GODFREY & KAHN S.C.

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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 $100,000,000 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 *Oneida Nation v. Village of Hobart*, 2020 WL 4355703 (7th Cir. 2020), the Village of Hobart (Village), a Wisconsin municipality located within the boundaries of the 65,000-acre reservation established for the Oneida Nation (Nation) by the Washington Treaty of 1838 (Reservation), sought to require the Nation to obtain a Village permit for its annual Big Apple Festival, an event held on fee land owned by the Nation partially within the Village. The Nation sued for a declaration that the Village could not regulate the Nation on its own reservation. The district court granted the Village summary judgment, concluding that the Reservation had been diminished by allotment and consisted solely of land that the United States holds in trust for the Nation. The Seventh Circuit Court of Appeals, relying on long-established principles relating to **reservation diminishment** and citing the Supreme Court's recent

decision in *McGirt v. Oklahoma*, reversed, holding that the 1838 Reservation boundaries were intact and that the Village had no authority to regulate the Nation: "The Reservation was created by treaty, and it can be diminished or disestablished only by Congress. Congress has not done either of those things. The governing legal framework—at least when the issue was decided in the district court and when we heard oral argument—was clear. Under *Solem v. Bartlett*, 465 U.S. 463, [104 S.Ct. 1161, 79 L.Ed.2d 443] (1984), we look—from most important factor to least—to statutory text, the circumstances surrounding a statute's passage, and subsequent events for evidence of a 'clear congressional purpose to diminish the reservation.' *Id.* at 476, 104 S.Ct. 1161. After this case was argued, the Supreme Court decided *McGirt v. Oklahoma*, [––– U.S. ––––,] 140 S. Ct. 2452, [––– L.Ed.2d ––––] (2020). We read *McGirt* as adjusting the *Solem* framework to place a greater focus on statutory text, making it even more difficult to establish the requisite congressional intent to disestablish or diminish a reservation. The Oneida Nation prevails under both the *Solem* framework and the adjustments made in *McGirt*. … The district court's reliance on Congress's general expectations about the decline of the reservation system was contrary to the requirement that Congress clearly express its intent to diminish a reservation. And its conclusion that fee-simple ownership—by Indians or non-Indians—was incompatible with continued reservation status is at odds with the Supreme Court's cases on diminishing reservations."

In *Gibbs v. Sequoia Capital Operations*, *LLC*, 2020 WL 4118283 (4th Cir. 2020) and *Gibbs v. Haynes Investments, LLC*, 2020 WL 4118239 (4th Cir. 2020), both issued July 21, 2020, the Fourth Circuit held that provisions in internet lending contracts requiring arbitration were unenforceable. In *Sequoia*, non-Indian residents of Virginia had **borrowed money over the internet** from lenders owned by the Chippewa Cree Tribe of the Rocky Boy's Reservation in Montana and the Otoe-Missouria Tribe of Oklahoma, under agreements that required binding arbitration of any disputes and the application of tribal rather than state law. The borrowers sued, alleging that the loan agreements violated Virginia limitations on interest rates and other state and federal laws. The defendants moved to enforce the delegation clause in the agreements which obligated borrowers to arbitrate "any issue" arising out of the agreement, including the obligation to arbitrate. The district court rejected the defendants' attempt to force the plaintiffs to arbitrate and the Fourth Circuit Court of Appeals affirmed: "Consistent with contract principles, the Supreme Court has recognized that arbitration agreements that operate as a prospective waiver of a party's right to pursue statutory remedies are not enforceable because they are in violation of public policy. … Therefore, so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, courts should enforce the parties' contract under the FAA. … But where an arbitration agreement prevents a litigant from vindicating federal statutory rights, courts will not enforce the agreement. … [T]he Great Plains and Plain Green arbitration agreements contain choice-of-law provisions (1) providing they 'shall be governed by tribal law'; … [t]he terms also limit the authority of the arbitrator to provide awards to those 'remedies available under Tribal Law.' … Although such provisions do not explicitly disclaim the applicability of federal law, they mandate the primacy and effective control of tribal law in resolving any disputes arising out of these agreements. And such law would, as discussed at length in *Haynes*, … prevent claimants from vindicating a RICO claim for treble damages against entities and individuals like the Sequoia Defendants." (Citations and quotations omitted.)

In *Williams v. Medley Opportunity Fund II*, LP, 2020 WL 3968078 (3d Cir. 2020), plaintiffs, residents of Pennsylvania, obtained **loans over the internet** from AWL, Inc., an online entity owned by the Otoe-Missouria Tribe of Indians (Tribe). They sued AWL's holding company, Red Stone, Inc., and three members of AWL's board of directors, Mark Curry, Vincent Ney, and Brian McGowan (collectively, Defendants), for violations of federal and Pennsylvania laws prohibiting excessive interest rates. The District Court denied the Defendants' motion to compel arbitration, holding that the loan agreements—which provided that only tribal law would apply in arbitration—stripped Plaintiffs of their right to assert statutory claims and were therefore unenforceable. The Third Circuit agreed and affirmed: "Because AWL permits borrowers to raise disputes in arbitration only under tribal law, and such a limitation constitutes a prospective waiver of statutory rights, its arbitration agreement violates public policy and is therefore unenforceable."

In *United States v. Many White Horses*, 2020 WL 3636363 (9th Cir. 2020), James Many White Horses, an enrolled member of the Blackfeet Indian Nation (Nation), had pleaded guilty to conspiracy to possess with intent to distribute methamphetamine. The Nation has its headquarters in Browning, Montana, which is also within the Tribe's reservation. Many White Horses was sentenced to 78 months in custody and 180 months of supervised release. Between

2014 and 2018, Many White Horses violated the terms of his supervised release nine times, which resulted in four revocations. Eight violations involved the use of either alcohol, methamphetamine, or another illegal substance, and all but one took place in Browning, where Many White Horses resided much of the time. As a result of a ninth violation, also involving intoxication in Browning, the district court revoked supervised release and imposed a sentence of six months custody and a new term of five years of supervised release, with special conditions, including Special **Condition 11, prohibiting Many White Horses from residing in the town of Browning**, Montana, or visiting the town without the prior approval of his probation officer. Condition 12, however, required Many White Horses to visit Browning in order to participate in the short-term residential treatment program. Many White Horses appealed, arguing that the district court lacked the authority to impose Special Condition 11, and that it is substantively unreasonable because it involves a greater deprivation of liberty than is reasonably necessary to accomplish the goals of supervised release. Specifically, Many White Horses contended that Special Condition 11 was tantamount to an illegal banishment or exclusion from the Blackfeet Reservation, and that it infringed the tribal sovereignty and right of self-government of the Blackfeet Nation. The Ninth Circuit disagreed and affirmed: "Many White Horses's argument conflates two distinct issues: the authority of the Blackfeet tribe over its own members and the authority of the federal government over its citizens, including tribal members. Many White Horses mistakenly assumes that the condition functions as a banishment from tribal lands, rather than as a temporary restraint on his ability to visit a tiny portion of the reservation absent permission from his probation officer. …. An external condition that is not a banishment does not conflict with the sovereign authority of the Blackfeet tribe to govern the banishment or exclusion of its members."

In *Peoria Tribe of Okl. v. Campbell*, 2020 WL 4334907 (N.D. Okl. 2020), the Peoria Tribe of Indians of Oklahoma (Tribe) filed an action in Oklahoma state court asserting legal malpractice claims against attorney Stuart Campbell and associated law firms arising out of Campbell's representation of the Tribe in connection with a casino management contract in which Campbell had an undisclosed personal interest. The defendants removed the case to federal court, alleging **federal jurisdiction** based on the circumstances that the Tribe's gaming operation was regulated under the Indian Gaming Regulatory Act, that the management contract had been approved by the Chairman of the National Indian Gaming Commission (NIGC), and that the Chairman of the NIGC had later issued a Notice of Violation relating to Campbell's actions. On the Tribe's motion, the court remanded to state court: "[I]t is undisputed that the Tribe's claims for legal malpractice; its alternative claims for breach of fiduciary duty, deceit/fraudulent concealment and failure to disclose, money had and received, and unjust enrichment; and its punitive damages claim all arise under state law. Nonetheless, Defendants argue that because the claims arose in the context of Indian gaming operations, the four *Grable* factors for federal question jurisdiction are satisfied, and the case was properly removed to federal court. … Accepting, for purposes of the pending motion, that the hypothetical 'case within a case' involves the Notice of Violation issued by IGRA, defendants have failed to demonstrate the resolution of the Tribe's malpractice claim against the attorneys will have any effect on Indian gaming laws in general or on IGRA's claims against the Tribe."

In *Sisto v. United States*, 2020 WL 4049941 (D. Ariz. 2020), Sisto, a San Carlos Apache tribal member, died following treatment at a hospital operated by the San Carlos Apache Healthcare Corporation, Inc. (SCAHC). His survivors sued the United States under the **Federal Tort Claims Act (FTCA)** alleging negligence by Gross, the attending emergency room physician. The court dismissed for lack of jurisdiction on the ground that Gross, as an independent contractor, was not an "employee of the Government while acting within the scope of his office or employment" for purposes of the FTCA: "In 2016, SCAHC entered into an Emergency Department Services Agreement (the Agreement) with Tribal EM, PLLC (T-EM). … Plaintiffs do not sufficiently dispute that Dr. Gross was employed by T-EM. … As a T-EM Provider, the Agreement required T-EM to be solely responsible for paying Dr. Gross' compensation and benefits. … The Agreement required T-EM to ensure that each T-EM Provider complied with performance standards. … Pursuant to the Agreement, T-EM maintained professional liability insurance for the negligent acts and omissions of Dr. Gross as a T-EM Provider. … . The Court finds that neither the SCAHC nor the Government had sufficient control over Dr. Gross' practice of medicine to render Dr. Gross a federal employee. The Court thus concludes that Dr. Gross was an independent contractor." (Internal quotations omitted.)

In *Hanson v. Parisien*, 2020 WL 4117997 (D.N.D. 2020), Belcourt School District #7 (School District), a subdivision of the State of North Dakota, owned and operated a school on trust land within the Turtle Mountain Indian Reservation (Reservation) under a memorandum of agreement with the Bureau of Indian Affairs. The School District awarded

a contract to Dakota Metal Fabrication (Dakota Metal), a company owned by Hanson, a non-Indian, to perform construction work on a pre-kindergarten and wrestling facility project developed as a joint venture between the School District and the Tribe, with ultimate ownership ascribed to the School District. The Tribe sought to impose a fee under its **Tribal Employment Rights Ordinance (TERO)** equal to 3% of the contract price, which amounted to $44,640, which Dakota Metal refused to pay. The TERO provided a process for dissatisfied contractors, including an administrative complaint, investigation, hearing before TERO commission and, ultimately, an appeal to the Tribal Court of Appeals. Dakota Metal instead sued in tribal court, where it initially won but then lost on appeal before the Turtle Mountain Court of Appeals, whereupon Dakota Metal sued the Tribe's TERO Director, Parisien, and four tribal agencies in federal court, contending that the Tribe had no authority to assess the TERO fee. The Court dismissed the tribal agencies on soverign immunity grounds and dismissed the claims against Parisien for failure to exhaust tribal remedies: "Plaintiffs indisputably failed to pursue TERO's administrative remedy process. What is more, by filing this lawsuit, they wholly ignored an order from the Turtle Mountain Court of Appeals mandating that they avail themselves of that process. Deciding the merits of the Plaintiffs' federal claims now would require this Court to brush that order aside in kind, spurning any semblance of respect for tribal self-government along the way. A full hearing before the Commission and potential ensuing appeal would also facilitate the development of a more adequate record on the weighty tribal jurisdiction issues. Moreover, the Commission's expertise on the limits of tribal authority to impose the fees at issue—as well as its unique ability to grant case-specific exceptions from those fees—should be brought to bear before reaching any decision in this forum."

In *Grondal v. Mill Bay Members Association, Inc.*, 2020 WL 3892462 (E.D. Wash. 2020), Evans, the owner of a 5.4% interest in a trust allotment known as MA-8 near the Colville Reservation, obtained the consent of a majority of the other allottee interest holders to a **lease of MA-8 for 25 years, with an option to renew for an additional 25 years**, for purposes of operating a campground. BIA approved the lease in 1984. The following year, Evans sent BIA a letter purporting to renew the lease but, contrary to the terms of the lease, failed to notify the other owners by certified mail. Evans developed an RV park on the leasehold and sold memberships providing for rights of use and occupancy to certain lots through 2034. BIA approved a modification to the lease describing members' expanded rights. In 2007, the BIA determined that the action Evans had taken in 1984 to trigger the renewal option was invalid. Although his successor-in-interest would have still had time to follow the prescribed procedures, it sued BIA instead. The Ninth Circuit held that the lease expired after the initial 25-year term. Membership holders sued, alleging various theories in support of their continued right of occupancy, including equitable estoppel and that MA-8 was not Indian trust land. The district court granted the government summary judgment on its trespass counterclaim seeking judgment of ejectment, holding that the plaintiffs, who had long made arguments based on the trust status of the land, were estopped from asserting the inconsistent argument that MA-8 was not trust land and rejecting their argument that the government should be equitably estopped from ejecting them based on its previous apparent acknowledgment of their 50-year term. "[T]he Government is acting in its trust capacity by seeking the removal of Plaintiffs from Indian trust land. Accordingly, Plaintiffs, as a matter of law, cannot assert the defense of equitable estoppel to combat the Governments' trespass claim."

In *Cheyenne River Sioux Tribe v. U.S. Army Corps of Engineers*, 2020 WL 3634426 (D.D.C. 2020), several Indian tribes sued the U.S. Army Corps of Engineers (ACE) under the Administrative Procedure Act contending that the ACE approval of an easement for the **Dakota Access Pipeline** under Lake Oahe, a large reservoir lying behind a dam on the Missouri River and stretching between North and South Dakota, violated the National Environmental Policy Act (NEPA) by failing to properly consider potential adverse environmental consequences. The Court several months ago found ACE's environmental review defective with respect to (1) whether the project's effects were likely to be highly controversial; (2) the impact of an oil spill on the Tribe's fishing and hunting rights under the Treaty of 1851; and (3) whether, under a required environmental-justice analysis, the Standing Rock Sioux Tribe would be disproportionately harmed by a spill. The Court remanded to the ACE for preparation of an environmental impact statement (EIS). In the instant decision, the Court determined that, pending the ACE's new EIS, the easement must be vacated: "Clear precedent favoring vacatur during such a remand coupled with the seriousness of the Corps' deficiencies outweighs the negative effects of halting the oil flow for the thirteen months that the Corps believes the creation of an EIS will take."

In *McCormick, Inc., v. Fredericks*, 2020 WL 4199698 (N.D. 2020), Fredericks, a member of the Three Affiliated Tribes of the Fort Berthold Reservation, and McCormick, Inc. (McCormick), a non-Indian company, formed Native Energy Construction to engage in construction operations related to oil production. Fredericks owned 51% of the company, and McCormick owned 49%. Fredericks was Native Energy's president, and McCormick and Northern Improvement provided management services to Native Energy for a fee of 5% of Native Energy's gross revenues. After the parties fell out, McCormick and Northern Improvement sued Fredericks, alleging he breached contractual and fiduciary duties owed to Native Energy, McCormick and Northern Improvement, took distributions from Native Energy without making a corresponding distribution to McCormick, wrongfully converted Native Energy's assets for his own use, made improper payments to his wife and performed other business activities on behalf of Native Energy without McCormick's authorization. The state district court ordered Fredericks to pay more than $1,000,000 in damages to McCormick, Inc., Native Energy Construction, LLC, and Northern Improvement Company. Fredericks appealed, alleging that the Three Affiliated Tribes court had sole jurisdiction. McCormick and Northern Improvement cross-appealed from a judgment denying their motion for a judicially supervised winding up of Native Energy. The North Dakota Supreme Court affirmed in part, reversed in part, and remanded, reducing Fredericks' liability by $49,795.76, ordering dissolution of Native Energy and rejecting Fredericks' jurisdictional challenge: "Fredericks brought claims against McCormick, not a claim against Steve McCormick individually. Fredericks' claims against McCormick arose from his ownership interest in Native Energy, a North Dakota limited liability company. See Arrow, 2015 ND 302, ¶ 16, 873 N.W.2d 16 ('[I]t is not the particular form of business entity used by a tribe or tribal member, but whether the business entity was created under tribal law or state law that determines if the business entity should be treated as a tribe or tribal member.'). In addition, Fredericks has not shown how the **exception to the general rule outlined in *Montana*** vested the tribal court with exclusive jurisdiction over his counterclaims against McCormick. Fredericks has not claimed the management fee between Native Energy and McCormick involved a consensual relationship with the tribe."

In *Treat v. Stitt*, 2020 WL 4185827 (Okl. 2020), the Oklahoma Supreme Court held that the governor lacked authority under state law to enter into gaming compacts with tribes and the compacts he had signed were invalid: "The State-Tribal **Gaming Act** sets forth the terms and conditions under which the State's federally recognized tribes can engage in Class III gaming on tribal land through Model Gaming Compacts. The Governor has the statutory authority to negotiate gaming compacts with Indian tribes to assure the State receives its share of revenue. However, the Governor must negotiate the compacts within the bounds of the laws enacted by the Legislature, including the State-Tribal Gaming Act. … The tribal gaming compacts Governor Stitt entered into with the Comanche Nation and Otoe-Missouria Tribes authorize certain forms of Class III gaming, including house-banked card and table games and event wagering. … The State-Tribal Gaming Act expressly bars house-banked card games, house-banked table games involving dice or roulette wheels, and event wagering. … The Court must, therefore, conclude Governor Stitt exceeded his authority in entering into the tribal gaming compacts with the Comanche Nation and Otoe-Missouria Tribes that included Class III gaming prohibited by the State-Tribal Gaming Act."