

A Wide Range Of Legal Priorities For Tribes In 2020

By **Donald Pongrace, Allison Binney, Jason Hauter and Denise Desiderio** (January 15, 2020)

As Congress begins its work in the second session of the 116th Congress, tribal nations will be focused on the reauthorization of the Violence Against Women Act and the Special Diabetes Program for Indians and beginning the appropriations process for fiscal year 2021.

In the administration, implementation will begin on initiatives aimed at combating the crisis of missing and murdered indigenous persons, while the Treasury Tribal Advisory Committee will continue its focus on tax policy for Indian Country.

In the courts, tribal nations are closely watching a challenge to the Indian Child Welfare Act, where a rehearing scheduled for Jan. 22 could disturb an earlier ruling that the law is constitutional as a political, not race-based, classification. Tribal nations are also monitoring Oklahoma jurisdiction cases at the U.S. Supreme Court, and Texas v. United States, a challenge to the Affordable Care Act that could impact the Indian Health Care Improvement Act provision of that law.

The 2020 presidential election will have a significant impact on the work of both Congress and the administration as the calendar will be compressed leading up to the elections in November.

Appropriations Update

On Dec. 20, President Donald Trump signed the congressionally passed fiscal year 2020 appropriations bills, thereby avoiding a government shutdown.

Both the Indian Health Service and Bureau of Indian Affairs received increases of 4% over fiscal year 2019 spending. At the IHS, a large part of the increase was to cover the growing costs of 105(l) leases. Appropriators requested that the U.S. Department of the Interior and IHS conduct consultations on the 105(l) lease program and work with the committees of jurisdiction, appropriators and OMB to formulate a long-term accounting, budget and legislative strategy to address funding for this program.

This self-governance program offers opportunities for tribal nations to improve infrastructure in their communities, but the inability of the IHS to predict the necessary appropriations continues to result in shortfalls and reallocating funding from other critical programs. Last summer, the Interior Department entered into the first school construction/leaseback with the Gila River Indian Community so the 105(l) lease program is expected to expand at the Interior Department as well.

In addition, a short-term extension of the Special Diabetes Program for Indians, or SDPI, through May 22, 2020, was included. This short-term extension falls short of what tribes wanted and of legislation pending in the Senate, which would renew the program for five



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years at \$150 million per year and legislation pending in the House which would renew the program for four years.

The SDPI has been one of the most successful programs for combating diabetes in tribal communities, but short-term extensions cause interruptions in tribal programs, loss of critical staff and an inability for long-term planning.

At the BIA, increases were focused on funding for public safety, with new funding for cold cases and Missing and Murdered Native Americans and an increase in facilities construction. The Tiwahe Initiative was also extended. These increases show a renewed focus by Congress and the administration on combating the crisis of missing and murdered Native Americans and addressing cold cases that have been dormant for years, and in some cases, decades.

The appropriations bills also included a tax extender package; however, provisions that would have encouraged use of new market tax credits in Indian Country were not included in the final language of the bill. Tribes remain concerned about Congress' failure to consider tax provisions that will increase investment in Indian Country after being left out of the 2017 Tax Cuts and Jobs Act and there will be a renewed effort to try to get Congress to focus on tax incentives for Indian Country.

House Passes Reauthorization and Expansion of Violence Against Women Act; Senate Introduces two Bills

The Violence Against Women Act expired this year and Congress has yet to reauthorize the law. The law is critical to tribes and tribal communities because it provides grant funding for programs that assist victims of domestic violence and, in 2013, provisions were added to the law that restored tribal court jurisdiction over non-Native American who have significant ties to the tribal community and commit acts of domestic violence.

The House of Representatives took the lead on reauthorization with Rep. Karen Bass, D-Calif., introducing a bill in March 2019.

The House quickly passed the bill in April with tribal-specific provisions included to expand tribal jurisdiction over non-Native Americans, create additional grant programs to assist tribes with accessing the federal criminal information database, reimburse tribes for certain expenses related to detaining non-Native Americans (such as health care costs), and direct the attorney general and secretary of interior to submit an annual report to Congress that includes data on missing and murdered women. The bill passed the House with 33 Republican votes and all but 3 Democrats voting in favor of the bill.

In the Senate, Chairman of the Senate Judiciary Committee Lindsey Graham, R-S.C. indicated that he did not support the House-passed bill and preferred that the Senate introduce their own version. Sen. Dianne Feinstein, D-Calif., took the lead from the Democratic side and Sen. Joni Ernst, R-Iowa, took the lead from the Republican side with the goal of trying to negotiate a bill that could get bipartisan support in the Senate. Negotiations hit an impasse in November and ceased.

Feinstein decided to introduce her own bill, S. 2843, that closely resembled the House-passed bill, H.R.1585. Every Democratic senator (46) and the two independent senators cosponsored Feinstein's bill, but no Republicans cosponsored it. Ernst subsequently introduced her own VAWA reauthorization bill, S. 2920, with 12 Republican cosponsors, including Graham.

With respect to the tribal provisions, both bills expand tribal jurisdiction. The Ernst bill, however, contains new restrictions on tribal courts that the National Congress of American Indians, National Indigenous Resource Center and a group of former U.S. attorneys oppose.

It is unclear how either bill will proceed in the Senate at this point since neither bill has sufficient support to pass the Senate. Until Congress passes a VAWA reauthorization bill that contains an expansion of the crimes that tribal courts can prosecute, victims of sexual violence, stalking and trafficking will remain without justice, and assaults against tribal law enforcement and detention officers and crimes against children that occur on tribal lands will likely continue to go unprosecuted at high rates.

Addressing Missing and Murdered Indigenous People

In November, the administration took steps towards addressing the crisis of missing and murdered indigenous people. On Nov. 26, 2019, President Trump signed an executive order establishing the Operation Lady Justice task force; an interagency task force charged with developing a government-wide strategy to address the crisis of missing and murdered indigenous women and girls. The taskforce authorization will remain in effect for two years.

On Nov. 22, 2019, Attorney General William Barr announced the Missing and Murdered Indigenous Persons, or MMIP, Initiative, a plan that:

1. Establishes missing and murdered indigenous persons coordinators. The U.S. Department of Justice is planning to make an initial investment of \$1.5 million to hire and place 11 coordinators in the U.S. attorney's offices of 11 different states (Alaska, Arizona, Montana, Oklahoma, Michigan, Utah, Nevada, Minnesota, Oregon, New Mexico and Washington). These coordinators will be tasked with working closely with federal, tribal, state and local entities to develop protocols and procedures to more timely respond in MMIP cases.
2. Creates FBI rapid deployment teams. The MMIP initiative will make certain FBI resources available to MMIP cases in order to provide a more coordinated and effective law enforcement effort. These FBI resources will be available to tribal, state or local law enforcement agencies and will include access to: child abduction rapid deployment teams; cellular analysis support teams; evidence response teams; cyber agents for timely analysis of digital evidence/social media; victim services division response teams and other available resources.
3. Conducts comprehensive data analysis. The initiative will analyze data stored in federal databases, as well as share all relevant information between agencies to ensure a more coordinated effort to solve and prevent missing and murdered cases.

Treasury Hosts Treasury Tribal Advisory Committee Meeting and Listening Session on Tribally Chartered Corporations

On Dec. 3, 2019, the U.S. Department of the Treasury hosted the third Treasury Tribal Advisory Committee meeting. The TTAC was created pursuant to Public Law 113-168, the Tribal General Welfare Exclusion Act of 2014, to advise the secretary of the treasury and the Internal Revenue Service on matters relating to taxation, tribal nations and their citizens.

The December meeting focused on finalizing the membership for each TTAC subcommittee:

(1) general welfare exclusion, (2) dual taxation, and (3) tribal pensions. Additionally, technical advisers were appointed for each member of the subcommittees. The bulk of the December meeting focused on discussion of substantive tax issues that impact Indian Country and development of a plan for TTAC's work in 2020.

The next TTAC meeting will be on March 25, 2020, and it was decided that each of the subcommittees would hold meetings before then with technical advisers to begin to develop outlines of the issues along with potential solutions, which could include administrative and legislative solutions. The work of the TTAC is considered important because it involves complicated issues that require focused attention to the nuances of law, treaties, and court decisions. .

During the afternoon of Dec. 3, the U.S. Department of the Treasury hosted a consultation listening session regarding the income tax treatment of corporations chartered under tribal law. The listening session was called in response to requests from tribes that the Treasury and the Internal Revenue Service issue guidance to address and clarify the income tax status of corporations wholly owned by a tribal government and chartered under tribal law.

The Treasury will host additional tribal consultation sessions in the New Year and in the meantime, welcomes comments from any interested tribal nations or leaders.

Indian Child Welfare Act In Potential Danger as Brackeen Heads for Rehearing

The Indian Child Welfare Act is in danger again as the U.S. Court of Appeals for the Fifth Circuit agreed to rehear en banc *Brackeen v. Bernhardt*.^[1]

On Aug. 9, 2019, the Fifth Circuit declared that ICWA and its implementing federal regulations are constitutional. The court affirmed the U.S. District Court for the Northern District of Texas' October 2018 ruling regarding the plaintiffs' standing to sue, but reversed the district court's grant of summary judgment in favor of the defendants, handing a big win to tribal nations and pro-ICWA advocates.

One judge concurred in part and dissented in part, concluding that certain parts of ICWA violated the Constitution because they directed state officers or agents to administer federal law. In October, the plaintiffs filed petitions for rehearing and on Nov. 7, 2019, the Fifth Circuit vacated the previous decision and granted the plaintiffs' petition for rehearing en banc.

In defense of ICWA, 486 federally recognized American Indian and Alaska Native tribes, 59 Native organizations, 26 states, the District of Columbia and 75 members of Congress filed amicus briefs to the Fifth Circuit. The case is currently scheduled to be reheard on Jan. 22, 2020, in New Orleans.

Some analysts have signaled that if the en banc Fifth Circuit declares the law unconstitutional as a race-based classification, other major Native American legislation could be threatened as well. At a minimum, such a ruling would alter adoptive placement preferences for Native American children, which prioritize families from the child's tribal nation under the 1978 law.

U.S. Supreme Court yet to Schedule Reargument in Oklahoma Jurisdiction Case

The Supreme Court announced in June 2019 that it would hold another round of oral argument in *Sharp v. Murphy*, but the case has yet to be scheduled for reargument. Initial

argument in Murphy took place in November 2018. In December 2018, the court asked the parties to file supplemental briefs. The new briefs addressed whether any statute gives Oklahoma jurisdiction over crimes committed by Native Americans within the 1866 territorial boundaries of the Creek Nation, regardless of whether the area maintains its reservation status, and whether land could qualify as a reservation without falling under 18 U.S. Code Section 1151(a)'s definition of Indian country.

The court will ultimately decide whether to uphold the U.S. Court of Appeals for the Tenth Circuit's decision that Oklahoma lacked jurisdiction to prosecute a 1999 homicide because Congress never disestablished the Muscogee (Creek) reservation.

On Dec. 13, the Supreme Court granted cert in McGirt v. Oklahoma involving a similar challenge to that state's exercise of jurisdiction over alleged crimes. Hearing McGirt could allow the full court to decide the issue from Murphy since Justice Neil Gorsuch recused himself from consideration of Murphy.

The outcome of the Murphy and McGirt cases are expected to decide whether tribal nations or Oklahoma have jurisdiction over millions of acres in the eastern part of the state.

Supreme Court Actions in 2020

The Supreme Court has been asked to hear three Native American law cases this term and these cert petitions are still pending.

Buchwald Capital Advisors LLC requested cert to resolve a split in authority regarding whether the Bankruptcy Code abrogates tribal sovereign immunity. Respondents Sault Ste. Marie Tribe of Chippewa Indians and Kewadin Casinos Gaming Authority have requested and been granted six time extensions, citing a settlement agreement resolving the case that the parties have entered into. The settlement agreement is pending approval by the bankruptcy court.

Pro se petitioner Patrick Terry asked the court to consider his argument that Oklahoma lacked jurisdiction to prosecute him because the land is part of an Native American reservation under an 1867 treaty.

Finally, in September, the Alabama-Coushatta Tribe of Texas asked the court to resolve a circuit split on whether the Indian Gaming Regulatory Act permits gaming on tribal lands previously governed by trust statutes prohibiting gaming. The Fifth Circuit held below that IGRA does not permit gaming on these lands.

Conclusion

Despite the upcoming presidential and congressional elections and impeachment trial, there are a number of critical policy and legal issues facing Indian Country that need to be addressed to ensure tribal sovereignty is protected. It will be incumbent on Native American law practitioners and advocates to ensure these important issues are highlighted in Congress, the administration and the courts.

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[1] Brackeen v. Bernhardt, No. 18-11479.