



Native Affairs Quarterly



Welcome

Welcome to Van Ness Feldman's Native Affairs Quarterly. Published on a quarterly basis, 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. We welcome your feedback!

Included in This Issue

- VAWA Reauthorization Brings Renewed Focus on Jurisdiction, Particularly for Alaska Native Tribes
- The Biden Administration Makes Tribal Consultation a Priority
- Tribes and Cannabis: Next Steps for Tribes to Consider While Awaiting Federal Legislation
- Department of Defense Indian Incentive Program Funding Fix to Help Clear the Rebate Backlog and Increase Benefits to Native American Subcontractors
- The Biden Administration's Emphasis on Combating Climate Change and Advancing Environmental Justice: What Does It Mean for Indian Country?
- The Overlap of Native American Rights and EJ: How the Concerns of Tribal Nations are Included in, but not Exhausted by, Climate Change and Environmental Justice Policies
- Addressing the Combined Impact of Historical Trauma and the COVID-19 Pandemic
- Role of Native CDFIs Expected to Strengthen with New Programs Focused on CDFIs as Engines of Growth and Recovery
- Update on Efforts to Establish a Proportional Set-Aside for Indian Country Within the New Markets Tax Credit Program
- Congress Needs to Provide Equitable Treatment for Native-Owned Businesses Participating in BIA's Loan Guarantee Program

In Case You Missed It...

On February 24, in our second webinar on historical trauma, "Addressing Historical Trauma in Indian Country: Stories of Healing and Success from the Implementation of Trauma-Informed Programming," we heard from community leaders who are at the forefront of implementing Trauma-informed programming in Indian Country: Lisa X'unyéil Worl (Tlingit), STEPS Partnership Coordinator from the Association of Alaska School Boards, Jerry Waukau (Menominee), Menominee Tribal Health Administrator, and Wendell Waukau (Menominee), Superintendent for the Menominee Indian School District, shared the benefits and hurdles of implementing trauma-informed programs in their communities. Check it out at [this link](#).



VAWA Reauthorization Brings Renewed Focus on Jurisdiction, Particularly for Alaska Native Tribes

BY CHARLENE KOSKI

A casualty of bipartisan politics, the Violence Against Women Act (VAWA) expired in 2019 but is set to rebound with reauthorization legislation in the 117th Congress. With the support of the Biden Administration, we think Congress will ultimately advance legislation that includes an expansion of VAWA's special domestic violence jurisdiction for all Tribal governments, including Alaska Native Tribes.

VAWA formally expired in February 2019. [1] Although the House of Representatives passed a reauthorization bill in March 2019, that legislation (H.R. 1585) died in the Senate due largely to bipartisan disagreement over a key provision that would have extended the Act's firearm restrictions to include current and former dating partners convicted of abuse or stalking charges. President Biden, who as a U.S. Senator first introduced the law in 1990, has said he will make reauthorization of VAWA one of his top priorities in his first 100 days in office. The House of Representatives recently introduced reauthorization legislation, H.R. 1620, week and, on Wednesday night, that Bill passed the House with a vote of 244-172. The President issued a [statement](#) applauding the introduction of H.R. 1620 and urging Congress to act. If his efforts are successful, American Indian and Alaska Native Tribes stand to gain an important new tool to combat domestic violence in Indian Country.

The Violence Against Women Reauthorization Act of 2013 (VAWA 2013) affirmed Tribes' inherent power to exercise special domestic violence criminal jurisdiction (SDVCJ) over certain defendants, regardless of their Indian or non-Indian status, when those defendants committed acts of domestic violence or other qualifying acts in Indian Country. This provision in VAWA 2013 created a framework for Tribal courts to criminally prosecute non-Indians—something Tribes had not been able to do since the U.S. Supreme Court's decision in *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978), which held that Tribal courts lacked criminal jurisdiction over non-Indians.

Section 910 of VAWA as originally enacted exempted Alaska Tribes. Although VAWA 2013 repealed that rule and authorized all Tribes in Alaska to exercise SDVCJ, because under VAWA 2013 the exercise of SDVCJ was expressly tied to Indian Country, which generally does not include Alaska Native villages or Native-owned lands in Alaska, as a practical matter most Alaska Tribes, with the exception of the Metlakatla Indian Reservation, remained ineligible. [2] Thus, although the [National Congress of American Indians](#) reports that 27 Tribes have implemented SDVCJ, none of those Tribes are in Alaska, even though Alaska Native Women are over-represented in the domestic violence victim population by 250 percent and, among Native American Tribes, suffer the highest rates of domestic and sexual violence in the country. [3]

To address this disparity, H.R. 1585 included a new section proposed by Rep. Don Young (R-Alaska), who serves as the Ranking Member of the Subcommittee for Indigenous Peoples, that would have created a pilot project allowing up to five Tribes in Alaska to implement criminal jurisdiction under VAWA regardless of the defendant's Indian status. [4]

The bill would have expanded the definition of "Indian Country" for purposes of the pilot project to include "Alaska Native-owned Townsites, Allotments, and former reservation lands acquired in fee by Alaska Native village corporations pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 33) and other lands transferred in fee to Native villages," and "all lands within any Alaska Native Village with a population that is at least 75 percent Alaska Native." Section 903 of H.R. 1585 also expanded generally the scope of VAWA Tribal jurisdiction over non-Indians to cover the crimes of assault of a law enforcement or correctional officer, obstruction of justice, sex trafficking, sexual violence, and stalking.

This extended jurisdiction is termed “special Tribal criminal jurisdiction,” and applies to Alaska Native Tribes participating in the pilot program. [5] H.R. 1585 also included a provision amending 18 U.S.C. 2265 to affirm the authority of Tribes in Alaska to issue and enforce protection orders. H.R. 1620, introduced last week, includes the same Tribal jurisdiction provisions contained in H.R. 1585.

Although H.R. 1585 did not pass the Senate, in October 2019, as part of the reauthorization effort, Senator Lisa Murkowski (R-Alaska), now Vice Chair of the Senate Committee on Indian Affairs, introduced the Alaska Tribal Public Safety Empowerment Act, [S. 2616](#), which also would have extended special Tribal criminal jurisdiction to up to 30 Alaska Native Villages or village consortia as part of a pilot program. Instead of redefining the term “Indian Country” for purposes of allowing Alaska Tribes to exercise jurisdiction pursuant to VAWA, as H.R. 1585 had done, Senator Murkowski’s legislation would expand the jurisdictional reach of Alaska Tribes participating in the pilot to all Alaska Native Villages. Like H.R. 1585, S. 2616 would affirm the authority of Alaska Tribes participating in the pilot program to exercise general civil jurisdiction, as well as criminal jurisdiction over crimes of domestic violence, dating violence, violation of a protective order, sexual violence, stalking, sex trafficking, obstruction of justice, and assault of a law enforcement or correctional officer. Additionally, S. 2616 would affirm the inherent authority of participating Tribes to exercise jurisdiction over any crime against a child, and any crime involving the possession, transportation, or sale of alcohol or drugs. [6] S. 2616 also expressly recognized the inherent authority of Alaska Tribes to issue and enforce protection orders through civil contempt proceedings, exclude violators from the Village, and use other appropriate mechanisms to address matters that are the subject of protect orders when those matters arise anywhere in the Village.

Either H.R. 1585 or the Alaska Tribal Public Safety Empowerment Act would have affirmed the inherent authority of Alaska Native Tribes over their Villages and provided new ways for those Tribes to fight domestic violence committed against Alaska Native women, and both will undoubtedly inform renewed discussions surrounding reauthorization. H.R. 1620, which contains H.R. 1585’s Tribal jurisdictional provisions, has set the stage for those discussions, which we expect to lead to reauthorization legislation that includes an expansion of Tribal jurisdictional authority for all Indian Tribes, including those in Alaska.

[1] Although the Act expired, Congress may continue to appropriate funding for VAWA grants and VAWA’s underlying law and provisions not tied to specific funding levels remain in place. See [The Violence Against Women Act – An Ongoing Fixture in the Nation’s Response to Domestic Violence, Dating Violence, Sexual Assault, and Stalking | OVV | Department of Justice; VAWA is Unauthorized – Now What? – NTF \(4vawa.org\)](#).

[2] See Cohen’s Handbook of Federal Indian Law 4.07[3][b], at 342 (Nell Jessup Newton ed., 2009) (describing reach of the Alaska Native Claims Settlement Act (ANCSA)); see also [Tribal Affairs \(justice.gov\)](#) (to qualify for SDVCJ grants, an Indian tribal government must have jurisdiction over Indian Country). The Metlakatla Indian Community voted to opt out of ANCSA and Metlakatla’s Annette Island Reserve retained its status as Indian Country. Other Alaska Native villages generally are not located within Indian Country, as currently defined under federal law.

[3] H.R. 1585, S. 2616 (citing statistics from the report of the Indian Law and Order Commission).

[4] A transcript of Rep. Young’s speech introducing the amendment can be found [here](#).

[5] H.R. 1585, Sec. 903.

[6] S. 2616.



The Biden Administration Makes Tribal Consultation a Priority

A Barrage of Dear Tribal Leader Letters Seeks Input from Tribal Governments and Native American Interests on a wide range of issues; but where Tribal Consultation Will End Up Remains a Big Question

BY MARANDA COMPTON & JONATHAN SIMON

On January 26, 2021, President Biden issued a Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships that seeks to honor the United States’ commitment to Tribal Nations by recommitting to and ensuring the effectiveness of Federal agency processes for consultation with Tribal Nations and Tribal officials. The Memorandum states that it is a priority of the new Administration to “make respect for Tribal sovereignty and self-governance, commitment to fulfilling Federal trust and treaty responsibilities to Tribal Nations, and regular, meaningful, and robust consultation with Tribal Nations cornerstones of Federal Indian policy.” A key part of this priority will be in robust and meaningful consultation with Tribal Nations.

History of Tribal Consultation Under Executive Order 13175

Initially issued by President Clinton in November 2000, Executive Order 13175 (EO 13175) recognizes the United States’ unique relationship with Indian Tribal governments and creates a specific obligation that Federal agencies have an “accountable process to ensure meaningful and timely input by tribal officials” in the development of regulations, policies, or actions “that have tribal implications.” Departments and agencies have developed various policies for carrying out these obligations, although ultimately with mixed results.

In November 2009, President Obama issued a Presidential Memorandum on Tribal Consultation that reiterated the importance of consultation to a “sound and productive” Federal-Tribal relationship and committed to “regular and meaningful consultation” through “complete and consistent implementation” of EO 13175. To that end, the Obama Memorandum required agencies to develop and periodically update plans of action to implement the policies and directives of EO 13175.

The Biden Administration Quickly Narrows Its Focus on the Tribal Consultation Process

On January 26, 2021, a mere six days into his presidency, President Biden issued a Memorandum reaffirming the federal government’s commitment to “honoring Tribal sovereignty and including Tribal voices in policy deliberation that affects Tribal communities” and reupping support for the policy set forth in the Obama Memorandum. To effectuate this policy, the Memorandum directs each Federal agency [1] to develop, after consultation with Tribal Nations and Tribal officials, a detailed plan of action to implement the policies and directives of EO 13175, and to submit that plan to the Office of Management and Budget (OMB) within ninety days – i.e., by April 26, 2021. It further directs agencies to submit regular progress reports on these actions to OMB, and in turn requires OMB to report to the President within one year on the implementation of EO 13175 based on its review of agency plans and reports and to provide any recommendations for making the consultation process more effective.

It is not yet clear, for the most part, how the Biden Administration intends to address agencies’ similar obligation to engage in meaningful consultation with Alaska Native Corporations (ANCs) established under the Alaska Native Claims Settlement Act. Although EO 13175 itself applies specifically to federally recognized Tribal governments, Congress subsequently extended these obligations to ANCs, requiring OMB and all Federal agencies to “consult with Alaska Native corporations on the same basis as Indian tribes under Executive Order No. 13175.” Federal departments and agencies have developed policies for consultation with ANCs under this requirement. The Biden Memorandum focuses on the government-to-government relationship with Tribes and does not address ANC consultation. Consultation with ANCs is a critically important tool for ensuring consideration of Alaska Native interests in agency decision-making.

Current Tribal Consultation Requests

Programmatic Consultation Requests Related to the Biden Memorandum. Pursuant to the Biden Memorandum, Federal departments and agencies are well underway with their consultation processes, with a series of consultation sessions scheduled during March and early April for the departments and agencies to receive recommendations for actions that they can take to improve the consultation process and make it more effective. These programmatic consultations seek Tribal input on a number of important aspects of the project- and policy-specific Tribal consultation process, including: (1) what does “consultation” mean, with some advocating for “free, prior and informed consent”; (2) what actions trigger the consultation requirement; (3) when should consultation take place (and the extent to which consultation should be ongoing throughout the decision-making process); and (4) what level of agency official participation is appropriate. Following is a listing of known Department consultations* related to the Biden Memorandum:

Department/Agency	Dear Tribal Leader Letter (dated)	Virtual Consultation Sessions	Date Comments Due
Dept. of Agriculture (USDA)	Feb. 5, 2021	Mar. 9, 2021 Mar. 11, 2021	Mar. 22, 2021
Dept. of Commerce			
Dept. of Defense	Feb. 8, 2021	None	Originally Mar. 8, 2021 – extended to Mar. 22, 2021
Dept. of Health and Human Services (HHS)	Mar. 2, 2021	Mar. 22, 2021 Mar. 23, 2021 Mar. 24, 2021 Mar. 25, 2021	Mar. 26, 2021
Dept. of Homeland Security			
Dept. of Housing and Urban Development	Feb. 3, 2021	Feb. 25, 2021 Mar. 23, 2021	Apr. 5, 2021
Dept. of the Interior (DOI)	Feb. 11, 2021	Mar. 8, 2021 Mar. 10, 2021 Mar. 12, 2021	Mar. 19, 2021
Dept. of Justice	Mar. 8, 2021	Apr. 7, 2021 Apr. 8, 2021 Apr. 9, 2021	Apr. 19, 2021
Dept. of Transportation	Mar. 9, 2021	Mar. 24, 2021	Mar. 31, 2021
Dept. of Treasury	Mar. 8, 2021	Apr. 6, 2021 Apr. 7, 2021 Apr. 8, 2021	Apr. 9, 2021
Dept. of Veterans Affairs			
Small Business Administration	<i>Held Jointly with Treasury</i>		
Social Security Administration			
Corporation for National and Community Service (AmeriCorps)	Mar. 8, 2021	Apr. 9, 2021	Apr. 7, 2021
Environmental Protection Agency (EPA)	Mar. 1, 2021	Mar. 15, 2021 Mar. 17, 2021	Mar. 31, 2021
Office of the U.S. Trade Representative	Mar. 9, 2021	Apr. 6, 2021 Apr. 9, 2021 Apr. 12, 2021	Apr. 2, 2021

**Author’s note: this information was necessarily gathered from various department and agency websites; no single clearing house for Nation-to-Nation consultations currently exists.*

[1] EO 13175 adopts a definition of “Agency” that includes any ‘executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President),’ excluding the Government Accountability Office, Federal Election Commission, governments of the District of Columbia, territories and possessions, and Government-owned contractor-operated facilities. EO 13175 specifically excludes independent regulatory agencies, such as the Federal Energy Regulatory Commission.

Departments that have not yet announced Tribal consultations include: Department of Education, Department of Energy, Department of Labor, and Department of State.

Other Tribal Consultation Requests. Even as Federal agencies are considering “how” to better consult with Tribal governments in the programmatic consultations related to the Biden Memorandum, they continue to consult with Tribal governments under their current policies. As Federal agencies receive Coronavirus-related funding and support and seek to take action under other Biden Administration directives, they are seeking additional Tribal input. Following is a list of known policy-specific consultations currently taking place:

Department/Agency	Consultation Topic	Dear Tribal Leader Letter (dated)	Virtual Consultation Sessions	Comments Due
HHS – Indian Health Services (IHS)	Allocation of \$6 billion under the American Rescue Plan	Mar. 8, 2021	Mar. 17, 2021	Mar. 19, 2021
National Indian Gaming Commission (NIGC)	Briefing on Agency Operations	Feb. 25, 2021	Mar. 18, 2021	
Dept. of the Treasury	Allocation of Remaining Coronavirus Relief Fund, related to <i>Shawnee Tribe v. Yellen</i>	Mar. 4, 2021	Mar. 18, 2021	Mar. 19, 2021
DOI	Developing Tribal Renewable and Conventional Energy Resources		Apr. 27, 2021 Apr. 29, 2021	Apr. 16, 2021
EPA	E15 Fuel Dispenser Labeling and Compatibility with Underground Storage Tanks	Jan. 19, 2021	TBD	Apr. 19, 2021

Where Tribal Consultation may be Headed Under the Biden Administration

Future Executive Action Stemming from the Biden Memorandum. After agencies submit their consultation plan of action reports (due by April 26, 2021), the Assistant to the President for Domestic Policy (APDP) and the Director of OMB will review agency plans for consistency with the policies and directives of EO 13175. Within one year from the date of the memorandum, the Director of OMB, in coordination with the APDP is directed to submit to the President a report on the implementation of EO 13175 across the executive branch, which may include recommendations for improving agency plans to make the Tribal consultation process more effective. Additionally, under the Biden Memorandum, agencies have a continuing obligation to submit (and OMB and APDP to review) annual progress reports.

Potential Legislative Efforts. In addition to efforts by the executive branch, there is potential that Congress could consider legislation aimed at revising the Tribal consultation process. Representative Raul Grijalva of Arizona, Chair of the House Natural Resources Committee, has long focused on this issue, introducing a version of the Requirements, Expectations, and Standard Procedures for Executive Consultation with Tribes Act (also referred to as the RESPECT Act) five times over the last seven Congresses. The Senate Committee on Indian Affairs recently held a hearing titled “A Call to action: Native communities’ priorities in focus for the 117th Congress,” in which National Congress of American Indians (NCAI) President Fawn Sharp highlighted the importance of Tribal consultation. In fact, the very first Tribal Nation priority for Congressional climate responses identified by NCAI President Sharp was that “Legislation must include full and meaningful consultation with decision makers that requires Tribal Nations’ free, prior, and informed consent and includes enforcement mechanisms.”

What This Means for Tribes and Project Proponents

For Tribes, the nearly fifty Federal consultation requests during the first two months of the Biden Administration present both an opportunity to engage and an incredible demand on Tribal government resources. Already taxed by the extraordinary stresses related to the COVID-19 pandemic, Tribal governments are struggling to participate in the hyperactive consultation schedule. This is even more relevant when one considers that the programmatic consultations listed here are in addition to the project-specific consultations occurring under specific agency and department consultation policies and relating to particular project impacts to Tribal lands, treaty resources, and cultural resources, as considered under the National Environmental Policy Act and Section 106 of the National Historic Preservation Act. The overall ability of Tribes to participate in this volume of Federal consultation could lead to questions regarding the efficacy and efficiency of the programmatic and policy consultations that are ongoing.

For Project Proponents—i.e., those impacted by and sometimes delegated some component of the Tribal consultation process—following and understanding how the federal government implements its Nation-to-Nation obligations to Tribal governments will be essential to project permitting. Whether and how federal agencies satisfy those obligations could mean the difference in the success of project permitting, construction, and operation.

If you are a Tribal government seeking to submit comments in response to Federal consultation requests and/or a project proponent interested in specific agency policies regarding consultation, and would like assistance, please reach out to our Native Affairs team.



Tribes and Cannabis: Next Steps for Tribes to Consider While Awaiting Federal Legislation

BY ROBERT CONRAD & LAURA JONES

In the Winter 2020 edition of *Native Affairs Quarterly*, we discussed potential changes for the cannabis industry under the Biden administration and what a new legal landscape could look like for American Indian Tribes that are considering entering the industry—or for those that have been in the cannabis business for some time. In this update, we highlight the status of pending legislation and discuss ideas that Tribes may want to consider implementing while we await the passage of federal legislation.

Federal Cannabis Legislation Update

Despite Democratic control of both the House and the Senate (with Vice President Harris acting as the tie-breaking vote in the 50-50 Senate), passing any cannabis legislation in this Congress will be difficult. Democrats do not have a clear position on cannabis legalization—President Biden has called for decriminalization, while other congressional members have stated that pending legislation does not go far enough. In addition, Senator Cory Gardner (R-CO), a supporter of the cannabis industry, lost his reelection, leaving limited remaining support for cannabis on the Republican side. Because the filibuster rules require 60 votes for most bills to pass the Senate, any cannabis legislation would need support from every Democratic Senator and ten Republicans. There has not been any movement on the SAFE Banking Act (which would allow financial institutions and insurers to legally do business with the cannabis industry), the STATES Act (which would allow states to legalize cannabis without risking federal intervention), or the MORE Act (which would fully remove cannabis from the Controlled Substances Act). However, it is possible that some cannabis reforms could be passed piecemeal in other legislation.

Tribal Cannabis Commissions as an Exercise in Sovereignty

While federal legislation supporting the cannabis industry is not guaranteed, there are steps that Tribes can take to set themselves up for success in the industry. In addition to the ideas presented in our previous article, Tribes could consider creating a Tribal Cannabis Commission.

Tribal Cannabis Commissions provide Tribes with a mechanism to regulate all areas of cannabis growth, sale, and use on Tribal lands. Creating a Tribal Cannabis Commission is an exercise in sovereignty that also provides transparency and certainty to those wanting to participate in the cannabis industry on Tribal lands. Ideally, a Tribal Cannabis Commission operates as an impartial governing body with rules and regulations that are transparent.

Many Tribes have already created their own Tribal Cannabis Commissions. For example, the Confederated Tribes of Warm Springs, located in Oregon, have extensive regulations regarding the cultivation, processing, and sale of marijuana that are included in their Tribal Code and overseen by the Tribal Cannabis Commission. The Tribes' regulations also cover areas such as licensing, permitting, and enforcement of Tribal marijuana laws. Tribes can consider including a range of beneficial provisions within their regulatory framework, such as by requiring that any cannabis-related business taking place on their Tribal lands be at least 51% owned by Tribal members, or by including a specific hiring preference for Tribal members to work in any cannabis-related businesses. Such measures will ensure that the economic benefit of cannabis is distributed within the Tribal communities they are serving.



Tribes can also consider exploring opportunities to partner with labor unions. Such partnerships can offer benefits to Tribes, such as providing cannabis business training and education to Tribal members and helping Tribes better advocate for themselves within the broader cannabis industry. For example, Hugh Giordano, union representative for the United Food and Commercial Workers' Union (UFCW) Local 152, is assisting with the creation of a cutting-edge national cannabis apprenticeship program that could potentially aid Tribes with educating and training employees. Mr. Giordano believes that “tribal sovereignty in the cannabis industry is a social equity issue,” and that labor unions can be important allies for Tribes entering the cannabis industry. As a team, labor unions and Tribes can better advocate for proper involvement of Tribes and proper treatment of employees in the cannabis space. Tribes can also work with labor unions to build a coalition to assist with advocating for Tribal cannabis issues at state and federal hearings. As Mr. Giordano explains, “The UFCW is proud to have a working coalition which advocates for People of Color, Women, Immigrants, LGBTQ, and Veterans within Cannabis. The UFCW would more than welcome the Native American community into these important conversations . . . their voice deserves to be heard.”

While the future of federal legislation supporting the cannabis industry is uncertain, Tribes that are intrigued by the revenue-generating potential of the cannabis industry can start implementing education and training programs and take steps toward regulating cannabis on their Tribal lands. Please keep an eye out for future newsletters, where we will continue to provide updates and potential ideas for Tribes involved in or considering entering the cannabis industry. If you have any questions about steps that your Tribe could be taking to prepare to participate in the cannabis industry, please contact Robert Conrad at rac@vnf.com or Laura Jones at ljones@vnf.com.



Department of Defense Indian Incentive Program Funding Fix to Help Clear the Rebate Backlog and Increase Benefits to Native American Subcontractors

BY MELINDA MEADE MEYERS

A simple legislative fix in the funding mechanism for the Department of Defense Indian Incentive Program (DOD IIP) achieved late in the 116th Congress is set to improve the functioning of this program and its significance to Native American contractors. Over the past several years, the lack of a direct congressional appropriation for the IIP contributed to a significant backlog in processing IIP rebates. The reinstatement of direct appropriations should decrease the backlog, reducing processing times for rebate claims and making the program more attractive for prime defense contractors. This legislative solution should enhance the utilization of this important program and further its ability to act as an economic multiplier for Native American communities.

Administered by the DOD Office of Small Business Programs (OSBP), the DOD IIP is a congressionally authorized program that incentivizes federal defense contractors to use Native-owned businesses as subcontractors by providing prime contractors with contracts of \$500,000 or more with a 5 percent rebate on subcontracted work performed by Indian Organizations, Indian-Owned Economic Enterprises, Alaska Native corporations, and Native Hawaiian Small Business Concerns.

Though the IIP payments are not paid directly to Indian-owned small businesses, the program, by generating subcontracts, serves as an economic multiplier for Native communities by creating an important incentive to subcontract with Native entities. This program has had broad-reaching effects.

According to the OSBP, in FY 2014-2020, IIP participants included 104 prime contractors and 160 Indian Organizations across the country.

However, this program had fallen out of favor with prime contractors because of a backlog of these rebate payments. This backlog has largely (and fairly) been attributed in the past to the lack of funding authorized by Congress for the IIP. If the annual authorized level of funds is expended before an eligible request is filled (i.e., if a request cannot be funded in the year in which it was submitted due to lack of funds), the request rolls over to the next fiscal year, creating a backlog of requests. At times, the IIP backlog grew to be as long as three years. Prime contractors reported that the impact of this uncertainty on their bottom line made the program unreliable, unattractive, and not worth the paperwork. Fortunately, the authorized level of funding for the program was increased from \$15 million to \$20 million in FY 2018 and from \$20 million to \$25 million in FY 2019.

However, the need for a higher authorized level of funding was not the sole cause of the backlog. For reasons unstated in the congressional record, Congress discontinued direct appropriations for the IIP starting in FY 2015. As a consequence, although the IIP was still funded, the OSBP had to begin paying for IIP rebates through internal reprogramming. Despite continued increases in the authorized level of funding, the lack of direct appropriations—and the need to reprogram funds—significantly increased the timeline for processing IIP rebates and payments to eligible prime contractors.

In an effort largely spearheaded by Congressman Don Young (R-AK) and Congresswoman Xochitl Torres Small (D-NM), Congress reinstated direct appropriations for the IIP in the FY 2021 Omnibus Appropriations bill, which means that the OSBP can once again make rebate payments to prime contractors without going through the burdensome internal reprogramming process. As a result, the OSBP can more easily keep up with the rebate requests, the program's attractiveness to prime contractors will continue to grow, and the DOD IIP will continue to serve an important role in creating incentives for prime contractors to work with federally recognized Indian Tribes, Alaska Native Corporations, and Native Hawaiian organizations.

The legislative fix to the DOD IIP funding mechanism was just one of the many changes enacted by the 116th Congress aimed at improving Native contracting (see our last [newsletter](#) for more details). Along with the Biden administration's prioritization of Native contracting and procurement, the 117th Congress is likely to continue to focus on efforts to boost Native economic development.



The Biden Administration's Emphasis on Combating Climate Change and Advancing Environmental Justice: What Does It Mean for Indian Country?

BY TIFFANY GANTHIER & ANI ESENYAN

The Biden Administration has reignited conversations and launched aggressive new policies centering on climate change and environmental justice (EJ). During the first week of his administration, President Biden escalated the conversation about climate change to one about the climate “crisis” and issued significant Executive Orders (EO) — on [Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis](#) [1] and EO on [Tackling the Climate Crisis at Home and Abroad \(Order on the Climate Crisis\)](#) [2]. These EOs, and other developments in the Biden Administration, present opportunities and potential risks for Native American communities.

The Biden Administration is also focused on establishing an inclusive cabinet, which ideally will further an inclusive approach to achieving the Administration's climate crisis and EJ goals. Of note for Indian Country, President Biden nominated Rep. Deb Haaland (D-N.M.) for Secretary of the Interior (DOI), and on March 15, 2021, the Senate confirmed the nomination. Rep. Haaland's confirmation is significant—as an enrolled member of the Pueblo of Laguna, she is the first Native American cabinet secretary in U.S. history.

The Order on the Climate Crisis also aims to increase resources and business and employment opportunities, thus presenting additional opportunities for Tribes.

We expect that Secretary Haaland will hear a lot from her Native American constituents about the administration's focus on the climate crisis and EJ given that the DOI's decisions related to those goals will have a significant impact on Native interests. The DOI is already engaged in a series of new Tribal consultations. With her confirmation, Rep. Haaland can help ensure a focus on both community priorities and equitable outcomes as new policies are implemented.

Biden's Executive Order on the Climate Crisis

The Executive Order on the Climate Crisis requires the Secretary of the Interior to serve on the National Climate Task Force (Task Force), the goal of which is to facilitate the organization and deployment of a governmentwide approach to combat the climate crisis. It also requires the Secretary of the Interior to serve on the Interagency Working Group on Coal and Power Plant Communities and Economic Revitalization (Working Group), the goal of which is to ensure a “just transition” for communities currently heavily reliant on fossil-fuel-based industry. In carrying out its purpose, when engaging with Tribal governments, the Task Force will prioritize action on climate change, among other things. This directive presents an opportunity for Tribes to voice their concerns and priorities to decision makers developing climate policy. The Working Group presents yet another such opportunity because that group is specifically instructed to consult with stakeholder groups, including Tribal officials, environmental justice organizations, and community groups. As the Secretary of the Interior has a role in both entities, Haaland will have a central role in ensuring that all Native communities have the opportunity to engage in meaningful consultation and voice their views on climate policies that could directly impact them.

The Order on the Climate Crisis also aims to increase resources and business and employment opportunities, thus presenting additional opportunities for Tribes. This EO:

- Sets a procurement goal to purchase clean and zero-emission vehicles for government fleets, including Tribal government fleets.
- Directs agency heads, including the Secretary of the Interior, to submit a draft Climate Action Plan to the Task Force and the Federal Chief Sustainability Officer that describes steps an agency can take with regard to its facilities and operations to bolster adaptation and to

increase resilience to the impacts of climate change. As part of this directive, the Secretary of the Interior and Deputy Director for Management of the Office of Management and Budget are to assess and provide to the Task Force a report on the potential development of a consolidated federal geographic mapping service that can facilitate public access to climate-related information that will assist various levels of government, including Tribal governments, in climate planning and resilience activities.

- Creates a Civilian Climate Corps by the DOI and the U.S. Department of Agriculture (USDA) to mobilize the next generation of conservation and resilience workers. Note that while DOI is a lead agency on this initiative, the EO does not specify consultation with Tribal governments to further this effort, and Tribes may wish to request such consultation.
- Directs the Secretary of the Interior to review siting and permitting processes on public lands and in offshore waters to alert the Task Force of possible measures to increase renewable energy production on those lands, with a goal of doubling offshore wind by 2030. Significantly, the EO specifies that the Secretary of the Interior will engage with Tribal authorities regarding the development and management of renewable and conventional energy resources on Tribal land. This directive presents a tremendous opportunity for Tribes to develop business and employment prospects while also voicing their concerns and priorities.

Environmental Justice Implications

Importantly, the Order on the Climate Crisis presents an opportunity for the federal government to simultaneously address EJ and climate change, given the exacerbating effects climate change has had on the health and well-being of residents of disadvantaged communities.

Black, Latinx, Native American, and low-income communities have long dealt with EJ impacts that have occurred in their communities as a result of the actions of others, including the federal government. The EJ movement embodies the principle that no group of people—regardless of race, color, national origin, or income—should bear a disproportionate share of negative environmental consequences resulting from governmental, industrial, or other operations or policies. The EJ movement thus prioritizes the meaningful involvement of all people concerning the development, implementation, and enforcement of environmental laws, regulations, and policies that impact a community's quality of life.

A portion of the Order on the Climate Crisis focuses on “securing environmental justice and spurring economic opportunity” by directing all agencies to develop programs, policies, and activities to address disproportionate health, environmental, economic, and climate impacts on disadvantaged communities.

The Order recognizes that the negative impacts of industry and governmental decisions and climate change are disproportionately felt by different groups of Americans and concludes that incorporating this recognition into federal government decision making will help establish a more fair future. In line with this goal, the Order on the Climate Crisis:

- Establishes a White House Environmental Justice Interagency Council and a White House Environmental Justice Advisory Council to prioritize EJ and to ensure a whole-of-government approach to addressing current and historical environmental injustices;
- Establishes new or strengthened offices at the Environmental Protection Agency, the Department of Justice, and the Department of Health & Human Services to strengthen EJ monitoring and enforcement;
- Tasks new offices with advising on ways to update President Clinton's Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations of February 11, 1994;
- Creates a governmentwide Justice40 Initiative, which promises to deliver 40 percent of the overall benefits of “relevant federal investments” to disadvantaged communities and tracks performance toward that goal through the establishment of an Environmental Justice Scorecard;
- Initiates the development of a Climate and Environmental Justice Screening Tool, building on the Environmental Protection Agency (EPA)'s existing EJSCREEN to identify disadvantaged communities, support the Justice40 Initiative, and inform equitable decision making across the federal government; and
- Commits the administration to an ambitious conservation goal—to protect 30 percent of all U.S. lands and coastal seas by 2030 (30 by 30 Campaign).

It is noteworthy that the 30 by 30 Campaign has the potential to significantly change the way the U.S. manages its ownership of approximately 640 million acres of federal lands, which comprise about 28 percent of the total acreage of the United States. Republicans and Democrats share conservation goals, when defined broadly, but the 30 by 30 Campaign has raised significant concerns, particularly among Republicans, given the need to set aside hundreds of millions of acres of new conservation lands to meet the goal. This is not a purely partisan issue.

Conservation can have a disproportionate impact on certain communities, particularly Native American communities. The Order on the Climate Crisis rightly directs the Departments of the Interior, Agriculture, and Commerce to solicit input from Tribal and territorial officials, among other groups, to identify strategies that will encourage broad participation to achieve the Campaign's goals.

The USDA is also specifically directed to collect input from Tribes, among other groups, on how to best use USDA programs and funding and how to encourage the voluntary adoption of climate-smart agricultural and forestry practices that decrease wildfires.

The EO's inclusion of Native communities in developing these policies and programs is imperative. Native communities rely on federal land that could be set aside for conservation for other purposes: subsistence, culture, agriculture, housing, and energy generation, as well as resource development that often supports community services such as health care facilities, schools, and fire departments. An especially important consideration is that Native communities across the country have varying views on oil and gas and other resource development activities, many of which occur on federal and Tribal lands, and many Native and non-Native communities alike rely on such activities to support their economies and fund essential community services.

Agency Implications

The Order on the Climate Crisis directs the Secretary of the Interior to pause new oil and natural gas leasing on public lands and in offshore waters pending completion of a comprehensive review of the leasing practices. Shortly before the issuance of this EO, the DOI published an Order that temporarily suspended the Agency's delegated authority to issue certain fossil fuel authorizations, with some exceptions. Some Native communities have expressed concern about this pause, voicing concerns about the economic impacts it might cause on their communities. Although the DOI clarified that the pause does not apply to Tribal lands, as the Administration works to further its goals of combating climate change, promoting conservation, and spurring environmental justice, it will need to actively and thoughtfully engage with all Native American communities to understand their unique concerns and perspectives.

As the Administration works to clarify new environmental justice initiatives—such as defining what qualifies as a “disadvantaged community” and strengthening EJ considerations within guidance governing environmental reviews under the National Environmental Policy Act (NEPA)—the EPA is simultaneously working to expand existing initiatives and mechanisms, such as updating the EPA's EJSCREEN to strengthen data and mapping used to help identify disadvantaged communities, and the continuation of the [July 2014 Policy on Environmental Justice for Working with Federally Recognized Tribes and Indigenous Peoples](#). The latter, together with a memo from former EPA Administrator Gina McCarthy, establishes seventeen principles to ensure that when the EPA engages with federally and state-recognized Tribes, individual Tribal members, Indigenous community-based and grassroots organizations, and others living in Indian Country, environmental justice plays an integral role in that engagement. Since the inception of the policy in 2014, the EPA has been working to implement these principles.

With Gina McCarthy now back in Washington as White House National Climate Advisor, and considering her strong views on environmental justice, it is likely that implementation of this policy will once again take priority.

Another agency poised to make strides in environmental justice is the Federal Energy Regulatory Commission (FERC). President Biden's pick for FERC Chairman, Richard Glick, [announced plans](#) to better incorporate environmental justice and equity concerns into the Commission's decision-making process by creating a new senior position to coordinate that work. Chairman Glick has long been an ally of community voices and has vowed to make sure that FERC solicits and considers input from communities impacted by FERC projects. This type of outreach is a vital procedural component of ensuring environmental justice. With natural gas pipeline projects historically causing a significant source of tension between FERC and Native communities, this new proactive approach from FERC should be key to alleviating disparate environmental impacts of FERC projects. The role of the newly created environmental justice position will be to consider whether projects under FERC review will have significant health or economic impacts on communities and if they will, whether those projects can be moved or the impacts mitigated. Project proponents must therefore be cognizant of the impacts on the rights and resources of Native American Tribes and whether they amplify any EJ concerns. This is particularly true when members of an impacted EJ community challenge the federal permitting and the NEPA processes.

The Biden Administration has set the groundwork for environmental justice to be an impactful initiative for Black, Latinx, Native American, and low-income communities across the country with its whole-of-government approach. However, it is equally clear that to ensure its efforts have a substantial positive impact on both a national and a community level, the Administration will need to provide meaningful opportunities to engage with every community as it advances its broader initiatives focused on climate change and EJ.



[1]The Order on Protecting Public Health contains a series of directives to federal agencies and departments that will have significant impacts on industry and agriculture, particularly within the natural resources and energy sectors, and will further the Biden Administration's commitment to aggressively address climate change and EJ as promised in Biden's July 2020 "[Plan to Secure Environmental Justice and Equitable Opportunity](#)". For a deep dive into the Order on Protecting Public Health and the EJ implications, please see our previously published alert.

[2]The Order on the Climate Crisis is a whole-of-government approach to addressing climate change and EJ. For an overview of the Order on the Climate Crisis, please see our previously published [policy update](#).

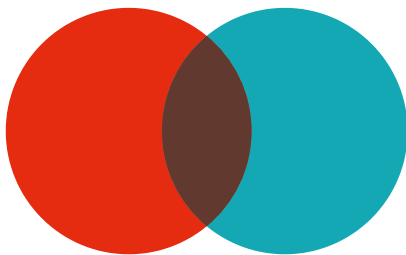
The Overlap of Native American Rights and EJ: How the Concerns of Tribal Nations are Included in, but not Exhausted by, Climate Change and Environmental Justice Policies

BY MARANDA COMPTON

Tribal and urban Native communities are a specific focus of recent Biden Administration Executive Orders regarding Environmental Justice (EJ) and climate change. President Biden's January 27, 2021 Executive Order on Tackling the Climate Crisis at Home and Abroad (Climate Crisis EO) identified "environmental and economic justice" as guiding principles of governance, which specifically require "investing and building a clean energy economy that creates well-paying jobs, turning disadvantaged communities – historically marginalized and overburdened – into healthy thriving communities, and undertaking robust actions to mitigate climate change while preparing for the impacts of climate change across rural, urban, and Tribal areas." But what will the role of Tribes be in this process?

How Tribes Are Included in Environmental Justice

To be sure, EJ includes certain Native American issues. Native American communities have been on the receiving end of environmental injustice for the entire history of the United States. In fact since the first treaties, the purpose of most Federal Indian Policy was to reshape the relationship of Tribal Nations to their environment – and largely to the detriment of Tribal lands, waters, and resources. In this way, it is fitting to consider and reconcile the inequitable impacts of environmental policies on Native American communities (both reservation and urban) in EJ policies.



However, it is equally important to note where EJ and Tribal rights diverge. For example, on January 26, 2021, just one day before issuing his Climate Crises EO, President Biden issued a Memorandum regarding Tribal Consultation and Strengthening Nation-to-Nation Relationships, in which the Administration reaffirmed the policies and directives of Executive Order 13175 ("EO 13175"), Consultation and Coordination With Indian Tribal Governments. EO 13175 is grounded in the cornerstone principles of "Tribal sovereignty and self-governance, the Federal trust and treaty responsibilities to Tribal Nations, and regular, meaningful, and robust consultations with Tribal Nations." This special Nation-to-Nation relationship, and the express obligations flowing from it, cannot be satisfied through EJ.

The key distinction is that Tribal Nations – i.e., Tribal governments and their citizens – are not stakeholders; they are sovereign, self-governing entities that predate the U.S. Constitution. They are the signatories to and beneficiaries of more than 368 treaties signed with the United States. The treaties permitted (through political agreement) western expansion of America through Indian lands and, as a result, mandate a continuing obligation of the U.S. Government. As highlighted in recent Supreme Court decisions (like *McGirt v. Oklahoma* in 2020; *Herrera v. Wyoming* in 2019, and even the Per Curium opinion in *Washington v. United States* in 2018) treaties continue to bind the regulatory actions, obligations, and topography of the Federal government. The commitments owed to Tribal Nations are separate and apart from EJ efforts.

Additionally, the 574 Federally recognized Tribes in the United States do not speak with a single voice when it comes to EJ, climate change, or economic development. As separate sovereigns, Tribal Nations maintain diverse and wide-ranging approaches to natural resource regulation and development – both as a matter of culture and economics. Just as we do not expect the sovereigns of North Dakota and California to have the same views and governing approach to environmental regulation and permitting, we cannot expect the sovereign Tribes located within those differing areas to be synonymous. For this reason, climate change and EJ policies implemented in Indian country must always start with the sovereign judgments of the Tribal Nation, or else these policies will always, at least partially, fail.

The Future of Tribal Consultation and Federal Project Permitting in the Era of Environmental Justice

As Federal departments and agencies begin to create policies to address EJ and climate change, they must necessarily consider Native American communities dually – both as EJ communities and as the heirs and assigns of the many treaty obligations and trust responsibilities owed by the United States. This will especially be true in federal permitting processes.

An early developing example can be found at the Federal Energy Regulatory Commission (the "Commission"). The Commission is an independent agency not directly bound by EO 13175 [1] and is thus not engaging in Tribal consultation related to the Biden Consultation Memorandum, however it recently issued a Notice of Inquiry, requesting comment on how the agency could revise its natural gas pipeline citing policy -- called the Certificate Policy Statement ("Policy Statement NOI"). [2] The Policy Statement NOI specifically sought information on five key questions: (A) potential adjustments to the Commission's determination of need; (B) the exercise of eminent domain and landowner interests; (C) the Commission's consideration of environmental impacts; (D) improvements to the efficiency of the Commission's review process;

and (E) the Commission's consideration of effects on EJ Communities.

Native communities are only mentioned in relation to the final question, where FERC defines "environmental justice community," as "(i) populations of color; (ii) communities of color; (iii) Native communities; and (iv) low-income rural and urban communities, who are exposed to a disproportionate burden of the negative human health and environmental impacts of pollution or other environmental hazards."

While Native communities are appropriately part of the EJ definition, Tribal Nation considerations may also be included in other components of the NOI – but Tribal Nations are not identified. Specifically, under the FERC Policy Statement on Consultation with Indian Tribes in Commission Proceedings (as revised in October 2019), FERC specifically and expressly considers treaty rights in the National Environmental Policy Act process and "in keeping with its trust responsibility, will assure that tribal concerns and interests are considered whenever the Commission's actions or decisions have the potential to adversely affect Indian tribes or Indian trust resources." Based upon this policy, numerous questions in the Policy Statement NOI could include Tribal concerns. How FERC addresses these various concerns will significantly impact the efficiency and effectiveness of the pipeline citing and permitting process. Ultimately, it will be project applicants and Tribes, utilizing their own resources, that must navigate the forms and components of Tribal input in the various Federal permitting processes. Therefore, it is essential that the policies of Federal agencies create clear standards and objectives for the engagement of Tribal Nations and Native communities. Otherwise the development of infrastructure and the appropriate protection of Tribal rights and resources will be opposing forces in the efforts of the Biden Administration to Build Back Better.

The Native Affairs, Government Advocacy & Public Policy, and Environmental teams at Van Ness Feldman are tracking and analyzing the impacts of the Biden Administration's actions on project proponents, stakeholders, disadvantaged communities, and Native American Tribes. Please contact Maranda Compton at mcompton@vnf.com for more information.

[1]EO 13175 utilizes the Federal Information Policy Act definition of "Agency," which is any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), excluding the Government Accountability Office, Federal Election Commission, governments of the District of Columbia, territories and possession, and Government-owned contractor-operated facilities. EO13175 also excludes independent regulatory agencies, such as the Federal Energy Regulatory Commission.

[2]Docket No. PL18-1-000, issued February 18, 2021.

Addressing the Combined Impact of Historical Trauma and the Covid-19 Pandemic

BY DAN PRESS

Neuroscientists have shown how historical and childhood traumas cause physiological changes in the brain that result in many of the health and social problems that continue to plague Indian Country—youth suicide, substance abuse, poor school performance, domestic violence, obesity, diabetes, and more. Most of these problems have not gotten better over the years because the efforts to address them have focused on the symptoms rather than the underlying cause—i.e., trauma.(See the presentation by Dr. Tami DeCoteau on the neuroscientific basis of trauma during our [First Webinar on Historical Trauma](#), hosted by Van Ness Feldman and the Roundtable on Native American Trauma-Informed Initiatives (Roundtable)).

Fortunately, a growing number of Indigenous communities are combining these scientific findings with traditional cultural practices to implement programs designed to undo the impact of that trauma. At our [Second Webinar on Historical Trauma](#), Jerry and Wendell Waukau, Menominee Tribal health administrator and superintendent for the Menominee Indian School District, respectively, described the comprehensive cross-sector trauma-informed program the Tribe has implemented in which every Tribal institution on the Reservation—the schools, the health care facility, the courts, the police department, the social services program, etc.—has successfully incorporated trauma-informed approaches. Another presenter during the webinar, Lisa X'unyél Worl, Supporting Transitions and Educational Promise in Southeast Alaska (STEPS) partnership coordinator from the Association of Alaska School Boards (AASB), described the work the AASB is doing to incorporate trauma-informed practices into schools serving Alaska Native students. All the presenters reported on the positive outcomes these trauma-informed programs have achieved, including reductions in teen pregnancies and school suspensions and a dramatic increase in graduation rates.

Other Indigenous communities around the country are implementing trauma-informed programs and seeing positive results. For example, according to data provided by Ann Mahi, the former superintendent of the Nānākuli-Wai'anae Complex Area in Hawaii, a trauma-informed initiative put in place by an Area school serving predominantly Native Hawaiian students resulted in a 50% drop in the number of suspensions and a 95% drop in teacher turnover. According to a San Carlos Apache [presentation](#), a public school on their Reservation that implemented a trauma-informed approach saw its suspensions decrease by 90% while academic performance rose. More significantly, the entire culture of the school changed from what a school official had labeled a "war zone" to a positive climate in which both student and teachers felt welcome.



As these examples demonstrate, we know that effective strategies are available to counter the damage caused by historical trauma. The question is: how do community leaders take what has been learned and put it to work broadly in Indigenous communities throughout the country? The pandemic has made doing so even more critical. Historical trauma has been described as akin to carrying around a backpack full of heavy rocks whose weight pulls one down, and its pain can cause those suffering from it to seek temporary relief in the form of drugs, alcohol, violent behavior, and other problems correlated with trauma.

The pandemic has compounded this problem, in essence adding more rocks to the backpack because Native communities have suffered so heavily from the impacts of COVID-19, and none more so than children and young adults. Studies [1] have illustrated that students from communities affected by major natural disasters, such as floods and hurricanes, return to school following the event carrying the burden of trauma with them, which causes them to engage in disruptive behaviors that undermine the learning process. The combined effects of historical trauma and the additional trauma caused by the pandemic threaten to weigh down this young generation of Indigenous students, interfering with their education and impeding their potential to achieve for years to come.

Given these unprecedented circumstances, it is critical that Native American communities quickly implement the kinds of programs discussed above that recognize the heavy load carried by these young people, teach the tools of resilience, and help prevent the vicious cycle of destructive behavior caused by historical trauma.

Fortunately, there are a multitude of funding opportunities included in the newest COVID relief package that may be used by federal agencies, Tribal governments, and state and local educational agencies to launch major trauma-informed programs that can help an entire generation of young people confront and overcome the combined effects of trauma.

While federal agencies can help, the most important role rests with Tribal governments or other Native institutions, in partnership with the school districts. Tribal leaders need to establish programs to train teachers and counselors on trauma-informed methods to assist those students who “act out” in class, helping them regulate rather than focusing on punishment, which is counterproductive. To implement such programs, Indian Tribes and school districts need funding and a road map.

Funding

Under the American Rescue Act that President Biden recently signed into law, Tribal governments will receive \$20 billion, more than twice what they received under the CARES Act. One of the permissible uses of those funds is addressing the mental health impacts of the pandemic, which means tribes can use a portion of these stimulus dollars to implement trauma-informed programs for their community as a whole, including partnering with schools to address the heightened trauma students will bring with them when schools fully reopen. While tribes have many needs, there are few needs more pressing than helping this generation of young people heal from the combined effects of the pandemic and existing historical trauma.

The American Rescue Plan includes other sources of funding that may be deployed as well. For example, K-12 schools are expected to receive approximately \$130 billion. Again, these funds can be used to address the mental health issues caused by the pandemic, so it is permissible to use a portion of those funds to establish or strengthen trauma-informed resilience programs.

Finally, the Act added \$85 million each to the programs in the Elementary and Secondary Education Act for Native Hawaiian and Alaska Native education programs. One of the permitted purposes is in-service teacher training so the funds may be used to provide teachers with trauma-informed training to address historical and pandemic-caused trauma.

Road Map

There are a number of resources available that focus on making schools trauma-informed generally. Implementing trauma-informed programs requires an additional level of expertise, where a particular emphasis on integrating traditional culture with the scientifically proven approaches is key to success. As just one resource, we worked with the Roundtable to prepare a 70-page how-to handbook on building trauma-informed Tribal programs within the community, including a chapter on trauma-informed schools. It draws heavily on the work of the Menominee Tribe. The handbook is available at no cost here. The San Carlos Apache Public School District has produced an excellent set of slides describing the steps it took to implement its trauma-informed initiatives that can be used as a resource.

We also offer the following recommendations for addressing the combined effects of historical trauma and the pandemic:

- The Senate Committee on Indian Affairs and the House Subcommittee for Indigenous Peoples of the United States should hold oversight hearings on historical and pandemic-caused trauma and highlight successful programs that have been implemented to address each.

- The Bureau of Indian Education (BIE) will receive \$850 million in COVID relief funding. BIE should use a portion of these funds to implement trauma-informed programs so their schools are prepared for the increase in trauma-triggered behavior when students return to school.
- The Indian Health Service (IHS) should work to make all of its programs trauma-informed, and we recommend that the Bureau of Indian Affairs' (BIA) behavioral health program partner with Tribes to assist with the implementation of community-wide trauma-informed programs. So much of the IHS patient caseload consists of problems that have trauma as one of their underlying causes—diabetes, heart disease, and injuries associated with alcohol, substance abuse, and domestic violence, to name a few.
- Trauma can also negatively impact the abilities of people trying to return to the workforce. BIA's 477 program, the Department of Labor's Workforce Innovation and Opportunity Act (WIOA) job training program, and Tribal governments and Tribal enterprises should incorporate trauma-informed components into their job training and retention programs.

By implementing trauma-informed programs, Tribal communities can acknowledge the heavy burden carried by so many and work to lighten the load of those backpacks made heavy by historical trauma and the impacts of the pandemic. In so doing, they can help tackle the myriad problems associated with trauma.

For more information, or for help identifying resources available to your community, please contact Dan Press at dsp@vnf.com.



[1] Chemtob CM, Nakashima JP, Hamada RS. Psychosocial intervention for postdisaster trauma symptoms in elementary school children: a controlled community field study. *Arch Pediatr Adolesc Med.* 2002 Mar;156(3):211-6. doi: 10.1001/archpedi.156.3.211. PMID: 11876663.

Role of Native CDFIs Expected to Strengthen with New Programs Focused on CDFIs as Engines of Growth and Recovery

BY ANDREW VANDERJACK

This is an exciting time for Native American Community Development Financial Institutions (Native CDFIs). Congress is deploying significant new COVID-19 relief funding to and through CDFIs—the 116th Congress enacted new legislation that will help CDFIs expand their role in business development, and the 117th Congress is developing a proposal that would create a set-aside for Native CDFIs within the New Markets Tax Credit (NMTC) program. The Biden administration has also proposed a range of new or expanded investments in Native small businesses, including expanded Native participation in the NMTC program and increased funding for the Native American CDFI Assistance Program (NACA Program). (For a discussion of other priorities of the Biden-Harris administration for Native American businesses, please see our December newsletter, available [here](#).)

The 116th Congress, which ended on January 3, 2021, took several steps to increase the deployment of new funding to communities through CDFIs. Among other things, Congress increased the annual funding available to Native CDFIs from \$15.5 million to \$16.5 million and, as part of the Indian Community Economic Enhancement Act of 2020, further discussed below, permanently waived the matching funds requirements for Native CDFIs.

The 116th Congress also appropriated \$3 billion to be allocated to CDFIs for COVID-19 relief, including \$1.25 billion to be deployed through the CDFI Rapid Response Program (CDFI RRP). The CDFI Fund published a Notice of Funds Availability for RRP funds on February 26, 2021, listing several deadlines, starting March 22, 2021. 86 Fed. Reg. 11824 (Feb. 26, 2021). Through the RRP program, the CDFI Fund will provide awards of up to \$5 million, or a minimum of \$200,000, to CDFIs to support, prepare for, and respond to the economic impact of the COVID-19 pandemic. A minimum of \$25 million of the RRP funds will be allocated to benefit Native American communities, although more is expected.

An additional \$1.75 billion will be made available as grants to CDFIs to respond to the economic impact of the COVID-19 pandemic, specifically to expand lending, grant-making, or investment activity in low- or moderate-income minority communities and to minorities who have significant unmet capital or financial services needs. Up to \$1.2 billion of this amount is to be used to provide financial assistance, technical assistance, awards, training, and outreach programs to recipients who are themselves minority lending institutions, representing a significant opportunity for Native CDFIs.

There is no time frame for funding expiration for the \$1.2 billion allocated for minority lending institutions, as opposed to the RRP funds, which must be dispersed before the end of the fiscal year. The 116th Congress also enacted the Indian Community Economic Enhancement Act of 2020. This important piece of legislation revises several federal laws focused on economic development for Native American communities. For example, the legislation requires better coordination between federal agencies to support economic development in Native communities, waives the matching funds requirement for assistance provided to Native CDFIs, directs the Government Accountability Office to conduct a study that assesses a range of programs to support Native American business and economic development, strengthens the Buy Indian Act, and authorizes the Administration for Native Americans (within the U.S. Department of Health and Human Services) to provide financial assistance to Native CDFIs.

Finally, the 116th Congress enacted the Native American Business Incubators Program Act, a bill championed in the Senate by Senator Tom Udall (D-NM) and in the House of Representatives by Congresswoman Deb Haaland (D-NM). The act establishes the new grant program within the Interior Department's Office of Indian Energy and Economic Development. The program will support organizations that provide a physical workspace, facilities, resources, and services to support both startups and established businesses. Native CDFIs are well positioned to take advantage—and, hopefully, to inform development—of the new program, with many complementary programs already in place. As just one example, the Native CDFI Spruce Root runs an annual "Path to Prosperity" business-development competition to support the development of businesses that could have a positive economic, environmental, and community impact within the Southeast Alaska region.

Competitors are judged based on the feasibility of their business proposal and its contribution to community development. Competition finalists attend an intensive Business Boot Camp, and winners receive a financial award along with consulting and technical assistance.

In the 117th Congress, the American Rescue Plan Act of 2021, signed into law on March 11, 2021, commits \$10 billion to the State Small Business Credit Initiative (SSBCI), which would support as much as \$100 billion in small business financing through Tribes, states, and local programs. This includes a \$500 million set-aside for Tribes to participate in the program. The SSBCI, established by the Small Business Jobs Act of 2010, previously provided nearly \$1.5 billion to state small-business financing programs. CDFIs played an important role in the SSBCI, completing 50 percent of all SSBCI lending transactions (7,889 loans) as of 2015. However, Native CDFIs and Native Americans more broadly did not participate in SSBCI programs at a high rate, spurring Congress' decision to establish the Tribal set-aside.

Additionally, the American Rescue Plan Act provides \$20 billion in COVID-19 relief funds (in addition to other program funds) to Tribal governments. Tribal governments will have the flexibility to provide funds to private nonprofit organizations, including nonprofit Native CDFIs, to help respond to or mitigate the COVID-19 public health emergency or its negative economic impacts.

In the article below, we discuss ongoing efforts to establish a Native set-aside within the NMTC program. Efforts also continue to permanently authorize the NMTC program, with Senators Ben Cardin (D-MD) and Roy Blunt (R-MO) leading the effort in the Senate and Congresswoman Terri Sewell (D-AL) and Congressman Tom Reed (R-NY) leading the effort in the House of Representatives.

Update on Efforts to Establish a Proportional Set-Aside for Indian Country Within the New Markets Tax Credit Program

BY ANDREW VANDERJACK

The Treasury Department has recognized that American Indian and Alaska Native communities face some of the greatest barriers to accessing capital and basic financial services in the nation. This is precisely the challenge that the department's New Markets Tax Credit (NMTC) program was designed to address.

Congress established the NMTC program as part of the Community Renewal Tax Relief Act of 2000 to encourage investments in impoverished, low-income communities that traditionally lack access to capital. However, the NMTC program has no built-in mechanism to ensure that NMTC investments reach Native American communities, and American Indian and Alaska Native stakeholders have long pointed out that the NMTC program has largely failed to reach Native American communities equitably.^[1] Last year, the Native CDFI Network reported that the Community Development Financial Institutions (CDFI) Fund had made 1,254 allocation awards totaling \$61 billion. Of that, \$52.5 billion had been invested in low-income communities. Only \$248 million, or 0.41 percent, had been awarded to Native-led community development entities (CDEs).

In 2020, during the previous (116th) Congress, the four senators from Alaska and Hawaii introduced the Inspiring Nationally Vibrant Economies Sustaining Tribes Act, or INVEST Act, which would have amended the NMTC program to, among other things, promote investments by Native American organizations in Native American communities. The bill also would have redefined "low income community" to extend the availability of NMTC benefits to all of Indian Country, including Native American lands in Alaska and Hawaii.

The INVEST Act would have established a 10 percent programmatic set-aside for Native American communities by defining a new phrase, “qualified Indian community development entity” (“Indian CDE”), and would have directed the Treasury Department to ensure that 10 percent of NMTC program investments are allocated to qualified Indian CDEs for investments that primarily serve Native American communities.[2] To qualify as an Indian CDE under the proposed legislation, an entity would need to meet the current statutory requirements that apply to all CDEs and would need to be 51 percent or more owned and controlled by an Indian Tribe or operate as a Native CDFI.

Because the phrase “Native community development financial institution” is not defined by law, the INVEST Act also included a new statutory definition of the phrase. Based on feedback from several stakeholders, the INVEST Act would have established that at least 51 percent of the Native CDFI’s activities must “serve” Native communities, aligning in part with the current policy of the Treasury Department’s CDFI Fund, which requires that “at least 50 percent of [the Native CDFI’s] activities are directed toward the Native Community.” The proposed legislation also would have established that a Native CDFI must be at least 51 percent “owned or controlled” by Native Americans.

Although the INVEST Act would have focused on investments by Native organizations in Native communities, the legislation would have continued to support the contributions of non-Native CDEs to Native communities. The legislation would have allowed a qualified Indian CDE to be up to 49% owned or controlled by a non-Native entity and did not preclude any ongoing or future effort of non-Native CDEs to steer NMTC investments outside of the proposed set-aside to Native communities.

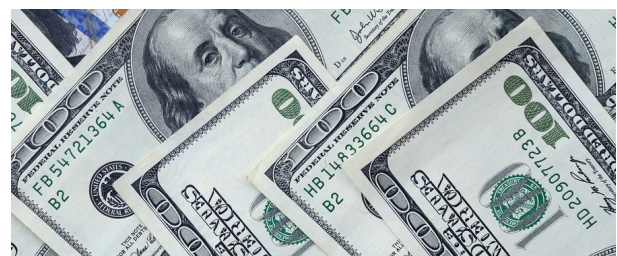
At least one piece of legislation proposed during the 116th Congress—the Moving Forward Act, a \$1.5 trillion infrastructure and recovery bill advanced by House Democrats—took a somewhat different tack. The Moving Forward Act included language that would have required a “proportional” allocation of NMTC benefits to Indian Country. The bill took a somewhat narrower approach to the definition of “low income community,” largely excluding Alaska Native hub communities and all Native Hawaiian home lands.

Advocates for NMTC set-aside legislation have met some objections on the basis that establishing a set-aside for one group would, in theory, open the door to enacting set-asides for multiple groups. It is for this reason, presumably, that the Moving Forward Act avoids a strict set-aside, authorizing a “proportional” allocation for Indian Country in a manner similar to an existing “proportional” set-aside for rural communities, a set-aside that was added to the NMTC program in 2004.

The Moving Forward Act does take a thoughtful approach to requiring a “proportional” allocation to Indian Country, specifically by requiring that NMTC allocation should be distributed “based on the overall number of Native Americans relative to the portion of the United States population which is at or below the poverty line” However, unlike the INVEST Act, the language does not require the Treasury Department to allocate funds to Native-owned or -controlled entities.

We hope the 117th Congress will put forward legislation that establishes an NMTC set-aside for Indian Country and believe the objections of some Members of Congress can be overcome, for a couple of reasons. For one thing, it is not at all uncommon to enact legislation that provides narrowly tailored, narrowly targeted services to the Native American community. Congress passed the Indian Financing Act of 1974 as targeted, narrowly tailored legislation intended to “reduce the disparity between business capital available to Indian and non-Indian businesses.” As the 116th Congress just observed in passing the Indian Community Economic Enhancement Act, the federal government has an important government-to-government relationship with Indian Tribes and a role in developing programs that will enable Tribes to “overcome a number of barriers, including” geographical location, lack of infrastructure or capacity, lack of sufficient collateral and capital, and regulatory bureaucracy relating to development and access to services provided by the federal government. Additionally, the Government Accountability Office (GAO) has previously recognized that “minority entities are less successful in obtaining awards than non-minority entities” within the NMTC program. One of the potential solutions to this problem, offered by the GAO itself, was to establish set-asides for minority CDEs.

The INVEST Act and Moving Forward Act offer two different approaches that ensure a fair allocation of NMTC benefits to Indian Country. These initiatives deserve Congress’ attention, especially now, as Native CDFIs and other CDEs work toward economic recovery in Indian Country.



[1]See, e.g., Native American Finance Officers Association (NAFOA), *New Market Tax Credits: Capital and Asset Management* (2014) (“Despite the considerable amount of tax credits deployed throughout the country and the potential of the program to significantly increase economic growth in Indian Country, tribal communities and tribally focused CDEs have been left behind.”).

[2]Although the legislation establishes a 10 percent programmatic set-aside for investments in Native American communities, some flexibility is allowed to facilitate projects like broadband or Tribal schools, which often involve infrastructure investments that primarily “serve” Native American communities but may not be fully located “in” Native communities.

Congress Needs to Provide Equitable Treatment for Native-Owned Businesses Participating in BIA's Loan Guarantee Program

BY ANDREW VANDERJACK

Last year, Congress enacted provisions in the CARES Act that provided \$17 billion to the Small Business Administration (SBA) to pay the principal, interest, and fees on all preexisting SBA loan products issued under SBA's Section 7(a) loan guarantee, 504, and microloan programs. The legislation directed SBA to provide this assistance for a period of six months on behalf of small businesses impacted by COVID-19. Congress recently extended this coverage under the Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act, signed into law on December 27, 2020.

We think that Congress should have provided equivalent relief to Native-owned businesses participating in the BIA loan guarantee program.

Recent reporting suggests that American businesses owned by people of color are failing due to COVID-19 at much higher rates than other businesses. We don't have statistics for Native-owned businesses, but we do know that many are struggling to stay afloat. This is particularly true for businesses in the tourism and hospitality sectors, for which the COVID-19 emergency has been particularly damaging.

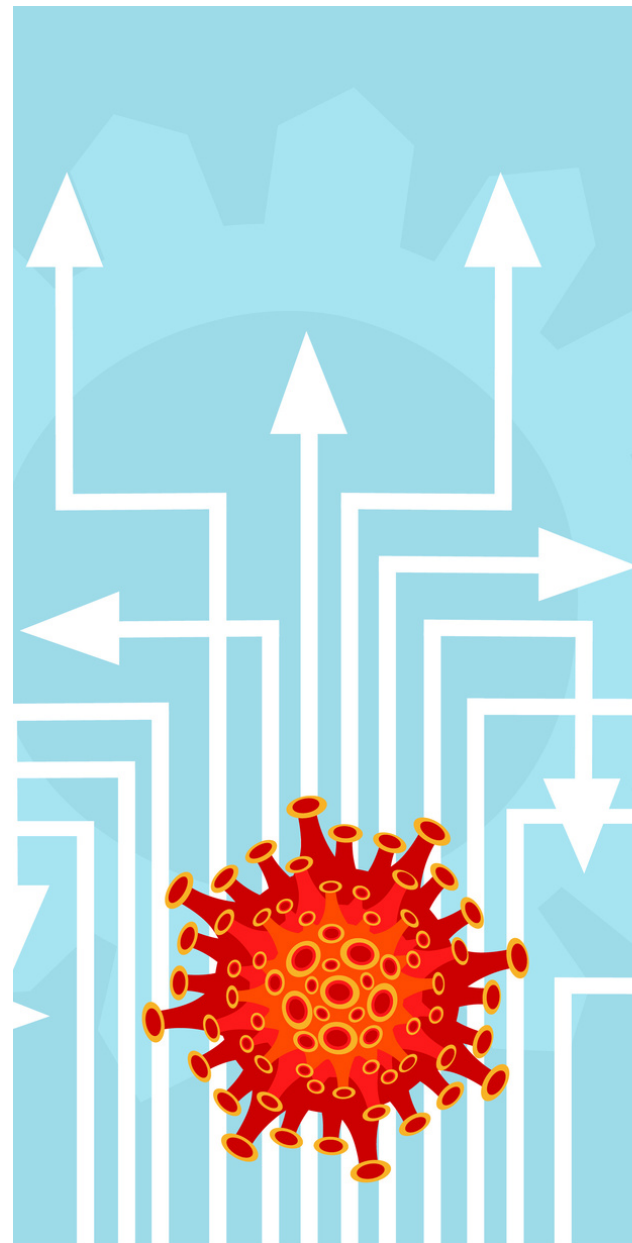
One of the programs already in place to support Native-owned business is the Bureau of Indian Affairs (BIA) Loan Guarantee Program, established pursuant to Section 201 of the Indian Financing Act of 1974. This program supports Native-owned businesses that contribute to the economy of an Indian reservation or Tribal service area. Hundreds of Native-owned businesses across Indian Country participate in this program, including businesses in New Mexico, Arizona, Alaska, Oklahoma, Nevada, Montana, Washington, Wisconsin, North Dakota, and South Dakota.

Congress should enact legislation that provides Native-owned businesses participating in the BIA loan guarantee program with a window of relief, which would help these businesses survive long enough to start generating cash, paying employees, and getting back on track financially. The BIA loan guarantee program is small, and relief would cost a small fraction of the relief already extended to other SBA program borrowers.

Congress could, for example, provide funding to BIA to provide assistance to Native-owned businesses on the basis of relative economic need, with a six-month base period for all borrowers (consistent with the CARES Act relief for SBA borrowers), and make additional funding available to allow BIA to extend the relief period for up to 18 months for individual borrowers based on the relative economic impact of COVID-19 on their business.

We think it is inequitable on its face that this financial assistance has not been extended to borrowers participating in the BIA loan guarantee program. As BIA points out on its website, "Congress passed the Indian Financing Act of 1974 . . . to reduce the disparity between business capital available to Indian and non-Indian businesses." As noted by the Treasury Department's Native American CDFI Assistance Program, Native communities face unique challenges to economic growth, including heightened barriers to accessing capital and basic financial services. Congress should provide the same assistance to BIA loan guarantee program borrowers that it has already extended to SBA program borrowers.[1]

[1]Congress also has not provided relief to U.S. Department of Agriculture programs, such as the Business and Industry (B&I) Guaranteed Loan Program. Although these programs target rural areas, the loans impact a wide range of Native American borrowers, including federally recognized Indian Tribes and Native-serving businesses. The B&I Guaranteed Loan Program supports a variety of important Native-serving industries, including fishing, seafood processing, healthcare, electric power distribution, transportation, engineering, restaurants, recreation, and tourism.



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