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MEMORANDUM

December 1, 2017

To: NAIHC

From: Ed Clay Goodman
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Re: Litigation and Regulation Update Concerning Issues in Housing and Indian Law

LITIGATION

1. *Lewis v. Clarke*: Sovereign immunity does not bar suits against Tribal Officers/Employees sued in their individual capacity.

Earlier this year, the Supreme Court held that sovereign immunity does not bar an individual-capacity tort suit for damages against a tribal employee acting within the scope of their employment. The case began when an employee of the Mohegan Tribal Gaming Authority caused a car accident while operating a vehicle owed by the Mohegan Tribal Gaming Authority and driving in his official capacity as the Mohegan Tribal Gaming Authority's Director of Transportation. The trial court found that tribal sovereign immunity did not bar suit against the defendant, but the Connecticut Supreme Court reversed on grounds that the plaintiff could not avoid tribal sovereign immunity by suing the individual defendant. The Supreme Court reversed, holding that even though the tribe might bear the financial costs (through a provision indemnifying the employee), sovereign immunity did not bar the suit against the drive because he was being sued in his individual capacity. This case and the implications will be discussed in detail in a breakout session.

2. Ongoing Litigation Regarding FCAS

The litigation that began in 2005 with the Fort Peck Housing Authority's suit against HUD continues. The original suit challenged HUD's decision, under 24 CFR 1000.318, to recapture IHBG funds for FCAS units that were no longer owned or operated by the TDHE (or that should have been conveyed). The Tenth Circuit ultimately upheld that regulation (and Congress subsequently amended NAHASDA to affirm the regulation going forward). *Fort Peck Housing Authority v. HUD*, 367 F.App'x 884 (10th Cir. 2010). However, there were still a number of issues remaining in the litigation specific to how HUD went about recapturing the funds from the various tribes at issue (as well as similar litigation going on in the Ninth Circuit).

The Tenth Circuit recently decided an appeal consolidating 22 separate tribes. *Modoc Lassen Housing Authority et al. v. HUD*. 864 F.3d 1212 (10th Cir. 2017). In these cases, HUD had recaptured purported FCAS overpayments from these tribes without providing for notice and an opportunity for a hearing. The U.S. District Court for Colorado held that HUD had violated NAHASDA by doing so, and ordered HUD to reimburse the recaptured funds to the tribes. HUD appealed, arguing that such hearings were not required under NAHASDA, that HUD had the "inherent right" to recapture funds under these circumstances, that HUD's calculation of the amount of FCAS overpayment was correct, and that in any event the District Court's order violated the United States' sovereign immunity, since it awarded what HUD characterized as money damages without a waiver of that immunity. HUD's argument regarding its "inherent right" to recapture funds paid "by mistake" was based on HUD's reading of the common law. The tribes argued that the NAHASDA statute sets out a specific process (under section 401 and under section 405), requiring notice and opportunity for a hearing, before HUD can take steps to recapture funds. The tribes also argued that this was not a money damages case, but a reimbursement of grant amounts, so that sovereign immunity is not at issue.

The Tenth Circuit issued a split decision on the three issues in the case. The three judge panel agreed unanimously that HUD did not recapture the funds under a statute that imposes a hearing requirement. Two members of the panel agreed (and thus the Court held) that HUD lacked authority to recapture the funds via administrative offset, and affirmed that portion of the district court's order characterizing the recaptures as illegal. However, two other members of the panel agreed (and thus the Court also held) that if HUD no longer has the recaptured funds in its possession, then the district court lacked authority to order the agency to repay the recipients because of the United States' sovereign immunity from suit (because such payments were money damages). The Court reversed that portion of the district court's order and remanded for further factual findings as to the availability of funds at HUD. Several of the tribes filed petitions for a rehearing before the full Tenth Circuit; the Tenth Circuit Court then ordered HUD to respond to the rehearing petitions. HUD's responses were filed just before Thanksgiving.

3. Tribal sovereign immunity, medication patents and big pharma

The pharmaceutical company Allergan, PLC, in a lawsuit filed under the Hatch-Waxman Act, asserted its patents against several companies seeking to develop generic equivalents to the popular dry-eye drug Restasis, including Teva Pharmaceuticals and Mylan Pharmaceuticals. The defendants filed counterclaims for invalidity of the patents and initiated *inter partes* review proceedings at the US Patent and Trademark Office for all six of the patents. Shortly before oral argument in the *inter partes* reviews, Allergan entered into a transaction with the Saint Regis Mohawk Tribe in which Allergan assigned its patents to the Tribe, paying a lump sum to the Tribe and receiving an exclusive license to those patents (in exchange for annual royalties to be paid to the Tribe). Shortly after the assignment, the Tribe filed motions to dismiss in each of the *inter partes* reviews on the basis that it has sovereign immunity and cannot be joined

to the action. While the court is still considering those motions, Senator Claire McCaskill (D-MO) introduced a bill that would waive tribal sovereign immunity to *inter partes* review litigation. McCaskill's bill states that "notwithstanding any other provision of law, an Indian tribe may not assert sovereign immunity as a defense in a review that is conducted under chapter 31 of title 35, United States Code."

4. Ninth Circuit holds that groundwater rights are reserved water rights (cert denied by U.S. Supreme Court)

In *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District (Phase I)* 849 F.3d 1262 (9th Cir. 2017), the Ninth Circuit affirmed a California District Court decision holding that groundwater rights are reserved rights under treaties and executive orders establishing reservations. While this question had been considered by several state courts, mostly ruling in favor of the tribal position, this is the first time that a federal court of appeals has so ruled. The case will now be remanded to the District Court to determine the next phases of the litigation (does the Tribe have a right to protection of water quality, and how much water was reserved for the Tribe?). The defendants appealed the decision to the Supreme Court, which just last week declined to hear the case.

5. Ninth Circuit holds that treaty rights include right to habitat protection (cert petitions filed with U.S. Supreme Court)

Earlier this year, the Ninth Circuit also affirmed a Washington District Court decision holding that treaty language in various treaties with tribes in the Pacific Northwest reserving the right to fish also reserved the right to protection of habitat necessary to support the fisheries. *United States v. Washington,* 853 F.3d 946 (9th Cir. 2017). The case is known as the "culverts" case, because the tribes seek to have the State of Washington repair highway culverts around the State that impede salmon passage to upstream spawning grounds. The Ninth Circuit held that in building and maintaining barrier culverts across various spawning streams across the State, Washington violated, and was continuing to violate, its obligation to the Tribes under the Treaties. The District Court had issued an injunction requiring Washington to correct most of its high-priority barrier culverts within seventeen years, and to correct the remainder at the end of their natural life or in the course of a road construction project undertaken for independent reasons, and that injunction will remain in effect. The State has requested review by the U.S. Supreme Court, joined by several other states; the tribes and the United States have asked the Court not to review.

6. Goldwater Institute continues in its attempts to undermine ICWA

The Goldwater Institute's class-action litigation challenging the constitutionality of ICWA was dismissed by the U.S. District Court for Arizona last March. *A.D. v. Washburn,* 2017 WL 1019685 (D. Ariz. 2017). The Institute has appealed the decision and briefing is under way at the Ninth Circuit. The case is yet another attempt to have a court rule that the ICWA is unconstitutional under equal protection as a race-based law. The

ramifications of this case extend far past ICWA. If the Goldwater Institute succeeds and the case makes it to the Supreme Court the implications for the field of Indian law could be significant. Much of Indian law is premised on the idea that the term "Indian" is a political designation, not a racial designation, thus not signaling a violation of the equal protection clause. A successful challenge this doctrine has the potential to impact nearly every aspect of Indian law.

REGULATION

1. Trump Administration moving to repeal or rollback numerous Obama-era regulations

Late in 2016, after the Presidential election but prior to the swearing in of President Trump, the President-elect and Republican leadership in Congress informed the Obama Administration not to issue any new regulations, and indicated that they would be taking steps to roll back newly-adopted regulations (adopted within 100 days of the new Administration) under the Congressional Review Act.

The legislative window for Republican leadership to use the Congressional Review Act to abolish rules adopted by the previous administration ended on May 11, 2017. The 1996 law allows Congress to target recently issued federal regulations via a "joint resolution of disapproval," which requires a majority vote and the president's signature to nullify a rule and prohibit the federal government from issuing a "substantially similar" one in the future. Fourteen different regulations were abolished in this manner, covering everything from limits on the dumping of waste from surface-mining operations to expanding states' power to offer retirement accounts to private-sector workers. Most of the overturned rules were related to labor and finance. There were 17 more proposed resolutions about environmental rules, but these did not get a vote and the regulations remain in place.

In July 2017, White House's Office of Management and Budget detailed how it would jettison hundreds of existing or planned regulations as part of its larger push to ease federal restrictions on the private sector, upending federal policies on labor, the environment and public health. The list, issued as part of a semiannual report on the entire government's regulatory agenda, outlines the Trump Administration's plans to reverse many of the Obama Administration's policy priorities. In several instances, the administration is dropping rules aimed at tightening worker safety standards or omitting species the government had pledged to protect under the Endangered Species Act. In other cases, it is proposing new regulations that provide employers with more leeway in how they run their businesses or report their activities to federal officials. The Trump administration said it was pulling or suspending 860 pending regulations. Of those, 469 were being completely withdrawn. Another 391 were being set aside or reevaluated. These proposed regulations could be revisited at some point or dropped altogether.

Although the Indian Housing Block Grant (IHBG) Program allocation formula regulations were adopted in November 2016 and within the 100-day window, these regulations were not impacted and remain in effect.

2. Trump Administration enacting significant changes via Executive Orders

The Administration has made a number of changes to the operation of the Executive Branch in key areas via the issuance of Executive Orders. EOs do not go through the normal regulatory review and public comment process for regulations. Here are some of the key Executive Orders potentially impacting Indian Country.

- **E.O. 13766, Expediting Environmental Review and Approvals for High Priority Infrastructure Projects (January 24, 2017).** Establishes "the policy of the executive branch to streamline and expedite, in a manner consistent with law, environmental reviews and approvals for all infrastructure projects, especially projects that are a high priority for the Nation, such as improving the U.S. electric grid and telecommunications systems and repairing and upgrading critical port facilities, airports, pipelines, bridges, and highways." The Chair of the White House Council on Environmental Quality, upon request by a governor of a state, the head of any executive agency or department, or on his or her own initiative, will decide whether an infrastructure project qualifies as "high priority". Once a project is so identified, the CEQ Chair will coordinate with the head of the relevant agency to establish expedited procedures and guidelines for completion of environmental reviews and approvals. While this Order does not identify tribal governments as the source of such requests, tribes can forward such requests through the BIA or IHS to the CEQ Chair.

- **EO 13771 Reducing Regulation and Controlling Regulatory Costs (January 30, 2017).** Requires that "for every one new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process." For FY 2017, whenever an executive department or agency proposes a new regulation, it must identify at least two regulations to be repealed (unless prohibited by law). Further, all agency heads are directed "that the total incremental cost of all new regulations, including repealed regulations, to be finalized this year shall be no greater than zero," and "any new incremental costs associated with new regulations shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations."

- **EO 13774 Preventing Violence Against Federal, State, Tribal and Local Law Enforcement Officers (February 9, 2017)**. Requires enforcement of all Federal laws to enhance protection of law enforcement officers from all jurisdictions, including tribes; development of strategies (in a process led by Department of Justice) to further enhance such protection; and pursue appropriate legislation toward the same end. The Attorney General is also

required to develop a strategy for prosecuting persons who commit crimes of violence against law enforcement officers, and to coordinate with other governments (including tribes) in prosecuting such crimes of violence.

- **EO 13777 Enforcing the Regulatory Reform Agenda (February 24, 2017)**. Requires each agency to designate a "regulatory reform officer" (RRO) and a regulatory reform task force, with the goal of reducing regulatory burdens and costs. The factors to be considered when undertaking such review are whether the regulations under review: eliminate jobs, or inhibit job creation; are outdated, unnecessary, or ineffective; impose costs that exceed benefits; create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies; are inconsistent with the requirements of section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note), or the guidance issued pursuant to that provision, in particular those regulations that rely in whole or in part on data, information, or methods that are not publicly available or that are insufficiently transparent to meet the standard for reproducibility; or derive from or implement Executive Orders or other Presidential directives that have been subsequently rescinded or substantially modified. Each regulatory reform task force is to provide a report to the agency head within 90 days on improving the implementation of regulatory reform initiatives and identifying regulations for repeal, replacement, or modification.

- **EO 13782 Revocation of Federal Contracting Executive Orders (March 27, 2017).** Revokes a series of Executive Orders by the Obama Administration that sought to impose certain interpretations of labor laws and regulations on federal contractors and subcontractors. One of the provisions revokes orders required certain disclosures by contractors and subcontractors of past violations of federal law, and specifically fair pay requirements, and authorized the federal government to take those disclosures into account when considering whether to procure services.

- **EO 13790 Promoting Agriculture and Rural Prosperity in America (April 25, 2017).** Establishes an Interagency Task Force on Agriculture and Rural Prosperity, headed by the Secretary of Agriculture but also composed of most of the cabinet secretaries. The Task Force "shall identify legislative, regulatory, and policy changes to promote in rural America agriculture, economic development, job growth, infrastructure improvements, technological innovation, energy security, and quality of life." Among the changes the Task Force is to consider are how to "remove barriers to economic prosperity and quality of life in rural America" and how to "empower the State, local, and tribal agencies that implement rural economic development, agricultural, and environmental programs to tailor those programs to relevant regional circumstances." The list also includes the following: "ensure that water users' private property rights are not encumbered when they attempt to secure permits to operate on public lands," further the Nation's energy security by advancing

traditional and renewable energy production in the rural landscape," and "address hurdles associated with access to resources on public lands for the rural communities that rely on cattle grazing, timber harvests, mining, recreation, and other multiple uses." The EO provides that the "Task Force shall, in coordination with the Deputy Assistant to the President for Intergovernmental Affairs, provide State, local, and tribal officials -- and farmers, ranchers, foresters, and other rural stakeholders -- with an opportunity to suggest to the Task Force legislative, regulatory, and policy changes." The Task Force is to provide a report to the President within 180 days. Finally, the EO revokes the White House Rural Council EO established by President Obama in 2011.

- **EO 13792 Review of Designations under the Antiquities Act (April 26, 2017)**. Purpose is to review all designations of lands (in excess of 100,000 acres) as national monuments since 1996, with the goal of reversing those designations in certain instances. The stated purpose specifically references Indian tribes: "Monument designations that result from a lack of public outreach and proper coordination with State, tribal, and local officials and other relevant stakeholders may also create barriers to achieving energy independence, restrict public access to and use of Federal lands, burden State, tribal, and local governments, and otherwise curtail economic growth. Designations should be made in accordance with the requirements and original objectives of the Act and appropriately balance the protection of landmarks, structures, and objects against the appropriate use of Federal lands and the effects on surrounding lands and communities." In reviewing such determinations, and considering what to do about them, one of the factors to be considered is the "concerns of State, tribal, and local governments affected by a designation, including the economic development and fiscal condition of affected States, tribes, and localities." The reviews were carried out by the Secretary of the Interior. One of the more controversial proposal was the reduction in size of the Bear's Ears National Monument in Utah, which was strongly opposed by tribes.

3. Department of Interior proposes amendments to land-into-trust regulations

On October 4, 2017, Acting Assistant Secretary for Indian Affairs, John Tahsuda, issued a Dear Tribal Leader Letter that sets forth the Department of the Interior's proposed amendments to 25 C.F.R. Part 151, the regulations governing the land-into-trust process. The proposed changes are to Part 151.11 (Off-Reservation Acquisitions) and Part 151.12 (Action on Requests). The letter listed three regional consultation sessions in November and indicated that more sessions might be scheduled. Subsequently, however, those three sessions were cancelled, with the notice that the sessions would be rescheduled.

Interior proposes to change Part 151.11, which governs the process for acquiring off-reservation land in trust, in several important respects. Interior's proposed changes would establish a two-step review and approval process for off-reservation trust

acquisitions. They would also distinguish off-reservation trust acquisitions for the purposes of gaming from off-reservation acquisitions for other purposes and set forth new requirements for the tribe's applications depending on the purpose of the acquisition.

Under the two-step review and approval process, tribes would only have to submit certain application information. If the application meets certain threshold criteria, then it would move to final review where the tribe would be required to submit more "resource-intensive" information. Interior states that these changes are in consideration of limited tribal resources and seek to reduce the burden on tribal applicants. The Letter states that the two-step process "would provide tribes with more certainty as to the possibility of an approval before expending significant resources."

Interior's proposed changes would also amend Part 151.12, Action on Requests, in two fundamental ways. First, the proposed changes would reinstate the 30-day waiting period before the land is acquired in trust after a decision has been issued approving an application. Second, the proposed changes would include a provision stating that if the land has been acquired in trust prior to judicial review of the decision to acquire it and a court rules that Interior erred in making the decision, Interior will comply with the court order and judicial remedy, including taking the land out of trust.

4. HUD's Proposed Tribal Intergovernmental Advisory Committee

In late 2016, HUD announced a proposed Tribal Intergovernmental Advisory Committee. The Committee would provide advice, recommendations, and connections for all tribal consultation projects. The Committee would consist of four HUD officials and six to eight tribal representatives. These representatives will be duly elected tribal leaders. The Committee would meet at least twice a year, and HUD would cover the cost of travel for the tribal leaders. HUD solicited nomination and comments on the proposal in December 2016, with a deadline for submission of nominations of February 2017.

5. 2013 OMB Uniform Administrative Requirements Are in Effect

The Office of Management and Budget issued a huge update to its practices and procedures for recipients of federal financial assistance. The purpose of the revised regulations was to streamline the federal government's guidance, administrative requirements, and procurement regulations by consolidating the requirements from eight OMB Circulars and other regulations into a single regulation at 2 CFR Part 200. The new standards are government-wide, affecting procurement and contracting for many federal agencies, including HUD. The revised regulations will affect tribal governments and tribal entities such as Tribally Designated Housing Entities that receive federal awards. It is important for recipients of federal awards to review and properly revise their procedures as needed to comply with the new regulations. One portion of the original rule was postponed for enforcement until December 2015. As that deadline has passed, all entities must now conform to the Uniform Procurement Guidelines.

If you have any questions, please do not hesitate to contact Edmund Clay Goodman at EGoodman@hobbsstraus.com or by phone at (503) 242-1745.