

William & Mary Environmental Law and Policy Review

Volume 46 (2021-2022)

Issue 3 Symposium Issue: *Environmental Justice in America: Where We Have Been & Can Go*

Article 4

4-2022

Expanding Renewable Energy Tax Credits to Tribal Governments: How Current Legislative Proposals Will Benefit Tribes and Their Members in Their Continued Efforts to Address Climate Change

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Repository Citation

Ben Reiter, *Expanding Renewable Energy Tax Credits to Tribal Governments: How Current Legislative Proposals Will Benefit Tribes and Their Members in Their Continued Efforts to Address Climate Change*, 46 Wm. & Mary Envtl. L. & Pol'y Rev. 687 (2022), <https://scholarship.law.wm.edu/wmelpr/vol46/iss3/4>

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EXPANDING RENEWABLE ENERGY TAX CREDITS TO TRIBAL GOVERNMENTS: HOW CURRENT LEGISLATIVE PROPOSALS WILL BENEFIT TRIBES AND THEIR MEMBERS IN THEIR CONTINUED EFFORTS TO ADDRESS CLIMATE CHANGE

BEN REITER*

There was no such thing as emptiness in the world. Even in the sky there were no vacant places. Everywhere there was life, visible and invisible, and every object possessed something that would be good for us to have also—even to the very stones. This gave great interest to life.¹

INTRODUCTION

When Europeans colonized North America they not only displaced American Indians² from their land but displaced them to lands that are now more vulnerable to the disastrous effects of climate change.³ The

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¹ LUTHER STANDING BEAR, LAND OF THE SPOTTED EAGLE 14 (1933).

² This Article generally uses the U.S. census-defined term "American Indian" as is consistent with the usage by the Native American Rights Fund, National Congress of American Indians, and National Museum of the American Indian. See *Mission and History*, NAT'L CONG. OF AM. INDIANS, <https://www.ncai.org/about-ncai/mission-history> [<https://perma.cc/YNC5-PAVQ>] (last visited Apr. 3, 2022); *Frequently Asked Questions*, NATIVE AM. RTS. FUND, <https://www.narf.org/frequently-asked-questions/> [<https://perma.cc/8W3V-QX5A>] (last visited Apr. 3, 2022); *Teaching & Learning About Native Americans*, NAT'L MUSEUM OF THE AM. INDIAN, <https://americanindian.si.edu/nk360/faq/did-you-know> [<https://perma.cc/J6KW-SHTG>] (last visited Apr. 3, 2022). However, the Article occasionally uses terms such as "Native American" or "Indian" when such use would be consistent with the way individuals or tribes refer to themselves or when such use would be consistent with statutory or regulatory text.

³ Justin Farrell et al., *Effects of Land Dispossession and Forced Migration on Indigenous Peoples in North America*, 374 SCI. 578, 578 (2021); Christopher Flavelle & Kalen Goodluck, *Dispossessed, Again: Climate Change Hits Native Americans Especially Hard*, N.Y. TIMES

Mojave Tribe now experiences an average of sixty-two more days of extreme heat per year than it did on the lands it inhabited prior to European colonization.⁴ The Navajo Nation has observed a steady decrease in annual snowfall over the past century leading to a corresponding decrease in surface water and the drying up of water wells used for drinking water.⁵ Alaska Native Inupiat and Yup'ik scientists have seen an accelerated melting of ice and snow habitats that are critical for arctic mammals used as subsistence foods, like bears, walrus, and seals.⁶ And rising tides and increasingly severe storms are forcing the Quileute Nation to consider all together abandoning the land they were previously confined to by the U.S. government.⁷ Given Indigenous Peoples' "dependence upon, and close relationship, with the environment and its resources,"⁸ and the severe consequences climate change has on the environment and those resources, the continued failure to reduce global greenhouse gas emissions and halt (or at the very least slow) global warming will have an outsize and negative impact on Indigenous communities both in the United States and abroad.

This fact was not lost on the United States' delegation to the 26th United Nations Climate Change Conference ("COP26") in Glasgow, Scotland. The United States, along with Germany, Norway, the Netherlands, Great Britain and over a dozen private funders, acknowledged the "critical guardianship provided by Indigenous Peoples and local communities in protecting tropical forests and preserving vital ecosystem services, and the global contribution they make to climate change mitigation, biodiversity

(Oct. 28, 2021), <https://www.nytimes.com/2021/06/27/climate/climate-Native-Americans.html> [<https://perma.cc/N9BJ-FK2Y>] ("Native tribes are experiencing an environmental peril exacerbated by policies—first imposed by white settlers and later the United States government—that forced them onto the country's least desirable lands.").

⁴ Rachel Treisman, *How Loss of Historical Lands Makes Native Americans More Vulnerable to Climate Change*, NAT'L PUB. RADIO (Nov. 2, 2021, 7:00 AM), <https://www.npr.org/2021/11/02/1051146572/forced-relocation-native-american-tribes-vulnerable-climate-change-risks> [<https://perma.cc/X77W-2FUT>].

⁵ PATRICIA COCHRAN ET AL., INDIGENOUS PEOPLES, LANDS, AND RESOURCES, in CLIMATE CHANGE IMPACTS IN THE UNITED STATES: THE THIRD NATIONAL CLIMATE ASSESSMENT 297, 303 (2014), https://nca2014.globalchange.gov/downloads/low/NCA3_Full_Report_12_Indigenous_Peoples_LowRes.pdf [<https://perma.cc/7T5Q-FAH5>]; Flavelle & Goodluck, *supra* note 3.

⁶ COCHRAN ET AL., *supra* note 5.

⁷ Flavelle & Goodluck, *supra* note 3.

⁸ U.N. DEP'T OF ECON. AND SOC. AFF., CLIMATE CHANGE AND INDIGENOUS PEOPLES 1, https://www.un.org/esa/socdev/unpfii/documents/backgrounder%20climate%20change_FINAL.pdf [<https://perma.cc/C2RU-6TRK>] (last visited Apr. 3, 2022).

preservation, and inclusive and sustainable development” and accordingly signed on to a \$1.7 billion pledge to support the advancement of Indigenous Peoples’ stewardship of forests.⁹ U.S. Agency for International Development (“U.S. AID”) Director Samantha Power, along with U.S. Secretary of the Interior Deb Haaland, announced a Global Action for Climate Equity Initiative that commits the United States to work with at least forty countries to address structural changes for those on the front lines of global climate change, including Indigenous Peoples.¹⁰ And the United States more broadly pledged to reduce its greenhouse gas emissions from 2005 levels by fifty to fifty-two percent by 2030,¹¹ go net zero by 2050,¹² end deforestation,¹³ and cut its methane emissions.¹⁴

These pledges and particularly the United States’ broader pledges to reduce its greenhouse gas and methane emissions, were, however, received with a healthy dose of skepticism from a global community¹⁵ that a little over a year ago saw the United States withdraw from their less ambitious emissions promises within the Paris agreement¹⁶ under the leadership of a man who claimed climate change is “mythical,” “nonexistent,”

⁹ *COP26 IPLC Forest Tenure Joint Donor Statement*, U.N. CLIMATE CHANGE CONF. U.K. 2021 (Nov. 2, 2021) [hereinafter U.N. CLIMATE CHANGE CONF. U.K. 2021], <https://ukcop26.org/cop26-iplc-forest-tenure-joint-donor-statement/> [<https://perma.cc/X2ZC-XPCD>].

¹⁰ The U.S. Center, *U.S. Center COP26—Saving Nature to Save Ourselves*, YOUTUBE (Nov. 6, 2021), https://www.youtube.com/watch?v=TMS6_g_ULcQ [<https://perma.cc/T6QC-Q8AU>]; Press Release, U.S. Agency for Int’l Dev., USAID Advances Global Action For Climate Equity (Nov. 6, 2021), <https://www.usaid.gov/news-information/press-releases/nov-6-2021-usaid-advances-global-action-climate-equity> [<https://perma.cc/T8T5-WPPU>].

¹¹ *Fact Sheet: President Biden Renews U.S. Leadership on World Stage at U.N. Climate Conference (COP26)*, WHITE HOUSE (Nov. 1, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/01/fact-sheet-president-biden-renews-u-s-leadership-on-world-stage-at-u-n-climate-conference-cop26/> [<https://perma.cc/8CAV-JVMA>].

¹² *Id.*

¹³ Hanna Duggal, *Infographic: What Has Your Country Pledged at COP26?*, ALJAZEERA (Nov. 14, 2021), <https://www.aljazeera.com/news/2021/11/14/infographic-what-has-your-country-pledged-at-cop26> [<https://perma.cc/QXN3-S4RT>].

¹⁴ *Id.*

¹⁵ See, e.g., Oliver Milman, *Cop26 Reveals Limits of Biden’s Promise to ‘Lead by Example’ on Climate Crisis*, GUARDIAN (Nov. 12, 2021, 2:00 AM), <https://www.theguardian.com/environment/2021/nov/12/biden-promised-lead-climate-crisis-cop26-revealed-limits> [<https://perma.cc/4KXL-P2N5>]; Jennifer A. Dlouhy & Justin Sink, *Biden Brings ‘Trust Us’ Pitch to Skeptics at UN Climate Summit*, BLOOMBERG GREEN (Nov. 1, 2021, 1:00 AM), <https://www.bloomberg.com/news/articles/2021-11-01/biden-brings-trust-us-pitch-to-skeptics-at-u-n-climate-summit> [<https://perma.cc/9HCZ-UHRY>].

¹⁶ Matt McGrath, *Climate Change: US Formally Withdraws from Paris Agreement*, BBC NEWS (Nov. 4, 2020), <https://www.bbc.com/news/science-environment-54797743> [<https://perma.cc/5RAW-CEGG>].

or “an expensive hoax.”¹⁷ Underlying this skepticism was the fact that since the signing of the United Nations Framework Convention on Climate Change (“UNFCCC”) in 1992—at which President George H.W. Bush declared the United States would be “the world’s pre-eminent leader in protecting the global environment”—the United States has failed, with one key exception, to adopt meaningful climate legislation.¹⁸ That is not to say the United States has done nothing. A bipartisan bill that would have capped carbon emissions for certain sectors and set up an emission trading market was introduced in the U.S. Senate in 2003 and the U.S. House of Representatives actually passed even more ambitious cap-and-trade legislation in 2009.¹⁹ In 2015, then President Barack Obama’s administration formulated regulations that would have established national limits on carbon emissions coming from power plants.²⁰

But the legislative attempts to pass meaningful climate legislation have been—with one exception—just that, attempts. Despite having a companion bill in the House,²¹ the bipartisan cap-and-trade bill introduced in the 108th,²² 109th,²³ and 110th²⁴ Congresses never made it out

¹⁷ Helier Cheung, *What Does Trump Actually Believe on Climate Change?*, BBC NEWS (Jan. 23, 2020), <https://www.bbc.com/news/world-us-canada-51213003> [<https://perma.cc/HGQ6-H4J5>].

¹⁸ *Congress Climate History*, CTR. FOR CLIMATE & ENERGY SOL. [hereinafter *Congress Climate History*], <https://www.c2es.org/content/congress-climate-history/> [<https://perma.cc/A373-KQER>] (last visited Apr. 3, 2022). This does not include the many U.S. states that have adopted remarkably effective climate policies. The most successful (both in terms of adoption and results) has been renewable portfolio standards (“RPS”). At their most basic level, RPS requires a state’s electricity providers to procure a certain percentage of the energy they supply to end-use customers from renewable or clean energy sources. Cf. David Roberts, *The Most Effective Clean Energy Policy Gets the Least Love*, VOX (Oct. 21, 2017, 9:31 AM), <https://www.vox.com/energy-and-environment/2017/9/27/16365290/renewableenergy-standards-are-working> [<https://perma.cc/227A-ZNCE>]. In recent years, states have been racing to outdo each other with more ambitious RPS goals. At least a dozen states have now set RPS goals of a hundred percent renewable electricity by or before 2050. Kassia Micek, *Commodities 2021: States Racing to Set Goals Toward Net-Zero Emission, 100% Renewable Electricity*, S&P GLOB. (Dec. 24, 2020, 5:28 PM), <https://www.spglobal.com/platts/en/market-insights/latest-news/electric-power/122420-commodities-2021-states-racing-to-set-goals-toward-net-zero-emission-100-renewable-electricity> [<https://perma.cc/Z5T4-NYP7>].

¹⁹ *Congress Climate History*, *supra* note 18.

²⁰ *The Clean Power Plan*, ENV’T DEF. FUND, <https://www.edf.org/clean-power-plan-resources> [<https://perma.cc/2TA7-A93N>] (last visited Apr. 3, 2022).

²¹ H.R. 4607, 108th Cong. (2004).

²² S. 139, 108th Cong. (2003).

²³ S. 342, 109th Cong. (2005).

²⁴ S. 280, 110th Cong. (2007).

of the Senate's Environment and Public Works Committee. The American Clean Energy and Security Act of 2009, which is more commonly known as the Waxman-Markey cap-and-trade bill,²⁵ got closer to becoming law than almost any other climate legislation in U.S. history when it narrowly passed the House in a 219–212 vote.²⁶ But Waxman-Markey was never even taken up by the Senate.²⁷

And the regulatory approaches to reducing U.S. carbon dioxide emissions have been diminished or prevented from ever going into effect by U.S. courts that are increasingly skeptical of environmental regulations.²⁸ Following the Senate's failure to take up Waxman-Markey, then President Barack Obama introduced a regulatory approach dubbed the Clean Power Plan²⁹ that would have imposed carbon dioxide limitations on electric generating plants pursuant to Section 111(d) of the Clean Air Act.³⁰ Yet despite the U.S. Supreme Court's previous finding just over a decade earlier that "greenhouse gases fit well within the Clean Air Act's capacious definition of 'air pollutant'" and that the Environmental Protection Agency has a statutory obligation to regulate greenhouse gas emissions from automobiles,³¹ the Court stayed the Clean Power Plan from going into effect.³² Before the Court ever addressed the merits of the Clean Power Plan, it was scrapped³³ in favor of a new regulatory framework that (if it were to go into effect) could actually increase carbon dioxide emissions.³⁴

²⁵ *H.R. 2454 (111th): American Clean Energy and Security Act of 2009*, GOVTRACK (Feb. 3, 2013), <https://www.govtrack.us/congress/bills/111/hr2454/summary> [<https://perma.cc/MJ2U-4JVS>].

²⁶ H.R. 2454, 111th Cong. (2009).

²⁷ *Id.*

²⁸ Steve Novak, *The Role of Courts in Remediating Climate Chaos: Transcending Judicial Nihilism and Taking Survival Seriously*, 32 GEO. ENV'T L. REV. 743, 746–47 (2020).

²⁹ *Climate Change and President Obama's Action Plan*, WHITE HOUSE, <https://obama.whitehouse.archives.gov/president-obama-climate-action-plan> [<https://perma.cc/BR7D-C4V7>] (last visited Apr. 3, 2022).

³⁰ *Fact Sheet: Overview of the Clean Power Plan*, EPA, <https://archive.epa.gov/epa/clean-powerplan/fact-sheet-overview-clean-power-plan.html> [<https://perma.cc/4SAB-Y4WW>] (last visited Apr. 3, 2022).

³¹ *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007).

³² *Order in Pending Case*, 577 U.S. 1126 (2016).

³³ Dana Nuccitelli, *The Trump EPA Strategy to Undo the Clean Power Plan*, YALE CLIMATE CONNECTIONS (June 21, 2019), <https://yaleclimateconnections.org/2019/06/the-trump-epa-strategy-to-undo-the-clean-power-plan/> [<https://perma.cc/RPF6-5TVL>].

³⁴ Amelia T. Keyes et al., *The Affordable Clean Energy Rule and the Impact of Emission Rebound on Carbon Dioxide and Criteria Air Pollutant Emissions*, 14 ENV'T RSCH.

The one exception to the United States' repeated failure to enact meaningful climate policy has been renewable energy tax credits. Renewable energy tax credits were first enacted as part of the Energy Tax Act of 1978,³⁵ and have subsequently been altered, expanded, and extended over a dozen times.³⁶ Aside from state and private policies, renewable energy tax credits have been the driving force behind the deployment of renewable energy projects in this country.³⁷ They have also played a major role in decreasing the cost of renewable energy to the point that it can now compete with (and in some cases out compete) traditional sources of energy in all U.S. markets.³⁸

Renewable energy credits appear likely to once again be the work horse of the United States' climate policy for at least the next decade and key to meeting the United States' COP26 pledges. The roughly \$1.2 trillion Infrastructure Investment and Jobs Act—signed into law by President Joe Biden on November 15, 2021,³⁹—contains some new programs such as the funding for clean hydrogen hubs, carbon capture and sequestration backbone infrastructure, and new investment in high voltage electric transmission lines that will undoubtedly provide some assistance in reaching the United States' emissions reduction targets.⁴⁰ But the bulk

LETTERS 044018, 3 (2019).

³⁵ MOLLY F. SHERLOCK, CONG. RSCH. SERV., THE ENERGY CREDIT OR ENERGY INVESTMENT TAX CREDIT (ITC) 1, <https://crsreports.congress.gov/product/pdf/IF/IF10479> [<https://perma.cc/7QFW-6SES>] (last updated Apr. 23, 2021).

³⁶ *Id.*; MOLLY F. SHERLOCK, CONG. RSCH. SERV., THE RENEWABLE ELECTRICITY PRODUCTION TAX CREDIT: IN BRIEF 3–6 [hereinafter SHERLOCK II], <https://sgp.fas.org/crs/misc/R43453.pdf> [<https://perma.cc/2JNU-AN4P>] (last updated Apr. 29, 2020).

³⁷ *Federal Renewable Energy Tax Credits: Creating American Jobs and Investment in State and Local Economies: Hearing on "Federal Energy Related Tax Policy and its Effects on Markets, Prices and Consumers" Before the H. Subcomm. on Energy*, 105TH CONG. 2, 7–8 (Mar. 29, 2017) (testimony of Steve Clemmer, Director of Energy Research and Analysis, Climate & Energy Program, Union of Concerned Scientists), <https://docs.house.gov/meetings/IF/IF03/20170329/105798/HHRG-115-IF03-Wstate-ClemmerS-20170329.pdf> [<https://perma.cc/ZW9G-BWFM>] ("Federal tax credits, combined with state renewable standards, have been a key driver for the recent growth in the U.S. wind and solar industries.").

³⁸ *Id.* at 13 ("The falling costs of wind and solar driven by federal tax credits and state renewable standards has made the cost of renewable more affordable to consumers. Recent analyses show that the benefits of increasing renewable energy use greatly exceeds the costs of federal tax credits.").

³⁹ Jim Tankersley, *Biden Signs Infrastructure Bill, Promoting Benefits for Americans*, N.Y. TIMES (Nov. 15, 2021), <https://www.nytimes.com/2021/11/15/us/politics/biden-signs-infrastructure-bill.html> [<https://perma.cc/3GHF-TZAZ>].

⁴⁰ H.R. 3684, 117th Cong. (2021).

of the Biden administration's climate change programs are contained in the roughly \$2.2 trillion Build Back Better Act ("BBBA"), that was passed by the U.S. House of Representatives on November 19, 2021.⁴¹ In fact, the single largest spending item in BBBA was the \$555 billion for programs aimed at addressing climate change.⁴² Of BBBA's roughly \$555 billion for climate change programs, approximately \$320 billion will go to new or extended and enhanced renewable energy tax credits.⁴³ Given the political realities surrounding legislative proposals such as a renewed push for a carbon tax or clean electricity performance program, renewable energy tax credits will almost certainly continue to play a starring role in the United States' climate policy over for at least the next decade.

The United States' renewable energy tax credit policy is, however, not without its limitations. One of the most significant of which is that because it is a tax credit—i.e., a specified dollar amount used to offset tax liability—its benefit is generally limited to those that have tax liability (and can also take advantage of other tax benefits such as accelerated depreciation).⁴⁴ For those that have little or no tax liability—like many non-profit organizations, state and local governments, and Tribes—they have no added incentive to invest in renewable energy projects.⁴⁵ Thus renewable energy tax credits have traditionally been utilized by a relatively limited number of large financial institutions and investors with significant amounts of tax equity.⁴⁶ While the United States will need these large financial institutions and investors to continue to put their tax equity (and now developed renewable energy expertise) to work in developing renewable energy projects if it intends on meeting its newly made COP26 promises, the United States should broaden its renewable

⁴¹ Emily Cochrane & Jonathan Weisman, *House Narrowly Passes Biden's Social Safety Net and Climate Bill*, N.Y. TIMES (Nov. 21, 2021), <https://www.nytimes.com/2021/11/19/us/politics/house-passes-reconciliation-bill.html> [<https://perma.cc/5HAM-6CP9>].

⁴² Coral Davenport, *What's in the \$2.2 Trillion Social Policy and Climate Bill*, N.Y. TIMES (Nov. 21, 2021), <https://www.nytimes.com/article/build-back-better-explained.html> [<https://perma.cc/8TQF-HGXN>].

⁴³ *Id.*

⁴⁴ Bidisha Bhattacharyya, *Renewable Energy Tax Credits: The Case for Refundability*, CTR. FOR AM. PROGRESS (May 28, 2020), <https://www.americanprogress.org/article/renewable-energy-tax-credits-case-refundability/> [<https://perma.cc/CAS8-AAE2>].

⁴⁵ Sarah Knuth, *Renewable Energy: US Tax Credits for Wind and Solar Mostly Benefit Big Banks*, THE CONVERSATION (Jan. 25, 2022, 9:42 AM), <https://theconversation.com/renewable-energy-us-tax-credits-for-wind-and-solar-mostly-benefit-big-banks-173965> [<https://perma.cc/8JGF-R8PE>].

⁴⁶ Bhattacharyya, *supra* note 44 ("Because of the significant costs, tax equity investors have generally been large commercial and investment banks.").

energy tax credit policy to take into account the acknowledgment it made at COP26—that Tribes are uniquely positioned to address climate change.⁴⁷

BBBA does exactly this. First, BBBA would remove restrictions in the Internal Revenue Code (“IRC”) which generally make tax exempt organizations and state, local, and Tribal governments ineligible for tax credits.⁴⁸ In short, Tribes could be treated as taxable organizations for the purpose of renewable energy tax credits. BBBA then proposes to allow a taxpayer—which under BBBA would include a Tribe—to make an election to be treated as having made a payment of tax equal to the value of the renewable energy tax credit it would otherwise be eligible to receive.⁴⁹ The “payment” will result in an overpayment of taxes which will then be refunded to the taxpayer by the federal government.⁵⁰ This is commonly referred to as “direct pay”⁵¹ or “refundability”⁵² and would allow Tribes to receive a direct payment for building or investing in wind, solar, carbon capture, and clean hydrogen projects as well as electric vehicle charging stations and clean energy manufacturing facilities.⁵³ BBBA also contains numerous other programs specifically aimed at boosting Tribes’ efforts at addressing climate change.⁵⁴

Tribes are well positioned to take advantage of the opportunities that an expansion of renewable energy tax credit eligibility and direct pay provide within the BBBA. As the United States and other countries

⁴⁷ U.N. CLIMATE CHANGE CONF. U.K. 2021, *supra* note 9.

⁴⁸ H.R. 5376, 117th Cong. (2021), § 6417(c)(1).

⁴⁹ H.R. 5376, 117th Cong. (2021), § 6417(a).

⁵⁰ *Id.*

⁵¹ Shannon Osaka, *Green Incentives Usually Help the Rich. Here's How the Build Back Better Act Could Change That.*, GRIST (Dec. 2, 2021), <https://grist.org/energy/green-incentives-usually-help-the-rich-heres-how-the-build-back-better-act-could-change-that/> [<https://perma.cc/23BS-YC6D>].

⁵² Bhattacharyya, *supra* note 44.

⁵³ H.R. 5376, 117th Cong. (2021), § 6417(b).

⁵⁴ BBBA also provides \$3.8 billion for providing homeowners and owners of multifamily buildings with high-efficiency electric home rebates that are carried out in Tribal communities or for low- or moderate-income households, \$441 million for funding Tribal climate resilience and adaptation programs and another \$9.4 million for the administrative costs of carrying out tribal climate resilience and adaptation programs, \$294 million for the provision of electricity to unelectrified tribal homes through renewable energy systems and the transition of electrified tribal homes to renewable energy systems and associated retrofitting to install renewable energy systems along with \$6 million for administration, \$200 million for the Tribal Energy Loan Guarantee Program, which is also authorized to increase its guarantee amount from \$2 billion to \$20 billion and it can guarantee up to a hundred percent of unpaid principal and interest (up from ninety percent).

at COP26 recognized, Tribes have already demonstrated their leadership in “climate change mitigation, biodiversity preservation, and inclusive and sustainable development.”⁵⁵ Furthermore, Tribal lands⁵⁶ are rich in renewable energy resources; containing approximately 17.6 terawatt-hours (“TWh”) of solar capacity⁵⁷ and 2.4 TWh of wind capacity.⁵⁸ And there are existing federal laws, including the ability to form a Tribal Energy Development Organization⁵⁹ or apply for funding under the Tribal Energy Loan Guarantee program, that will provide Tribes advantages that are unavailable to other renewable energy developers.⁶⁰

Part I of this Article will review the history of renewable energy tax credits in this country and how they have played such a prominent role in the United States’ efforts to address climate change.⁶¹ Part II of this Article will describe BBBA’s proposal to broaden the scope of entities—including Tribes—that can take advantage of renewable energy tax credits.⁶² Finally, Part III of this Article will argue that Tribes are uniquely positioned to take advantage of BBBA’s renewable energy tax credit direct pay proposal based on their demonstrated leadership in combating climate change, the significant amount of renewable energy resource potential that is located on their lands, and existing federal programs and policies that can be further leveraged for the development of renewable resources on Tribal lands.⁶³

⁵⁵ U.N. CLIMATE CHANGE CONF. U.K. 2021, *supra* note 9.

⁵⁶ Consistent with the Indian Tribal Energy Development and Self-Determination Act, when referring to “tribal land,” this Article references “any land or interests in land owned by any Indian tribe, title to which is held in trust by the United States, or is subject to a restriction against alienation under laws of the United States.” 25 U.S.C. § 3601(13).

⁵⁷ Silvio Marcacci, *Could This New Approach Unlock Gigawatts of Native American Solar Energy Potential*, FORBES (June 24, 2019, 7:30 AM), <https://www.forbes.com/sites/energy-innovation/2019/06/24/could-this-new-approach-unlock-gigawatts-of-native-american-solar-energy-potential/#301d5ea62509> [<https://perma.cc/3PJB-B8KY>].

⁵⁸ LIZANA PIERCE, OFF. INDIAN ENERGY, U.S. DEP’T ENERGY, DOE INDIAN ENERGY PROGRAM OVERVIEW 7 (Nov. 2018), <https://www.energy.gov/sites/prod/files/2018/12/f58/1-indian-energy-overview.pdf> [<https://perma.cc/ED5G-67LN>].

⁵⁹ 25 U.S.C. §§ 3501–02.

⁶⁰ Jigar Shah, LPO Director, Remarks at the Reservation Economic Summit (July 20, 2021) (transcript available at <https://www.energy.gov/lpo/articles/lpo-director-jigar-shah-delivers-remarks-reservation-economic-summit-2021>) [<https://perma.cc/EGX8-KBEV>].

⁶¹ See discussion *infra* Part I.

⁶² See discussion *infra* Part II.

⁶³ See discussion *infra* Part III.

I. BACKGROUND AND HISTORY OF RENEWABLE ENERGY TAX CREDITS

In the wake of the energy crisis of the 1970s, Congress created as part of the Energy Tax Act of 1978 “a temporary ten percent tax credit for business energy property and equipment [that used] energy resources other than oil or natural gas.”⁶⁴ The ten percent credit, which could be used for wind or solar business energy property, was effectively the first renewable energy tax credit adopted in the United States and became what is now commonly referred to as the Investment Tax Credit (“ITC”) under IRC Section 48.⁶⁵ The ITC is now most commonly deployed to help with financing solar projects and effectively allows—at least in its current formation—a investor or developer to reduce on a dollar-for-dollar basis their tax liability based on the percentage of the dollar amount the investor or developer has made in the qualifying energy property.⁶⁶ To use a very simplified example, an investor investing \$10 million in a qualifying solar generating facility would be entitled to a \$2.6 million tax credit under the current ITC rate of twenty-six percent⁶⁷ and could thus reduce its tax liability by that \$2.6 million.⁶⁸

Although the ITC was set to expire in 1982, the Windfall Profit Tax Act of 1980 extended the credit to property placed in service prior to 1985 and increased the credit for solar and wind generating property to fifteen percent.⁶⁹ The Tax Reform Act of 1986 provided a further extension for solar property until 1989, but phased the credit back down to ten percent and provided no extension for wind property.⁷⁰ The ten percent solar credit was further repeatedly extended by a series of legislative acts (i.e., the Miscellaneous Revenue Act of 1988, the Omnibus Budget Reconciliation Act of 1989, and the Omnibus Budget Reconciliation Act of 1990) up until 1992.⁷¹

The Energy Policy Act of 1992 made the ITC for solar facilities permanent⁷² and introduced a new renewable energy tax credit for wind

⁶⁴ SHERLOCK, *supra* note 35, at 1. Interestingly, the initial credit had the full refundability that BBBA now proposes to restore.

⁶⁵ *Id.*; *see also* 26 U.S.C. § 48.

⁶⁶ 26 U.S.C. § 48.

⁶⁷ 26 U.S.C. § 48(a)(6)(A)(I).

⁶⁸ Investors and developers have created various entity and financing structures aimed at maximizing the credit for the benefit of the tax equity investor.

⁶⁹ SHERLOCK, *supra* note 35, at 1.

⁷⁰ *Id.* at 1–2.

⁷¹ *See id.* at 2.

⁷² *Id.*

(and closed-loop biomass) based upon the kilowatt (“kW”) hours of electricity produced by such facility during its first ten years in service.⁷³ This tax credit, which is commonly known as the Production Tax Credit (“PTC”) and can be found under IRC Section 45, allows an investor or developer to offset their tax liability based on a multiple of the kW hours of electricity a qualifying facility produces and sells to an unrelated third party in a given year multiplied by the applicable credit amount.⁷⁴ As a simplified example based on the current PTC inflation adjusted rate of 2.5 cents per kW produced,⁷⁵ a wind project wholly owned by one investor that generated one million kW in a given year would provide the investor with a credit of \$25,000 for that year.

As with the ITC, since its passage in 1992 the PTC has been extended and modified over a dozen times.⁷⁶ The PTC was initially set to expire in mid-1999 but the Ticket to Work and Work Incentives Improvement Act of 1999 extended it through the end of the year and then the Job Creation and Worker Assistance Act further extended it until 2004.⁷⁷ The Job Creation and Worker Assistance Act and Working Families Tax Relief Act of 2004 extended the PTC up to 2005 when the Energy Policy Act of 2005 kicked in.⁷⁸

The Energy Policy Act of 2005 significantly boosted the ITC by increasing the applicable percentage from ten percent to thirty percent, but set both the ITC and PTC phase out to occur two years later in 2007.⁷⁹ The ITC, however, was subsequently extended by the Emergency Economic Stabilization Act of 2008 until 2017, and then by the 2016 Consolidated Appropriations Act, the Bipartisan Budget Act of 2018, the Taxpayer Certainty and Disaster Tax Relief Act of 2020, and the 2021 Consolidated Appropriations Act, until its current phase out date at the end of 2025.⁸⁰ The PTC was subject to a few more extensions, including the Emergency Economic Stabilization Act of 2008, the American Recovery and Reinvestment Act of 2009, the American Taxpayer Relief Act of 2012, the Tax

⁷³ SHERLOCK II, *supra* note 36, at Summary.

⁷⁴ *Id.* at 1–2.

⁷⁵ 26 U.S.C. § 45(a)(1); Jeffrey G. Davis & Andre M. Smith II, *IRS Releases 2021 Section 45 Production Tax Credit Amounts*, TAX EQUITY TIMES (May 24, 2021), <https://www.taxequitytimes.com/2021/05/irs-releases-2021-section-45-production-tax-credit-amounts/> [<https://perma.cc/P28X-4UVL>].

⁷⁶ SHERLOCK II, *supra* note 36, at Summary.

⁷⁷ *Id.* at 3.

⁷⁸ *Id.*

⁷⁹ SHERLOCK, *supra* note 35, at 2; SHERLOCK II, *supra* note 36, at 4.

⁸⁰ SHERLOCK, *supra* note 35, at 2; 26 U.S.C. § 48(a)(6)(B).

Increase Prevention Act of 2014, the 2016 Consolidated Appropriations Act, the Bipartisan Budget Act of 2018, and the Further Consolidated Appropriations Act of 2020.⁸¹

In their current forms, the ITC for solar is set to be phased out at the end of 2025,⁸² and the PTC for wind at the end of 2021.⁸³ The solar ITC percentage has been reduced to twenty-six percent for 2022 and will be further reduced to twenty-two percent for 2023 and ten percent thereafter.⁸⁴ The onshore wind PTC⁸⁵ is set at only sixty percent of the original credit level for its final year.⁸⁶ While Congress has enacted other tax credits in recent years aimed at decarbonizing the electric system—the most notable of which is the credit for carbon dioxide sequestration in IRC Section 45Q⁸⁷—the ITC and PTC have been the focal point of renewable energy tax policy since their enactment.⁸⁸

II. BBBA'S EXPANSION OF RENEWABLE ENERGY TAX CREDITS FOR THE BENEFIT OF TRIBES

If BBBA is enacted, the ITC and PTC will continue to play a starring role in the United States' efforts to meet its COP26 pledges. Approximately \$320 billion of BBBA funds are earmarked to once again extend and expand the ITC, PTC, and other renewable energy tax credits⁸⁹ including a new clean hydrogen tax credit, new transmission investment tax credit, and new clean fuel production tax credit.⁹⁰ But perhaps the

⁸¹ SHERLOCK II, *supra* note 36, at 4–5.

⁸² 26 U.S.C. § 48(a)(6)(B).

⁸³ 26 U.S.C. § 45(b)(5)(D).

⁸⁴ 26 U.S.C. § 48(a)(6)(A)–(B).

⁸⁵ NAT'L ASS'N OF TAX PROS., SUMMARY: CONSOLIDATED APPROPRIATIONS ACT OF 2021—HR 133, at 4 (2021), <http://www.cpa-services.com/Special%20Articles/2020-Consolidated-Appropriation-Act-of-2021.pdf> [<https://perma.cc/L78U-53ES>] (the Consolidated Appropriations Act, 2021, added a new ITC for offshore wind facilities that runs through 2025 at the full thirty percent credit amount).

⁸⁶ 26 U.S.C. § 45(b)(5)(D).

⁸⁷ 26 U.S.C. § 45Q.

⁸⁸ Bhattacharyya, *supra* note 44.

⁸⁹ Nat Eng & Peter Lawrence, *House-passed \$1.7 Trillion Build Back Better Reconciliation Legislation; Includes \$325 Billion in Green Energy Tax Incentives and More Than \$92 Billion in Spending to Address Robust Climate Change Goals*, NOVOGRADAC (Nov. 19, 2021, 12:00 AM), <https://www.novoco.com/notes-from-novogradac/house-passed-17-trillion-build-back-better-reconciliation-legislation-includes-325-billion-green> [<https://perma.cc/W759-7CPA>].

⁹⁰ *Id.*

most notable proposal in the legislation—at least for the purposes of this Article—is BBBA’s proposal to expand the circle of entities that can benefit from renewable energy tax credits. Under BBBA, not only could large private investors and major renewable developers make productive use the tax credits, but state and local governments, non-profit organizations, and Tribes would all be eligible to directly benefit from developing or investing in renewable energy projects.⁹¹

As to Tribes, BBBA proposes to make them eligible by doing two things. First, BBBA provides that the ITC, PTC, 45Q, new alternative fuel vehicle refueling credit, advanced energy credit, new credit for transmission investment, zero emissions facility credit, nuclear power production credit, clean hydrogen credit, and future clean electricity production and investment tax credits will all be determined without taking into account IRC Section 50(b)(4)(A)(I).⁹² IRC Section 50(b)(4)(A)(I) prohibits “the United States, any State or political subdivision thereof, any possession of the United States, or any agency or instrumentality of any of the foregoing” from taking a renewable energy tax credit.⁹³ Although a Tribe may not consider itself a political subdivision or agency or instrumentality of the United States or a U.S. state, IRC Section 168(h)(2)(A)(iv) makes clear that “any Indian tribal government . . . shall be treated in the same manner as a State” for the purposes of the Code’s definition of a tax-exempt entity.⁹⁴ By making clear that the tax-exempt rules that prohibit Tribes from taking renewable energy tax credits would no longer apply, BBBA explicitly makes Tribes eligible to take advantage of renewable energy tax credits.⁹⁵

Of course, just making Tribes eligible to receive renewable energy tax credits would do little to incentivize Tribes to invest in renewable energy projects given that their tax-exempt status otherwise remains intact, and they thus have no tax liability that the credits could be used to offset. BBBA, however, solves this by allowing Tribes (or pretty much anyone) to elect to have their renewable energy tax credit treated as making a payment against taxes that would otherwise be imposed.⁹⁶ For those that have made the election and have no tax liability like a Tribe, the election will result in an “overpayment” of taxes and a refund.⁹⁷ Refundability or

⁹¹ *Id.*

⁹² H.R. 5376, 117th Cong. § 6417(c)(1) (2021).

⁹³ 26 U.S.C. § 50(b)(4)(A)(I).

⁹⁴ 26 U.S.C. § 168(h)(2)(A)(iv).

⁹⁵ H.R. 5376, 117th Cong. § 6417(c)(1) (2021).

⁹⁶ H.R. 5376, 117th Cong. § 6417(a) (2021).

⁹⁷ 26 C.F.R. § 301.6402-3(c) (2017).

direct pay could thus result in a Tribe receiving, for example, a \$3 million payment on a \$10 million investment in a solar project it developed.⁹⁸

In short, BBBA will put Tribes in the position that tax equity investors and major developers have historically been in with respect to monetizing renewable energy tax credits. Moreover, Tribes are even better positioned to take advantage of renewable energy tax credits based on their demonstrated experience addressing climate change, significant renewable energy resources under their stewardship, and existing federal policies that can be utilized in conjunction with renewable energy tax credits.⁹⁹

III. HOW TRIBES CAN MAXIMIZE RENEWABLE ENERGY TAX CREDITS FOR THE BENEFIT OF THEIR MEMBERS WHILE FIGHTING CLIMATE CHANGE

At COP26, U.S. AID Administrator Samantha Power recognized the effectiveness of Indigenous Peoples at addressing climate change, stating:

Proof that indigenous and local populations are effective stewards of critical ecosystems is clear: On lands Indigenous Peoples and Local Communities legally control, deforestation rates are lower and the amount of stored carbon is higher than on neighboring lands and forest areas. And, a quarter of the world's above ground carbon is stored in tropical forests on land managed by Indigenous Peoples.¹⁰⁰

Power's statement—while made in the global context—applies to Tribes in the United States with equal force. The Navajo Nation, for

⁹⁸ This assumes that BBBA's restoration of the ITC to its full thirty percent is also passed.

⁹⁹ Nicola Jones, *How Native Tribes Are Taking the Lead on Planning for Climate Change*, YALE ENV'T 360 (Feb. 11, 2020), <https://e360.yale.edu/features/how-native-tribes-are-taking-the-lead-on-planning-for-climate-change> [<https://perma.cc/6S8F-H4RW>]; *Decision Support for Tribes*, NAT'L RENEWABLE ENERGY LABORATORY, <https://www.nrel.gov/state-local-tribal/decision-support-tribes.html> [<https://perma.cc/Y6EY-AGFC>] (last visited Apr. 3, 2022); Global Project Finance Alert, *IRS Ruling Creates Tax Opportunity for American Indian Tribes to Own Solar Projects*, AKIN GUMP (Apr. 1, 2013), <https://www.akingump.com/en/news-insights/irs-ruling-creates-tax-opportunity-for-american-indian-tribes-to.html> [<https://perma.cc/TL5W-V7Q4>].

¹⁰⁰ U.S. Agency for Int'l Dev. Administrator Samantha Power, Remarks at the "Saving Nature to Save Ourselves" Roundtable Co-hosted by DOI Secretary Haaland (Nov. 6, 2021) (transcript available at <https://www.usaid.gov/news-information/speeches/nov-6-2021-remarks-administrator-samantha-power-saving-nature-save-ourselves> [<https://perma.cc/DC6M-9KAZ>]).

example, has adopted their own Climate Adaptation Plan that includes objectives like eliminating trash burning, implementing vehicle emissions testing centers, and even consideration of a carbon tax.¹⁰¹ To take another example, the Swinomish Tribe is establishing clam gardens and salmon runs¹⁰² while working to block mining in sensitive areas to help ensure a species survival and boost food security for its members.¹⁰³

While these activities may seem somewhat removed from the technical expertise required to develop large scale wind and solar projects—not to mention monetizing the associated renewable energy tax credits—many Tribes have experience with building and managing the electric systems used to transmit renewable energy. For instance, the Ak-Chin, Aha Macav, Gila River, Navajo, Tohono O’odam, Confederated Salish, and Kootenai Tribes all manage electric utilities that procure, schedule, and deliver affordable electricity to their members.¹⁰⁴ Tribal utilities have personnel (many of whom are members) with fundamental understandings of electric systems and what is required to connect renewable resources to the grid and reliably deliver those same resources to end-use customers.¹⁰⁵ Moreover, some Tribes already have programs that allow their members to connect their own renewable energy resources to the grid.¹⁰⁶ It is also worth keeping in mind that Tribes have experience with the development of energy resources on their own lands.¹⁰⁷ Granted, much of this experience has been through the development of

¹⁰¹ NAVAJO NATION DEP’T OF FISH & WILDLIFE, CLIMATE ADAPTION PLAN FOR THE NAVAJO NATION 25 (Dec. 2018), <https://www.nndfw.org/docs/Climate%20Change%20Adaptation%20Plan.pdf> [<https://perma.cc/3UY2-F2YU>].

¹⁰² Jones, *supra* note 99.

¹⁰³ Judith Lavoie, *Why an International Coalition Is Going All Out to Stop Mining in B.C.’s Skagit Headwaters*, THE NARWHAL (June 17, 2019), <https://thenarwhal.ca/why-an-international-coalition-is-going-all-out-to-stop-mining-in-the-skagit-headwaters/> [<https://perma.cc/3VF7-2YAZ>].

¹⁰⁴ LEONARD S. GOLD, U.S. DEP’T OF INTERIOR INDIAN ENERGY & ECON. DEV., ESTABLISHING A TRIBAL UTILITY AUTHORITY HANDBOOK 12, 48 (2012), https://www.bia.gov/sites/bia_prod.opengov.ibmcloud.com/files/assets/as-ia/ieed/ieed/pdf/tribalutility_handbook.pdf [<https://perma.cc/G67X-N9G3>].

¹⁰⁵ *Id.* at 18, 20.

¹⁰⁶ See, e.g., *Solar*, GILA RIVER INDIAN CMTY. UTIL. AUTH., <https://gricua.net/new-service-requirements/solar/> [<https://perma.cc/QMV3-62R4>] (last visited Apr. 3, 2022).

¹⁰⁷ See, e.g., Press Release, Indian Affs., U.S. Dep’t of the Interior, Crow Tribe’s Coal Mining Agreement with Shell Approved (Apr. 6, 1983) [hereinafter Indian Affs. Press Release], <https://www.bia.gov/as-ia/opa/online-press-release/crows-tribes-coal-mining-agreement-shell-approved> [<https://perma.cc/Y5ZB-YCHY>]; DAVID GRANN, KILLERS OF THE FLOWER MOON 6 (2017).

coal, oil, and gas reserves by non-Tribal entities operating on their lands.¹⁰⁸ But not all Tribal energy development has been done by non-Tribal entities. The Navajo Nation, for example, has operated its own coal mine.¹⁰⁹ And some of the Tribal energy development has already been renewable energy development.¹¹⁰ In the lower forty-eight states, Tribal lands contain 17.6 TWh of solar capacity¹¹¹ and 2.4 TWh of wind capacity.¹¹² The U.S. Department of Energy (“DOE”) estimates these resources constitute 6.5% of the total utility-scale renewable energy technical potential in the United States, and the Bureau of Indian Affairs (“BIA”) believes Tribal lands have the potential to supply up to ten percent of the country’s energy supply.¹¹³

Given Tribes’ demonstrated experience combating climate change and the wealth of renewable resources located on Tribal lands,¹¹⁴ it is possible—perhaps likely—that development of Tribal renewable energy resources will occur regardless of any future policy incentive, including the BBBA direct pay program.¹¹⁵ For instance, the Crow Creek Sioux Tribe is already a partner in the development of a 400 megawatt (“MW”) wind project in South Dakota.¹¹⁶ The Moapa Band of Paiutes is on pace to host over 600 MW of solar projects on its lands in southern Nevada.¹¹⁷

¹⁰⁸ Indian Affs. Press Release, *supra* note 107; GRANN, *supra* note 107, at 6.

¹⁰⁹ *Navajo Company Takes Over Operation of Coal Mine It Owns*, U.S. NEWS (Oct. 1, 2021, 12:47 AM), <https://www.usnews.com/news/best-states/new-mexico/articles/2021-10-01/navajo-company-takes-over-operation-of-coal-mine-it-owns> [<https://perma.cc/A5V4-2VBS>].

¹¹⁰ *Native American Tribes Pushing into Renewable Energy Development Across the U.S.*, INST. FOR ENERGY ECON. & FIN. ANALYSIS (Aug. 29, 2019), <https://ieefa.org/native-american-tribes-pushing-into-renewable-energy-development-across-the-u-s/#:~:text=To%20date%2C%20however%2C%20there%20are,of%20biomass%2C%206%20MW%20of> [<https://perma.cc/MMT8-6FEH>].

¹¹¹ Marcacci, *supra* note 57.

¹¹² PIERCE, *supra* note 58, at 7.

¹¹³ *Id.*; LIZANA K. PIERCE, OFF. OF ENERGY EFFICIENCY & RENEWABLE ENERGY, U.S. DEP’T OF ENERGY 11 (2016), https://www.energy.gov/sites/prod/files/2016/01/f28/0811review_01_pierce.pdf [<https://perma.cc/55YZ-LGBB>].

¹¹⁴ Linda Etchart, *The Role of Indigenous Peoples in Combating Climate Change*, 3 PALGRAVE COMM’N 17085, 1 (2017).

¹¹⁵ See *supra* notes 101–04 and accompanying text.

¹¹⁶ Carmen, *Crow Creek Tribal Wind Project, US*, POWER TECH. (Dec. 2, 2021), <https://www.power-technology.com/marketdata/crow-creek-tribal-wind-project-us/> [<https://perma.cc/P9EF-3TX3>].

¹¹⁷ Chris Crowell, *Largest Solar Project on Tribal Land Being Developed by NV Energy, 8minutenergy*, SOLAR BUILDER (June 4, 2018), <https://solarbuildermag.com/news/largest-solar-project-on-tribal-land-being-developed-by-nv-energy-8minutenergy/> [<https://perma.cc/42G7-GCKN>].

And the Crow Tribe in Southeast Montana is planning to develop a carbon-enabled coal-to-hydrogen project.¹¹⁸

However, BBBA along with other existing federal policies will allow for a different sort of Tribal energy development than has occurred in the past. Whether it is the development of traditional oil, gas and coal resources or new development of renewable resources, Tribes have generally been limited—following approval from the BIA—to leasing their lands out to non-Tribal corporations so that they could develop and profit from the energy resources.¹¹⁹ Tribal members could often get jobs working the mines or oil rigs located on their lands and the Tribe would receive royalties and access fees, but they often did not receive the full benefit of their resource potential.¹²⁰ BBBA could change this equation and put Tribes in the position to develop their own renewable energy resources for their own benefit.

That being said, developing wind and solar projects is a tough business,¹²¹ and carbon capture and clean hydrogen are even more challenging.¹²² But Tribes will not have to undertake these renewable energy developments on their own to receive direct payment of the BBBA renewable energy tax credits. The 2018 Amendments to the Indian Tribal Energy Development and Self Determination Act (“ITEDSDA”) now allow Tribes to enter into Tribal Energy Development Organizations (“TEDOs”) with non-Tribal entities.¹²³ A TEDO is defined as an organization engaged in the development of energy resources wholly owned by a Tribe, or an organization composed of two or more entities, at least one of which is a Tribe, that has consent of all participating Tribes to enter into an energy resource development agreement under ITEDSDA.¹²⁴ A TEDO must be certified as such by the Secretary of the Interior.¹²⁵ To obtain certification,

¹¹⁸ Tom DiChristopher, *Hydrogen Threatens to Drive Wedge Between Democrats, Climate Activists*, S&P GLOBAL (Sept. 24, 2021), <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/hydrogen-threatens-to-drive-wedge-between-democrats-climate-activists-66655161> [<https://perma.cc/CA8L-HMZ8>].

¹¹⁹ 25 U.S.C. § 415(a).

¹²⁰ Indian Affs. Press Release, *supra* note 107.

¹²¹ David Roberts, *Why Wind and Solar Power Are Such a Challenge for Energy Grids*, VOX (June 19, 2015, 9:00 AM), <https://www.vox.com/2015/6/19/8808545/wind-solar-grid-integration> [<https://perma.cc/F57E-97E3>].

¹²² Alex Zapantis, *Carbon Capture and Storage: Challenges, Enablers and Opportunities for Deployment*, GLOB. CCS INST. (July 30, 2020), <https://www.globalccsinstitute.com/news-media/insights/carbon-capture-and-storage-challenges-enablers-and-opportunities-for-deployment/> [<https://perma.cc/J7BY-B5EB>].

¹²³ 25 U.S.C. § 3504(h).

¹²⁴ 25 U.S.C. § 3501(12).

¹²⁵ 25 U.S.C. § 3504(h)(1).

the Tribal entity within the TEDO must have carried out a contract pursuant to the Indian Self-Determination and Education Assistance Act that included programs relating to the management of Tribal land without uncorrected audit exceptions within the last three years.¹²⁶

The TEDO must be organized under the laws of the Tribe, and several requirements are in place to ensure the Tribe maintains significant control over the TEDO.¹²⁷ Specifically, the Tribe must hold a majority interest in the TEDO, the TEDO's organizing documents must specify that the Tribe whose land is being developed has a controlling interest at all times, and the TEDO must be subject to the jurisdiction, laws, and authority of the Tribe.¹²⁸ Once a proposed certification is submitted, the Secretary has ninety days to approve or disapprove the TEDO application¹²⁹ and, if approved, must issue a certification within ten days.¹³⁰

Although no Tribe has yet taken advantage of a TEDO, Tribes could use the TEDO structure to enter into public-private partnerships with entities with expertise in specific areas of energy development—such as a partnership with a solar or wind developer. Of course, without BBBA there has not been much incentive for Tribes to take on the risk of these types of development activities, even if shared through a TEDO. BBBA and its direct payment option of renewable energy tax credits to Tribes fundamentally changes this equation. A Tribe that partnered with a solar developer in a fifty-one to forty-nine split-ownership TEDO would be eligible to split a direct payment refund of the thirty percent of costs the solar project requires.¹³¹ Moreover, if a Tribe's contribution to the project's costs consists of the Tribal land that it already controls at no or marginal costs, the profits generated by the project and the BBBA renewable tax credits would be even greater.¹³² This could all be accomplished while generating renewable energy that helps reduce the United States' carbon emissions and meet its COP26 pledges.¹³³

Outside of a TEDO, Tribes can also take advantage of the Department of Energy's Tribal Energy Loan Guarantee Program ("TELGP").¹³⁴

¹²⁶ 25 U.S.C. § 3504(h)(2)(A).

¹²⁷ 25 U.S.C. § 3504(h)(2)(B)(I).

¹²⁸ 25 U.S.C. § 3504(h)(2)(B).

¹²⁹ 25 U.S.C. § 3504(h)(1).

¹³⁰ 25 U.S.C. § 3504(h)(3).

¹³¹ See *supra* notes 96–98 and accompanying text.

¹³² Cf. AKIN GUMP *supra* note 99 (explaining how putting Tribes in the position of tax equity investors with respect to solar energy tax credits provides economic benefits, especially where a Tribe's investment in a solar project is marginally low).

¹³³ Duggal, *supra* note 13.

¹³⁴ *Tribal Energy Loan Guarantee Program*, U.S. DEPT OF ENERGY, <https://www.energy>

TELGP allows DOE's Loan Program Office ("LPO") to guarantee up to ninety percent of the unpaid principal and interest due on any loan made to a Tribe for energy development.¹³⁵ While the TELGP is already funded and available for Tribes to make use of, BBBA would further enhance it. Under BBBA, TELGP would receive an additional \$200 million.¹³⁶ But, more importantly, LPO would be authorized to increase its guaranteed amount from \$2 billion to \$20 billion and it could guarantee up to a hundred percent of unpaid principal and interest.¹³⁷ This is all in addition to the fact that LPO is already looking to boost the program by, among other things, deferring fees until closing.¹³⁸ TELGP can help Tribes acquire the upfront capital required to develop major renewable energy projects.

CONCLUSION

Tribes are on the front lines of climate change. Tribes are both more vulnerable to its disastrous effects and better prepared to address it than their nonindigenous neighbors. However, Tribes have long been excluded from the benefits of the United States' most successful and essentially only climate policy: renewable energy tax credits.¹³⁹ BBBA would change this by making Tribes eligible to receive renewable energy tax credits and allowing them to elect a direct payment in lieu of the credit.¹⁴⁰ If Tribes can combine BBBA's new renewable energy tax credit with their experience in energy development and take advantage of existing federal policies like TEDOs and TELGP, they can not only fight climate change but do so while providing significant economic benefits to their members.

.gov/lpo/tribal-energy-loan-guarantee-program [https://perma.cc/N9TD-N47A] (last visited Apr. 3, 2022).

¹³⁵ DEP'T OF ENERGY LOAN PROGRAMS OFF., TRIBAL ENERGY LOAN GUARANTEE PROGRAM 1 (2020), <https://www.energy.gov/sites/prod/files/2020/01/f70/DOE-LPO-Tribal-Energy-Jan2020.pdf> [https://perma.cc/GN6M-ANZR].

¹³⁶ *Critical Tribal Provisions in the Build Back Better Act*, ARIZ. CAPITOL TIMES (Nov. 30, 2021), <https://azcapitoltimes.com/news/2021/11/30/critical-tribal-provisions-in-the-build-back-better-act/> [https://perma.cc/A83M-87SC].

¹³⁷ H.R. 5376, 117th Cong. § 30301 (2021).

¹³⁸ Shah, *supra* note 60.

¹³⁹ ROBERT F. LAWRENCE, ORRICK, FINANCING RENEWABLE ENERGY DEVELOPMENT ON NATIVE AMERICAN LANDS 3 (2009), <https://media.orrick.com/Media%20Library/public/files/1/1720-pdf.pdf> [https://perma.cc/JP82-FDYD].

¹⁴⁰ John Engel, *Big Wins for Renewable Energy in the 'Build Back Better' Bill*, RENEWABLE ENERGY WORLD (Sept. 13, 2021), <https://www.renewableenergyworld.com/solar/big-wins-for-renewable-energy-in-the-build-back-better-bill/#gref> [https://perma.cc/8HFY-LBT9].