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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!

Marking Native American Heritage Month

The firm marked Native American Heritage month by hearing from some of our up-and-coming professionals, who shared helpful information and resources on topics ranging from the brutal legacy of Native American "Boarding Schools", recognizing the Missing and Murdered Indigenous People Crises, the importance of Native American representation and the harmful stereotypes of mascots, reconciling the myth of Thanksgiving, and why Native language preservation and revitalization is at the core of Tribal sovereignty. Their informative efforts were accompanied by their personal stories which helped all of us at Van Ness Feldman better understand and appreciate the perspectives of Native and Indigenous people.

Special thanks goes to **Robert Conrad**, **Laura Jones, Sophia Amberson**, **Xena Burwell** and **Melinda Meade Meyers** for their efforts.

Dan Press Featured in Blog Post

Dan Press, Senior Counsel with the firm was featured in an article in the PACEs (positive & adverse childhood experiences) Connection blog. The piece tells the story of how a kid from the Bronx came to practice Native American law and Dan's leadership in raising awareness about historic trauma and adverse childhood experiences and their long-term impact on the welfare of Native communities.

You can view the article here.

Included in This Issue

Alaskans who traveled to Washington, D.C., for congressional hearings on the Alaska Native Claims Settlement Act, which was signed into law by President Richard Nixon in December 1971. Standing from left are George Gardner, Roger Connor, Emil Notti, Flore Lekanof, Cliff Groh, Barry Jackson, congressional secretary Thoda Forslund and Morris Thompson. Seated are Alaska state Rep. Willie Hensley, Alaska U.S. Rep. Howard Pollock and Laura Bergt. (ADN archive; Anchorage Times photo)

A Reflection on ANCSA at 50

BY VAN NESS FELDMAN'S NATIVE AFFAIRS PRACTICE GROUP

On December 18, 2021, the Alaska Native community will mark the 50th anniversary of the Alaska Native Claims Settlement Act of 1971(ANCSA), a law in which the United States Congress "settled" the Indigenous land claims of the Alaska Native people.

Of course, the story of ANCSA starts well before 1971. Few Americans today know the history of the United States in Alaska, let alone the history of Indigenous Alaska.

In 1863, the Russian Navy's fleets arrived in New York and San Francisco harbors and stayed for the entire winter, not as enemies, but as friends of the United States. It was a demonstration of unity between the two nations in the middle of America's Civil War. Britain and France were both openly negotiating with the Confederate States. Two "iron-clad" ships—the most powerful warships of the day—were rumored to be under construction in Liverpool for the Confederate Navy. The arrival of the Russian Navy helped bolster the Union and its forces at a difficult time.

The friendship between Russia and America led to the purchase of Alaska by the United States. Russia had claimed dominion over all of what is now Alaska for more than 100 years. But the Russians had a tenuous hold on the territory in the 1860s, and it became clear that Russia did not have the financial resources needed to support Russian settlements or to stand up a military presence to defend the territory. There were never more than 800 Russians posted in Alaska, a territory two and a half times the size of Texas. In 1867, Russia sold Alaska for $7.2 million—less than two cents an acre—to the United States.

The purchase of Alaska ultimately yielded enormous economic and geopolitical benefits for the United States. But lost in the "purchase" of Alaska and the expansion of the United States were the rights and the fate of Alaska's Indigenous peoples.

In the early years, the United States sent its Navy to control the new territory. In 1869, after disputes with the Tlingits in southeastern Alaska, the Navy shelled the villages of Kake and Wrangell. In 1882, the Navy shelled and burned the village of Angoon. Alaska Natives would not be granted U.S. citizenship—never mind the right to vote—until 1924. During World War II, Aleuts from the Aleutian and Pribilof Islands were removed and interned in camps, where they endured significant hardship. After World War II, the Native Village of Kaktovik was bulldozed into the ocean to make way for a new military installation. In the 1950s, Iñupiat and Athabascan individuals were unknowingly subjected to Iodine 131 experimentation. Unfortunately, there are many more examples of this type of treatment of the Alaska Native people.

In 1912, the Alaska Native Brotherhood and the Alaska Native Sisterhood were organized to fight for long-overdue civil rights for Alaska Natives. And, in the 1930s, the Tlingits and Haidas of southeastern Alaska took the initial fight for Alaska Native land rights to Congress.

In 1958, Congress enacted the Alaska Statehood Act, which authorized Alaska to select 102 million acres of vacant, unappropriated, and unreserved federal lands from the 365-million acres that comprised the new state. Some of the State's early selections were lands on the North Slope of Alaska, an area considered highly prospective for oil and gas.

In 1966, the Alaska Federation of Natives was formed to fight for the land claims of the Alaska Native people. In that same year, U.S. Secretary of the Interior Stewart Udall froze the selection of lands in Alaska by the State until Alaska Native land claims could be resolved. When Humble Oil discovered oil on the North Slope in 1968, pressure built in Washington, D.C. to resolve the Alaska Native land claims quickly.

In the Alaska Organic Act of 1884, which established Alaska as a district nearly seventeen years after Russia ceded the territory to the United States, Congress specified that Alaska Natives "shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress." The Second Organic Act in 1912 similarly did not specifically address Alaska Native land claims, again continuing to leave them for future Congressional action. While the State's selection of lands under the Statehood Act created significant tension and conflict with regard to Alaska Native land claims, it was not until the new petroleum discoveries—and the consequent need to construct an 800-mile oil pipeline to move the North Slope's vast oil resources to market—that Congress finally devoted serious attention to the issue of Alaska Native land claims.

In 1966, one of our firm's founders, Bill Van Ness, was hired by U.S. Senator Henry M. "Scoop" Jackson (D-WA) to serve as special counsel to the Senate Committee on Interior and Insular Affairs. As Chairman of the Committee, Senator Jackson devoted himself to pursuing a fair settlement for the Alaska Native community, and the fight for Alaska Native land claims became a full-time job for Bill Van Ness. The job appealed to Bill's deep sense of justice. He understood that Congress knew little about the Alaska Native peoples, and he insisted that a federal study be completed to inform efforts to settle the land claims. Bill developed close relationships with Alaska Native leaders as he worked with Senator Jackson and Alaska's Congressional delegation to develop a legislative framework for the settlement.

When it passed in 1971, ANCSA marked a deliberate departure by Congress from an Indian policy that had been based on Tribal government, reservations, and federal oversight. It reflected the work of Congress during a period of transition from a national policy of termination and assimilation of Native peoples to one of self-determination. In this regard, ANCSA was viewed by many in Congress at the time as a "grand experiment." Members of Congress sought to create a system that allowed Alaska Native people to maintain their traditional cultural ties to the land while also providing the Alaska Native community with the means to engage and survive in the capitalist economic system of the United States.

ANCSA provided for the creation of more than 200 Alaska Native corporations (ANCs) that would serve the long-term interests of the Alaska Native people. Congress divided Alaska into twelve regions based on common language and customs and directed that each region form a Regional Corporation and that each Alaska Native village form a Village Corporation. As part of the ANCSA settlement, ANCs were to be conveyed approximately 44 million acres of land, or approximately twelve percent of the state. Each Alaska Native Village Corporation was entitled to select certain lands underlying or adjacent to its village, while each Regional Corporation generally received title to the subsurface of such Village Corporation lands and, in some cases, was entitled to select additional surface and subsurface lands within its region.

Any Alaska Native individual who was alive when ANCSA passed was enrolled by the Bureau of Indian Affairs as a shareholder both of their Regional Corporation and of their respective Village Corporation. Stock ownership was restricted so that it could only be issued to Alaska Natives.

To empower ANCs to promote the interests of their Alaska Native shareholders, Congress—in ANCSA and subsequent acts—granted ANCs certain rights, duties, and preferences. For example, Congress directed Regional Corporations to share 70 percent of revenues generated from timber and subsurface natural resources with all other Regional and Village ANCs, exempted ANCs from certain employment restrictions to protect shareholder hiring, enacted laws protecting undeveloped ANCSA lands from taxation and involuntary alienation, and required federal agencies to consult with ANCs "on the same basis as" federally-recognized Tribes. ANCSA expressly authorized and confirmed the authority of ANCs to provide benefits to promote the health, education, and welfare of their Alaska Native shareholders or descendants and their family members.

The enactment of ANCSA and the creation of ANCs was not without controversy or error. Similar to the Indian Reorganization Act of 1934, the enactment of ANCSA had the effect of displacing Indigenous systems of governance and commerce by superimposing a Western corporate structure that was foreign to Indigenous Alaska, just as it was to other regions subjected to Western colonization. ANCSA preserved some of the land and resources of Alaska for the Alaska Native people, but it also provided significant advantage and certainty for the federal government and the state of Alaska with respect to the ownership and disposition of land and resources in the state. Congress did not acknowledge or address the role of Tribal governments in Alaska, focusing solely on the roles, structures, and authority of the ANCs. ANCSA, as enacted, also provided for the free alienation of stock by Alaska Native shareholders starting 20 years after enactment, a policy analogous to the United States' allotment era policies. As a consequence, the free alienation of stock put ANCs in jeopardy of being taken over by non-Native investors and corporations starting in 1991.But ANCSA was not frozen in time in 1971.

In 1988, Congress enacted the "1991 amendments"—so-called because the legislation averted ANCSA's automatic provision for the alienation of stock starting in 1991. These amendments establish that stock in an ANC cannot be alienated without a vote of the Alaska Native stockholders of that ANC.

The 1991 amendments contained many other improvements to the original legislation as well, including, authorizing shareholders to vote to let their corporations issue new classes of stock to Alaska Natives born after December 18, 1971, to Alaska Natives who missed their chance to enroll, and to Alaska Native elders.

The legislative history of ANCSA tells the story of the push-and-pull of U.S. politics that led to the passage of legislation that was as momentous as any previous effort of the federal government to address its crimes against Indigenous peoples. The formation of ANCSA involved broader and deeper consultation with Alaska Native leaders than any other component of federal policy since the time of treaties. And yet it was just as imperfect and incomplete as so many legislative projects defined by political compromise and, in this case, marred by the lack of Indigenous representation in government. Indeed, one of the most fundamental rights of the Alaska Native peoples—the right to maintain a way of life defined in part by subsistence—was extinguished by the legislation and remains a priority to redress. Congress has amended ANCSA many times and, we suspect, will do so many times again.

Today, we celebrate ANCSA's successes and welcome the ongoing conversation about how best to improve on its legacy. ANCSA provided a legal mechanism to ensure that 44 million acres of Alaska would remain in Native ownership and that those lands, and the resources on and under them, would be available for use by Alaska Natives for the benefit of the Alaska Native people. Many ANCs today are economic and political powerhouses that have the capacity to support the education and advancement of Alaska Native youth and the empowerment of the Alaska Native community economically and politically. We would be hard-pressed to find any other political jurisdiction in the world like Alaska, in which 18 of the top 20 businesses are Indigenous-owned.

As a practice group, we reflect this year on ANCSA's 50-year history with appreciation for all of the people who have invested, through public service and personal commitment, to fulfilling its promise. We are proud and grateful that serving the Alaska Native community is part of the heritage of our law firm, and we are honored to continue this important work.

When Bill Van Ness started Van Ness Feldman with three other Capitol Hill attorneys, he sought to foster a community of professionals committed to an enterprise that would be greater than any one individual, a culture of collaboration that would produce innovative legal and policy solutions for those in need of assistance, a deep respect for the public servants with whom we work, and a recognition that our work ultimately supports the rule of law, justice and good government.

Several members of our practice group have worked for Members of Congress, including three members of Alaska's Congressional delegation. Our colleague and former chairman of the firm, Rick Agnew, worked for Congressman Don Young (R-AK) from 1985-1991, serving as his Chief Counsel and Staff Director to the House Committee on Interior and Insular Affairs and working with the Congressman and with advocates for the Alaska Native community—including Bill Van Ness, Tom Roberts, and Alan Mintz at Van Ness Feldman—to advance the "1991 amendments."

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

Bill Van Ness (center) being sworn in as a member of the Washington State Bar by U.S. Supreme Court Justice William O. Douglas (r.); Senator Henry Jackson (l.), Washington, D.C., September 1966 Courtesy Bill Van Ness

New Economic Development Administration Regulations Expand Grant Access and COVID Relief for Native American Communities

BY MELINDA MEADE MEYERS

A recent change to the U.S. Economic Development Administration's (EDA) regulations that expands eligibility for EDA grants to certain for-profit Tribal entities will provide Native American communities greater access to EDA funds. Specifically, these entities will have access to the $3 billion in federal funding that was made available to the EDA through the American Rescue Plan Act—$100 million of which is specifically allocated for Indigenous communities, "to prevent, prepare for, and respond to coronavirus and for necessary expenses for responding to economic injury as a result of coronavirus."

The Public Works and Economic Development Act of 1965 (Pub. L. No. 89-136, 79 Stat. 552) (PWEDA) established the EDA within the U.S. Department of Commerce in order to "provide grants for public works and development facilities, other financial assistance and the planning and coordination needed to alleviate conditions of substantial and persistent unemployment and underemployment in economically distressed areas and regions." The EDA is the only federal agency solely focused on economic development, and its mission is "[t]o lead the federal economic development agenda by promoting innovation and competitiveness, preparing American regions for growth and success in the worldwide economy." The PWEDA declares "Indian tribes" to be eligible for EDA grants and defines "Indian tribes" to mean "any Indian tribe, band, nation, pueblo, or other organized group or community, including any Alaska Native village or Regional Corporation (as defined in or established under the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.)), that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." The PWEDA also specifically authorizes Indian Tribes as eligible for 100% grant rates under EDA's grant programs.

However, although such restriction is not contained within the PWEDA, EDA's regulations historically limited the types of organizations included within the definition of "Indian Tribe" to Tribal non-profit organizations. For more than 45 years, previous iterations of EDA's regulations defined "Indian Tribe" to be "an entity on the list of recognized tribes published pursuant to the Federally Recognized Indian Tribe List Act of 1994 . . ., and any Alaska Native Village or Regional Corporation (as defined in or established under the Alaska Native Claims Settlement Act," and interpreted the term to "include[] the governing body of an Indian Tribe, non-profit Indian corporation (restricted to Indians), Indian authority, or other non-profit Indian tribal organization or entity; provided that the Indian tribal organization or entity is wholly owned by, and established for the benefit of, the Indian Tribe or Alaska Native Village."

Despite the fact that Native communities are among the most economically distressed in the country, the EDA reports that it has seen a stagnation in funding to Tribal communities. At the same time, the agency has experienced an increase in EDA grant applications from for-profit Tribal entities, which were barred from receiving EDA grants by regulation. In response, the EDA identified steps that could increase the flow of EDA funding to Tribal communities, including expanding Tribal eligibility for EDA grant funding to for-profit Tribal entities.

On September 24, 2021, following government-to-government consultations between the EDA and Tribal representatives in April 2021, the EDA published a final rule updating its regulations to extend EDA Tribal eligibility to include for-profit entities that are wholly owned by and established exclusively for the benefit of a Tribe. 86 Fed. Reg. 52,957. EDA grant eligibility will not be limited to any particular type of entity, as long as that entity is wholly owned by a Tribe and organized for the benefit of the Tribe; accordingly, Indian corporations, Section 17 corporations, state-chartered corporations, and limited liability corporations are all potentially eligible.

In the final rule, the EDA notes that there is no background information as to why the "non-profit" limitation was previously included in the definition of Indian Tribe. The EDA acknowledges that Tribal corporations are distinct from other types of "for-profit" entities—particularly because they are often tasked with creating economic development for Tribal communities—and are crucial to furthering the long-term economic development of American Indian Nations (AIN). The final rule suggests that expanding EDA eligibility to Tribally owned for-profit businesses would also promote job growth, as these businesses are often major employers within their Tribal communities.

Though the new rule greatly broadens the scope of the types of Tribal businesses eligible for EDA funding, it does contain an important restriction. Although Tribal for-profit entities may generally have non-Indian business partners, the EDA notes in the final rule that a for-profit entity will only be eligible for EDA Tribal funding if it is wholly owned and managed by the Tribe. This restriction is meant to ensure that EDA investments benefit the Tribe. Also of note, the new rule does not directly extend eligibility to Alaska Native corporations. However, in the final rule, EDA noted that it had determined, following the Supreme Court's Yellen v. Confederated Tribes of the Chehalis Reservation decision in June 2021, that the definition of Indian Tribe itself is inclusive of Alaska Native corporations.

The timing of the regulatory change is auspicious considering that it will expand Native communities' access to funds made available to the EDA under the American Rescue Plan Act of 2021. On March 11, 2021, Congress passed the American Rescue Plan of 2021, which appropriated an additional $3 billion to the EDA "to prevent, prepare for, and respond to coronavirus and for necessary expenses for responding to economic injury as a result of coronavirus." In July, U.S. Commerce Secretary Gina M. Raimondo announced that the EDA would create a series of six programs—known as "Investing in America's Communities"—in order to distribute the $3 billion in funding made available to EDA through the American Rescue Plan Act. Within these programs, the EDA allocated $100 million to the Indigenous Communities Challenge in order to support the needs of Tribal governments and Indigenous communities, which were disproportionately impacted by the COVID-19 pandemic.

This crucial change to the EDA's definition of Indian Tribe making certain Tribally-owned for-profit entities eligible for EDA assistance should lead to more COVID relief flowing to Native American communities in the short term and broad economic development opportunities for Native communities in the long term.

Tribal Cannabis Tourism and Current Status of Federal Legislation Impacting the Cannabis Industry

BY ROBERT CONRAD & LAURA JONES

As Tribes expand their economic endeavors into the cannabis industry, the growth of cannabis tourism is a natural development. Below, we offer details on how cannabis tourism could support Tribal governments' economic development efforts. We also provide an update on the status of pending federal legislation that could bring positive impacts to the cannabis industry. Further discussions on this topic can be found in previous editions of Van Ness Feldman's Native Affairs Quarterly, available under "Thought Leadership" here.

Cannabis Tourism

With the pandemic continuing to take a toll on the tourism industry, many U.S. states and territories are exploring ways to help that industry recover. One potential savior for tourism is cannabis. As states went into varying levels of lockdown in early 2020, businesses deemed "nonessential," including recreational facilities, gyms, bars, restaurants, etc. were forced to shut down. However, early into lockdown, cannabis was deemed "essential" in California, a designation other states with functional cannabis markets quickly adopted. In total, nearly 30 states, along with the District of Columbia and Puerto Rico, deemed cannabis businesses essential. This triggered some major changes in the industry, including:

- Aiding in the de-stigmatization of cannabis among consumers;
- Allowing cannabis businesses to take advantage of mandated business-friendly safety measures such as curbside pickup and home delivery; and
- Allowing physicians to prescribe medical marijuana through online appointments, making it easier for patients to obtain medical marijuana cards.

With all of these changes, cannabis tourism has developed into a potentially rewarding industry that Tribal governments might be able to cultivate as part of efforts to recover economic losses suffered by their tourism and other businesses.

What is Cannabis Tourism?

Cannabis tourism is most generally characterized as a destination-based industry that attracts tourists because cannabis is legal in that location. But the industry can take many forms. For example, tourists might visit a dispensary to learn more about the development of cannabis crops, stay at a "bud and breakfast," tour a cannabis farm or growing facility, or dine at a restaurant with cannabis-infused dishes. Cannabis tourism can also have a positive knock-on effect for many other Tribal businesses.

How can Tribes Participate?

Interested Tribes can create specific cannabis-centered tourist destinations. One example is opening a farm or growing facility that is similar to a wine vineyard, where consumers can tour the facility and sample the products. This concept would serve multiple functions in that the farm would supply dispensaries while providing a tourism destination that would benefit hotels, restaurants, and the local economy.

Another route is to add cannabis tourism into existing tourism infrastructure. Tribes can take advantage of their land base and natural resources by offering cannabis hikes or camping expeditions, where participants are able to experience nature while partaking. Tribes with resort properties can offer CBD-infused massages at their spa, include CBD and hemp products at their gift shops, or offer travel packages designed for cannabis tourists. The idea behind this approach is to utilize the Tribe's existing tourism infrastructure to provide new cannabis tourism options.

Federal Cannabis Legislation Update

The following is an update on pending federal legislation that would impact the cannabis industry. Summaries of previous cannabis legislative developments are provided in past articles, available here.

- The Cannabis Administration and Opportunity Act, S. ___ has not yet been introduced in the Senate. The bill 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. Senators Schumer, Booker, and Wyden published a discussion draft of the legislation on July 14, 2021, and the deadline for public comments was September 1, 2021. Once the legislation is finalized it will be referred to committee for continued review and revision.

- The MORE Act of 2021, H.R. 3617, was introduced in the House of Representatives on May 28, 2021. The Act would end the criminalization of cannabis at the federal level retroactively and going forward. Federal cannabis arrests, charges, and convictions would be automatically expunged at no cost to the individual. Under the MORE Act, individual states would determine whether to criminalize cannabis. The Act would also create the Office of Cannabis Justice to oversee the social equity provisions in the law. The Act has been referred to several House subcommittees and was most recently marked up by the House Judiciary Committee on September 30, 2021.

The Democrats control both the House and the Senate (with Vice President Harris acting as the tie-breaking vote in the 50-50 Senate) but passing any cannabis legislation in the current Congress might prove difficult. The filibuster rules require 60 votes for a bill to pass the Senate, so any cannabis legislation would need relatively strong bipartisan support.

The future of federal cannabis law remains unclear, but Tribes interested in the cannabis industry can start taking steps now to establish the necessary framework to support this new area of Tribal economic enterprise. If you have questions about steps your Tribe can take to prepare to participate in the cannabis industry, please contact Robert Conrad at rac@vnf.com or Laura Jones at ljones@vnf.com.

Before the Supreme Court…

BY PATRICK DAUGHERTY

The Supreme Court placed two Indian law cases on its docket for the October 2021 term.

In *Ysleta del Sur Pueblo v. Texas* (20-493) the Court will determine whether legislation that restored federal recognition to two Tribes permits the State of Texas to regulate gaming activities on the Tribes' land. The restoration legislation contained a provision stating that "[a]ll gaming activities which are prohibited by [Texas] are hereby prohibited on the reservation[.]" Because Texas regulates bingo but does not prohibit it, the Tribe asserts that it therefore retains full authority to set the terms of its bingo games and need not comply with Texas' regulations. Texas argues that the Tribe must submit to Texas' regulations. The Fifth Circuit sided with Texas, holding that Texas' regulations became surrogate federal law under the restoration legislation. The federal government filed a brief supporting the Tribe and urging the Supreme Court to take the case. The case will directly affect the two Tribes subject to the restoration legislation, but there may be broader implications depending on whether the Supreme Court accepts or rejects the idea that state regulations may, under certain circumstances, become surrogate federal law that Tribes must follow.

In *Denezpi v. United States* (20-7622) the Supreme Court will decide whether a Tribal member convicted for assaulting another Tribal member on trust land in a "CFR Court" can later be tried for the same conduct in U.S. District Court. The defendant was charged with serious offenses in the Court of Indian Offenses of the Ute Mountain Ute Agency. Unlike a Tribal court, Courts of Indian Offenses (or "CFR Courts"—so called because they are authorized by the Code of Federal Regulations) are created by the Bureau of Indian Affairs to administer criminal justice for Tribes lacking their own courts. The CFR Courts may prosecute violations of Tribal ordinances and other offenses listed in the regulations. The defendant was charged with three offenses in the CFR Court and ultimately pled guilty to one count and received a 140-day sentence. Six months later, the defendant was indicted in U.S. District Court. The defendant asserted his prosecution was barred by the Double Jeopardy clause of the U.S. Constitution.

The lower federal courts, however, concluded that the CFR Court was not exercising the sovereignty of the United States, but was instead exercising the sovereign powers of the Ute Mountain Tribe. Under the long-established "dual sovereignty" doctrine, the federal government may prosecute an American Indian after a Tribal prosecution for the same act. The same rule generally permits the federal government to charge an individual with a federal crime even after that person has been tried for the same conduct in state court. The key question for the Supreme Court to decide is: Whose sovereignty is the CFR Court exercising? The answer will affect the five existing CFR Courts that serve more than a dozen Tribes.

The Supreme Court has not yet decided whether it will hear an appeal in *Haaland v. Brackeen*. In that case the Fifth Circuit held several provisions of the Indian Child Welfare Act ("ICWA") to be unconstitutional. If the Supreme Court agrees to hear the case it will likely become the most significant Indian law case of the term.

The Senate Judiciary Committee Considers VAWA Reauthorization, Including Expansion of Tribal Jurisdiction, as Negotiations Continue

BY CHARLENE KOSKI

It had been nearly seven months since the House of Representatives introduced legislation to reauthorize the Violence Against Women Act ("VAWA") when, on October 5, 2021, the Senate Judiciary Committee held a hearing to consider the matter. At the hearing, Deputy Attorney General Lisa Monaco testified to the importance of passing legislation to modernize and improve VAWA to better protect underserved populations, including Native Americans. She also noted the role of VAWA in addressing the crisis of missing and murdered Indigenous women and the importance of expanding Tribal jurisdiction to empower Tribes to protect their communities from domestic and sexual violence.

As noted in our Summer 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. The provision is vital to improving the ability of Tribes to respond to incidents of domestic violence in their communities. Because the Alaska Native Claims Settlement Act (ANCSA) extinguished most Indian country in Alaska, and because VAWA expressly ties a Tribe's ability to exercise SDVCJ to Indian country, most Alaska Tribes are currently ineligible to exercise the special jurisdiction. H.R. 1620 would begin to correct that disparity by expanding the definition of "Indian country" for purposes of a VAWA pilot project to

include Alaska Native-owned Townsites, Allotments, and former reservation lands acquired in fee by Alaska Native Village Corporations pursuant to ANCSA, and other lands transferred in fee to Native Villages. The definition would also apply to all lands within any participating Alaska Native Village with a population that is at least 75 percent Alaska Native.

At last month's hearing, U.S. Senate Majority Whip Dick Durbin (D-IL), committee chair, urged the Senate to move quickly to introduce a bipartisan bill to reauthorize VAWA. Because the Senate is evenly divided at 50-50, Democrats must find 10 Republican votes to avoid a filibuster. The primary sticking points this time around appear to be the same issues that derailed reauthorization before the last Congress: provisions that would add firearm restrictions for convicted domestic abusers and new protections for LGBTQ victims of violence. Although the Senate has yet to pass a VAWA reauthorization bill, in October 2019, Senator Lisa Murkowski (R-Alaska) drafted Alaska Native provisions for VAWA reauthorization that will likely inform the broader Tribal provisions in the bill the Senate puts forward. Her proposal, described in our Spring 2021 Native Affairs Quarterly, 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," Sen. Murkowski proposed expanding the jurisdictional reach of Alaska Tribes participating in the pilot program to the entirety of participating Alaska Native Villages.

VAWA reauthorization is a priority for the Biden Administration, a point Sen. Durbin emphasized at last month's Senate Judiciary Committee meeting. There is pressure on Congress to reach a bipartisan solution, and we expect whatever legislation results from ongoing Senate negotiations to include expanded jurisdictional authority for Tribes.

SSBCI Comes to Indian Country: New Federal Funding for Tribes to Invest in Indian Country Small Businesses and Native Entrepreneurs

BY MARANDA COMPTON & XENA BURWELL

If you have ever watched an episode of Shark Tank, then you know the basics of venture capital investing – an investor invests in a company for a piece of its equity or revenue. What you may not know is that it is incredibly difficult for Native small businesses and entrepreneurs to engage venture capitalist or other credit and financing. However, a new Federal program is aiming to address this issue by providing Tribal governments the opportunity to be a shark – to invest and support the businesses of its Tribal citizens using Federal funds.

What is SSBCI?

The State Small Business Credit Initiative (SSBCI) provides federal funding to Tribes to distribute in a variety of programs that support the credit and capital needs of Native-owned small businesses and Entrepreneurs. While SSBCI was first established for State participation in the Small Business Jobs Act of 2010, as the result of revisions included in the American Rescue Plan Act (ARPA), Tribal governments can now participate.

Native-owned small businesses and entrepreneurs frequently meet a variety of headwinds when starting or scaling a business, with lack of credit and capital resources being a major issue. Under ARPA, SSBCI will allocate a minimum of $500,000,000 to Tribal governments, who then will distribute the funds to support the funding needs of businesses owned by the Tribe and Tribal citizens. ARPA also provides funding for technical assistance to participating Tribes.

In order to participate in the program, a Tribe must start the application process by December 11, 2021. Importantly, Treasury recently extended the deadline to file a notice of intent to participate (NOI) in the program to also coincide with this date. So if you are a Tribe that is interested in receiving federal funding to support small businesses in your community, it is not too late to apply.

Tribes Can Provide Various Types of Small Business Financing with SSBCI Funds

Tribal governments may use SSBCI funds to support eligible small business financing in any eligible manner it chooses. This includes supporting small businesses on Tribal lands, small businesses in states where Tribal lands or Tribal citizens are located, and small businesses owned by the Tribe and Tribal citizens, wherever they are located.

We are awaiting final guidance from Treasury but historically in SSBCI there are two key types of financing programs Tribes can create utilizing SSBCI funding: capital and credit.

Capital Access Programs:

On the capital side, a Tribe can develop Capital Access Programs (CAPs), which represents an opportunity for Tribes to partner with Native Community Financial Institutions (CDFIs) and other lenders. In an SSBCI CAP, a Tribe sets up a reserve account at one or more lenders to cover losses on enrolled loans. Both the lender and borrower contribute a percentage of an individual loan or line of credit to the reserve fund for a total of 2 to 7 percent of the loan amount. The Tribe then matches these contributions to the reserve account dollar-for-dollar using SSBCI funds. Lenders may use the reserve account to cover any losses on their CAP loans.

The benefit of these programs can be multi-fold. First, it allows a unique opportunity for Tribes to partner with CDFIs to increase capital flow to Tribal-owned and Native-owned businesses. Treasury advises partnering with CDFIs in the design phase to ensure smooth implementation. Second, the use of SSBCI funds decreases the risk to those lending institutions and frequently limiting or removing altogether working capital restrictions of small business borrowers.

Other Credit Support Programs:

SSBCI funds can also be utilized in a variety of other credit support programs (OCSPs) to increase the availability of credit for Tribal-owned and Native-owned businesses. Credit Programs are varied but most frequently include:

- Loan Participation Programs (LPPs): The Tribe purchases a portion of a loan that a lender makes, or make a direct loan from the Tribe in conjunction with a private loan (companion loan). The Tribe can often subordinate to the lender's senior loan.
- Loan Guarantee Programs (LGPs): the Tribe provides an assurance to lenders of partial repayment if a loan goes into default after the lender makes every reasonable effort to liquidate available collateral and collect on personal guarantees.
- Collateral Support Programs (CSPs): The Tribe provides cash to lenders to boost the value of available collateral; sets aside funds to augment collateral borrower pledges for new loans
- State-run Venture Capital Fund Programs: (VCPs) provide financing by purchasing an ownership interest or providing equity-like loans to enterprises that typically do not participate in debt financing markets due to their business stage and structure.
    - Under previous iterations of the state-implemented program, SSBCI categorized VCPs into four different groups based on how the state engaged with the investment process: Funds, State-supported entities, State agencies and Co-Investment Models

Learning From the State-Administered SSBCI

Because the SSBCI has been around for a few iterations as a state-administered program, we can glean a significant amount for those experiences. For example, we know that CAPs typically support a high volume of very small loans, with a median cap loan of $14,800. And CAPs were most successful when developed and designed with significant input from lenders.

We also know that in the venture capital space, SSBCI VCPs can provide significant access to capital. State-administered VCPs targeted high-growth potential businesses in various stages of development (from pre-seed and proof of concept to mezzanine and debt investments), with about two-thirds going to pre-seed and seed capital investments. Additionally states routinely partnered with specialized third parties such as private investment funds, CDFIs, and non-profits (state-supported entities) to administer VCPs. These third-party administrators provided necessary expertise to source, structure, close, and manage equity investments in small businesses. Funds and state-supported entities manages 83% of the funding allocated to VCPs.

Key Take-Aways

If your Tribe is interested in participating in the SSBCI program, you must file a NOI and start your application by December 11, 2021. Treasury has already extended this deadline several times and, based upon statutory mandate, cannot do so beyond this date. Additional components of project design can continue past this date, but the very basics of your program must be filed with Treasury by then.

Van Ness Feldman is here to assist. Please reach out to Xena Burwell, Maranda Compton, or a professional on our Native Affairs team if you or your Tribal entity needs assistance.

State Small Business Credit Initiative

The 2021 American Rescue Plan Act allocated $500 million in the SSBCI program for Tribal governments to administer in support of financing and increasing capital access for small businesses.

How Tribes Can Use Funds

SSBCI provides funding for: (1) small business financing programs, including the capital access programs, loan participations, loan guarantees, collateral support, and venture equity programs; and (2) technical assistance to very small businesses and business enterprises owned and controlled by socially and economically disadvantaged individuals. Tribes can use SSBCI funds to support supporting small businesses on tribal lands, small businesses in states where tribal lands or tribal members are located, and small businesses owned by tribal members anywhere within the United States.

Who Can Apply?

The recognized governing body of any Indian or Alaska Native tribe, band, nation, pueblo, village, community, component band, or component reservation is individually identified (including parenthetically) in the list published pursuant to section 104 of the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 5131). Tribal governments can apply individually or jointly and can operate programs themselves or contract with third parties or other Tribal governments to operate programs.

Allocation

The amount allocated to a Tribal government is based on Treasury's calculation of the pro-rata share of self-certified enrollment numbers and subject to a minimum allocation amount. This process sums Tribal enrollment to obtain total Tribal enrollment for all Tribes combined. Each Tribe's enrollment is then divided by total Tribal enrollment to obtain the share of enrollment for each Tribe. The tribal share is then multiplied by the amount being allocated.

Important Deadlines

Applications for SSBCI capital programs must be "initiated" by Tribes by December 11, 2021. Applications for technical assistance are due by March 31, 2022. Complete application is due by February 11, 2022.

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.