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MEMORANDUM

December 11, 2018

To: National American Indian Housing Council

From: Ed Clay Goodman and Sarah Dandurand
HOBBS, STRAUS, DEAN & WALKER, LLP

Re: Litigation and Regulation Update Concerning Issues in Housing and Indian Law

LITIGATION

A. Recent Supreme Court Decisions

1. *Washington v. United States*: treaty rights include right to habitat protection

The Supreme Court issued a one-sentence per curiam opinion in *United States v. Washington*, regarding the phase of the treaty fishing rights case commonly known as the "culverts" case. The Court was split 4-4 (Justice Kennedy recused himself), thus affirming the Ninth Circuit Court of Appeals 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. Because the vote was 4-4 and no formal opinion was entered, the precedential value of the Supreme Court's decision will be limited. The case is referred to as the "culverts" case because the treaty tribes involved sought 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 ruling upholds 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. The cost of stream restoration required by the court decision was estimated to be $3.7 billion.

2. *Upper Skagit Indian Tribe v. Lundgren*: clarifies *Yakima* case and remands

The Supreme Court considered whether the sovereign immunity of the Upper Skagit Indian Tribe protects it from a suit in Washington State Court to adjudicate the Tribe's claim to land located outside the Tribe's reservation, where Congress has not unequivocally abrogated the Tribe's sovereignty. The Tribe purchased land outside of its

reservation that became the subject of a quiet title action in state courts against the Tribe, with the adjacent landowner arguing adverse possession of a section of the purchased land, or "squatter's rights." The state courts denied the Tribe's motion to dismiss the action for lack of subject matter jurisdiction on the basis of sovereign immunity from suit and for failure to join the necessary parties, and cited the Supreme Court's decision in *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*. The Tribe petitioned for review, arguing that the Washington Supreme Court contradicted federal law by recognizing *in rem* proceedings as a third exception to tribal sovereign immunity where there is no clear exception.

The Court clarified that its decision in *County of Yakima* resolved nothing about the law of sovereign immunity. While *County of Yakima* mentioned *in rem* jurisdiction, the case only confirmed the ability of state and local governments to levy taxes on tribal land under the Indian General Allotment Act of 1887, and did not answer the question of whether tribes have sovereign immunity in *in rem* lawsuits. The Court found no reason to examine the question in this case. However, the landowner also raised a new sovereign immunity issue before the Court: the common law doctrine that a sovereign has no immunity for actions involving "immovable property" located in the territory of another sovereign. If the doctrine is applicable to tribes, the Tribe would have no immunity from the quiet title action, because the parcel is outside of the Tribe's reservation. The Court remanded the case to the Washington Supreme Court to address the newly raised question of sovereign immunity.

3. *Patchak v. Zinke*: Congress may protect tribal trust lands from litigation

The underlying suit challenged the authority of the Secretary of the Interior to take land into trust for the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians where the Band wished to build a casino. In an earlier appeal in the case, the Supreme Court held that the Secretary lacked sovereign immunity and that the plaintiff had standing, and remanded the case. In response, Congress enacted the Gun Lake Act, which provided that "an action . . . relating to [that] land shall not be filed or maintained in a Federal court and shall be promptly dismissed," Section 2(b).

In a plurality opinion, the Court affirmed the dismissal of the case by the D.C. Circuit, and upheld the D.C. Circuit Court's ruling, which concluded that Section 2(b) of the Gun Lake Act did not violate Article III of the Constitution, and that it was not an impermissible exercise of legislative power for Congress to change the law applicable to pending lawsuits, even if it made one side much more likely to prevail. The Court distinguished this scenario from legislative attempts to compel a particular result under old law, which would have violated Article III. The Court explained that by stripping federal courts of jurisdiction in actions relating to the property at issue, §2(b) "changed" the law, and that making this type of change was a valid exercise of legislative power.

B. Upcoming Supreme Court Cases

1. *Washington State Dep't of Licensing v. Cougar Den*: Indian treaty preemption of state taxes

The case asks whether the Yakama Treaty of 1855 creates a right for tribal members to avoid state taxes on off-reservation commercial activities that make use of public highways. The Yakama Treaty allows for tribal members to freely travel and bring goods to market, including upon all public highways. At issue is a fuel station operated on-reservation by an enrolled member of Yakama Nation, using fuel purchased wholesale from Oregon and carried on Washington State highways. The Washington State Supreme Court held that the Yakama Nation is entitled under the Yakama Treaty to import fuel without holding an importer's license and without paying state fuel taxes.

2. *Herrera v. Wyoming*: off-reservation treaty hunting rights

At issue is whether Wyoming's admission to the Union or the establishment of the Bighorn National Forest abrogated the Crow Tribe of Indians' 1868 treaty right to hunt on the "unoccupied lands of the United States," thereby permitting the criminal conviction of a member of the Crow Tribe of Indians who engaged in subsistence hunting for his family. The petitioner and other members of the Crow Tribe pursued several elk from reservation lands in Montana across state lines into Wyoming, and then into the Bighorn National Forest, and killed three elk. Crow members have relied on the treaty language to hunt on off-reservation lands, including in the Bighorn National Forest, which is adjacent to the Crow Reservation and was established in 1897 from lands that the Tribe ceded to the United States. The Wyoming Supreme Court denied review of the Wyoming Court of Appeals decision upholding the criminal conviction. The lower courts prohibited the petitioner from asserting the treaty right as a bar to prosecution, relying on an earlier case which concluded the Tribe's treaty-protected hunting rights were abrogated by Wyoming's admission to the union.

3. *Carpenter v. Murphy*: Reservation diminishment in Oklahoma

This case considers whether the 1866 territorial boundaries of the Muscogee (Creek) Nation within the former Indian Territory of eastern Oklahoma constitute an "Indian reservation" today under 18 U.S.C. § 1151(a)). The underlying question is whether the State of Oklahoma has criminal jurisdiction to prosecute a member of the Creek Nation for the murder of another member committed within the Creek Nation's historic territory. In 2017, the Creek Nation secured a landmark victory in a unanimous decision by the 10th Circuit Court of Appeals holding that the reservation had not been diminished by an act of Congress. Oklahoma appealed. The outcome will affect the treaty territory of the other members of Oklahoma's Five Tribes and their ability to follow the Creek Nation's path and reclaim their tribal lands, which total roughly 19 million acres and include parts of the city of Tulsa and nearly half of the land in Oklahoma. The Justice Department has weighed in, arguing in favor of disestablishment. Justice Gorsuch has

recused himself, as he was a member of the Tenth Circuit Court of Appeals when the case was being appealed.

4. *Sturgeon v. Frost*: National Park Service regulatory control over state, native corporation, and private Alaska land located within the National Park System

At issue is whether the Alaska National Interest Lands Conservation Act (ANILCA) withdrew the National Park Service's authority to regulate activities on navigable waters located within conservation system units of the National Park System in Alaska, including within the boundaries of native corporation land physically located within the boundaries of the National Park System. Section 3103(c) of ANILCA both grants and limits the Park Service's authority within the boundaries of conservation system units, stating that "…[n]o lands which, before, on, or after December 2, 1980, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units." The case was brought by a hunter after park rangers prevented him from traveling by hovercraft on a stretch of the Nation River within Yukon-Charley to access moose-hunting grounds located upstream from the preserve.

C. Cert Pending

1. *Bearcomesout v. United States*: tribal sovereignty in the context of successive prosecutions

The petition asks whether a citizen of the Northern Cheyenne Tribe can be prosecuted by the United States for killing her common-law husband, whom she accused of beating her, after she was already convicted of involuntary manslaughter by the Northern Cheyenne Tribal Court. The petitioner argues that the Northern Cheyenne Constitution "cedes almost unfettered authority to the federal government such that Petitioner's prior conviction in Tribal Court bars subsequent federal prosecution in United States District Court as a violation of the Double Jeopardy Clause." The question presented is "whether the 'separate sovereign' concept actually exists any longer where Congress's plenary power over Indian tribes and the general erosion of any real tribal sovereignty is amplified by the Northern Cheyenne Tribe's Constitution in this case such that Petitioner's prosecutions in both tribal and federal court violate the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution." This is an appeal from the Ninth Circuit Court of Appeals, which wrote in an unpublished decision that because the Tribe is a separate sovereign, successive prosecutions for the same offense are not barred by the Fifth Amendment.

2. *Harvey v. Ute Indian Tribe of the Uintah and Ouray Reservation*: tribal remedies exhaustion doctrine

There are two questions presented: 1) Whether the tribal remedies exhaustion doctrine, which requires federal courts to stay cases challenging tribal jurisdiction until

the parties have exhausted parallel tribal court proceedings, applies to state courts as well; and 2) Whether the tribal remedies exhaustion doctrine requires that nontribal courts yield to tribal courts when the parties have not invoked the tribal court's jurisdiction. The Utah Supreme Court held that the tribal exhaustion doctrine prevented Utah state courts from reviewing a non-Indian businessman's claims against Tribal officials until he had exhausted his remedies in the judicial system of the Ute Indian Tribe of the Uintah and Ouray Reservation. The Solicitor General has been invited to file a brief expressing the views of the United States.

3. *Osage Wind, LLC, et al. v. United States*: Tribal right to appeal summary judgment without having intervened in lower court

There are two questions presented: 1) whether the Tenth Circuit Court of Appeals had jurisdiction over the appeal filed by a nonparty (the Osage Nation) when the nonparty did not participate in any capacity in the district court proceedings, and 2) whether the Tenth Circuit improperly expanded the Department of Interior's regulatory definition of "mining" for the financial benefit of the Tribe.

The Tenth Circuit Court of Appeals held, *inter alia*, that the Tribe was entitled to appeal the district court's grant of summary judgment to Osage Wind without having intervened in district court; that the definition of "mining" in the regulation at 25 C.F.R. Part 211 requiring mineral leases on Indian land is not limited to commercial extraction of minerals, but also includes acting upon the minerals to exploit the minerals themselves, and that Osage Wind's excavation constituted mineral development. The Solicitor General has been invited to file a brief expressing the views of the United States.

D. Notable 2018 Circuit and District Court Cases

1. *Modoc Lassen, et al. v. HUD, et al.*: FCAS

As we reported last year, in the summer of 2017, the 10th Circuit Court of Appeals ruled 1) HUD had no power or authority outside of the NAHASDA statute to recapture IHBG funds from grant recipients, 2) that any repayments from HUD to grant recipients should be made from funds that are from the same grant year in which HUD's original recaptures occurred and remanded back to Colorado District Court. On remand, the parties agreed to determine what, if any authority, HUD had to demand repayment from Plaintiff grant recipients (before tackling the question of what moneys from past grant years had been available to HUD at time repayments were made to Plaintiff tribes in 2014-2015). HUD moved for restitution of funds from Plaintiff tribes (which moved the case from APA review to an equity footing). The District Court found HUD's request for restitution to be inequitable and did not grant the motion (e.g., tribes keep all the funds HUD repaid to them in 2014-2015). HUD did not appeal the determination. That brings this litigation to an end after ten years.

2. *Brackeen v. Zinke*: ICWA

On October 4, 2018, the United States District Court for the Northern District of Texas held the Indian Child Welfare Act (ICWA) violates the equal protection clause of the U.S. Constitution. The court found the Supreme Court's *Morton v. Mancari* political classification framework did not apply to ICWA because ICWA extends to Indians who are not formal members of tribes. The court struck down ICWA, finding that it does not survive the strict scrutiny test for racial classifications. The court also held that ICWA violates the Constitution's non-delegation doctrine and the Tenth Amendment's prohibition on commandeering state legislative functions. Finally, the court struck down the 2016 ICWA regulations.

On November 19, the four intervening tribes in the case – the Cherokee Nation, Oneida Nation, Quinault Indian Nation, and the Morongo Band of Mission Indians – filed a notice of appeal and a motion to stay in the Fifth Circuit Court of Appeals. The Native American Rights Fund (NARF) is coordinating tribal signatories to an amicus brief to be filed the Fifth Circuit in support of ICWA. On November 30, the United States also filed a notice of appeal. On December 3, the Fifth Circuit granted the tribes' motion to stay pending further order of the Fifth Circuit.

3. *Brakebill v. Jaeger*: Voting Rights Act, 14th Amendment Equal Protection Clause

The Eight Circuit Court of Appeals entered a stay of a North Dakota district court's preliminary injunction against enforcement of a North Dakota law requiring eligible voters to present identification that included a current residential street address. A group of Native American voters in North Dakota challenged the law. In issuing the injunction, the district court considered that at least 4,998 otherwise eligible Native Americans (and 64,618 non-Native voters) did not possess a qualifying voter ID under the new law, as many live on reservations or in other rural areas where people do not have street addresses; and even if they do, those addresses are frequently not included on tribal IDs. Further, nearly 50% of Native Americans who lacked a qualifying ID also lack the "supplemental documentation" required under the law. The Supreme Court declined a request to intervene.

4. *Pakootas v. Teck Cominco Metals, LTD*: CERCLA

The Confederated Tribes of the Colville Reservation brought a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) action, with the State of Washington as Intervenor-Plaintiff against Teck Cominco Metals, seeking to hold the company liable for the dumping of several million tons of toxic industrial waste into the Columbia River. Teck operates the world's largest lead and zinc smelter ten miles upstream of the U.S. border. In this multi-decade dispute centered on Teck's liability, the Ninth Circuit Court of Appeals affirmed a Washington district court's finding that the company was a liable party under CERCLA and was liable for more than $8.25 million of plaintiffs' response costs.

5. *State of California v. Iipay Nation of Santa Ysabel*: Gaming

The Ninth Circuit Court of Appeals upheld a California district court's injunction against the Iipay Nation of Santa Ysabel, prohibiting the Tribe from continuing to operate a server-based game that allowed patrons to play bingo exclusively over the internet, although the servers were located on Tribal lands. The Court of Appeals affirmed the district court, finding that as a matter of first impression, the Tribe's operation of the game violated the Unlawful Internet Gambling Enforcement Act (UIGEA). The Court acknowledged that the Indian Gaming Regulatory Act (IGRA) protects gaming activity conducted on Indian lands, but found that a patron's act of placing a bet or wager on a game while located in California constitutes gaming activity that is not located on Indian lands, violates the UIGEA, and is not protected by the IGRA.

6. *Pauma v. National Labor Relations Board*: NLRA

The Ninth Circuit Court of Appeals upheld a National Labor Relations Board decision that the Casino Pauma (owned by the Pauma Band of Mission Indians) committed unfair labor practices in violation of the National Labor Relations Act (NLRA) by trying to stop union literature distribution in guest areas at the casino's front entrance and in non-working areas near its employees' time clock. The Court of Appeals held, *inter alia*, that the NLRA applies to tribal employers, and that the law does not violate the Tribe's right to self-government.

7. *The Tulalip Tribes and the Consolidated Borough of Quil Ceda Village v. The State of Washington*: Taxation

The Tulalip Tribes and the Consolidated Borough of Quil Ceda Village (QCV), a tribal municipality located on Tulalip tribal land, and Plaintiff-Intervenor the United States, challenged the administration and enforcement of certain taxes within QCV by the State of Washington and Snohomish County. QCV is located within the Tribes' reservation on 2,100 acres of trust land, and contains dozens of commercial and retail businesses, several are which are owned by the Tribes. The plaintiffs sought a declaration and an injunction prohibiting the State of Washington and Snohomish County from collecting retail sales and use tax, business and occupation tax, and personal property tax from businesses located at QCV, arguing that collection of these taxes imposes on Tulalip's tribal sovereignty, and is preempted by operation of federal law. A Washington district court held that in the absence of an extensive federal regulatory scheme governing the activity being taxed, Supreme Court and Ninth Circuit precedent has all but closed the door on preemption of a state's generally applicable tax on activities between non-Indians, concerning non-Indian goods, on an Indian reservation, particularly where the state has not "abdicated" responsibility to the Tribe and continues to provide government services to the taxpayers in question.

8. *Citizen Potawatomi Nation v. State of Oklahoma*: Gaming

The Citizen Potawatomi Nation brought an action against the State of Oklahoma, seeking to enforce an arbitration award obtained in connection with a dispute under its Tribal-State Gaming Compact. The Tenth Circuit Court of Appeals held that the de novo review provision of a binding arbitration clause in the compact was legally invalid, and that the Oklahoma district court erred in failing to sever the binding arbitration clause from compact in its entirety. The case was remanded with instructions to vacate arbitration award. The Supreme Court denied cert.

9. *In Re: National Prescription Opiate Litigation*: Opioid Crisis

Since 2014, over 1,100 lawsuits have been filed against the manufacturers, distributers and retailers of prescription opiate drugs in response to the opioid crisis sweeping the nation. Most of these lawsuits have been filed by States, cities, counties, and at least 85 tribes or tribal organizations. The lawsuits allege that opioid manufacturers overstated the benefits and downplayed the risks of these medications while aggressively marketing them to physicians, and that distributors and retailers failed to monitor, investigate, and report suspicious orders. The legal claims include violations of racketeering laws, consumer protection laws, and common law claims like public nuisance, negligence, fraud, and unjust enrichment. Collectively, the plaintiffs are seeking hundreds of billions in damages for costs incurred and to be incurred in responding to the opioid crisis.

All federal court cases have been combined for pretrial purposes as Multidistrict Litigation (MDL) in the Federal District Court for the Northern District of Ohio, presided over by Judge Dan Polster. MDL is a procedural mechanism for consolidating related cases in a single proceeding for pre-trial matters such as discovery and dispositive pre-trial motions, as well as to try and facilitate settlement. The Court is actively encouraging settlement, and there are ongoing settlement discussions (the content of which is being kept confidential by court order). The Court has selected several cases to proceed as "bellwether" cases to test the claims, which the parties requested as a means of facilitating settlement. The two bellwether test cases for tribes are the Muscogee Creek Nation and Blackfeet Tribe cases. In August 2018, the defendants filed motions to dismiss the Muskogee and Blackfeet lawsuits. In September, the two tribes responded to those motions, and in October 448 tribes joined in a supporting amicus brief, with Hobbs Straus serving as counsel for amici curiae.

REGULATION

1. Section 184 Draft Regulations Released

Congress established the Section 184 Program in 1992 to facilitate homeownership and increase access to capital in Native American communities. There have been some concerns identified by HUD and others with the Section 184 program

over the past few years, including the relatively low numbers of Section 184-guaranteed loans on reservation and trust lands (as opposed to fee lands), the continued reluctance of certain lenders to make loans in Indian Country, and the recent statements by HUD that it has been advised by the Department of Justice that such loans and their related mortgages cannot be enforced in tribal courts.

As a result of these issues and other considerations, over the past year, HUD ONAP has been soliciting input from tribes and TDHEs in order to develop a set of comprehensive regulations to govern the Section 184 program. On October 24, 2018, during the NCAI conference, HUD ONAP presented HUD's draft regulations during a consultation for Subpart B (Lender Eligibility and Requirements) and Subpart C (Underwriting, Closing and Endorsement) and fielded questions and comments from Tribal Leaders and representatives. The HUD representatives said that drafting the other sections of these regulations is a priority, and that HUD wants to hear from tribes now on the drafts available. HUD will share the other draft sections as HUD completes them.

2. Administration Considers Potential Changes to NEPA Regulations

The Council on Environmental Quality (CEQ) published an advance notice of proposed rulemaking (ANPRM) seeking comments on potential changes in the regulations implementing the National Environmental Policy Act (NEPA) of 1970. The submittals received during the public comment period, which closed on August 20, 2018, may be viewed at https://www.regulations.gov/docket?D=CEQ-2018-0001. No other official movement has occurred on this considered revision.

NEPA is the federal statute that requires the preparation of an environmental impact statement for any major federal action "significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The ANPRM suggests that CEQ is contemplating making rather major changes – the request for comments was framed as twenty questions, covering a wide range of issues, many of which may be of concern to tribes. Two of the questions specifically asked about involvement of tribes in the NEPA process. NEPA is implemented through regulations promulgated by CEQ in 1978. 40 C.F.R. Parts 1500 – 1508. In the four decades since, CEQ has issued numerous guidance documents, but the regulations have been substantively revised only once, in 1985.

3. Tribal Social Security Fairness Act Enacted

On September 20, 2018, the President signed HR 6124, the Tribal Social Security Fairness Act, as PL 115-243. The Act provides long-sought parity for tribal governments with regard to Social Security and Medicare coverage for tribal council members. It provides a process by which tribal governments, like state and local governments, can opt-in to Social Security and Medicare taxes and coverage for appointed or elected tribal council members and tribal council leadership. The Act also retroactively provides a process by which tribal council members who had erroneously paid (and were not

refunded) Social Security and Medicare taxes prior to enactment of the Act can receive Social Security and Medicare credit for the payment of those taxes.

4. Attorney General Sessions Rescinds Obama-Era Marijuana Policy for Indian Tribes

On January 4, 2018, U.S. Attorney General Jeff Sessions sent a memorandum regarding marijuana enforcement to all U.S. Attorneys announcing the termination of previous policies issued under the Obama Administration regarding enforcement of federal criminal law prohibitions against marijuana activities in jurisdictions that met key criteria. The new memorandum makes clear that the those Cole and Wilkinson Memoranda are no longer in effect and that all U.S. Attorneys are free to prosecute marijuana related activities under existing federal laws and in accordance with the U.S. Attorney's Manual.

The 2013 Cole Memorandum described situations in which each U.S. Attorney could exercise discretion not to take enforcement actions against individuals or officials in states which had in place robust regulatory and enforcement systems governing recreational or medicinal marijuana production, processing, and sales. In 2014, the U.S. Justice Department issued similar guidance through the Wilkinson Memorandum regarding the production, processing, and sale of recreational and medicinal marijuana in Indian Country. In states including Washington, Oregon, and Nevada, a number of tribes have entered both the recreational and medicinal marijuana markets since the issuance of the Wilkinson Memorandum. Others have been considering undertaking such enterprises.

The Sessions Memorandum does not replace the rescinded memoranda with any new guidance. On November 7, 2018, Attorney General Sessions resigned his post, and no replacement has been confirmed. It remains to be seen whether his eventual replacement will take a different approach to marijuana regulation.

5. "STATES Act" introduced - would protect certain tribal marijuana activities

On June 7, 2018, Senators Warren (D-MA) and Gardner (R-CO) introduced the "Strengthening the Tenth Amendment Through Entrusting States Act" or the "STATES Act" as S. 3032. The STATES Act would authorize states and tribes, in certain instances, to approve and regulate the growth, production and sale of marijuana free from federal penalties or criminal enforcement. The bill would not change the scheduling of cannabis under the Controlled Substances Act (CSA), but it would exempt lawful state and tribal regulated cannabis activities from the penalties of the CSA.

The STATES Act would not provide a blanket exemption from the CSA for marijuana growth, production and distribution by tribes. Instead, the bill is tied to what each state has done, and it would protect only those tribes located in states that have legalized marijuana. For example, the bill would provide protection and certainty to commercial marijuana activity by tribes located in states that have approved commercial

marijuana such as Washington, Oregon, California, Colorado, Alaska, Maine, and Massachusetts. The bill would also provide clarity and certainty for tribes engaged in medical marijuana activity in states that permit only medical marijuana. As currently drafted, however, it is not clear whether the bill would protect a tribe engaging in commercial marijuana activity if that tribe is located in a state that has approved only medical marijuana. No movement has occurred on the bill.

6. President Signs Recognition Bill for Virginia Tribes

On January 29, 2018, the President signed the Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2017 into law as PL 115-121. The law extends federal recognition, with gaming restrictions, to six state-recognized tribes from the Commonwealth of Virginia, namely: the Chickahominy Indian Tribe; the Chickahominy Indian Tribe--Eastern Division; the Upper Mattaponi Tribe; the Rappahannock Tribe, Inc.; the Monacan Indian Nation; and the Nansemond Indian Tribe.

Enactment of PL 115-121 is a landmark event that was years in the making. These six tribes were some of the first to come into contact with early English settlers but, because of events specific to Virginia history that resulted in the destruction of important records, they ultimately lacked the necessary documentation to successfully navigate the Department of Interior's document-intensive federal acknowledgement process.

7. Enactment of the Indian Employment, Training and Related Services Consolidation Act of 2017

On December 18, 2017, the Indian Employment, Training and Related Services Consolidation Act of 2017 was signed into law. This comprehensive amendment to the Indian Employment, Training and Related Services Demonstration Act of 1992 (as amended), makes the "477 program" permanent, extends it to additional federal agencies, and allows for participating tribes and tribal organizations to submit a 477 plan with one budget, audit, and report for all agencies. Further, it requires that an interdepartmental memorandum of agreement providing for the implementation of the law be entered into no later than one year after enactment. The memorandum of agreement is close to being finalized, but the process has not been transparent. The White House held a meeting on December 3, 2018, which many participating agencies and members of the 477 Tribal Work Group attended. The draft memorandum of agreement was not shared with the 477 Tribal Work Group, and the agency drafters would not answer specific questions about the draft.

The 477 program was established to enable tribes to coordinate and integrate employment and training programs administered by the Departments of Labor, Interior, Education, and Health and Human Services. Today, there are approximately 60 active 477 plans, representing more than 250 tribes and tribal organizations in 17 states.

8. Tribal Governments Gain Access to Crime Victims Fund and AMBER Alert Funds

The FY 2018 Omnibus Appropriations Act provided the first ever direct tribal allocation under the Crime Victims Fund. The 3% allocation amounts to $133 million.

On April 13, 2018, the President signed the Ashlynne Mike AMBER Alert in Indian Country Act as PL 115-166. Sponsored by Senators McCain (R-AZ) and Heitkamp (D-ND), the law allows tribes to access resources to develop and integrate their alert systems for missing and abducted children into surrounding state and regional systems. Prior to this, the Department of Justice operated a pilot program for tribes regarding AMBER Alert training services. The law contains authority for the Department of Justice to waive matching requirements for tribes in some instances and requires a report on tribal capacities and needs to implement AMBER Alert systems.

9. Attorney General Jeff Sessions Resigns

Attorney General Jeff Sessions resigned on November 7, 2018, at the President's request. The President announced that Sessions' chief of staff, Matthew Whitaker, would serve as an acting replacement. During his nearly two year tenure, Sessions took a hard-liner approach. Sessions threatened so-called sanctuary cities with the loss of federal funding and announced a "zero-tolerance policy" for people who cross the southern U.S. border illegally. He ordered federal prosecutors to seek the most serious charges and long prison sentences against drug criminals, a stark reversal of President Obama's most prominent and bipartisan justice policy. He also presided over a rollback in investigations of local police in civil rights disputes. As described above, he rescinded the Cole and Wilkinson Memoranda regarding enforcement of marijuana laws.

10. Tribal HUD-VASH passes Senate; pending in House

On May 23, 2018, the Tribal HUD-VASH Act of 2017 (S. 1333) passed the Senate with an amendment by voice vote. The bill is now pending in the House. Introduced by Senator Tester (D-MT), the bill provides rental assistance and supportive services for homeless or at-risk Indian veterans residing in Indian areas; improves the availability and cultural suitability of VA case management services for homeless or at-risk Indian veterans residing in Indian areas, mandates federal agencies to work cooperatively to better meet the needs of Indian veterans and tribal communities, and ensures program accountability through Congressional reporting.

11. THRIVE Act passes House, pending in Senate

On June 14, 2018, the House passed H.R. 5735, the "Transitional Housing for Recovery in Viable Environments Demonstration Program Act" or "THRIVE Act". The THRIVE Act will now move to the Senate for consideration. The THRIVE Act was introduced by Rep. Barr (R-KY), and would amend the United States Housing Act of

1937 to establish a demonstration program to set aside up to 10,000 Section 8 housing vouchers for supportive and transitional housing for individuals recovering from opioid use disorders or other substance use disorders. In the Senate, the bill has been referred to the Committee on Banking, Housing, and Urban Affairs.

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.