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Native Affairs Newsletter May 2024

Van Ness Feldman LLP

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. Please contact our attorneys or public policy professionals with any questions, and please send us your feedback!

Included in This Issue

Van Ness Feldman Welcomes Back Jaeleen Kookesh as Senior Counsel

The Native Affairs team is excited to announce that Jaeleen Kookesh has rejoined the firm as Senior Counsel. With an impressive career in Native community advocacy and corporate leadership, Jaeleen brings unparalleled expertise in legislative, regulatory, litigation, and transactional matters affecting Native communities, Native businesses, stakeholders, and partners.

Jaeleen rejoins Van Ness Feldman after 16 years at Sealaska Corporation, a regional Alaska Native Corporation with over 25,000 Native shareholders. Prior to her service at Sealaska, Jaeleen was an attorney at Van Ness Feldman from 1998 to 2008. Her leadership roles at Sealaska included Vice President and General Counsel, Vice President for Policy & Legal Affairs, and Corporate Secretary. In these positions, she directed legal strategies across a variety of business sectors including Water Resources, Natural Foods, and Lands. At Sealaska, Jaeleen also worked closely with Tribal Governments, Alaska Native Corporations, the Alaska Federation of Natives, and other community organizations throughout the region.

Jaeleen grew up in Angoon, Alaska, on Admiralty Island, and carries two Tlingit clan names from the L'eeneidí (Dog Salmon) Central house: Kajoohein and Kinagoo.ut. She is a child of the Teikweidí (Brown Bear) Clan. She is also Koyukon Athabascan.

Jaeleen holds a J.D., from the University of New Mexico, with a Certificate in Indian Law, and a B.A. from Stanford University. She can be reached at 206-802-3854 or jkookesh@vnf.com.

Recent Federal Investments under the IIJA and IRA in Clean Energy Programs and Accelerators Provide Long-Term Opportunities for Tribal Communities

BY ANDREW VANDERJACK

When the Infrastructure Investment and Jobs Act (IIJA) was enacted in 2021, Congress made $13 billion available for investment directly into Tribal communities. The Inflation Reduction Act (IRA), enacted the following year, made at least another $720 million available for direct investment in Tribal communities. That was just the tip of the iceberg, with dozens of federal programs under the IIJA and IRA making additional funds available to Tribes through grant competitions and other funding mechanisms. In recent months, we have seen a number of federal programs funded under the IIJA and IRA unlock extraordinary opportunities for Tribal communities that will pay dividends for many decades, but Tribal communities must be positioned to take advantage of them. This article highlights just a few of those recent developments in Tribal funding opportunities in the clean energy space.

Potentially valued at $36 billion over ten years, the IRA created two new tax credit delivery mechanisms that extend the full value of IRA energy tax credits to organizations with little to no tax liability. This novel mechanism, known as "elective pay" or "direct pay," allows tax-exempt entities, including Tribes, to receive the benefit of tax credits in the form of a tax refund. In February, the U.S. Department of Energy (DOE) outlined how this program will work for Tribes in its Tribal Nations and Native Communities Resource Guide. On March 5, 2024, the U.S. Treasury Department published final regulations implementing the program. The Treasury Department is working on a separate rulemaking now that will provide further clarity and flexibility for applicable entities that that co-own clean energy projects and would like to utilize direct pay.

On April 4, 2024, the U.S. Environmental Protection Agency (EPA) announced that it was investing $14 billion of IRA funds through the National Clean Investment Fund to support awards to three organizations. These organizations, in turn, will establish national clean financing programs that deliver accessible, affordable financing for clean technology projects. The largest award went to the Climate United Fund, at almost $7 billion, which will invest in "harder-to-reach market segments like consumers, small businesses, small farms, community facilities, and schools." Climate United Fund has committed to provide at least 60% of its investments in low-income and disadvantaged communities, 20% in rural communities, and 10% in Tribal communities, supporting projects like energy efficiency home retrofits, electrification upgrades, and solar installations. The Coalition for Green Capital received $5 billion, and the Power Forward Communities received $2 billion. Both organizations have committed to making a majority of their investments in low-income and disadvantaged communities.

On April 22, 2024, the EPA announced $7 billion in grant awards under the Solar for All program, also funded by the IRA, which will deliver residential solar projects to over 900,000 households nationwide. More than $500 million of the funding has been awarded to six Tribal projects, to be managed by Midwest Tribal Energy Resources Association Inc. (for the benefit of 35 Tribes), the Three Affiliated Tribes (serving Tribes in five states), Tanana Chiefs Conference (for the benefit of Tribal residents throughout Alaska), Oweesta Corporation, Hopi Utilities Corporation, and GRID Alternatives. Recipients of the Solar for All grants are tasked with developing long-lasting solar programs to benefit Tribal communities. For example, GRID Alternatives will partner with Tribal Nations in five states—along with partners that include the Alliance for Tribal Clean Energy, Native CDFI Network, Native Renewables, and Tribal and community colleges—with a goal of ensuring that 50 percent of installation and development work come from the local Tribal workforce.

Among the recent announcements regarding federal funding for Tribal energy priorities, we have observed a number of investments through clean energy accelerators. An accelerator is an organization or program that gives startup businesses support—often in the form of guidance, technical assistance, marketing, funding, and/or access to investors—to help the businesses become independently viable. An accelerator can be publicly or privately funded.

In May 2023, the National Science Foundation awarded a grant to the Southern California Tribal Chairmen's Association to lay the groundwork for a Tribal Energy Innovation Accelerator. The accelerator will "facilitate a mix of technical and non-technical collaborations to encourage the creation of new clean-energy equipment products and Tribal businesses, more resilient energy-producing systems, and workforce-training services." The project, funded under the CHIPS and Science Act, is designed to complement other Tribal energy activities funded through the IRA.

In Alaska, the climate tech deployment accelerator Launch Alaska will leverage a $3.4 million Energyshed grant from the Department of Energy to help support at least $10 million in investments in Southeast Alaska and the Northwest Arctic region. Launch Alaska's broader agenda is to support $1 billion in clean energy project development by 2030. But many of the beneficiaries of Launch Alaska's work—including the Alaska Native villages of Kivalina, Shungnak, and Kotzebue—are remote Tribal communities that rely on diesel generators to serve their microgrids. With the help of the Energyshed grant, a minimum of three new projects will be matched with committed public and private funding.

A nationwide Tribal energy accelerator—The Tribal Solar Accelerator Fund—has been able to provide match funding for Tribes that have a cost-share funding need, including outstanding Department of Energy grant matching funds requirements, thereby leveraging IRA and other funding opportunities. The Fund manages a Tribal-led grantmaking program that supports solar projects in Tribal communities across the country, offers Tribal solar grant opportunities for Tribal communities and Tribal-led nonprofit organizations, as well as leadership development programs.

The IRA itself also established a clean technology accelerator, housed under the EPA, which aims to support distributed energy, net-zero buildings, and zero-emissions transportation projects. Unlike the three accelerators highlighted above, the Clean Communities Investment Accelerator (CCIA) does not itself invest in or support start-up companies. Instead, the CCIA has invested $6 billion through five organizations "to establish hubs that provide funding and technical assistance to community lenders working in low-income and disadvantaged communities, providing an immediate pathway to deploy projects in those communities." Among the five recipients of CCIA funding is the Native CDFI Network, which received $400 million to enable 63 community lenders—including 58 Native CDFIs—to provide technical assistance, technical assistance funding, and capitalization funding to expand capacity for clean energy lending in Native communities. According to the EPA, each of the selectees will provide capitalization funding (typically up to $10 million per community lender), technical assistance subawards (typically up to $1 million per community lender), and technical assistance services so that community lenders can provide financial assistance to deploy projects where they are needed most.

These federally funded projects are, of course, just a sampling of the many initiatives under way across the nation to deploy clean energy infrastructure in Tribal communities. For more information on funding opportunities available to support clean energy projects in Tribal communities, we suggest visiting the following DOE website, which provides information on opportunities from the DOE and other federal agencies, as well as several non-federal entities:

https://www.energy.gov/indianenergy/ongoing-funding-opportunities

If you need assistance in pursuing any of these opportunities, please contact Andrew VanderJack at amv@vnf.com or (202)-298-1941. We would love to work with you.

The Corporate Transparency Act and Tribal Businesses: What You Need to Know

BY PATRICK DAUGHERTY

Congress passed the Corporate Transparency Act (CTA) to address money laundering, tax fraud, and other illicit activity by requiring companies to report ownership information to the Financial Crimes Enforcement Network (FinCEN). The CTA may impact your Tribal businesses, as most companies chartered under state, Tribal, or foreign law are now required to report on their "beneficial owners"—defined as those who exercise substantial control over the reporting company or anyone who owns at least 25% of the company. As discussed below, some Tribal businesses may be eligible for an exemption, though the Treasury Department has not issued specific guidance on the CTA's applicability to Tribal businesses. Although ongoing litigation is challenging the validity of the law, Tribal business should be prepared to submit the required information to FinCEN per the requirements below.

Required Information

The report filed with FinCEN must include information about the company's name(s), addresses, formation, registration, Tax Identifier Number, and what jurisdictions the company is subject to. The report must also include personal information about the beneficial owner(s) of the company, including their name, date of birth, residential address, and a copy of a photo identification.

Timeline & Potential Penalties

Businesses created prior to January 1, 2024, have until January 1, 2025, to file their report with FinCEN. All non-exempt businesses formed during 2024 have 90 days to report, and businesses formed after January 1, 2025, must report within 30 days. A failure to submit reports can result in up to a $10,000 fine and potential prison time. Unless an exemption applies, businesses must file electronic reports using the FinCEN's online filing system. After the initial report is filed, an updated report must be filed within 30 days if certain changes occur.

Exemptions

The CTA includes 23 statutory reporting exemptions, including several that may be of particular interest to Tribal businesses. See 31 U.S.C. § 5336(a)(11)(B).

1. Entities exercising governmental authority; (B)(ii);
Tribally designated housing entities, healthcare consortiums, development corporations, and other arms of the Tribe—as well as the Tribal government itself—are most likely exempt from reporting under the government authority exemption. An entity is eligible for the government authority exemption when it is (1) chartered under federal, state, or Tribal law; and (2) exercises governmental authority on behalf of a Tribe. Entities that qualify as arms of the Tribe may qualify for this exemption. Of course, each Tribal business will need to consider these factors on a case-by-case basis.

2. Large operating companies (B)(xxi); and
If a Tribal entity does not qualify for the governmental exemption, it may still be exempt if it meets employment, tax, and physical presence criteria. To qualify a company must: (1) employ more than 20 full time employees in the United States; (2) have filed federal income tax returns exceeding $5,000,000 in gross receipts or sales; and (3) have a physical office withing the United States. If these three criteria are met, the entity may not need to file a FinCEN report.

3. Subsidiaries of exempt entities (B)(xxii).

Under the CTA, subsidiaries of exempt entities are also exempt. This means subsidiaries of entities exercising government authority exempt under (B)(ii) and subsidiaries of large operating companies exempt under (B)(xxii) are also exempt from the reporting requirements. The application of this exemption to Tribal entities is unclear and will require an analysis of how much ownership and control the exempt entity possesses over the subsidiary. This exemption may be of particular interest for smaller Tribal businesses that are subsidiaries of larger Tribal economic development agencies.

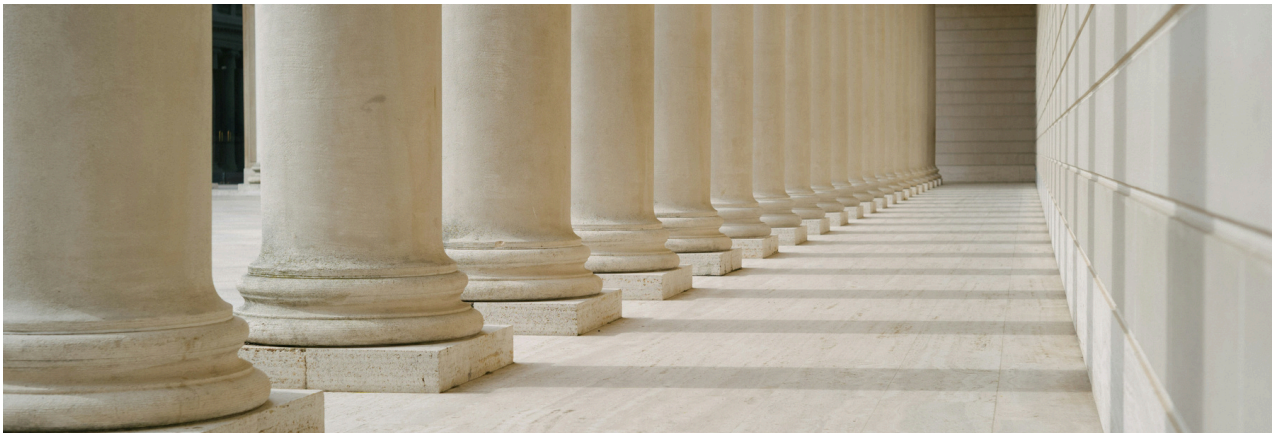
Litigation

One U.S. District Court judge has already determined that the CTA is unconstitutional because it exceeds the powers granted to Congress. National Small Business United v. Yellen, Case No. 5-22-cv-1448, 2024 WL 899372 (N.D. Ala. Mar. 1, 2024). The Court's injunction was limited, however, to a small group of parties participating in the litigation. An appeal of this decision is pending before the Eleventh Circuit (Case No. 2410736). The Court granted a joint motion for expedited briefing and argument, and oral argument is expected to be scheduled later this year.

Next Steps

As this is the first year of CTA reporting, many unanswered questions remain. The Treasury Department may issue new guidance on the CTA's application to Tribal businesses. This newsletter is not intended to provide legal advice on the application of the CTA to any particular Tribal businesses. If you have questions about the reporting requirements for your Tribe's businesses, please contact Patrick Daugherty at pod@vnf.com or (202)-298-1810.

VNF Law Clerk, Sam Schimmel contributed to this article.



EPA Unveils Environmental Justice Clearinghouse

BY SEAN TAYLOR

On April 21, 2023, President Biden signed Executive Order 14906, aiming to bolster the nation's dedication to environmental justice. One key aspect of this order was the creation of an Environmental Justice ("EJ") Clearinghouse, which was announced by the Environmental Protection Agency on April 23, 2024. The Clearinghouse is intended to be a comprehensive online repository of culturally and linguistically suitable materials related to environmental justice and dedicated to addressing environmental inequalities.

This online platform serves as a centralized hub for information, tools, and resources aimed at addressing environmental injustices. The information ranges from case studies and reports to interactive maps and community engagement resources. For example, a search for the word "consultation" within the EJ Clearinghouse website produces links for EPA's Policy on Consultation with Indian Tribes, EPA's Guidance for Discussing Tribal Treaty or Similar Rights, and other federal resources. The preliminary resources listed on the Clearinghouse—including funding opportunities, screening and mapping tools, and technical assistance—were provided by agencies from across the federal government.

Users can access databases containing environmental and demographic data, explore interactive maps to visualize environmental disparities, and discover best practices for engaging with affected communities. Additionally, the Clearinghouse features searchable categories to simplify results for the public to ensure a more efficient and accessible process for accessing information related to environmental justice. It also facilitates collaboration and knowledge-sharing through webinars, training materials, and networking opportunities.

For additional information on the EJ Clearinghouse click here.

Pilot Program Aims to Create and Implement Tribal-Based Model of Care to Respond to Missing or Murdered Indigenous People Cases

BY CHARLENE KOSKI

The Office on Violence Against Women (OVW) is accepting applications for a newly announced grant program that will support the creation of a Tribal-based model of care to respond to Missing or Murdered Indigenous People (MMIP) cases related to domestic violence, dating violence, sexual assault, stalking, and sex trafficking.

Eligible applicants are national, Tribal, statewide, or other nonprofit organizations that have the capacity to provide Tribal-specific training and technical assistance (TTA) on a national level. Award recipients will coordinate with OVW to identify, make subawards to, and collaborate with three subrecipients that will act as pilot sites: (1) a Tribal government; (2) a Tribal coalition; and (3) an urban Indian or other Tribal nonprofit. Funding must be used to support activities related to implementing Healing and Response Teams (HRT), including staffing, supplies, and consultants. Grant recipients must also develop an HRT Toolkit for use by Tribes, as well as plan and deliver one national level in-person workshop for Tribal entities interested in developing an HRT approach to MMIP for their community.

Relevant submissions deadlines are June 25, 2024 and June 27, 2024. For more information, see OVW Fiscal Year 2024 Healing and Response Teams Special Initiative - Solicitation (justice.gov).

Regulatory Revisions to Water Quality Standards Protect Tribal Reserved Rights

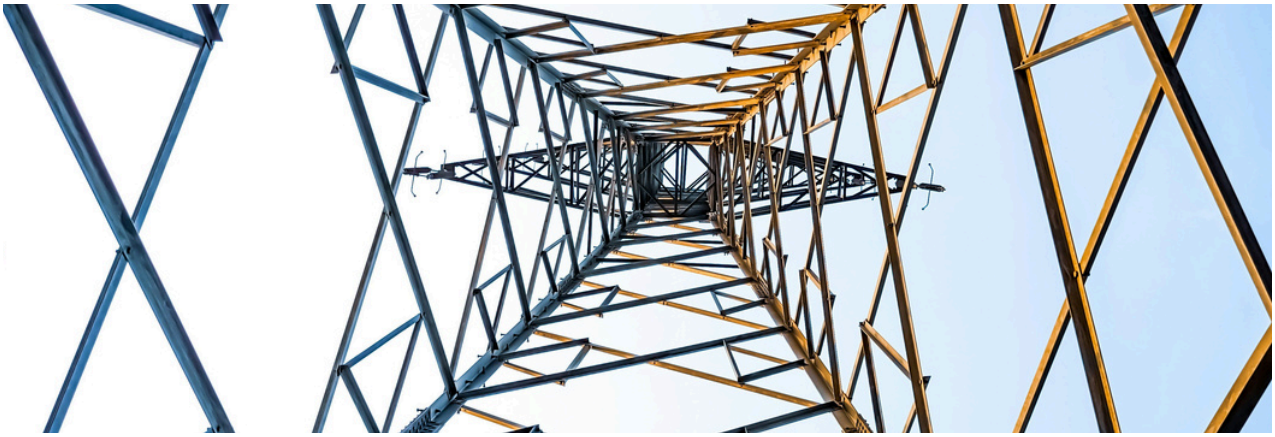
BY NAKIA ARRINGTON

The U.S. Environmental Protection Agency ("EPA") has finalized revisions to the Clean Water Act ("CWA") Water Quality Standards ("WQS") at 40 CFR Part 131. The final rule will be effective on June 3, 2024. The new rule considers tribes' explicit and implicit rights to natural and cultural resources. The revised regulatory framework expressly (1) defines Tribal reserved rights, (2) establishes and clarifies the responsibilities of states regarding Tribal reserved rights in the WQS context, and (3) establishes and clarifies EPA's role and responsibilities.

The rule outlines how Tribal reserved rights, defined as any rights to Clean Water Act-protected aquatic and/or aquatic-dependent resources reserved to tribes, "either expressly or implicitly," through treaties, statutes, or executive orders where tribes assert these rights, must be considered when establishing both federal and state WQS.

Pursuant to 40 CFR 131.9(a), the final rule imposes several requirements on EPA and states where a right holder has asserted a reserved right in writing. The requirements in 40 CFR 131.9(a) are premised on states having "available data and information" supporting the application of those requirements. "[T]he state would seek available data and information, with assistance from the EPA if requested, and then evaluate the data and information to determine whether and how WQS may need to be revised to comply with 40 CFR 131.9(a)." To have an impact on a WQS action, a Tribal reserved right must be asserted as part of the public record and subject to public review and comment.

EPA's stated purpose of the revisions is to provide "transparency and clarity" regarding the expectations of WQS where Tribal reserved rights are applicable. However, mandating inclusion of Tribal rights in WQS adds significant substantive requirements to the standards applicants for Clean Water Act authorizations must meet and we expect the mandate to result in more stringent conditions on such authorizations.



FERC Reinvigorates Authority over Interstate Transmission Projects, Recognizing Tribal Interests but Stopping Short of Implementing Presumption Based on Adverse Tribal Impact

BY CHARLENE KOSKI AND TIFFANIE A. ELLIS

On May 13, 2024, the Federal Energy Regulatory Commission issued a Final Rule under Order 1977 reinvigorating what is known as the Commission's "backstop siting authority," which governs applications for permits to site interstate electric transmission facilities when state authorizations are either not attainable for various reasons or are denied or not received by a project proponent within a year of filing with the state. While the Commission recently adopted a position that it will deny hydropower licenses in the event a tribe upon whose reservation the project will sit protests the application, even when prompted, the Commission declined to do the same here. Specifically, the Yaruk Tribe asked the Commission to adopt a presumption that when states deny projects based on adverse tribal impacts, the project is not in the public interest. Rather than aligning its transmission policy under its backstop siting authority with its hydropower policy, the Commission concluded that it will consider only the adverse effects of a proposed transmission project on tribes, landowners, and local communities and impose mitigation requirements if the project moves forward.

Although the Commission declined to impose the requested presumption, it made other amendments aimed at protecting tribal interests. For example, applicants seeking to take advantage of the Commission's backstop siting authority must develop a "Tribal Engagement Plan" to identify and engage tribal communities potentially affected by the transmission project. This plan was added following the proposed rule and is in conjunction with an engagement plan for communities adversely impacted by environmental justice concerns. The plan must summarize comments received from potentially affected tribes during any previous outreach activities and describe planned targeted outreach activities both before and after filing the application. Although the Commission declined to require applicants to receive engagement training provided by a tribe, it emphasized that the applicant must demonstrate a good-faith effort to engage.

The Commission also broadened notice requirements to include tribes whose ancestral or current-day lands may be affected by a project, even when the potentially affected tribe is not already involved with the project. The order also clarifies that applicants must obtain consent to enter tribal lands, which includes land owned in-fee by a tribe or member of a tribe.

CEQ's Phase 2 Final Rule: NEPA Revisions Highlight Tribal Considerations

BY TIFFANIE A. ELLIS AND JONATHAN SIMON

On May 1, the Council on Environmental Quality ("CEQ") published a final rule making "Phase 2" revisions to its National Environmental Policy Act ("NEPA") implementing regulations. In 2021, CEQ began a two-phase process to revise these regulations. "Phase 1" largely reversed several changes made to the regulations in 2020 under the Trump administration, including key changes relating to defining "purpose and need" and the long-used concepts of direct, indirect, and cumulative effects.

The new "Phase 2" revisions are more extensive. Some of the Phase 2 revisions codify in regulation amendments to NEPA made by the Fiscal Responsibility Act of 2023 ("FRA") and are intended to improve the efficiency of the NEPA process, such as establishing page limits for environmental documents and facilitating the use of categorical exclusions. The Phase 2 revisions also restore additional concepts or provisions from the 1978 regulations and case law interpreting those regulations, remove additional changes made in 2020 that CEQ now "considers imprudent."

The final rule includes a number of noteworthy changes specifically addressing Tribal engagement and consideration of Tribal interests in the NEPA process, including the following:

1. The final rule clarifies that "activities or decisions for projects approved by a Tribal Nation that occur on or involve land held in trust or restricted status" and involve "no or minimal Federal funding or other Federal involvement" are not "major federal actions" that require compliance with NEPA. According to CEQ, categories of activities on trust lands that typically would not constitute major Federal actions under this exclusion include, among others, human resources programs unrelated to development, self-governance compacts, and certain service line agreements.
2. For the first time, agencies are explicitly required to analyze "disproportionate and adverse human health and environmental effects on communities with environmental justice concerns"—which can include areas within Tribal Nation boundaries—and climate change-related effects. The final rule also specifically adds ''effects on Tribal resources" to the types of effects or impacts that must be considered in the NEPA process.
3. The final rule directs agencies—in considering whether an adverse effect of the proposed action is "significant"—to consider, among other factors, the degree to which the proposed action may adversely affect historic or cultural resources and Tribal sacred sites, whether the action could violate relevant Tribal laws or be inconsistent with Tribal environmental policies, and the degree to which the action could "adversely affect rights of Tribal Nations that have been reserved through treaties, statutes, or Executive Orders."
4. In directing that environmental impact statements include the "environmentally preferable alternative(s)," CEQ defines such an alternative as one that "will best promote" NEPA policy "by maximizing environmental benefits, such as addressing climate change-related effects or disproportionate and adverse effects on communities with environmental justice concerns; protecting, preserving, or enhancing historic, cultural, Tribal, and natural resources, including rights of Tribal Nations that have been reserved through treaties, statutes, or Executive Orders; or causing the least damage to the biological and physical environment."
5. The final rule encourages agencies to include sufficient time for meaningful government-to-government consultation when they establish schedules and deadlines for the NEPA process.
6. The final rule specifically includes Indigenous Knowledge as a form of special expertise for purposes of inviting Tribal agencies to serve as cooperating agencies, in order to help ensure that agencies "respect and benefit from the unique knowledge that Tribal governments bring to the environmental review process." It also specifically references Indigenous Knowledge as a category of "high-quality information" to inform the NEPA analysis.
7. The final rule defines "extraordinary circumstances"—which agencies must consider in determining whether to apply a categorical exclusion as a streamlined means of NEPA compliance—to include potential disproportionate and adverse effects on communities with environmental justice concerns and potential adverse effects on historic properties or cultural resources.

See our full alert, further describing key changes to the regulations in the Phase 2 rule, here.

On May 21, 2024, twenty states filed suit in the U.S. District Court for the District of North Dakota to challenge the Phase 2 Final Rule. Absent an injunction, the Phase 2 Final Rule is scheduled to take effect July 1, 2024.

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.