May 2019

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The 116th Congress officially convened amid a continued partial government shutdown that began on December 22, 2018, and ended 35 days later on January 25, 2018. The partial government shutdown set the record for the longest-running shutdown and led to a slow start in Congress. On January 3, new members were sworn into office in both chambers, kicking off the new legislative session. The House returned to Democratic control for the first time since losing the 2010 midterm elections, with the largest number of sitting Native American Congressional members in the history of the United States.

House Democrats, newly emboldened by their majority status, began to pursue an agenda that emphasizes Democratic policies and oversight of the Trump administration, including legislation to stabilize and expand the Affordable Care Act and other progressive priorities, like gun control and campaign finance reform.

Republicans in the Senate continue to work on their own priorities, including confirming judges and executive branch appointees, protecting the 2017 tax reform law and limiting policy riders in appropriations bills. Republican leadership is expected to continue to push forward on judicial and executive nominations, and is trying to pass a disaster aid package by Memorial Day. Importantly, the Senate confirmed David Bernhardt as the new Secretary of the Department of the Interior to replace Ryan Zinke who resigned at the end of 2018.

Congress has continued its focus on appropriations, nominations and investigations as the Memorial Day recess approaches, although appropriations, drug pricing, privacy and trade are expected to continue to dominate the policy discussions in both chambers over the course of the summer.

Legislators are also grappling with how to handle the discretionary spending caps and prevent the impending $126 billion in automatic, across-the-board spending cuts, known as sequestration, that will be triggered in January 2020 if Congress fails to reach a deal. Budget Committee leaders in both chambers have spent weeks negotiating, but a compromise has yet to materialize. Consequently, House Speaker Nancy Pelosi (D-CA) and Senate Majority Leader Mitch McConnell (R-KY) have begun discussions over a two-year budget deal at the leadership level.

While the constructs of a budget caps deal remain up for debate, lawmakers are beginning to markup the Fiscal Year (FY) 2020 appropriations bill in an attempt to keep the process somewhat on track. In the House, several Appropriations Subcommittees have already begun marking up appropriations legislation. The Senate is continuing to negotiate on spending levels and has yet to release or markup any spending measures.

Closely connected to the budget caps debate are negotiations surrounding the debt ceiling. The temporary suspension of the debt limit expired in early March. However, the Treasury continues to use “extraordinary measures” to prevent a default on U.S. debt. Those measures are expected to run out as soon as September, putting pressure on Congress to suspend or raise the debt ceiling by the fall. It is possible that a debt ceiling increase could be attached to another “must pass” item, including any budget deal that may come together.

The President released his proposed FY 2020 budget in March 2019. The administration continues to focus on trade as the President’s top policy priority. On the tribal front,

President Trump proclaimed May 5, 2019, to be Missing and Murdered American Indians and Alaska Natives Awareness Day. In the meantime, vacancies remain for the Indian Health Service Director and the head of the Small Business Administration. The President is expected to appoint a replacement for the Chair of the National Indian Gaming Commission soon.

In the Courts, the outcome of the Herrera and Cougar Den cases provided a win to Indian treaty rights and Indian Country continues to look to the U.S. Supreme Court to see how it will decide a number of pending cases and petitions for certiorari. The constitutionality of the Indian Child Welfare Act (ICWA) continues to be challenged by anti-ICWA groups across the United States.

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PRESIDENT TRUMP AND CONGRESS MOVE FORWARD TO SECURE FY20 BUDGET

On March 11, 2019, President Trump released his FY 2020 budget request to Congress. The budget proposes to decrease nondefense discretionary funding by $54 billion from the FY 2019 levels including cuts to the Bureau of Indian Affairs (BIA) and Bureau of Indian Education (BIE) (a 10.5 percent cut), Department of Health and Human Services (12 percent cut), Department of Housing and Urban Development (HUD) (18 percent cut), and the Environmental Protection Agency which faced the largest proposed cut (31 percent). Key highlights regarding the funding changes are provided below (See NCAI FY 2020 Budget Analysis for more highlights):

• BIA/BIE: Rather than combine the agencies into the same budget, the budget proposes separating the BIA and BIE as independent budgets. The budget also proposed the elimination of several programs including the Indian Loan Guarantee Program, the Housing Improvement Program, Small and Needy Tribes funding and Tribal Resilience Program. Traditionally, Congress protects funding for these programs in the appropriations process.

• Indian Health Service (IHS): The President's IHS budget proposal includes a funding increase of $392 million, which includes increases for contract support costs, clinical services and behavioral and substance abuse programs designed to address the opioid crisis. $25 million is proposed to establish a new program to eliminate Hepatitis C and HIV/AIDS in Indian Country. The Special Diabetes Program for Indians would be level-funded at $150 million.

Congress will consider the President's budget proposal as it takes action to pass the appropriations bills necessary to fund the government in FY 2020. The House is expected

to begin holding floor votes on appropriations bills in June. All House appropriation subcommittees have held hearings related to the FY 2020 budget and three bills were voted on by their respective subcommittees and full committees of jurisdiction: (1) Labor, Health & Human Services (HHS) & Education; (2) Military Construction, Veteran Affairs and Related Agencies; and (3) Legislative Branch. Another four bills have been approved by their relevant Subcommittees: (1) Interior, Environment and Related Agencies; (2) Defense; (3) Energy and Water Development, and Related Agencies; and (4) State, Foreign Operations and Related Programs. In the Senate, bills are moving slower but the Senate is likely to begin voting on bills this summer.

On May 15, 2019, the House Subcommittee on Interior, Environment and Related Agencies approved, by voice vote, its FY 2020 bill. This bill provides $13.8 billion in discretionary appropriations for the Department of the Interior (DOI), which is $2.41 billion more than the amount requested by the President. The legislation also includes $3.5 billion in funding for the BIA and BIE, and accepts the President's recommendation to separate the two. This level of funding is $432 million above the FY 2019 levels and $739 million above the President's budget request. $6.3 billion is included for the IHS, an increase of $537 million above FY 2019 and $431 million above the President's budget request. Additionally, the Environmental Protection Agency is allocated $9.52 billion, up $672 million from FY 2019 and $3.42 million from the President's budget request.

Although Congress would like to avoid a second government shutdown this year, it must agree on a budget deal by October 1 to raise current spending caps or face across-the-board cuts of 10 percent to all discretionary programs in January 2020. On March 18, 2019, President Trump issued a sequestration order that would uphold such cuts and indicated his opposition to a spending deal. However, in recent days the President has indicated he is amenable to discussions with Congress to raise the budget caps. Congressional Democrats and Republicans have started bicameral discussions on how to avoid sequestration, but there is no serious plan yet to raise the budget caps. Tribal programs at the DOI, HHS and other federal agencies are discretionary, so Tribal Nations would be significantly impacted if mandatory cuts go into place. The spending bills already in the pipeline include higher limits than what would be allowed under the 2011 deficit reduction law, including the Interior, Environment and Related Agencies bill which has an allocation that is 4.9 percent over current levels.

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DAVID BERNHARDT CONFIRMED AS SECRETARY OF THE INTERIOR; KEY POSTS REMAIN OPEN

On April 11, 2019, the Senate confirmed David Bernhardt as Secretary of the Department of the Interior by a vote of 56-41, with three Senators not voting (Cory Booker (D-NJ), Kamala Harris (D-CA) and David Perdue (R-GA)). Supporters cited the Secretary's in-depth experience in various government positions as preparing him with the expertise to handle the role. Opponents expressed concerns related to the Secretary's time as a lobbyist for fossil fuel and water interests, as well as his alleged conflicts of interest. All 52 voting Republicans, three Democrats (Martin Heinrich (D-NM), Joe Manchin (D-WV) and Kyrsten Sinema (D-AZ)) and one Independent (Angus King (I-ME)) voted in support of the Secretary's confirmation.

Three key posts affecting tribal issues remain vacant pending action by the President and Congress:

• Chairman of the National Indian Gaming Commission (NIGC) - On April 24, 2019, the NIGC announced the departure of Chairman Jonodev Chaudhuri (Muscogee Creek), effective May 15, 2019. Chaudhuri was appointed by President Barack Obama and has served as Chairman of the NIGC since 2013. Beginning May 16, 2019, Vice Chair Kathryn Isom-Clause (Taos Pueblo) will lead the day-to-day operations of the NIGC until a new Chair is appointed.

• Administrator of the Small Business Administration (SBA) - On March 29, 2019, Linda McMahon issued a statement announcing her resignation as head of the SBA, effective April 12, 2019, to return to the private sector. McMahon now serves at the Chair of the pro-President Trump Super Political Action Committee, America First Action. Chris Pilkerton,

SBA General Counsel, is serving as Acting Administrator. President Trump announced via Twitter, his plan to nominate Jovita Carranza, current Treasurer of the United States, to be the new SBA Administrator.

• Director of the IHS - An appointment for the Director of the IHS has not yet been made. The IHS remains under the leadership of Rear Admiral Michael D. Weahkee (Zuni), the Principal Deputy Director of the IHS.

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THE COLORADO RIVER DROUGHT CONTINGENCY PLAN AUTHORIZATION ACT BECAME LAW

President Trump signed H.R. 2030, the Colorado River Drought Contingency Plan Authorization Act, Pub. L. No. 116-14, into law on April 16, 2019. The law authorizes and directs the Secretary of the Interior to execute and implement agreements related to the Colorado River Drought Contingency Plan, negotiated among the Colorado River Basin States (Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming) to address regional drought and increased risk to reservoir levels in Lake Mead and Lake Powell. The Lower Basin States (Arizona, California and Nevada) agreed to additional reductions to water deliveries when Lake Mead falls to certain elevations.

Under the plan, two tribal communities will contribute 350,000 acre-feet of water to support conservation efforts to augment falling water levels in Lake Mead. The Colorado River Indian Tribes committed to conserve 150,000 acre-feet of their water in Lake Mead and the Gila River Indian Community committed to store a minimum of 200,000 acre-feet of water in Lake Mead and not to take delivery of this water until after 2026. The United States and major parties in the Lower Basin States, including the Gila River Indian Community, signed a number of agreements implementing these efforts on May 20, 2019 at a ceremony at the Hoover Dam.

The Colorado River Drought Contingency Plan will be in place through 2026 when the current Colorado River operational guidelines expire. The United States, Colorado River Basin States and other key stakeholders will need to negotiate new guidelines for managing the Colorado River after 2026.

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INFRASTRUCTURE NEGOTIATION AND LEGISLATIVE DEVELOPMENTS

On April 30, 2019, President Trump and Democratic leadership (Speaker of the House Nancy Pelosi and Minority Leader Chuck Schumer) announced a tentative agreement to spend $2 trillion on a “big and bold” infrastructure plan that would focus on rebuilding the Nation’s aging bridges, roadways, and waterways. This meeting is the latest in infrastructure talks that go back to the President’s first 100 days in office when he declared infrastructure a top priority of his Administration. Infrastructure was also a key talking point in last November’s election and is a priority for the Democratic controlled House. Democrats regained the House, in part, because of their messaging on clean government, healthcare and infrastructure. Although infrastructure talks between the White House and Democrats have become more productive, there is still no agreement on how to pay for the large-scale infrastructure plan. Republicans in the Senate are unwilling to enter into negotiations absent a clear understanding of how the plan would be funded. The White House and Democratic leadership will hold their second infrastructure meeting the week of May 20, so more details related to the initial $2 trillion infrastructure plan are expected to emerge then. However, without support from both Democrats and Republicans, an infrastructure deal is far from certain in the current political climate.

The infrastructure discussions come at a time when the House and Senate Committees on Transportation and Infrastructure are holding hearings and drafting the next surface transportation reauthorization bill with the goal of having language in place before the current authorization expires in early 2020. Specific to tribal transportation programs, the Senate Committee on Indian Affairs held a hearing on April 3, 2019, “Enhancing Tribal Self -Governance and Safety of Indian Roads.” Following the hearing, Chairman John Hoeven

(R-ND), with Senators Martha McSally (R-AZ) and Kevin Cramer (R-ND), introduced legislation, S.1211, the Addressing Underdeveloped and Tribally Operated Streets Act, that would increase funding for tribal safety programs and BIA road maintenance, streamline federal processes for construction, and separate the Bridge Program from the Tribal Transportation Program. Although this legislation may move forward as a standalone bill, the timing of its introduction may allow for all or some provisions of the legislation to be considered in the larger surface transportation bill.

Additionally, two recently announced grant programs might be beneficial to Tribal Nations. First, the Department of Transportation announced funding for the FY 2019 BUILD Transportation grant program, which provides grant funding for planning of regionally significant, large-scale infrastructure projects. Grant awards of up to $25 million will be provided, with half of the $900 million available expected to be designated for rural infrastructure projects. Grant applications are due by July 15, 2019. Second, the Department of Transportation and the Federal Transit Administration announced the availability of $5 million in Tribal Transit Program funding, with applications due July 9, 2019.

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SPORTS BETTING/ONLINE GAMING GAINS TRACTION

Last year, the Supreme Court opened the door to the legalization of sports betting in all 50 states. The Supreme Court, in Murphy v. National Collegiate Athletic Association, held that the Professional and Amateur Sports Protection Act (PASPA)—which prohibited state authorization of sports betting—was unconstitutional. The decision removed the primary federal obstacle to legalization of sports betting across the country.

Since the decision, sports betting has quickly spread. Several states have legalized sports betting in the last year, including New Jersey and Mississippi. Other states are currently considering legislation that will authorize sports betting in the near future, including North Carolina and Colorado. Indeed, legislators have introduced sports betting bills in nearly every state since the Supreme Court's decision. These developments are beginning to benefit tribal gaming facilities. For example, the Mississippi Band of Choctaw Indians currently offers sports betting at its Golden Moon Hotel and Casino facility. In addition, the Pueblo of Santa Ana opened New Mexico's first sports betting operation at its Santa Ana Star Casino and Hotel facility under its existing tribal-state compact with New Mexico without new state legislation.

The scope of newly authorized sports betting differs from state-to-state, especially with respect to mobile sports betting. Mississippi, for example, quickly authorized sports betting at all existing casinos in the state. The Mississippi law also provides for mobile sports betting, but only if conducted on casino grounds. Washington state is considering a similar bill, but it limits authorization to tribal casinos. Sports betting is pending launch in New York, where the legislature has authorized casino-based sports betting once relevant regulations are in place, but the state has yet to authorize mobile sports betting. However, the legislature is currently considering a bill that would authorize mobile bets so long as the servers are located at existing casinos, including tribal casinos.

While there has been much activity at the state-level, federal action on sports betting has been slow. Senators Chuck Schumer (D-NY) and now-retired Orrin Hatch (R-UT) introduced a federal sports betting bill in December 2018. However, there was no action on the bill before the end of the session and the bill has not been re-introduced.

As more states authorize some level of sports betting, we can expect to see more tribes offer sports betting at tribal gaming facilities and even over the Internet. These new revenue streams can be a major benefit to Indian country. However, there are some questions about the interaction between online or mobile gaming generally and federal law. In November 2018, the Department of Justice Office of Legal Counsel reversed its prior decision constraining the Wire Act to sports betting. New Hampshire quickly filed suit in federal court in New Hampshire seeking to protect its participation in a multi-state lottery using the Internet. Several other states have filed amicus briefs in the litigation supporting New Hampshire, including Michigan. Michigan has much at stake in the litigation because

of pending bills in the Michigan state legislature that would generally authorize commercial casinos and tribes to conduct online gaming in the state. These issues highlight potential problems that may arise as tribes engage in mobile sports betting, and online gaming more generally in Michigan.

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PRESIDENT TRUMP PROCLAIMS MAY 5, 2019 MISSING AND MURDERED AMERICAN INDIANS AND ALASKA NATIVES AWARENESS DAY

On May 3, 2019, President Trump issued a proclamation declaring May 5, 2019, to be "Missing and Murdered American Indians and Alaska Natives Awareness Day" to draw attention to the violence committed against American Indian and Alaska Native people, particularly women and children. Citing data from the National Institute of Justice and the Centers for Disease Control and Prevention, the proclamation noted that "more than 1.5 million American Indian and Alaska Native women have experienced violence, including sexual violence, in their lifetimes," and that "American Indian and Alaska Native children attempt and commit suicide at rates far higher than those in any other demographic in our Nation." The President called upon "Americans and all Federal, State, tribal, and local governments to increase awareness of the crisis of missing and murdered American Indians and Alaska Natives through appropriate programs and activities." The proclamation was published in the Federal Register on May 9, 2019, one day after the Senate agreed by unanimous consent to S.Res.144, a Resolution Designating May 5, 2019, as the "National Day of Awareness for Missing and Murdered Native Women and Girls."

Earlier this year, Congress introduced bipartisan legislation to study and address the crisis. In February, Senator Jon Tester (D-MT) introduced S.336, the Studying the Missing and Murdered Indian Crisis Act of 2019 in the Senate. The bill currently has six cosponsors- Senators Steve Daines (R-MT), James Lankford (R-OK), Catherine Cortez-Masto (D-NV), Tina Smith (D-MN), Tom Udall (D-NM) and Elizabeth Warren (D-MA). The bill would direct the Comptroller General of the United States to submit a report to the Senate Committee on Indian Affairs and the House Committee on Natural Resources on the response of law enforcement agencies to reports of missing or murdered Indians with recommendations for improvements. In April, Representatives Ruben Gallego (D-AZ), Deb Haaland (D-NM), Raul Grijalva (D-AZ), Tom Cole (R-OK), Paul Cook (R-CA) and Sharice Davids (D-KS) introduced a companion bill in the House, H.R.2029. S.336 is currently pending before the Senate Committee on Indian Affairs and H.R.2029 is currently pending before the House Subcommittee for Indigenous Peoples of the United States. The language of S.336 and H.R.2029 is also included in H.R.1585, the Violence Against Women Reauthorization Act of 2019 (VAWA), which passed the House and is now with the Senate.

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THE VIOLENCE AGAINST WOMEN REAUTHORIZATION ACT OF 2019 PASSES THE HOUSE

On April 4, 2019, the House passed the VAWA, with a 263 to 158 vote. The legislation includes several tribal amendments, which most notably seek to expand tribal jurisdiction and protections of VAWA to children and elders. Specifically, the following six tribal-related amendments passed in the House version of the legislation.

1. Urban Indian Resources – Rep. Deb Haaland (D-NM) submitted a resolution that would provide for victim advocates/resources in state courts for urban American Indian/Alaska Native victims of domestic violence. Funding for these resources would come out of the Department of Justice STOP formula grant program for states.
2. Alaska Jurisdiction – Rep. Don Young (R-AK) filed an amendment that would change the definition of land eligible for tribal jurisdiction to include all land within any Alaska Native village as a pilot project. The legislation would allow up to five Alaska tribes to pilot special jurisdiction.

3. Government Accountability Office (GAO) Report – Reps. Ruben Gallego (D-AZ), Haaland (D-NM) and Tom Cole (R-OK) filed an amendment that directs the GAO to submit a report on the response of law enforcement agencies to reports of missing or murdered Indians, including recommendations for legislative solutions.
4. Definition of "Domestic Violence" – Reps. Raul Grijalva (D-AZ) and Paul Cook (R-CA) submitted an amendment that revises the definition of domestic violence to include violence against, or witnessed by, a youth under the age of 18 or an elder.
5. Reimbursement for Implementation Costs – Reps. Grijalva (D-AZ), Cook (R-CA) and Dan Kildee (D-MI) filed an amendment that would create a grant program at the Department of Justice to allow tribal governments to seek partial reimbursement for expenses incurred in exercising special tribal jurisdiction. These expenses would include costs to detain inmates (including providing healthcare), probation and rehabilitation services.
6. Sharing of Criminal Database Information Among Jurisdictions – Reps. Haaland (D-NM), Young (R-AK) and Cook (R-CA) filed an amendment to clarify that federal criminal information database sharing extends to entities designated by a tribe as maintaining public safety within a tribes territorial jurisdiction that have no federal or state arrest authority.

No amendments were offered that would strip the expansion of tribal jurisdiction from the 2013 VAWA reauthorization. However, the fate of the recent tribal amendments agreed upon in the House remains unclear. If the Senate pursues a straight reauthorization of VAWA, any of the changes passed in the House version of the bill may not be incorporated. The Senate Judiciary Committee has jurisdiction over the legislation in the Senate.

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INDIAN CHILD WELFARE ACT CONTINUES TO BE CHALLENGED ACROSS THE UNITED STATES

The constitutionality of the Indian Child Welfare Act (ICWA) , a federak statute that provides important protections for American Indian Tribes in child welfare proceedings involving Indian children, continues to be challenged in state and federal courts across the United States. Three of those cases have drawn particular interest, and Akin Gump attorneys have been heavily involved in the constellation of ICWA-related litigation.

First, a petition for writ of certiorari in Carter et al. v. Sweeney et al., No. 18-923, is currently pending in the U.S. Supreme Court. This case began in 2015 with a wide-ranging constitutional challenge by plaintiffs represented by the Goldwater Institute. Because the plaintiffs failed to allege any facts demonstrating that their injuries were traceable to ICWA or that the ICWA actually applied to the foster/adoptive parents and Indian children serving as plaintiffs, the district court dismissed the case for lack of Article III standing. The Ninth Circuit agreed that Article III prevented adjudication of the merits for a different reason: the case had since become moot because the adoption proceedings at issue had been finalized. Plaintiffs filed a petition for rehearing en banc and requested a stay of the Ninth Circuit's "mandate" pending the filing of a petition for a writ of certiorari in the U.S. Supreme Court. Both requests were denied.

Plaintiffs filed their petition for a writ of certiorari in January 2019. The Gila River Indian Community, Navajo Nation, and the Director of Arizona Department of Child Safety elected to waive response. The Solicitor General, on behalf of the federal government, filed an opposition in April 2019 and plaintiffs filed their reply in early May 2019. The petition has been distributed for consideration at the Court's May 23, 2019 conference.

Second, a major U.S. Court of Appeals case that has the potential to be reviewed by the U.S. Supreme Court is Brackeen v. Bernhardt, No. 18-11479 (5th Cir.) (the "Texas ICWA" case). In October 2018, the U.S. District Court for the Northern District of Texas declared that portions of ICWA and its Final Rule were unconstitutional. The court concluded that ICWA relies on impermissible "racial" classifications, in part because it applies to those

who are members of federally recognized tribes or are eligible for membership in such tribes. The court also determined that ICWA violates other constitutional provisions, such as the Tenth Amendment. This case was appealed to the Fifth Circuit. Briefing concluded in February 2019 and oral argument was held in March 2019.

If the Fifth Circuit upholds the lower court's decision and the Supreme Court subsequently reviews it, the outcome could have the potential to strike down ICWA for all of Indian Country. Moreover, the scope of the courts' decisions in the Texas ICWA litigation could threaten other Indian laws that were enacted based on the premise that Tribal Nations have a "political" and not "racial" relationship with the federal government that comes from Tribal Nations' inherent status as sovereign nations.

Third, a relatively new federal ICWA case is Fisher v. Cook, No. 19-cv-2034 (W.D. Ark.) which involves a Cherokee Nation child. In this case, plaintiffs filed suit to declare certain provisions of ICWA and its Final Rule unconstitutional and inapplicable to private actions for termination of parental rights and stepparent adoptions. Earlier this month, the Cherokee Nation and federal defendants filed motions to dismiss the suit for failure to state a claim, lack of jurisdiction, application of the Anti-Injunction Act, and the doctrine of abstention. In the meantime, a bench trial has been scheduled for April 6, 2020.

For more resources regarding these cases and additional open Federal ICWA cases visit the ICWA Appellate Project.

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SUPREME COURT UPHOLDS TRIBAL TREATY RIGHTS AND INDIAN COUNTRY AWAITS ADDITIONAL DECISIONS ON OTHER INDIAN LAW CASES

The Supreme Court recently upheld the Yakama Nation's treaty rights in a tax dispute with Washington state, preserved the Crow Tribe's treaty hunting rights, considered arguments on the meaning of "Indian country" in Oklahoma, and declined to take up issues of sovereign immunity in Allergan, Inc. and the Saint Regis Mohawk Tribe's patent dispute. Soon, the Court will consider reviewing the Eleventh Circuit's decision to subject certain per-capita payments to federal taxation. Important developments concerning these key Indian law cases are noted below.

• Washington State Dep't of Licensing v. Cougar Den, Inc. (Decided March 19, 2019)

The Supreme Court issued its decision in Washington State Dep't of Licensing v. Cougar Den, Inc. on March 19, 2019. In a fractured opinion, the Supreme Court held that the Yakama Nation's treaty right to travel preempts Washington state's fuel tax on Cougar Den, Inc., a corporation of the Yakama Nation. Justice Breyer delivered the three-justice plurality opinion, joined by Justices Kagan and Sotomayor. Justice Gorsuch filed a concurring opinion, in which Justice Ginsburg joined. There were two dissenting opinions filed.

The Court, in both the plurality decision and concurrence, reasoned that the Washington state fuel tax imposed an impermissible burden on the Yakama Nation's treaty right to travel. There are few, if any, doctrinal differences in the plurality and the concurring opinions. Justices Breyer, Kagan, Sotomayor, Gorsuch, and Ginsburg all agree that the Yakama Nation's treaty should be given the meaning that the Yakama Nation understood it to have in 1855, which is that the treaty would protect their right to travel on public highways with goods for purposes of trade without encumbrance. Because the fuel tax at issue conflicts with this understanding, it is preempted as applied to members and corporations of the Yakama Nation. The Chief Justice's dissent, joined by Justices Thomas, Alito, and Kavanaugh, did not disagree with the plurality and concurrence on doctrinal grounds, but rather about whether the tax burdens the treaty right to travel. Chief Justice Roberts reasoned that the tax is a tax on the possession of fuel rather than on the right to travel with it, so it does not interfere with the Yakama Nation's treaty rights.

Justice Kavanaugh's dissent, however, does raise a fundamental disagreement regarding the law of tribal treaty interpretation. In his dissent joined by Justice Thomas, Justice Kavanaugh argued that the treaty language simply guaranteed the Yakama Nation a right against discrimination: "[t]he treaty recognizes tribal members' right to travel on off-reservation public highways on equal terms with other U.S. citizens." This reasoning, as

the plurality and concurrence point out, was expressly rejected by the Supreme Court in United States v. Winans.

This opinion is an initial indication of the stark difference between the approach that may be taken by the Court's newest members, Justices Gorsuch and Kavanaugh, on tribal issues. Justice Gorsuch consistently applies canons of Indian law to tribal treaty cases and Justice Kavanaugh appears ready to reject established Indian law. As Justice Gorsuch states in his concurrence, established precedent mandates that "[the Court's] job in this case it to interpret the treaty as the Yakamas originally understood it in 1855—not in light of new lawyerly glosses conjured up for litigation a continent away and more than 150 years after the fact." Justice Gorsuch rejects Justice Kavanaugh's analysis at every turn as contrary to existing law, stating "long ago this Court refused to impose such an 'impotent' construction on the treaty." It will be interesting to see how these two Justices continue to interact on Indian law issues.

The Court's plurality opinion, concurrence, and two dissents are available here.

• Herrera v. Wyoming (Decided May 20, 2019)

In Herrera v. Wyoming, the Court considered whether Herrera, a member of the Crow Tribe, could assert his tribal treaty right to hunt in the Bighorn National Forest as a defense to criminal charges for hunting elk off-season and without a state hunting license. The Court held 5-4 in favor of Herrera.

Specifically, Justice Sotomayor joined by Justices Ginsburg, Breyer, Kagan, and Gorsuch, held that the Crow Tribe's treaty right to hunt freely on its ceded territory was not extinguished when Wyoming became a state. Indeed, the Court clarified that treaty rights cannot be impliedly extinguished at statehood. The Court, relying again on traditional canons of Indian law, also held that the Bighorn National Forest did not become categorically "occupied," such that the treaty provisions would not apply on their own terms when the area was declared a national reserve. The treaty must be interpreted as it would have been understood by the Crow Tribe, and they would have interpreted "occupied" to mean an area free of settlement by non-Indians not an area regulated by the federal government.

This opinion is interesting in part because it provides another early example of Justice Gorsuch's willingness to side with the four liberal justices in treaty cases. Justice Alito wrote the dissenting opinion in the case, joined by Chief Justice Roberts, Justice Thomas and Justice Kavanaugh. Justice Gorsuch provided the necessary vote for the majority, likely because of his strong views of treaty language and interpretation. Important to note, however, is that the Court limited its holding: the State may argue on remand that while the Bighorn National Forest is not categorically "occupied", the area where Herrera was hunting is "occupied", as the Crow Tribe would have understood the term at the time the treaty was signed. Moreover, the State can argue that the hunting laws at issue are generally applicable and necessary for conservation, which may override treaty rights. Thus, although the opinion may not result in an absolute victory for the Crow Tribe and Herrera, it demonstrates again a group of five justices voting in support of tribal treaty rights. The Court's opinion and the dissent are available here.

• Carpenter v. Murphy (Argued Nov. 27, 2018)

The Supreme Court heard oral argument in the case on November 27, 2018. In Carpenter v. Murphy, Patrick Murphy, a citizen of the Muscogee (Creek) Nation, challenges the jurisdiction of the Oklahoma state court that convicted him of murder. It is settled law that states lack jurisdiction to convict Native Americans for murders that occur in "Indian country." The Tenth Circuit agreed with Murphy that the crime at issue occurred in "Indian country," and, consequently, the state of Oklahoma lacked jurisdiction to try him for it. The state of Oklahoma appealed to the Supreme Court, asking "[w]hether the 1866 territorial boundaries of the Creek Nation within… Oklahoma constitute an 'Indian reservation' today." If not, the state has jurisdiction to convict Murphy. If the 1866 boundaries remain intact, however, the entire eastern half of Oklahoma was and remains to be "Indian country" for purposes of jurisdictional allocation and federal law.

During oral argument, the Court appeared concerned with the broad implications of declaring most of eastern Oklahoma "Indian country," leading commentators to believe that the Court will find a way to avoid disrupting the allocation of jurisdiction in Oklahoma if

possible. The oral argument is available here.

In a rare move that supports this view, the Court requested additional briefing from the parties and the United States and the Muscogee (Creek) Nation as amicus curiae on December 4, 2018. The Court asked (1) "Whether any statute grants the state of Oklahoma jurisdiction over the prosecution of crimes committed by Indians in the area within the 1866 territorial boundaries of the Creek Nation, irrespective of the area's reservation status" and (2) "Whether there are circumstances in which land qualifies as an Indian reservation but nonetheless does not meet the definition of Indian country as set forth in 18 U.S.C. § 1151(a)." Supplemental briefing was complete on January 11, 2019 and is available here.

• Miccosukee Tribe of Indians v. United States (Cert. Pending)

The Miccosukee Tribe of Indians of Florida filed a petition for writ of certiorari on January 7, 2019. The Tribe requests review of an Eleventh Circuit decision that gaming revenue distributed through a co-mingled account is subject to federal taxation because it does not qualify as Indian general welfare benefits. The petition has been distributed amongst the Court and is scheduled for discussion at the Court's May 23, 2019 conference. The petition is available here.

• Saint Regis Mohawk Tribe, et al v. Mylan Pharmaceuticals (Cert. Denied)

The Supreme Court denied the petition for writ of certiorari filed by the Saint Regis Mohawk Tribe and Allergan, Inc. on April 15, 2019. The petitioners sought review of the Federal Circuit's determination that tribal sovereign immunity cannot be asserted in Patent Trial and Appeal Board proceedings. Accordingly, that decision stands. The Federal Circuit's decision is available here.

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CHIEF STANDING BEAR STATUE OBTAINS FINAL CONGRESSIONAL APPROVAL FOR PLACEMENT IN THE U.S CAPITOL

The State of Nebraska recently chose to highlight the important leadership of Chief Standing Bear as an early civil rights leader by placing a statue of him in Statuary Hall in the United States Capitol. On April 2018, the Nebraska Legislature voted to replace two existing Nebraska statues in the Capitol—Julius Sterling Morton and Williams Jennings Bryan—with Willa Cather and Ponca Chief Standing Bear. On April 23, 2018, Governor Ricketts signed this action into law. Akin Gump has been working, in a pro bono capacity, to represent the Chief Standing Bear Statuary Hall Committee to navigate the Congressional process. On August 30, 2018, the Architect of the Capitol executed the agreement with the State of Nebraska to replace the William Jennings Bryan statue with the Ponca Chief Standing Bear statue. Earlier this month the Joint Library Committee approved the final Chief Standing Bear statue which concludes the Congressional approval process.

Chief Standing Bear and the Ponca tribe, originally from the banks of the Niobrara River in Nebraska, lived peacefully there until forcibly removed to Indian Territory in modern-day Oklahoma. Chief Standing Bear and the Ponca people walked over 500-miles from Nebraska to Oklahoma, enduring hardships of travel, illness and the conditions of Indian Territory.

Tragically, many members of the tribe perished during the first year, including Chief Standing Bear's son, Bear Shield. In his final days, he told his father that he wished to be buried in his homelands along the Niobrara River. Determined to grant his son's dying wish, Chief Standing Bear led 30 tribal members, including women and children, on the treacherous, wintery 500-mile-long walk back to their home in Nebraska. The tribal party, just short of the resting place of Bear Shield, was arrested and imprisoned at Fort Omaha. In May of 1879, with the help of local attorneys, Chief Standing Bear sued the federal government seeking his freedom and right to return home. With his historic "I Am a Man" testimony, Chief Standing Bear compellingly swayed the outcome of the court on May 12, 1879, which finally recognized Indians as persons within the meaning of the law. It is fitting that Chief Standing Bear and his struggle for freedom be recognized in Statuary Hall.

The State of Nebraska, in partnership with the Architect of the Capitol, finalized the last Statuary Hall statue replacement requirements and are now working with Speaker Pelosi and the Nebraska Congressional Delegation to schedule the Chief Standing Bear dedication and unveiling ceremony later this summer or in the early fall.

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