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Native Affairs Quarterly

Van Ness Feldman LLP

Welcome

Welcome to Van Ness Feldman's Native Affairs newsletter. 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

Native Affairs Practice Recognized as a Nationwide Leader

Congratulations to Maranda Compton, Andrew VanderJack, Patrick Daugherty, Michael Goodstein and Robert Conrad on receiving recognition from *Chambers USA* and the *Legal 500* 2021-2022 rankings for their outstanding work in the area of Native American law and policy.

Congratulations to Melinda Meade Meyers

We are proud to announce that Melinda Meade Meyers has been promoted to Of Counsel effective July 1. Melinda's practice focuses on law and policy issues pertaining to Alaska's Native communities, natural resources, and public lands. She counsels Alaska Native corporations, Tribes, local governments, public lands user groups, and others on regulatory compliance matters and strategic business decisions related to land use, permitting, and economic development. Melinda also counsels Alaska Native corporations and Tribes on federal small business contracting and participation in the U.S. Small Business Administration's business development programs, such as the 8(a) and HUBZone Programs. She helps clients navigate the complexities of program compliance and advises Native-owned firms on legislative and regulatory changes impacting their businesses. Melinda is an invaluable member of the Native Affairs practice team.

In Case You Missed It…

On April 16th, we hosted the third installment of our webinar series on Historical Trauma. We were joined by Donna Manuelito, Assistant Superintendent of Academic Excellence for the San Carlos Unified School District; Ann Mahi, Former Superintendent of the Nanakuli-Waianae Complex in Hawaii; Kalei Ka'ilihiwa, Director for Kamehameha Schools' O'ahu Moku; Dr. Tami DeCoteau, a leader in trauma-informed psychology; and Dan Press, Senior Counsel at Van Ness Feldman who shared lessons learned from their experiences implementing trauma-informed programs in Native communities and spoke on how to take advantage of the myriad federal resources available to Native Communities in the American Rescue Plan Act of 2021.

Check it out at this link.

In Cooley, Supreme Court Reaffirms "Montana Exceptions" Permitting Tribes to Exercise Authority Over Certain Activities of Nonmembers

BY PATRICK DAUGHERTY

On June 1, 2021, the Supreme Court unanimously held that a tribal police officer does have authority to temporarily detain and search non-Indians traveling on public rights-of-way running through a reservation. *United States v. Cooley*, ___ U.S. ___, No. 19-1414. The tribal police officer may investigate potential violations of state or federal law during such a stop, not just violations of tribal law.

Cooley, a non-Indian, was in a truck parked on the side of a highway within the boundaries of the Crow Reservation in Montana. A tribal police officer spotted Cooley and asked him why he was parked on the side of the highway in the middle of the night. The officer observed two semi-automatic rifles and a pistol in the truck. The officer called for backup from the county police and secured Cooley in his patrol car. While securing the weapons, the officer saw methamphetamine in the vehicle.

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. A Ninth Circuit panel affirmed.

In a unanimous decision written by Justice Breyer, the Court noted the "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." Slip. Op. at 4 (citing *Montana v. United States*, 450 U.S. 544 (1981)). However, the court emphasized that the rule was not absolute and that two exceptions exist. First, a tribe "may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements." *Id.* Second, a "tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."

Holding that the second exception "fits the present case, almost like a glove" the Court upheld the authority of tribal police to detain non-Indians traveling on public rights of way through a reservation. The Court quoted the Washington Supreme Court's holding in another case that "[a]llowing a known drunk driver to get back in his or her car, careen off down the road, and possibly kill or injure Indians or non-Indians would certainly be detrimental to the health or welfare of the Tribe." *Id.* at 5 (quoting *State v. Schmuck,* 850 P.2d 1332, 1341, *cert. denied*, 510 U.S. 931 (1993)). The Court also expressed concerns about the practical consequences of the Ninth Circuit's holding for the safety of Indians and non-Indians living on Indian reservations, citing amicus briefs filed former U.S. Attorneys and the National Indigenous Women's Resource Center.

The Court's re-affirmation of the first exception to *Montana's* general proposition may also prove to be useful to tribes engaged in economic development efforts that involve contracting with non-Indian persons.

Justice Alito concurred stating he would limit the holding to cases in which the public highway is "primarily patrolled" by tribal police.

Legislative Update for the Tribal Cannabis Industry

BY ROBERT CONRAD & LAURA JONES

In this article, we provide an update on the status of pending legislation we discussed in previous editions of the Native Affairs Quarterly, an overview of newly proposed and upcoming federal legislation involving cannabis, and details about how the American Rescue Plan Act's allocations for Tribal governments could be utilized to benefit future or existing Tribal cannabis or hemp operations.

Federal Cannabis Legislation Update

There are several pieces of legislation pending before Congress that could have a significant impact on the cannabis industry:

- The SAFE Banking Act of 2021, H.R. 1996, which was introduced in the previous Congress, would allow financial institutions and insurers to legally do business with the cannabis industry without fear of legal action by the federal government. It passed the House on April 19, 2021. It was received in the Senate and referred to the Committee on Banking, Housing, and Urban Affairs on April 20, 2021.
- The Marijuana 1-to-3 Act of 2021, H.R. 365, would transfer cannabis from a schedule I to a schedule III drug under the Controlled Substances Act. It was introduced in the House on January 19, 2021 and referred to both the Committee on Energy and Commerce and the Judiciary Committee, which in turn referred the legislation to the Subcommittee on Health on February 2 and the Subcommittee on Crime, Terrorism, and Homeland Security on March 5, respectively.
- The MORE Act of 2021, H.R. 3617, was reintroduced by Congressman Jerrold Nadler on May 28, 2021. The Act would end the criminalization of cannabis at the federal level retroactively and going forward. Cannabis arrests, charges, and convictions would be automatically expunged at no cost to the individual. However, cannabis could still be criminalized by individual states. The Act would also create the Office of Cannabis Justice to oversee the social equity provisions in the law. On July 7, the Act was referred to the Subcommittee on Conservation and Forestry for further discussion.
- The Cannabis Administration and Opportunity Act, S. ___ would completely remove cannabis from the controlled substances list under the Controlled Substances Act and would allow states to implement their own laws regarding cannabis without fear of federal intervention. A discussion draft was released by Senators Schumer, Booker, and Wyden on July 14, 2021. The Senators are seeking feedback as they finalize the proposed piece of legislation.

As discussed in our Spring 2021 article, although the Democrats control 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. The filibuster rules require 60 votes for a bill to pass the Senate, so any cannabis legislation would need support from every Democratic Senator and ten Republicans.

The American Rescue Plan Act of 2021

In March, Congress passed the American Rescue Plan Act of 2021 ("ARPA" or "Act"), which allocated $20 billion to Tribal governments. Congress directed that $1 billion be allocated equally among eligible Tribal governments and the remaining $19 billion be allocated to Tribal governments in a manner determined by the Secretary of the Treasury. Of that $19 billion, 65% of these funds, or $12.35 billion, will be distributed based on pro rata, self-certified Tribal enrollment. Treasury will distribute the remaining 35% of these funds, or $6.65 billion, based on self-certified Tribal employment data. Tribal governments may be able to utilize some of these funds to benefit future or existing Tribal cannabis or hemp operations, as Tribes receiving ARPA funding have substantial discretion to use the funds in ways that best suit the needs of their citizens as long as the use fits into one of the following four statutory categories:

1. Responding to the COVID-19 public health emergency or its negative economic impacts;
2. Responding to workers performing essential work during the COVID-19 public health emergency by providing premium pay to the Tribal government's eligible workers, or by providing grants to employers that have eligible workers who performed essential work;
3. For the provision of government services, to address the reduction in revenue of the recipient due to the COVID-19 public health emergency, relative to revenues collected in the most recent full fiscal year of the recipient prior to the emergency; or
4. To make necessary investments in water, sewer, or broadband infrastructure.

Tribes considering ways to positively impact their citizens through the use of ARPA funds could make the following investments—while not directly related to cannabis or hemp—to benefit future or existing Tribal cannabis operations.

Education – one of the eligible uses for ARPA funds is to address educational disparities. Tribes receiving funds could invest in science and business courses for their local high school or vocational schools. These types of courses are critical for any Tribal member that wants to own, operate, or work at a small business, such as a Tribal cannabis operation.

Infrastructure – the ARPA provides broad allowances for investments in infrastructure, including water, sewer, and broadband. Investments in each of these areas could provide dividends for Tribal economic development and small businesses, such as cannabis or hemp operations. In addition, water infrastructure projects would also benefit agricultural uses.

Small Businesses – ARPA funds can also be used to assist small businesses, including loans, grants, in-kind assistance, technical assistance, or other services, that addresses the negative economic impacts of the COVID-19 public health emergency. Tribes can explore the availability of these funds for cannabis or hemp related businesses.

While the future of federal legislation legalizing cannabis remains unclear, Tribes that are interested in the cannabis industry can start taking steps toward establishing the necessary framework for this area of Tribal economic enterprise. 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.

OPM Working to Implement New FEHB Program Eligibility for Tribally Controlled Schools

BY ANDREW VANDERJACK

Last year, South Dakota's Congressional delegation successfully advanced federal legislation that will enable more than 100 Tribally Controlled Schools across the country to participate in the Federal Employee Health Benefits (FEHB) Program. The Office of Personnel Management (OPM) is working to get the word out, and we hope this short update will provide helpful background for newly eligible entities and other groups interested in efforts to expand Tribal eligibility under the FEHB Program.

According to the Congressional Research Service, the FEHB Program is the largest employer-sponsored health insurance program in the country, providing health care benefits to about 85 percent of federal government employees and 90 percent of federal retirees. Under the Program the federal government and the employee or retiree share the cost of health insurance, with the federal government generally contributing 72% of the weighted average premium of all plans but no more than 75% of any given plan's premium. OPM administers the program.

Many Tribal employers have been eligible to participate in the FEHB Program since 2012. The Patient Protection and Affordable Care Act (Pub. L. 111–148), enacted in 2010, established that an Indian tribe or Tribal organization carrying out programs under the Indian Self-Determination and Education Assistance Act (ISDEAA), or an urban Indian organization carrying out programs under title V of the Indian Health Care Improvement Act, could participate in the FEHB Program.

In 2011 and 2012, OPM completed consultations with Indian tribes and other stakeholders on the new program and, in May of 2012, Tribal employers began purchasing FEHB coverage, rights, and benefits for their employees. Under the Program for Tribal employers, the Tribal employer is required to pay at least the government's share of the premium, and the enrollee pays the remaining share. Tribal employers are allowed to purchase coverage only for employees and their dependents, and coverage is not available to retirees.

The "Tribal School Federal Insurance Parity Act," introduced in the 115th Congress, focused on extending FEHB Program benefits to employees of Tribally Controlled Schools. Tribally Controlled Schools are generally defined as K-12 schools that 1) are operated by Indian tribes or tribal organizations, 2) do not qualify as a local educational agency, and 3) are not directly administered by the Bureau of Indian Affairs (BIA). According to the Bureau of Indian Education (BIE), the BIA funds 183 schools serving Native Americans located on 64 reservations in 23 states. Of these schools, 57 are managed directly by the BIE and already participate in the FEHB Program, and 126 are Tribally Controlled Schools and do not. Prior to the enactment of the Tribal School Federal Insurance Parity Act, even BIE "contract" schools (operated by Indian Tribes through the ISDEAA) were ineligible to participate in the FEHB Program without a change to the statute.

Congresswoman Kristi Noem (R-SD) in the U.S. House of Representatives and Senators John Thune (R-SD) and Mike Rounds (R-SD) in the U.S. Senate sponsored the Tribal School Federal Insurance Parity Act in the 115th Congress. Congressman Dusty Johnson (R-SD-At Large) joined the two senators to reintroduce the legislation again in the 116th Congress.

By the end of the 116th Congress, the South Dakota delegation had recruited a remarkably bipartisan coalition of cosponsors, including Congresswoman Deb Haaland (D-NM). The legislation also received support from the National Congress of American Indians, the National Indian Health Board, the National Indian Education Association, the All Pueblo Council of Governors, the Great Plains Chairmen's Health Board, the United Tribes of North Dakota, and the Saint Stephens Indian School Educational Association, among others.

On May 1, 2019, the Senate Committee on Indian Affairs held a legislative hearing on the Tribal School Federal Insurance Parity Act, at which John Tahsuda III, Principal Deputy Assistant Secretary—Indian Affairs, U.S. Department of the Interior, and Cecelia Firethunder, President, Oglala Lakota Nation Education Coalition, testified in support of the bill. Deputy Assistant Secretary Tahsuda reported that the participation of BIE schools in the FEHB program had reduced costs and aided in school recruitment and retention. Ms. Firethunder estimated that access to FEHB would save a single BIE grant school on the Pine Ridge Reservation, the Little Wound School, $1,000,000 per year. The Committee on Indian Affairs reported the bill to the full Senate in July 2019, and the legislation was ultimately enacted at the end of 2020, in section 1114 of the Consolidated Appropriations Act, 2021 (Pub. L. No. 116-260).

In April of 2021, OPM held a government-to-government consultation that, among other things, covered OPM's work with Tribes to enroll Tribal employees in the FEHB Program. During that consultation, OPM noted that Tribally Controlled Schools are now eligible to purchase coverage for their employees, and OPM has since formally initiated the application process. Inquiries may be directed to tribalprograms@opm.gov.

VAWA Reauthorization Efforts Continue, Including Focus on Expanding Jurisdiction for Alaska Native and Other Tribes

BY CHARLENE KOSKI

In March, the House of Representative introduced and passed legislation to reauthorize the Violence Against Women Act (VAWA), which expired in 2019. The reauthorization legislation, H.R. 1620, was received in the Senate on March 18, 2021, and negotiations to reach bipartisan agreement are underway. Because the Senate is evenly divided at 50-50, Democrats must find 10 Republican votes to avoid a filibuster. Primary sticking points in 2019 included provisions adding firearm restrictions for convicted domestic abusers and new protections for LGBTQ victims of violence, and those provisions are once again included in H.R. 1620. Also included are provisions intended to expand the special domestic violence jurisdiction for all tribal governments, including Alaska Native Tribes. If negotiations are successful, VAWA will include language intended to address the Act's disparate treatment of Alaska Native Women and Tribes.

As noted in our Spring 2021 Native Affairs Quarterly, H.R. 1620 includes an expansion of VAWA's special domestic violence criminal jurisdiction (SDVCJ) for all Tribal governments, including Alaska Native Tribes. That special jurisdiction affirms the inherent authority of Tribes to exercise domestic violence jurisdiction over certain defendants, regardless of their Indian or non-Indian status. Under the current version of VAWA, SDVCJ jurisdiction is expressly tied to Indian country, which generally does not include Alaska Native villages or Native-owned lands in Alaska. As a practical matter, that means most Alaska tribes are currently ineligible, 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.

Last year, Congressman Don Young (R-Alaska), who serves as the Ranking Member of the House Subcommittee for Indigenous Peoples, and Senator Lisa Murkowski (R-Alaska), who serves as Vice Chair of the Senate Committee on Indian Affairs, each introduced legislation that would have created a pilot project allowing Tribes in Alaska to implement criminal jurisdiction under VAWA regardless of a defendant's Indian status.

Congressman Young's legislation would have redefined the term "Indian country" for purposes of the project, and Senator Murkowski's legislation would have expanded the jurisdictional reach of Alaska Tribes participating in the pilot to the entirety of participating Alaska Native Villages. H.R. 1620 contains similar language, and Senator Murkowski and Congressman Young both remain committed to finding a solution.

Tribal Governments May Need to Reach Out to Low Income Members Who Need Assistance Accessing the Expanded Child Tax Credit Program

BY DAN PRESS

One of the largest appropriations in the American Rescue Plan Act (ARPA) went to an expansion of the Child Tax Credit. It provides an eligible family $3000 a year for each child between 6 and 17 and $3600 a year for each child aged 5 and under. Full eligibility is open to families making less than $75,000 a year; the payment gradually diminishes until a family making $240,000 a year will receive no money. Families that file tax returns or received a stimulus check will automatically receive the payment, which will now arrive on a monthly basis paid in advance.

Importantly, under the ARPA a family is now eligible for the Child Tax Credit even if it has never filed a tax return. The payment is not considered income and therefore will not affect the family's eligibility for other programs, such as SNAP or WIC. To receive the credit, a family that did not file a tax return in 2019 or 2020 needs to file a "non-filer" form. Those who have at least one qualifying child and earned less than $24,800 as a married couple, $18,650 as a head-of-household, or $12,400 as a single-filer can apply by using the IRS non-filer sign-up tool.The online tool also allows individuals and families to apply for the stimulus payments as part of the process.

There is an important role to play here for tribal governments and organizations serving Native American populations. Families in your community that have not filed income tax returns within the last two years—and therefore need to use the non-filer sign-up tool—may not have ready access to a computer or the internet and may find filling out the form challenging. Tribal social service offices and non-profit organizations should be equipped to reach out to families to ensure they are aware of this opportunity to assist them with online signup.

While the ARPA provision is only good for one year, there is a major effort underway in Congress to get it extended at least through 2025. As a result, helping families enroll in the Child Tax Credit program now may well have a major impact on reducing child poverty in Native communities well into the future.

Below are links to the non-filer sign-up tool and more information on the Child Tax Credit.

Child Tax Credit Non-Filer Sign Up Tool
Child Tax Credit Non-Filer Fact Sheet
Child Tax Credit Logic Path to Determine Eligibility (interactive)

Spread the word far and wide! This is one of the most important and relatively easy ways we can help alleviate poverty.

Interior Department Moves Forward with Alaska Native Vietnam Era Veterans Land Allotment Selections

BY JONATHAN SIMON & MELINDA MEADE MEYERS

After 50 years, Alaska Native Vietnam era veterans and their heirs continue to hope for meaningful progress in obtaining the land allotments to which they are entitled and for which they have long been waiting. There is now some indication that, despite multiple delays, challenges, and false starts, the U.S. Department of the Interior (DOI) is taking limited action to move the process forward. On May 13, 2021, DOI announced next steps in its implementation of the Alaska Native Vietnam Era Veterans Land Allotment Program (Allotment Program), which aims to compensate Alaska Native veterans who missed the opportunity to apply for an allotment of certain federal lands in Alaska due to their military service during the Vietnam War. Specifically, DOI announced that it will allow applications for allotments within 28 million additional acres covered by several Trump Administration Public Land Orders (PLOs) currently under departmental review. However, while the Bureau of Land Management (BLM) has said it will process and expedite applications for these lands, it is important to note that the agency has indicated it will not complete processing unless and until DOI makes those lands available after finishing its two-year review of the legality of these PLOs.

The Allotment Program aims to address disparities created in 1971 when the Alaska Native Claims Settlement Act (ANCSA) repealed the 1906 Alaska Native Allotment Act, under which Alaska Natives could apply to receive an allotment of 160 acres of land. Because they were off fighting in the Vietnam War, thousands of eligible Alaska Natives were precluded from applying for allotments before the 1906 Act was repealed.

> **"After 50 years, Alaska Native Vietnam era veterans and their heirs continue to hope for meaningful progress in obtaining the land allotments to which they are entitled and for which they have long been waiting. "**

A subsequent congressional effort to remediate this inequity fell short. In 1998, Congress opened an 18-month application window for certain veterans who were in active duty between 1969 and 1971 to apply for allotments, but the limited application window, service year restrictions, and an occupancy requirement led to the issuance of only about 250 allotments.

In 2019, Congress again sought to address compensation of Alaska Native Vietnam veterans who missed the opportunity to apply for an allotment before the enactment of ANCSA in the John D. Dingell, Jr. Conservation, Management, and Recreation Act of 2019, which established the Alaska Native Vietnam Era Veterans Land Allotment Program. The Dingell Act's Allotment Program differs from Congress's previous efforts in several important ways. First, the Dingell Act lengthened the amount of time lands are available for selection to a period of five years, until December 29, 2025. Next, it extended eligibility to any Alaska Native Vietnam veteran who served between August 5, 1964, and December 31, 1971, and who did not previously receive an allotment, and it allowed the surviving heirs of deceased eligible veterans to apply in their stead. Finally, the Dingell Act removed the personal use or occupancy requirement mandated under prior law, as many eligible veterans, and the heirs of deceased eligible veterans, now live outside of Alaska. In November 2020, BLM issued final regulations to implement the Dingell Act and allow approximately 2,200 veterans and their heirs to apply for land allotments.

However, even with the expanded eligibility requirements, a fundamental impediment to allotment selection has long been that the lands available for selection are unsuitable to potential applicants. Eligible individuals may only select an allotment from "vacant, unappropriated, and unreserved federal lands" in Alaska. Although approximately 1.6 million acres are available for selection, that land is often hundreds of miles away from applicants' home villages or otherwise practically inaccessible. For example, a majority of eligible veterans and their heirs live in Southeast Alaska, which is largely comprised of the nearly 17-million-acre Tongass National Forest.

Because lands within national forests are ineligible for selection, these individuals are precluded from receiving allotments on their ancestral lands or lands near their homes. Alaska Native veterans from the North Slope region face a similar challenge, with the nearly 23 million acre National Petroleum Reserve-Alaska and the 19.3 million acre Arctic National Wildlife Refuge, among other federal lands, off limits to selections, despite the fact that majority of the North Slope villages are situated within these two massive reserves. Eligible individuals repeatedly have asked for more lands to be made available for selection near their Native villages.

In January 2021, the outgoing Trump Administration issued several PLOs that sought to remove federal restrictions on approximately 28 million acres of BLM-managed lands in Alaska, which would open the land to additional uses and selection under the Allotment Program. Quickly following the administration transition, DOI announced that it would review those PLOs for legal defects and delay their implementation for two years. Though the State of Alaska filed a lawsuit on July 7 challenging the Biden Administration's action to delay the implementation of the PLOs, allotment selections of lands covered by these PLOs could also be delayed by two years, if not ultimately barred entirely.

In response to concerns raised about the impact of the PLO review on the Allotment Program, DOI recently indicated it will move forward with allotment applications for these areas while the review is ongoing. On May 13, 2021, DOI announced that BLM will prioritize its review of those lands to offer them for allotment selection, and that it will expedite and process allotment applications across those lands during the review of the PLOs. Accordingly, BLM added approximately 28 million acres to its "Available Lands Map" as "Potentially Available after PLO Review" to denote the lands potentially available pending DOI's review of the PLOs. However, although BLM has said it will immediately begin processing any applications it receives for these lands, according to a May 25, 2021, Program Update, it will only complete processing "if the lands become available after the ongoing review."

DOI conducted consultation in May and June 2021 with Alaska Native tribes and Alaska Native corporations. Notably, DOI has cited lack of consultation with these entities and the potential negative impacts of the PLOs on rural subsistence preferences for Alaska Natives as defects in the Trump Administration's PLO decision-making processes.

Alaska Native and American Indians have a proud history of military service, serving in the military at higher rates than any other ethnic group in the country. Efforts to expand the lands available for selection under the Alaska Native Vietnam Era Veterans Land Allotment Program would advance the important objective of finally allowing Alaska Native veterans or their heirs to receive the allotments to which they are entitled. Whether and to what extent DOI's recently announced steps ultimately help achieve the goal of rectifying this inequity for Alaska Native Vietnam veterans remains to be seen.

Supreme Court Confirms Alaska Native Corporation Eligibility for CARES Act Relief

BY JONATHAN SIMON

Once again recognizing "the unique circumstances of Alaska and its indigenous population," the U.S. Supreme Court recently confirmed the special status that Congress has afforded to Alaska Native corporations under the Alaska Native Claims Settlement Act (ANCSA), as amended.

On June 25, 2021, in *Yellen v. Confederated Tribes of the Chehalis Reservation*, the Court ruled that Alaska Native corporations (ANCs) are "Indian tribes" under the Indian Self-Determination and Education Assistance Act of 1975 (ISDEAA or ISDA) and are therefore eligible to receive certain COVID-19 relief funds made available under Title V of the CARES Act. Although the case itself, together with a related case, *Alaska Native Village Corp. Association v. Confederated Tribes of the Chehalis Reservation*, was concerned specifically with the CARES Act funds, because many other federal programs incorporate the ISDEAA definition of "Indian tribe" by reference or utilize similar language, the decision has important potential implications for the continuing and future participation by ANCs in a range of other programs benefitting Alaska Natives.

In March 2020, in Title V of the CARES Act, Congress appropriated $8 billion to "Tribal governments" to aid those entities in responding to the COVID-19 public health emergency. The CARES Act defines "Tribal governments" as "the recognized governing body of an Indian Tribe," and specified that "[t]he term 'Indian Tribe' has the meaning given that term" in section 4(e) of the ISDEAA. Under ISDEAA, an "Indian Tribe" is:

"any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians."

In April 2020, the U.S. Department of Treasury determined that, under these definitions, ANCs were eligible to receive relief under Title V of the CARES Act, and the Department set aside a portion of the $8 billion for payment to ANCs. A number of federally recognized tribes subsequently challenged this determination, arguing that ANCs were not eligible for Title V payments because (1) ANCs do not meet ISDEAA's definition of "Indian tribe," and (2) ANCs are not or do not have a "recognized governing body" of an Indian tribe.

Neither sovereign Tribes nor typical for-profit corporations, ANCs are unique entities established pursuant to the direction of Congress to implement the settlement of Alaska Natives' aboriginal land claims under the Alaska Native Claims Settlement Act (ANCSA) in 1971. Generally eschewing the Tribal reservation and trusteeship model used to address Native lands in the lower-48 states, Congress instead settled Alaska Native aboriginal land claims in exchange for title to approximately 44 million acres of land and a payment of almost $1 billion, and directed the establishment of ANCs, including 12 regional corporations and more than 200 village corporations, to receive and manage the benefits of the settlement on behalf of their Alaska Native shareholders. For 50 years, consistent with ANCSA, ANCs have served a key role in promoting the health, education, and welfare of Alaska Natives and Alaska Native communities, often working in cooperation with Alaska Native villages (which, by and large, are federally recognized Tribes) and other Native organizations.

After first finding that the plaintiffs were likely to prevail on the merits and granting their request for a preliminary injunction in April 2020, in June 2020, Judge Amit P. Mehta of the U.S. District Court for the District of Columbia ultimately held that ANCs fall within ISDEAA's definition of Indian tribe and therefore qualify for emergency relief funding under Title V of the CARES Act.

In September 2020, the U.S. Court of Appeals for the D.C. Circuit reversed, holding that ANCs were not eligible for emergency aid under Title V of the CARES Act because ANCs have not been recognized as eligible for special programs and services provided by United States to Indians because of their status as Indians, which the Court of Appeals found to be required to qualify as "Indian tribes" under ISDEAA. In so holding, the D.C. Circuit created a split with an earlier decision by the U.S. Court of Appeals for the Ninth Circuit, Cook Inlet Native Association v. Bowen, which had held that ANCs are "Indian tribes" under ISDEAA, irrespective of the "recognized as eligible" clause in the definition of that term. The United States and several ANCs and ANC groups subsequently took the D.C. Circuit's opinion case up to the Supreme Court.

In a 6-3 opinion delivered by Justice Sotomayor and joined in full by Chief Justice Roberts and Justices Breyer, Kavanaugh, and Barrett, and in part by Justice Alito, the Supreme Court reversed: "The Court today affirms what the Federal Government has maintained for almost half a century: ANCs are Indian tribes under ISDA. For that reason, they are Indian tribes under the CARES Act and eligible for Title V funding."

In so ruling, the Court first held that ANCs satisfy the "recognized as eligible" clause in the ISDEAA definition, but went on to say that even if they did not, they would still qualify under the definition. In the first instance, the Court explained that ANCs were established pursuant to ANCSA and therefore are "recognized as eligible" for ANCSA's benefits. Such eligibility, the Court concluded after recounting provisions of ANCSA describing the roles and responsibilities of ANCs and noting that ANCSA is "Indian legislation enacted by Congress pursuant to its plenary authority under the Constitution of the United States to regulate Indian affairs," counts as eligibility for "the special programs and services provided by the United States to Indians because of their status as Indians." "Congress' express inclusion of ANCs" in the ISDEAA definition, the Court said, "confirms that eligibility for ANCSA's benefits alone is eligibility enough to be an Indian tribe."

The Court further rejected the Tribes' argument that "recognized" as used in the "recognized as eligible" clause should be read as a term of art to refer exclusively to federally recognized tribes having a government-to-government relationship with the United States. "Recognized," the Court stated, "is too common and context dependent a word to bear so loaded a meaning wherever it appears, even in laws concerning Native Americans and Alaska Natives."

But even if they did not satisfy the "recognized as eligible" clause, the Court concluded that ANCs would still meet ISDEAA's definition of "Indian tribe." Pointing to the fact that no Alaska Native villages or ANCs had been recognized for a government-to-government relationship with the United States when ISDEAA was enacted in 1975, and the high unlikelihood at that time that ANCs ever would be recognized as sovereign political entities, the Court explained that applying the "recognized as eligible" clause to these entities would have rendered the clause specifically "including" the Alaska groups without effect. Noting that certain grammatical canons of interpretation must give way when applying them would yield a "contextually implausible outcome," the Court concluded: "Any grammatical awkwardness involved in the recognized-as-eligible clause skipping over the Alaska clause pales in comparison to the incongruity of forever excluding all ANCs from an 'Indian Tribe' definition whose most prominent feature is that it specifically includes them."

The Court dismissed concerns that its holding would "open the door" to other Indian groups that have not been federally recognized from being deemed Indian tribes under ISDEAA. ANCs, the Court reasoned, were "part of a legislative experiment tailored to the unique circumstances of Alaska and recreated nowhere else" and no other entities other than Alaska Native villages —which are themselves federally recognized—are expressly included in ISDEAA's definition of "Indian tribe." It also disagreed that its decision "vest[s] ANCs with new and untold tribal powers: "It merely confirms the powers Congress expressly afforded ANCs and that the Executive Branch has long understood ANCs to possess."

Following the decision, although some Tribal Nations and other groups expressed disappointment with the Court's ruling, key groups representing Alaska Natives and American Indians in the lower-48 states issued statements calling for the broader Native community to work together going forward in the interest of all indigenous people:

"ARA and ANVCA are committed to building greater understanding about the critical roles ANCs play in the lives of Alaska Native people, and we stand ready to unite with Indian Country to better serve all of our Indigenous communities." *ANCSA Regional Association and Alaska Native Village Corporation Association (June 25, 2021)*

"NCAI looks forward to continuing our work representing tribal governments and working with Alaska Native Corporations, tribal partners, and other allies to ensure that the United States meets its treaty obligations and its trust responsibilities to moving forward." *National Congress of American Indians (NCAI) President Fawn Sharp (June 25, 2021)*

This dispute over CARES Act relief funds focused attention on the importance of recognizing and respecting the sovereign status of Tribes and their government-to-government relationship with the United States, while also recognizing and respecting the unique status and role of ANCs in serving Alaska Natives and Alaska Native communities. While the Court's decision brings closure to the CARES Act litigation, these issues can be expected to remain a focus of policymakers and stakeholders going forward.

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.