



**Native
Affairs
Newsletter
February
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Welcome

Welcome to Van Ness Feldman's Native Affairs Newsletter. The Newsletter serves as a forum to discuss a range of legal and policy developments of interest to our clients, colleagues, and friends across Indian Country. This edition of the Newsletter focuses on legislative and administrative efforts that impact Indian Country, including upcoming federal funding opportunities. Please contact our attorneys or public policy professionals with any questions, and please send us your feedback!

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It's Time to Submit FY 2024 Project and Programmatic Requests for Federal Spending

BY ANDREW VANDERJACK

Do you or your community partners need funding assistance for a community project? Do you have an opinion about how programmatic dollars should be spent by the federal agencies next year? If so, it is time to actively engage with your representatives in Congress.

Many Members of Congress are currently accepting requests for federal earmark spending—now called “congressionally directed spending” (CDS) requests—from constituents. Each Member of Congress will have the option submit a limited number of project-specific spending proposals for consideration during the FY 2024 Appropriations cycle.

CDS requests for FY 2024 must be submitted by Members of Congress to the Senate and House Appropriations Committees in late March and early April. Members generally ask that constituents submit proposals at least two weeks in advance of the deadlines set by the Appropriations Committees. For this reason, deadlines set by individual Members will come up starting in early March.

Earmark spending was banned for almost a decade, starting in 2011, due to high-profile abuses of the practice. Two years ago, earmark spending returned, along with a host of new rules intended to avoid the abuses of the past. Starting in FY 2022, Congress has allocated billions of dollars in congressionally directed spending to support public projects sponsored by local governments, Tribes, ports, hospitals, health clinics, universities, museums, and other organizations.

Last year, congressionally directed spending benefitted dozens of projects in Indian country of all types and sizes. For example, U.S. Department of Agriculture funding was earmarked for an educational facility for the Coushatta Tribe of Louisiana and a fire station for the Morongo Band of Mission Indians. Department of Commerce funding will support Tribal salmon conservation projects in Washington and Oregon and fund research to support the Alaska Native co-management of marine mammals. Funding through the Environmental Protection Agency will support water infrastructure projects for the Hopi Tribe, the Confederated Tribes of Warm Springs, and the Muckleshoot Tribe.

Indian Health Service funding will support Tribal wastewater treatment projects in New Mexico and Washington. Funding through the Department of Justice and the Bureau of Indian Affairs will support Tribal justice and safety projects. Several Tribes and Tribal health centers will receive funding through the Department of Health and Human Services. In Arizona, the Pascua Yaqui Tribe will receive funding through the Department of Education for academic programs, curricula, and teacher development. The Makah Tribe will receive funding through the Department of Transportation for a residential road project. Tribes in Maine, Minnesota, Washington, and Colorado will receive Department of Housing and Urban Development (HUD) funding for housing development projects. The Snoqualmie Indian Tribe in Washington will receive HUD funding to expand a child development center. The list goes on.

CDS requests are subject to various requirements and restrictions, so if you are submitting a request, pay close attention to guidance posted by the Appropriations Committees on their websites. Projects for which funding is sought must be eligible for funding from a particular eligible appropriations account, which the Appropriations Committees will list on their websites. You will need to work with your congressional delegation to determine whether your project is eligible for funding from a particular account. Remember that congressional staff will be extremely busy in March handling hundreds of constituent requests; the more work you can do up front to assist congressional staff, the more likely it is that you will succeed with your request.

In addition to CDS requests, the Appropriations Committees will be focused on how *programmatic* funds should be spent in FY 2024. Tribes and other stakeholders can weigh in on these broader spending priorities as well. Programmatic requests address how federal funding should be spent through a regularly authorized program, for example, the Supplemental Nutrition Assistance Program (SNAP).

Programmatic funding requests can be submitted to individual Members of Congress. Again, be sure to understand your Member's deadline for submitting these requests.

The Appropriations Committees will also accept testimony directly from Tribes and other stakeholders on FY 2024 programmatic funding priorities. For example, the House Appropriations Subcommittee on Interior, Environment, and Related Agencies will hold American Indian and Alaska Native public witness hearings on Wednesday, March 8, 2023, and Thursday, March 9, 2023. Several witnesses will provide oral testimony on behalf of national and regional Tribal organizations. Written testimony from Tribes and other organizations will be accepted in accordance with guidelines specified by the Committee. The deadline to submit written testimony to the Subcommittee is Friday, March 17, 2023.

Here at Van Ness Feldman, we appreciate the opportunity to work on appropriations and grant requests that infuse critical funding into community programs and projects. Let us know how we can help you!

Infrastructure Investment and Jobs Act: Funding Available Now for Tribes' Grid Resiliency Projects

BY [TIFFANIE ELLIS](#)

President Biden signed the Infrastructure Investment and Jobs Act (“IIJA”) into law in November 2021. The IIJA involves funding for various infrastructure projects throughout the United States, including grants for diverse transportation projects, electric vehicle charging stations, and power infrastructure. As a part of the IIJA, Tribal communities receive specific consideration and opportunities: the IIJA directs more than \$13 billion to Tribal infrastructure via Tribal-specific programs or set-asides for Tribes within existing programs. The IIJA directs funds specifically for Tribes in the following areas: clean water and drinking water grants (\$0.9 billion), Indian Water Rights Settlement (\$2.5 billion), IHA Sanitation Facilities Construction Program (\$3.5 billion), Tribal Transportation Program (\$3.0 billion), dam safety (\$0.3 billion), and the Tribal Broadband Connectivity Program (\$2.0 billion). Among those funds available to Tribes through other programs, currently, the U.S. Department of Energy (“DOE”) is accepting applications from Tribes and States under the Preventing Outages and Enhancing Resilience of the Electric Grid Program (“Program”) under Section 40101 of the IIJA.

For fiscal years 2022 through 2026, the Program provides \$2.3 billion (\$459 million annually) in federal grants for reducing the likelihood and consequences of disruptive events in State and Tribal communities. 50 percent of the funds for each fiscal year may be used to make grants to States and Indian Tribes, while the other 50 percent may be used for grants for other eligible entities. States and Tribes may apply for and receive grants based on an allocation formula set forth in the IIJA and developed by DOE. The allocation formula includes consideration of the total population of the Tribe, the Tribe’s total area, areas with a low ratio of electricity customers per mileage of power lines, and the probability of disruptive events during the previous 10 years. DOE has issued its allocation determinations for fiscal years 2022 (“Year 1”) and 2023 (“Year 2”), with the highest allocation to a federally recognized Tribe of \$2.1 million (Confederated Tribes of the Coville Reservation) and the lowest for federally recognized Tribes of just over \$45,000.

Applications must include, among other requirements, “a report detailing past, current, and future efforts by the eligible entity to reduce the likelihood and consequences of disruptive events.” Grants may not be provided in an amount greater than the total amount that the entity has spent on resiliency efforts in the previous 3 years. Conditions for Tribes to receive a grant include: (1) submit a Program application annually; (2) commit to matching 15% of funds received; and (3) use the funds to carry out a project that improves the electric grid’s resiliency for its members or enter into a sub-grant agreement with an eligible entity.

If the latter approach is chosen, the entity must provide a 100% match for any funding it receives through the agreement with the Tribe. And although the entity may prepare and submit the grant application, the grant will be awarded to the Tribe itself, and the Tribe will be responsible for satisfying grant requirements.

DOE has provided the following examples for projects eligible to receive Program funds: undergrounding electrical equipment, managing utility poles, relocating or reconductoring power lines; managing vegetation; grid monitoring; integrating distributed energy resources like microgrids or energy storage. The IIJA prohibits the use of Program funds for new electric generating facilities or large-scale battery-storage facilities, or for cybersecurity. DOE has provided that Tribes may not use grant funds to construct new solar generation within a microgrid on Tribal trust lands. The IIJA directs the DOE to prioritize giving grants that “will generate the greatest community benefit (whether rural or urban) in reducing the likelihood and consequences of disruptive events.”

Recently, DOE issued an amendment to the Administrative and Legal Requirements Document (“ALRD”) for the program. The ALRD now includes Year 2 funding allocations and provides eligible entities access to \$459 million in Year 2 funding, making the total allocations: Year 1: \$471.6 million; and Year 2 - 5: \$459 million per year. The amendment adds Alaskan Native Village Corporations as eligible Tribal applicants for which funds are available. In addition, it seeks to reinforce Affirmative Action and Pay Transparency Requirements for workers of the funded projects, and it reiterates Build America, Buy America requirements that all iron, steel, and manufactured products in infrastructure work and all construction materials be produced in the United States.

DOE extended the deadline for applications from September 30, 2022 to [March 31, 2023](#). Applications may be submitted for Year 1 and Year 2 as combined or separate applications. Applications will be processed as they are received, and funds may be distributed prior to the deadline.

VNF has published previous guidance on other aspects of the IIJA available [here](#), [here](#), and [here](#).

Native Farm Bill Coalition Hopes to See the 2023 Farm Bill Include Expanded Provisions for Funding and Incorporating Traditional Ecological Knowledge

BY [LAURA JONES](#)

Congress is preparing for reauthorization of the Farm Bill, an omnibus law that expires every five years and sets federal policy for agriculture, nutrition, conservation, forestry policy, and more (the “Farm Bill”). The current Farm Bill, the Agriculture Improvement Act of 2018, expires this year on September 30th.

The Native Farm Bill Coalition is a joint project led by the Intertribal Agriculture Council, the Shakopee Mdewakanton Sioux Community, the National Congress of American Indians, and the Indigenous Food and Agriculture Initiative that advocates for legislative provisions in the Farm Bill that will advance important agricultural issues for Indian Country. The membership of the Native Farm Bill Coalition also includes more than 170 Tribes, Intertribal groups, other Native organizations, and non-Native allies. One issue that the Native Farm Bill Coalition supports for the 2023 Farm Bill is expanded provisions on funding that incorporates traditional ecological knowledge (TEK).

TEK is the “knowledge, practice and belief about relationships between living beings in a specific ecosystem that is acquired by [I]ndigenous people over hundreds or thousands of years through direct contact with the environment, handed down through generations, and used for [sustainability]. This knowledge includes the relationships between people, plants, animals, natural phenomena, landscapes, and timing of events for activities such as hunting, fishing, trapping, agriculture, and forestry. It encompasses the world view of a people, which includes ecology, spirituality, human, and animal relationships, and more.” National Park Service, Overview of TEK, available at [NPS TEK](#). On the importance of using TEK-based knowledge in agriculture, Carly Griffith Hotvedt (Cherokee Nation), the Associate Director of the Indigenous Food and Agriculture Initiative, the research partner of the Native Farm Bill Coalition, has explained that Native people “have been engaging in production agriculture and using traditional ecological knowledge—observing the seasons and climate change, knowing when to plant, knowing when to harvest—since time immemorial. Those actions have been shown to be much more climate-friendly than common and more-intensive [agricultural] practices.” See “Native Growers Can Help the US Meet Its Climate Goals. Will the New Farm Bill Offer Enough Support?” (June 27, 2022), available [here](#).

Title II of the Farm Bill addresses Conservation, and it includes funding resources for agriculture producers who want to adopt practices for land stewardship on their property, e.g. improving soil and water quality and wildlife habitat. The Native Farm Bill Coalition explains that these conservation funding initiatives are not easily accessible for producers in Indian Country and recommends that conservation programs incorporate and recognize TEK-based conservation efforts. The Natural Resources Conservation Service (NRCS) is an agency within the U.S. Department of Agriculture (USDA) that provides technical assistance programming on conservation to farmers and agriculture producers. The Native Farm Bill Coalition believes that NRCS programming efforts should be improved for Native producers by recognizing TEK and including tribal priorities. The Coalition also recommends that the 2023 Farm Bill include a new section under Title II that specifically allows for a Tribe or a group of Tribes to create TEK-based technical standards for implementing conservation efforts. See Native Farm Bill Coalition Resources, available [here](#).

Title VII of the Farm Bill is entitled Research with a focus of supporting agricultural research. The USDA’s in-house research agency is the Agricultural Research Service (ARS), and its mission is to provide scientific solutions to the nation’s agricultural challenges. The Native Farm Bill Coalition is advocating for the 2023 Farm Bill to include provisions for the ARS to support research that focuses on TEK and its role in the areas of food science, nutrition, and health. See Native Farm Bill Coalition Resources, available [here](#).

The next several months will involve focused advocacy efforts on the part of the Native Farm Bill Coalition to ensure that legislators are aware of issues that are important to Indian Country for the 2023 Farm Bill. TEK is only one aspect of the Coalition’s efforts. The Coalition is working with Tribal leaders and Native producers to speak to members of Congress and the Biden Administration about policy changes in the 2023 Farm Bill that will have positive impacts for Indian Country producers. More information on the Coalition’s scheduled advocacy efforts is available [here](#). Check out more information about the Native Farm Bill Coalition’s policy goals [here](#).

Van Ness Feldman is working with Tribal stakeholders to monitor progress on the 2023 Farm Bill and to advocate for programs that will have a positive and lasting impact on Indian Country. Laura can be reached at LJones@vnf.com.

Administration Takes Significant Steps to Promote Tribal Co-Stewardship of Federal Lands and Resources

BY MELINDA MEADE MEYERS AND TYSON KADE

The Biden Administration has made renewed commitments to strengthen relationships between the federal government and Tribes, including through agreements with Tribes to collaborate in the co-stewardship of our nation’s natural resources. While these policy commitments are important and significant steps in recognizing the critical role that Native communities can play in managing public lands and resources, Tribes should also consider working with their representatives in Congress on legislation that formalizes certain co-stewardship relationships and responsibilities or that authorizes co-management of certain lands and resources.

Biden Administration Co-Stewardship Initiatives

At the 2021 White House Tribal Nations Summit, the Secretaries of the Interior and Agriculture signed a [Joint Secretarial Order on Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters](#) (S.O. 3403) that, in part, commits the Departments of the Interior (DOI) and Agriculture (USDA) to collaborate with Tribes in the co-stewardship of federal lands, waters, and wildlife.

The U.S. Department of Commerce joined S.O. 3403 in November 2022. Through S.O. 3403, the Departments commit “to ensure that [USDA, DOI, and Commerce] . . . are managing Federal lands and waters in a manner that seeks to protect the treaty, religious, subsistence, and cultural interests of federally recognized Indian Tribes . . . ; that such management is consistent with the nation-to-nation relationship between the United States and federally recognized Indian Tribes; and, that such management fulfills the United States’ unique trust obligation to federally recognized Indian Tribes and their citizens.”

When viewed holistically, S.O. 3403 includes a number of principles that are intended to strengthen and better reflect the Departments’ relationship with, and responsibilities to, Indian Tribes. Notably, among its principles of implementation, S.O. 3403 directs that the Departments: “will collaborate with Indian Tribes to ensure that Tribal governments play an integral role in decision making related to the management of Federal lands and waters through consultation, capacity building, and other means[,]” “will engage affected Indian Tribes in meaningful consultation at the earliest phases of planning and decision-making relating to the management of Federal lands to ensure that Tribes can shape the direction of management[, including] agencies giving due consideration to Tribal recommendations on public lands management[,]” and “will consider Tribal expertise and/or Indigenous Knowledge as part of Federal decision making relating to Federal lands, particularly concerning management of resources subject to reserved Tribal treaty rights and subsistence uses.”

Importantly, as one component of how the Departments will fulfill their obligations to federally recognized Indian Tribes, S.O. 3403 directs the relevant federal agencies to “[m]ake agreements with Indian Tribes to collaborate in the co-stewardship of Federal lands and waters under the Departments’ jurisdiction, including for wildlife and its habitat; [and] [i]dentify and support Tribal opportunities to consolidate Tribal homelands and empower Tribal stewardship of those resources[.]”

S.O. 3403 also sets forth standards for how the Departments are to work with Indian Tribes on issues related to the stewardship of federal lands and waters, and requires the Departments to “endeavor to engage in co-stewardship where Federal lands or waters, including wildlife and its habitat, are located within or adjacent to a federally recognized Indian Tribe’s reservation, where federally recognized Indian Tribes have subsistence or other rights or interests in non-adjacent Federal lands or waters, or where requested by a federally recognized Indian Tribe.” In particular, the Departments are directed to:

- Promote the use of collaborative agreements and/or provisions in land management plans consistent with the Department’s obligations under existing law;
- Develop and implement, whenever possible, employee performance review standards that evaluate progress toward meeting the objectives and goals of this Order, including success toward developing new collaborative stewardship agreements and enhancing existing ones;
- Coordinate and cooperate on co-stewardship efforts and initiatives between the Departments;
- Use agreements as a tool to foster cooperation on protection of treaty, subsistence, and religious rights consistent with consensual policy-making referenced in Executive Order 13175; and
- Evaluate and update Departmental Manuals, handbooks, or other guidance documents for consistency with this Order.

DOI and USDA have since released reports and guidance on their implementation of S.O. 3403, and the Bureau of Land Management, National Park Service (NPS), U.S. Fish and Wildlife Service, and Bureau of Indian Affairs have each released new guidance that sets forth how each agency will facilitate and support agreements with Tribes to collaborate in the co-stewardship of federal lands and waters.

On balance, the Biden Administration’s initiatives provide needed support and new directives for the relevant federal agencies to engage with Indian Tribes on co-stewardship of federal lands and resources. For example, the USDA reported that it had entered into 11 new co-stewardship agreements with another 60 in development at the end of 2022. However, for more durable or enhanced roles and responsibilities, Tribes may wish to consider working with their representatives in Congress to pursue co-management opportunities as well.

Co-Stewardship v. Co-Management

The distinction between the two related concepts of “co-stewardship” and “co-management” is important. The term “co-stewardship” can encompass a wide range of working relationships related to management decisions, including co-management, collaborative or cooperative management, and Tribally led stewardship. Co-stewardship can be implemented through cooperative agreements, MOUs, self-governance agreements, and other means. In contrast, “co-management” provides for the sharing in the legal authority to manage the resource.

For example, there are currently four National Park units that share some level of “co-management” authority with Tribes:

(1) Canyon de Chelly National Monument, which is located within the boundaries of the Navajo Nation in Arizona; (2) Glacier Bay National Park and Preserve in Southeast Alaska; (3) Grand Portage National Monument, which is located within the boundaries of the Grand Portage Indian Reservation in northern Minnesota; and (4) Big Cypress National Preserve in Florida. In all four cases, Tribal co-management authority derives at least in part from federal legislation—e.g., the enabling legislation for Canyon de Chelly National Monument preserves some land and mineral rights of the Navajo Nation as well as a preferential right to provide some visitor services. In March 2022, NPS reported that the development of a co-management plan would begin in FY 2023, with NPS looking to the success at Uluru-Kata Tjuta National Park in Australia as a model.

Conclusion

The current Administration's commitment to engage in co-stewardship provides new opportunities for Tribes seeking to increase their involvement in federal decision-making related to their traditional lands and resources through co-stewardship initiatives. However, because these directives are provided in a Secretarial Order, their durability and implementation will be subject to the priorities of the President and current and future Executive Branch officials. To solidify and build upon these initiatives, Indian Tribes may consider pursuing additional legislative or regulatory measures necessary to ensure a greater degree of legal authority and management responsibility with respect their traditional lands and resources.

Office on Violence Against Women Announces Grant Initiative for Alaska Tribes as VAWA 2022 Nears One-Year Anniversary

BY **CHARLENE KOSKI**

The Department of Justice's Office on Violence Against Women ("OVW") has announced a special \$3 million grant initiative to assist Alaska Native tribal governments, or consortia of Alaska Native tribal governments, who are planning to participate in the Alaska Pilot Program for Special Tribal Criminal Jurisdiction ("STCJ"). STCJ is authorized as part of the Violence Against Women Reauthorization Act of 2022 ("VAWA 2022"). OVW anticipates making six awards of up to \$500,000 each. Applications are due in two phases beginning May 9, 2023, and concluding May 11, 2023 (see break-out box for more details).

The initiative comes nearly one year after Congress authorized VAWA 2022, which included important jurisdictional provisions for all tribes, but especially Alaska tribes. Historically, Alaska tribes have been unable to take advantage of VAWA's tribal jurisdiction provisions because Alaska Native villages did not meet the definition of "Indian country" as that term is defined under federal law.

This jurisdictional restriction has had a detrimental impact for Alaska Natives, especially because Alaska Native women

suffer the highest rates of domestic and sexual violence compared to other Native American groups. VAWA 2022 affirmed the inherent authority of Alaska tribes to exercise civil and criminal jurisdiction in Native villages, providing for the first time an express statutory basis for Alaska tribes to exercise territorial jurisdiction. VAWA 2022 also tied STCJ to a tribe's occupancy of an Alaska Native village and created a pilot program in which qualifying Alaska tribes may exercise STCJ over non-Native defendants for certain "covered crimes" defined in the Act.

The Alaska Native Justice Center ("ANJC"), along with many Alaska Native leaders, advocated for the changes contained in VAWA 2022 and has been working with Alaska tribes to implement them. Alex Cleghorn, Senior Legal and Policy Director for ANJC, said tribes throughout the state have expressed interest in VAWA 2022's jurisdictional provisions. At a recent conference, 52 people representing every region in Alaska attended ANJC's session to share their priorities and concerns related to implementing and funding sustainable tribal criminal justice systems. Funding is a significant hurdle. To qualify for VAWA 2022's special pilot program, tribes must be able to provide safeguards for defendants' rights consistent with the Indian Civil Rights Act. Opportunities for economic development are limited, making grant opportunities, such as the one being offered under the current initiative, especially important.

Although building a sustainable tribal justice system is a daunting task, Mr. Cleghorn said VAWA 2022 has already provided important clarity on the scope of tribal jurisdiction in Alaska, and he is optimistic Alaska tribes will succeed in their efforts to improve criminal justice for Alaska Natives. "I believe Alaska tribes can do this," he said, noting that tribes and tribal organizations previously worked together to develop a statewide tribal health system and are now looking to that system as a model for criminal justice. "We have done hard things before," Mr. Cleghorn said. "When everyone expected us to fail, we succeeded."

For more information on resources available through ANJC, visit <https://anjc.org/services/tribal-justice-support/> or call 907-793-3550. For more information on OVW's grant initiative, see the break-out box accompanying this article.

Charlene Koski can be reached at ckoski@vnf.org.

What: Grant Opportunity for Alaska Native Tribes interested in Special Tribal Criminal Jurisdiction under VAWA 2022.

When:

- **April 4, 2023:** Pre-recorded Pre-Application Information Session expected to be available on OVW website.
- **April 20, 2023:** Letters of Intent encouraged to be submitted by this date.
- **May 9, 2023:** Step 1 deadline (Grants.gov forms).
- **May 11, 2023:** Step 2 deadline. (JustGrants full application).

For more information, visit:

<https://www.justice.gov/ovw/page/file/1568261/download>

For assistance, email OVW.TribalJurisdiction@usdoj.gov or call 202-307-6026.

EPA Issues Rule Requiring States to Consider Tribal Reserved Rights in Water Quality Standards

BY TIFFANIE ELLIS

The Environmental Protection Agency (“EPA”) issued a Notice of Proposed Rulemaking (“NOPR”) under its Clean Water Act (“CWA”) Section 303 authority to require that states consider tribal reserved rights in developing their water quality standards (“WQS”). Although, the EPA has considered tribal reserved rights in approving or disapproving state WQSs in the past, this explicit requirement will encourage transparency and informed decision-making by the states.

History of the EPA’s and States’ Consideration of Tribal Reserved Rights

In 2015, EPA disapproved certain human health criteria adopted by Maine because they did not adequately protect a sustenance fishing designated use, which was based in part on tribal reserved rights. In 2016, in promulgating human health criteria for Washington, EPA noted that most waters covered by the state’s WQS were subject to federal treaties that retained and reserved tribal fishing rights. The EPA concluded that these rights must be considered when establishing criteria to protect the state’s fish harvesting designated use. After these actions, however, in 2020, the EPA disavowed the approach of protecting tribal reserved rights. In this proposed rulemaking, the EPA finds that the CWA should not impair treaty or other tribal rights and therefore, states should consider the impacts to tribal treaty and fishing rights when developing WQS.

Summary of the Rulemaking

The proposed rulemaking solidifies the requirement to consider tribal reserved rights by adding a new section specifying that WQS “must protect tribal reserved rights applicable to waters subject to such standards” and defining “tribal reserved rights” as “any rights to aquatic and/or aquatic-dependent resources reserved or held by tribes, either expressly or implicitly, through treaties, statutes, executive orders, or other sources of Federal law.” The new section will require that WQS protect:

1. “The exercise of tribal reserved rights unsuppressed by water quality or availability of the aquatic or aquatic-dependent resource;” and
2. “The health of the right holders to at least the same risk level as provided to the general population of the State.”

The proposed rulemaking also would make these requirements applicable to the EPA when it promulgates WQS applicable to federal waters. And the proposed rulemaking will “require determining the level of water quality necessary to protect users of the resource and/or the aquatic or aquatic-dependent resource itself, based on available data.”

In a hearing on the NOPR, the EPA emphasized that changes to the WQS depend on the availability of data, and where adequate data does not exist, the WQS may be more lenient.

Effect of the Proposed Rule

In some instances, tribal reserved rights may be already adequately protected by the requirement that water quality criteria protect fish, shellfish, and wildlife, and provide for recreation in and on the water. Indeed, the “EPA does not anticipate that more stringent criteria to protect aquatic or aquatic-dependent resources themselves would be necessary in most cases to comply with this proposed rulemaking than already required by the existing Federal WQS regulations.” The EPA anticipates that the circumstances where WQS may need to be adjusted to protect tribal reserved rights would fall primarily into two categories:

1. Human health criteria to protect fish consumers, where tribes with reserved fishing rights consume more fish and are therefore exposed to greater levels of contaminants in fish. This is because there is a differential health risk between rights holders and the general population of the state because rights holders are more highly exposed to the resource.
2. Where a reserved right is not already accounted for as a designated or presently attained use for a waterbody, but that waterbody could be reasonably expected to support that right in the future (e.g., if restoration efforts are underway). EPA anticipates that this could arise with uses to protect aquatic life, aquatic-dependent wildlife, and users of those resources, where those uses are not already designated or presently attained.

If the WQS do not adequately protect tribal reserved rights, states will be required to revise their WQS either to adopt designated uses that recognize and identify tribal reserved rights or to adopt criteria protective of tribal reserved rights. States also may use their antidegradation policies to maintain high water quality and provide a margin of safety in accordance with the new rule. The EPA seeks comments on how these antidegradation policies might advance the purpose of the proposed rule.

The effect of the proposed rulemaking on water-dependent activities depends on whether the relevant state already accounts for tribal reserved rights in determining applicable WQS. Moreover, because each state has varying degrees and types of applicable tribal reserved rights—based on the relevant tribes’ treaties, etc.—and each state has considered tribal reserved rights to varying degrees, the effect of the proposed rulemaking will vary greatly and will be specific to the state. That is, to fully understand the ramifications of this proposed rulemaking, the regulated entity must review the state specific WQS. However, the proposed rulemaking will presumably have an impact on WQS going forward, as it will require consideration of issues not presently considered or not adequately considered and provides for EPA’s review of the WQS.

White House Climate and Environmental Justice Screening Tool

BY MOLLY LAWRENCE, RACHAEL LIPINSKI, TIFFANY GANTHIER, AND APRIL KNIGHT

The White House Council on Environmental Quality (“CEQ”) recently released Version 1.0 of its Climate and Economic Justice Screening Tool (“CEJST”), an interactive geospatial mapping tool identifying communities burdened by various socioeconomic and environmental factors. According to the White House, CEJST is key in the implementation of President Biden’s Justice40 Initiative, which is the administration’s effort to ensure that disadvantaged communities receive 40% of the overall benefits of federal climate, clean energy, clean water, and other investments. As the White House’s recent Executive Order on Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government demonstrates, environmental justice continues to be a key focus of the administration.

CEJST will help the federal government identify disadvantaged communities that would benefit from federal investments in climate, clean energy and energy efficiency, clean transit, affordable and sustainable housing, remediation efforts and clean water infrastructure, among other areas. To date, CEJST has identified 27,251 communities as disadvantaged or partially disadvantaged, defined as either (1) belonging in a census tract that satisfies the requirements of at least one of CEJST’s categories of burden and their corresponding economic indicators, or (2) are on the lands of a federally recognized Tribe.

For more information, we recently published an Alert on the new CEJST, available at this [link](#).

Biden Executive Order 14091 Strengthens Equity for Federal Agencies

BY MOLLY LAWRENCE, RACHAEL LIPINSKI, TIFFANY GANTHIER, AND APRIL KNIGHT

On February 16, President Biden issued Executive Order 14091: Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government (“EO”), which directs federal agencies to undertake additional efforts to advance equity initiatives. This new EO targets the significant barriers still faced by underserved communities by requiring nearly every federal agency to integrate equity in their planning and decision-making. By requiring agencies to consider equity, the Biden Administration is hoping to achieve more equitable and inclusive outcomes in nearly every facet of federal programs.

In the context of this EO, the term “underserved communities” refers to those populations as well as geographic communities that have been systematically denied the opportunity to participate fully in aspects of economic, social, and civic life, as defined in Executive Orders 13985 and 14020. Executive Order 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government (Jan. 20, 2021) defines underserved communities to include Indigenous and Native American communities.

For more information, we recently published an Alert on EO 14091, available at this [link](#).

2023 VNF Congressional Calendar

Please find our 2023 congressional calendar available at this [link](#).

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

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](https://www.vnf.com).