GODFREY & KAHN S.C.

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Indian Nations Law Update

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COVID-19 Related Information Available From G&K

G&K is advising tribal clients on a wide range of COVID-19-related issues, including Paycheck Protection Program compliance, contract and insurance issues and legal requirements relating to reopening. See our online COVID-19 Resource Center. For more information, contact John Clancy (414.287.9256 jclancy@gklaw.com) or Brian Pierson (414.287.9456 or bpierson@gklaw.com).

IEED Tribal Energy Development Capacity Grant Applications Due Sept. 1

On June 3, the BIA announced the availability of Tribal Energy Development Capacity (TEDC) grants through the Division of Energy and Mineral Development (DEMD), Office of Indian Energy and Economic Development (IEED). Tribes can use TEDC grants to build capacity for energy resource regulation and management. DEMD anticipates awarding approximately fifteen (15) grants ranging from approximately $10,000 to $1,000,000. Applications are due Sept. 1, 2020.

Godfrey & Kahn has worked with its tribal clients to obtain and use this grant and other sources to build legal infrastructure, including utility, right-of-way, tax and trespass ordinances and enforce that legal infrastructure to strengthen tribal sovereignty and generate revenue to support tribal governmental services. 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 or Indian Nations Practice Group co-leader Brian Pierson.

DOE Extends Tribal Energy Grant Application Deadline to July 30

The US Department of Energy (DOE) has extended the deadline for Tribal Energy Grant applications by thirty days. Applications are now due July 30th. DOE's Office of Indian Energy Policy and Programs will provide up to $15 million in new funding to deploy energy technology on tribal lands. DOE anticipated making individual awards ranging 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 reducing 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 John Clancy or Brian Pierson.

The information contained herein is based on a summary of legal principles. It is not to be construed as legal advice and does not create an attorney-client relationship. Individuals should consult with legal counsel before taking any action based on these principles to ensure their applicability in a given situation.

Selected Court Decisions

In *Stand Up for California! v. U.S. Department of the Interior*, 2020 WL 2745320 (9th Cir. 2020), plaintiffs challenged the Secretary of the Interior's issuance, under the Indian Gaming Regulatory Act (IGRA), of **Secretarial Procedures** authorizing the North Fork Rancheria of Mono Indians (Tribe) to operate Class III gaming activities on a parcel of land in Madera, California. Plaintiffs argued that the Secretarial Procedures violated the Administrative Procedure Act (APA) because they conflict with specific prohibitions of the Johnson Act and that the Secretary, in issuing the Secretarial Procedures, violated the **National Environmental Policy Act (NEPA)** and the Clean Air Act (CAA). The district court granted summary judgment for the Secretary. On appeal, the Ninth Circuit affirmed as to the Johnson Act claims but vacated and remanded for further consideration of the plaintiffs' NEPA and CAA claims: "Appellants argue that Indian tribes should be forced to settle for an incomplete remedy—that the Secretary can approve some class III gaming activities, but not those, like slot machines, that are illegal under the Johnson Act. But such an incomplete remedy would create only feeble and ineffective incentives for states to negotiate in good faith. … IGRA does not at once authorize Secretarial Procedures, while simultaneously making gaming pursuant to those Procedures illegal and robbing the Procedures of their remedial force. … [W]e conclude that IGRA does not categorically bar application of NEPA because the two statutes are not irreconcilable and do not displace each other, and because a contrary result would contravene congressional intent and common sense. … For similar reasons, we vacate and remand the district court's grant of summary judgment against Appellants' claim that the Secretary was required to, but did not, make a conformity determination under the CAA. Our analysis above shows that the Secretary has some discretion to consider other applicable federal laws in prescribing Secretarial Procedures. And our duty to strive to give effect to multiple statutes rather than finding conflict …convinces us that the district court erred by categorically precluding the CAA's requirements in the context of IGRA."

In *Employers Mutual Casualty Company v. McPaul*, 2020 WL 2316616, Fed. Appx. (9th Cir. 2020), the Navajo Nation (Nation) sued Employers Mutual Casualty Co. (EMC) and two of EMC's insureds, among others, in tribal court, alleging that the insureds had caused a gasoline leak on tribal lands and that EMC had declined to defend them in tribal court litigation or indemnify them against their liability. EMC moved to dismiss for lack of subject matter jurisdiction. The tribal court denied the motion and the Navajo Nation Supreme Court denied a writ of prohibition. EMC then sued Nation officials in federal district court, challenging the tribal court's jurisdiction. The district court granted summary judgment in favor of EMC and the Ninth Circuit affirmed: "Because it is not contested that EMC's relevant conduct—negotiating and issuing general liability insurance contracts to non-Navajo entities—occurred entirely outside of tribal land, **tribal court jurisdiction** cannot be premised on the Navajo Nation's right to exclude. … The insurance contracts, which do not mention liability arising from activities on the reservation, bear no 'direct connection to tribal lands.' *Knighton v. Cedarville Rancheria of N. Paiute Indians*, 922 F.3d 892, 902 (9th Cir. 2019). … Tribal jurisdiction also cannot lie under the second exception in *Montana v. United States*, because EMC's conduct did not take place 'within [the] reservation.' 450 U.S. 544, 566 (1981); *see also Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 815 (9th Cir. 2011)…Moreover, EMC's refusal to defend and indemnify its insureds does not 'imperil the subsistence of the tribal community.' *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 341 (2008)."

In *Denan v. Trans Union LLC*, 2020 WL 2316680 (7th Cir. 2020), Denan and others had borrowed money from a tribe-affiliated **internet lender** at interest rates in excess of allowable rates under state law. When the plaintiffs stopped making payments on the loans, the lender reported the non-payment to Trans Union LLC, a credit reporting agency, which included the non-payment in its credit reporting. The plaintiffs sued under the Fair Credit Reporting Act (FCRA), asserting that Trans Union should not have included the debts in its report because they were illegal. The district court granted Trans Union's motion for judgment on the pleadings and the Seventh Circuit Court of Appeals affirmed: "Here, plaintiffs contend not only that Trans Union had a duty to verify plaintiffs' debt liability, but that Trans Union 'knew or recklessly ignored' that their loans 'are void and uncollectible as a matter of clearly established law.' Their claims, though, attempt to graft responsibilities of data furnishers and tribunals onto a consumer reporting agency. Only furnishers are tasked with accurately reporting liability. …The collectability of plaintiffs' loans here requires resolution of three legal issues: whether the choice-of-law provisions in plaintiffs' loan agreements are enforceable; whether New Jersey and Florida lending laws render plaintiffs' loans void; and whether tribal sovereign immunity shields Plain Green and Great Plains from the application of New Jersey and Florida laws. The power to resolve these legal issues exceeds the competencies of consumer reporting agencies."

In *Gila River Indian Community v. Cranford*, 2020 WL 2537435 (D. Ariz. 2020), the Gila River Indian reservation had been established and enlarged to encompass 370,000 acres through an act of Congress in 1859 and a series of subsequent executive orders. The United States filed suit in 1925 on behalf of itself, the Gila River Indian Community (GRIC), the San Carlos Apache Tribe, and other landowners, naming as defendants numerous individuals, irrigation districts, canal companies, and corporations, and seeking a comprehensive determination of rights to the waters of the Gila River (Globe Equity Litigation). A court decree (Decree) emerged that identified and quantified parties' claims and rights to waters of the Gila River mainstem by listing priority dates, entitlement amounts, and associated lands and designated a water commissioner ("Gila Water Commissioner") authorized to cut off noncompliant water diversions. In 1992, the Arizona Supreme Court adjudicated rights to the use of water obtained from the Gila River Basin System (Gila Adjudication) and issued a decree enforceable by the director of the Arizona Department of Water Resources (ADWR), but excluding authority over the distribution of water "reserved to special officers appointed by courts under existing judgments or decrees." In 2019, the GRIC sued owners of land near the Gila River upstream of the Reservation, alleging that Defendants had irrigated their lands with well water consisting in whole or in part of waters of the Gila River despite the circumstances that their lands were not cultivated at the time of the Globe Equity Litigation and that neither Defendants nor their predecessors-in-interest were parties to the Decree. The Defendants moved to dismiss on the grounds that the Court lacked jurisdiction to hear GRIC's claims, and, alternatively, that the Court must abstain in deference to the ongoing Gila Adjudication. The Court denied the motion, holding that jurisdiction was supported by both **28 U.S.C. § 1331 and 28 U.S.C. § 1362**: "Defendants misapprehend the scope of the Gila Adjudication. As the Arizona Supreme Court recognized in 2006, the Gila Adjudication is determining only '[t]he rights of those with claims to the Gila River tributaries,' not those with mainstem claims. *Gen. Adj. 2006*, 127 P.3d at 893–94. It is *this* Court that has jurisdiction over claims to mainstem waters, which began with the Globe Equity Litigation and continues to this day. *Id.* at 885; (Decree at 113). The Gila Adjudication court lacks jurisdiction to determine mainstem rights. Since this case involves Defendants' alleged use of mainstem water, this Court has exclusive jurisdiction. … Abstention is not warranted here. Defendants have not proved that the issues raised here are duplicative of those in the Gila Adjudication. If GRIC is correct that Defendants are pumping mainstem water, then the Decree will determine if Defendants have any rights to the water; these rights cannot be redetermined in state court. If Defendants correctly assert that they are *not* pumping mainstem water, then they are pumping groundwater. Defendants' groundwater rights are not within the purview of the Gila Adjudication, whose stated and statutory purpose is to determine surface water rights."

In *Eastern Band of Cherokee Indians v. United States Department of Interior*, 2020 WL 2079443 (D.D.C. 2020), the Eastern Band of Cherokee Indians (EBCI) sued the Department of Interior (DOI) after the DOI approved an application from the Catawba Nation to take sixteen acres in North Carolina into trust for purposes of developing a gaming enterprise. EBCI contended that the DOI had failed to comply with its obligations under the National Environmental Policy Act (NEPA) and **National Historic Preservation Act (NHPA)** in light of the potential presence of Cherokee historical artifacts at the site. The Court denied EBCI's motion for a preliminary injunction, holding that EBCI had not shown the requisite irreparable harm that would result in the absence of an injunction: "First and foremost, Plaintiff has not shown that it is likely that Cherokee historical artifacts even exist at the Kings Mountain site. … Plaintiff requests that its THPO be provided an opportunity to check out a project site for possible cultural items any time that site is located within the EBCI's aboriginal lands. … Such areas potentially encompass most of Kentucky and substantial portions of Tennessee, the two Virginias, Alabama, Georgia, and the Carolinas. … The statutes at issue do not compel the Government to conduct extensive surveys, and certainly not archeological digs, within these broad geographical bounds each time it proposes to take a major action — without any proof that items of cultural significance will likely be found there. … Even if Cherokee historical artifacts exist at the proposed site, the EBCI has not shown that any damage to such resources is imminent. In its Final Environmental Assessment, Interior pointed out that the Catawba had agreed to use certain best practices and undertake enumerated mitigation measures so that the proposed complex would have a 'less than significant' impact across several environmental measures."

In *Reyes v. United States Department of Interior*, 2020 WL 2319848 (S.D. Cal. 2020), Reyes requested records from the Bureau of Indian Affairs (BIA) under the Freedom of Information Act (FOIA) pertaining to the 1928 California Indian applications of deceased individuals Lena Mae (Montes) Lawson, Frances (Montes) Adams and Cleveland Richard Adams and records of Lena Mae (Montes) Lawson relating to the BIA's consideration of her **enrollment and membership eligibility** in the Miwok Tribe, including her application under the revised roll of the Act of 1948. The BIA disclosed some records and redacted others. Reyes sued for disclosure of the redacted material. The Court

granted the government summary judgment: "FOIA contains exemptions an agency may invoke to protect certain documents from public disclosure. … Defendants maintain they withheld certain materials pursuant to Exemption 6. Exemption 6 protects from disclosure 'personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.' 5 U.S.C. § 552(b)(6). 'The Supreme Court has defined "similar file" broadly as government records containing "information which applies to a particular individual." … When determining whether the exemption was properly applied, courts must balance personal privacy interests against the public interest in disclosure. … This Court reviewed the documents *in camera* and confirms they contain personal information of individuals other than Plaintiff. Plaintiff argues the withheld information can be obtained through United States' repositories available in the public domain and he suggests the privacy interests are eliminated by relying on rules of other agencies which assume after a number of years a person is no longer living and there is no interest in keeping the information private. The Court is not persuaded that the privacy interests of the living relatives are somehow diminished or eliminated by the possibility the information is available elsewhere to the public." See also companion case 2020 WL 2319861.

In *Robbins v. Mason County Title Insurance Company*, 462 P.3d 430 (Wash. 2020), the Mason County Title Insurance Company (MCTI) had insured the Robbins's property, which included tidelands. When the Squaxin Island Tribe asserted the right to harvest shellfish on their property under the **1854 Treaty of Medicine Creek**, the Robbinses demanded that MCTI defend their title. MCTI refused, contending that the Tribe's asserted right is an "easement" within the title policy exception for existing easement and that a "treaty between the federal government and a Native American Indian tribe is not a record that imparts constructive notice pursuant to Washington law." The Robbinses sued, alleging bad faith. The Washington Appellate Court held that the Squaxin claim triggered MCTI's obligation to defend the title. The Washington Supreme Court affirmed and remanded for consideration of affirmative defenses not included in the parties' summary judgment pleadings: "[B]ecause the insurance policy conceivably covered the treaty right and no exceptions to coverage applied, MCTI owed the property owners a duty to defend and, in failing to do so, breached the duty. Because this breach was unreasonable given the uncertainty in the law, MCTI acted in bad faith. Further, because the property owners did not seek summary judgment on MCTI's affirmative defenses, we remand to the superior court for consideration of the defenses. Accordingly, we decline to rule on the property owners' request for attorney fees as premature."

In *On-Auk-Mor Trade Center LLC v. Arizona Tax Unit*, (Ariz. Dept. Economic Security Appeals Bd. 2020), DM, a member of the Salt River Pima-Maricopa Indian Community (SRPMIC), was the sole member of the M. Family Trust, which owned and operated the On-Auk-Mor Trade Center LLC, an Arizona LLC operating solely within the SRPMIC reservation under a license from the SRPMIC. The Appeals Board of the Arizona Department of Economic Security held that the State could not impose its **unemployment insurance taxes** on the LLC, notwithstanding its employment of non-Indians. "The Department contends that Petitioner cannot be a member of the SRPMIC because under the tribe's constitution, only a natural person can be a member of the tribe. The Department concludes that because Petitioner is an LLC, the incidence of the tax falls on a non-Indian, thereby triggering application of the *Bracker* balancing test. … The Supreme Court has stated that congressional federal Indian policy in favor of 'tribal self-sufficiency and economic development' is 'overriding.' … Reflecting that emphasis, the court in *Pourier*, recognized that the policy favoring tribal economic development weighs heavily in favor of treating an Indian owned business organization as a tribal member. … Therefore, considering especially the public policy ramifications of our decision, we conclude that the Petitioner is a tribal member. Because the legal incidence of the UI tax falls on the Petitioner, a tribal member, the *Chickasaw* categorical test applies. The Department next argues that Arizona's UI contributions are neither taxes nor excise taxes. … The payments made by employers as contributions to the state unemployment insurance fund are quite similar to the federal FUTA taxes. Both the federal taxes and the state contributions are payments made by employers to the government to support the Unemployment Insurance program. Both payments are transactional, based on the exchange of labor for wages. While these payments may be somewhat unlike other excise taxes, the FUTA tax is clearly an excise tax. And given the similarity between the FUTA tax and state contributions, we conclude that state contributions are also properly classified as excise taxes."