

Legislative and Administrative Update



National
Congress of
American
Indians

May 24, 2017

Legislation

- American Recovery and Reinvestment Act
 - Tribal Infrastructure – \$3 billion
 - Tribal Economic Development Bonds - \$2 billion
- Indian Health Care Improvement Act
- Tribal Law & Order Act of 2010
 - Extended Sentencing
 - Declination Reporting
 - Reassumption of Federal Jurisdiction, Mille Lacs; White Earth
- Stafford Act 2012 – tribal disaster declarations
- HEARTH Act 2012 – self-determination for tribal lands
- Violence Against Women Act 2013 - SDVCJ
- Tribal General Welfare Exclusion Act of 2014
- Indian Trust Asset Management Reform Act of 2016
- Water Resources Development Act of 2016

Settlements

- Cobell Settlement – \$1.4 billion
 - Buy Back Program - \$1.9 billion - 1.5 million acres
 - Secretarial Commission on Trust Reform
- Tribal Trust Settlements – 104 tribal settlements totaling over \$3.35 billion
- Keepseagle Settlement - \$680 million
- Water Settlements – \$9 tribes – \$2 billion
- Ramah v. Jewell Contract Support \$940 million

Nation to Nation Relationship

- White House Tribal Nations Summit
- White House Council on Native American Affairs
- Consultation Improvements
 - Earlier Notice, Meeting Structure, Framing Papers, Workgroups
- United Nations Declaration on Rights of Indigenous People
- President's Historic Trips to Indian Country
- High Level Appointments, such as Diane Humetewa and Hilary Tompkins
- Native One Stop- access to federal resources and programs
- DOJ Statement of Principles for Working with Federally-Recognized Tribes
- Made Permanent Indian offices and desk example DOE, FCC

Major Regulatory Advances

- Leasing Regulations & Taxation of Permanent Improvements
- Rights-of-Way Regulations – preemption of state tax
- Federal Acknowledgement amended regulations
 - Shinnecock, Pamunkey Acknowledged
- Indian Child Welfare Act Regulations and Guidance
 - DOJ Initiative to Promote Compliance with ICWA
 - HHS ICWA data collection from states
- Secretarial Election Regulations
- DOI Gaming Policy Advances (Limiting State Overreach in Compacts, etc.)
- Procedures for Establishing a Formal Government-to-Government Relationship with the Native Hawaiian Community
- Indian Trader Advanced Notice of Proposed Rulemaking
- BIA Guidance on Police Detention of Non-Indians

Land and Natural Resources

- Land into Trust – 847 square miles – or 542,000 acres
- Land to Trust in Alaska – regulatory fix, litigation in Akiachak v. Jewell, first acquisition in Craig
- Land to Trust “Patchak Patch” – appeals of land to trust
- Reservation proclamations
- Carcieri Determinations – Cowlitz, Mashpee, etc.
- Army Corps Denial of Cherry Point Permit regarding Lummi Treaty Rights
- Climate Change –inclusion in Task Force and Glacier Summit
- Renewable Energy Projects (Moapa, Tule Wind)
- XL Pipeline Permit Denied
- Dakota Access Pipeline Permits Delayed
- National Consultation on Infrastructure Construction Affecting Indian Lands

Cultural Resources

- Interagency MOU on Sacred Site Protection
- Access to Eagle Feathers – Policy Statement
- Re-naming of Mt. McKinley to Denali

Education

- Bureau of Indian Education Reform
- Support for Tribally Controlled Schools
- Emphasis on restoring native languages/ESSA
- Mascot support w/ School climate report

Native Youth

- White House Tribal Youth Gathering 2015
- Generation Indigenous
- American Indian and Alaska Native Children Exposed to Violence Task Force

Health Care

- IHS budget increase nearly 50% Move to full funding of contract support
- Implementation of Indian Health Care Improvement Act Reauthorization
- MOU with Indian Health Service and Veterans Administration
- Expansion of Community Health Aides

Department of Justice

- Streamlined Grant Solicitation Process for Tribal Communities (CTAS)
- U.S. Attorney's Office Tribal Liaisons – many new positions
- Traditional Justice Practices and Alternatives to Incarceration
- Native American Issues Coordinator Designated in EOUSA
- DOJ Policy Statement Regarding Marijuana Issues in Indian Country
- Enhanced Training for Prosecutors and Law Enforcement
- Sex trafficking prosecutions in South Dakota
- Tribal Crime Data Collection
- Yakama Nation retrocession of P.L. 280
- Additional Resources to Combat Sexual Assault in Indian Country
- Native Voting Rights – Legislation Proposed
- Federal Reassumption at Hoopa
- Expansion of TAP – Access to Criminal Databases
- Concurrent Federal Criminal Jurisdiction in “Optional” Public Law 280 States



HOW TO KEEP IT GOING?

- Tribal leaders working to educate Members of Congress, Administration and Public
- Bi-Partisan Support – Native Vote
- Policy Direction in Administration
- Leadership in Congress
- Coalition Building in Indian Country & Outside

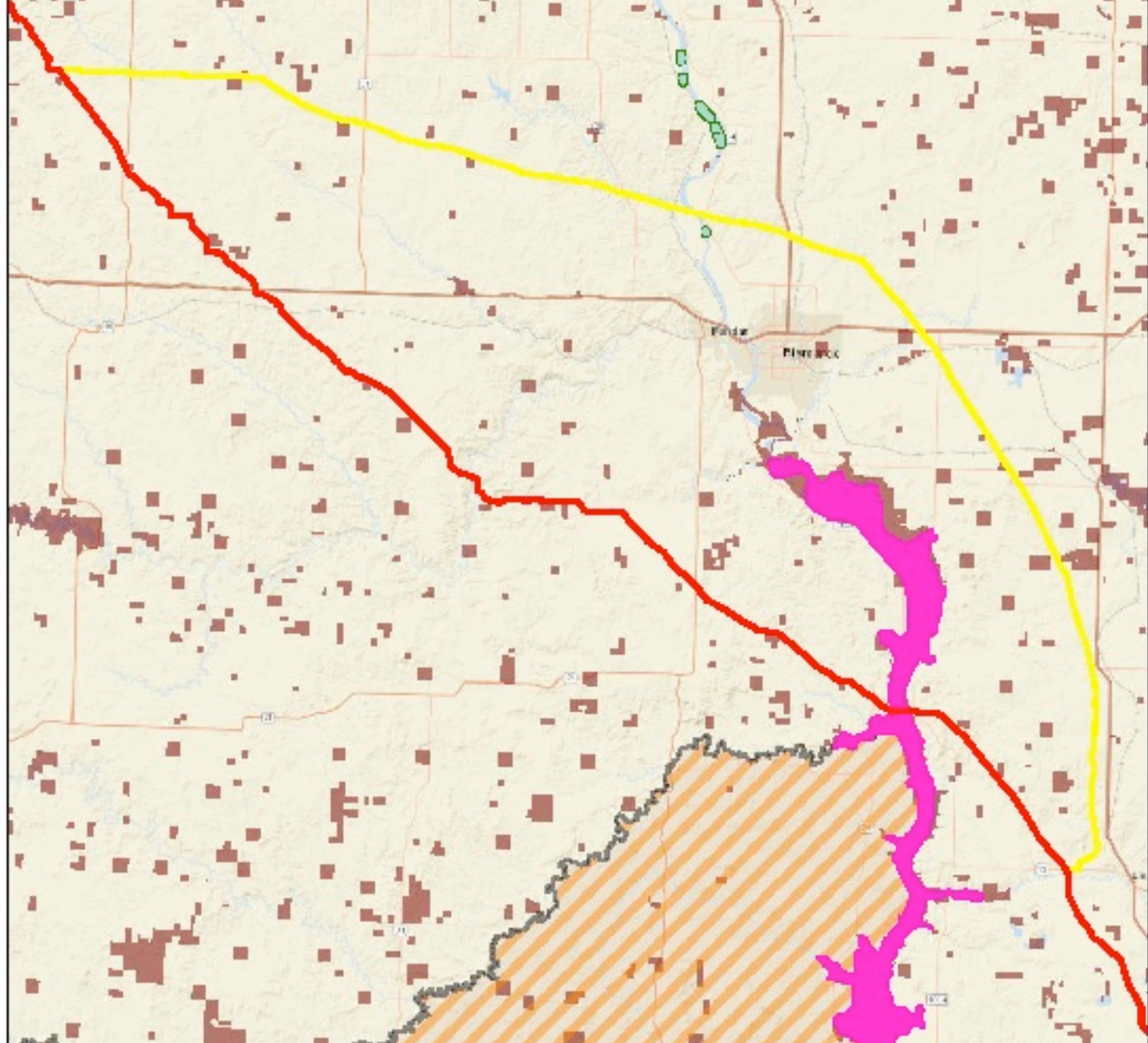
- Messaging
- Research and Data
- Work, work, work to communicate



TRIBAL CONSULTATION

on Federal Infrastructure Decisions

- Announced on September 9, 2016 by DOJ, DOI, and Army
- Proposed two questions to be answered:
- (1) within the existing statutory framework, what should the federal government do to better ensure meaningful tribal input into infrastructure-related reviews and decisions and the protection of tribal lands, resources, and treaty rights; and
- (2) should new legislation be proposed to Congress to alter that statutory framework and promote those goals.





DAPL Environmental Assessment

“The North Bismarck route alternative crossed through or in close proximity to several wellhead source water protection areas that are identified and avoided in order to protect areas that contribute water to municipal water supply wells. . . where a release from a pipeline could have the most significant adverse consequences.” p. 8

“... state of the art construction techniques, high quality materials and standards that meet or exceed federal standards, there will be no direct or indirect effects to the Standing Rock Sioux tribe. This includes a lack of impact to its lands, cultural artifacts, water quality or quantity, treaty hunting and fishing rights, environmental quality, or socio-economic status.” p. 86



Army Corps of Engineers – Specific Issues

- No independent environmental analysis – relies entirely on reports submitted by project applicant
- Nationwide Permits – no consistent process for regional or case-by-case conditions
- Nationwide Permits - disregard cumulative impacts
- Appendix C – Procedures for Protection of Historic Properties - ignore statutory duty to consult with tribes under Section 106 of National Historic Preservation Act
- Appendix C is built into Nationwide Permit process so that private contractors ignore duty to consult



Federal Energy Regulatory Commission

Natural gas pipelines and hydropower

- No Consultation – refuses to consult if Tribal Nation raises any issue or concern, triggers adversarial process
- Withholds Information in Deference to Applicant
- Defers tribal consultation to applicants



PRINCIPLES AND BEST PRACTICES

Five Principles

- 1. Recognition of Tribal Sovereignty**
- 2. Compliance with the Federal Trust Responsibility, Independent Analysis of Risks, and Tribal Informed Consent**
- 3. Respect for Tribal Treaty Rights**
- 4. Upholding Statutory Obligations**
- 5. Ensuring Environmental Justice**



PRINCIPLES AND BEST PRACTICES

Seven Best Practices

- 1. Consultation in Early Planning and Coordination**
- 2. Regional Mapping and Tribal Impact Evaluation**
- 3. Early, Adequate Notice and Open Information Sharing**
- 4. Funding for Tribal Participation in Process**
- 5. Training for Agencies to Improve Understanding of Tribal Stakeholders**
- 6. Indian Trust Impact Statement and Trust Responsibility Compliance Officer**
- 7. Cumulative Impacts and Regional Environmental Impact Statements**



Interior -- 512 DM 2

Heads of bureaus and offices are responsible for identifying any impact of Departmental plans, projects, programs or activities on Indian trust resources. Department officials shall:

1. Establish procedures to ensure that the activities of Departmental organizations impacting upon Indian trust resources are explicitly addressed in planning, decision, and operational documents;
2. Ensure that bureaus and offices consult with the recognized tribal government whose trust resource, asset, or health and safety is potentially affected by the proposed action, plan, or activity;
3. Remove procedural impediments to working directly and effectively with tribal governments;



Interior -- 303 DM 2

Trust Principles. It is the policy of the Department of the Interior to discharge, without limitation, the Secretary's Indian trust responsibility with a high degree of skill, care, and loyalty. The proper discharge of the Secretary's trust responsibilities requires that persons who manage Indian trust assets:

- A.** Protect and preserve Indian trust assets from loss, damage, unlawful alienation, waste, and depletion;
- D.** Promote tribal control and self-determination over tribal trust lands and resources;
- M.** Protect treaty-based fishing, hunting, gathering, and similar rights of access and resource use on traditional tribal lands.



NEW GUIDANCE ON INFRASTRUCTURE PERMITTING

- Recommended Best Practices for Environmental Reviews and Authorizations for Infrastructure Projects
- Improving Tribal Consultation and Tribal Involvement in Federal Infrastructure Decisions
- ?
- Other federal agencies need to adopt policies like Interior's 512 DM 2 and 303 DM 2



TRIBAL LABOR SOVEREIGNTY ACT

- Would treat Indian tribes the same as state, federal or local governments under National Labor Relations Act
- Passed House last year
- Introduced in Senate as S. 63 by Senator Moran of Kansas
- In House as H.R. 986 by Rep. Rokita of Indiana
- Pursue co-sponsors and Senate support



VICTIMS OF CRIME ACT

- Federal fund from forfeitures
- Distributed to state programs for assisting victims of crime – very little to tribes
- Health care, housing assistance, emergency assistance for victims
- Last year 5% set-aside for 145 million annually distributed for tribes
- Not included in Omnibus for 2017, but in President's Budget for 2018



H.R. 131- CARCIERI FIX

- 1) Introduced in House by Tom Cole
- 2) Clean fix
- 3) No re-introduction of Interior Improvement Act yet, which was the new process for Off-Reservation Acquisitions to encourage cooperative agreements with counties
- 4) Concerning hearing in House Oversight Committee



TRIBAL GENERAL WELFARE EXCLUSION ACT

- Codified Tribal General Welfare Doctrine
- Establishes Tribal Advisory Committee
- Ron Allen, Jamestown S'Klallam Tribe
- Lacey Horn, Cherokee Nation
- Lynn Malerba, Mohegan Tribe
- Eugene Magnuson, Pokagon Potawatomi
- Patricia King, Oneida Tribe of Wisconsin
- Sharon Edenfield, Confederated Tribes of Siletz
- Nomination by Senator Hatch of Utah pending



MODERNIZE TRADER REGULATIONS

- Secretary has authority to regulate all trade with Indians on reservations
- Regulations not amended since 1957

NCAI Proposal at Interior:

- 1) Empower Tribal Business Licensing
- 2) Consent to Tribal Jurisdiction – Dollar General v. Mississippi Choctaw
- 3) Eliminate Dual Taxation



TAX REFORM

- Tax Exempt Bonds
- Employee Benefit and Pension Plans
- Tribal Foundations and Charities
- Child Support Enforcement Agencies
- Adoption Tax Credit
- IHS Doctor Loan Repayment Exemption
- Kiddie Tax Penalty on Tribal Funds
- New Markets Tax Credit
- Low Income Housing Tax Credit
- Accelerated Depreciation
- Employment Tax Credit
- Tribal Empowerment Zones



TRIBAL LAW & ORDER ACT REAUTHORIZATION

- Bureau of Prisons Pilot - Violent Prisoners
- Juvenile Justice – alternatives to incarceration, states required to provide notice, feds may transfer cases
- Criminal Trespass
- Funding consolidation like 477

- At NCAI Midyear will be preparing recommendations for Summit on Crime Reduction and Public Safety



H.R.253 - FAMILY FIRST PREVENTION SERVICES ACT

- Would allow foster care funding to be used for preventative services, rather than removing the child first.
- This is something that tribes have wanted for a very long time.
- Indian tribes would receive same benefits as states, because of 42 USC 679c.
- Additional flexibility in planning and reporting.



OTHER ISSUES

- Indian Energy Legislation
- Farm Bill
- Wildfire Disaster Funding Legislation
- Self-Governance Legislation
- NAHASDA Reauthorization
- Magnusson Stevens Fisheries



Lewis v. Clarke

- Limo driver from Mohegan Sun
- Car accident 70 miles from reservation
- Injured party filed in Connecticut state court
- Supreme Court holds that a suit brought against a tribal employee in his individual capacity, the employee, not the tribe, is the real party in interest and the tribe's sovereign immunity is not implicated.



Lewis v. Clarke — Preliminary Recommendations

- Distinguish on-reservation conduct of tribal officials or employees
- *Williams v. Lee* defense (barring state jurisdiction over tribes and tribal members for conduct on reservations)
- Tribal codes to assert “official immunity” for officials and employees
- Legislative, judicial, and tribal prosecutorial immunity
- Insurance policy provisions addressing the official immunity defense
- Re-examine indemnity provisions in tribal tort claims acts
- Where tribal police are cross-deputized, tribes should seek to have their officers covered by state tort claims acts
- Tribes and tribally controlled schools relying on FTCA coverage make sure that all activities are covered in the contract, compact or TCSA school grant scope of work



U.S. ATTORNEY VACANCIES

All 93 Seats vacant

U.S. Attorneys play important role in Indian Country

- Prosecute federal crimes
- Protection of tribal lands and resources
- Voting rights
- Senior Republican Senator chooses names
- If no Republican Senators, then senior House Member
- Democratic Senators also vet nominees
- Communicate and urge U.S. Attorney in your district who is committed to Indian Country
- Inquire & vet -- Awareness of unfriendly candidates



NINTH CIRCUIT JUDICIAL VACANCIES

- **Court of Appeals - 4 vacancies – Oregon, Arizona, California, Hawaii**
- Western District of Washington - 3 vacancies
- District of Idaho - 1 vacancy
- District of Oregon - 1 future vacancy
- District of Alaska - 1 vacancy
- District of Arizona - 2 vacancies
- Central District of California - 5 vacancies
- Southern District of California - 1 vacancy
- District of Nevada - 1 vacancy



WORLD INTELLECTUAL PROPERTY ORGANIZATION – PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS

- WIPO is an agency of the United Nations
- International agreement to protect intellectual property like trademarks and copyrights
- Considering protection of traditional cultural property
- Tulalip Tribes tracking for many years
- Negotiations coming to a head
- NARF drafting session leads to a new direction
- Focus on theft and illegal possession
- Also false marketing



NCAI MIDYEAR AT MOHEGAN

- June 12-15
- Secretary Zinke, Jim Cason
- Tribal lands, tax issues
- Series of federal consultations
- Budget
- Ongoing Transition
- Farm Bill, etc.

THANK YOU!



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Thank You!

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