HOBBS STRAUS DEAN & WALKER

516 SE Morrison Street, Suite 1200
Portland, OR 97214

T 503.242.1745
F 503.242.1072

HOBBSSTRAUS.COM

MEMORANDUM

December 1, 2021

To: NATIONAL AMERICAN INDIAN HOUSING COUNCIL

From: Ed Clay Goodman and Cari Baermann
HOBBS, STRAUS, DEAN & WALKER, LLP

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

LITIGATION

A. Recent Supreme Court Decisions

1. *Yellen v. Confederated Tribes of the Chehalis Reservation* (CARES Act; ANCs)

Several tribes filed suit in 2020 seeking to prohibit the United States Treasury from distributing any of the $8 billion set aside for tribal governments from the Coronavirus Aid, Relief, and Economic Security (CARES) Act to Alaska Native Corporations (ANCs). The key issue revolved around the definition of "Tribal government" in the CARES Act and the Indian Self-Determination and Education Assistance Act's (ISDEAA) definition of "Indian tribe." The CARES Act provides that CRF monies must be made available to "Tribal governments," which the CARES Act further defines as "the recognized governing body of an Indian Tribe". The CARES Act defines "Indian Tribe" as having "the meaning given that term" in the ISDEAA. The ISDEAA defines "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." On June 25, 2021, the Supreme Court issued its decision, holding that Alaska Native Corporations (ANCs) are "Indian tribes" under the ISDEAA and, thus, they are "Tribal governments" under the CARES Act, and eligible to receive CRF monies. The Court held that ANCs established pursuant to the Alaska Native Claims Settlement Act (ANCSA) are "Indian tribes" under the ISDEAA because they satisfy the "recognized-as-eligible" clause in the ISDEAA's definition of "Indian tribe" by being eligible for ANCSA's programs and services. The Court rejected the Plaintiff Tribes' argument that the "recognized-as-eligible" clause was in reference to tribes' federal recognition status.

2. *United States v. Cooley* (Tribal jurisdiction)

This case involved the question of whether the lower courts erred in suppressing evidence on the basis that a tribal police officer lacked authority to temporarily detain and search a non-Indian, on a public right-of-way within a tribal reservation, based on a potential violation of state or federal law. After a tribal police officer stopped a non-Indian who he believed had committed a crime, he performed a search incident to arrest while awaiting local and federal police,

discovering firearms and illegal narcotics. The trial court granted the non-Indian's motion to suppress evidence found by the officer, and the Ninth Circuit affirmed. On petition to the Supreme Court, the federal government argued that the lower courts' decisions erroneously diminish the inherent sovereign authority of Indian tribes and unjustifiably impedes the enforcement of state and federal law on Indian reservations throughout the Ninth Circuit. On June 1, 2021, the Court unanimously reversed, holding that a tribal officer may detain a non-Indian who is suspected of committing a crime and perform a search incident while awaiting local and federal police.

3. *California v. Texas* (Affordable Care Act challenge)

California v. Texas involved a constitutional challenge to the individual mandate provision of the Affordable Care Act (ACA), which by extension, challenged the validity of the entire law. The Indian Health Care Improvement Act (IHCIA) and other Indian-specific provisions of the ACA are among many other provisions of the law that are unrelated to the individual mandate, but are threatened by the sweeping relief sought in the lawsuit. The State of Texas argued that the individual mandate can no longer be considered a proper exercise of congressional tax powers because Congress reduced the amount of the penalty to $0 as part of the Tax Cuts and Jobs Act of 2017 (TCJA). Texas also argued that the individual mandate was so central to the ACA that the remainder of the law could not continue to function as Congress intended without the mandate in place, and therefore the entire law should be struck down. On June 17, 2021, the Supreme Court voted 7–2 to uphold the ACA and reject the Plaintiffs' challenge in full. Justice Breyer penned the majority opinion, holding that Texas and the other Plaintiffs lacked standing to bring their case. Justice Alito filed a dissenting opinion joined by Justice Gorsuch. The Court avoided the substantive legal questions of the case, instead resting its decision on the threshold issue of standing.

4. *Alabama Association of Realtors v. Department of Health and Human Services* (CDC Eviction Moratorium)

On September 4, 2020, the CDC published an Eviction Moratorium Order in response to the COVID-19 pandemic. The Moratorium prohibited all private and public landlords and property owners from evicting individuals from residential properties for failure to make rental or housing payments. The eviction Moratorium was originally set to expire on December 31, 2020, but it was extended by Congress until March 31, 2021, and then again by the CDC through July 31, 2021. The Plaintiffs in this case originally brought a challenge to the moratorium, which was rejected by the Supreme Court on a 5-4 vote. One of the justices joining the majority, Brett Kavanaugh, stated in a concurrence that he doubted CDC had the authority to issue the moratorium, but that since it was going to expire shortly he did not think it was necessary to vote to strike it down. However, subsequent to that initial decision, on August 3, 2021, the CDC issued an order extending its Eviction Moratorium through October 3, but only for persons located in counties that had "substantial" or "high" transmission levels of COVID-19. Alabama Association of Realtors and other plaintiffs again brought suit to enjoin the Moratorium. On August 26, 2021, the Supreme Court issued a per curiam (unsigned) opinion striking down the CDC Eviction Moratorium. The six justices who voted to strike down the moratorium felt that the CDC exceeded its legal authority. The CDC had based its action on a decades-old statute (42 U.S.C. 264) that gave it certain authorities to address pandemics (e.g., ordering quarantines and

fumigation). The Court noted that while the measures authorized by the statute directly relate to preventing the interstate spread of disease, the Moratorium only indirectly related to interstate infection. The Court therefore held that the statute did not provide CDC authority to mandate an eviction moratorium, noting that if a federally imposed eviction moratorium is to continue, Congress must specifically authorize it.

B. Upcoming Supreme Court Cases (cert granted)

1. *Denezpi v. United States* (Double Jeopardy)

Denezpi presents the question of whether the Court of Indian Offenses (CFR) of the Ute Mountain Ute Agency is a federal agency such that the defendant's conviction in that court barred his subsequent prosecution in a United States District Court for a crime arising out of the same incident. The defendant argued that his trial in federal district court subsequent to the proceedings before the CFR court violated the Fifth Amendment's guarantee against double jeopardy. The Fifth Amendment prohibits more than one prosecution for "the same offence." However, under the dual-sovereignty doctrine, "a crime under one sovereign's laws is not 'the same offence' as a crime under the laws of another sovereign." The Tenth Circuit reasoned that the ultimate source underlying the CFR court's prosecution of the defendant was the Ute Mountain Ute Tribe's inherent sovereignty and not that of the federal government's. Therefore, the Tenth Circuit held that prosecution in federal District Court after defendant was prosecuted for same criminal conduct in the Court of Indian Offenses did not violate the Fifth Amendment's prohibition against double jeopardy.

2. *Ysleta del Sur Pueblo v. Texas* (Gaming)

This case considers whether the Ysleta del Sur Pueblo and Alabama-Coushatta Indian Tribes of Texas Restoration Act (Restoration Act) provides the Pueblo with sovereign authority to regulate non-prohibited gaming activities on its lands, or whether the Fifth Circuit's decision affirming *Ysleta I* subjects the Pueblo to all Texas gaming regulations. The Restoration Act prohibited gaming on the Alabama and Coushatta Indian Tribe's land to the same extent it was prohibited by the state of Texas. The Fifth Circuit held that the Restoration Act, instead of the Indian Gaming Regulatory Act, controls the issue of whether the Pueblo's gaming activities are allowed under Texas law. As a result, the Fifth Circuit held that the Pueblo's gaming is prohibited. The Ysleta del Sur Pueblo filed a petition for a writ of certiorari for review of the Fifth Circuit's decision.

C. Cert Petitions Still Pending

1. *Stand Up For California! v. Department of the Interior* (Land into trust; federal recognition)

A nonprofit organization, Stand Up For California!, filed a petition for certiorari challenging whether the Secretary can acquire land in trust on behalf of Indians whose federal supervision was terminated by Congress. The United States Department of the Interior and its Bureau of Indian Affairs (BIA) made a decision to acquire land into trust for the Wilton Rancheria to build a casino. Stand Up For California! argues that because Congress

disestablished Wilton through the California Rancheria Act ("Rancheria Act"), the Tribe is not federally recognized and therefore not eligible to receive land into trust. The District of Columbia Circuit Court of Appeals held that a court-approved settlement agreement was sufficient to have restored the status of the Tribe as federally-recognized.

2. *Big Sandy Rancheria Enterprises v. Bonta* (State regulation of tribal sales)

This case raises the question of whether an Indian tribe incorporated by federal charter under section 17 of the Indian Reorganization Act of 1934 (25 U.S.C. Sec. 5124) is an "Indian tribe or band with a governing body duly recognized by the Secretary of the Interior" authorized to bring suit under 28 U.S.C. Sec. 1362. The case also poses the question of whether the Indian Trader Statutes (25 U.S.C. Secs. 261-263) or the *White Mountain Apache Tribe v. Bracker* balancing test preempts the State of California's regulation of intertribal cigarette sales, where an Indian tribe sells tribally manufactured cigarettes to Indian tribal buyers on their home reservations. The Ninth Circuit, affirming the lower court decision, held that California cigarette tax regulations apply to inter-tribal sales of cigarettes by a federally chartered tribal corporation wholly owned by a federally recognized Indian tribe. In so holding, the Ninth Circuit rejected the corporation's argument that the Indian Trader Statutes preempt California's cigarette regulations as applied to inter-tribal sales of cigarettes.

3. *Hawkins v. Haaland* (Water rights)

The question presented is whether the federal government possesses final decision-making authority over the management of water rights held in trust for an Indian tribe. Ranchers who hold irrigation water rights in the Upper Klamath Basin region of the State of Oregon sued to prevent the Tribes' from making a "call" on their Treaty-reserved water rights that would require the ranchers to stop diverting water to irrigate their ranchlands. The ranchers challenge an agreement between United States and the Klamath Tribes, contending that the federal government, as trustee of the Tribes' water rights, unlawfully delegated its call-making authority to the Tribes and that absent such delegation, the Tribes would be unable to secure state implementation of their water rights. The Ninth Circuit held that the agreement does not delegate federal authority to the Tribes but instead recognizes the Tribes' preexisting authority to control their water rights under the Tribes'1864 Treaty. The Ninth Circuit therefore held that the ranchers did not establish the causation or redressability necessary for standing, and affirmed the lower court's dismissal of the ranchers' complaint.

4. *Haggerty v. United States* (Indian Country Crimes Act)

This case raises two questions on petition for certiorari: (1) whether the "interracial" nature of a minor offense in Indian Country is an element of the Indian Country Crimes Act (18 U.S.C. Sec. 1152), rather than an affirmative defense, and thus must be both pled and proved by the prosecution; and (2) whether the government must plead and prove the "interracial" nature of a minor offense in Indian Country to establish federal subject matter jurisdiction under 18 U.S.C. Sec. 1152. The defendant was convicted of malicious injury of property located on "Indian country" in violation of 18 U.S.C. §§ 1152 and 1363. He argued that because 18 U.S.C. § 1152 does not cover offenses committed by Indians against Indian victims, the Indian/non-Indian statuses of both the defendant and victim were essential elements of an offense prosecuted under § 1152 and therefore must be proven by the Government. He then argued that because the

Government did not present sufficient evidence proving that the defendant was a non-Indian, there was insufficient evidence supporting his conviction. The Fifth Circuit Court of Appeals disagreed and held that the intra-Indian exception was an affirmative defense that must be asserted by the defendant, with the Government retaining the ultimate burden of proof. The Court of Appeals therefore affirmed his conviction.

5. *Self v. Cher-Ae Heights Indian Community of the Trinidad Rancheria* (sovereign immunity)

The case presents the question of whether the immovable-property exception applies to tribal sovereign immunity. The case involved a plaintiff's attempt to establish a public easement over coastal property that the Tribe purchased in fee simple absolute. The Tribe has applied to the Bureau of Indian Affairs (BIA) to take the property into trust for the benefit of the Tribe. A California Court of Appeals rejected the plaintiffs' argument that the common law "immovable property" exception to sovereign immunity— i.e. states and foreign sovereigns are not immune to suits regarding real property located outside of their territorial boundaries— applied to the Tribe. The dissent in *Upper Skagit Indian Tribe v Lundgren,* an earlier Supreme Court case addressing tribal sovereign immunity, raised the argument that this doctrine applied to waive tribal sovereign immunity. The Court of Appeals therefore held that the Tribe's sovereign immunity barred the quiet title action to establish a public easement for coastal access on property owned by an Indian tribe.

6. *Challenges to McGirt v Oklahoma* (jurisdiction; reservation disestablishment)

There have been numerous petitions filed raising various challenges related to the 2020 Supreme Court decision in *McGirt v. Oklahoma,* 591 U.S. ___, 140 S.Ct. 2452, (2020). In *McGirt,* the Supreme Court considered whether Oklahoma had adjudicatory criminal jurisdiction over an Indian accused of a major crime enumerated under the Indian Major Crimes Act, committed within the boundaries of the Muscogee (Creek) Nation's historic reservation. Under federal law, an Indian reservation can only be diminished or disestablished by Congress through a clear expression of congressional intent to do so. The Court, in a 5–4 decision, held that the boundaries of the Muscogee (Creek) Nation's reservation remain intact. Because the reservation remained intact, the reservation land was Indian country for purposes of the federal crimes and as such, Oklahoma lacked criminal jurisdiction over McGirt's crimes.

Below are some of the questions being raised relating to the *McGirt* decision:

- *Oklahoma v. Cottingham*: Asking that *McGirt* should be overruled. (There are a number of other petitions arguing that *McGirt* should be overruled as well)

- *Parish v. Oklahoma*: Does *McGirt* apply retroactively to convictions that were final when McGirt was announced?

- *Oklahoma v. Castro-Huerta*: Does a State have authority to prosecute non-Indians who commit crimes against Indians in Indian Country?

7. *Dakota Access, LLC v. Standing Rock Sioux Tribe, et al.* (NEPA)

This case presents the question of whether, under the National Environmental Policy Act (NEPA), an agency that carefully considers all criticisms of its environmental analysis must also "resolve" those criticisms to the court's satisfaction to justify a finding of no significant impact; and whether procedural error under NEPA per se warrants remand with vacatur. *Dakota Access* involves the Lake Oahe, created when the United States Army Corps of Engineers flooded thousands of acres of Sioux lands in the Dakotas by constructing the Oahe Dam on the Missouri River. The Lake currently provides several successor tribes of the Great Sioux Nation with water for drinking, industry, and sacred cultural practices. The Dakota Access Pipeline passes beneath Lake Oahe's waters and transports crude oil from North Dakota to Illinois. Under the Mineral Leasing Act, 30 U.S.C. § 185, the pipeline must have an easement from the Corps in order to traverse the federally owned land at the Oahe crossing site. The D.C. Circuit Court of Appeals affirmed the lower court's decision that the Corps acted unlawfully and violated NEPA by issuing that easement without preparing an environmental impact statement despite substantial criticisms from the Tribes. The court affirmed the court's order vacating the easement while the Corps prepares an environmental impact statement. However, the Court of Appeals reversed the lower court's order to the extent it directed that the pipeline be shut down and emptied of oil.

8. Challenges to the Indian Child Welfare Act

Four certiorari petitions have been filed with regard to the en banc decision by the U.S. Court of Appeals for the Fifth Circuit upholding and striking down certain provisions of the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901–1963 (ICWA), and its implementing regulations. The Fifth Circuit's en banc *Brackeen v. Haaland* decision held that Congress had authority to enact ICWA and that ICWA's "Indian child" classification is not unconstitutionally race-based and therefore not in violation of the Equal Protection Clause of the U.S. Constitution. However, the judges were equally divided and thus the District Court's ruling was "affirmed without a precedential opinion" that adoptive placement preference for "other Indian families" and foster care placement preference for "Indian foster home[s]" both violate the Equal Protection Clause. Further, the court also found that some of ICWA's provisions violate the anti-commandeering doctrine, including ICWA's "active efforts" provision. Additionally, it concluded that some provisions of ICWA's implementing regulations violate the Administrative Procedure Act (APA), including the regulations' "good cause" provision.

- The United States has petitioned the Supreme Court to reverse the Fifth Circuit on Fifth and Tenth Amendment grounds, and it argued that the individual plaintiffs lack standing to challenge ICWA's placement preferences for "other Indian families" and "Indian foster home[s]." *Haaland v. Brackeen*.

- The Cherokee Nation, Morongo Band of Mission Indians, Oneida Nation, and Quinault Nation filed a companion petition in defense of ICWA's constitutionality. *Cherokee Nation v. Brackeen*.

- Texas filed a petition asking the Court to review ICWA provisions that, in the State's view, the Fifth Circuit erroneously upheld. *Texas v. Haaland*.

– Finally, in *Brackeen v. Haaland*, the individual challengers filed their own petition for review on whether ICWA violates the U.S. Constitution and whether ICWA's placement preferences exceed Congress's Article I authority.

9. *Grand River Enterprises Six Nations v. Boughton* (State regulation of tribal sales)

Grand River Enterprises Six Nations, LTD, an indigenous-owned company, raises the questions of whether Connecticut violates the dormant Commerce Clause, Due Process protections, and Supremacy clause of the U.S. Constitution in its actions relating to its requirement that a manufacture obtain and provide private sales and shipping information possessed by non-Connecticut distributors doing no business in Connecticut and having no nexus with Connecticut. Connecticut requires certain cigarette manufactures to report to the State its total nation-wide sales of cigarettes on which federal excise tax is paid, its total interstate cigarette sales, and its total intrastate cigarette sales. Grand River is one of the manufacturers that Connecticut required to report its sales. The Second Circuit Court of Appeals held that the state reporting requirement has a rational relationship to the State's legitimate interests in collecting excise taxes and combatting cigarette smuggling that satisfies both federal and state due process requirements, and that it violated neither the Commerce Clause nor the Supremacy Clause.

D. Notable 2021 Circuit and District Court Cases

1. *Acres Bonusing, Inc. v. Marston*, No. 20-15959, 2021 WL 5144701 (9th Cir. 2021) (Tribal sovereign immunity)

Blue Lake Rancheria sued Acres over a business dispute involving a casino gaming system. Acres prevailed in tribal court but brought suit in federal court against the tribal court judge and others. There were two groups of defendants. The Blue Lake Defendants consisted of tribal officials, employees, casino executives, and lawyers who assisted the tribal court. The second group was comprised of Blue Lake's outside law firms and lawyers. The district court held that tribal sovereign immunity shielded all of the defendants from suit. Reversing in part the Ninth Circuit Court of Appeals held that tribal sovereign immunity did not apply because Acres sought money damages from the defendants in their individual capacities. Based on the framework of Lewis v. Clarke, 137 S. Ct. 1285 (2017), the Court of Appeals held that the Tribe was not the real party in interest. However, the Ninth Circuit held that the judge, his law clerks, and the tribal court clerk were entitled to absolute judicial or quasi-judicial immunity.

2. *Cook Inlet Tribal Council, Inc. v. Dotomain, 10 F.4th 892 (D.C. Cir. 2021)* (Indian Self-Determination and Education Assistance Act)

A federal appeals court issued another ruling narrowly construing the contract support costs (CSC) requirement in favor of the Indian Health Service (IHS). This case involves a longstanding controversy over how to read the CSC provisions of the Indian Self-Determination and Education Assistance Act (ISDEAA). On August 24, 2021, the D.C. Circuit Court of Appeals reversed a district court ruling awarding the Cook Inlet Tribal Council CSC to cover facilities costs not fully funded in the "Secretarial amount" transferred by IHS to the Council. The court ruled that the additional facilities costs claimed by the Council did not meet the

definition of CSC because they are costs normally incurred by the Secretary when operating the program directly. The appeals court thus vacated the district court's judgment awarding the Council $302,000.

3. *Swinomish Indian Tribal Community v. Becerra*, No. 19-5299 (D.C. Cir. 2021) (Indian Self-Determination and Education Assistance Act)

On April 13, 2021, the U.S. Court of Appeals for the District of Columbia Circuit affirmed a district court ruling holding that the Swinomish Indian Tribal Community is not entitled to contact support costs (CSC) for health care services funded by third-party revenues, such as Medicare, Medicaid, and private insurance payments. The court held that neither the ISDEAA nor the Swinomish contract require IHS to pay for CSC on what the court called "insurance money." The court noted that the CSC provisions of the ISDEAA do not mention program income, and the program income provisions do not mention CSC. Instead, the ISDEAA refers to program income as "supplemental funding" that "shall not result in any offset or reduction in the amount of funds." From this, the court concluded, without much analysis, that the ISDEAA does not require payment of CSC on expenditures of third-party revenues or other program income.

4. *Rosebud Sioux Tribe v. United States*, No. 20-2062, 2021 WL 3744427 (8th Cir. Aug. 25, 2021) (Indian Trust Law)

The United States and representatives of what is now the Rosebud Sioux Tribe signed the Treaty of Fort Laramie of 1868, in which the United States agreed to provide a resident physician to the Tribe. The Indian Health Service (IHS) operates the Rosebud Hospital in Rosebud, South Dakota. Persistent deficiencies at Rosebud Hospital prompted the Tribe to file suit against the IHS, the U.S. Department of Health and Human Services (HHS), and others. The federal government argued that, based on the doctrine of Indian trust law, no duty to provide healthcare existed because the Tribe cannot establish the existence of a trust corpus. The Court of Appeals disagreed, finding that the Tribe's case relied not on Indian trust law doctrine but instead on interpretation and construction of the Treaty, the trust relationship between the Government and the Tribe, and the statutory scheme underlying the alleged duty to provide healthcare. Based on the Tribe's Treaty and relevant legislation the Eighth Circuit affirmed that the district court correctly articulated the existence and scope of the duty that the United States has a to provide "competent physician-led healthcare" to the Rosebud Sioux Tribe and its members.

5. *Sisto v. United States*, No. 20-16435, 2021 WL 3379036 (9th Cir. 2021) (Federal Tort Claims Act; Indian Self-Determination and Education Assistance Act)

A plaintiff brought suit against the United States under the Federal Tort Claims Act ("FTCA") alleging negligence by an emergency room physician at a tribal hospital. The physician in question was working at the tribal hospital pursuant to a contract between the hospital and a third party. The district court found that the physician was an employee of an independent contractor, rather than a federal employee, and thus the United States had not waived sovereign immunity as to the plaintiffs' claim. The Ninth Circuit affirmed the lower court's dismissal of the suit for lack of subject matter jurisdiction. In affirming the lower court decision, the Court of Appeals noted that the contract between the hospital and the third party

explicitly provided that the contract did not establish an employer/employee relationship between the hospital and any provider of the third party.

6. *Becker v. Ute Indian Tribe*, Nos. 18-4030 & 18-4072, 2021 WL 3361545 (10th Cir. 2021) (Tribal Sovereign Immunity; Exhaustion of Tribal Court Remedies)

Becker involved a contract dispute between the Ute Indian Tribe of the Uintah and Ouray Reservation and a non-Indian. The dispute led to five separate lawsuits in the tribal, state, and federal court systems. Becker first filed suit in federal district court against the Tribe on contract claims. After that suit was dismissed for lack of subject matter jurisdiction, Becker filed suit in Utah state district court alleging the same claims against the Tribe. The Tribe moved to dismiss the case in state court on grounds of sovereign immunity. The Tribe's Business Committee had passed a resolution approving the contract, but the Tribe argued that the resolution failed to expressly reference the issue of sovereign immunity, and thus the Tribe had never expressly agreed to the waiver of sovereign immunity contained in the contract. When the state refused to dismiss the case, the Tribe filed suit in federal district court seeking to enjoin the Utah state court proceedings. The Tribe also filed suit in Tribal Court seeking a declaration of the contract's invalidity. The federal district court issued a decision to preliminarily enjoin the Tribal Court proceedings and to preclude the Tribal Court's orders from having preclusive effect in other proceedings. On appeal, the Tenth Circuit Court of Appeals held that, "out of respect for tribal self-government and self-determination," the tribal exhaustion rule required Becker's federal lawsuit to be dismissed without prejudice, allowing the Tribal Court case to proceed for now.

7. *Deschutes River Alliance v. Portland General Electric Company*, No. 18-35867, No. 18-35932, No. 18-35933, 2021 WL 2559477 (9th Cir. 2021) (Tribal Sovereign Immunity; Clean Water Act)

The Confederated Tribes of the Warm Springs Reservation and Portland General Electric (PGE) co-own and co-operate a hydroelectric project on the Deschutes River, located partly within the Warm Springs Indian Reservation. Deschutes River Alliance (DRA) alleged that PGE was operating the hydroelectric project in violation of the Clean Water Act (CWA). The district court denied PGE's motion under the Federal Rules of Civil Procedure to dismiss for failure to join the Tribe as a required party, holding that the Tribe was a required party but feasible to join because the CWA had abrogated the Tribe's sovereign immunity. The Ninth Circuit Court of Appeals reversed, holding that the CWA did not abrogate the Tribe's sovereign immunity. The court found that the inclusion of "an Indian tribe" in the definition of "municipality" in 33 U.S.C. § 1362(4) of the CWA (and, in turn, the definition of "person" in 33 U.S.C. § 1362(5)) "does not indicate—let alone clearly indicate—that Congress intended in the CWA to subject tribes to unconsented suits." Because the court found that the Tribe was a required party, it ruled that DRA's suit must be dismissed for failure to join a required party.

8. Opioid Litigation Update

Developments continue to unfold in the opioid multi-district litigation (MDL). The MDL involves approximately 3,000 plaintiffs seeking to hold opioid manufacturers, distributers, and retailers accountable for fueling the opioid crisis. Most of these lawsuits have been filed by States, cities, counties, and a majority of Tribes. 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 court had selected several cases to proceed as "bellwether" cases to test the claims, which the parties requested as a means of facilitating settlement. A tribal track was created as part of this process with Muscogee Creek Nation and the Blackfeet Tribe of Montana serving as the "bellwether" cases in Judge Polster's court. The Cherokee Nation case has been remanded to the U.S. District Court for the Eastern District of Oklahoma. On September 28, 2021, the Cherokee Nation announced its $75 million settlement with the "big three" opioid distributors McKesson, AmeriSource Bergen, and Cardinal Health.

On November 23, 2021, Pharmacy giants CVS, Walgreens and Walmart were found liable for contributing to the opioid abuse epidemic in two Ohio counties.

Opioid claims against the global consulting firm McKinsey & Co. (McKinsey) have been broken out from the main opioids MDL and consolidated in a new MDL proceeding. McKinsey intends to seek dismissal of the claims of all Plaintiffs, including Tribes, in particular states where McKinsey argues it had no relevant jurisdictional contacts that would give rise to the claims against it. The Plaintiffs for the Tribal track filed a Master Consolidated Complaint on November 23, 2021. Arguments will take place on March 17, 2022.

Additionally, two of the manufacturer defendants, Purdue Pharma (the manufacturer of OxyContin) and Mallinckrodt Pharmaceuticals (a manufacturer of generic opioids), filed for bankruptcy as a result of the MDL. As a result, the cases against Purdue and Mallinckrodt were stayed and the focus moved to negotiating a bankruptcy plan. Both of those plans contemplate the creation of opioid trusts to fund abatement activities by groups of public (governmental) and private opioid litigation plaintiffs, and both provide for an approximately 3% set-aside for tribes from the amounts ultimately allocated to governmental plaintiffs. The Purdue plan was recently approved by the bankruptcy court, and while voting is still underway on the Mallinckrodt plan, we expect that it will be approved as well. As a result, and depending somewhat on the course of appeals of the final confirmation orders, these bankruptcy funds could begin flowing to tribes and tribal organizations by the end of this year or early 2022.

STATUTES AND REGULATIONS

1. <u>FY 2022 Appropriations</u>

Fiscal Year (FY) 2021 ended on September 30, 2021, but rather than passing detailed, full-year FY 2022 appropriations bills, Congress passed a short-term continuing resolution (CR) to keep the federal government funded through December 3, 2021, at largely FY 2021 funding levels and conditions. The House has passed all of their FY 2022 appropriations bills. However, the Senate bills are still a work in progress. Last week, another CR was passed funding the federal government through February 18, 2022. The White House is trying to build pressure on lawmakers to reach a deal on FY 2022 funding, which would include new funding levels and priorities, a tall lift given the current state of talks.

2. Debt Limit

With a potential default looming in October, Congress passed a short-term increase in the debt limit to temporarily continue to cover federal obligations through what was estimated to be December 3, 2021. However, senators in both parties now believe they have more time to pass another increase in the debt ceiling. The Bipartisan Policy Center has estimated that Congress will need to act as soon as mid-December or as late as February. A number of Republicans faced backlash from their own caucus after some supported the short-term debt extension after months of vowing that they would make Democrats go it alone. As the deadline nears, there could be increased pressure to exempt the debt ceiling from the legislative filibuster, but some Democrats, including Sen. Manchin (D-WV), are pushing to raise the debt ceiling on their own through reconciliation if they cannot reach a deal with Republicans.

3. Build Back Better Act

On November 19, 2021, the House passed a slimmed down ($1.7 trillion, instead of $3.5 trillion) budget reconciliation package, the Build Back Better Act, (BBB), a package of ambitious provisions to address childcare, health, education, and climate change. Further changes are expected in the Senate to the following provisions: paid leave, immigration, certain state and local tax deductions, methane emissions, and a vaping tax. Any changes made by the Senate would send the package back to the House for another vote. The package, as currently drafted, contains significant resources for Indian Country, but at much lower levels than in than the original $3.5 trillion version. Examples include:

- $200 million to carry out the tribal energy loan guarantee program;
- $441 million for tribal climate resilience and adaptation programs;
- $19.6 million for Bureau of Indian Affairs fish hatchery operations and maintenance programs;
- $294 million for the provision of electricity to un-electrified tribal homes through renewable energy systems;
- $945 million for the maintenance and improvement of Indian Health Service and tribal healthcare facilities;
- $490 million for Indian Affairs public safety and justice programs; and
- $1 billion for Indian Housing programs (IHBG, ICDBG)
- $715.4 million for the Bureau of Indian Affairs Road System and Tribal transportation facilities for road maintenance, planning, design, construction, and to address the deferred road maintenance backlog.

4. Infrastructure Investment and Jobs Act

On November 15, 2021, President Biden signed the roughly $1 trillion bipartisan infrastructure bill and five-year surface transportation reauthorization, the "Infrastructure Investment and Jobs Act" ("IIJA", Pub. L. No. 117-58). The IIJA provides over $11 billion for Native communities, including:

- $3.5 billion for the Indian Health Service Sanitation Facilities Construction Program
- $3 billion for the US Department of Transportation Tribal Transportation Program
- $2.5 billion to address approved Indian water rights settlements
- $2 billion for the National Telecommunications and Information Administration Tribal Broadband Connectivity Program

It also establishes an Office of Tribal Government Affairs in the U.S. Department of Transportation and an Assistant Secretary for Tribal Government Affairs, among other beneficial provisions and funding for tribes.

5. Biden Administration Tribal Initiatives

On November 15, 2021, President Biden announced the following:

- A new initiative involving 17 departments and agencies to designed protect tribal treaty rights and the work of the federal government.
- A new initiative to increase tribal participation in the management of stewardship of federal lands.
- The Administration will be the first to work with the tribes to comprehensively incorporate tribal ecological knowledge into the federal government's scientific approach, helping fight climate change.
- The Administration will be taking action to protect the Greater Chaco Landscape in Northwestern New Mexico from a future oil and gas drilling and leasing.

President Biden also signed an executive order directing four federal agencies to create a strategy to improve public safety and justice for Native Americans and to address the epidemic of missing or murdered Indigenous people. Additionally, on November 16, 2021, several announcements were made, including the creation of the first Secretary's Tribal Advisory Committee at the U.S. Department of the Interior and a new interdepartmental memorandum of understanding to protect indigenous sacred sites.

6. Economic Development Administration Final Rule

On September 24, 2021, the Economic Development Administration (EDA) of the U.S. Department of Commerce published a final rule in the Federal Register to expand the definition of Tribal entities eligible to receive grants under the Public Works and Economic Development Act of 1965 (PWEDA) to include for-profit Tribal corporations so long as they are wholly owned by, and established exclusively for the benefit of, a Tribe. Previously, EDA's regulations limited the types of eligible tribal entities to non-profits.

7. Family Violence Prevention and Services Improvement Act.

On October 27, 2021, the Family Violence Prevention and Services Improvement Act (H.R. 2119) passed the House by a vote of 228-200. The bill would modify, expand, and reauthorize through FY 2026 the Family Violence and Prevention Services program, which funds emergency shelters and supports related assistance for victims of domestic violence. The bill includes specific provisions and resources for tribes.

8. American Rescue Plan (ARP)

On March 11, 2021, the President Biden signed the ARP (H.R. 1319) in response to the health and economic effects of COVID-19. The ARP is targeted towards economic recovery, in addition to providing assistance during the pandemic. This sweeping law includes a historic $31.2 billion investment in Native communities. The ARP provides $750 million in funding, to remain available until September 30, 2025, for programs funded under the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA), allocated as follows:

- $450 million for the IHBG Program (IHBG-ARP)
- $280 million for the (noncompetitive) ICDBG Program (ICDBG-ARP)
- $5 million for the Native Hawaiian Housing Block Grant program (NHHBG-ARP)
- $10 million for related technical training and assistance (TA)
- $5 million for Administration.

A second ARP provision providing funding for Indian housing programs is a $500 million set aside for a Homeowner Assistance Program (HAP) (out of approximately $9.9 billion nationwide). The funding can be used for the following services:

- Mortgage payment assistance
- Financial assistance to allow a homeowner to reinstate a mortgage or to pay other housing related costs related to a period of forbearance, delinquency, or default
- Principal reduction
- Facilitating interest rate reductions
- Payment assistance for utilities, internet, homeowner' s insurance, flood insurance, mortgage insurance, homeowner' s association fees, condominium association fees or common charges

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