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Indian Nations update

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ARPA Presents Rare Opportunity to Meet Middle-Income Housing Needs

The Native American Housing Assistance and Self-Determination Act of 1996 ("NAHASDA"), the federal government's principal housing grant program for tribes, generally limits assistance to families whose income does not exceed 80% of area (or national) median income ("AMI"). The absence of federal funding and other challenges associated with the development of housing in Indian country, particularly on trust land, has led to an acute shortage of housing for middle-income families.

The American Rescue Plan Act of 2021 ("ARPA") will result in the infusion of $20 billion into Indian country. The Treasury Department's May 17, 2021 Final Interim Rule provides that certain designated activities, including "development of affordable housing to increase supply of affordable and high-quality living units," are permissible uses of ARPA funds when "provided to households and populations living in a qualified census tract" ("QCT") or "provided by a Tribal government." Explanatory comments published with the Rule suggest a pathway for tribes to use ARPA funds to meet the housing needs of middle-income (e.g., up to 125% of AMI) tribal member families, provided assistance is rendered through a carefully-crafted program that takes into account the purposes of the ARPA and the requirements of other federal regulations that govern federal grant programs. Godfrey & Kahn has over 25 years experience in tribal housing. For more information, contact John Clancy (jclancy@gklaw.com or 414.287.9256) or Brian Pierson (bpierson@gklaw.com or 414.287.9456).

Selected Court Decisions

In *Ysleta del Sur Pueblo v. City of El Paso*, Not Reported, 2021 WL 5504744 (5th Cir. 2021), Ysleta del Sur Pueblo sued in federal district court seeking a declaratory judgment that it was the rightful owner of 111 acres possessed by the City of El Paso, citing recognition of its title by the Spanish Crown in 1751 and confirmation by the United States in the Treaty of Guadalupe Hidalgo ending the Mexican War. The district court dismissed for lack of **subject matter jurisdiction** and the Fifth Circuit affirmed: "The Pueblo nonetheless contends that even though it is never mentioned, the complaint implicitly rests on a theory of aboriginal title. … Here, the Pueblo's contention that its complaint implicitly alleges an aboriginal title claim is belied by the explicit text of the complaint. The pleading expressly grounds the Pueblo's claim for relief not on alleged possession of the land from time immemorial, but on 'title to real property deriving from a [1751] Spanish grant.' … Nor is the INIA [Indian Non-Intercourse Act] mentioned, or even alluded to, anywhere in the complaint. The Pueblo asserts on appeal that the INIA, if applicable, may form part of its cause of action because the INIA would bar any alienation of its land without congressional approval. … Indeed, there is no allegation in the complaint that the INIA must be applied to invalidate purported conveyances in the chain of title of the land at issue because Congress did not approve the grants. And the

Pueblo makes no allegation that federal law generically bars the alienation of the Pueblo's claimed land. The complaint only contains the bare assertion that the land belongs to the Pueblo by virtue of the 1751 Spanish land grant. While perhaps an interesting question of title, it is one to be resolved by a Texas court, applying Texas law."

In *Hengle v. Treppa*, 2021 WL 5312780 (4th Cir. 2021), Virginia consumers who had received short-term loans, at interest rates exceeding the rates allowable under Virginia law, from **online lenders** affiliated with the Habematolel Pomo of Upper Lake Tribe (Tribe) brought a putative class action against tribal officials and two non-members affiliated with the tribal lenders to avoid repaying their debts, which they alleged violated Virginia and federal law. The defendants moved to compel arbitration under the terms of the loan agreements and to dismiss the complaint on various grounds. The district court denied the motions to compel arbitration and, with one significant exception, denied the motions to dismiss, holding that the arbitration provision was an unenforceable prospective waiver of the borrowers' federal rights, the tribal officials were not entitled to tribal sovereign immunity, the loan agreements' choice of tribal law was unenforceable as a violation of Virginia's public policy against usurious loans. The district court dismissed the federal claim against the tribal officials based on the Racketeer Influenced and Corrupt Organizations Act (RICO) on the ground that RICO does not authorize private plaintiffs to sue for injunctive relief. The Fourth Circuit affirmed: "[W]here an arbitration agreement prevents a litigant from vindicating federal substantive statutory rights, courts will not enforce the agreement. … Pursuant to the prospective waiver doctrine, courts—including this one—have refused to enforce arbitration agreements that limit a party's substantive claims to those under tribal law, and hence forbid federal claims from being brought. … [T]the choice-of-law clauses of this arbitration provision, which mandate exclusive application of tribal law during any arbitration, operate as prospective waivers. In effect, those clauses would require the arbitrator to determine whether the arbitration provision impermissibly waives federal substantive rights without recourse to federal substantive law. As a result, the delegation clause is unenforceable as a violation of public policy. … [The choice-of-law clauses of the arbitration provision operate as a prospective waiver twice over, waiving not only a borrower's right to pursue federal statutory remedies … but also the very federal and state defenses to arbitrability that preserve that right. … In line with *Hayes, Dillon*, and every court of appeals to consider the question, we conclude that the choice-of-law clauses applying tribal law to the exclusion of federal law cannot be severed because they go to the essence of the agreement to arbitrate. … We agree with the district court that the Supreme Court's decision in Bay Mills forecloses the Tribal Officials' argument. Tribal sovereign immunity does not bar state law claims for prospective injunctive relief against tribal officials for conduct occurring off the reservation. … In *Pennhurst*, the Supreme Court refused to extend the *Ex parte Young* rationale to suits against state officials alleging violations of their own State's laws. … But the sovereignty and federalism concerns underpinning *Pennhurst* are not implicated here. In suits against tribal officials like *Bay Mills* envisioned, federal courts are called upon to instruct tribal officials on how to conform their conduct to state law. … In sum, substantive state law applies to off-reservation conduct, and although the Tribe itself cannot be sued for its commercial activities, its members and officers can be. … We acknowledge that contractual choice-of-law clauses should be enforced absent unusual circumstances, but the circumstances here—unregulated usurious lending of low-dollar short-term loans at triple-digit interest rates to Virginia borrowers—unquestionably shocks one's sense of right in view of Virginia law." (Internal quotations, emendations and citations omitted.)

In *Acres Bonusing, Inc v. Marston*, 2021 WL 5144701 (9th Cir. 2021) Blue Lake Casino & Hotel (Blue Lake Casino) had previously filed a contract fraud action against Acres Bonusing, Inc. and James Bonusing, its principal (collectively, ABI) in the Blue Lake Rancheria Tribal Court. ABI contested the Court's jurisdiction. Marston, the tribal court judge initially assigned to the case, later recused himself and was replaced by Lambden, a retired California Court of Appeals justice. After Lambden dismissed the case, ABI brought a malicious prosecution action against lawyers, law firms, and court personnel associated with the tribal court fraud case, seeking damages against them personally in order to avoid a sovereign immunity defense under the rule of *Lewis v. Clarke*. The district court dismissed all defendants on the ground of **sovereign immunity** anyway, concluding that the suit was really aimed at the Tribe and that all defendants were acting within the scope of authority conferred by the Tribe. The Ninth Circuit Court of Appeals reversed, holding that suits for money damages from certain individual defendants were permissible but that other defendants were entitled to personal immunity: "Applying Lewis, Pistor, and our earlier precedents to the case before us, we conclude that tribal sovereign immunity does not bar this suit. Acres and ABI seek money damages

against the defendants in their individual capacities. Any relief ordered by the district court will not require Blue Lake to do or pay anything. Because any 'judgment will not operate against the Tribe,' Lewis, 137 S. Ct. at 1291, Blue Lake is not the real party in interest, and tribal sovereign immunity does not apply. … [A]s we explained in *Pistor*, 'tribal defendants sued in their individual capacities for money damages are not entitled to sovereign immunity, even though they are sued for actions taken in the course of their official duties.' 791 F.3d at 1112. That is the same principle that the Supreme Court reaffirmed two years later in *Lewis*. … Although tribal sovereign immunity does not bar this action, defendants may still avail themselves of personal immunity defenses. … We easily conclude that Chief Judge Marston is entitled to absolute judicial immunity. … Although plaintiffs allege that Huff also performed other roles for the tribe, they challenge only actions she took in her role as Clerk. … According to the plaintiffs, Huff issued an improper summons in the tribal court case and rejected a filing from Acres for not conforming with a tribal court rule. These actions were an integral part of the judicial process … and so Huff is entitled to absolute immunity. … The attorneys functioning as Chief Judge Marston's law clerks—defendants Burrell, DeMarse, Vaughn, and Lathouris—are also entitled to absolute immunity."

In *West Flagler Associates v. Haaland*, 2021 WL 5492996 (D.D.C. 2021), the State of Florida and the Seminole Tribe had entered into a gaming compact under the Indian Gaming Regulatory Act (IGRA) under which the Tribe was authorized to offer **online sports betting throughout the State**, including to bettors located off tribal lands. The Compact was submitted to the Secretary of the Interior (Secretary) for approval, as required by the IGRA. The Secretary, by taking no action within forty-five days, allowed the Compact to become effective under the IGRA default provision, explaining in a letter that the Compact did not violate IGRA's requirement that tribal gaming occur only on "Indian lands" and only if such gaming is authorized by the "Indian tribe having jurisdiction over such lands" because the sports betting provision represented a permissible "allocation of criminal and civil jurisdiction" under IGRA, because Florida had consented to the Compact and because the IGRA "should not be an impediment to tribes that seek to modernize their gaming offerings." Owners of competing gaming and anti-gambling groups sued, arguing that the Compact's authorization of online betting violated the IGRA, the Unlawful Internet Gambling Enforcement Act (UIGEA), the Wire Act, and the Equal Protection Clause of the U.S. Constitution. On motions for summary judgment, the district court held that (1) owners of a competing gaming enterprise had standing based on potential lost profits, (2) the Seminole Tribe would not be permitted to intervene because the Secretary and the State of Florida were adequately advocating in favor of the compact and (3) the compact violated the IGRA by authorizing the Tribe to offer gaming outside of its lands: "The instant Compact attempts to authorize sports betting both on and off Indian lands. In its own words, the Compact authorizes such betting by patrons who are 'physically located in the State of Florida but not on [the Tribe's] Indian Lands.' … Most locations in Florida are not Indian lands, which IGRA defines to mean lands 'within the limits of any Indian reservation,' 'held in trust by the United States for the benefit of any Indian tribe,' or 'over which an Indian tribe exercises governmental power,'… And although the Compact 'deems' all sports betting to occur at the location of the Tribe's sports book(s)' and supporting servers, see Compact § III(CC)(2), this Court cannot accept that fiction. When a federal statute authorizes an activity only at specific locations, parties may not evade that limitation by 'deeming' their activity to occur where it, as a factual matter, does not."

In *Smith v. Landrum*, 334 Mich.App. 511, 965 N.W.2d 253 (Mich. App. 2020), Smith, a non-Indian owner of fee simple land on the L'Anse Reservation of the Keweenaw Bay Indian Community (Tribe) brought a quiet title action in Baraga County circuit court to obtain a prescriptive easement across adjacent land, also on the Tribe's reservation, owned in fee simple by Landrum, also a non-Indian. While Landrum's property had previously been held in trust for a member of the Tribe, it had passed into fee simple status when it passed to the member's non-Indian heirs through a Department of Interior probate proceeding. The Tribe's legal code provided that the Tribe's court would have jurisdiction over "all areas within the exterior boundaries of the L'Anse Indian Reservation." The circuit court decided on summary judgment that it lacked jurisdiction but the Michigan Court of Appeals disagreed and reversed, holding that the exercise of jurisdiction by the state court would not infringe the Tribe's right of self-government contrary to the rule of ***Williams v. Lee*** and that neither of the exceptions to the general rule of *Montana v. United States* circumscribing tribal jurisdiction over non-Indians was applicable: "Exercise of jurisdiction by the circuit court would have no significant, catastrophic-type consequences to the tribe and its power to control and govern its members and affairs. … Frankly, there would be little interference, if any, with tribal self-government as a result of the circuit court's ruling. The tribe lost control of

the disputed land (perhaps not all activity on that land, but the land itself) when it was transferred by Indians to non-Indians in 2012. Now that the land is non-Indian fee land, the presumption is against tribal jurisdiction, and resolution of the easement dispute between non-Indians on non-Indian fee lands will have no meaningful impact on the tribe's authority over the reservation and its members."

In *Lopez v. Quaempts*, 2021 WL 5561997 Not Reported (Cal. App 2021), the Confederated Tribes of the Umatilla Indian Reservation (Tribe) hired Lopez to be manager of its First Foods Policy Program. When the position turned out to be different from what Lopez believed the Tribe had represented, she sued the Tribe, Quaempts, the director of the Tribe's Department of Natural Resources (the Department), and Tovey, the Tribe's executive director. The trial court dismissed on the ground of **sovereign immunity** and the Court of Appeals affirmed, rejecting Lopez's argument that her suit against Quaempts and Tovey fell within the rule of *Lewis v. Clarke*: "Although the caption of the first amended complaint named Quaempts and Tovey as individuals, we may not simply rely on the caption but must determine whether the action against Quaempts and Tovey actually sought relief against the Tribe. … The first amended complaint alleged that Quaempts committed wrongful acts against Lopez while he was employed as the director of the Department. And Tovey failed to act or acted improperly as to Lopez while Tovey was employed as the Tribe's executive director. Lopez's declaration in opposition to defendants' motion to quash and dismiss described acts or omissions by Quaempts in interviewing Lopez, discussing her potential employment with the Tribe, and responding to her concerns about staffing and budget when she was the program manager. Lopez averred that her attorney unsuccessfully attempted to negotiate on her behalf with the Tribe and her only option was to obtain relief in state court. Lopez did not discuss in her declaration any attempt to obtain monetary relief from Quaempts or Tovey personally. Neither the first amended complaint nor Lopez's declaration stated that as to Quaempts and Tovey, Lopez sought a judgment against those defendants personally. … [U]nlike the circumstances in *Lewis*, the first amended complaint named the Tribe as a defendant and sought to hold the Tribe vicariously liable for the conduct of its employees Quaempts and Tovey, whose alleged acts or omissions in the course of recruiting, hiring and supervising Lopez, another tribal employee, formed the grounds for Lopez's causes of action. … In fact, the cause of action for fraudulent misrepresentation in violation of Labor Code section was based on defendants' alleged status as employers. … The Tribe was the real party in interest in the first amended complaint against Quaempts and Tovey. … [A] claim of error in the exercise of delegated power or the mere allegation that the agent acted illegally is not sufficient to establish that the acts of the agent were beyond his or her authority."