regulated by FERC and DOE — FERC regulates the interconnection process, fees and charges for transmission; either FERC or WAPA will be

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owned by non-Tribal municipalities); *Swim v. Bergland*, 696 F.2d 712 (9th Cir. 1983) (fishing rights imply access of Tribal commercial fishing boats to municipal marinas).

<sup>46</sup> *E.g.*, *U.S. v Mitchell*, 463 U.S. 206 (1983) (mismanagement of timber resources); *Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2004) (failure to obtain prevailing rates for rights of way); *Navajo Tribe of Indians v. U.S.*, 364 F.2d 320 (Ct. Cl. 1966) (allowing oil lease to lapse); *Manchester Band of Pomo Indians, Inc. v. U.S.*, 363 F. Supp 1238 (N.D. Cal. 1973) (failure to deposit Tribal funds in bank accounts yielding highest available interest rate).

<sup>47</sup> *U.S. v Mitchell*, 463 U.S. at 206-207.

<sup>48</sup> *Id.* at 226.

involved in permitting the grid upgrades; WAPA maintains transmission facilities on and connecting to the OSPA Tribes' reservations; DOE is administering the billions of dollars in grant funds from the Bipartisan Infrastructure Law and the Inflation Reduction Act that are dedicated to upgrading the national power grid; DOE is also establishing the policies and priorities for rebuilding the national power grid, through the i2X Roadmap, the Transmission Needs Study, and the NIETC designation process. And on the generation side, WAPA will likely be the lead NEPA agency for the Tribes' generation projects, and BIA must approve the leases and lease rates for allotted land. There is no more comprehensively regulated enterprise than Tribal Energy and the transmission needed to support it. This comprehensive regulatory scheme "defines the contours" of DOE's fiduciary obligations to the Tribes, and DOE's responsibility in making it possible for the Tribes to realize the economic value of their wind and solar resources.

These unambiguous statements of the federal government's obligations under treaties and the federal trust responsibility clearly establish the government's obligation to provide the infrastructure necessary for the OSPA member Tribes to prosper on their Reservations. The clearest analogy for the OSPA member Tribes is the Mni Wiconi (pr. Mini Wich-O-nee, "water is life") water project.

In 1988, Congress authorized the Mni Wiconi Water Project — at the time, the longest water pipeline and distribution system in the United States. The Project transported water from the Missouri River across eight counties in South Dakota and three Tribal reservations, including two OSPA member Tribes — the Oglala and Rosebud Sioux Tribes. (The Oglala Pine Ridge Reservation is the site of one of the wind farms OSPA has been developing, and the Rosebud

Reservation is the planned site for the next wind farm OSPA plans to develop.) The Mni Wiconi Water Project Act of 1988 states the following:

[2](a) FINDINGS.—The Congress finds that—

. . . (2) Shannon County, South Dakota, one of the counties where the Pine Ridge Indian Reservation is located, is the poorest county in the United States, and the lack of water supplies on the Pine Ridge Indian Reservation restricts efforts to promote economic development on the reservation; \*\*\*

(4) the United States has a trust responsibility to ensure that adequate and safe water supplies are available to meet the economic, environmental, water supply, and public health needs of the Pine Ridge Indian Reservation;<sup>49</sup>

\* \* \*

[3](a) AUTHORIZATION.—The Secretary of the Interior . . . is authorized and directed to plan, design, construct, operate, maintain, and replace a municipal, rural, and industrial water system, to be known as the Oglala Sioux Rural Water Supply System . . . . The Oglala Sioux Rural Water Supply System shall consist of—

(1) pumping and treatment facilities located along the Missouri River near Fort Pierre, South Dakota;

(2) pipelines extending from the Missouri River near Fort Pierre, South Dakota, to the Pine Ridge Indian Reservation;

(3) facilities to allow for interconnections with the West River Rural Water System and Lyman-Jones Rural Water System;

(4) distribution and treatment facilities to serve the needs of the Pine Ridge Indian Reservation, including but not limited to the purchase, improvement and repair of existing water systems . . . .

(7) electrical power transmission and distribution facilities necessary for services to water systems facilities; and

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<sup>49</sup> Mni Wiconi Project Act of 1988, Public Law 100-516, 102 Stat. 2566 (enacted October 24, 1988), at Section 2(a): Findings (emphasis added). <https://www.mni-wiconi.org/mni-wiconi-project-act-of-1988>

(8) such other pipelines, pumping plants, and facilities as the Secretary deems necessary or appropriate to meet the water supply, economic, public health, and environmental needs of the reservation . . . .

[9](a) The Systems authorized by sections 3 and 4 of this Act shall utilize power from Pick-Sloan for their operation. This power shall be deemed to be a project use pumping requirement of Pick-Sloan.<sup>50</sup>

The Mni Wiconi project demonstrates that the provision of utility infrastructure sufficient to meet the economic needs of a reservation falls under the federal trust responsibility. Federal court precedent since the turn of the 20<sup>th</sup> century consistently has found that the federal trust responsibility requires the federal government to enable Tribes to achieve Tribal sovereignty and economic development by developing their natural resources, and that such resources are defined broadly. The federal trust responsibility requires that the Plains Tribes be empowered to develop their wind and solar renewable energy resources, and to do so in a way that optimizes the economic development value of those resources. To the extent DOE fails to take the steps necessary to provide upgraded EHV transmission facilities to the Tribes, sufficient for them to build utility-scale wind and solar farms, it is abandoning its obligations under the federal trust responsibility.

### **III. ADDITIONAL SOLUTIONS**

The solutions above are easy and can be used to provide immediate relief to Tribal Energy projects — get us back on the interconnection queue, let new projects join the queue without inflated and unjustified fees and charges, and provide funding to enable utility-scale

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<sup>50</sup> *Id.*, Section 9(a): Use of Pick-Sloan Power (emphasis added). Note, the reference to Pick-Sloan Power is a reference to the Western Area Power Administration, the federal Power Marketing Administration established under the Department of Energy that was formed for the purpose of managing, marketing, transmitting and distributing the hydropower produced by the Missouri River dams built pursuant to the federal program commonly known as the Pick-Sloan Program.

Indian Energy development now and in the future, and to repair the damage caused by the lack of federal support requested by Tribes/TEDOs for projects delayed or abandoned because of federally regulated unjust and unreasonable fees and cost allocations. In addition, there are other solutions that will take longer to work out, but are still necessary.

**A. FERC: Insert Indian Energy Generation Projects Into the Regional Planning Process Now**

In Section I(C)(3) above, OSPA demonstrates how the SPP ITP process is stacked against Tribes and other remote, underserved DACs. The reforms adopted in FERC Order 1920 will start to address these problems, but they likely will take multiple planning cycles to implement, and the Tribes can't wait any longer. SPP has multiple mechanisms to amend its project portfolio outside the regular ITP process — it uses them to address emergency power requirements caused by catastrophic weather, and in response to unexpected leaps in demand, as with the dramatic growth of Bakken oil and gas development. SPP has the ability to use Target Area Studies or Sensitivity Studies to consider the full economic value of the eastern branch of the TRIBES Project as part of its ITP process, and include it in its ITP portfolio, and OSPA strongly urges SPP to do so. If SPP does not, FERC must require it to do so, using the sources of authority discussed in Section II(B)(3) above.

**B. DOE: Use an “All of Agency” Approach to Define the Role PMAs Can Play in Supporting Indian Energy**

From its inception, the Biden/Harris Administration has promoted “a whole of government approach to combatting the climate crisis.”<sup>51</sup> But for reasons OSPA can't

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<sup>51</sup> The White House, *FACT SHEET: President Biden Takes Executive Actions to Tackle the Climate Crisis at Home and Abroad, Create Jobs, and Restore Scientific Integrity Across Federal Government* (January 27, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/27/fact-sheet-president-biden-takes->



understand, this approach has not taken root among the offices within DOE when it comes to utility-scale Indian Energy — the Administration, National Laboratories, and WAPA all have identified the support of utility-scale Indian Energy as a priority, yet the DOE offices that administer grants and loans — the Office of the Under Secretary for Infrastructure, including the Grid Deployment Office and the Office of Clean Energy Demonstrations, the Office of Indian Energy, and the Loan Programs Office have consistently refused to fund such priorities in the Upper Great Plains. This disconnect between policy and funding has caused at least 680 MW of renewable Indian Energy on the reservations of OSPA member Tribes to drop off the SPP interconnection queue, and threatens hundreds of MW more. DOE can fix this by listening to the National Laboratories and empowering the Power Marketing Administrations within its Agency.

In the case of the OSPA member Tribes, the TO is the Western Area Power Administration. WAPA is among the top 10 energy transmission providers in the U.S., serving about 700 wholesale customers — 10% of which are Indian Tribes.<sup>52</sup> WAPA's extensive network and decades of experience make it a powerful engine for upgrading the national power grid in rural and remote areas, including Tribal lands. Even more important, WAPA has the desire to work with Tribes to upgrade its network to meet their needs — WAPA, along with Basin Electric Power Cooperative, worked closely with OSPA to design the network upgrades

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*executive-actions-to-tackle-the-climate-crisis-at-home-and-abroad-create-jobs-and-restore-scientific-integrity-across-federal-government/*

<sup>52</sup> Western Area Power Administration, *Native American Tribal Informational Outreach* (July 12, 2022). <https://www.wapa.gov/wp-content/uploads/2023/04/WAPA-Native-American-Tribe-Informational-Outreach-6-6-22.pdf>

that would bring EHV to the Transmission Desert of western South Dakota, and across the reservations of three OSPA member Tribes.

DOE's Interconnection Innovation e-Xchange (i2X) program has recognized that the federal Power Marketing Administrations would be an efficient way of providing interconnection to Indian Energy projects:

[I]ncluding projected Tribal clean power projects in Power Marketing Administration's (PMA) transmission plans would enable Tribal projects to interconnect to these transmission networks with reduced queue delays and interconnection costs . . . [PMAs] are a natural party to engage in direct consultation to incorporate Tribal renewable energy development plans and include Tribes in regional and interregional transmission planning activities.<sup>53</sup>

However, this would be a new role for WAPA and the other three PMAs across the country, and because this would be novel, it raises several questions: Can PMAs make network investments that are not directly related to their statutory mandates? Can PMAs be subrecipients of federal grants? Can PMAs sign Community Benefits Agreements with Tribes/TEDOs and Project Labor Agreements with labor unions? These questions can be resolved by direct discussions between the PMAs and the DOE General Counsel's Office, but so far, that hasn't happened. The consequence is significant — the grant application to fund the network upgrades designed by OSPA, WAPA and Basin Electric was rejected by DOE's Grid Deployment Office last month, in part because "[n]early all of the budget is assigned to one entity [OSPA], which may demonstrate a lack of partner engagement or budget planning."<sup>54</sup> While WAPA took the lead in designing the network upgrades, and most upgrades are to the

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<sup>53</sup> Interconnection Innovation e-Xchange, *Transmission Interconnection Roadmap, Transforming Bulk Transmission by 2035* (April 2024) at 37-38. <https://www.energy.gov/eere/i2x/doe-transmission-interconnection-roadmap-transforming-bulk-transmission-interconnection>

<sup>54</sup> *GRIP Analysis*, *op. cit.* n. 23, at 5.

WAPA network, WAPA's in-house counsel would not allow WAPA to sign a Commitment Letter for the grant because it was unsure about WAPA's legal authority to do so. WAPA is an organization within the Department of Energy — yet the General Counsels of DOE and WAPA couldn't resolve this question, and that uncertainty became one of the reasons DOE's Grid Deployment Office rejected our grant application. The Biden/Harris Administration's Whole of Government Approach requires coordination among the federal agencies to implement the Administration's priorities — DOE failed to perform such coordination within its own offices, to the detriment of OSPA. Given the critical role WAPA will play in allowing the OSPA member Tribes to develop their renewable energy resources, and the role that PMAs across the country can play in supporting energy development, in Tribal and other rural and remote communities, it is incumbent on the DOE General Counsel's Office to resolve these matters in an open, comprehensive and consistent way.

**C. Congress: For 16 Years the Tribal Energy Loan Guarantee Program, Administered by DOE's Loan Programs Office, Was a \$2 Billion Disgrace — Today, It's a \$20 Billion Disgrace — Repurpose the Money**

The Tribal Energy Loan Guarantee Program (TELGP, since renamed Tribal Energy Finance Program) administered by the DOE Loan Programs Office (LPO) is a longstanding embarrassment to the federal government — the program was established by Congress in the Energy Policy Act of 2005, which authorized up to \$2 billion to promote the development of Indian energy. But DOE did not request funding until 2016, and Congress did not fund the program until 2017.<sup>55</sup> Even so, until March of this year, not a single loan or loan guarantee had

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<sup>55</sup> Benjamin J. Hulac, *Fees are hurdles for decades-old, unused tribal energy program*, Roll Call, January 20, 2022. <https://rollcall.com/2022/01/20/fees-are-hurdles-for-decades-old-unused-tribal-energy-program/>

been made by the program. When this issue was raised in a Congressional hearing in 2021, Secretary Granholm stated, “I know we are reversing that.”<sup>56</sup>

But nothing has been reversed, even after Congress increased the program’s budget tenfold, to \$20 billion, in the Inflation Reduction Act. In March 2024, LPO announced its first and only conditional commitment — up to \$72.8 million — to a Tribe with a large, successful casino that can afford to issue its own PPA to build a solar-powered microgrid to reduce its operating costs, that also received a \$31 million dollar grant from the state of California.<sup>57</sup> This Administration cannot possibly think there are enough Indian projects like that to put a dent in the \$20 billion budget that Congress gave it. More importantly, a profitable casino that has equity and can issue its own PPA to de-risk the project, along with being awarded a multi-million dollar grant from the richest state in the nation, can readily get a commercial loan from any large bank — it doesn’t need a federal program to provide access to the capital markets.

The reason for the failure of the TELGP is well-known — LPO requires projects to meet all the criteria required for standard commercial debt: equity, collateral, credit ratings, PPAs — all things that are beyond the reach of impoverished Indian Tribes that want to develop their considerable renewable energy resources. TELGP, like all federal loan guarantee programs, “is designed to reduce the financial risk of a project to a lender.”<sup>58</sup> But the award criteria required by LPO require an eligible project to be virtually de-risked before a guarantee is issued.

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<sup>56</sup> *Id.*

<sup>57</sup> <https://www.energy.gov/lpo/articles/lpo-announces-conditional-commitment-viejass-microgrid-build-renewable-utility-scale>; <https://www.energy.ca.gov/news/2022-11/california-energy-commission-approves-31-million-tribal-long-duration-energy>


<sup>58</sup> Congressional Research Service, *Department of Energy Loan Programs: Tribal energy Loan Guarantee* (July 8, 2020), at 1 (discussing Congressional options for reforming or eliminating the program in light of its non-use.)

DOE's history of inaction in administering the TELGP — continuing to the present — indicates that Congress should close the program and repurpose the money. The \$20 billion could be the source of funding for the upgrades to the national power grid needed to bring Tribal infrastructure into the 21<sup>st</sup> century, and allow the Tribes to develop their utility-scale renewable energy resources. The funds should not be used as loans for Tribes and TEDOS — for OSPA, a loan of a quarter-billion dollars to fund interconnection will still make its wind farms economically inviable, no matter how good the terms of the loan. Rather, the money should directly subsidize the Transmission Owners directly serving the Tribes — preferably as grants to partnerships formed between TOs and Tribes or TEDOs. Cost share and match requirements for grants for such Indian Energy transmission projects should be dramatically reduced or eliminated and substantial capacity on the new transmission lines should be explicitly reserved for Tribal clean energy projects.

#### IV. CONCLUSION

OSPA thanks the Commission Staff for the opportunity to provide this input. We are at your disposal if we can provide any additional information or materials.

Respectfully submitted,

/s/ 

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