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Indian Nations Update

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HUD Announces Competitive IHBG Round: Unique Opportunity to Fund New Tribal Housing

The Consolidated Appropriations Act of 2020, Public Law 116-94, provided $100 million for competitive grants to eligible Indian Housing Block Grant (IHBG) recipients under the Native American Housing Assistance and Self-Determination Act (NAHASDA). HUD's Aug. 11 Notice of Funding Availability (NOFA) describes how the funds will be awarded. As in previous rounds, the focus will be reducing the estimated 68,000-unit housing shortage identified in HUD's 2017 needs study, while assuring that recipients are able to successfully execute projects.

In accordance with the Appropriations Act, HUD will give priority to projects that spur construction and rehabilitation, while considering need and administrative capacity. … While HUD will give funding priority for new construction projects, rehabilitation projects, acquisition of existing housing units that increases housing stock, and necessary affordable housing-related infrastructure projects, applicants may also apply for funding to carry out other eligible activities under NAHASDA. Finally, Indian tribes and TDHEs that are applying for funding under this NOFA are encouraged to propose projects that are part of a comprehensive plan to address housing conditions in their communities, including overcrowding and physically deteriorating units, as appropriate. Applicants should also engage in long-term planning and ensure that the project being proposed is part of a holistic plan that considers planned future infrastructure development, economic development opportunities, and more.

The application deadline is Dec. 10, 2020. Godfrey & Kahn has assisted tribes in preparing successful applications under this program and other similar federal programs, including an almost $5 million new housing award under this program. For more information, contact John Clancy at jclancy@gklaw.com or 414.287.9256.

Selected Court Decisions

In *Perkins v. Commissioner of Internal Revenue*, 2020 WL 4644984 (2d Cir. 2020), Perkins, a member of the Seneca Nation (Nation), and her husband, extracted and sold gravel they had removed from Seneca Territory under a lease and permit issued by the Nation. When the Internal Revenue Service claimed they owed **federal income taxes** on the proceeds of the sale, the Perkinses first filed a petition in tax court, then a refund suit in federal court, contending in both fora that the income was protected from taxation by the 1794 Treaty of Canandaigua, which provides that "the United States will never ... disturb the Seneka [Seneca] nation ... or of their Indian friends residing thereon and united with them, in the free use and enjoyment" of the Seneca land, and the treaty of 1842, which provides that the parties to the treaty "agree to solicit the influence of the Government of the United States to protect such of the

lands of the Seneca Indians … from all taxes, and assessments for roads, highways, or any other purpose…." The tax court disagreed and held that the gravel was subject to taxation and the Second Circuit Court of Appeals affirmed: "Like other treaty provisions which secure the 'peaceful possession' of American Indian land, guaranteeing the 'free use and enjoyment' of the land 'applies to the use of land,' not to taxes levied upon individuals who profited from the use of the land. … Article IX [of the 1842 treaty] as a whole was intended to prevent the imposition of specific taxes imposed by the State of New York on land belonging to the Nation. … Article IX of the Treaty with the Seneca cannot be construed to create an exemption to income taxes on income earned from land owned by the Seneca Nation." (Citations omitted.)

In *Eglise Baptiste Bethanie De Ft. Lauderdale, Inc. v. Seminole Tribe*, 2020 WL 4581439, not reported in F.3d (11th Cir. 2020), a dispute arose over the leadership of a church, located on non-Indian land, after its pastor died. The Board of Directors of the church filed a federal suit against the Seminole Tribe and Auguste, the deceased pastor's widow, alleging that Auguste, with the assistance of Seminole police officers, forcibly took over the church and expelled Auguste's opponents in violation of the federal Freedom of Access to Clinic Entrances Act (FACE Act). The district court granted the Tribe's motion to dismiss, holding that the Tribe was protected by **sovereign immunity** regardless of whether the alleged conduct occurred off-reservation or whether it was allegedly criminal, and also dismissed Auguste for lack of jurisdiction over a matter of church governance. The Eleventh Circuit affirmed: "That the plaintiffs allege criminal violations under § 248 cannot change our conclusion; where tribal sovereign immunity applies, it 'bars actions against tribes regardless of the type of relief sought.' *Freemanville Water Sys., Inc. v. Poarch Band of Creek Indians*, 563 F.3d 1205, 1208 (11th Cir. 2009). Also unavailing is the plaintiffs' contention that tribal sovereign immunity is inapplicable here because the alleged conduct occurred off-reservation. 'To date, [the Supreme Court has] sustained tribal immunity from suit without drawing a distinction based on where the tribal activities occurred' nor has the Court 'drawn a distinction between governmental and commercial activities of a tribe.' … Auguste's decision to exclude the plaintiffs from church property and the related events are part and parcel of ecclesiastical concerns … the very types of questions we are commanded to avoid."

In *Goodface v. Lower Brule Sioux Tribe 2020 Election Board*, 2020 WL 5017352 (D.S.D. 2020), Goodface, a member of the Lower Brule Sioux Tribe, sued the Tribe, its election board and several tribal officials in federal court after the Tribe disqualified her from running for Tribal Council. Goodface contended that the court had **jurisdiction** under the Indian Civil Rights Act but the federal court disagreed and dismissed: "In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), … the Supreme Court held that ICRA did not create a cause of action to enforce its civil rights guarantees. … Instead, the only federal relief available under ICRA is the habeas corpus provision of 25 U.S.C. § 1303. … And while Goodface's complaint refers to her Constitutional rights to due process and equal protection, the Equal Protection and Due Process Clauses do not apply to tribal governments and cannot provide federal question jurisdiction for Goodface's complaint."

In *United States v. Smith*, 2020 WL 5084128 (D. N.M. 2020), the United States, in the 1848 treaty of Guadalupe Hidalgo, had agreed to honor the land titles of the Pueblo Indians previously confirmed by the King of Spain and the Republic of Mexico. Congress had enacted the Pueblo Lands Act (PLA) in 1924, which resolved disputes of title to Pueblo lands and resulted in the transfer of title of certain Pueblo lands to non-Indians. The PLA was amended in 2005 to clarify that Pueblo lands within the original boundaries recognized in 1848 remained under tribal and federal jurisdiction. Federal authorities charged Smith under the Indian Country Crimes Act, 18 U.S.C. § 1152, with the murder of an Indian on land that was within the boundaries of the Santa Clara Pueblo but which had been conveyed to non-Indians under the PLA. The Defendant argued that the Reservation had been diminished and that the alleged crime was not committed within Indian country, depriving the government of jurisdiction under Section 1152. The court disagreed and denied the defendant's motion to dismiss: "'Whether a reservation has been disestablished or diminished depends on whether its boundaries were erased or constricted, not on who owns title to land inside the lines.' *Murphy*, 875 F.3d at 952. Adjudicating title is distinct from adjudicating reservation or pueblo status. *See id*. Based on the *Solem* factors, the Tenth Circuit's decision in *Antonio*, and that the Executive, not Congress, quieted title to the Property at issue, Defendant has not overcome the **presumption against diminishment.**" In a companion decision, *United States v. Smith*, 2020 WL 5076404 (D.N.M. 2020), the Court granted the government's motion in limine seeking a determination that the lands within the exterior boundaries of the Santa Clara Pueblo were Indian country.

In *Easley v. Hummingbird Funds*, 2020 WL 5099955 (S.D. Ala. 2020), Easley had borrowed money over the internet from Hummingbird Funds, a business owned by the Lac Courte Oreilles Chippewa Tribe, at rates of interests higher than permitted under Alabama law. The plaintiff sued Hummingbird and individually sued members of the board of LCO Financial Services, which allegedly managed Hummingbird, alleging violations of the Racketeer Influenced and Corrupt Organizations (RICO) Act and other causes of action. The defendants moved to dismiss on the ground of **sovereign immunity** and to stay to allow for exhaustion of tribal remedies. The magistrate judge recommended that the motions be denied, concluding that sovereign immunity did not apply to the claims against the individual defendants and that the plaintiffs be permitted to conduct discovery to determine whether Hummingbird was an arm of the LCO Tribe: "[T]he Individual Defendants' arguments that they are entitled to tribal sovereign immunity do not extent [sic] beyond assertions that they are tribal employees who were acting within the scope of their employment, which *Lewis* makes clear 'is not, on its own, sufficient to bar a suit against [them in their individual capacities] on the basis of tribal sovereign immunity.' … The Individual Defendants argue that the Court should look beyond Easley's 'individual capacity' label and find that the relief she seeks is really only appropriately brought against them in their official capacity; however, the undersigned is not persuaded to do so for purposes of determining entitlement to tribal sovereign immunity. While suing the Individual Defendants in only their individual capacities certainly might limit Easley's ability to obtain all of the relief she seeks, that issue goes to the merits of her claims." The district court adopted the magistrate's recommendations, 2020 WL 5099941 (S.D. Ala. 2020): "Tribal immunity is akin to an affirmative defense in that a tribe (or an arm of a tribe) must invoke immunity; a plaintiff does not have the burden to plead sufficient facts to defeat immunity. Adoption of the Defendants' argument would require that a plaintiff anticipates whether an entity intends to claim to be an arm of the tribe and to invoke sovereign immunity. Defendants' cited authority does not support such a pleading requirement. Instead, the Defendants' cited authority requires that once a tribe or arm of the tribe invokes immunity, a plaintiff is required to prove that immunity has been abrogated by Congress or waived by the tribe (emphasis in original).

In *Ryder v. Sharp*, 2020 WL 5038520 (E.D. Okla. 2020), Ryder, a member of the Choctaw Nation of Oklahoma facing a death sentence pursuant to an Oklahoma murder conviction, sought appointment of counsel to bring a new habeas corpus petition arguing that the **state lacked jurisdiction** under the Supreme Court's 2020 decision in *McGirt v. Oklahoma*. The Court granted the motion: "The Choctaw Nation is a federally recognized Indian tribe which is one of the five tribes that often are treated as a group for purposes of federal legislation. The Cherokee, Muscogee (Creek), Choctaw, Chicasaw, and Seminole Nations historically are referred to as the 'Five Civilized Tribes' or the 'Five Tribes…. Although *McGirt* was a habeas action concerning a crime committed on the Muscogee (Creek) Reservation by an enrolled member of the Seminole Nation of Oklahoma, Petitioner alleges the treaty and allotment history of the Choctaw Nation is very similar to that of the Creek. He asserts that applying *McGirt* to the Choctaw Nation will likely produce the same result as portended by the *McGirt* dissent. … After careful consideration, the Court concludes that it is appropriate for federal counsel to represent petitioner as he exhausts his *McGirt* claim in state court."

In *Mendoza v. First Santa Fe Insurance*, 2020 WL 4784806 (D.N.M. 2020), Hudson Insurance insured the Isleta Resort and Casino (Casino), an enterprise of the Isleta Pueblo Tribe, against third-party claims. Tribal First, a non-Indian California corporation, acted as Hudson's third-party administrator. First Santa Fe Insurance, an insurance broker, arranged for Hudson's engagement. Employees of the Casino sued Tribal First, First Santa Fe and Hudson in New Mexico state court, alleging that their worker's compensation claims were improperly denied. The defendants removed to federal court, contending that the plaintiffs' claims arose within the Pueblo, the Pueblo is a federal enclave within the meaning of Article I, Section 8, Clause 17 of the United States Constitution, and the federal court, therefore, had **jurisdiction**. The district court disagreed and remanded: "The Court agrees with Plaintiffs that their claims did not arise within the 'federal enclave itself' and are therefore beyond the reach of the federal enclave doctrine. … While Plaintiffs allege that they suffered workplace injuries on the grounds of the Isleta Resort & Casino, those injuries are not the 'pertinent events' out of which the claims in this case arose. … Instead, the claims in this case center on the allegedly unfair and illegal actions Defendants undertook *after* Plaintiffs suffered their injuries and filed claims for workers' compensation." (Citations omitted; emphasis in original.)

In *Shawnee Tribe v. Mnuchin*, 2020 WL 4816461 (D.D.C. 2020), the Shawnee Tribe of Oklahoma sued the Treasury Secretary and other federal officials under the Administrative Procedure Act (APA), alleging that the Defendants used erroneous demographic data provided by HUD in allocating funds appropriated for in the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) for the relief of tribal governments. The Court denied the plaintiff's motion for a preliminary injunction: "Plaintiff points to nothing in either the text of the CARES Act or any associated agency action that overcomes the presumption of non-reviewability that attaches to the Secretary's discretion over how to allocate the $8 billion lump-sum appropriation under Title V. The Secretary's choice of the HUD tribal population data to make the first tranche of Title V payments is therefore unreviewable. Accordingly, Plaintiff has not demonstrated a likelihood of success on its APA claim."

In *Saginaw Chippewa Tribe v. Blue Cross Blue Shield*, 2020 WL 4569558 (E.D. Mich. 2020), the Saginaw Chippewa Indian Tribe and its Welfare Benefit Plan (collectively the Tribe) operated group health plans for employees and members of the Tribe that were administered by Blue Cross Blue Shield of Michigan (BCBSM). The Tribe sued BCBSM, alleging it had charged hidden fees, overstated the cost of medical services, and violated its ERISA fiduciary duties by failing to demand **Medicare Like Rates (MLR)** from medical service providers pursuant to 42 U.S.C. § 1395cc, which mandated MLR with respect to health services "under the contract health services program funded by the Indian Health Service and operated by the Indian Health Service, an Indian tribe" and pursuant to 42 C.F.R. § 136.30(b), a federal regulation issued under the statute. After other claims were dismissed and the case had been appealed to the Sixth Circuit and remanded, the issue remained whether BCBSM was obligated under ERISA to charge MLR with respect to the employee plan. The Tribe argued that so long as its Contract Health Services (CHS) program authorized services, MLR rates were available, even if tribal funds were used to pay for services. The district court, citing an Indian Health Services (IHS) document interpreting the regulations, disagreed and granted BCBSM summary judgment: "At issue in this case is whether a medical service is eligible for Medicare-Like Rates when an employee health care plan engaged by the tribe uses a source of funding other than CHS funds to pay for the service. … The specific guidance of these three passages … explicitly state that CHS payment is necessary for the application of MLR. Claiming that CHS payment is not necessary for the application of MLR directly contradicts these passages. Though the FAQ Document is not federal regulation, it was promulgated by the IHS and accordingly provides guidance to the Court in interpreting 42 C.F.R. § 136.30(b). Specifically, it demonstrates that references to 'CHS program' in 42 C.F.R. § 136.30(b) do not signify solely CHS program authorization, but additionally, CHS payment."

In *Zurich American Insurance Company v. McPaul*, 2020 WL 4569559 (D. Ariz. 2020), Pic-N-Run (PNR), a non-tribal entity, operated a gas station under a lease of tribal trust land within the Navajo Reservation. Zurich American Insurance Company (Zurich), a New York corporation with its principal place of business in Illinois, insured PNR under a "Storage Tank System Third-Party Liability and Cleanup Policy" from Sept. 9, 2003 to Sept. 9, 2004. After a NPR subcontractor in 2005 caused a fuel line breach that resulted in the release of over 15,000 gallons of gasoline onto Navajo land, the Navajo Nation sued PNR's insurer in Navajo district court. Zurich sued Navajo court and other officials in federal court, **challenging the Navajo Court's jurisdiction**. The federal district court granted Zurich summary judgment, holding that (1) the question whether a tribal court has jurisdiction over a non-member is a federal question supporting federal subject matter jurisdiction, (2) the Navajo court did not have jurisdiction over Zurich pursuant to its right to exclude non-Indians from the Reservation where the alleged injury occurred outside the policy period, (3) the Navajo Court did not have jurisdiction over Zurich under the second *Montana* exception because the alleged harm occurred outside the policy period, and (4) Zurich was not required to exhaust tribal court remedies because Navajo jurisdiction was "plainly lacking."

In *United Auburn Indian Community of Auburn Rancheria v. Newsom*, 2020 WL 5103639 (Cal. 2020), the Enterprise Rancheria of Maidu Indians (the Enterprise Tribe) in 2002 had sought to acquire land in trust for gaming purposes which, under the **Indian Gaming Regulatory Act (IGRA),** required (1) a determination by the Department of Interior that the acquisition would be in the best interest of the Tribe and not detrimental to the surrounding community, and (2) the concurrence of the governor of California (Two-Part Determination). After then-governor Jerry Brown issued the required concurrence in 2012, the United Auburn Indian Community, which owned a casino about 20 miles from the proposed site of the Enterprise Tribe's casino, sued, contending that Proposition 1A, the California ballot

initiative approved by the voters that provides the fundamental authority for Indian gaming compacts, authorized the governor only to negotiate compacts "subject to ratification by the Legislature." Different panels of the California Appellate Court reached contrary conclusions. The California Supreme Court resolved the split, holding that the governor possessed the power to concur in an IGRA Two-Part Determination: "We agree that the power to negotiate compacts with Indian tribes does not, by itself, imply the power to concur. But neither does Proposition 1A's failure to expressly mention the power to concur imply any sort of limitation on the Governor's inherent powers — including his power to concur. The ballot initiative amended the Constitution to bestow the Governor with the power 'to negotiate and conclude compacts ... for the operation of [casino-style gaming] ... on Indian lands in California.' (Cal. Const., art. IV, § 19, subd. (f).) Because casino-style gaming cannot occur on some Indian lands — certain land taken into trust for an Indian tribe after IGRA was enacted — without the Governor's concurrence, the power to negotiate compacts for class III gaming on those lands is consistent with the Governor exercising his inherent power to concur to allow class III gaming to occur on those lands."

In *Samish Indian Nation v. Department of Licensing*, 2020 WL 5105074 (Wash. App. 2020), Washington law permitted the State's Department of Licensing (DOL) to negotiate fuel tax agreements with "any federally recognized Indian tribe located on a reservation within this state," relative to retail stations "located on reservation or trust property." When the Samish Indian Nation (Tribe) sought to negotiate a fuel tax agreement, the DOL refused to negotiate on the ground that, while the Tribe had trust land, it did not have a formal reservation. The lower court affirmed but the Court of Appeals reversed: "The dictionary **definition of 'reservation'** extends both to formal reservations and tribal trust properties. Although the legislature appears to distinguish between reservations and trust properties in the statute, in context, the location of a tribe and the location of an operating fuel station are very different questions. In context, the plain meaning of 'any federally recognized Indian tribe located on a reservation within this state' is the dictionary definition of 'reservation' and extends to trust property. Alternatively, it would be an absurd result to promote litigation by barring DOL from negotiating fuel tax agreements with federally recognized tribes operating retail fuel stations located on trust property merely because the tribe lacks a formal reservation."

In the case of *In re Internet Lending Cases v. AMG Services, Inc.*, 2020 WL 4745994 (Cal. App 2020), class action plaintiffs, non-Indian California residents who had borrowed money over the internet from AMG Services, Inc. (AMG), a wholly owned tribal corporation of former defendant Miami Tribe of Oklahoma (Tribe), sued AMG, alleging various violations of California and federal lending laws. After the trial court had previously dismissed on the ground of **sovereign immunity**, the Court of Appeals remanded and ordered the trial court to reevaluate AMG's immunity in view of the five "arm of the tribe" factors prescribed by the California Supreme Court in *People v. Miami Nation Enterprises*, 2 Cal.5th 222 (Cal. 2016) (*Miami Nation*). Before the trial court heard the motion to dismiss, AMG changed its governance and structure to satisfy the *Miami Nation* test, removing the nontribal actors from positions of authority and control. Applying these new facts to the *Miami Nation* test, the trial court found AMG entitled to immunity as an arm of the tribe. The Court of Appeals affirmed, that the trial court should make its "arm of the tribe" determination based on the facts as of the date the court hears a motion to dismiss, not as of the date of the alleged wrongdoing: "[a] tribe or tribal entity may, like other sovereigns, assert or waive immunity at any time, even after a lawsuit is brought against it. … Further, as a necessary corollary of this, the status of a tribe or tribal entity's immunity is appropriately assessed by the court at the time of the motion to dismiss based on immunity, as was done in this case."

In *Irv's Boomin' Fireworks, LLC v. Muhar*, 2020 WL 4932787 (Minn. App. 2020), Irv's Boomin' Fireworks LLC and Irving Seelye (collectively "Irv's"), its managing member, a member of the Leech Lake Band of Chippewa Indians, operated a fireworks business on the Leech Lake Reservation under a tribally-issued permit. When a county prosecutor threatened to sue Irv's for violating a Minnesota law prohibiting the sale of fireworks, Irv's sued for a declaratory judgment that, as a tribally-owned business operating within the Leech Lake Chippewa reservation, it was not subject to the Minnesota law. The county district court dismissed for lack of jurisdiction on the ground that granting declaratory or injunctive relief would "usurp the prosecutor's discretion and curtail the prosecutor's charging authority," in violation of the separation-of-powers doctrine. The Minnesota Court of Appeals reversed: "Irv's requests a declaration that selling explosive fireworks to individuals who reside outside of the reservation does not violate the fireworks law as defined by the legislature and therefore cannot support a criminal charge. This legal determination requires consideration of the interplay between **Public Law 280**, the band's ordinances, and the fireworks statutes—precisely the type of

analysis that courts routinely perform. … [T]he exercise of jurisdiction to clarify that particular conduct cannot sustain a particular criminal charge is consistent with the purpose of the [Uniform Declaratory Judgments Act] UDJA—to provide certainty. Minn. Stat. § 555.12 (2018) (stating that the UDJA's purpose is 'to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations'); … We must construe the UDJA 'liberally' to achieve that end. Minn. Stat. § 555.12. Certainty is provided when an individual facing potential criminal liability may obtain the court's interpretation of the applicable criminal statute before undertaking conduct that risks prosecution."