



# Native Affairs Quarterly



# Welcome

Welcome to the inaugural issue of our Native Affairs newsletter. We plan to publish this newsletter on a quarterly basis, and we hope the newsletter will serve as a forum to discuss a range of legal and policy developments of interest to our clients, colleagues, and friends across Indian Country. We welcome your feedback!

Throughout our organization's history, we have served Native communities across the United States—from the northern tip of Alaska to the southern tip of Florida. We are honored to count Native Americans among our partners, employees, and clients. Our colleagues advocate on behalf of Native governments and businesses and work with non-Native stakeholders and partners to advance economic development and opportunity throughout Indian Country.

## For More Information

Several of the articles in this newsletter examine the political transition to the 117th Congress and our expectations for a Biden administration. We invite you to hear from our colleagues in more depth about the political transition in one of several webinars posted on our website:

- 2020 Election Debrief: Outcomes and Their Impacts on Public Policy
- Changes to Congressional Committee Leadership
- Post-Election Natural Resources Policy Outlook
- Post-Election Impacts on the Energy Sector

The Native Affairs Practice Group also hosted a webinar on December 4th on Historical Trauma in Indian Country, in which we discussed opportunities to work with the Biden administration and the 117th Congress on trauma-informed initiatives. All VNF webinars are available through our Resource Center or our Webinar Library. Additionally, we appreciated the opportunity to discuss the implications of the political transition for Indian Country as part of the 36th Annual Alaska Native Law Conference in November, which is available from the Alaska Bar Association.

VNF will host additional webinars on the ongoing political transition in the coming months. Please sign up to receive our written issue alerts and notices about future webinars.

## Included in This Issue

- Getting Ready for January: Notes on the 117th Congress
- New Administration's Prioritization of Native Contracting Could Mean More Economic Development Opportunities for Native-Owned Businesses
- New Administration Could Provide Ideal Backdrop for Tribes Entering Cannabis Industry
- Before the Supreme Court...
- Implementing Trauma-Informed Initiatives Now Will Help Address the Increased Trauma that COVID-19 is Causing in Native American Communities

## Honoring Native American Heritage Month

On October 12, VNF was proud to recognize Indigenous Peoples' Day, acknowledging and celebrating the contributions that Indigenous peoples have made to this Nation. Over the course of Native American Heritage Month (November), our Practice Group led an internal conversation on Tribal Relations and Cultural Awareness and we focused on our pro bono work on behalf of organizations that serve the Native American community. In this issue, we are pleased to feature the firm's work with the Roundtable on Native American Trauma-Informed Initiatives. Our Practice Group also developed a series of Infographics—one for each week of November—which highlight the wide variety of services that our professionals draw upon when aiding and advising our clients. These infographics can be viewed below.



## Getting Ready for January: Notes on the 117th Congress

BY DANIELLE MERCURIO & ANDREW VANDERJACK

The next time you walk through the doors at 1849 C Street, NW, the portrait above the security desk may well feature the first Native American Secretary of the Interior. As has been widely reported, Congresswoman Deb Haaland (D-NM-01) and former Interior Deputy Secretary Michael Connor are among several Native American candidates currently being vetted for the position.

As President-elect Joe Biden prepares to take the helm on January 20, his transition team is identifying landing teams, political nominees, policy agendas, and management plans for early action. For Indian Country, the Biden Campaign's Plan for Tribal Nations serves as a useful framework for early action, with public safety and justice, infrastructure, access to capital, federal procurement, clean energy, climate change, environmental justice, land into trust, and conservation all featured prominently.

But beyond the campaign promises, the Biden administration's policy for Indian Country will be heavily influenced by the actions (or inaction) of the 117th Congress.

The 117th Congress will play a central role in vetting and confirming the new administration's key political nominees and enacting or rejecting legislative initiatives that will advance or undermine the administration's Plan for Tribal Nations. This article therefore provides a preliminary look at the 117th Congress and identifies just a few of the Members who are likely to influence legal and policy developments in Indian Country for the next two years.

When the 117th Congress kicks off in early January, the U.S. Senate will be divided 48-50 in favor of the Republican party.

The ultimate balance of power in the Senate for the 117th Congress hinges on two run-off races in Georgia scheduled for January 5.

If Republicans win just one of the two Georgia elections, they will retain control of the Senate. Intensive campaigning, high profile advocates, and record-breaking campaign spending will influence these key contests.

The results of the Georgia election will have immediate consequences for the Biden administration. The Biden team will need to fill thousands of presidential appointments during the opening months of the new administration, at least 1,200 of which will require Senate confirmation. As a result of changes made in 2013 to the rules of the Senate, the President's nominations are not subject to the filibuster. Still, a majority of Senators must confirm each nomination, and a Republican-led Senate—and a Republican-led Judiciary Committee—could have significant influence on the composition of the administration's political leadership team.

The Georgia run-off also will determine who will lead Senate committees with jurisdiction over issues of importance to Indian Country. In particular, if Republicans retain the majority, Sen. Lisa Murkowski (R-AK) is expected to take over as Chair of the Senate Committee on Indian Affairs. Senator Brian Schatz (D-HI) likely would become Vice Chair.

The Indian Affairs Committee is generally known for taking a bipartisan approach to legislation, and Sens. Murkowski and Schatz would be expected to carry on this tradition. The senators have a shared interest in addressing a wide range of unique legal and policy challenges that affect Indigenous communities within the noncontiguous states they represent. (Former Hawaii Senators Daniel Inouye (D-HI) and Daniel Akaka (D-HI) both served as Chairmen of the Committee, with Senator Inouye serving as Chair for a combined total of five Congresses. The Committee has never been chaired by an Alaskan.)

During the 116th Congress, Senators Murkowski and Schatz demonstrated their interest in working together to advance bipartisan solutions for Indian Country, for example, through their introduction—along with Senators Mazie Hirono (D-HI) and Dan Sullivan (R-AK)—of the INVEST Act, which would create a set aside within the New Markets Tax Credit program for Native American communities. Senators Murkowski and Schatz both sit on the Senate Committee on Appropriations, and Senator Murkowski currently chairs the Senate Appropriations Subcommittee on Interior, Environment, and Related Agencies, with jurisdiction over spending for the Bureau of Indian Affairs, Indian Health Service, and other key agencies.

In the U.S. House of Representatives, although Democrats will retain a slim majority in the 117th Congress, with Republicans successfully flipping several seats from blue to red. Democrats may hold just 222 seats when the new Congress convenes, a number that could diminish further (if only temporarily) if Members leave to join the Biden administration. With 218 votes needed to pass a bill in the House, legislative initiatives (including spending bills) that cannot gain consensus within the House Democratic Caucus will require some level of bipartisanship to move forward.

Congressman Raúl Grijalva (D-AZ-03) will continue to serve as Chairman of the House Committee on Natural Resources, with jurisdiction over a wide range of legislation for Indian Country. We expect Congressman Ruben Gallego (D-AZ-07) to continue to serve as Chairman of the Committee's Subcommittee for Indigenous Peoples of the United States.

A record number of Native American representatives—three Republicans and three Democrats—will serve in the 117th Congress. Congressman Tom Cole (R-OK-04), an enrolled member of the Chickasaw Nation, will start his 10th term. Congressman Cole sits on several key committees, including the House Committees on Appropriations, Budget, and Ways and Means. Congressman Markwayne Mullin (R-OK-02), an enrolled member of the Cherokee Nation, will start his 5th term in the House. He sits on the House Committees on Natural Resources (including the Subcommittee for Indigenous Peoples of the United States) and Transportation and Infrastructure.

Joining the two Oklahoma Republicans, Yvette Herrell defeated incumbent Xochitl Torres Small and will serve as the Congresswoman for New Mexico's second Congressional district. Herrell, an enrolled member of the Cherokee Nation, was previously elected to the New Mexico state House in 2010, where she largely focused on public safety and support for small businesses, drawing on her previous experience as an entrepreneur and real estate agent.

Congresswomen Sharice Davids (D-KS-03) and Deb Haaland, who made history two years ago as the first Native American women to be elected to Congress, both return for second terms.

Congresswoman Davids, an enrolled member of the Ho-Chunk Nation of Wisconsin, serves on the House Committee on Small Business, where she has been a strong advocate for Native small business, as well as the Committee on Transportation and Infrastructure.

Congresswoman Haaland, an enrolled member of the Pueblo of Laguna, serves on the House Committees on Armed Services, Natural Resources (including the Subcommittee for Indigenous Peoples of the United States), and Oversight and Reform. Congresswoman Haaland and Congressman Cole currently serve as co-chairs of the Congressional Native American Caucus.

Congresswoman Haaland is one of a handful of candidates reportedly under consideration by the Biden transition team for possible nomination to be Secretary of the Interior. Her nomination has received support from various sources, including from Chairman Grijalva, whose name also had been circulated for the position. Congressman Grijalva signaled some time ago that he was no longer interested in the role and urged fellow committee members to support Congresswoman Haaland, stating, "It is well past time that an Indigenous person brings history full circle at the Department of Interior."

From Hawaii, Democrat Kaiiali'i Kahele will become the second Native Hawaiian to represent his state in Congress. A combat veteran and commercial airline pilot, Mr. Kahele entered Hawaii state politics in 2016, when he was appointed to the state Senate by Governor David Ige to replace his father, Gil Kahele, who passed away that year. He was re-elected twice to the state legislature and recently served as the majority floor leader, largely focusing his legislative efforts on the economic development of Hilo and East Hawaii.

Broadly speaking, we expect issues of importance for Indian Country in the 117th Congress to include the following: public safety and justice (in part, through reauthorization of the Violence Against Women Act and enactment of new language defining special tribal criminal jurisdiction); infrastructure (including tribal transportation reform, broadband funding, and equitable access to water infrastructure funding, an ongoing issue highlighted by the ongoing COVID-19 pandemic); and Native contracting and procurement. All of these issues received some attention during the 116th Congress, but relatively little was accomplished. All of these issues overlap broadly with many of the priorities listed by the Biden team in its Plan for Tribal Nations.

In addition, several pending tribal tax reform initiatives likely will remain at the forefront, particularly if a subset of these legislative priorities do not advance as part of a tax extenders bill in the final days of the 116th Congress.

National Congress of American Indians and Native American Finance Officers Association are among the organizations pressing for legislation to address multiple tribal tax priorities, including efforts to: increase deployment of New Markets Tax Credits to Indian Country; increase the deployment of low income housing tax credits to Indian Country; increase the Indian employment tax credit; clarify the public charity status of organizations that support Indian tribes; empower Indian tribes to utilize tax-exempt debt; clarify whether certain employee benefit plans maintained by Indian tribes are subject to federal minimum standards for private benefit plans; and extend certain authorities to Indian tribes that would enable parents to ensure that adoptive parents of Native children are able to claim the adoption tax credit.

As the 117th Congress gets underway, we hope to share our thoughts on a range of legal and political developments in future editions of this newsletter. For additional commentary on the potential impacts of this transition, we invite you to join one of several VNF webinars on this topic to be scheduled in the coming months. To view past webinars on the political transition and related updates and alerts, please visit our Resource Center or our Webinar Library.



## New Administration's Prioritization of Native Contracting Could Mean More Economic Development Opportunities for Native-Owned Businesses

BY MELINDA MEADE MEYERS

The incoming Biden administration has signaled that it plans to prioritize Native economic development, which may continue the trend of increasing and streamlining opportunities for Native-owned businesses through regulation as well as high-level political support for legislative reform. On October 8, 2020, President-Elect Joe Biden released his plan for how his administration will work with Tribal Governments. While many of the elements of the plan are also part of Biden's larger policy platforms, the Biden-Harris Plan for Tribal Nations contains several proposals that specifically encourage Native American economic development and efforts to invest in Native-owned small businesses.

Native-owned businesses—particularly those owned by Tribes, Alaska Native Corporations (ANCs), and Native Hawaiian Organizations (NHOs)—

seeking to take advantage of economic opportunities presented by the new administration should take note of the following objectives of the Plan for Tribal Nations:

- Provide Native-owned small businesses and other small businesses with an ambitious “restart package” to survive the current economic crisis caused by the COVID-19 pandemic.
- Increase access to capital for Native-owned businesses by:
  - Creating a Small Business Opportunity Fund that leverages more than \$150 billion in new capital and opportunities for Native businesses and other minority-owned small businesses. This fund is intended to spur more than \$50 billion in additional public-private venture capital funds by dedicating funding to entrepreneurs who create jobs and growth in lower-income areas, including tribal areas, with an emphasis on reaching businesses owned by Native people and other people of color.
  - Tasking the Treasury Department with supporting Native community participation in the New Markets Tax Credit program and expanding access to \$100 billion in low-interest business loans to small businesses, including those owned by Native entrepreneurs, by extending state, local, tribal, and nonprofit lending programs with \$20 billion in new capital.
  - Capitalizing Community Development Financial Institutions (CDFIs) by providing increased resources to the Native American CDFI Assistance Program, which has proven to be a successful way to increase capital access across Indian Country.
- Strengthen implementation of the Buy Indian Act within the Bureau of Indian Affairs (BIA) and Indian Health Service (IHS) to increase procurement opportunities for Native-owned businesses (more below).
- Increase funding for the Indian Community Development Block Grant to help fund tribal efforts to expand affordable housing, improve infrastructure, and increase economic opportunities for low-income individuals and communities.

The Plan for Tribal Nations also includes several elements geared towards expanding long-term technical assistance and federal contracting preferences for small disadvantaged businesses (SDBs), including those owned by Native Americans, such as tripling the federal goal for contracting with all SDBs from 5% to a minimum of 15% of all federal procurement dollars by 2025. More specific to Native participation in federal procurement, the Biden administration aims to:

- Increase and enhance Native participation in federal procurement through formula-based awards; widespread outreach and counseling to small business owners, especially tribal business owners and business owners of color; and transparent, frequent monitoring of contract awards. The Biden administration plans to require prime contractors to develop and fully execute plans to increase subcontracting opportunities for SDBs, including those owned by Native Americans.
- Improve the Small Business Administration's (SBA) 8(a) Business Development Program. The Biden administration plans to increase the 8(a) Program's administrative capacity, encourage greater participation among businesses owned by Native American entrepreneurs, Indian tribes, NHOs, and ANCs, and streamline the application process. Biden also plans to extend the maximum length of time that a firm may participate in the 8(a) Program and create a more supportive off-ramp to help program graduates transition out. The 8(a) Program will require public disclosure of program participant demographics to ensure participation is equitable.

In addition to the Plan for Tribal Nations, other developments benefitting Native-owned businesses are already in the works. On the regulatory side, for example, the SBA continues to streamline the regulations governing the 8(a) Program. On October 16, 2020, the SBA released its final rule consolidating its mentor-protégé programs and making other changes to small business government contracting regulations, including those governing the 8(a) Program, aimed at simplifying or eliminating regulations. Further, on November 10, 2020, the U.S. Department of Health and Human Services proposed new regulations to guide implementation of the Buy Indian Act, which provides the IHS with authority to set-aside procurement contracts for Indian-owned and controlled businesses. The proposed rule establishes acquisition policies and procedures for the IHS that are consistent with those adopted by the BIA, which is the only other federal agency where the Buy Indian Act is applicable. The IHS may use the Buy Indian Act to give preference to Indian Economic Enterprises through set-aside contract awards when acquiring supplies, services, and covered construction to meet IHS requirements.

Finally, the Conference Report for the 2021 National Defense Authorization Act contains, among other language of interest, a provision that would require the SBA to allow for a one-year extension for 8(a) Program participants who were admitted to the Program by September 9, 2020. If signed by President Trump, the SBA will be required to issue regulations to carry out this provision within 15 days.

Going into the 117th Congress, Tribes, ANCs, and NHOs will need to remain vigilant.

While the Native contracting community saw several significant issues arise in the current Congress aimed at improving Native contracting—including the increase in the cap on sole-source awards, efforts to improve the Department of Defense Indian Incentive Program funding mechanism, and the failed attempt to exempt the SBA from the requirements of Category Management—several proposals floated during the 116th Congress would have undermined Native contracting.

One proposal would have dramatically increased sole-source caps for individually-owned small businesses, which would have had significant impacts on the ability of entity-owned businesses (i.e., those businesses owned by tribes, ANCs, and NHOs) to compete for a significant pool of federal contracts. Another proposal would have enabled large venture capital firms to own and potentially control 8(a) firms and women-owned small businesses. Nevertheless, the new administration's prioritization of Native contracting and procurement, combined with Congress's interest in these issues in recent years, suggests that we will continue to see legislative activity aimed at boosting Native economic development in the new Congress.

If you would like more information on how the transition or new Congress may impact your business, please contact Melinda Meade Meyers or Andrew VanderJack.



## New Administration Could Provide Ideal Backdrop for Tribes Entering Cannabis Industry

BY ROBERT CONRAD & LAURA JONES

With the current legal and financial restrictions on the sale of cannabis, and confusion regarding the legal framework that governs this multi-billion dollar medical and recreational trade, many Tribes may have been hesitant or unable to enter the cannabis industry. The upcoming change in administration, along with legislative developments on both the federal and state level, suggest that the legal landscape for the cannabis industry may move further towards rationalization. Tribes considering entering the industry—as well as those that have been in the cannabis business for some time—should be aware of several key legal developments that will influence the future of this industry.

As sovereign nations, Tribes have the inherent authority to protect and promote the health and welfare of their citizens using methods most beneficial for their communities. This authority is plenary and provides a tribe with exclusive power over its members and territory.

However, the authority is subject to limitations imposed by federal law. In other words, as long as cannabis is illegal under federal law, Tribes enter the industry with the risk of potential federal censure and prosecution.

As more and more states have legalized medicinal and/or recreational marijuana use, an increasing number of Tribes have become involved in the cannabis industry. Many Tribes, particularly those in California, have been involved in the medical marijuana industry for over a decade. This involvement is not without its legal limitations. For example, California Tribes are subject to state licensing regulations in order to participate in the recreational market, which requires cessation of sovereignty.

Other Tribes, such as the Bay Mills Indian Community in Michigan, are just entering the cannabis industry. Michigan legalized marijuana for recreational use in 2019, and Bay Mills opened the first Tribally-owned dispensary in Michigan last month. As reported by Native Business Magazine, Bay Mills Tribal Chairman Bryan Newland stated that the Tribe is “excited about what this means for economic development and job opportunities in Bay Mills,” and highlighted that “[c]ommunity-owned and community-grown will be the focus of our operation.” Muscogee (Creek) Nation in Oklahoma, recently updated its laws to decriminalize medicinal marijuana within its Reservation boundaries, and the Tribe plans to explore economic opportunities for medical marijuana.

Regardless of whether a tribe has been in the cannabis business for over a decade or only a few weeks, a new administration could mean significant changes to the industry. For example, through administrative processes, there will likely be a shift in the scheduling of cannabis from a Schedule I to a Schedule II drug under the Controlled Substances Act (21 U.S.C. 802), which would allow for cannabis to be used—as a matter of federal law—for limited medical purposes. Indeed, the Biden campaign signaled that it hopes to allow states to set their own laws regarding recreational use of cannabis.

Some cannabis-related issues for tribes to keep in mind as the new administration takes over include:

- If cannabis is eventually legalized for medicinal use under federal law, then the remaining states that criminalize cannabis would be required to allow the cannabis industry to enter their state. States that currently criminalize marijuana use and possession entirely include Alabama, Idaho, Kansas, South Carolina, Tennessee, and Wyoming. Tribes that are located within these state borders could potentially be at the forefront of the industry in these states.

- Federal legalization of medicinal cannabis would likely mean that financial institutions and insurance companies would be able to legally do business with the medical cannabis industry.
- There are several pieces of legislation pending before Congress that could have a significant impact on the cannabis industry, and we expect to see these bills reintroduced in the 117th Congress:
  - The SAFE Banking Act, H.R. 1595 and S. 1200, would allow financial institutions and insurers to legally do business with the cannabis industry without fear of legal action by the federal government.
  - The STATES Act, H.R. 2093 and S. 1028, would allow states to legalize cannabis without risking federal intervention.
  - The MORE Act, introduced by Senator Kamala Harris as S. 2227 and by Congressman Jerrold Nadler as S. 3884, would fully remove cannabis from the Controlled Substances Act. The Act also provides pathways for ownership opportunities in the cannabis industry and establishes funding sources to reinvest in communities disproportionately affected by the war on drugs. On December 4, 2020, the House passed the MORE Act; it is now pending in the Senate. Republican leadership in the Senate may be unwilling to allow this legislation to move forward in the 117th Congress, making the upcoming Senate runoff election in Georgia of particular interest to the cannabis industry.
- Tribes can seek Treatment as a State (TAS) under several environmental statutes, allowing greater autonomy and resilience related to environmental laws on tribal lands. For example, the Federal Insecticide, Fungicide, Rodenticide Act (FIFRA) requires all pesticides to be registered before they may be sold or distributed. Since cannabis is illegal federally, this means no pesticide has been registered for use on cannabis. (Earlier this year, however, the Environmental Protection Agency (EPA) approved the use of 10 pesticide products for hemp ahead the 2020 growing season after Congress removed hemp-derived products from Schedule I). If cannabis becomes legal federally, then the EPA could delegate implementation of the FIFRA program to tribes that have met the requirements for TAS.

Aside from the upcoming shift in administration, tribes should also keep the following cannabis related issues in mind with respect to state regulation:

- As more states move to legalize cannabis for recreational use, individual tribes may wish to consider becoming more involved in the states’ legislative and regulatory processes.

Tribes can advocate for provisions within state law that will benefit tribal industry participants, including grant programs for minority and/or tribally owned cannabis businesses. Tribes also can advocate for Tribal-State marijuana compacts like those implemented in Washington state, which allow for collaboration between a tribe and the state for regulating the sale of marijuana on tribal lands.

- Tribes may wish to consider developing their own Tribal licensing and inspection processes for cannabis that follow the processes of the state(s) in which they are located, if such processes exist. This may help avoid the issues faced by Tribes in California where, due to an oversight in the legislative process, Tribes were unable to participate in the recreational cannabis industry without allowing the state to regulate their facilities. By establishing this regulatory process, Tribes could potentially participate in the recreational market without state involvement.

The expected changes within the cannabis industry offer unique opportunities for tribes seeking to leverage their status and exercise their inherent right to provide economic development, taxable revenue, and job opportunities for tribal members. If you have any questions about how these developments could impact your Tribe, please contact Robert Conrad at [rac@vnf.com](mailto:rac@vnf.com) or Laura Jones at [ljones@vnf.com](mailto:ljones@vnf.com).



## Before the Supreme Court...

BY PATRICK DAUGHERTY

With the current legal and financial restrictions on the sale of cannabis, and confusion regarding the legal framework that governs this multi-billion dollar medical and recreational trade, many Tribes may have been hesitant or unable to enter the cannabis industry. The upcoming change in administration, along with legislative developments on both the federal and state level, suggest that the legal landscape for the cannabis industry may move further towards rationalization. Tribes considering entering the industry—as well as those that have been in the cannabis business for some time—should be aware of several key legal developments that will influence the future of this industry.

As sovereign nations, Tribes have the inherent authority to protect and promote the health and welfare of their citizens using methods most beneficial for their communities.

This authority is plenary and provides a tribe with exclusive power over its members and territory. Cooley was charged with possession with intent to distribute and possessing a firearm in furtherance of drug-trafficking. In the District Court, Cooley successfully moved to suppress the evidence on the theory that the officer acted outside the scope of his authority as a tribal law enforcement officer in detaining Cooley and conducting a search. Tribal officers, the court held, may only detain a non-Indian on a right of way when the violation is “apparent” or “obvious” a higher standard than the traditional reasonable suspicion and probable cause standards. A Ninth Circuit panel affirmed, though four judges would have granted the government’s request to have the case reheard *en banc*.

## The case may clarify tribal jurisdiction on highways running through reservations, which have also been the subject of litigation and threats of litigation related to COVID-19 checkpoints at Reservation boundaries this year.

The government asked the Supreme Court to take the case arguing that the Ninth Circuit’s decision “diminishes the inherent sovereign authority of Indian tribes and unjustifiably impedes the enforcement of state and federal law on Indian reservations[.]” The government also argued that state and federal law enforcement cannot be expected to fill the void created by the Ninth Circuit’s decision due to the “sheer size of reservations and the lean staffing of law enforcement departments in remote areas.” Among other things, the government cited the work of journalist Sierra Crane Murdoch describing the hours it could take for non-tribal law enforcement to respond to calls in Indian country.

The Crow Tribe supported the government’s request as an *amicus curiae*, noting their 1868 treaty provision ensuring their right to have “bad men” apprehended, prosecuted, and excluded from the Reservation. The Crow Tribe was supported by the National Congress of American Indians, the National Indigenous Women’s Resource Center and more than a dozen other Tribes and tribal organizations.

The case may clarify tribal jurisdiction on highways running through reservations, which have also been the subject of litigation and threats of litigation related to COVID-19 checkpoints at Reservation boundaries this year.

Notably, this case may be the first indication of recently confirmed Justice Barrett’s views on matters of federal Indian law. A memorandum prepared by the Native American Rights Fund in October 2020 concluded that among the 900 cases Judge Barrett heard on the Seventh Circuit, none involved an Indian Tribe or an Indian law issue. The Supreme Court agreed to hear the case on November 20, 2020. Oral argument has not yet been scheduled.

## Implementing Trauma-Informed Initiatives Now Will Help Address the Increased Trauma that COVID-19 is Causing in Native American Communities

BY DAN PRESS

It is now well established by neuroscientists that historical trauma of the kind suffered by Native Americans as a result of Conquest, as well as Adverse Childhood Experiences (ACEs), produce physiological changes in the brain that raise the stress levels of those subjected to such experiences for their entire lives, leading or contributing to such problems as substance abuse, incarceration, self-harm and suicide, obesity and diabetes. It is also well established that disasters such as hurricanes and floods cause trauma that increases the stress among the victims, particularly children and youth. The combination of the trauma caused by the ongoing pandemic and historical trauma will have powerful adverse impacts on children across the country, particularly in Native American communities. The impacts of the pandemic will be felt for years. In fact, the experience after Hurricane Harvey showed that the worst impacts of the trauma manifested 18 months after the disaster.



The pandemic has resulted in the physical removal of children from schools, which in most cases today provide a supportive environment for children, particularly those who have already suffered from the effects of historical trauma. Online education cannot replace in-person education, and limited benefits of online interaction with teachers and counselors do not reach all children equally. We have heard from school administrators in rural areas of Indian Country who have observed, in some cases, the absence of 2/3 of students from online classes. Teachers and students alike will face new challenges when students return to in-person education. For example, it is well-established that trauma leads to increased “acting out” in the school setting, which in turn can lead to increases in suspensions and expulsions and significantly interfere with the learning environment in ways that can have ramifications for generations.

In an effort to help remedy the effects of trauma in Indian Country, the VNF Native Affairs practice has been assisting the Roundtable on Native American Trauma-Informed Initiatives on two initiatives.

In the first, we have worked with the Roundtable to develop and present programming to an Indian tribe that will provide teachers with the skills they need to deal with the increased trauma the pandemic is likely to bring to the schools serving Native American students.

Native American trauma-informed experts such as Dr. Tami DeCoteau, who serves as President of the Roundtable, have developed successful programs for schools to use to combat the problems caused by trauma. For example, Dr. DeCoteau assisted the San Carlos Apache Public School District with efforts to implement a comprehensive trauma-informed program that reduced suspensions by 80 percent while improving academic performance. Under the program the Roundtable has proposed, Dr. DeCoteau in partnership with local universities, would provide teachers and counselors at all of the tribe’s schools—on and near the reservation—with training to help their students build resilience in the face of trauma.

Combatting the impact of trauma requires a comprehensive approach that involves all of the institutions on the reservation—the schools, the health and mental health programs, law enforcement, the courts, the social welfare programs and most importantly the tribal government. The Menominee Tribe of Wisconsin has demonstrated the amazing improvements that can be achieved through a comprehensive trauma-informed resilience strategy.

We are also advocating before Congress to include specific funding in COVID-19 relief legislation and appropriations legislation that targets assistance to Native American communities for comprehensive programs to deal with the increased trauma caused by the pandemic.

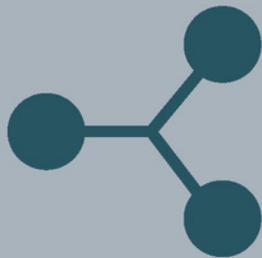
VNF will continue to work with the Roundtable to lobby for resources that can be deployed by American Indian, Alaska Native, and Native Hawaiian communities to implement programs designed to keep the trauma caused by COVID-19 from exacerbating a second devastating pandemic—a mental health pandemic—that has impacted Native American communities for generations and deserves attention at all levels of government through trauma-informed planning, programming and funding.

On December 4th, the firm hosted a webinar on historical trauma. Dr. Tami DeCoteau and I presented on the science of historical trauma, provided examples of Native American communities that have implemented trauma-informed programs, and discussed ways tribes can use their CARES Act funds to implement programs to address the severe trauma resulting from the combination of historical trauma and the trauma caused by the pandemic. A recording of the webinar is available at this link. This is the first in a series of webinars the firm will be hosting in the coming months on historical trauma and programs to address it. To make sure you get the notices, please email Anat Allal at [aja@vnf.com](mailto:aja@vnf.com).

# NATIVE AFFAIRS AND PUBLIC POLICY

## COLLABORATIVE

What sets Van Ness Feldman apart is the depth and breadth of expertise possessed by our professionals in the areas of Native Affairs and public policy, Indian law, environmental regulation, natural resources management, public lands, energy policy, transportation and infrastructure, federal appropriations, and government contracting. **We work collaboratively across our practices to ensure that clients are served by tailored teams of experts that can help clients anticipate trends, adapt to changes in the political and regulatory environment, and accomplish set objectives.** Our Native Affairs practice has over 40 years of experience solving challenges that arise when working with all levels of government, whether that challenge is local, national or international in scope.



Many of our professionals are former Members of Congress, Congressional staff, and senior officials who served within the White House, the Department of the Interior, the Environmental Protection Agency and other departments and agencies. **We value the experience and knowledge our colleagues bring to Van Ness Feldman from their years of public service.** The collective knowledge and expertise of our Native Affairs team allows us to understand the needs of the public officials with whom we work and to provide a complete and sophisticated suite of services to our clients.

## CONNECTED

## CONSCIENTIOUS

We honor Native Americans as the first people of these lands and recognize their culture, history, and communities. **We are proud of the work that our Native Affairs practice group does to advance Native issues - by both advocating on behalf of Native governments and businesses and working with non-Native stakeholders and business partners to advance economic development and opportunity in Indian Country.** Our goal is to see our clients succeed, whether that means generating bipartisan support for legislation to settle indigenous land claims, developing solutions concerning the role of Tribes in federal permitting decisions, or interfacing with federal agencies to ensure Native-owned businesses are able to successfully navigate the federal bureaucracy.



## WE CAN BE YOUR TRUSTED PARTNER

Van Ness Feldman's Native Affairs practice is a cornerstone of the firm. Since the mid-1970s, Van Ness Feldman is proud to have cultivated a record of historic achievements for Indian Country, with successes on behalf of Indian Nations, Alaska Native interests, Native coalitions, Native nonprofits, and companies and foundations committed to thoughtfully navigating and collaborating on mutually beneficial engagements with Native American communities.



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# ENVIRONMENTAL LAW IN TRIBAL COMMUNITIES

## OVERVIEW

For over 40 years, Van Ness Feldman's Native Affairs practice has worked with Tribal governments and entities in the lower 48 states and Alaska to help solve environmental challenges. We work with our clients to ensure that their interests are meaningfully considered and addressed during environmental planning and permitting, to understand and anticipate regulatory changes, and to protect and advance Tribal sovereignty over environmental and cultural resources.



## CONSULTATION, COMPLIANCE & ENFORCEMENT

The environmental attorneys in our Native Affairs practice group work with clients to ensure compliance with and address legal and enforcement challenges related to a broad range of environmental and natural resource laws involving hazardous waste, air quality, land use, water, wetlands management, climate change, and endangered species. We have a deep understanding of the underlying legal requirements and regulatory processes coupled with strong relationships with the federal agencies that administer these programs. This allows us to quickly navigate and resolve any environmental issues, and to support Tribal programs that complement or administer those programs, including meeting requirements for "Treatment as a State" status, which is permitted under many of the major federal environmental laws.

## TRIBAL REGULATIONS & SERVICES

Van Ness Feldman provides counsel to Tribal organizations, non-profit groups, and corporate partners working in Indian Country on a range of land use issues, including negotiating land access, acquisition, and exchanges, and scoping development agreements for natural resources. Since the firm's founding, we have also served ANCs and other Alaska Native interests on issues relating to the management and use of lands in Alaska under ANCSA, ANILCA, and related legislation, making our attorneys some of the foremost authorities in these areas.



## HOW WE CAN HELP

Our team can assist with a wide range of environmental and natural resource related issues by working with the federal agencies, including the EPA and the Interior Department, and, whenever necessary, with Congress and key Congressional committees. We can work with you to identify and resolve environmental regulation and compliance issues related to the negotiation of rights-of-way and leases on Tribal lands, applications to take land into trust, efforts to preserve and share cultural heritage, and a wide range of business- and industry-related challenges.

# LITIGATION IN INDIAN COUNTRY

## OVERVIEW

At Van Ness Feldman, we understand that litigation can be costly and time consuming. We also understand the unique demands of litigation on behalf of Tribes. In addition to jurisdictional, procedural, and choice-of-law issues in litigation involving Tribes, **we understand Tribal sovereignty and our representation is tailored accordingly.**



## HOW WE CAN HELP



Our litigators have decades of experience working with Tribal governments and businesses to resolve complex and sensitive matters through litigation or negotiated settlement. **We work in close partnership with our clients to identify solutions that protect Tribal resources and sovereignty, while building consensus within the various stakeholder groups.** Our litigators have worked to protect air, water, and land resources, sacred cultural sites, and Tribal trust resources. Our litigators also have a proven track-record in defending Tribal businesses.

## FORWARD THINKING

**Our connections within Indian Country allow us to stay at the forefront identifying risk and opportunities for Tribal governments.** Our litigators also work collaboratively across all of the firm's practice groups to stay on top of legislative and regulatory actions, in order to identify multi-pronged strategies in our representation of Tribal governments and entities.



## WE CAN BE YOUR TRUSTED PARTNER

Our Native Affairs practice has over 40 years of focused experience solving challenges that face Tribal governments and entities. We take a uniquely collaborative approach—with our clients, stakeholders, and other VNF professionals—to identify creative solutions to these challenges.



Van Ness  
Feldman LLP

[vnf.com](http://vnf.com)

# TRIBAL AND ALASKA NATIVE CONSULTATION

## DUTY TO CONSULT

The U.S. has a unique relationship with Indian Tribes, recognizing them as sovereign nations under the U.S. Constitution, and in treaties, statutes, Executive Orders, judicial interpretations, and government policies. In recognition of this unique relationship and sovereignty, Federal and State agencies have adopted policies and procedures that require consultation with Tribal governments on various activities. The consultation process gives Tribal governments the ability to identify and protect cultural values, traditional practices, culturally significant places, religious beliefs, and the legal rights of their Tribal citizens. Additionally, under certain Federal laws and policies, Federal agencies are required to consult with Alaska Native Corporations (ANCs) on the same basis as federally recognized Tribes.



## SIGNIFICANCE

As demonstrated by the protests at Standing Rock and elsewhere, failure to follow consultation procedures and provide for meaningful consultation can lead to contentious litigation and overall harm to Native interests and industry alike. Van Ness Feldman recognizes the importance of consultation, and takes a collaborative approach to engage Tribal governments, Alaska Native entities, Federal and State agencies, and industry leaders in identifying and implementing procedures to ensure that the consultation process is taken seriously, is meaningful and timely, and results in mutual benefit to all parties involved.

## HOW WE CAN HELP

Van Ness Feldman provides a depth of relationships, knowledge and experience to effectively serve our clients across the country. Our professionals have direct experience working alongside top U.S. officials to find creative and beneficial solutions to problems impacting Indian Country, Alaska Native lands, and beyond. However, our work does not stop at the government level. We have assisted industry groups in developing and hosting one-of-a-kind programs to bring together Tribal leaders and industry professionals in a dialogue to aid in future consultation efforts. We also have aided corporate clients in developing Tribal engagement and environmental justice protocols that encourage engagement of Tribal and Alaska Native interests.



## WE CAN BE YOUR TRUSTED PARTNER

Van Ness Feldman's Native Affairs practice has over 40 years of focused experience solving challenges that arise when working with Federal, State, and Tribal governments, and other Tribal and Alaska Native groups. We work with our clients to anticipate trends, adapt to changes in the political and regulatory climate, and achieve client goals. We have built lasting relationships with industry, non-profit organizations, and governments at all levels, and in the inter-related areas of energy, environment, natural resources, and public lands.

The logo features a vertical green bar to the left of the text. The text is in a white, sans-serif font, with "Van Ness" on the top line and "Feldman" on the bottom line. "LLP" is positioned to the right of "Feldman" in a smaller font size.

# Van Ness Feldman LLP

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](http://VNF.COM).