

# Inflation Reduction Act Direct Pay for Tribes

Stanford Law School  
August 28, 2023

# Lawyers for a Sustainable Economy

**“We will continue to harness the power of the public and private sector together, moving forward to build a brighter, cleaner, and more sustainable future.”**

Xavier Becerra, Former California Attorney General

17

Major, private U.S. law firms

120

Startups and nonprofits assisted

2

Corporate and non-profit partners

Firms offer pro bono legal assistance to eligible Tribal entities, non-profits, and early-stage entrepreneurs taking on key sustainability challenges.

# Speakers



**Molly Loughney Melius**

Director, Stanford Lawyers for a Sustainable Economy Initiative



**Wahleah Johns**

Director of the U.S. Department of Energy Office of Indian Energy Policy and Program

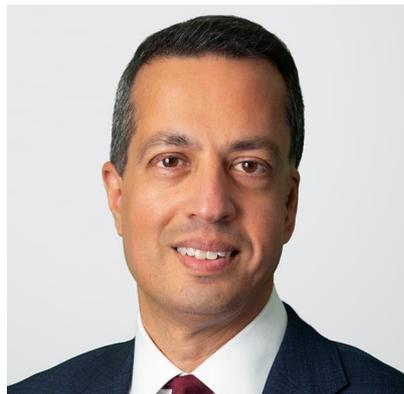
# Holland & Knight Team



Nicole M. Elliott



Ken Parsons



Amish Shah

# IRA: Climate & Energy

- The most significant climate legislation in U.S. history
- Provides incentives in the form of direct spending and tax benefits
- Provides a significant runway for investments
- Helps ensure disadvantaged communities are not left behind
- Has strong labor components, ensuring job creation
- Focused on domestic supply chain and onshoring
- **IRA tax credits can be directly paid to tribes!**

# Webinar Series

- Augst 3 - Overview of the IRA
- **TODAY** – Deep Dive, Direct Pay for Tribes
- September 25 – Deep Dive, ITC and PTC

# Agenda

- Direct Pay for Tribes
  - What is it?
  - Who can claim it?
  - How is it claimed?
  - When is payment received?
- Questions and Answers

## **Twelve Underlying IRA Tax Incentives Available for Direct Pay**

# Underlying IRA Tax Credits

## Energy Generation

- Investment Tax Credit - Section 48 ↓
  - *NEW* Clean Electricity Investment Credit – Section 48E
- Production Tax Credit – Section 45 ↓
  - *NEW* Clean Electricity Production Credit – Section 45Y
- Zero- Emission Nuclear Power Production – Section 45U



Future  
Webinar

## Clean Fuels

- *NEW Clean Hydrogen* – Section 45V
- *NEW Clean Fuel Production Credit* – Section 45Z

# Underlying IRA Tax Credits (cont.'d)

## Energy Manufacturing

- Advanced Energy Project Credit - Section 48C
- *NEW* Advanced Manufacturing Production Credit – Section 45X

## Clean Vehicles

- *NEW* Qualified Commercial Vehicles - Section 45W
- Alternative Fuel Vehicle Refueling Property (charging stations) - Section 30C

## Carbon Sequestration

- Credit for Carbon Oxide Sequestration - Section 45Q

# What is direct pay?

- Direct Pay = Elective Pay
- Mechanism by which entities not subject to federal taxation can benefit from tax credits.
- Only available for certain tax-exempt entities, considered “applicable entities,” which includes Indian tribal governments
- Direct payment = asking IRS for \$
- Treasury and IRS have issued proposed rules that are subject to change.
- This presentation is based on these proposed rules and information currently available.

# Who can claim direct payment, i.e., who are applicable entities?

- Indian tribal government
- Subdivision of an Indian tribal government
- Agency or instrumentality of Indian tribal government or subdivision thereof
- Alaska Native Corporations

# What is a subdivision, instrumentality, agency?

**Subdivision:** The term “political subdivision”... denotes any division of any State or local governmental unit which is a municipal corporation or which has been delegated the right to exercise part of the sovereign power of the unit. As thus defined, a political subdivision ... may or may not... include special assessment districts so created, such as road, water, sewer, gas, light, reclamation, drainage, irrigation, levee, school, harbor, port improvement, and similar districts and divisions of any such unit.

**Instrumentality/Agency:** In determining whether an entity qualifies as a government instrumentality, the IRS generally looks at the following six factors: 1) whether the organization is used for a governmental purpose and performs a governmental function; 2) whether performance of its function is on behalf of one or more governmental units; 3) whether there are any private interests involved, or whether the governmental unit has the power and interest of an owner; 4) whether control and supervision of the organization is vested in a public authority or authorities; 5) whether express or implied statutory or other authority is necessary for the creation and/or use of the organization, and whether this authority exists; 6) and the degree of financial autonomy of the entity and the source of its operating expenses.

**IRS FAQs note this includes water districts, school districts, and economic development agencies.**

# How is direct pay claimed?

## Three steps:

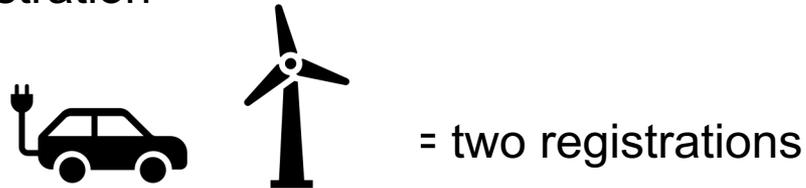
1. Ensure qualification for the underlying credit
2. Complete pre-filing registration
3. Request direct payment using annual tax return

# Step 1: Ensuring Qualification for the Underlying Credit

- Each of the twelve underlying tax credits have various rules.
- The applicable entity claiming direct payment must own the property generating the underlying tax credit or be conducting the activities giving rise to the underlying credit.
- Under proposed rules partners of a partnership are not allowed to use direct pay, this could limit for example an Indian tribal government from forming a legal partnership and owning property with another entity. This rule extends to partnerships with other applicable entities. However, other ownerships structures may work.

## Step 2: Pre-filing Registration

- Expected to launch 2023 – not currently available
- Completed online
- Requires an EIN or TIN
- Requires identification of all underlying credits for which tribe intends to seek direct payment.
- Project by project registration



- Completing this step, generated a unique registration number that is needed for Step 3.

## Step 3: Annual Return Requesting Payment

- For tribes this is Form 990-T
- Form has not yet been updated – not currently available
- Due date is based on established accounting period, or if not applicable, a calendar year basis
- No late filings! Must be filed by due date plus extensions
- Can be filed in paper, but electronic is strongly encouraged
- Included IRS Form 3800 and any other underlying credit forms.
- Once filed requesting direct payment, cannot be revoked.
- Timing of payments unknown; IRS has said not entitled until after due date.

# Timing Considerations

- In general, underlying tax credits eligible for direct payment are earned during the tax year the property is placed in service or activities commence.

Example: Tribe places a solar panel project in service in March of calendar year 2024 that qualifies it for an underlying Investment Tax Credit under Section 48 of the Internal Revenue Code. Tribe is entitled to the investment tax credit in 2024.

- Based on current information, the pre-registration process must occur after the project is placed in service but before the annual return is filed.

Example: In the above example, the Tribe can complete the pre-registration process as soon as March 2024

- The annual return, Form 990-T for tribes seeking direct payment must be filed by the due date, with extension.

Example: In the above example, assuming tribe is calendar year taxpayer, Form 990-T for tax year of 2024 seeking direct payment of the Investment Tax Credit is due May 15, 2025.

**GIVEN THIS TIMING:** Direct payment will not help finance the project during the construction. Therefore, if financing is needed, tribe should explore other options.

# Important Considerations!

- There is no prohibition on using direct pay and federal or state grant funding on the same project. For example, a tribe receive direct pay for tax credits on projects funded by federal grant programs enacted in the Bipartisan Infrastructure Law (BIL) or through the grant provisions of the IRA. In certain instances, however the amount of the tax credit (and therefore the direct payment) must be reduced if nontaxable grants or other nontaxable proceeds are used.
- Receiving a registration number through the pre-filing registration process or a payment is not a determination that a tribe qualifies for the credit or for direct payment. **IRS can still perform tax audit.**

## Related Resources

- IRS FAQs
- Pub. 5817-F
- Notice of Proposed Rulemaking, 88 Fed. Reg. 40528 (June 21, 2023)
- Temporary Regulations, 88 Fed. Reg. 40,086 (June 21, 2023).

# Investment Tax Credit Example

- Tax credit for placing in service projects that produce renewable energy (e.g., solar, wind, electrochromic glass), certain interconnection property, qualified biogas property, or energy storage projects.
- If certain **labor conditions** are met, the credit value is multiplied five (6% → 30%).
- Additional bonus credit amounts are available based on **domestic content**, placement in an **energy community**, or with an allocation for placement in connection **with a low-income community**.
- Tax credit claimed in the year the project is placed in service.

# Investment Tax Credit Example (continued)

A Tribe purchases and places into service solar panels to put on the roof of its administrative building thereby generating electricity for the facility. The solar panels cost \$500,000. Under the IRA, the tax credit eligible for direct payment is generally 6% of this cost, or \$30,000. The value of the credit is increased if additional conditions are met - if certain **labor conditions** are met or if the output is less than 1 MW, the credit is increased by five-fold to \$150,000.

Additional bonus amounts of 10% each are also available increasing the value if either certain **domestic content** requirements are met (e.g. the products were produced in the United States) and/or the solar panels are placed in specially designated communities (e.g. **energy communities** or receive an allocation under the **low-income community bonus** program). Accordingly, under the right circumstances, the credit can be as much as 70% of the cost of the energy property.

- Step 1: The Tribe undertakes the necessary steps to qualify for the underlying Investment Tax Credit found at Section 48
- Step 2: The Tribe completes the Pre-Filing Registration process to obtain its unique registration number
- Step 3: The Tribe files the Form 990-T electing for direct payment of the tax credit and seeking payment. In this example, for \$350,000.

# Questions and Answers

# Webinar Series

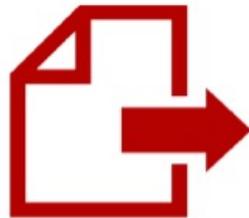
- September 25 – Deep Dive, ITC and PTC

# How to Apply for Pro Bono Help



## Step 1:

Fill out the form;



## Step 2:

Discuss legal request with Stanford Law School;



## Step 3:

Stanford Law School provides your project description and request to the firms in the Initiative;



## Step 4:

Stanford Law School will help to connect you with a firm.

For the application form and more on eligibility criteria, visit:  
**[lawyersforsustainability.com](http://lawyersforsustainability.com)**

# Learn More

Webinar content provided by: **Holland & Knight**

## Contact the Initiative

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