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Indian Nations update

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DOE Extends Tribal Energy Grant Application Deadline to December 10

The Department of Energy's Office of Indian Energy Policy and Programs announced the availability of the Tribal Energy Grant on March 27, 2020. The deadline for applications, originally July 1, 2020, has now been extended to Dec. 10. DOE will provide up to $15 million in new funding to deploy energy technology on tribal lands. DOE anticipated individual awards may range from $50,000 to $2 million, which may be used, among other things, for energy efficiency measures, conversion to solar energy or other renewable energy, or battery storage projects to help assure resiliency during utility outages.

Godfrey & Kahn has assisted tribes and tribal entities with the preparation of renewable energy, energy efficiency, energy-efficient housing and related grant applications that have resulted in total awards of more than $15 million. We have also assisted tribes in meeting DOE's 50% cost share requirement and driving down project costs by packaging federal grants with other grants and tax incentives, including the federal tax credit for renewable energy projects, state and/or utility grants, New Market Tax Credits or other private funding, often resulting in the construction of projects with no upfront tribal capital costs.

For more information about Godfrey & Kahn's energy-related Indian country experience, or a free consultation, contact Energy Strategies and Indian Nations Practice Group leader John Clancy at 414.287.9256 or jclancy@gklaw.com or Indian Nations Practice Group co-leader Brian Pierson at 414.287.9456 or bpierson@gklaw.com.

Selected Court Decisions

In *United States v. Abouselman*, 2020 WL 5792100 (10th Cir. 2020), the Tenth Circuit, addressing a single narrow issue in a 37-year-old **water rights** case involving the Pueblos of Jemez, Santa Ana, and Zia (Pueblos), the State of New Mexico and other parties, in an interlocutory decision, reversed the district court's determination that the Pueblos' aboriginal water rights were extinguished by Spain's assertion of sovereignty over the region in the 1500s: "There is no indication, let alone a clear and plain indication, that Spain intended to extinguish any aboriginal rights of these three Pueblos. Spain's general assertion of governing authority does not indicate any intent to extinguish the Pueblos' water rights because, in general, Spain respected the Indians and their possessions. … The passive implementation of a generally applicable water administration system does not establish Spain's clear intent to extinguish the aboriginal water rights of these three Pueblos. … Nor is there any evidence in the experts' reports or testimony that Spain's water administration system was adverse to the Pueblos, as it never actually ended the Pueblos' exclusive use of water or limited their use in any way. … Because Spain's water administration system had no impact, let alone a negative impact, on the Pueblos' right to use

water, it cannot be said that the system was "adverse" to the Pueblos."

In *Confederated Tribes of the Chehalis Reservation v. Mnuchin*, 2020 WL 5742075 (D.C. Cir. 2020), plaintiff tribes had challenged a determination by the Department of the Treasury that **Alaska Native Corporations (ANCs)** were "tribal governments" for purposes of Title V of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) and, therefore, eligible for a share of the $8 billion appropriated by Congress to help tribal governments combat the COVID-19 pandemic. The CARES Act defined "Tribal government" as "the recognized governing body of an Indian tribe" and provided that "'Indian Tribe' has the meaning given that term" in section 4(e) of the Indian Self-Determination and Education Assistance Act (ISDEAA). The ISDEAA, in turn, defined "Indian tribe" as "any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." The district court concluded that Congress intended the qualifying "which is recognized" clause to apply only to "any Indian tribe, band, nation, or other organized group or community" and to Alaska Native Villages, but not to ANCs. The D.C. Circuit reversed, applying the series qualifier rule and holding that the ANCs were not tribal governments eligible for CARES funding: "The text and structure of this definition make clear that the recognition clause, which is adjectival, modifies all of the nouns listed in the clauses that precede it. Under the series-qualifier canon, when there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series." (Internal citations, quotations, emendations omitted.)

In *SPRAWLDEF v. Guidiville Rancheria*, 2020 WL 5642142, Fed. Appx. (9th Cir. 2020), the Guidiville Rancheria (Tribe) and the City of Richmond, California (City) had entered into a settlement agreement and stipulated judgment resolving the Tribe's suit alleging that the City had breached a Land Disposition Agreement allowing development of a casino on the Richmond coastline at Point Molate. The agreement stated that the district court "shall retain jurisdiction over this Action to enforce the terms of this Judgment." SPRAWLDEF, a group opposed to the casino, filed a petition for writ of administrative mandate in California state court, alleging that the City had entered into the settlement agreement and stipulated judgment in violation of the Brown Act, which requires open meetings before local government agencies take certain actions. When the City removed the action to federal court, SPRAWLDEF sought to join the Tribe as a defendant. The Tribe moved to dismiss on **sovereign immunity** grounds but the District Court denied the motion and the Ninth Circuit affirmed: "Because they are sovereign entities, Indian tribes are immune from unconsented suit in state or federal court. … However, a tribe consents to a court's exercise of jurisdiction by initiating a lawsuit. … When a tribe seeks an equitable decree, it assumes the risk that any equitable judgment secured could be modified if warranted by changed circumstances. … That is, when a tribe consents to a court's continued exercise of jurisdiction to enforce the terms of an equitable order, it also consents to the court's jurisdiction over suits seeking to modify or set aside that order. … The Tribe here expressly consented to the district court's continued exercise of jurisdiction to enforce the terms of the stipulated judgment. In so doing, it consented to the court's jurisdiction over suits seeking to modify it or set it aside. SPRAWLDEF's suit seeks to void the settlement and resulting judgment, set aside any City actions taken pursuant to the judgment, and require the City to comply with the Brown Act in future deliberations. The complaint does not specify any other remedies sought against the Tribe. The suit therefore falls within the scope of the Tribe's waiver of sovereign immunity in the settlement agreement and stipulated judgment." (Internal quotations, citations and emendations omitted.)

In *Southcentral Foundation v. Alaska Native Tribal Health Consortium*, 2020 WL 5509742 (9th Cir. 2020), Congress had created the Alaska Native Tribal Health Consortium (ANTHC), pursuant to Section 325 of the Department of the Interior and Related Agencies Appropriations Act of 1998 to provide certain statewide health services at the Alaska Native Medical Center in Anchorage. Southcentral Foundation (SCF), a nonprofit **regional tribal health organization** member of ANTHC, sued ANTHC for alleged violations of Section 325 in (1) forming an Executive Committee and delegating to it the full authority of the ANTHC Board of Directors; and (2) erecting informational barriers in a Code of Conduct and Disclosure Policy. The district court dismissed for lack of standing but the Ninth Circuit reversed: "Section 325 conferred governance and participation rights to SCF, which necessarily includes an entitlement to information necessary to effectively exercise those rights."

In *United States v. Begay*, 2020 WL 5493743 (10th Cir. 2020), Begay, a Navajo citizen, was prosecuted federally under the **Major Crimes Act** for assault and battery arising from an attack on another Navajo on the Navajo reservation. After Begay pled guilty, the Probation Office issued a Presentence Report (PSR) calculating Begay's guidelines imprisonment range to be 46 to 57 months. In *Kimbrough v. United States*, 552 U.S. 85, 128 S.Ct. 558 (2007), the U.S. Supreme Court had upheld deviations from the sentencing guidelines based on the unwarranted discrepancies in penalties imposed for possession and sale of cocaine in crack vs. powder form. Analogizing to the *Kimbrough* case, Begay argued that he should receive less than 46 months based on disparities in the sentences received by Native Americans in federal court for aggravated assault as compared to state-court sentences for similar conduct. The district court rejected Begay's argument and the Tenth Circuit, citing several of its precedents, affirmed: "We are sympathetic to Begay's concern that Native Americans receive harsher sentences for aggravated assault than other groups for no reason other than Native Americans are disproportionately subject to federal criminal jurisdiction. Nevertheless, we acknowledge '[w]e cannot overrule the judgment of another panel of this court. We are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court.' *In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993) (per curiam). *Branson* and *Wiseman* control, and they preclude consideration of Begay's sentencing-disparity arguments."

In *Jamul Action Committee v. Simermeyer*, 2020 WL 5361652 (9th Cir. 2020), a small group of Kumeyaay Indians residing on a two-acre plot of land in Rancho Jamul, California, in 1981 had organized under the Indian Reorganization Act (IRA) as the Jamul Indian Village (Village). The Bureau of Indian Affairs (BIA) had approved the Village's constitution, and the Village had appeared on the BIA's published list of federally **recognized Indian tribes** ever since. When the Village sought to open a gaming enterprise, groups opposed sued federal and Village officials. Relying on the BIA's historical practice of distinguishing, for purpose of the IRA, between tribes and less sovereign Indian communities, the plaintiffs argued that the Village fell into the latter category and was not eligible to engage in gaming under the Indian Gaming Regulatory Act. The district court rejected the challenge and held that the Village enjoyed sovereign immunity. The Ninth Circuit affirmed: "The Act of May 31, 1994, prohibits any agency decision under the IRA 'that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.' … The purpose and effect of the Act was to eliminate the distinction between 'created' and 'historic' tribes. … Even if the BIA intended the Village to have only a different and lesser status when the Village was first included on the list of recognized tribes, federal law no longer permits this distinction. Today, the Village enjoys the same privileges and immunities as other federally recognized Indian tribes, including tribal sovereign immunity."

In *Pauma Band v. California*, 2020 WL 5225700 (9th Cir. 2020), the Pauma Band of Luiseno Mission Indians of the Pauma and Yuima Reservation (Pauma) sued California officials under 25 U.S.C. § 2710(d)(3)(A) of the **Indian Gaming Regulatory Act (IGRA)**, which provides that, upon a request from a tribe, a state "shall negotiate with the Indian tribe in good faith to enter into such a compact" and that courts "may" consider "the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities" when evaluating whether a state negotiated in good faith and "shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence" of bad faith. The district court granted the State summary judgment and the Ninth Circuit Court of Appeals affirmed: "The State actively participated in the negotiations and tried to advance the negotiations. True, the State was reluctant to finalize compact language during the second meeting, but it encouraged Pauma to circulate draft language so it could analyze the information and respond in writing. The record is replete with examples of the State's fruitless requests that Pauma provide specific details about its envisioned on-track facility. Moreover, Pauma filed this action without ever commenting on the State's sample compact from North Dakota, its draft off-track wagering addendum, or its draft compact. A state's duty to negotiate in good faith does not compel blind negotiation, and nothing in the record shows that the State negotiated in bad faith over on-track horse racing and wagering."

In *Chemehuevi Indian Tribe v. United States*, 2020 WL 5807578 (Fed. Cl. 2020), the Chemehuevi Tribe (Tribe) sued the United States in the Court of Federal Claims under the **Indian Tucker Act** seeking (1) accounting and damages for mismanagement of funds previously paid to the Tribe to compensate for damages resulting from construction of the Parker Dam, (2) accounting and damages for Indian Claims Commission judgment funds distributed decades earlier,

(3) damages for alleged mismanagement of tribal water rights, (4) an accounting and damages for mismanagement of shoreline and suspense accounts, and (5) a breach of trust claim arising out of a 1996 Arthur Andersen Report accounting for the Tribe's trust funds. The court dismissed all claims: "[T]he Complaint is long on history and legal conclusions but almost entirely devoid of operative facts. And although the history is often troubling, to say the least, the Tribe's claims are barred by the statute of limitations, erroneous as a matter of law, so equivocal as to fail to state a claim, or plainly outside of this Court's jurisdiction. Indeed, even after more than two years of exhaustive jurisdictional discovery, the Tribe's Complaint is a jumbled puzzle that once properly arranged and viewed even in the light most favorable to the Tribe, reveals that it has backed itself into a corner from which it cannot proceed further."

In *Scotts Valley Band v. United States*, 2020 WL 5763583 (D.D.C. 2020), the Scotts Valley Band of Pomo Indians (Scotts Valley) filed a complaint against officials of the United States Department of the Interior (DOI) who denied Scotts Valley's request for a determination that land newly acquired by the Tribe fell within the "restored lands" exception to the **Indian Gaming Regulatory Act (IGRA)** prohibition against gaming on lands acquired after enactment of the IGRA. The Yocha Dehe Wintun Nation (Yocha Dehe) moved to intervene, arguing that the land at issue was the exclusive territory of its ancestors, the Patwin people, and that if Scotts Valley was permitted to develop the parcel, including by establishing a casino there, Yocha Dehe's existing nearby gaming facility will suffer "severe injury," thereby harming the important tribal programs and cultural resources that depend upon casino revenue. The Court denied the motion to intervene but indicated it would permit Yocha Dehe to file an amicus brief later in the proceedings: "In a case such as this, where there are a series of steps with multiple decision makers standing between Scotts Valley and the proposed development, the movant cannot demonstrate that it is substantially probable that the remand, or even the reversal of the preliminary DOI decision at issue will result in lost revenue to Yocha Dehe."

In *United States v. Estate of Gallego*, 2020 WL 5748099 (D. S.D. 2020), the Oglala Sioux Tribe entered into a residential lease with Ernabelle Skye for a parcel of trust land on Pine Ridge Indian Reservation. Skye assigned the residential lease to Gallego and the assignment was recorded as an encumbrance in the Bureau of Indian Affairs (BIA) Title Status Report of the Real Property. Wells Fargo loaned Gallego $55,736 and secured the loan by taking a leasehold mortgage, which the United States guaranteed under **Section 184 of the Housing and Community Development Act of 1992** which provides that, in the event of default, the leasehold must be offered to the tribe, tribal housing authority or other tribal member. When Gallego's estate defaulted on the loan, the United States paid Wells Fargo the amount due pursuant to the guarantee, assumed the loan and sued Gallego's estate and the Tribe. The Court granted a judgment of default but declined to grant a judgment of foreclosure in view of affirmative defenses asserted by the Tribe related to alleged deficiencies in the procedures followed by the lender and the government in offering the property to the Tribe: "In order for the Court to enter a judgment of foreclosure and decree of sale, the Government must first bring a motion addressing the merits of the Tribe's affirmative defenses in this case and/or the Tribe's standing to object to the foreclosure in this case."

In *Jamestown S'klallam Tribe v. Azar*, 2020 WL 5505156 (D.D.C. 2020), the Jamestown S'Klallam Tribe (Tribe) owned and operated the Jamestown Family Health Center in Sequim, Washington, whose patients were 97% and 3% non-Indian and Indian, respectively. The Tribe submitted a proposal to the Indian Health Services (IHS), a division of the Department of Health and Human Services (HHS), for funding under the **Indian Self-Determination and Education Assistance Act (ISDEAA)** for costs (including depreciation, interest, and maintenance) associated with the use of the entire facility. IHS rejected the proposal on the ground that it was not obligated to compensate the Tribe for costs attributable to services to non-Indians. The Tribe sued IHS and HHS officials. The Court granted the government summary judgment: "IHS determined that … nearly 80% of the Health Center is used to serve only non-Indian, non-IHS beneficiaries. Compensating the Tribe for allowable costs attributable to that 80% would be tantamount to paying it for the facilities costs of providing services exclusively to non-beneficiaries. That would not be a reasonable use of IHS's limited funds. Put briefly, section 105(l) lease compensation is intended to reimburse tribes, as federal contractors are reimbursed, for the reasonable costs of carrying out services in the place of the government. Under the ISDEAA, the services that tribes are so authorized to perform are those for Indian beneficiaries. Section 105(l), therefore, is intended to reimburse tribes for the costs they incur providing those services, not to provide funds that underwrite services to non-beneficiaries."

In *Shoshone-Bannock Tribes of Fort Hall Reservation v. Bernhard*, 2020 WL 5440548 (D.D.C. 2020), the Shoshone-Bannock Tribes of the Fort Hall Reservation (Tribes) had sued the federal government for breach of trust, alleging mismanagement of tribal assets. The case was settled pursuant to an agreement that resolved all claims against the United States accrued as of the 2012 settlement date but recognized certain exceptions, including the Tribes' claims against "third parties for the wrongful use of railroad **rights-of-ways** located off the Fort Hall Reservation." In 2018, the Tribes sued the United States, federal officials, the Union Pacific Railroad Company and the City of Pocatello in the United States District Court for the District of Idaho over several plots of land in Pocatello, Idaho, contending that they had granted the lands to the United States in the 1880s for railroad easements, that the easements included a reservation of the Tribes' reversionary interests in the event the parcels were no longer used for railroads and that, the easements having been abandoned by the railroads, the court should order the government to transfer title to the Tribes. The Idaho district court stayed the government's motion while the Tribes filed a motion with the D.C. District Court, which had retained jurisdiction to enforce the 2012 settlement, asking the Court to clarify that the Settlement did not waive their claims against the United States arising from the wrongful use of railroad rights-of-way or that, if it did, their claims arose after May 16, 2012, when the Court accepted the Settlement. The D.C. court partially granted and partially denied the Tribes' motion for clarification, holding that the Idaho claims were within the types of claims that were released in the 2012 settlement but left it to the Idaho district court to assess when the claims arose.

In *MacLeod v. Braman*, 2020 WL 5258478 (E.D. Mich. 2020), MacLeod, a member of the Sault Ste. Marie Chippewa Tribe, challenged his Michigan drug convictions on the ground that, as a tribal member, he was permitted to grow and sell marijuana free from state regulation under the 1836 Treaty of Washington. The District Court disagreed: "The determination of whether a state court is vested with jurisdiction under state law over a criminal case is a function of the state courts, not the federal courts. … The Sixth Circuit has noted that "[a] state court's interpretation of state **jurisdictional** issues conclusively establishes jurisdiction for purposes of federal habeas review." *Strunk v. Martin*, 27 F. App'x. 473, 475 (6th Cir. 2001). Petitioner's claims that the trial court lacked jurisdiction to try his case raises an issue of state law because it questions the interpretation of Michigan law, and is therefore not cognizable in federal habeas review."

In *Pueblo of Jemez v. United States*, 2020 WL 5238734 (D.N.M. 2020), the Jemez Pueblo sued under the federal common law and the Quiet Title Act, 28 U.S.C. § 2409a (QTA), seeking a judgment that the Pueblo had the exclusive right to use, occupy, and possess the lands of the Valles Caldera National Preserve "pursuant to its continuing aboriginal title to such lands." Several other tribes contested the Pueblo's claim based on their own historical use of the lands. The district court had previously dismissed, concluding that although the Jemez Pueblo had continuously used and occupied the Valles Caldera for a long time, many Pueblos and Tribes also used the Valles Caldera, defeating Jemez Pueblo's **aboriginal title claim**, thus quieting title in the United States. 2019 WL 4740604 (D.N.M. 2019). On motions to reconsider, the court concluded that Jemez Pueblo would not be permitted to seek aboriginal title to small sub-areas where it had not proven aboriginal title to the surrounding areas; "(iii) Jemez Pueblo's Valle San Antonio use was not exclusive; (iv) Jemez Pueblo's Redondo Meadows use was not exclusive; (v) Jemez Pueblo had not established aboriginal title to the geothermal project area within the Valles Caldera; and (vi) Jemez Pueblo has not established aboriginal title to Banco Bonito."

In *Seneca Nation v. Cuomo*, 2020 WL 5248467 (W.D.N.Y. 2020), the Seneca Nation, in 1954, in return for a one-time payment of $75,000, had granted an easement through Nation lands to the State of New York for the purpose of building a portion of the New York Throughway. The State failed to obtain federal approval, as required by 25 U.S.C. § 323. The Nation sued the Thruway Authority and the State in federal court in 1993, contending that the easement was invalid under the **Non-Intercourse Act, 25 U.S.C. § 177**. The Second Circuit, without addressing the validity of the easement, affirmed dismissal on the ground that, under the Eleventh Amendment, the court could not exercise jurisdiction over the State of New York, a necessary party. The Nation brought the current suit in 2018, naming Governor Cuomo and other officials in their official capacities and seeking an injunction ordering state officials to obtain a valid easement. The defendants moved to dismiss, largely on the basis of the alleged collateral estoppel effect of the 1993 proceedings. The magistrate judge recommended that the motion to dismiss be granted but the district court disagreed and denied it: "The issues raised in the current litigation are different than those decided by Judge Arcara and the Second Circuit in the 1993 suit. The current issues are (1) whether the Nation's claims against

state officials may proceed under *Ex parte Young*; (2) and, if so, whether the easement was validly obtained. Those specific issues were not decided in the 1993 case. As explained above, the only issues decided by Judge Arcara and the Second Circuit were that (1) the State—not the Thruway Authority— owns the easement; and (2) the State was an indispensable party that was immune to suit and the Nation's claims therefore could not proceed against the State, the Thruway Authority, and the Thruway Authority's executive director. … Although a close question, this Court agrees with the Nation that its suit may proceed under *Ex parte Young*. Taking the allegations of the complaint as true—as this Court must—there is an ongoing violation of federal law: the State is using and earning income from an invalid easement. Although it is true that the alleged wrong occurred initially when the easement was formed, the Nation adequately alleges ongoing wrongs—that is, the unsanctioned use of its lands. … The defendants may well have a valid laches defense in this case. But it is not plain *from the complaint* that laches applies. It is not clear, for example, what the prejudice is to the defendants or whether there was actual lack of diligence during all those years on the part of the Nation. Thus, just as it is too soon to weigh in on the merits of this lawsuit, see *supra*, so it is premature to decide whether laches applies." (Emphasis added in original.)

In *San Carlos Apache Tribe v. Azar*, 2020 WL 5111109 (D. Ariz. 2020), the Indian Self-Determination and Education Assistance Act (ISDEAA) required the Indian Health Service to enter into contracts with tribes to cover the costs of carrying out federal programs, including both direct costs and "indirect costs," defined to include "any additional administrative or other expense related to the overhead incurred by the tribal contractor in connection with the operation of the Federal program, function, service, or activity pursuant to the contract." The San Carlos sought funding from the IHS to cover indirect costs relating to revenues it received from non-IHS third parties, including Medicare, Medicaid and private insurers. When the IHS declined, the Tribe sued. The district court granted the government's motion to dismiss, holding that the costs of administering third-party revenues were not **eligible indirect costs under the ISDEAA**: "Numerous subsections within § 5325(a) refer to funds that are 'provided' by the Secretary as part of the Secretarial Amount. … Other subsections refer to contract support costs that must be 'paid' by the Secretary. … In contrast, § 5325(m)—the only section in § 5325 concerning program income (and accordingly, third-party revenue)—refers to 'income *earned* by a tribal organization in the course of carrying out a self-determination contract.' (emphasis added). The Court therefore agrees with the court in *Swinomish Indian Tribal Community* that '[r]ead together, the ISDEAA's various provisions clearly limit the Secretarial amount to funds that the IHS appropriates and exclude from that amount any third-party revenue that the Tribe collects on its own.' … Contract support costs accordingly need not be provided for expenditures of third-party revenue."

In *Driscoll v. Stapleton*, 2020 WL 5793546 (Mont. 2020), plaintiffs, including members of Montana tribes, challenged two recent Montana **voting laws** that (1) required absentee ballots to be returned to local election offices no later than 8:00 p.m. on Election Day, and (2) restricting the delivery of such ballots by persons other than the elector (Ballot Interference Prevention Act or BIPA). The lower court preliminarily enjoined the enforcement of both laws. The Montana Supreme Court reversed the injunction against the election-day ballot deadline but affirmed the preliminary injunction against the ballot-delivery restriction: "Noting that voters have come to rely on ballot-collection services, Democrats argue that BIPA will disproportionately affect the right of suffrage for certain subgroups, including Native Americans, rural and elderly voters, students with full-time jobs, low-wage workers, working parents, disabled voters, and first-time voters. Democrats presented evidence of increased Native American voter turnout between the 2014 and 2018 elections due to the efforts of organizations like Western Native Voice that do ballot-collection work on reservations. The District Court found that the evidence of various factors contributing to unequal access to the polls for Native American voters would be exacerbated by BIPA, burdening this subgroup's constitutional right to vote. … [T]he Secretary has pointed to no evidence in the preliminary injunction record that would rebut the District Court's finding of a disproportionate impact on Native American voters, and he leaves the contention largely undisturbed in his briefing on appeal. The Secretary's only suggestion is a general one—that the alternative means of returning ballots or of voting in person remain equally available to all voters. But this does not address Democrats' evidence that the burden on Native American communities is disproportionate, and the Secretary fails to refute the District Court's finding. … Democrats' evidence was sufficient to make a prima facie showing of the harm BIPA may impose on Native American voters in particular. On review of the preliminary injunction record, we conclude that the District Court did not err in finding prima facie evidence that BIPA may unconstitutionally burden the right of suffrage, particularly with

respect to Native American communities, or in concluding that the Secretary did not demonstrate an interest that weighed more heavily than the burdens Democrats assert. … Neither Democrats nor the District Court took issue with the need for a deadline by which absentee ballots must be returned. … The District Court failed to analyze how the Ballot Deadline would impact other related election functions and deadlines or to consider whether enjoining the Ballot Deadline would maintain the status quo. Because it would not, we reverse those portions of the District Court's order enjoining the Ballot Deadline and mandating that absentee ballots postmarked on or before Election Day be counted as valid provided they are received by the deadline for federal write-in ballots."