

Native Affairs Newsletter Fall 2023

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Celebrating the Service of Native Veterans and the Native American Women Warriors Association

The **Native American Women Warriors Association** (“NAWW”) is a nonprofit Veterans’ organization dedicated to empowering Native women Veterans. NAWW recognizes women across all tribes and all branches who have served in the U.S. military. This Veteran organization assists fellow Native women Veterans with recovery, military transition, posttraumatic stress disorder support, and other emotional and mental trauma that may have developed during their service. NAWW aims to be a resource for Veterans and provide support to one another and the greater community.

Members of NAWW travel the United States performing color guard and powwow ceremonies to honor the legacy of Native American Veterans. NAWW is possible because of the generosity of small, tax-deductible donations, and is not affiliated with any service organization.

American Indians and Alaska Natives serve in the U.S. military at a rate five

times the national average. As a result, Native Americans are the highest per-capita of any population to serve in the U.S. Armed Forces.[1] Natives have served with distinction in every major conflict for more than 200 years.

[1] Danielle DeSimone, The USO, A History of Military Service: Native Americans in the U.S. Military Yesterday and Today (Nov.21, 2021), <https://www.uso.org/stories/2914-a-history-of-military-service-native-americans-in-the-u-s-military-yesterday-and-today>.

Update on Initiatives to Expand Federal Authority to Support Tribal Land Repatriation, Co-Management, and Co-Stewardship

With the White House planning to hold its annual Tribal Nations Summit on December 6 and 7, we are looking forward to seeing the Interior Department's second annual report on tribal co-stewardship. The annual reports are required under Joint Secretarial Order 3403, "Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters." The Department's first annual report detailed more than 20 new co-stewardship agreements signed by the Interior Department and the USDA Forest Service and signaled that more than 60 additional agreements were under review.

The current efforts of the Interior Department and of the Department of Agriculture are all, of course, limited by the constraints of federal law. While we are following efforts pursuant to existing legal authorities, the following summarizes three notable efforts to expand federal authorities to support tribal land repatriation as well as tribal co-management and co-stewardship of federal lands.

BIA's Proposed LWCF Tribal Land Acquisition Program

In the President's FY 2024 Budget, released in March 2023, the Bureau of Indian Affairs (BIA) proposed to create a new tribal Land and Water Conservation Fund (LWCF) land acquisition program. BIA stated that the primary objective of the program would be to "provide funding to Tribes to acquire lands or easements for the purposes of protecting and conserving natural resource areas that may also be of cultural importance to the Tribe or have significant recreational benefits for Tribal communities." BIA has previously received funds for tribal land acquisition, but not through a stand-

alone LWCF program.

Congress currently allocates LWCF funding to the Bureau of Land Management, National Park Service, U.S. Fish & Wildlife Service, Forest Service, and state and local governments. LWCF funds are invested by federal agencies to purchase and protect federal lands for public outdoor recreation. Agencies also partner with landowners to support voluntary conservation activities on private lands. The LWCF program is well-funded, and in 2020, the Great American Outdoors Act, Pub. L. No. 116-15, amended the statutory authorization for LWCF to provide full and permanent funding for the program. The law provides for the deposit of \$900 million into the LWCF each fiscal year, which is available the next fiscal year to support the purposes of the program.

Some LWCF funds are distributed directly to states and local communities through grant programs. Currently, Tribes can work with states through the grant programs to secure LWCF funding for conservation projects. These grants can be used for a range of projects, including projects that protect historic and cultural sites.

BIA's FY 2024 budget requests \$12 million in funding specifically for LWCF Tribal Land Acquisition. So far, however, Congress has not been willing to implement the proposal. Neither the Senate nor the House appropriations bills for FY 2024 provide funding for the proposed program—Senate appropriations legislation explicitly states that no funding is appropriated. Still, BIA continues to work on developing the new program. In August, BIA invited Tribal Governments to consult on the proposed program, and three consultations were held in September. We will be interested to see how BIA's proposal fares when Congress considers BIA's FY 2025 budget this spring.

“Co-Stewardship” Model Proposed in Wy’east Tribal Resources Restoration Act

On November 15, Congressman Earl Blumenauer (D-OR) re-introduced the Wy’east Tribal Resources Restoration Act. Senator Ron Wyden (D-OR) introduced a companion bill in the Senate. According to Congressman Blumenauer’s office, the legislation “would establish one of the first placed-based co-management strategies in the nation.” This legislation is notable for its approach to establishing a comprehensive co-management system specifically for the Mount Hood National Forest, including by providing for the automatic withdrawal from the public land laws, mining laws, and mineral leasing laws of

“any area within the [Mount Hood] National Forest with respect to which the [Confederated Tribes of the Warm Springs] and the [Forest Service] enter into a memorandum of understanding.”

The legislation would direct the U.S. Forest Service to establish work with the Confederated Tribes of the Warm Springs to establish Treaty Resource Emphasis Zones, within which the Forest Service would develop a co-management plan that, among other things must:

- prohibit new temporary or permanent roads, except as necessary;
- provide for the retention of large trees;
- assess wildfire risk to the Tribe’s Reservation and to Treaty and cultural resources within Mount Hood National Forest; and
- provide that forest restoration and management planning within any Zone includes, and is guided by, reserved Treaty rights, and the resources on which the Treaty rights depend.

Existing roads would be permitted to stay in place so long as they are “deemed to be necessary” by the Forest Service in consultation with the Tribe.

The legislation also directs the Secretary of Agriculture to provide funding to the Tribe “to ensure that the Tribe, in partnership with the Forest Service, has the capacity to participate in designing, implementing, and monitoring projects within a Zone.”

A Senate hearing was held on the legislation during the previous (117th) Congress.

Legislation Establishing Tribal Cultural Areas System Would Incorporate Tribal Co-Management

Legislation introduced by Congressman Raúl Grijalva (D-AZ) in the House (H.R. 6147) and Senator Martin Heinrich (D-NM) in the Senate (S. 3185) would establish a federal “Tribal Cultural Areas System,” which could include historic properties, landforms, locations, and landscapes with significant historical, cultural, or spiritual significance to a specific Tribe or Tribes. Similar legislation

was introduced in the previous (117th) Congress.

The legislation would establish a system under which Tribes would recommend—and Congress would designate—an area of public lands that would be withdrawn and designated as a tribal cultural area. Tribal Commissions would be established for each tribal cultural area and would be consulted on all aspects of federal management of the area. One of the goals of the bill is to establish a co-management role for interested Tribes. According to the bill sponsors: “Through cooperative management agreements known as self-determination contracts and increased consultation with land management agencies, tribes [would be able to] share their traditional knowledge, and help ensure that tribal cultural area management protects cultural resources.”

However, the proposal, as drafted, has also elicited a number of concerns. For example, the legislation does not establish any limits on the size of a tribal cultural area withdrawal, which raises concerns because Tribal cultural areas would be subject to significant management restrictions, including prohibitions on road construction and withdrawal from mineral leasing laws. Committee Republicans have suggested that other federal laws—including the Antiquities Act—may offer alternative mechanisms to protect cultural sites and have noted that the proposed legislation could authorize the set aside of entire landscapes. Additionally, although Congress must formally designate new tribal cultural areas, observers have noted that any Tribe would be able to recommend the designation of a tribal cultural area, and the Secretary of the Interior (or the Secretary of Agriculture, as appropriate) would be required to withdraw “all public land” in any such recommended cultural area and “only allow such uses in the recommended Tribal cultural area as are consistent with preserving Tribal cultural sites and cultural values of the area.”

The three proposals outlined above all appear to be mired in political discord for now. However, it’s worth understanding the approach that each proposal takes to promoting tribal interests. Federal agencies must, of course, adhere to the limits set forth in federal statute, but we see a lot of interest right now in expanding federal statutory authorities to allow for innovative new approaches to promoting tribal land repatriation and tribal co-stewardship and co-management of federal lands.

Federal Appropriations Legislation Is Delayed Again

As we approach the third month of the new federal fiscal year (FY 2024), Congress remains largely deadlocked over how to proceed with individual appropriations legislation, including the important Interior-EPA Appropriations bill. That bill has passed the House, but not yet passed the Senate. In the meantime, Congress has focused on temporary continuances in the form of Continuing Resolutions, which carry the federal agencies from one deadline to another.

The president has signed a Continuing Resolution (CR) spending bill last week averting a government shutdown with just days to spare. The bill, which cleared the House on November 14 by a vote of 336-95, passed in the Senate on Nov 15 by vote of 87-11. The vote was stalled in the Senate for hours over negotiations on defense policy legislation still on Congress' to-do list this year. The stopgap CR uses a two-tiered deadline structure pioneered by Speaker Mike Johnson (R-LA), which will keep four agencies of the government funded until January 19, 2024, while funding for the military and some of the government's biggest domestic programs are funded through February 2, 2024. The idea is to stagger funding deadlines, which Congress struggles to meet, so lawmakers are not stuck with having to pass a single massive 12-bill government spending bill by the end of the CR and to provide time to seek to negotiate the content of individual appropriations bill.

The House has struggled under the former leadership of Speaker Kevin McCarthy (R-CA) and current Speaker Johnson this Congress to bring annual spending bills to the floor for passage. House conservatives are now refusing to pass any more GOP spending bills until Johnson produces a plan to cut government funding for the fiscal year that began on October 1. With respect to the Interior-EPA Appropriations bill, which has passed the House, there are not significant disputes over funding levels for Native American focused programs, but there are disputes over climate and conservation issues and policies of the Biden Administration. The EPA funding bill has been a target of conservatives as they look to defund what they believe has been an overreach of powers by the Biden administration's EPA. Senate Democrats — and many Republicans — will not accept additional cuts to the annual spending bills, preferring to stick to the debt deal struck between the White House and former Speaker Kevin McCarthy (R-CA) earlier this year. As part of that deal, all non-mandatory federal spending would be cut by 1 percent if the government were to continue being funded under a continuing resolution beyond early April 2024. To avoid that across-the-board cut, all of these issues will need to be ironed out between the House and Senate in negotiations occurring before the CR deadlines. The outlook for successful negotiations is bleak, but a breakthrough for the Interior bill at least is

possible.

Tribal Engagement Considerations for Transmission Infrastructure Development

To accommodate its clean-energy objectives, Congress has prioritized an expansion of the nation's transmission infrastructure, and many of those transmission projects will need to cross federal lands, tribal lands, or lands where tribes have historical treaty rights or cultural interests. Developers should anticipate these interests and prepare for engaging with potentially impacted tribes as early in the planning process as possible.

Congressional Mandates and Funding

Over the past two years, and as part of an ongoing effort, federal agencies have been working to implement the mandates of the Infrastructure Investment and Jobs Act ("IIJA") and the Inflation Reduction Act ("IRA") to strengthen American infrastructure and invest in clean energy development. The investments contained in the IIJA and IRA are significant, including \$65 billion for clean energy transmission and \$550 billion designated for new roads, infrastructure, and energy resilience.^[1] Achieving the goals of the IIJA and the IRA will require substantial efforts to expand the United States' transmission infrastructure, which will necessarily impact tribal rights and interests.

Considerations for Engaging with Tribes

- ***Identify Potentially Impacted Tribes:*** Conduct a concerted and focused effort to identify any tribes that may be potentially impacted by the project. This will require identifying tribes that are currently located near the project and those that may have historical ties to the area.
- ***Research Tribal Histories and Current Tribal Events:*** After identifying tribes that will be impacted by the project or have historical interest in the project area, research the tribe's history, including any applicable treaty rights. It is also important to be aware of any current events and developments with the tribe, including an understanding of the tribe's current governmental leadership, any relevant case law, and specific business development efforts that the tribe engages in. A project developer should also identify potential areas where the tribe and the developer could

partner on the project.

- ***Attempt to Engage with Impacted Tribes as Early as Possible:*** Once the impacted tribes have been identified and researched, reach out to the tribes as early in the planning process as possible. It is also critical to confirm that communications are occurring with the correct tribal department and contacts— sending a general letter to tribal leadership is not sufficient. Attempts to open lines of communication with the tribe early in the process will help establish a solid foundation as the project moves forward.

[1] The White House, “UPDATED FACT SHEET: Bipartisan Infrastructure Investment and Jobs Act,” The White House, August 3, 2021, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/08/02/updated-fact-sheet-bipartisan-infrastructure-investment-and-jobs-act/>

DOJ Launches Violence Against Women Act Alaska Pilot Program

More than a year and a half after Congress authorized the Violence Against Women Reauthorization Act of 2022 (“VAWA 2022”), the Department of Justice’s Office on Violence Against Women (“OVW”) has launched a pilot program that will allow Alaska Native tribes to seek to exercise Special Tribal Criminal Jurisdiction (“STCJ”) over non-Indian offenders for certain crimes, including crimes of sexual and domestic violence. Any Alaska tribe may participate in the pilot program and receive federal guidance and technical assistance to develop their criminal justice capacity. A tribe may participate in the pilot program even if it ultimately opts against seeking official designation from the Attorney General to exercise STCJ.

The pilot program marks an important development in efforts to combat violent crimes committed against Alaska Natives. 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 inequity has had a detrimental impact in Alaska, where Alaska Native women suffer the highest rates of domestic and sexual violence compared to other Native American groups. VAWA 2022 provided important clarity on the scope of tribal jurisdiction in Alaska,

affirming the inherent authority of Alaska tribes to exercise civil and criminal jurisdiction in Native villages. VAWA 2022 also provided for the first time an express statutory basis for Alaska tribes to exercise STCJ over non-Native defendants for certain “covered crimes” as defined in the Act.

Following tribal consultations in 2022, a working group formulated a three-track process for the Alaska pilot program. Under Track One, Alaska tribes may join a working group on STCJ to receive technical assistance and peer-to-peer support. Under Track Two, any Alaska tribe may become a Preliminary Pilot Program Tribe by completing a questionnaire to assess their readiness and identify any gaps in meeting the statutory requirements. Every tribe that completes a questionnaire will be assigned a federal liaison, who will help the tribe address any unmet requirements. Under Track Three, an Alaska tribe may seek Attorney General designation as a Participating Pilot Program Tribe and will either be recommended for designation or invited to continue participating in readiness activities under Track Two. The intent of the three-track program is to provide a way for all Alaska tribes to receive federal support to develop their criminal justice capacities, regardless of whether a tribe ultimately seeks to exercise STCJ.

To participate in the pilot program, any Alaska tribe may email the Department of Justice at VAWAAAlaskaPilot@usdoj.gov.

DOJ Issues First-Ever Environmental Justice Enforcement Strategy Report

On October 15, 2023, the Department of Justice (“DOJ”) issued its first-ever [Comprehensive Environmental Justice Enforcement Strategy Annual Report](#) (“Report”) detailing DOJ’s progress in advancing environmental justice under its [Comprehensive Environmental Justice Enforcement Strategy](#) (“EJ Strategy”), and through the operation of its new Office of Environmental Justice. The Report highlights DOJ cases involving environmental justice issues and inequities, including several enforcement cases that span across various industries and geographical areas. The Report demonstrates how DOJ’s environmental justice initiatives are fueling enforcement cases and should be considered by companies in their evaluation of compliance programs, particularly in industries and geographic areas where non-compliance may affect communities of color, indigenous, low-income, and other historically disadvantaged communities.

Background

The Report follows DOJ's May 2022 creation of the Office of Environmental Justice and issuance of its EJ Strategy. The Office of Environmental Justice supports DOJ in environmental justice investigations and litigation, as well as outreach to communities with environmental justice concerns. In May, DOJ also issued its EJ Strategy, which seeks to provide “timely remedies for systemic environmental violations and contaminations, and injury to natural resources” through the enforcement of federal laws. For more information on these May 2022 DOJ environmental justice announcements, please see our previous [alert](#).

The Report. The Report details DOJ's progress in implementing its EJ Strategy. Specifically, the Report outlines several cases that sought to protect communities most overburdened by environmental harm. Several of these key cases are highlighted below.

Civil Division. The DOJ's Civil Division worked to ensure that a natural gas transporter and an oil and gas lessee fulfilled decommissioning obligations to clean-up or prevent further environmental damage. In a separate case, DOJ filed a civil lawsuit to prevent a local irrigation district from diverting water from a river without approval by the Bureau of Reclamation, and potentially harming downstream Tribal reserved water rights held for fisheries purposes.

Civil Rights. The Report also outlines two significant cases pursued by DOJ's Civil Rights Division. In the first case, DOJ announced an interim resolution agreement that concluded its first-ever Civil Rights Act of 1964 Title VI environmental justice investigation into racial discrimination in the operation of a wastewater disposal program. The second case resolved an environmental justice investigation into a city's response to illegal dumping in Black and Latino neighborhoods.

Environmental Enforcement. The Report summarizes several significant environmental enforcement cases brought both by DOJ's Environment and Natural Resources Division and individual U.S. Attorney's offices that have addressed, at least in part, environmental justice issues. Those cases included Clean Air Act cases against natural gas facilities, a refinery, and a heavy-duty diesel engine service company, as well as a Clean Water Act case against a wastewater treatment facility. Another significant case resolved Safe Drinking Water Act charges against a municipal drinking water system. In the Report, DOJ identifies how the enforcement action relates to disproportionately impacted

communities.

Tribal Environmental Justice. The Report notes that environmental justice concerns in Tribal communities are unique, and it is necessary to consider the sovereignty of federally recognized Indian Tribes and Alaska Native Villages. In addition to environmental and public health issues, Tribes' environmental justice concerns may also include damage or potential injury to cultural and sacred sites and resources, depletion of fisheries or harm to traditional hunting and gathering areas, impairment of treaty rights, and degradation of water and land resources on or needed to support Tribal homelands or associated rights.

The Report summarizes efforts of federal agencies to collaborate with Tribal government representatives and to conduct Tribal outreach sessions. The outreach focused on climate adaptation measures, Tribal water rights, and Tribal treaty rights associated with the safeguarding of natural resources. The DOJ's Office of Tribal Justice also designated a formal Tribal Liaison to the Office of Environmental Justice, which will help facilitate the government-to-government relationship between the federal government and Tribes regarding matters of environmental justice.

Implications

The Report demonstrates DOJ's continued commitment to implementing its EJ Strategy by prioritizing enforcement actions that potentially benefit environmental justice communities. Aligned with this effort are also the Environmental Protection Agency's recently released National Enforcement and Compliance Initiatives, which incorporate environmental justice as a significant facet especially with regard to the priorities concerning coal ash and air toxics, as outlined in a [prior alert here](#). These robust enforcement efforts highlight the importance of compliance with environmental laws and regulations.

Now, more than ever, it is critical that companies prioritize environmental compliance and promptly undertake internal investigations into any potential non-compliant conduct—particularly when that conduct may negatively impact an environmental justice community. Prompt investigation and remediation of potential environmental violations can position companies to reduce the scope of fines and injunctive relief in a DOJ enforcement action.

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National Law Review, Volume XIII, Number 334

Source URL: <https://natlawreview.com/article/native-affairs-newsletter-fall-2023>