
Can We Save Our Foodways? The Inflation Reduction Act, Climate Change, and Food Justice

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ABSTRACT. This Essay examines USDA programs supported by the Inflation Reduction Act and its approach toward addressing climate change and historical funding inequities for Indigenous and Black Farmers. It also argues for how the next Farm Bill can expand upon these efforts to further address inequities and promote climate resilience.

INTRODUCTION

Farmers, especially minority and Native farmers, are facing unprecedented hurdles with respect to providing food to communities, as well as protecting their own livelihoods. They are tackling the need to change their existing agricultural practices to adapt to either increased fire risk, drought, flooding, seasonal changes, and pests.¹ And many have already been burdened by historical practices of discrimination by the U.S. Department of Agriculture (USDA) itself.²

One example is what is happening with Tribal farmers in our state of Wisconsin and the broader Great Lakes region where weather has oscillated from extreme and even exceptional droughts to historic storms with widespread floods.³ These incredible weather variations have devastated growing seasons for

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1. Gurdeep Singh Malhi, Manpreet Kaur & Prashant Kaushik, *Impact of Climate Change on Agriculture and Its Mitigation Strategies: A Review*, 13 SUSTAINABILITY 1318, 1318 (2021).
 2. See Stephen Carpenter, *The USDA Discrimination Cases: Pigford*, In re Black Farmers, Keepseagle, Garcia, and Love, 17 DRAKE J. AGRIC. L. 1, 1 (2012).
 3. See, e.g., U.S. Climate Resilience Toolkit, *Great Lakes*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. (Nov. 9, 2022 9:06 AM), <https://toolkit.climate.gov/regions/great-lakes> [<https://perma.cc/9KQW-4XZ8>] (“At-risk communities in the Great Lakes are becoming more vulnerable to

many Indigenous producers who generally lack safety nets,⁴ which are primarily structured to support conventional farming operations.⁵ While USDA has made concerted efforts recently to reach small and historically underserved agricultural producers, these groups continue to lack access to the services and support received by white farmers, preventing them from developing economically viable operations and inflicting disproportionate harm when disasters strike. A striking example is the nearly ninety-seven percent of Coronavirus Food Assistance Program funding that went to white farmers.⁶ Natural disasters like the extreme and exceptional droughts striking the Upper Midwest, along with many other areas in 2023, disproportionately impact historically underserved groups who haven't had support in implementing conservation measures while building financial security to buffer against the worst impacts.⁷

This Essay will explore how USDA has attempted to use the Inflation Reduction Act (IRA) to address these issues.⁸ These efforts consist of three key programs: (1) loans for financially distressed borrowers, (2) assistance in USDA conservation programs, and (3) funds for producers facing discrimination. USDA expects to spend \$24.8 billion on these programs.⁹ To put this investment into perspective, under its existing Fiscal Year 2023 budget (apart from the IRA),

climate change impacts such as flooding, drought, and increases in urban heat islands. Tribal nations are especially vulnerable because of their reliance on threatened natural resources for their cultural, subsistence, and economic needs. Integrating climate adaptation into planning processes offers an opportunity to better manage climate risks now.”).

4. See Tony N. VanWinkle & Jack Friedman, *Between Drought and Disparity: American Indian Farmers, Resource Bureaucracy, and Climate Vulnerability in the Southern Plains*, 9 J. AGRIC., FOOD SYS., & CMTY. DEV. 53, 54 (2019).
5. See, e.g., William S. Eubanks II, *The Sustainable Farm Bill: A Proposal for Permanent Environmental Change*, 39 ENV'T L. REP. 10493, 10495 (2009) (“Although well-intentioned at the outset, the Farm Bill’s subsidy program has gradually snowballed into a legislative package of subsidized commodities that increasingly benefits the largest of agricultural producers.”).
6. Jared Hayes, *USDA Data: Nearly All Pandemic Bailout Funds Went to White Farmers*, ENV'T WORKING GRP. (Feb. 18, 2021), <https://www.ewg.org/news-insights/news/2021/02/usda-data-nearly-all-pandemic-bailout-funds-went-white-farmers> [https://perma.cc/U5RH-J8LT].
7. See Bennet Goldstein, *Midwest Drought: Corn and Soybeans Suffer as Forecasters Expect No Quick Relief for Farmers*, WIS. WATCH (June 23, 2023), <https://wisconsinwatch.org/2023/06/midwest-drought-corn-and-soybeans-suffer-as-forecasters-expect-no-quick-relief-for-farmers> [https://perma.cc/4ENY-zZ4F].
8. Farmers.gov, *Inflation Reduction Act Investments in FPAC Loan and Conservation Programs*, U.S. DEP'T AGRIC. (Sept. 2023), <https://www.farmers.gov/loans/inflation-reduction-investments> [https://perma.cc/H7Y4-HGJC].
9. *Id.*

USDA is spending approximately \$105 billion in financial assistance.¹⁰ So, the IRA is a significant addition to USDA's programs, and provides an opportunity for USDA to address two major issues facing farmers today: the need to encourage climate-friendly agriculture, and the need to promote the economic viability of farming in minority and Native communities to address historical injustices. This Essay thus adds to two growing – but still underexplored – bodies of legal scholarship: scholarship regarding federal infrastructural support for climate change responses,¹¹ and scholarship regarding Indigenous food justice.¹² Tying these two areas together is especially important, because scholars have suggested that Indigenous knowledge can be critical for climate change adaptation in agriculture.¹³ Thus, we argue that remedying these historical economic injustices can not only aid Black and Indigenous farmers suffering historical discrimination, but also generate knowledge about ensuring food security in light of climate change that is useful to everyone. This is an especially critical time for addressing these two areas, as Congress is currently at work developing the next Farm Bill.

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10. Department of Agriculture (USDA), USASPENDING.GOV (2024), <https://www.usaspending.gov/agency/department-of-agriculture?fy=2023> [<https://perma.cc/4FBZ-A5Q5>].
 11. See, e.g., MacKenzie Thurman, *Climate-Smart Agriculture Certification: A Call for Federal Action*, 122 COLUM. L. REV. F. 37 (2022); Peter H. Lehner & Nathan A. Rosenberg, *Promoting Climate-Friendly Agriculture for the Benefit of Farmers, Rural Communities, and the Environment*, 33 NAT. RES. & ENV'T 7 (2018); Sara Dewey, Liz Hanson, Claire Horan, Wendy Jacobs & Shaun Goho, *Opportunities to Address Climate Change in the Next Farm Bill*, HARV. ENV'T L. REV. ONLINE (2017); Ann Jaworski, Note, *Encouraging Climate Adaptation Through Reform of Federal Crop Insurance Subsidies*, 91 N.Y.U. L. REV. 1684 (2016).
 12. See, e.g., Janie Simms Hipp, Colby D. Duren & Erin Parker, *Building Indian Country's Future Through Food, Agriculture, Infrastructure, and Economic Development in the 2018 Farm Bill*, 14 J. FOOD L. & POL'Y 24 (2018), Leonardo Figueroa Helland, *Indigenous Pathways Beyond the "Anthropocene": Biocultural Climate Justice Through Decolonization and Land Rematriation*, 30 N.Y.U. ENV'T L.J. 347 (2022); Kate Ricart, Comment, *Cooking Food Customs in the Pot of Self-Governance: How Food Sovereignty Is a Necessary Ingredient of Tribal Sovereignty*, 44 AM. INDIAN L. REV. 369 (2020); Julia Guarino, *Tribal Food Sovereignty in the American Southwest*, 11 J. FOOD L. & POL'Y 83 (2015).
 13. Emily C. Sousa & Manish N. Raizada, *Contributions of African Crops to American Culture and Beyond: The Slave Trade and Other Journeys of Resilient Peoples and Crops*, 4 FRONTIERS SUSTAINABLE FOOD SYS. 1, 2 (2020) ("As our world is facing climate change, food insecurity, and a need for more sustainable agricultural development, these crops, and their associated resources including genetic diversity and indigenous knowledge may, in turn, provide potential solutions and pathways for resilience and adaptation to these issues . . ."); see also Miguel A. Altieri & Clara I. Nicholls, *The Adaptation and Mitigation Potential of Traditional Agriculture in a Changing Climate*, 140 CLIMACTIC CHANGE 33 (2017) (describing how traditional ecological knowledge can mitigate climate change effects on agriculture); Winona LaDuke, *Traditional Ecological Knowledge and Environmental Futures*, 5 COLO. J. INT'L ENV'T L. & POL'Y 127 (1994) (describing the use of traditional ecological knowledge to develop responses to climate change).

This Essay proceeds in three Parts. Part I explores how farmers – especially Black and Indigenous farmers – need USDA support to thrive. Part II describes how the IRA channeled essential funding to farmers to respond to (a) the financial distress created during the COVID-19 pandemic, (b) adaptation to and mitigation of climate change, and (c) the historical financial injustices created by USDA's history of discrimination. Part III then makes recommendations for how the next Farm Bill can further improve economic support for farmers, address climate mitigation and resilience, and respond to historical inequities despite challenges raised by the Supreme Court's recent affirmative-action decision.

I. BACKGROUND: THE NEED FOR USDA SUPPORT

The dual assault of the COVID-19 pandemic and climate stressors has led to much financial stress among farmers.¹⁴ The pandemic brought with it worker shortages and supply chain and transportation failures, which have harmed the livelihood of farmers as well as our domestic food supplies.¹⁵ Climate change has led to abrupt seasonal window shifts and increasing pest problems, in addition to an increased risk of fire, drought, or flooding in some regions.¹⁶ This Part will examine in further detail the drivers behind the increasing number of financially distressed farmers in need of programmatic support provided under USDA IRA programs. In particular, it will focus on how climate change has exacerbated the existing financial distress of farmers, and how historical discrimination has contributed to Black and Native farmers being particularly vulnerable to the impacts of climate change.

At the moment, U.S. farmers are already in financial distress due to the lingering effects of the pandemic.¹⁷ Black and Indigenous farmers were especially affected, with most of the pandemic agricultural debt relief program funding directed towards white farmers.¹⁸ Much of the reason behind that was that the

14. See Allen H. Olson & Edward J. Peterson, *The Pandemic, Climate Change and Farm Subsidies*, 17 J. FOOD L. & POL'Y 36 (2021); see also *Inflation Reduction Act Assistance for Distressed Borrowers*, U.S. DEP'T AGRIC. (2023), <https://www.farmers.gov/loans/inflation-reduction-investments/assistance> [<https://perma.cc/6GQX-Q8UX>] (“For many farmers, including those who have been hard hit by pandemic-induced market disruptions exacerbated by more frequent, more intense, climate-driven natural disasters, this assistance is vital if they are to continue producing the food, fiber, and fuel that are essential to the well-being of not only our rural communities but our Nation as a whole.”).

15. Malhi, Kaur & Kaushik, *supra* note 1, at 1318.

16. *Id.*

17. See Olson & Peterson, *supra* note 14, at 36.

18. See Hayes, *supra* note 6.

relief programs were tied to farm-production history, which in turn was shaped by inequitable lending practices by USDA, as explained later in this Essay.¹⁹

But climate change is exacerbating this distress. As the Fifth National Climate Assessment has stated, “Climate change . . . disproportionately harms the livelihoods and health of communities that depend on agriculture, fishing, and subsistence lifestyles, including Indigenous Peoples reliant on traditional food sources.”²⁰ There are two main ways in which climate change threatens farmers’ livelihoods. First, changes in temperature and precipitation patterns can “reduce [the] productivity, yield, and nutritional content of many crops.”²¹ Next, farmers in regions that face increased heavy rain and storm events risk crop damage and water contamination, while farmers in regions that face drastic decreases in precipitation risk lowered crop production and increased heat stress on livestock.²² Extended periods of heavy rain, storms, or drought can even lead to wholesale crop destruction.²³

Climate change disrupts traditional farming practices in additional ways. For example, climate change is altering projected plant hardiness zones,²⁴ which are used to determine the optimal crops grown in each zone. It also increases the risk of plant invasion, which can threaten existing agricultural uses²⁵ and require adaptive strategies. And it can lead to greater soil salinity, reducing crop production,²⁶ thereby requiring either mitigation measures or adoption of alternative

19. *See id.*

20. Alexa K. Jay et al., *Chapter 1. Overview: Understanding Risks, Impacts, and Responses*, U.S. GLOB. CHANGE RSCH. PROGRAM, FIFTH NAT’L CLIMATE ASSESSMENT 24 (2023), https://nca2023.globalchange.gov/downloads/NCA5_Ch1_Overview.pdf [<https://perma.cc/VQC8-4SFM>]. The U.S. National Climate Assessments are conducted by the U.S. Global Change Research Program, a federal program established “by Congress to coordinate federal research and investments in understanding the forces shaping the global environment, both human and natural, and their impacts on society.” *About USGCRP*, U.S. GLOB. CHANGE RSCH. PROGRAM, <https://www.globalchange.gov/about-us> [<https://perma.cc/U4KA-Y4QS>].

21. Jay et al., *supra* note 20, at 24.

22. *Id.*

23. *See, e.g.*, Cecilia Nowell, *Waterlogged Wheat, Rotting Oranges: Five Crops Devastated by a Year of Extreme Weather*, *GUARDIAN* (Nov. 1, 2022, 5:00 AM EDT), <https://www.theguardian.com/environment/2022/nov/01/climate-crisis-us-food-system-five-crops> [<https://perma.cc/F97V-A2U2>].

24. Carl H. Bolster et al., *Chapter 11. Agriculture, Food Systems, and Rural Communities*, U.S. GLOB. CHANGE RSCH. PROGRAM, FIFTH NAT’L CLIMATE ASSESSMENT 6 (2023), https://nca2023.globalchange.gov/downloads/NCA5_Ch11_Agriculture.pdf [<https://perma.cc/8M2V-7EUL>].

25. *See, e.g.*, Bethany A. Bradley, David S. Wilcove & Michael Oppenheimer, *Climate Change Increases Risk of Plant Invasion in the Eastern United States*, 12 *BIOLOGICAL INVASIONS* 1855, 1856 (2010).

26. *See, e.g.*, Dennis L. Corwin, *Climate Change Impacts on Soil Salinity in Agricultural Areas*, 72 *EUR. J. SOIL SCI.* 842, 843-45 (2020).

crops. The reality that minority and Native farmers are disproportionately relegated to marginal lands with poor soils that typically lack irrigation further exacerbates climate change challenges.²⁷

Traditional Indigenous agriculture is also highly dependent on healthy ecological landscapes to support diverse food production including practices such as wild rice harvesting, maple syrup and sugar production, and wild berry and medicinal plant gathering, along with fishing and hunting. This is because these traditional practices are inherently tied to a thriving natural ecosystem, rather than lands with commercial agrochemical inputs.²⁸ And so many of these traditional practices are affected by climate change. For example, climate change has led to the shifting of the production season for maple syrup.²⁹ Similarly, climate change can disrupt the traditional preservation of fish for subsistence purposes.³⁰ The landscapes supporting these wide-ranging Indigenous agricultural activities, both for subsistence and for market sales, include on-reservation and extensive off-reservation treaty lands. But Tribes were often provided more marginalized lands as treaty lands, making them even more vulnerable to climate change.³¹ Thus, the climatic impact on these activities is increasingly severe, leading many Tribes to explore adaptation and mitigation strategies.³²

With its sensitivity to water fluctuations, wild rice that is hand-harvested from lakes and free-flowing rivers highlights climate change impacts. For example, the unprecedented drought that struck northern Minnesota in 2021 was so extreme that harvesters' canoes were unable to float upon the waterways, only

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27. See Megan Horst & Amy Marion, *Racial, Ethnic and Gender Inequities in Farmland Ownership and Farming in the U.S.*, 36 AGRIC. & HUM. VALUES 1, 3 (2019); see also Nándor Csikós & Gergely Tóth, *Concepts of Agricultural Marginal Lands and Their Utilisation: A Review*, 204 AGRIC. SYS. 103560 (2023) (describing various sources of criteria for marginal lands, including soil suitability and water access).
28. See LaDuke, *supra* note 13, at 129.
29. See, e.g., Daniel Houle, Alain Paquette, Benoit Cote, Travis Logan, Hugues Power, Isabelle Charron & Louis Duchesne, *Impacts of Climate Change on the Timing of the Production Season of Maple Syrup in Eastern Canada*, PLOS ONE art. no e0144844, at 2 (2015).
30. See Kathryn Norton-Smith, Kathy Lynn, Karletta Chief, Karen Cozzetto, Jamie Donatuto, Margaret Hiza Redsteer, Linda E. Kruger, Julie Maldonado, Carson Viles & Kyle P. Whyte, *Climate Change and Indigenous Peoples: A Synthesis of Current Impacts and Experiences*, U.S. DEP'T AGRIC. 29 (2016), https://www.climatehubs.usda.gov/sites/default/files/Norton-Smith%20pnw_gtr944.pdf [<https://perma.cc/J9AW-ACV7>].
31. See, e.g., EDWARD LAZARUS, BLACK HILLS WHITE JUSTICE: THE SIOUX NATION VERSUS THE UNITED STATES: 1775 TO THE PRESENT 31 (1991) (describing how the Dakota were provided less arable lands as treaty lands).
32. Kim Stone, Rob Croll, Tanya Aldred, Travis Bartnick, Aaron Shultz, Hannah Panci & Melonee Montano, *Aanji-bimaadiziimagak O'ow Aki: Climate Change Vulnerability Assessment Version 2*, GREAT LAKES INDIAN FISH & WILDLIFE COMM'N 10 (2023), <https://glifwc.org/ClimateChange/VulnerabilityAssessment.html> [<https://perma.cc/VR4R-RMUM>].

to be followed by extensive flooding decimating wild rice beds in 2022.³³ Tribes have responded to declining wild rice beds by using extensive management to remove invasive aquatic species, reseeding vast areas, and constructing or enhancing water-control structures, all of which may be supported with USDA Environmental Quality Conservation Program funding.³⁴

Similarly, maple syrup production has dramatic annual fluctuations due to its temperature sensitivity, which requires precise temperatures ranging from mid-twenty degree overnight lows to forty-plus degree daytime highs. The maple syrup season has gradually shifted earlier in many areas, and increasing climatic variability caused widespread production failures in recent years.³⁵ More broadly, climate change is stressing ecosystems, resulting in shifting habitat ranges and more immediate adverse impact from pests and natural disasters.³⁶ Treaty rights restoration with the Boldt decision in the Pacific Northwest, the Voigt decision in the Great Lakes, and numerous other holdings all emphasize the importance of Tribal natural resources for community subsistence and economic development.³⁷ Beyond adversely impacting Indigenous agricultural production through diminished treaty resources, climate change is affecting almost the entire nation through severe temperature and precipitation fluctuations.

These climate disruptions exacerbate the already existing disparities in the U.S. agricultural system. USDA has already acknowledged its own history of racism in reviewing applications through its various loan-application programs, systemically underfunding, delaying, and even denying loan applications by minority farmers.³⁸ In *Pigford v. Glickman*,³⁹ a class action brought by Black farmers, and *Keepseagle v. Vilsack*,⁴⁰ a class action brought by Native American

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33. See Madeline Nyblade, *First We Must Consider Manoomin/Psiij: The Impacts of Climate and Land Cover Change on Wild Rice 152* (2023) (Ph.D. dissertation, University of Minnesota) (on file with author).
34. See M.K. Johnson, M.J. Rowe, A. Lien & L. Lopez-Hoffman, *Enhancing Integration of Indigenous Agricultural Knowledge into USDA Natural Resources Conservation Cost-Share Initiatives*, 76 J. SOIL & WATER CONSERVATION 487, 495 (2021).
35. See Stone et al., *supra* note 32, at 19-24.
36. *Id.*
37. See Ed Goodwin, *Protecting Habitat for Off-Reservation Tribal Hunting and Fishing Rights: Tribal Comanagement as a Reserved Right*, 30 ENV'T L.J. 279, 289 n.42 (2000). The Boldt Decision refers *United States v. Washington*, 384 F. Supp 312 (W.D. Wash. 1974). The Voigt Decision was *Lac Courte Oreilles Band of Lake Superior Chippewa v. Voigt*, 700 F.2d 341 (7th Cir. 1983). *Voigt* is the seminal case affirming that Ojibwe treaty-recognized usufructuary rights to ceded territories were not abrogated by the 1850 Removal Order or Treaty of 1854 and thus still valid.
38. See Carpenter, *supra* note 2, at 13-32.
39. *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999).
40. See *Keepseagle v. Vilsack*, No. 99-cv-03119, 2001 WL 34676944 (D.D.C. Dec. 12, 2001) (certifying a class of Native American farmers).

farmers, the two classes alleged racism and Tribal discrimination, respectively, in USDA's lending practices.⁴¹ As Judge Paul Friedman noted in *Pigford*:

For decades, despite its promise that “no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity of an applicant or recipient receiving Federal financial assistance from the Department of Agriculture,” . . . the Department of Agriculture and the county commissioners discriminated against African American farmers when they denied, delayed or otherwise frustrated the applications of those farmers for farm loans and other credit and benefit programs. Further compounding the problem, in 1983 the Department of Agriculture disbanded its Office of Civil Rights and stopped responding to claims of discrimination. These events were the culmination of a string of broken promises that had been made to African American farmers for well over a century.⁴²

In response to these challenges, USDA either reached settlement agreements or created administrative forms of relief.⁴³ Despite these settlements, many farmers still face economic instability and economic injustice.⁴⁴ USDA's 2017 Census of Agriculture highlights many challenges facing minority and Native farmers. The average Black farm is only one-third the size with one-fifth the sales and receives barely one-half the amount of government payments compared to the national average.⁴⁵ Even more striking, the per farm net income for Black farms

41. In the settlements for these cases, the U.S. Department of Agriculture (USDA) acknowledged that its discriminatory conduct extended across other USDA programs as well. *Keepseagle v. Vilsack*, 815 F.3d 28, (D.C. Cir. 2016) (approving settlement); *Pigford*, 185 F.R.D. (same). Later claims were also filed by women and Hispanic farmers and ranchers. *Love v. Connor*, 525 F. Supp. 2d 155 (D.C. Dist. 2007); *Garcia v. Vilsack*, 563 F.3d 519 (D.C. Cir. 2009).

42. *Pigford*, 185 F.R.D. at 85.

43. See Carpenter, *supra* note 2, at 13-32.

44. See Megan Buechler, Note, *The Never-Ending Drought for Black Farmers: The Lasting Effects of Pigford and the Continuance of USDA Discrimination*, 61 U. LOUISVILLE L. REV. 223, 240-46 (2022); Megan Mucioki et al., *Native American Agriculture and Food Systems: Challenges and Opportunities Presented by the COVID-19 Pandemic*, 11 J. AGRIC., FOOD SYS. & CMTY. DEV. 121, 123-24 (2022).

45. Nat'l Agric. Stat. Serv., *2017 Census of Agriculture: Race/Ethnicity/Gender Profile*, U.S. DEP'T. OF AGRIC., https://www.nass.usda.gov/Publications/AgCensus/2017/Online_Resources/Race,_Ethnicity_and_Gender_Profiles/cpd99000.pdf [https://perma.cc/HQ6H-HUFB]. The average Black farm is 132 acres compared to 441 acres for all farms; the average value of market products sold is \$39,928 compared to \$190,245; and the average government payments received are \$7,108 compared to \$13,906.

is less than nine percent the national average.⁴⁶ Government statistics for Native farmers and ranchers reflect a similar reality. While their average farm size is over double the national average, Native agricultural producers only have one-third the average sales and one-fifth the net income.⁴⁷

For Native communities, this has implications for food sovereignty because it greatly impacts the ability of Indigenous peoples to access culturally appropriate foods.⁴⁸ Reviewing reservation-specific information reinforces the impact of land loss, particularly of the most productive Native agricultural lands. Only 12.89% of total agricultural sales on reservations come from Tribal members.⁴⁹ That tremendous disparity in agricultural sales is largely due to loss of the most productive agricultural lands through a variety of means that generally trace back to the Dawes General Allotment Act. Most reservation lands, in an effort to assimilate Tribal members into a Eurocentric way of life, were assigned to individuals who often subsequently lost ownership through land sales, unpaid property taxes, and occasionally outright fraud.⁵⁰

Aside from the lack of access to individual credit through USDA and other discriminatory lending practices, an assortment of other factors have stymied individual Native agricultural producers and other entrepreneurs, including restrictive commercial prohibitions, lacking Tribal-government tax bases, and disparate federal and state funding.⁵¹ Despite recent landmark water-rights settlements, the majority of Native farmers and ranchers lack access to the lands and resources necessary to maintain viable agricultural enterprises that are culturally and economically tailored to their own communities. This is a matter of food justice, which “refers to the conditions under which communities can eat, grow, and sell affordable, culturally appropriate, and nutritious food that is locally

46. *Id.* The net farm income for Black farmers is \$3,509 versus the \$43,053 national average.

47. *Id.* The average Native farm size is 978 acres compared to 441 acres; the average market value of products sold is \$58,885 compared to \$190,245; and the average net farm income is \$8,577 compared to \$43,053.

48. *Cf.* Center for Integrated Agricultural Systems, *Tribal Elder Food Box Program*, U. WIS.-MADISON, <https://cias.wisc.edu/tribal-elder-food-box-program> [<https://perma.cc/4ATR-H8FJ>] (providing an example of a ground-up food-sovereignty program initiated by one of the Essay’s authors). One of the authors calculated the percentage by comparing the column in Table 1 on total sales on each reservation to the total sales by Native Americans on each reservation.

49. Nat’l Agric. Stat. Serv., *2017 Census of Agriculture: American Indian Reservations Volume 2 Part 5*, U.S. DEP’T OF AGRIC. (Aug. 2019), https://www.nass.usda.gov/Publications/AgCensus/2017/Online_Resources/American_Indian_Reservations/AMINDIAN.pdf [<https://perma.cc/XJ2F-3QMR>].

50. See Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 12 (1995).

51. See Robert J. Miller, *Economic Development in Indian Country: Will Capitalism or Socialism Succeed?*, 80 OR. L. REV. 757, 837-42 (2001).

cultivated and sensitive to the well-being of animals, land, and workers.”⁵² Thus, the ability of farmers historically undersupported by USDA to provide food for their communities is critical for food justice.

Furthermore, traditional farming practices are not only threatened by climate change but can also either contribute to or mitigate climate change. The agricultural sector is the source of around twenty-one percent to thirty-seven percent of the world’s greenhouse-gas emissions.⁵³ These emissions can result from deforestation,⁵⁴ poor livestock management,⁵⁵ and poor soil management.⁵⁶ As a result, a Special Report of the Intergovernmental Panel on Climate Change advocated for “increasing soil organic matter, erosion control, improved fertiliser management, improved crop management, . . . and use of varieties and genetic improvements for heat and drought tolerance. For livestock, options include better grazing land management, improved manure management, higher-quality feed, and use of breeds and genetic improvement.”⁵⁷

At the same time, the agricultural sector can act as a source of carbon sequestration through the conservation of healthy soils and wetlands, thereby providing some limited mitigation potential for climate change.⁵⁸ That is, financial incentives that promote conservation of wetlands and soil can contribute significantly to mitigating the effects of climate change, while financial incentives that promote development that destroys wetlands⁵⁹ or healthy soils⁶⁰ can contribute significantly to increasing the effects of climate change. What this means

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52. Joshua C. Gellers & Trevor J. Cheatham, *Sustainable Development Goals and Environmental Justice: Realization Through Disaggregation?*, 36 WIS. INT’L L.J. 279, 285 (2019) (citing Alison Hope Alkon & Julian Agyeman, *Introduction: The Food Movement as Polyculture*, in *CULTIVATING FOOD JUSTICE: RACE, CLASS, AND SUSTAINABILITY* 1, 5 (Alison Hope Alkon & Julian Agyeman eds., 2011)).
53. See John Lynch, Michelle Cain, David Frame & Raymond Pierrehumbert, *Agriculture’s Contribution to Climate Change and Role in Mitigation Is Distinct from Predominantly Fossil CO₂-Emitting Sectors*, 4 FRONTIERS SUSTAINABLE FOOD SYS., 2021, at 2.
54. See Priyadarshi R. Shukla et al., *Summary for Policymakers*, in *CLIMATE CHANGE AND LAND: A SPECIAL REPORT BY THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE* 10 (2019).
55. See *id.* at 13.
56. See *id.*
57. *Id.* at 24.
58. See Jack A. Morgan et al., *Carbon Sequestration in Agricultural Lands of the United States*, 65 J. SOIL & WATER CONSERVATION 6, 9-10 (2010).
59. William R. Moomaw, G. L. Chmura, Gillian T. Davies, C. M. Finlayson, B. A. Middleton, Susan M. Natali, J. E. Perry, N. Router & Ariana E. Sutton-Grier, *Wetlands in a Changing Climate: Science, Policy and Management*, 38 WETLANDS 183 (2018).
60. See *Soils Help to Combat and Adapt to Climate Change by Playing a Key Role in the Carbon Cycle*, FOOD & AGRIC. ORG. OF THE UNITED NATIONS 1 (2015), <http://www.fao.org/3/a-i4737e.pdf> [<https://perma.cc/83HX-6D74>].

is that the incentives created by USDA programs have the potential to either contribute to or mitigate climate change.

Thus, the next Part addresses three challenges: the challenges to financially distressed farmers, the challenges of mitigating and adapting to climate change, and the challenges of addressing historical discrimination. In many ways, these challenges are intertwined. As explained earlier, the farmers most impacted by financial distress after the pandemic were Indigenous farmers, Black farmers, and small-scale traditional farmers, either due to historical Tribal or racial discrimination, or due to USDA's focus on supporting large-scale agriculture. Yet these are the farmers that may provide the most resilient practices for addressing climate change. We approach the next Part with these considerations in mind.

II. USDA IRA PROGRAMS

This Part will provide context about the programs that have received investment under the IRA in its attempt to address climate change and food justice. The IRA channels funds to USDA to address the three separate issues discussed in this Essay: the financial distress created by the COVID-19 pandemic and climate change, responding to and mitigating climate change, and the remediation of harms caused by USDA's discriminatory lending history. Some of these funds exist outside of the prior Farm Bill but use administrative mechanisms (such as subagencies under USDA) created by the Farm Bill, while others of these funds are directly tied to programs created by the prior Farm Bill. Each Section will first describe how Congress structured these funds with respect to existing USDA programs and then explore the current state of how USDA has been implementing the use of these funds. The focus of this Part is not only to describe the actions undertaken by USDA, but also to lay the groundwork for future actions that can address climate change and food justice.

A. *Loans for Financially Distressed Borrowers*

First, Congress, through the IRA, appropriated \$3.1 billion to provide payments to distressed borrowers of direct and guaranteed loans administered by the Farm Service Agency (FSA) under USDA.⁶¹ The funds are to remain available until September 30, 2031.⁶² So far, USDA has used this funding to initiate two major programs: Cash Flow-Based Assistance, and Extraordinary Measures

61. Inflation Reduction Act, Pub. L. No. 117-169, § 22006, 136 Stat. 1818, 2021 (2022).

62. *Id.*

Assistance.⁶³ Under the Cash Flow-Based Assistance program, USDA began identifying “whether an operation has sufficient cash flow to make their next scheduled loan payment” and permitting qualified borrowing farmers to “re-request FSA cover their next installment or a recently missed installment.”⁶⁴ Similarly, under the Extraordinary Measures Assistance program, USDA targets farmers who – in the wake of the pandemic – took “extraordinary measures . . . , such as taking on more debt, selling property, or cashing out retirement accounts,” in order to avoid delinquency on their loans.⁶⁵ A subset of those farmers also have the opportunity to access additional funding to avoid delinquency.⁶⁶ The rationale behind both of these programs is to keep farming operations afloat despite their financial stress.

In addition, USDA is working on additional guidance and regulations to streamline the process of accessing these funds, in order to address some of the barriers to programmatic access described earlier.⁶⁷ These access barriers have existed not just with respect to any single USDA program, but rather, all USDA programs in general.⁶⁸ As stated earlier, both Black and Native farmers have already suffered disproportionately from lack of funding access, due to the acknowledged racism of USDA lenders and other structural inequities. All of these measures are extremely important for U.S. farmers, most of whom are reliant on federal loans.⁶⁹

B. Assistance in USDA Conservation Programs

USDA’s efforts to address climate change and economic distress are structured by the Farm Bill, which is passed every four to five years.⁷⁰ Under the last

63. Farmers.gov, *Inflation Reduction Act Assistance for Distressed Borrowers*, U.S. DEP’T AGRIC., <https://www.farmers.gov/loans/inflation-reduction-investments/assistance> [https://perma.cc/4RXC-4E6F].

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*; see *supra* Part I (describing barriers to programmatic access).

68. See, e.g., Lucy Asare-Baah, Robert Zabawa & Henry J. Findlay, *Participation in Selected USDA Programs by Socially Disadvantaged Farmers in Selected Black Belt Counties of Georgia*, 33 J. RURAL SOC. SCIS. 32, 50-51 (2018); Ximena Bustillo, ‘Rampant Issues’: Black Farmers Are Still Left Out at USDA, POLITICO (July 5, 2021), <https://www.politico.com/news/2021/07/05/black-farmers-left-out-usda-497876> [https://perma.cc/S5UW-5E2G].

69. See Emily K. Burchfield, Britta L. Schumacher, Kaitlyn Spangler & Andrea Rissing, *The State of US Farm Operator Livelihoods*, 5 FRONTIERS SUSTAINABLE FOOD SYS. art. no. 795901, at 11 (2022).

70. See John H. Davidson, *The Federal Farm Bill and the Environment*, NAT. RES. & ENV’T, Summer 2003, at 3-4 (describing how the Farm Bills structure federal government financial support

Farm Bill passed in 2018, USDA has been implementing a number of voluntary conservation programs for farmers. These include the Environmental Quality Incentives Program (EQIP),⁷¹ the Conservation Stewardship Program (CSP),⁷² the Agricultural Conservation Easement Program,⁷³ and the Regional Conservation Partnership Program.⁷⁴

All of these programs give farmers financial incentives to voluntarily engage in conservation practices, such as soil conservation, habitat conservation, and use of more energy- and resource-efficient agricultural practices. Thus, these programs have the potential to both address some of the climate change related effects described earlier, as well as mitigate some of agriculture's contributions to climate change. They also give underserved farmers additional financial and technical support.

Under EQIP, for example, USDA's Natural Resources Conservation Service (NRCS) provides farmers with the financial assistance and technical support to adopt new conservation practices.⁷⁵ The CSP is similar to EQIP, but it is directed towards "enhanc[ing]" or "maintaining existing conservation efforts."⁷⁶ The Agricultural Conservation Easement Program provides financial and technical assistance for restoring and conserving grazing land and wetlands,⁷⁷ which can increase carbon sequestration.⁷⁸ Finally, the Regional Conservation Partnership Program leverages public-private partnerships to extend the reach of USDA's

for farming, stating "The key ingredients of the early legislation remain in place: (1) income supplements to farmers; (2) attempts to stimulate price by controlling production; and (3) employing soil conservation as the rationale for supplemental payments to farmers.").

71. Agricultural Improvement Act of 2018, Pub. L. No. 115-334, § 2305, 132 Stat. 4490, 4561 (2018) (codified as amended at 16 U.S.C. § 839aa-5 (a)(3)).
72. § 2308, 132 Stat. at 4564-68.
73. §§ 2601-2605, 132 Stat. at 4585-92.
74. §§ 2701-2707, 132 Stat. at 4596-4601.
75. See Nat. Res. Conservation Serv., *Environmental Quality Incentives Program*, U.S. DEP'T AGRIC., <https://www.nrcs.usda.gov/programs-initiatives/eqip-environmental-quality-incentives> [<https://perma.cc/VNV2-GPYF>].
76. See Nat. Res. Conservation Serv., *Conservation Stewardship Program*, U.S. DEP'T AGRIC., <https://www.nrcs.usda.gov/programs-initiatives/csp-conservation-stewardship-program> [<https://perma.cc/CKF5-X2V3>].
77. See Nat. Res. Conservation Serv., *Agricultural Conservation Easement Program*, U.S. DEP'T AGRIC., <https://www.nrcs.usda.gov/programs-initiatives/acep-agricultural-conservation-easement-program> [<https://perma.cc/TGU8-YKQX>].
78. See, e.g., Yongfei Bai & M. Francesca Cotrufo, *Grassland Soil Carbon Sequestration: Current Understanding, Challenges, and Solutions*, 377 SCI. 603, 607-08 (2022); William J. Mitsch, Blanca Bernal, Amanda M. Nahlik, Úlo Mander, Li Zhang, Christopher J. Anderson, Sven E. Jørgensen & Hans Brix, *Wetlands, Carbon, and Climate Change*, 28 LANDSCAPE ECOLOGY 583, 584, 589 (2013).

conservation efforts.⁷⁹ The financial incentives created by these programs can encourage farmers to engage in farming practices that reduce, rather than contribute to, carbon emissions or destruction of carbon sinks and therefore mitigate climate change.

The IRA also attempts to increase access to the various USDA conservation programs by providing them with an additional \$19.5 billion over the next five years, beginning in 2023.⁸⁰ In particular, over the next five years, it provides \$8.45 billion for EQIP, \$4.95 billion for the Regional Conservation Partnership Program, \$3.25 billion for the CSP, \$1.4 billion for the Agricultural Conservation Easement Program, and \$1 billion for additional conservation technical assistance.⁸¹

The IRA's level of investment into agricultural conservation has been historic. To put this into context, the 2018 Farm Bill allocated \$1.8 billion to the EQIP program,⁸² \$300 million for the Regional Conservation Partnership Program,⁸³ and \$450 million for the Agricultural Conservation Easement Program.⁸⁴ The IRA, therefore, dramatically increases the amount of funding available to support and encourage farmers in their conservation efforts. All of these measures – if implemented to streamline access – can help the farming community better contribute to mitigating, rather than exacerbating, the effects of climate change.

These programs, however, are voluntary, and so their success depends on providing sufficient incentives for farmers to actually participate in these programs. As such, the effectiveness of these programs is heavily dependent on how the conservation programs are managed by USDA, in addition to the funds

79. See Nat. Res. Conservation Serv., *Regional Conservation Partnership Program*, U.S. DEP'T AGRIC., <https://www.nrcs.usda.gov/programs-initiatives/rcpp-regional-conservation-partnership-program> [<https://perma.cc/4RFQ-TP9P>].

80. Nat. Res. Conservation Serv., *Inflation Reduction Act*, U.S. DEP'T AGRIC., <https://www.nrcs.usda.gov/about/priorities/inflation-reduction-act> [<https://perma.cc/2XMA-ZC4W>].

81. See Inflation Reduction Act, Pub. L. No. 117-169, §§ 21001-21002, 136 Stat. 1818, 2015-18 (2022) (codified in scattered sections of 7 U.S.C. and 16 U.S.C.).

82. See *Environmental Quality Incentives Program*, NAT'L SUSTAINABLE AGRIC. COAL., <https://sustainableagriculture.net/publications/grassrootsguide/conservation-environment/environmental-quality-incentives-program> [<https://perma.cc/G8FD-BVAB>].

83. See Nat. Res. Conservation Serv., *Regional Conservation Partnership Program*, U.S. DEP'T AGRIC., <https://www.nrcs.usda.gov/programs-initiatives/rcpp-regional-conservation-partnership-program> [<https://perma.cc/G5ZR-YBV6>].

84. See Nat. Res. Conservation Serv., *Agricultural Conservation Easement Program*, U.S. DEP'T AGRIC., <https://www.nrcs.usda.gov/programs-initiatives/acep-agricultural-conservation-easement-program> [<https://perma.cc/2C7N-MUQN>].

available for these programs.⁸⁵ For example, critics have argued that the effectiveness of these programs could be enhanced by a stronger focus on cost-effectiveness analysis.⁸⁶ Critics have also expressed concerns about backlog for provision of funds in these programs.⁸⁷ Finally, a study of farmer participation in these programs suggested that financial and technical barriers, such as limited access to engineering designs, sometimes limited farmers' participation in these programs.⁸⁸ Limited staffing for USDA outreach, which is largely outsourced through cooperative agreements, is also an obstacle to achieving maximum participation in conservation programs. While not currently documented by empirical studies, it is plausible that these participation barriers for Indigenous and Black farmers could be heightened by their historical lack of access to funding and support.

C. Funds for Farmers Facing Historical Discrimination

The USDA IRA program for farmers facing discrimination attempts to address its history of loan discrimination.⁸⁹ Under its Discrimination Financial Assistance Program (DFAP), USDA is providing “financial assistance for farmers, ranchers, and forest landowners who experienced discrimination in USDA’s farm lending prior to 2021.”⁹⁰ It covers a wide range of loans programs through which farmers may have faced historical discrimination, including Farm

85. See, e.g., Marc O. Ribaldo, *Conservation Programs Can Accomplish More with Less by Improving Cost-Effectiveness*, 32 CHOICES 4 (2017) (arguing that support should be based on a cost-effective analysis); MEGAN STUBBS, CONG. RSCH. SERV., R40197, ENVIRONMENTAL QUALITY INCENTIVES PROGRAM (EQIP): STATUS AND ISSUES 6 (2010) (describing a USDA backlog for providing funds to Environmental Quality Incentives Program applicants).

86. See, e.g., Ribaldo, *supra* note 85.

87. See, e.g., STUBBS, *supra* note 85.

88. See, e.g., Adam P. Reimer & Linda S. Prokopy, *Farmer Participation in U.S. Farm Bill Conservation Programs*, 53 ENV'T MGMT. 318-32 (2014).

89. Farmers.gov, *Inflation Reduction Act Assistance for Producers Who Experienced Discrimination in USDA Farm Loan Programs*, U.S. DEP'T AGRIC., <https://www.farmers.gov/loans/inflation-reduction-investments/assistance-experienced-discrimination> [<https://perma.cc/Y8TD-P8ZL>]; see also Inflation Reduction Act, Pub. L. No. 117-169, § 22007, 136 Stat. 1818, 2021-23 (2022) (codified as amended at 7 U.S.C. § 2279) (creating USDA programs of assistance and support for underserved farmers, ranchers, and foresters).

90. *Discrimination Financial Assistance Program*, U.S. DEP'T AGRIC., <https://22007apply.gov> [<https://perma.cc/W59Z-K486>].

Ownership Loans, Farm Operating Loans, Farm Storage Facility Loans, and Soil and Water Loans.⁹¹ The close date for the applications was January 17, 2024.⁹²

Under this program, USDA is also working with nongovernmental program administrators, including a national administrator and four regional hubs⁹³ to set up and process applications.⁹⁴ Such nongovernmental groups include the Farmer Veteran Coalition, the Farmers' Legal Action Group, the Intertribal Agriculture Council, the Land Loss Prevention Project, the National Young Farmers Coalition, and various regional groups of Black and Latino farmers.⁹⁵ Working with such community organizations is especially important due to the understandable lack of trust that many farmers facing historical discrimination have in USDA itself.

The financial assistance applications are still being processed. Thus, the actual implementation of this program is still very much in development and may face legal challenges given developments in Supreme Court jurisprudence described in the following Part. That said, news accounts suggest that applications have been overwhelming.⁹⁶ This suggests that a large number of farmers are indeed seeking such financial assistance, but that attention must be paid in terms of how quickly and how responsive USDA is in terms of processing these applications.

III. THE FUTURE OF USDA RESPONSES TO CLIMATE THREATS AND INEQUITIES

The IRA's historic investment in supporting financially distressed and historically vulnerable farmers has already had an immediate impact, just by creating sustainable avenues for farmers to avoid insolvency. But recent Supreme Court opinions will make it more difficult for USDA to address its past practices

91. *Eligibility*, U.S. DEP'T AGRIC., <https://22007apply.gov/eligibility.html> [<https://perma.cc/T826-C36E>].

92. *Discrimination Financial Assistance Program Applications to Be Accepted Through Jan. 17, 2024*, U.S. DEP'T AGRIC., <https://www.usda.gov/media/press-releases/2024/01/14/discrimination-financial-assistance-program-applications-be> [<https://perma.cc/2ETL-URRL>].

93. *Program Overview*, U.S. DEP'T AGRIC., <https://22007apply.gov/program-overview.html#regional-hubs> [<https://perma.cc/FL9T-AEVA>].

94. *Get Help with Your Application*, U.S. DEP'T AGRIC. (2024), <https://22007apply.gov/local-assistance.html> [<https://perma.cc/3R8N-DVLJ>].

95. Farmers.gov, *supra* note 89.

96. See, e.g., Danny McArthur, *Deadline Approaches for USDA Loan Discrimination Funds for Underserved Farmers*, MISS. PUB. BROAD. (Jan. 12, 2024), <https://www.mpbonline.org/blogs/news/deadline-approaches-for-usda-loan-discrimination-funds-for-underserved-farmers> [<https://perma.cc/25A5-RWGD>].

of racial discrimination, despite USDA's own acknowledgment that lending practices have been discriminatory. This Part will describe these barriers and suggest avenues for USDA to move forward in terms of redressing acknowledged historical discrimination, as well as suggest additional policy measures to ensure equitable funding distribution.

A. *Promoting Economic Viability*

The IRA provided an immediate \$800 million in assistance to 11,000 distressed borrowers who were delinquent on their FSA farm loan in October 2022.⁹⁷ This assistance waived both past-due payments and the following year's installment under the Extraordinary Measures Assistance program. These delinquent borrowers were then eligible to request further assistance through the Cash-Flow Based Assistance Program.⁹⁸ However, these IRA provisions neither address deeper issues in the USDA FSA's structure, which continues to emphasize local discretion through county committees and offices, nor do they fully recognize and rectify the deep distrust among minority and Native farmers and ranchers that was heightened by cancellation of the American Rescue Plan Act's (ARPA) \$4 billion investment in USDA farm-loan debt repayment.⁹⁹

Understanding ARPA's initial implementation prior to its court-mandated halt and subsequent congressional recession is essential to recognizing the direct harm inflicted upon many FSA borrowers due solely to their racial classifications. The FSA notified eligible loan holders of loan repayment at 120% of their total loan balances as of January 1, 2021, with the additional twenty percent reflecting payment for IRS tax liability, through direct communication and with a Federal Register announcement on May 25, 2021, for program implementation beginning the following day.¹⁰⁰ Despite near immediate court injunctions, FSA

97. *Inflation Reduction Act Section 22006 Automatic Payments for Distressed Borrowers*, U.S. DEP'T OF AGRIC. (Mar. 2023), <https://www.farmers.gov/sites/default/files/documents/farmersgov-factsheet-ira-22006-additional-automatic-payments.pdf> [<https://perma.cc/69WY-ZSKK>].

98. *Id.*

99. See Maia Foster & P.J. Wilson. *Rattlesnakes, Debt, and ARPA § 1005: The Existential Crises of American Black Farmers*, 71 DUKE L. J. ONLINE (2022); Ximena Buxillo, *In 2022, Black Farmers Were Persistently Left Behind from the USDA's Loan System*, NAT'L PUB. RADIO (Feb. 19, 2023), <https://www.npr.org/2023/02/19/1156851675/in-2022-black-farmers-were-persistently-left-behind-from-the-usdas-loan-system> [<https://perma.cc/XQ2N-NF5C>]; see also Amy Mayer, *Can \$3 Billion Persuade Black Farmers to Trust the Department of Agriculture?*, NAT'L PUB. RADIO (Jan. 8, 2024), <https://www.npr.org/2023/12/26/1221725620/where-biden-administration-3-billion-farming-grant-has-been-going> [<https://perma.cc/R9AU-YMBB>] (describing the deepness of some of the distrust felt by minority and Native farmers).

100. Notice of Funds Availability; American Rescue Plan Act of 2021 Section 1005 Loan Payment (ARPA), 86 Fed. Reg. 28329 (May 26, 2021).

participant notification for program implementation delay was not sent until early 2022, leaving eligible historically underserved loan holders with the understanding their loans would be forgiven for an extended period of time.¹⁰¹ FSA subsequently sent detailed balance confirmation forms to each eligible participant to be signed and submitted with a voided check. Based on their reasonable perception of a binding agreement, many eligible loan holders made significant operational investments, including to minimize tax liability.¹⁰² The precise extent of FSA's reputational damage among those historically underserved individuals expecting debt repayment is difficult to quantify. Subsequent IRA actions likely assisted in lessening this damage, but the full extent of relational status may not be clear for several years.¹⁰³

The USDA conservation programs, addressed more fully in the next section, can also provide much needed funding to farmers. Indeed, the USDA is increasing its minimum annual payment for participants in these programs to “address challenges faced by small scale, underserved, and urban producers and improve[] equity in the program by making participation more financially beneficial for smaller operations.”¹⁰⁴ However, access to conservation programs is limited by several factors, including adequate USDA NRCS staffing whose impact is disproportionately severe on Tribal lands. Combinations of poor past experiences, general governmental distrust, lack of NRCS conservation planning and engineering-design capacity in remote and high-poverty communities, and simple lack of program awareness all hamper implementation of conservation programs to minority and Native agricultural producers, especially on reservations and Tribal lands.

The Biden Administration has begun a number of USDA projects intended to support Indigenous farmers and enhance their economic viability. On December 6, 2023, the White House announced various initiatives it has taken to support Indigenous farmers.¹⁰⁵ These include funds for the harvesting and

101. Letter from Zach Ducheneaux, Adm'r, Farm Serv. Agency, to Borrower (Jan. 10, 2023) (on file with authors).

102. See Sayifa Charles, *After a Last Ditch Lawsuit Is Filed in Texas, Black Farmers Wait to Learn the Fate of USDA's Imperiled Debt Relief Program*, COUNTER (Oct. 26, 2021), <https://thecounter.org/lawsuit-miller-versus-vilsack-texas-black-farmers-usda-debt-relief> [<https://perma.cc/FT85-Y9BL>].

103. See Charles, *supra* note 102.

104. Natural Resources Conservation Service, *USDA Increases Minimum Annual Payment for Conservation Stewardship Program*, U.S. DEP'T OF AGRIC. (Nov. 16, 2023), <https://www.nrcs.usda.gov/conservation-basics/conservation-by-state/new-mexico/news/usda-increases-minimum-annual-payment-for#:~:text=The%20U.S.%20Department%20of%20Agriculture,starting%20in%20fiscal%20year%202024> [<https://perma.cc/9MA8-GJJG>].

105. See *At White House Tribal Nations Summit, USDA Fulfills Long-Standing Tribal Requests to Strengthen Food Sovereignty and Expand Indigenous Roles in Forest Management*, U.S. DEP'T

processing of Indigenous animals made available to the Alutiiq Tribe of Old Harbor in Alaska to buy and modernize an unused processing facility that will help the community address food shortages – including bison meat – due to climate change; funds for the Tribal Government of St. Paul Island in Alaska to re-establish a local reindeer meat processing operation; funds for the Tolowa Dee-ni' Nation in southern Oregon and northern California to expand a Food Sovereignty Program that provides the community a space and resources to learn traditional processing methods for local game and fish, including black-tailed deer, Roosevelt Elk and chinook salmon; and funds for the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation in Montana to process bison, elk, deer, antelope and pheasant.¹⁰⁶ It also named eleven new members to the inaugural USDA Tribal Advisory Committee, a committee created by the 2018 Farm Bill to ensure that USDA is informed by Tribal perspectives.¹⁰⁷

Effective USDA programmatic assistance to historically underserved agricultural producers must rebuild trust while meeting critical needs. Working with groups such as the Intertribal Agriculture Council and various regional groups of Black and Latino farmers, as described earlier, must only be the beginning. Partnership with cooperative service organizations may improve outreach, but USDA must also take responsibility for internal staff training and accountability. Even if farm-loan issues are resolved, loan holders need economic viability that USDA appears to have recognized with a host of ARPA programs such as the Regional Food Business Centers, Local Food Purchase Assistance Program, and Increasing Land, Capital, and Market Access Program. The common theme among these programs is a focus on economic viability that seeks to ensure adequate cash flow.

B. Promoting Climate Resilience

Overall, we encourage the use of Farm Bill subsidies and crop insurance premiums through the Farm Bill to promote diverse crop rotation to respond to climate risks, mitigate the effects of climate change, and even address economic risks faced by farmers due to higher yields under pressures of climate change. This Section will explain why.

First, we commend the increased funding for USDA conservation programs under the IRA. Moreover, USDA – outside of the IRA – is already developing a program for the promotion of climate-friendly agriculture, through its

AGRIC. (Dec. 6, 2023), <https://www.usda.gov/media/press-releases/2023/12/06/white-house-tribal-nations-summit-usda-fulfills-long-standing> [<https://perma.cc/5DNV-HMLJ>].

¹⁰⁶. *Id.*

¹⁰⁷. *Id.*

Partnerships for Climate-Smart Commodities Program.¹⁰⁸ This program is investing more than \$3.1 billion in 141 projects that would “[p]rovide technical and financial assistance to producers to implement climate-smart production practices on a voluntary basis on working lands; [p]ilot innovative and cost-effective methods for quantification, monitoring, reporting and verification of greenhouse gas benefits; and [d]evelop markets and promote the resulting climate-smart commodities.”¹⁰⁹

In addition, we support the USDA Action Plan for Climate Adaptation and Resilience, issued in August of 2021, in which the USDA promised to undertake four actions: (1) “Improve climate information management, including capturing, organizing, and integrating climate information and relevant research at appropriate scales”; (2) “Better understand and address novel ecosystems and emerging issues, including by integrating new technology, evaluating and targeting plant materials, and developing regional priorities for new conservation systems, with a concerted effort on at-risk ecosystems”; (3) “Establish multidisciplinary climate change technical expertise team and strategies to evaluate and determine climate change requirements and guidance for conservation planning, implementation, assessment, research/demonstration, and investments”; (4) “Maintain, strengthen, and enhance climate-related SWAPA+HE-associated databases, information platforms, and datasets (including soil and vegetative information), as well as ongoing data collection, measurement, and modeling efforts[.]”¹¹⁰

These efforts are laudable in terms of providing better information for farmers to respond to climate change, but they fail to change the economic incentives that prevent uptake of adaptive strategies. This is not the fault of USDA; the agency only has the funding authority given to it by the previous Farm Bill. Changing the economic incentives to respond to the effects of and mitigate climate change rests on the next Farm Bill.

But this is not enough. Running counter to these goals of promoting climate-friendly agriculture are the USDA crop insurance programs, which were “born in Title V of the Agricultural Adjustment Act of 1938.”¹¹¹ These programs are restructured in each Farm Bill and attempt to promote farmers’ economic stability through insurance. They create insurance packages for farms so that they do

108. *Partnerships for Climate-Smart Commodities*, U.S. DEP’T AGRIC., <https://www.usda.gov/climate-solutions/climate-smart-commodities> [<https://perma.cc/HM7R-JPNE>].

109. *Id.*

110. Nat. Res. Conservation Serv., *Climate Change Adaptation Plan*, U.S. DEP’T OF AGRIC. 14, (July 2022), https://www.usda.gov/sites/default/files/documents/CombinedUSDAandAgencyClimateAdaptationPlans_2022.pdf [<https://perma.cc/ET94-HGHF>].

111. Paul Janda, Note, *Fire, Flood, Famine, and Pestilence: Climate Change and Federal Crop Insurance*, 26 COLO. NAT. RES., ENERGY & ENV’T L. REV. 81, 85 (2015).

not become insolvent when faced with unexpected agricultural loss due to weather. Despite efforts such as premium waivers for socially disadvantaged producers on FSA's Non-Insured Agricultural Products Program, crop insurance coverage and federal support for historically underserved producers is significantly less than the national average.¹¹²

Because climate change has created increased agricultural risks, the next Farm Bill must restructure crop insurance to effectively respond to these risks and provide incentives to engage in farming activities that actively plan for these risks.¹¹³ Under the previous Farm Bills, a third of the subsidies support insurance companies rather than farmers themselves, thus failing to fully respond to the economic risks created by climate change.¹¹⁴ Moreover, the current structure of crop insurance fails to encourage farmers to engage in either climate-adaptive or climate-mitigative planning.¹¹⁵ As explained below, because such considerations are not contained in the current crop insurance structure, farmers have little incentive to shift their crops or crop varieties to adapt to increased soil salinity, increased drought or flooding, or even increased plant pests and diseases that arise from climate change depending on the agricultural region. Nor does the current crop insurance structure create the incentives for planting crops that require lower carbon inputs, either due to the nature of the crop itself, or due to the mechanized planting and harvest associated with particular crops.

To promote climate-resilient agriculture, crop insurance must actively promote planting choices that plan for climate risk. For example, crop insurance can and should be restructured to address climate risk. Premiums for particular crops and crop varieties could be based upon the degree of risk posed by climate change in the particular agricultural region.¹¹⁶ The Food and Agricultural

112. See Eric J. Belasco, Vincent H. Smith & Benjamin J. Goren, *The Identification and Relevance of Racial and Ethnic Disparities in Federal Crop Insurance*, AM. ENTER. INST. 3-4 (Oct. 2023), <https://www.aei.org/wp-content/uploads/2023/10/The-Identification-and-Relevance-of-Racial-and-Ethnic-Disparities-in-Federal-Crop-Insurance.pdf> [<https://perma.cc/33FF-NJWY>]; GAO Report Recommends Creation of AGI to Reduce Crop Insurance Costs, Citing One Single Farm Receiving \$1.2 Million in Average Subsidies, U.S. GOV'T ACCOUNTABILITY OFF. (Feb. 2023), <https://www.gao.gov/assets/gao-23-106228.pdf> [<https://perma.cc/42WE-BTUV>].

113. *Food and Agriculture Climate Alliance Presents Joint Policy Recommendations*, FOOD & AGRIC. CLIMATE ALL., https://www.agclimatealliance.com/wp-content/blogs.dir/98/files/2020/11/faca_recommendations.pdf [<https://perma.cc/GM65-82V5>].

114. Peter Lehner, *Agriculture, Climate, and 2023 Farm Bill (a 3-Part Blog Series)*, EARTHJUSTICE (June 27, 2023), <https://earthjustice.org/experts/peter-lehner/agriculture-climate-2023-farm-bill-harvesting-climate-benefits-from-2023-farm-bill> [<https://perma.cc/9YNR-XR8S>].

115. *Id.*

116. Janda, *supra* note 111, at 102-03; see, e.g., Carlo Fadda & Jacob van Etten, *Generating Farm-Validated Variety Recommendations for Climate Adaptation*, in THE CLIMATE-SMART

Organization is already engaging in such assessments and recommendations for climate-friendly farming practices and should provide a model for USDA.¹¹⁷

Another way that the Farm Bill not only encourages farmers to plan for climate risk, but also mitigate the contributions of agriculture to climate change is by using the crop insurance program to leverage insurance premiums—or even provide subsidies—to promote perennial crops and diverse crop rotations.¹¹⁸ Perennial crops are more likely to thrive despite drought and flood, a necessity when facing climate change risks.¹¹⁹ Moreover, such crops also mitigate the effects of climate change by increasing carbon sequestration. Unlike those of annual crops, the greater root masses of perennial crops improve carbon storage and—through their longevity—prevent soil carbon from being released back into the atmosphere at the end of a growing cycle.

As with perennial crops, the use of diverse crop rotations can both respond to climate risks and sequester carbon.¹²⁰ One thing that diverse crop rotation does is increase nutrient cycling¹²¹ and thus decreases the need for synthetic fertilizers, which themselves contribute to climate change when soil microbes process the fertilizers and release N₂O—a greenhouse gas with a global warming potential 265 times that of carbon dioxide—as a byproduct.¹²² Additionally, the practice can respond to predicted climate change effects by reducing agricultural susceptibility to plant diseases, insect pests, and managing weeds.¹²³ This practice can reduce soil erosion (and thus loss of soil for carbon sequestration).

Finally, the use of crop insurance to encourage the use of diverse crop rotations can mitigate economic risks faced by farmers due to climate change. Studies have shown that the use of diverse crop rotations can actually lead to

AGRICULTURE PAPERS: INVESTIGATING THE BUSINESS OF A PRODUCTIVE, RESILIENT AND LOW EMISSION FUTURE 127-38 (Todd S. Rosenstock, Andreea Nowak & Evan Girvetz eds., 2018).

117. *Climate Impact Assessments and Appraisals of CSA Options*, FOOD & AGRIC. ORG. UNITED NATIONS, <https://www.fao.org/climate-smart-agriculture-sourcebook/enabling-frame-works/module-c8-impact-assessments/c8-overview/en> [https://perma.cc/Q4SW-S4XN].

118. Lehner, *supra* note 114.

119. *Id.*

120. Timothy Bowles et al., *Long-Term Evidence Shows that Crop-Rotation Diversification Increases Agricultural Resilience to Adverse Growing Conditions in North America*, 2 ONE EARTH 284, 284 (Mar. 20, 2020).

121. *Id.* at 289.

122. Stefano Menegat, Alicia Ledo & Reyes Tirado, *Greenhouse Gas Emissions from Global Production and Use of Nitrogen Synthetic Fertilisers in Agriculture*, 12 SCI. REPS., no. 14490 (2022).

123. Samiha Ouda & Abd El-Hafeez Ahmed Zohry, *Crop Rotation Defeats Pests and Weeds*, in CROP ROTATION: AN APPROACH TO SECURE FOOD 77-88 (2018) (Samiha Ouda, Abd El-Hafeez Ahmed Zohry & Tahany Noreldin eds., 2018).

increased crop returns over time.¹²⁴ Thus, encouraging farmers to use diverse crop rotations can lead to longer-term economic stability.

C. Overcoming Equity Hurdles

As described earlier, the USDA IRA program for providing financial assistance to farmers who have historically faced discrimination is still very much in development. But the agency will encounter implementation hurdles due to recent Supreme Court cases. During the 2022-2023 Term, the Supreme Court tackled two cases: *Haaland v. Brackeen*¹²⁵ and *Students for Fair Admissions v. Harvard*.¹²⁶ In *Brackeen*, the Supreme Court upheld congressional authority under the Indian Child Welfare Act to provide preferential treatment to Native Americans in the adoption of Native American children.¹²⁷ In *Students for Fair Admissions (SFFA)*, the Supreme Court found unconstitutional two preferential college-admission programs for underrepresented minorities.¹²⁸

Both cases had the potential to affect USDA efforts to provide support for historically disadvantaged farmers in the future. Indeed, current USDA programs providing support for farmers facing discrimination have already been challenged in cases such as *Miller v. Vilsack*, where a farmer “who describe[d] his ancestry as ‘overwhelmingly white’” challenged the constitutionality of the ARPA provision providing loan relief to disadvantaged farmers.¹²⁹ This Section will both (1) address how *Brackeen* and *SFFA* affect USDA’s ability to continue to pursue such relief, and (2) propose ways to address the effects of documented historical discrimination after *SFFA*. Given these cases, USDA will have an easier time providing loan relief to Native farmers than farmers from disadvantaged ethnic groups. But USDA can draw upon its own earlier innovations as well as those of some higher education programs to direct their support programs.

1. The Effects of *Brackeen* and *SFFA*

Many advocates for Tribal farming-support programs were concerned about what the result in *Brackeen* would be. But these concerns did not get realized in the Supreme Court’s opinion. That is, while the challengers to the Tribal

^{124.} Natalie D. Hunt, Jason D. Hill & Matt Liebman, *Cropping System Diversity Effects on Nutrient Discharge, Soil Erosion, and Agronomic Performance*, 53 ENV’T SCI. & TECH. 1344, 1350 (2019).

^{125.} 599 U.S. 255 (2023).

^{126.} *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181 (2023).

^{127.} *Brackeen*, 599 U.S. at 272-80.

^{128.} *Students for Fair Admissions, Inc.*, 600 U.S. at 213-31.

^{129.} No. 21-cv-11271, 2022 WL 851782, at *1 (5th Cir. 2022).

preferences created by the Indian Child Welfare Act argued that such preferences unconstitutionally discriminated on the basis of race, the Supreme Court ultimately rejected that argument.¹³⁰ Instead, the Court avoided reaching that question, and found that the challengers lacked standing to raise equal-protection challenges.¹³¹ So, for the time being, the Supreme Court has not ruled unconstitutional Tribal preferences in governmental programs.

Unlike with Tribal farmers, USDA will face hurdles in providing targeted relief to farmers of color. As the Supreme Court held in *SFFA*, programs that address race-based discrimination must satisfy strict scrutiny, which includes refraining from using race as a disqualifier or stereotype and having an end point, as well as other components.¹³² The Supreme Court's interpretation of these requirements might limit USDA's use of IRA funds to support farmers facing historical discrimination on the basis of race by limiting what USDA may consider in programs that seek to compensate or support Black, Latino, and other farmers of color for historical inequities.

Any new USDA program that considers an individual's race as part of their application must have a measurable benefit.¹³³ Benefits such as "training future leaders," "producing new knowledge stemming from diverse outlooks," "promoting the robust exchange of ideas," and "preparing engaged and productive citizens and leaders" were not considered in *SFFA* to be sufficiently measurable.¹³⁴ Instead, such benefits were too intangible to survive strict scrutiny.¹³⁵

Secondly, the Court held that programmatic considerations must be narrowly tailored.¹³⁶ It held that use of broad racial classifications such as "Asian" and "Hispanic" meant that the program was not narrowly tailored.¹³⁷ Instead, these racial categories were overbroad and created arbitrary classifications that treated alike dissimilar students.¹³⁸ The Court also found that "by grouping

^{130.} *Brackeen*, 599 U.S. at 272-80.

^{131.} *See id.* at 260 ("The Court does not reach the merits of petitioners' two additional claims – an equal protection challenge to ICWA's placement preferences and a nondelegation challenge to § 1915(c), the provision allowing tribes to alter the placement preferences – because no party before the Court has standing to raise them."); *see also id.* at 261 ("Because Texas is not injured by the placement preferences, neither would it be injured by a Tribal resolution that altered those preferences pursuant to § 1915(c). Texas therefore does not have standing to bring either its equal protection or its nondelegation claims.").

^{132.} *Students for Fair Admissions, Inc.*, 600 U.S. at 213.

^{133.} *Id.* at 214-18.

^{134.} *Id.* at 214.

^{135.} *Id.*

^{136.} *See id.* at 215-25.

^{137.} *Id.* at 216-17.

^{138.} *Id.*

together all Asian students” the colleges demonstrated that they were “apparently uninterested in whether South Asian or East Asian students [were] adequately represented.”¹³⁹ The Court also indicated that it is important that programs using racial classifications have an end point.

With respect to providing an end point to the program,¹⁴⁰ the DFAP under the IRA does have an end point—the length of the funding period itself—and the application period has already closed. Therefore, the major hurdles for USDA benefit programs are whether they can survive the Court’s application of strict scrutiny and whether race itself is used as a disqualifier.

In terms of prior USDA analogs, farmer-support initiatives such as § 1005 of the American Rescue Plan Act of 2021 offered targeted benefits to categories of historically discriminated farmers.¹⁴¹ ARPA had a program that would relieve “120 percent of the indebtedness” of “socially disadvantaged farmer[s] or rancher[s].”¹⁴² In turn, socially disadvantaged farmers or ranchers are those who “have been subjected to racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities.”¹⁴³ This includes “American Indians or Alaskan Natives; Asians; Blacks or African Americans; Native Hawaiians or other Pacific Islanders; and Hispanics or Latinos.”¹⁴⁴ ARPA, with respect to farmers, was repealed and replaced by the IRA,¹⁴⁵ but also faced legal challenges causing it to be temporarily enjoined due to lawsuits like *Miller v. Vilsack*.¹⁴⁶ Nevertheless, any similar programs to provide support to historically discriminated farmers, after *SFFA*, might be even more successfully challenged, given the holding of *SFFA*. The *Miller v. Vilsack* case, mentioned earlier, is only the start.

Whether and how the “socially disadvantaged farmer or rancher” classification survives is essential to numerous USDA programs across multiple agencies that demonstrate some of the best current efforts to increase program participation in directing resources and support to communities and individuals who

139. *Id.* at 216.

140. *Id.* 221.

141. American Rescue Plan Act of 2021, H.R. 1319, 117th Cong. § 1005 (2021).

142. *Id.*

143. 7 U.S.C. § 2279(a) (2018).

144. Notice of Funds Availability; American Rescue Plan Act of 2021 Section 1005 Loan Payment (ARPA), 86 Fed. Reg. 28329, 28330 (May 26, 2021).

145. Farmers.gov, *American Rescue Plan Act Debt Payments*, U.S. DEP’T AGRIC., <https://www.farmers.gov/loans/american-rescue-plan> [<https://perma.cc/5M7X-ZQJ5>].

146. *Miller v. Vilsack*, No. 4:21-CV-0595-O, 2021 WL 1115194, at *12 (N.D. Tex. July 1, 2021), *amended*, No. 4:21-CV-0595-O, 2021 WL 1115227 (N.D. Tex. Oct. 18, 2021).

have been historically excluded from federal support.¹⁴⁷ The 1990 Farm Bill provides support for those farmers and ranchers that “have been subjected to racial or ethnic prejudices because of their identity as a member of a group without regard to their individual qualities.”¹⁴⁸ Current use of socially disadvantaged classifications include funding set-asides, program eligibility, limited priority scoring, and special programs.

Thus, after *SFFA*, challengers might raise that case to attempt to strike down the USDA DFAP, at least as applied to farmers of color. But the DFAP has a stronger defense than the universities in *SFFA* or even the ARPA’s support for historically discriminated farmers.

As the Court held in *SFFA*, even though racial identity must be treated neutrally, an applicant’s race does not cease to exist when they apply to a state program.¹⁴⁹ Programs are still permitted to consider “an applicant’s discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise.”¹⁵⁰ Thus, any racial considerations must be tied to something else besides race. For example, an individual’s experience with discrimination may speak to their perseverance.¹⁵¹ Broadly, USDA’s continued use of socially disadvantaged classifications will be strongest if individuals provide evidence of specific discrimination and the use is of limited duration.

2. Potential USDA Responses to the Supreme Court Decisions

As discussed earlier, DFAP does attempt to support historically vulnerable farmers, including farmers historically discriminated against on the basis of race.¹⁵² And some of the initiatives that provide financial benefits to these farmers consider a farmer’s race, though less directly than the previously mentioned

147. See Nat. Res. Conservation Serv., *Limited Resource Farmer and Rancher, Socially Disadvantaged Farmer Rancher Definition*, U.S. DEP’T AGRIC., https://lrftool.sc.egov.usda.gov/SDFP_Definition.aspx [<https://perma.cc/Z5WQ-6CS2>]; Farm Serv. Agency, *Loans for SDA Farmers and Ranchers*, U.S. DEP’T OF AGRIC. (Aug. 2019), https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdafiles/FactSheets/2019/sda_loans-fact_sheet-aug_2019.pdf [<https://perma.cc/S5D2-6LLF>].

148. Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. 101-624 § 2501(e)(2) (codified as amended at 7 U.S.C. § 2279(a)(6) (2018)).

149. *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181, 230 (2023).

150. *Id.*

151. *Id.* at 230-31.

152. Inflation Reduction Act of 2022, Pub. L. 117-169 § 22007, 136 Stat. 1818, 2021-23 (2022) (codified as amended at 7 U.S.C. § 2279).

ARPA provisions.¹⁵³ But DFAP also requires actual documentation of historic discrimination.¹⁵⁴ This can include

Any documentation you possess of a complaint or assertion of discrimination that was close in time to the events (e.g. complaint itself or a response to it), [c]ommunications with the USDA (including FSA), or lending institution that include any Statement under penalty of perjury from a non-family member and how they have knowledge of the discrimination discriminatory statements, including any available name, title, or position details of the representatives that made such statements.¹⁵⁵

Thus, DFAP is far more consistent with the Supreme Court’s acceptance of programs that consider “an applicant’s discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise,”¹⁵⁶ through its targeting of prior racial discrimination using documentation.

One potential weakness to legal challenge is USDA’s use of partnerships with race-centered community farming groups to provide targeted assistance for applying to DFAP. The constitutionality of partnerships like these was not addressed in *SFFA*. The U.S. Department of Education, however, has taken the position that targeted outreach and pathways programs remain legal.¹⁵⁷ Moreover, the application period for DFAP is now over, and USDA also partnered with community farming groups that are not race-centered, including young farmers, veteran farmers, and various other farmer categories. For the time being, targeted outreach and pathways programs for farmers appear to remain a viable approach to addressing historical inequities in agricultural funding.

From a purely Tribal perspective, *Brackeen*’s reaffirmation that Tribal membership is a political rather than racial classification may offer additional latitude in the operation of USDA programs. USDA has yet to distinguish treatment of individual federally enrolled Tribal members from racial classifications within “socially disadvantaged” and “historically underserved” groups, although the Supreme Court in *Morton v. Mancari*, has stated that race and Native American

153. *Id.*

154. *Resources & Documents*, U.S. DEP’T AGRIC. (2024), <https://22007apply.gov/resources.html> [<https://perma.cc/QN6Z-EBR4>].

155. *USDA Discrimination Financial Assistance Program (DFAP) Application: Documentation Checklist*, U.S. DEP’T OF AGRIC., https://22007apply.gov/media/Checklist_Printable_English.pdf [<https://perma.cc/BX34-SKPM>].

156. *Id.*

157. *Strategies for Increasing Diversity and Opportunity in Higher Education*, U.S. DEP’T OF EDUC. 9-12 (Sept. 2023), <https://sites.ed.gov/ous/files/2023/09/Diversity-and-Opportunity-in-Higher-Education.pdf> [<https://perma.cc/3VNK-HA36>].

status can be distinct.¹⁵⁸ The practicality of separating one historically marginalized group from others poses potential complications, particularly in application of government assistance to individuals in a new yet not entirely unprecedented manner. The federal government does presently extend federal support to individual Native Americans through special programs like the Indian Health Service.¹⁵⁹ However, such support is generally predicated on the government-to-government relationship between the United States and federally recognized Tribes. Targeted USDA support to Tribal producers has the greatest constitutional defense when conducted under this government-to-government relationship.

Similarly, USDA has the opportunity to draw from some of the innovations in higher education that are occurring after *SFFA*. One tool that universities have been experimenting with is targeting the hiring of faculty – regardless of race – who demonstrate aptitude for mentoring “at-risk” students, including students of color.¹⁶⁰ USDA could adapt this program to provide additional loan support to farmers who could mentor at-risk farmers and farmers of color. This could especially dovetail with the 2018 Farm Bill’s Beginning Farmers and Ranchers Program.¹⁶¹ Under this program, USDA prioritizes grant funding for beginning farmers and ranchers. While such farmers are still overwhelmingly white, they consist of somewhat more farmers of color than the general farmer demographic.¹⁶² Providing additional support for existing farmers who can act as mentors for beginning farmers – especially farmers of color – ultimately prioritizes support for farmers who have historically faced discrimination. Indeed, California is already creating an agricultural mentoring program using USDA funding that targets veterans and disadvantaged farming coalitions in this manner.¹⁶³

158. *Morton v. Mancari*, 417 U.S. 535, 550 (1974).

159. See INDIAN HEALTH SERV., INDIAN HEALTH MANUAL ch. 1., pt. 2, <https://www.ihs.gov/ihtm/pc/part-2/chapter-1-eligibility-for-services> [<https://perma.cc/4LUC-D6M9>] (describing persons eligible for the Indian Health Service).

160. See, e.g., *Special Meeting of the Board of Regents of the University of Wisconsin System, Proposed Resolution Approving Terms Related to State Funding Proposal*, UNIVS. OF WIS. ¶ 5 (Dec. 13, 2023), [https://www.wisconsin.edu/regents/download/meeting_materials/2023_meeting_materials/Meeting-Book---Special-Board-of-Regents-Meeting-\(December-13,-2023\).pdf](https://www.wisconsin.edu/regents/download/meeting_materials/2023_meeting_materials/Meeting-Book---Special-Board-of-Regents-Meeting-(December-13,-2023).pdf) [<https://perma.cc/94GS-J4ZB>].

161. See 7 U.S.C. §§ 5301, 5306; see also *id.* § 1627c(d)(5)(C)(i)(I) (prioritizing access to grants for beginning farmers and ranchers).

162. See U.S. DEP’T OF AGRIC., *2017 New and Beginning Producers* (Nov. 2020), <https://www.nass.usda.gov/Publications/Highlights/2020/census-beginning%20-farmers.pdf> [<https://perma.cc/6ZQ2-XM4C>].

163. See Vicki Gonzalez & Tony Rodriguez, *California Aims to Cultivate a Diverse Next Generation of Farmers Through USDA Funding*, NAT’L PUB. RADIO (Dec. 13, 2023), <https://www.npr.org/>

Hiring USDA staff from historically underserved communities is another strategy with close parallels to *SFFA*. Such targeted hires may be more likely to build trust and understand nuances in communicating with underserved individuals and groups. Existing USDA pathways programs have targeted minority students, providing internships allowing fast-track hiring for successful participants.¹⁶⁴ Established Scholars Programs operated with 1890 Historically Black Universities and 1994 Tribal Colleges to facilitate outreach and employment opportunities by connecting to institutions centered on serving historically underserved communities without using race as a factor.

Another tool used by universities that USDA could adopt is the targeting of those with socioeconomic disadvantages, both in terms of access to programs and access to funding. This is a tool that universities have long pursued, but its importance has increased after *SFFA*.¹⁶⁵ As described earlier, Indigenous farmers and farmers of color already face greater risk of loan default, a demonstrable sign of socioeconomic disadvantage. Thus, adopting lending programs (including access to the incentives created by the voluntary conservation programs) with a higher degree of weight based on socioeconomic disadvantage could still allow USDA to support historically discriminated farmers.¹⁶⁶

Easing barriers to USDA lending may be assisted by addressing obstacles to individuals from communities with limited access to capital, which are largely programmatic in nature.¹⁶⁷ Since most predominantly Black, Latino, or Indigenous communities have historically lacked basic services such as financial institutions, they often lack the credit and accumulated capital that are critical for loan qualification.¹⁶⁸ Addressing impacts from that level of historic

2023/12/26/1221725620/where-biden-administration-3-billion-farming-grant-has-been-going [https://perma.cc/R9AU-YMBB].

164. *Internships and Career Opportunities*, U.S. DEP'T AGRIC., <https://www.usda.gov/youth/career> [https://perma.cc/D3LE-EFE4].

165. See Stephanie Saul, *With End of Affirmative Action, a Push for a New Tool: Adversity Scores*, N.Y. TIMES (July 2, 2023), <https://www.nytimes.com/2023/07/02/us/affirmative-action-university-of-california-davis.html> [https://perma.cc/WL2M-GH7B].

166. Nat'l Agric. Stat. Serv., *2017 Census of Agriculture*, U.S. DEP'T OF AGRIC. (Apr. 2019), https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_US/usv1.pdf [https://perma.cc/H6NV-LXAJ]. Even expanding service options to small agricultural producers is another strategy that would better serve a large percentage of historically underserved groups. Since ninety-four percent of Native, eighty-eight percent of Latinx, and ninety-six percent of Black farms have revenues of less than \$100,000, revenue considerations could be one method to provide support to a large percentage of historically underserved producers. *Id.*

167. See Carpenter, *supra* note 2, at 13-32.

168. See Janine S. Hiller & Lindsay Sain Jones, *Who's Keeping Score?: Oversight of Changing Consumer Credit Infrastructure*, 59 AM. BUS. L.J. 61, 61 (2022).

discrimination requires societal level intervention at a time when policies are increasingly limited from *SFFA*, but basic strategies like expanding financial education efforts and partnering with existing community development financial institutions (CDFIs) can help build the basic capacity necessary for qualifying for FSA and most other loans.

USDA's FSA has taken affirmative steps to ease application burdens by significantly simplifying application forms while creating new support tools, yet the application process is still challenging for many applicants.¹⁶⁹ FSA's simplified application released in 2023 addressed redundancies while streamlining information collection. However, as a lender of last resort, FSA's application process is subject to a heightened level of documentation to minimize the risk of default.¹⁷⁰ FSA could provide greater support to loan applicants through direct assistance or expanded support resources that assist loan seekers in both building financial literacy and navigating the nuances of detailed loan-application forms. Alternatively, or concurrently, FSA could expand partnerships with entities like CDFIs to provide financial-planning training tailored to farm business-plan development. CDFIs have established a presence in many historically underserved communities where they have worked to build trust and relationships to address capital access.¹⁷¹ The simple reality is that the information required for FSA farm loans provides a foundation level of farm business records necessary not only for access to other USDA assistance, particularly crop insurance and disaster payments, but it helps make improved business management decisions.¹⁷² That foundational financial capacity is essential to realizing and maintaining economic viability. It also helps lay a stronger foundation for effectively accessing conservation programs.

The long-term implications of *SFFA* on the operation of conservation programs supporting historically underserved producers is more pronounced since overall need far exceeds available funding. Although IRA's historic conservation program investments have created massive funding pools, this enhanced

169. See Farm Serv. Agency, *USDA Now Accepting Applications for Farm Loans Online*, U.S. DEP'T AGRIC. (Dec. 5, 2023), <https://www.fsa.usda.gov/news-room/news-releases/2023/usda-now-accepting-applications-for-farm-loans-online> [<https://perma.cc/6LY6-7FR7>].

170. See JIM MONKE, CONG. RSCH. SERV. RS21977, *AGRICULTURAL CREDIT: INSTITUTIONS AND ISSUES* 5 (2018).

171. Cmty. Dev. Fin. Insts. Fund, *What Does The CDFI Fund Do?*, U.S. TREASURY DEP'T, <https://www.cdfifund.gov> [<https://perma.cc/P3L3-FSJ8>].

172. Key aspects of the Farm Service Agency's (FSA) simplified FSA-2001 loan-application forms include a balance sheet, farm asset and liability schedules, cash flow projections, and an operating plan. Farm Serv. Agency, *Request for Direct Loan Assistance (FSA-2001)*, U.S. DEP'T OF AGRIC. (Mar. 5, 2024), https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdafiles/Farm-Loan-Programs/pdfs/direct-loan-apps/Form_FSA_2001_Request_For_Direct_Loan_Assistance.pdf [<https://perma.cc/47W2-N49G>].

funding is temporary and may still be insufficient to meet full conservation needs in many states and areas. Dedicated NRCS funding pools for socially disadvantaged producers have helped extend support to many historically underserved producers. If the socially disadvantaged funding pool were deemed unconstitutional, an essential resource supporting equitable program delivery would be eliminated given insufficient overall conservation funding.¹⁷³

NRCS's recent emphasis on "Urban and Innovative Production" through EQIP and a new dedicated grant program demonstrates how development of new conservation practices and funding may be targeted at smaller, often specialty growers, many of whom have not been historically served.¹⁷⁴ In so doing, the approach makes no reference to racial classification but reaches a large number of individuals from historically underserved groups.¹⁷⁵ This type of program emphasis could be expanded to other priority areas, but it would not be a complete replacement for the existing socially disadvantaged funding pool.

Shifting to the unique government-to-government aspects of USDA-Tribal relationships, recent Farm Bills have gradually explicitly included Tribes in stand-alone provisions and sections referencing states with the 2018 Farm Bill featuring sixty-three tribally oriented provisions, including both alternative funding arrangements (AFAs) for conservation programs and Tribal self-governance authority in nutrition and forestry programs.¹⁷⁶ Specifically focused on NRCS conservation programs, AFAs authorized by the 2018 Farm Bill offer an excellent yet unimplemented opportunity to extend EQIP and CSP conservation funding to individual Indigenous agricultural producers through their Tribal governments.¹⁷⁷ Requiring advancement of EQIP and CSP program goals, this AFA approach is predicated on the ability to achieve an improved outcome over

173. See Jonathan Coppess, *Farm Bill 2023: NRCS Backlogs and the Conservation Bardo*, FARMDOC DAILY (Sept. 28, 2023), <https://farmdocdaily.illinois.edu/2023/09/farm-bill-2023-nrcs-backlogs-and-the-conservation-bardo.html> [<https://perma.cc/MYB8-34T7>].

174. Nat. Res. Conservation Serv., *USDA Office of Urban Agriculture and Innovative Production*, U.S. DEP'T AGRIC., <https://www.nrcs.usda.gov/getting-assistance/other-topics/urban-agriculture> [<https://perma.cc/87KX-B5A6>].

175. *Id.*

176. Agricultural Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490 (codified as amended in scattered sections of 7 U.S.C. and 16 U.S.C.); see also Erin Parker, Carly Griffith Hotvedt, John VanPool, Kelli Case, Mary Belle Zook, Summer Wilkie, Joseph Damaso & Kristiana Coutu, *Gaining Ground: A Report on the 2018 Farm Bill Successes for Indian Country and Opportunities for 2023*, NATIVE FARM BILL COAL. & SHAKOPEE MDEWAKANTON SIOUX CMY. (Sept. 2023), https://www.nativefarmbill.com/_files/ugd/8b3589_763e8879ac2842c0baa45c586ddfd83a.pdf [<https://perma.cc/59N4-TSB2>] (updating implementation progress on the 2018 Farm Bill while identifying areas of continued need.)

177. Agricultural Improvement Act of 2018, Pub. L. 115-334, § 2503(c), 132 Stat. 4490, 4581 (2018) (codified as amended at 16 U.S.C. § 3844(m)).

a traditional program contract while also furthering Tribal resource-management plan development and implementation.¹⁷⁸ By working on a government-to-government basis, these AFAs may utilize expanded flexibility in allowing enhanced Tribal government conservation funding implementation, including to individual Tribal members.¹⁷⁹

Many Tribal governments, particularly on larger reservations, may be well-suited for managing conservation programs for their individual members under AFAs since they will have better knowledge of their producers and lands under their jurisdictions. Greater Tribal government control would allow improved coordination in targeting resources for maximum impact, especially in accordance with Tribal resource-management plans.¹⁸⁰

Smaller Tribes or those with comparatively fewer resources may be better positioned to administer such efforts through Tribal Conservation Advisory Councils (TCACs), which provide opportunities for improved delivery of conservation technical and financial assistance on Indian lands.¹⁸¹ Whereas conservation districts cover localized geographic areas or watersheds, TCACs are inter-tribal organizations composed of Tribal governments within state boundaries.

The Wisconsin Conservation Advisory Council (WTCAC), the first TCAC, serves as a model. Each Tribe in Wisconsin appointed delegates to WTCAC, which has been able to significantly expand financial assistance while creating numerous new conservation practices incorporating traditional ecological knowledge and better meeting unique Tribal needs.¹⁸² Importantly, WTCAC's structure leverages Tribal governments' political sovereignty by creating a direct connection through the appointment of delegates by governing bodies. WTCAC has simultaneously improved interagency and inter-Tribal cooperation. This model has expanded to several other states and nationally with three Regional Tribal Conservation Advisory Councils. However, TCACs generally focus on Tribal governments rather than individual producers who face unique challenges

178. Nat. Res. Conservation Serv., *Conservation Programs Manual*, U.S. DEP'T AGRIC. § 530.111-530.119, <https://directives.sc.egov.usda.gov/47744.wba> [<https://perma.cc/8SMX-WCE4>].

179. *Id.* at § 530.113(E) (specifically referencing the process for working with individual Tribal members in ensuring compliance with gross adjusted income).

180. American Indian Agricultural Resources Management Act, 25 U.S.C. §§ 3701-3703 (2018). Tribal management plans include integrated resource-management plans and agricultural resource-management plans.

181. 7 C.F.R. § 1466.3 (2024) (providing a broad definition of "Indian lands" ranging from federal and Tribal trust land to fee land held by individual Tribal members to "[I]and which is subject to rights of use, occupancy or benefit of certain Indian Tribes").

182. *Wisconsin Tribal Conservation: Stewardship for the Future*, U.S. DEP'T OF AGRIC. (Mar. 2021), https://www.wtcac.org/files/1416/1909/5029/2021_Wisconsin_Tribal_Conservation_1.pdf [<https://perma.cc/BM65-63A4>].

with greater proportional needs. Nonetheless, TCACs' structure offers an ideal mechanism for directing conservation funding to individual members better.

Whereas TCACs are a mechanism uniquely designed to leverage Tribal governmental capacity, similar approaches may help improve delivery of conservation and broader technical assistance to other historically underserved populations. Just as WTCAC was initially created as a subcommittee of Wisconsin's NRCS State Technical Committee, NRCS's administrative policy allows the creation of subcommittees and local workgroups that could help engage targeted producer groups with improved outreach, technical assistance, and development of new conservation practices where appropriate.¹⁸³ Potential subcommittee examples could be geographically centered to better serve urban or other concentrated underserved areas, or they could be based on production such as small vegetable growers. Further, NRCS has implemented new, more flexible authorities to fund such efforts that extend well beyond basic racial and ethnic classifications, highlighting how resources may be directed to serving a broader array of groups and needs than the historic emphasis on larger producers with relatively conventional conservation needs.¹⁸⁴

CONCLUSION

This is a critical time for Congress to support climate change adaptation and mitigation in the farming sector, as well as to support historically underserved farmers, whose traditional knowledge may lead to greater climate resilience for the sector as a whole. Not only is climate change posing an increasing threat to agriculture in general, but the most recent Farm Bill expired on October 1, 2023.¹⁸⁵ On November 21, 2023, Congress passed and President Biden signed into law a bill to extend the 2018 Farm Bill until September 30, 2024.¹⁸⁶ As of this point, it is unclear whether a new Farm Bill will get passed in September 2024, or whether the 2018 Farm Bill will be further extended on a temporary basis.

Regardless, the next Farm Bill provides Congress with an opportunity to build upon the programs supported by the IRA. In particular, Congress must

¹⁸³. 7 C.F.R. § 610 (2024).

¹⁸⁴. See Nat. Res. Conservation Serv., *Equity*, U.S. DEP'T AGRIC., <https://www.nrcs.usda.gov/about/priorities/equity> [<https://perma.cc/P5W3-HKUG>].

¹⁸⁵. See *What the Expiration, and Likely Extension, of the 2018 Farm Bill Means for Food and Agriculture*, NAT'L SUSTAINABLE AGRIC. COAL. (Oct. 25, 2023), <https://sustainableagriculture.net/blog/what-the-expiration-of-the-2018-farm-bill-means-for-food-and-agriculture> [<https://perma.cc/DNG2-SFU3>].

¹⁸⁶. See Further Continuing Appropriations and Other Extensions Act, 2024, Pub. L. No. 118-22, 137 Stat. 112 (codified as amended in scattered sections of the U.S.C.).

focus on three primary areas. First, they must strengthen the ability of USDA to deliver financial aid and to facilitate the delivery of financial and technical assistance needed to support a thriving national food economy across all production levels. Second, they must also tailor crop insurance funding and focus on maintaining adequate conservation funding while expanding and streamlining funding access to these programs. Finally, they must extend their approaches to addressing the injustices created by historical injustices of USDA funding programs through creative developments, including stronger partnerships with Indigenous and Black farming associations. These efforts are necessary to save our foodways in this climate emergency.

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