



Native Affairs Newsletter



Welcome

Welcome to Van Ness Feldman's Native Affairs newsletter. The newsletter serves as a forum to discuss a range of legal and policy developments of interest to our clients, colleagues, and friends across Indian Country. Please contact our attorneys or public policy professionals with any questions, and please send us your feedback!

Included in This Issue

- An Uncommon Dialogue Among a Coalition of Tribes, Industry and River Advocacy Groups Leads to Proposed Legislative Changes to Streamline and Improve Hydroelectric Licensing
- As FY 2023 Appropriations Deadlines Pass, a Reminder that Success is a Year-Long Effort
- President Biden Signs VAWA Reauthorization Containing Expansions of Tribal Jurisdiction Over Non-Native Offenders
- Challenges at the Northernmost Border: Alaska Native Leaders Highlight Role of Indigenous Leadership in National Security, and Participants Hear from the New Ted Stevens Center for Arctic Security Studies
- Tribal Business Successfully Moves to Dismiss State Court Suit
- SCOTUS To Decide Question of State Jurisdiction in Indian Country
- Insurance Coverage Considerations for Tribal Cannabis Businesses
- DOE Announces Grants for Federally Recognized Indian Tribes and Tribal Organizations

VNF Celebrates Big Wins for Critical Infrastructure in Indian Country

We are pleased to highlight two recent successes for our clients:

The firm worked with the Alaska Federation of Natives to secure more than **\$35 million** under the Tribal Broadband Connectivity Program for a consortium of 74 Tribes, Alaska Native village corporations, and regional non-profit tribal organizations, including housing entities. Please contact [Rick Agnew](#) for more information.

The firm worked with a municipal government with a Native American constituency representing approximately 80 percent of its population to secure more than **\$230 million** for a coastal erosion mitigation project. The project will protect the community itself, the community's drinking water source, and a significant cultural site, among other critical resources along a five-mile stretch of coastline. Please contact [Andrew VanderJack](#) for more information.

Congratulations to Laura Jones

Please join us in congratulating [Laura Jones](#) for her promotion to Of Counsel!

Laura is a rising leader in the Native Affairs practice group. She focuses her practice on a wide range of matters with a focus on American Indian law, including economic development, federal regulatory issues, environmental compliance, and federal-tribal consultation, as well as a broad range of civil litigation. Laura represents Tribes, tribal businesses, and non-tribal businesses that want to work on or near tribal land. Laura's expertise includes advising clients on regulatory and compliance matters, land use issues, and commercial lending transactions. Laura is a citizen of the Cherokee Nation.

Welcome to the Newest Members of our Team!

Nakia Arrington

We are excited to welcome [Nakia Arrington](#) to the Native Affairs practice group! Nakia Arrington focuses her practice on litigation and investigations, including economic development work, federal regulatory issues, environmental compliance, and American Indian Law, as well as a broad range of civil litigation. Nakia has represented businesses regarding regulatory and compliance matters, land use issues, and Clean Water Act citizen suits.

Prior to joining the firm, Nakia served for 20 years in the United State Marine Corps. She was hired under the prestigious and highly competitive Attorney General's Honors Program, where she served as Assistant General Counsel at the Federal Bureau of Investigation in the Sensitive and Strategic Information Litigation Section. She has also completed an internship with the U.S. Department of Justice's Environment and Natural Resources Division. Nakia and her husband have three children and hail from the beautiful state of North Carolina. Nakia is a member of the Lumbee Tribe.



Xena Burwell

We are excited to welcome [Xena Burwell](#) to the Native Affairs practice group! Xena focuses her practice on Native American, environmental, and energy law issues.

During law school, Xena clerked with Van Ness Feldman for two summers. Xena also has experience working for federal agencies and environmental non-profits. As a law clerk for the U.S. Department of Justice's Environment and Natural Resources Division, Xena worked on a variety of federal regulatory issues—including Clean Water Act, Solid Waste Disposal Act, and Safe Drinking Water Act—for EPA Regions 3 and 8. She also clerked for the Environmental Defense Fund, where she worked on issues for the Clean Air litigation team.

During law school, Xena was a member of the Howard Energy and Environmental Law Society. She was also a student-mediator for the Alternative Dispute Resolution Unit in the Washington Field Office of the Equal Employment Opportunity Commission. Xena served as the Environmental Law teaching assistant for Professor Carlton Waterhouse, who currently serves as the Deputy Assistant Administrator of Land and Emergency Management at the Environmental Protection Agency. Xena is of Haliwa-Saponi heritage.

Gregg Renkes

We are excited to welcome [Gregg Renkes](#) to the firm as Senior Counsel! Bringing over 30 years of experience, primarily in roles of public service, Gregg focuses his practice on matters relating to energy, environmental, public lands, Alaska Native and federal Native American law. In addition, with over a decade of prior experience as general counsel for a national commercial real estate and energy development company, Gregg brings seasoned leadership expertise to real estate, energy, and infrastructure project development teams.

Prior to joining the firm as Senior Counsel, Gregg was appointed to the position of Administrative Judge on the Interior Board of Land Appeals (IBLA) where he decided appeals from Department of the Interior bureau decisions relating to the use and disposition of public lands and their resources. Before joining the IBLA, he held the positions of Senior Counselor to the Secretary and Deputy Chief of Staff for Policy at the U.S. Department of the Interior, where he developed and led the execution of policy priorities and regulatory initiatives through departmental, inter-agency and executive processes and reviewed all matters requiring secretarial action.

Earlier in his career, Gregg served as Alaska Attorney General, was appointed to the Exxon Valdez Oil Spill Trustee Council and the Alaska Permanent Fund Board. He co-chaired, with the U.S. Attorney for the District of Alaska, the Alaska Rural Justice and Law Enforcement Commission, created by Congress to review and provide recommendations regarding federal, state, and local jurisdiction over civil and criminal matters and the criminal justice needs of rural Alaskans. Gregg served in the U.S. Senate for nearly a dozen years in various capacities including Chief of Staff for Senator Frank Murkowski (R-AK) and Majority Staff Director for the U.S. Senate Committee on Energy and Natural Resources.

VNF @ RES 2022

Come see us at RES 2022! Feel free to reach out to Laura Jones or Andrew VanderJack to let us know if you will be in Las Vegas for RES or come visit our booth in the RES Exhibit Hall.

Nakia Arrington @ 2022 NE Regional National Hydropower Association Conference

Nakia Arrington will be moderating Hydropower's Big Tent: Tribal Engagement and Environmental Justice in Relicensing Panel at the 2022 NE Regional National Hydropower Association Conference at the Royal Sonesta in Baltimore, Maryland on June 27, 2022 (the conference is June 27-28, 2022). The panel will focus on tribal relicensing protocols, treaty rights, environmental justice, and the impact the Federal Power Act and the Uncommon Dialogue amendments have on federally recognized Tribes.

Recent Appearances

We are delighted to be on the road again. We hope we had an opportunity to see you at Wiring the Rez, the NACo Legislative Conference, or the Arctic Encounters Symposium.

In case you missed it, Laura Jones presented on Tribal Consultation and Collaboration at the National Hydropower Association's Waterpower Week Conference in April, and she recently provided a Tribal Lending Litigation Update training for Native American Financial Services Association members. Patrick Daugherty provided a Tribal Lending Litigation Update at the American Financial Services Association Regulatory & Economic Development Workshop.

If we missed you, please come see us at RES 2022 or NCAI's Mid-Year Conference in Anchorage.



An Uncommon Dialogue Among a Coalition of Tribes, Industry, and River Advocacy Groups Leads to Proposed Legislative Changes to Streamline and Improve Hydroelectric Licensing

BY MIKE SWIGER AND LAURA JONES

The National Hydropower Association, several Tribal Nations, and a number of river advocacy groups have announced an agreement on proposed amendments to Part I of the Federal Power Act (FPA) to improve the Federal Energy Regulatory Commission (FERC) hydroelectric licensing process. The groups supporting the legislative changes participated in four years of discussions in order to reach the compromise proposal. The legislative proposal was the product of an “Uncommon Dialogue” on hydropower and river conservation, which was facilitated by the Stanford University’s Woods Institute for the Environment.

The Tribes that participated in the Uncommon Dialogue advocated for more self-determination in the hydroelectric licensing process. Under the proposal, Tribes would have authority to condition licenses for projects on Indian trust lands in order to protect Tribal interests. That authority currently rests with the Department of the Interior. The proposals would also streamline the licensing process, which was important to the industry groups.

Highlights of the proposed legislative changes are provided below:

- Requiring FERC and other agencies and Tribes with regulatory authority over a project to produce a joint schedule and coordinate efforts for obtaining the necessary permits and regulatory approvals
- New requirements for FERC to consider, in issuing licenses: reasonably foreseeable economic factors relating to a project’s value; reasonably foreseeable effects of climate change on the water resources to be utilized by a project as well as the project’s climate benefits; and applicable federal treaty obligations to Tribes
- Requiring federal land management agency conditions on a license under Section 4(e) of the FPA and fishway prescriptions under FPA Section 18 be tied to project effects

- Shifting authority to issue mandatory license conditions under Section 4(e) for projects located within Indian reservations from the U.S. Department of the Interior (Interior) to Tribes
- Requiring federal land management agencies to consult with Tribes in setting 4(e) conditions where the project may affect treaty hunting and fishing rights
- Providing deference to fish and wildlife recommendations of Tribes under FPA Section 10(j) where a project could affect treaty hunting and fishing rights
- Direct reimbursement of costs through the FERC annual charges program to other federal agencies participating in the FERC licensing process, as well as providing limited funding for state agency and Tribal participation
- Requiring FERC to conduct a rulemaking to establish more predictable license surrender procedures
- Requiring FERC to put in place an expedited licensing process for certain new hydroelectric developments at existing federal and non-federal dams
- Requiring a streamlined licensing process for closed-loop and off-stream pumped storage projects
- Requiring reliance on existing studies where practicable and avoiding duplication of studies

For questions about the legislative proposal, please contact Mike Swiger, a member of the legislative drafting team, at mas@vnf.com or 202-413-4809.

As FY 2023 Appropriations Deadlines Pass, a Reminder that Success is a Year-Long Effort

BY MELINDA MEADE MEYERS AND ANDREW VANDERJACK

The FY 2023 appropriations cycle is now well underway, and our team is busy helping our clients work with their representatives in Congress to bring federal benefits back to their communities through this annual process. As we move past the deadlines for making FY 2023 appropriations requests, we offer this brief recap of the appropriations process along with a reminder that the most successful efforts to engage in this process require a long-term strategy.

The Annual Appropriations Cycle

Federal government spending falls into mandatory or discretionary spending categories. While mandatory spending is typically governed by statute—such as Social Security, Medicare and Medicaid, and federal employee retirement programs—discretionary government spending must be appropriated by Congress on an annual basis. Accordingly, each year, Congress embarks on a process to fulfill its Constitutional duty to appropriate funds from the federal treasury to support various agencies, departments, and organizations for the next fiscal year. Each branch of Congress has a committee dedicated to appropriations.

VNF NATIVE AFFAIRS NEWSLETTER

These committees are comprised of twelve subcommittees, which are each tasked with drafting plans to allocate funds to the agencies and programs under their jurisdictions. Therefore, Congress considers twelve appropriations bills each year.

Because the federal fiscal year runs from October 1 to September 30, Congress must enact all appropriations bills by the end of September into order to avoid a government shutdown or the necessity of funding the federal government through a temporary extension known as a continuing resolution. As such, the appropriations subcommittees begin considering the President's budget request, as well as requests from individual members of Congress, and drafting their respective appropriations bills in the spring.

Citizens can engage in the appropriations process by asking Congress to direct funds to a state or local government or an eligible non-profit entity (a "directed spending" request), increase or decrease funding for a federal program (a "programmatic" request), or include language within an appropriations bill or report that directs or urges a federal agency to undertake or avoid certain actions (a "language" request).

Appropriations requests generally must be submitted for consideration to individual Members of Congress in March or April, though these deadlines vary by congressional office and often depend on which appropriations subcommittee will ultimately consider the Member's request. For any reader that is dismayed to find they have missed the deadlines for FY 2023, we have good news: now is a very good time to begin developing your proposals for FY 2024. In fact, we strongly urge our clients to undertake efforts to develop appropriations proposals as part of their broader planning efforts throughout the year. Taking a long-term strategic approach to this process will serve you well.



The Return of Earmarks and Examples of Projects Funded in FY 2022

Earmarks are in the news, and for good reason. In early 2021, Senate Appropriations Chair Patrick Leahy (D-VT) and his House counterpart Representative Rosa DeLauro (D-CT) announced new plans for the return of congressionally

directed spending—also known as earmarks—for FY 2022 appropriations. This action ended a decade-long moratorium on the practice and added reforms aimed at improving transparency and accountability for the use of earmarks.

The return of earmarks offers Tribal Governments and Organizations an opportunity to work with their congressional representatives to identify funding priorities that will help their communities better meet the needs of their constituents. In 2021, Tribal Governments and Organizations across the country successfully worked with their Members of Congress to obtain funding for community priorities ranging from basic housing and water projects to innovative social services, economic development, and cultural preservation projects. Here are just a few examples:

- **\$2,000,000 to the Ute Mountain Ute Tribe in Colorado to support the Ute Mountain Ute Housing Improvement Project.** This project will help the Ute Mountain Ute Tribe upgrade some of its 600 multi-generational, stick-built and mobile homes to bring them up to code, make them fully functional, and provide ADA-compliant bathrooms and accessibility for disabled and elderly residents (requested by Senators Bennet and Hickenlooper).
- **\$2,000,000 to the Mississippi Band of Choctaw Indians for the Bogue Homa water system project in Heidelberg, Mississippi.** This project supports enhancements to the quality and reliability of the Mississippi Band of Choctaw Indians' rural drinking water system (requested by Senator Hyde-Smith and Representative Palazzo).
- **\$1,000,000 to the Nooksack Indian Tribe in Whatcom County, Washington, to support the Nooksack Clinic and Wellness Facility.** This project intends to provide one-stop health services, providing the Nooksack Tribal community with a pharmacy, dental services, optometry, chiropractic services, physical therapy, and behavioral and substance use disorder treatment services (requested by Rep. DelBene).
- **\$500,000 to the Sealaska Heritage Institute in Juneau, Alaska, to help support the Kootéeya Deiyi project.** This project will create a trail of totem poles and storyboards representing Tlingit, Haida, and Tsimshian clans along the waterfront in Juneau. The project is expected to help increase economic development while highlighting and preserving Native art and culture, consistent with the goals of the NATIVE Act (P.L. 114-221) (requested by Senator Murkowski).
- **\$242,000 to the American Indian Chamber of Commerce of New Mexico for its Native Economic Advancement and Development (NEAD) Initiative.** This initiative will facilitate job growth and business development in tribal areas through training programs that support community needs (requested by Senators Lujan and Heinrich).

Conclusion

A 1000-page appropriations bill may contain just a few words that finally deliver an ambulance, a training program, or a new bridge to a community. But getting there is not easy. Congress cannot fund most of the projects proposed, and Members of Congress must work with the appropriations committees to determine which projects will be allowed to move forward based on factors that range from legal to political to practical. For those who have submitted appropriations proposals for FY 2023, you are now working with your representatives to support the proposals submitted. But for all of us, a successful effort in FY 2024 starts now and continues throughout the year.

For more information about federal appropriations, contact Andrew VanderJack at amv@vnf.com or Melinda Meade Meyers at mmm@vnf.com.

Violence Against Women's Act Reauthorization Expands Tribal Jurisdiction over Non-Native Offenders

BY CHARLENE KOSKI

In March 2022, after three years of failed negotiations, Congress finally passed legislation to reauthorize the Violence Against Women Act (VAWA 2022), with President Biden signing the bill into law as part of the 2022 Consolidated Appropriations Act, [H.R. 2471](#). Title 8 of VAWA 2022, titled “Safety for Indian Women,” includes important expansions of tribal jurisdiction over non-Native offenders in Indian country. Critically, VAWA 2022 also expands the jurisdiction of Alaska tribes, which have historically been unable to take advantage of VAWA’s tribal jurisdiction provisions due to a lack of “Indian country” as that term is defined under federal law, even though Alaska Native women suffer the highest rates of domestic and sexual violence compared to other Native American groups. It also creates a pilot program in which qualifying Alaska tribes may exercise jurisdiction over non-Native defendants for certain crimes occurring in a tribe’s Native village.

VAWA 2022 Jurisdictional Expansion for All Tribes

VAWA as reauthorized in 2013 recognized tribal authority to exercise “special domestic violence jurisdiction” (SDVJ) over non-Indian defendants in certain circumstances when those defendants committed acts of domestic or dating violence or violated certain protection orders in “Indian country,” which is a defined term under federal law. SDVJ was limited in scope and, in effect, did not apply to most Alaska tribes, which lack Indian country. VAWA 2022 attempts to address those gaps by expanding the list of “covered crimes” and tying the jurisdiction of Alaska tribes to Alaska Native villages on a pilot basis (discussed in more detail below).

Under what is now called Special Tribal Criminal Jurisdiction (STCJ), in addition to crimes of dating and domestic violence, “covered crimes” over which tribes—including participating Alaska tribes—may exercise criminal jurisdiction over non-Natives include assault of tribal justice personnel, child violence, obstruction of justice, sexual violence, sex trafficking, stalking, and violation of a protection order.

VAWA 2022 also increases the authorized level of STCJ implementation grant funding from \$5 million per fiscal year to \$25 million per fiscal year; expands the grant program to cover reimbursement costs; codifies the Department of Justice’s Tribal Access Program to provide tribes with access to national criminal information databases; and permanently authorizes the Bureau of Prisons Tribal Prisoner Program, which requires the federal Bureau of Prisons to house a limited number of qualifying inmates sentenced in tribal court. The law also makes clear that defendants must exhaust their tribal court remedies before seeking habeas relief in federal court.

Tribal Civil and Criminal Jurisdiction in Alaska Under VAWA 2022

VAWA 2022 recognizes that any Indian tribe occupying an Alaska Native village has the inherent authority to exercise criminal and civil jurisdiction over “all Indians present in the Village,” providing for the first time an explicit statutory basis for Alaska tribes without Indian country to exercise territorial jurisdiction. Under VAWA 2022, a “court of any Indian tribe” in Alaska also has full civil jurisdiction to issue and enforce protection orders involving any person, regardless of Native status, in matters arising within the Alaska Native village, or otherwise within the authority of the tribe. That jurisdiction includes civil contempt proceedings and the exclusion of violators from the village.

As noted above, Alaska tribes have historically been unable to take advantage of VAWA’s special jurisdictional provisions. VAWA 2022 changes that by tying STCJ to a tribe’s occupancy of an Alaska Native village rather than “Indian country.” VAWA 2022 creates a pilot program in which qualifying Alaska tribes may exercise STCJ over non-Native defendants for “covered crimes” (described above) occurring within a participating Native village. The tribe’s jurisdiction would be concurrent with that of the United States and the State of Alaska and would not apply to crimes in which both the defendant and victim are non-Native except in cases of obstruction of justice or assault of tribal justice personnel. There are limits on the number of participating tribes, but those limits are not firm. For example, although the United States Attorney General may designate no more than 30 total tribes for participation in the pilot program, two or more tribes may participate jointly by providing shared resources and the entire partnership would still be considered only a single participating tribe. Other tribes may join such a partnership after it is established.

The Attorney General may also designate more than 30 tribes after giving written notice to the Senate Committee on Indian Affairs and the House Committee on Natural Resources.

In terms of selecting which tribes will participate, the new law instructs the Attorney General to consult with the Secretary of the Interior and affected Indian tribes to establish a process to designate tribes for participation in the pilot program. The process must give preference to tribes occupying Alaska Native villages whose populations are predominantly Native or who lack a permanent state law enforcement physical presence. Any participating tribe must also have a criminal justice system that provides safeguards for defendants' rights consistent with the Indian Civil Rights Act. The Attorney General and Secretary of Interior may enter into memoranda of agreement with participating tribes and the State of Alaska as necessary to coordinate law enforcement, share equipment and resources, establish cross-deputization arrangements, coordinate training activities, and address other matters to facilitate implementation of the pilot program including agreements regarding incarceration, investigation, and prosecution.

Additionally, the law establishes an "Alaska Tribal Public Safety Advisory Committee" to focus on improving the justice systems, crime prevention, and victim services of Indian tribes and the State of Alaska. The committee will have representatives from federal, tribal, state, and local law enforcement.

VAWA "Boyfriend" Loophole Persists

As described in our previous [newsletters](#), VAWA had expired in 2019, and prior reauthorization efforts failed due primarily to disagreements over a proposal to close the Act's "boyfriend loophole," under which convicted domestic abusers who are married, live with, or have a child in common with their victims are restricted from possessing firearms, but convicted intimate partners (i.e., boyfriends/girlfriends) are not. VAWA 2022 does not close that loophole but makes important updates to improve the ability of tribes to respond to violence in Indian country and Alaska Native villages.

If you have questions about VAWA jurisdiction, please contact Charlene Koski at ckoski@vnf.com.



Challenges at the Northernmost Border: Alaska Native Leaders Highlight Role of Indigenous Leadership in National Security, and Participants Hear from the New Ted Stevens Center for Arctic Security Studies

BY ANDREW VANDERJACK

On April 14, 2022, the Alaska Federation of Natives (AFN) hosted the latest in a series of meetings focused on national defense at the Nation's northernmost border, with a focus on the North Slope region of Alaska.

The series of events hosted by AFN have highlighted the central role that Alaska Native institutions and leaders play in understanding and responding to national security challenges faced by the United States in the Arctic, including infrastructure, domain awareness and communications, energy and mineral security, partnerships with private industry, food security, and climate change.

As noted by AFN President Julie Kitka:

This is a time of great uncertainty and potential for escalating conflict. The full implications of the Russian invasion of Ukraine and unprecedented sanctions, amplified by the private sector are very complex. We have to be clear on our state and national priorities. And we need to be unified in purpose.

AFN's Focus on National Security in America's Arctic

AFN's April 14 event was held in the community of Utqiagvik on the North Slope of Alaska. The North Slope region is the northernmost region of the state, spanning an area the size of Minnesota and stretching from the narrow waterway that divides Alaska from Russia in the west to Alaska's border with Canada in the east. The event was co-hosted by the North Slope Borough, the regional municipal government; the Inupiat Community of the Arctic, the regional federally-recognized Alaska Native tribal government, and Arctic Slope Regional Corporation, the regional Alaska Native corporation. Also present as co-hosts were the region's state representatives—Senator Donny Olson and Representative Josiah Patkotak.

The event featured presentations by senior U.S. defense officials, members of Alaska's Congressional delegation, members of Alaska's legislature, the governor of Alaska, representatives from the White House and State Department, and representatives of key energy and defense industries in Alaska.

The history of the U.S. military in Alaska is one that has seen generational shifts defined within the last century by the defense of the Nation during World War II, including the occupation of two of the Aleutian Islands by Japanese forces and the movement of supplies by land and air to aid the Soviet Union's war effort in Europe; the fortification of the state during the Cold War, including the development of extensive communications and air and missile defense systems; and the ongoing realignment of geopolitical power, most notably to counterbalance the influence of Russia and China. It is a history of service and sacrifice, most notably among the Alaska Native community, where Alaska Native individuals have served at levels higher than any other group of Americans. It is also a history that demands acknowledgement and redress for grave mistakes, including the bombing of three Native villages in Southeast Alaska, the demolition of Kaktovik, the internment of Alaska Natives removed from western villages during World War II, the testing of radioactive Iodine 131 on Inupiat and Athabaskan individuals, and the legacy of contaminated lands.

AFN's leadership seeks to learn from this history, recognizing the shared responsibility of securing our Nation's borders, and bringing key stakeholders together to pursue a collaborative approach to defining the future of national security in America's Arctic.

AFN's April 14 event provided an opportunity for military and civilian leaders to provide an overview of their roles and obligations on matters related to national defense in the Arctic region. Although the event largely focused on the North Slope region, military and civilian leaders alike spoke at length about the relationship between activities in Alaska and economic and political developments around the world, particularly within the circumpolar Arctic region and in relation to the ongoing war in Europe.

Craig Fleener Introduces The Ted Stevens Center for Arctic Security Studies

Following the AFN event, I had the opportunity to follow up with Craig Fleener, who capped off the event with a discussion focused specifically on "How Can We Work Together?"

Mr. Fleener was recently appointed to serve as Deputy Advisor for Arctic Security Affairs at the newly formed Ted Stevens Center for Arctic Security Studies ("Ted Stevens Center"), one of just six Department of Defense (DoD) Regional Centers for Security Studies. The establishment of the Ted Stevens Center was, notably, a recommendation by AFN to the DoD and Congress.

Mr. Fleener's career is defined by public service, including, most notably, 35 years of service in the U.S. military. Originally from Fort Yukon, Mr. Fleener is a Gwich'ya Zhee Gwich'in Tribal member. He enlisted in the U.S. Marine Corps in 1986 and continues to serve in the Alaska Air National Guard.

Among other positions, he has served as the Director of the Division of Subsistence, the Deputy Commissioner of Wildlife, Subsistence, and Habitat Divisions at the Alaska Department of Fish and Game, as the Governor's Arctic Policy Advisor, and as Director of State and Federal Relations for the State of Alaska in Washington, D.C.

In his various roles, Mr. Fleener has developed a unique perspective on a wide range of public policy priorities that reflect the objectives of the Ted Stevens Center, including the ability to understand the capacity of government and other partners to collaborate to strengthen national security. He has worked on Alaska Native tribal and village corporation land issues, wildlife and fisheries issues, environmental stewardship, climate change research, vocational training, and healthcare. "Experiences that I've had as a permanent participant of the Arctic Council, evaluating the effect of changing Arctic habitat conditions on people and wildlife, working with Arctic tribal governments, and serving as the state's lead on Arctic issues are instrumental in this new role."

The Ted Stevens Center Mission

Mr. Fleener's comments at the April 14 AFN event addressed the mission of the new Ted Stevens Center, which, he noted, will provide executive-level education programs and workshops and support research to support DoD priorities, gain understanding of and responses to transnational threats, foster common perspectives on regional security challenges, and strengthen binational and multinational institutional relationships to meet Arctic challenges through networks and solutions underpinning full-spectrum security cooperation. By doing so, the Ted Stevens Center will build our Nation's and our partners' capacity to collaborate against shared threats. The prioritized areas of focus include territorial security, transnational and asymmetric threats, and defense sector governance.

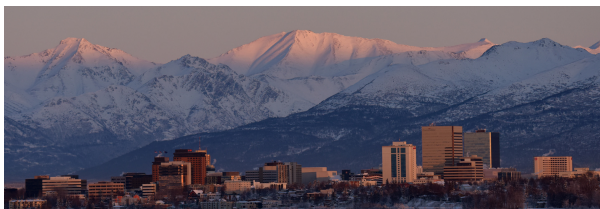


Mr. Fleener stated that the Ted Stevens Center will focus on developing and strengthening networks of government agencies and non-governmental organizations to support a stable, rules-based order in the Arctic:

When we look at what is going on in the world today and the circum-polar vision of the Arctic, we understand that the rule of law is fundamental to our national security and that our national security is, in turn, fundamental to the rule of law. As such, our national security framework is tied to the governing bodies and organizations outside of the traditional defense framework. The Ted Stevens Center, like the other DoD Regional Centers, will provide an opportunity for military and civilian policymakers and practitioners to come together, to educate and to be educated, and collaborate in support of our rules-based order.

Mr. Fleener noted that many of those who participated in the April 14 AFN event are familiar with longstanding efforts to support a rules-based order in the Arctic, including the Arctic Council and Arctic Economic Council. Alaska's indigenous communities also regularly participate in cross-border scientific and resource management activities organized through multilateral (e.g., the International Whaling Commission) or bilateral forums (e.g., the U.S.-Russia Polar Bear Commission, the International Porcupine Caribou Board, and the Polar Bear Technical Committee).

Mr. Fleener also commented on the broader importance of businesses and nongovernmental organizations that support the economic, social and cultural landscape within which the U.S. military and its allies operate. Alaska Native corporations (ANCs) play an important role in supporting and partnering with the U.S. military, including at Fort Greeley, Fort Wainwright, Joint Base Elmendorf-Richardson, and the Air Force's Long Range Radar Sites. Tribal governments are investing in critical infrastructure, including roads, broadband, and ports. Alaska Native communities know how to operate without critical infrastructure, constructing seasonal ice roads, operating search and rescue teams in severe weather, and providing remote medical assistance in the absence of urban facilities. "The future of Arctic preparedness would be best served by a strong partnership between the services and tribes and ANCs, especially for Arctic operations where indigenous peoples have first-hand experience with the challenges of extreme cold, extreme dark, extreme wet and extreme wind, and who have lived and thrived in these conditions for millennia."



Tribal Business Successfully Moves to Dismiss State Court Suit

BY PATRICK DAUGHERTY

A tribal business created, owned, and operated by the Tunica-Biloxi Tribe of Louisiana successfully moved to dismiss a lawsuit against the Business that alleged that the tribal business had failed to follow Florida state laws.

In its April 11, 2022 decision, a Volusia County Court applied the Breakthrough factors to determine whether the business was an "arm-of-the-tribe" and therefore shared the Tribe's sovereign immunity. *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, (10th Cir. 2010). Those factors are: (1) the method of the entity's creation; (2) its purpose; (3) its structure, ownership, and management, including the control the Tribe has over the entity; (4) whether the Tribe intended for it to have tribal sovereign immunity; (5) the financial relationship between the Tribe and the entity; and (6) whether the purposes of tribal sovereign immunity are served by granting it immunity. *Id.* at 1191.

Factor 1 – Method of Creation

The court concluded that creation of the tribal business as an LLC with the Tribe as the sole member under tribal law by the Tribal Council supported a finding of sovereign immunity.

Factor 2 – Purpose of the Business

The court noted that the purpose of the tribal business was to generate revenues for the Tribe and those revenues had, in fact, been used to fund schools, social services, and the Tribal Government. The court identified specific programs supported by the tribal business' revenues, including hurricane relief, COVID-19 assistance, and a juvenile teen court.

The court declined to find that the tribal business lacked a proper purpose because the Tribe received only a small percentage of the tribal business' revenue. The court noted that without data on the overall profitability of the tribal business, the fact that a small percentage of revenue was distributed to the Tribe was not meaningful. Accordingly, this factor supported a finding of sovereign immunity.

Factor 3 – Structure, Ownership, Management, and Control

The court noted that the tribal business' Board was composed entirely of members of the Tribe, that the tribal business' office was located on the Tribe's reservation land, and that tribal members served in key management roles, including Communications Liaison and Administration Manager.

The court did not accept the Plaintiff's argument that the use of third-party vendors defeated the tribal business' claim to sovereign immunity.

The court also faulted the Plaintiff for not presenting clearer evidence of what certain vendor activities—“credit information processing services”—meant, writing:

if the “credit information processing services” is merely the furnishing of credit scores and credit reports to Tribal citizen/employees, and then those Tribal citizen/employees are responsible for the rest of the loan processing workload, that would severely weaken Plaintiff’s claim that most daily operations are performed by non-Tribal entities. However, if the “credit information processing services” also includes generating loan applications, processing the applications, and making lending decisions, that would be significantly more probative of Plaintiff’s claim.”

Since the Plaintiff failed to provide evidence on this point, the court concluded this factor also supported a finding of sovereign immunity.

Factor 4 – Tribal Intent

The court found the Tribal Council resolution stating “[t]he LLC shall be vested with all of the privileges and immunities of the Tribe, including, without limitation, the immunity from suit by any person or entity in any forum” supported a finding of sovereign immunity.

Factor 5 – The Financial Relationship

In analyzing the financial relationship factor, the court noted the positive effect of the tribal business on the Tribe’s treasury but focused primarily on the limitations on the Tribe’s liability for debts of the tribal business. The tribal business’ Operating Agreement stated that the business’ debts would not be debts of the Tribe. The court found this limitation weighed against sovereign immunity due to the “lack of actual financial exposure to any adverse judgments or other financial obligations incurred” by the tribal business.



Factor 6 – The Purposes of Tribal Sovereign Immunity

The court noted that the tribal business, like almost every other business, exists to make money. Finding that the tribal business was not immune to suit would place its assets at risk and potentially affect its ability to give its revenues to the Tribal Government. The court concluded this “would defeat the intended purpose of encouraging tribal self-sufficiency and economic development.”

With five of the applied *Breakthrough* factors supporting immunity and only one against, the court concluded that the Tribe’s sovereign immunity also protected the tribal business. The court also dismissed allegations made against three individual employees of the tribal business, finding that the suit against them was brought in their official capacity as employees and officers of the tribal business and those official capacity claims were also barred by sovereign immunity.

The case is *Reyes v. MobiLoans LLC, et al.* (Volusia County, FL Case No. 2020-16482-CODL).

SCOTUS to Decide Question of State Jurisdiction in Indian Country

BY CHARLENE KOSKI

The Supreme Court will soon decide whether a State has authority to prosecute non-Native individuals who commit crimes against Native individuals in Indian country, potentially upending the commonly understood meaning of a 75-year-old statute and expanding state criminal jurisdiction in Indian country without tribal consent or express congressional authorization.

The case, *Oklahoma v. Castro-Huerta*, No. 21-429, asks whether states have criminal jurisdiction to prosecute non-Native individuals who commit crimes against Native individuals in Indian country. Defendant Victor Manuel Castro-Huerta was convicted in an Oklahoma court of a crime against a Native child. Following the Supreme Court’s landmark decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), in which the Court concluded much of Oklahoma is Indian country, Castro-Huerta successfully argued that the State lacked jurisdiction to prosecute him because he committed his crime in Indian country. The state appellate court’s decision in Castro-Huerta’s favor was consistent with the interpretation of the General Crimes Act (“GCA”— also known as the Indian Country Crimes Act), 18 U.S.C. § 1152, that has prevailed since the statute’s 1948 reenactment. Under that interpretation, only the federal government has authority to prosecute non-Native individuals who commit crimes against Native individuals in Indian country.[1] The relevant statutory language reads:

Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed *in any place within the sole and exclusive jurisdiction of the United States*, except the District of Columbia, shall extend to Indian country.

Id. (emphasis added).

Oklahoma claims the prevailing interpretation is incorrect. Even though the Supreme Court has repeatedly stated that, unless Congress expressly says otherwise, “States lack jurisdiction over crimes committed in Indian country against Indian victims,” *United States v. Bryant*, 579 U.S. 140, 146 (2016), and that “[w]ithin Indian country, State jurisdiction is limited to crimes by non-Indians against non-Indians, and victimless crimes by non-Indians,” *Solem v. Bartlett*, 465 U.S. 463, 467 n.2 (1984),^[2] Oklahoma suggests those and other precedents do not control. Under Oklahoma’s proposed interpretation, the GCA simply extends federal enclave laws to Indian country without displacing State jurisdiction over non-Native individuals. Castro-Huerta insists the federal government has “sole and exclusive” jurisdiction over those federal laws, and that, in Indian country, a State may act only with Congress’s express approval which, in this instance, Oklahoma lacks.

The Court’s decision could disrupt the criminal jurisdictional structure in a significant number of states. According to briefing filed with the Court, Congress has authorized 21 states to exercise criminal jurisdiction in Indian country while 26 states lack such authorization. In those 26 states, federal jurisdiction is currently exclusive. Many of the other states have retroceded all or part of their jurisdiction or assumed only partial jurisdiction. Accepting Oklahoma’s argument would also create a drastic departure from established principles of federal Indian law, under which States lack jurisdiction in Indian country unless Congress explicitly says otherwise.^[3]



When accepting the case, the Court expressly declined to consider whether to overrule its 2020 landmark decision in *McGirt*, leaving undisturbed its prior conclusion that much of Oklahoma is Indian country. Oral argument occurred Wednesday, April 27, 2022. If you have questions about tribal jurisdiction, please contact Charlene Koski at ckoski@vnf.com.

[1] A Tribe might also have jurisdiction over certain crimes committed by non-Native individuals against Native individuals under the Violence Against Women Act (“VAWA”) if that Tribe has implemented VAWA’s Special Tribal Criminal Jurisdiction (see CROSS REFERENCE TO VAWA ARTICLE).

[2] The briefing also notes that Congress has enacted several statutes authorizing states to exercise jurisdiction over “offenses committed by or against Indians” in Indian country, indicating state jurisdiction did not already exist. See, e.g., Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162; 25 U.S.C. § 1321) (emphasis added) (“P.L. 280”). In 1968, Congress amended P.L. 280 to prohibit future extensions of state jurisdiction without tribal consent and to allow states to retrocede jurisdiction in part or whole.

[3] An Amicus Brief filed by former United States Attorneys notes that Oklahoma’s position that states have inherent authority to prosecute non-Indians who commit crimes in Indian country unless Congress preempts that authority is contrary to Federal Indian Law as understood by all United States Attorney’s Offices and the Department of Justice.

Insurance Coverage Considerations for Tribal Cannabis Businesses

BY **ROBERT CONRAD, LAURA JONES, AND JOHN BALIAN**

As part of our ongoing efforts to provide guidance for the Tribal cannabis industry, we have highlighted areas such as the creation of Tribal cannabis commissions, cannabis tourism, and opportunities for Tribes to utilize funds from the American Rescue Plan Act of 2021 to benefit Tribal cannabis businesses. Past articles on Tribal cannabis can be found in previous editions of Van Ness Feldman’s Native Affairs Quarterly, available under “Thought Leadership” here. In this edition, we team up with John Balian, Practice Director for the Cannabis Industry at Wood Gutmann & Bogart Insurance Brokers, to provide expert advice on insuring Tribal cannabis businesses.

The Tribal cannabis industry can highly profitable if undertaken correctly, but it involves an ever-evolving series of complex hurdles and loopholes. Insurance coverage is an important business decision, and when you combine both cannabis and Tribal components, it can seem nearly impossible to navigate. However, the complexity can be easily managed if Tribes utilize knowledgeable and reputable partners.

Mr. Balian has provided the top three issues that Tribes should keep in mind when choosing and purchasing insurance coverage for their Tribal cannabis businesses:

1) Policy Wording. The policy wording (particularly exclusions and endorsements) needs to be carefully reviewed. Tribes should watch out for “Health Hazard Exclusion” on Products Liability policies, and a variety of exclusions (e.g., Definition of Claim, Cannabis Regulatory and Enforcement Exclusion, Bankruptcy and Insolvency & Creditor and Debtor Exclusions, Automatic Class Action, Automatic 10% Threshold for Reduction in Force Exclusion) on Management Liability/ Employment Practices Liability Insurance (EPLI) policies. The extent of the exclusions can render many policies basically worthless to Tribal cannabis businesses.

2) Tribal Sovereignty. The majority of cannabis insurers will not insure Tribal businesses due to concerns about Tribal sovereignty. Sometimes, their reinsurers exclude Tribes and, other times, these insurers are frightened of the concept of Tribal sovereignty. It may be necessary to negotiate a limited waiver of sovereign immunity that is solely applicable to the jurisdiction for claims disputes that is acceptable to both the insurer and insured. It is helpful to engage legal counsel who can explain Tribal sovereignty to an insurer in a manner that gives them some comfort. Regardless, Tribes need to work with an experienced broker who knows the marketplace, prepares quality submissions, and works hard to dialogue with potential carriers. Knowledge of the unique environment in which Tribes operate and make decisions is critical.

3) Potential Exposures. Tribes must ensure that all potential exposures to loss are identified and addressed. That treatment may be an insurance policy, risk transfer (via indemnification/hold harmless agreements), or self-insurance. Depending upon the nature of the operations, insured Tribes need to consider management liability, crime/employee dishonesty, crop, stock throughput, cargo, business income, builders risk, etc., in addition to the basic coverages such as workers compensation, liability, and property and automobile coverage.

Many cannabis businesses, Tribal or otherwise, fail because their management team is more experienced in the cultivation, processing, and/or sale of cannabis than in running a business. However, Tribes can enhance their chances of success by choosing partners who have the expertise to help their cannabis businesses succeed. Tribes—or businesses that want to work with Tribe—who are interested in learning more about purchasing cannabis insurance should contact John Balian at johnb@wgbib.com. For additional questions or guidance on preparing for participation in the Tribal cannabis industry, please contact Robert Conrad at rac@vnf.com or Laura Jones at ljones@vnf.com.



DOE Announces Grants for Federally Recognized Indian Tribes and Tribal Organizations

BY [NAKIA ARRINGTON](#)

On March 21, 2022, the Department of Energy (DOE) Office of Indian Energy [announced](#) that it will distribute nearly \$9 million to more than a dozen tribal communities to help meet their clean energy needs. The tribal community energy projects are expected to generate millions of dollars in energy savings.

The funding is intended to help develop, or enhance, clean energy resources and energy security among federally recognized tribes and tribal organizations through a combination of solar, battery storage, hydroelectric, or geothermal advancements. The selected projects will power homes, communities, increase energy efficiency, and install microgrids for essential services and resiliency.[1] Several awards provide support for workforce training.

Many rural tribal communities lack access to basic energy resources. The DOE Office of Indian Energy grant program, together with a wide range of programs funded by the [Infrastructure Investment and Jobs Act](#) (IIJA), will be deployed in an effort to remedy these issues by supplementing traditional financial resources available for tribal community energy projects. IIJA programs can also be leveraged to support transportation projects, water and sanitation facilities construction, climate resiliency initiatives, natural resource management, and environmental remediation projects.[2] The selected [energy projects](#) also support the general goals of the [Building a Better Grid Initiative](#), which is an effort by the federal government to collaborate with government entities, states, tribes and tribal organizations, and other stakeholders to modernize, harden, and expand the national electric transmission grid.[3]

To learn more and for a list of award recipients read [DOE's full press release](#) and visit the Office of Indian Energy's [project successes page](#).

[1] Department of Energy, DOE Awards \$12 Million to Tribal Communities to Maximize Deployment of Energy Technology (Jul. 13, 2021), <https://www.energy.gov/articles/doe-awards-12-million-tribal-communities-maximize-deployment-energy-technology#:~:text=The%20selected%20projects%20will%20power,zero%20carbon%20emissions%20by%202050>

[2] Chairman Brian Schatz, Infrastructure Investment and Jobs Act Bipartisan Support for Tribes and Native Communities, United States Senate Committee on Indian Affairs (Nov. 8, 2021), <https://www.indian.senate.gov/sites/default/files/2021-11-08%20Top%20Line%20Summary%20SCIA%20%28FINAL%29.pdf>.

[3] Building a Better Grid Initiative to Upgrade and Expand the Nation's Electric Transmission Grid to Support Resilience, Reliability, and Decarbonization, 87 Fed. Reg. 2,769 (Jan. 12, 2022).

The logo features a vertical green bar to the left of the text. The text "Van Ness" is on the top line, "Feldman" is on the bottom line, and "LLP" is positioned to the right of "Feldman".

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Van Ness Feldman LLP has served Alaska Native and American Indian communities and the businesses they own and operate since the day the firm opened its doors in 1977. From the firm's inception through the present day, Van Ness Feldman professionals have been at the cutting edge of legislative, regulatory, litigation, and transactional solutions that power economic development for Native peoples.

Our lawyers and policy professionals have years of experience and diverse talents to assist Native communities and their businesses, as well as stakeholders and business partners collaborating with them, with the conviction that Nation Building and meaningful economic success requires sophisticated national counsel. Van Ness Feldman's capabilities are provided from a platform that is fully integrated, rate-sensitive, and culturally aware. Learn more at [VNF.COM](https://www.vnf.com).