

American Indian Law and Policy

Akin Gump
STRAUSS HAUER & FELD LLP

July 2018

SHARE THIS



All three branches of the federal government had a busy spring. The U.S. Supreme Court just completed its 2017 term in June with a full-strength bench after spending much of the previous term with only eight justices after the death of Justice Antonin Scalia in February 2016. The vacancy during the 2016 term was prolonged when the Senate refused to consider President Obama's nominee to replace Justice Scalia before the 2016 elections. Ultimately, President Trump nominated Neil Gorsuch to replace Scalia, and Gorsuch was confirmed by the Senate in April 2017. This term had fewer unanimous rulings and far more where the Court was closely divided. Some analysts have described this term as the most conservative since 1935, with many decisions being decided by a 5-4 vote. The completion of this term ended with Justice Anthony Kennedy announcing his retirement. Often seen as a swing vote, Justice Kennedy reliably sided with the conservative justices during this term. As described below, two tribal cases were decided in the final months of the term, and President Trump announced D.C. Circuit Judge Brett Kavanaugh as his proposed replacement for Justice Kennedy. The Court has recessed for the summer and will reconvene in late September.

Congress is focusing on wrapping up significant pieces of legislation prior to the August recess and will spend much of September focused on fiscal year (FY) 2019 appropriations bills. Additionally, the Senate will focus its attention on trying to confirm President Trump's nominee to the Supreme Court before the October 2018 term begins. Congress is expected to recess for the month of October so that members can focus on the November midterm elections. Democrats are well-positioned to take control of the House of Representatives, and Republicans are fighting to keep their narrow majority in the Senate and potentially expand it. The November elections should be interesting, and the outcomes have been difficult to predict, given the recent trends, as described more below.

Key pieces of legislation that are expected to take up much of the summer congressional calendar include defense bills, both spending and the National Defense Authorization Act; conferencing of the recently passed House and Senate Farm bills; opioid legislation; and reauthorization of the Federal Aviation Administration Act.

In June, Senate Majority Leader Mitch McConnell (R-KY) announced that the Senate will stay in session for the majority of August, which is usually when Congress is in recess, with only a one-week break during the week of August 6. The August recess was canceled, in part, to process more of President Trump's nominees and advance FY2019 spending bills before the end of September. The House still plans to recess for the month of August.

After the November elections, Congress will return to Washington, D.C., for the lame-duck session and will likely complete work on any outstanding spending bills that are not passed before September 30. Congress is also expected to unveil a statue of Chief Standing Bear in the Capitol before year's end.

The executive branch filled more of its senior political vacancies with the Senate confirming Tara Sweeney to be the Assistant Secretary for Indian Affairs at the Department of the Interior and Jean Carol Hovland as Commissioner of the Administration for Native Americans at the Department of Health and Human Services. The next few months will be busy for the Department of the Interior as it continues consultation on its proposed reorganization, potential changes to its land-into-trust regulations and discussions about

IN THIS ISSUE

- [Status of New Federal Funding Outlook for FY2019](#)
- [Congress Passes Two Versions of the Farm Bill and Heads to Conference](#)
- [Comprehensive Opioid Legislation Expected by the End of the Year](#)
- [Ponca Chief Standing Bear to Be Honored in the U.S. Capitol](#)
- [Recent Trends in 2018 Electoral Politics](#)
- [Supreme Court Issues Two Tribal Decisions, and Justice Kennedy Retires](#)
- [11th Circuit is First Court to Interpret Tribal General Welfare Exclusion Act](#)
- [Key Trump Administration Changes Impacting Indian Country](#)
- [Consultations Begin on the Department of the Interior Reorganization Proposal](#)
- [Drought Discussions Restart in Arizona](#)

STATUS OF NEW FEDERAL FUNDING AND OUTLOOK FOR FY2019

After two government shutdowns, Congress finally passed the FY2018 Omnibus Appropriations bill in March to fund the federal agencies through September. As previously reported, the \$1.3 trillion bill contained several new funding allocations for tribal nations. Of particular note were the 3 percent set aside for tribal nations to access funds for the first time from the Victims of Crime Act funding, \$50 million in the first-ever direct grant aid to help address the opioid epidemic in Indian Country and an increase of \$100 million in competitive grant funding under the Native American Housing Block Grants Program. This new funding will need to be obligated by the end of the fiscal year (September 30).

The Substance and Mental Health Services Administration (SAMHSA) issued its grant announcement for the Tribal Opioid Response Grants, which are available for tribes to use in prevention, treatment and recovery activities in response to the opioid crisis. The agency anticipates awarding up to 263 grants, which can be funded over a two-year period. These grant applications are due by August 20, 2018, and can be found [here](#). In addition, SAMHSA also released the announcement for the State Opioid Response grants, which are due by August 13. During this grant cycle, states are being required to include tribal nations in their needs assessment in order to receive grant funding, so additional funding outside of the tribal set-asides may be available to tribal programs. The Department of Justice released its grant funding announcement in June for the \$110 million in funding available to tribes to provide services to crime victims. The grants can be used to cover victim services for victims of domestic violence, homicide, assault, child abuse, cybercrime, opioid and other drug issues, human trafficking and other crimes. The grant applications are due on August 6 and can be found [here](#). The Department of Housing and Urban Development has not yet issued its funding announcement for the \$100 million allocated in competitive grant funding under the Native American Housing Block Grant program.

The length of the FY2018 Omnibus Appropriations bill (more than 2,200 pages) and the fact that it was approved by Congress just hours after it was released frustrated President Trump to the point of him threatening not to sign the bill into law. Ultimately, he signed the bill, but warned Congress that he would not sign a massive omnibus bill for FY2019. This led Congress to focus much of May and June on drafting and considering the 12 annual appropriations bills for FY2019 through the regular legislative process. Much of July will be spent on appropriations bills, and Senate Majority Leader McConnell announced that the Senate will stay in session for a portion of August to ensure progress on FY2019 spending. President Trump's threat also resulted in the two leaders of the Senate Appropriations Committee (Richard Shelby, R-AL, and Patrick Leahy, D-VT) coming to agreement on avoiding adding any policy riders to the appropriations bills. In order to get

as many bills passed by September 30 as possible, the House and Senate have been clustering appropriations bills into what are called "minibuses." So far, the House passed four of the 12 annual appropriations bills: Energy and Water; Legislative Branch; Military Construction and Veterans Affairs; and Defense. The House is planning to consider the Interior and Environment and Financial Services bills by mid-July. The Senate passed the Energy and Water, Legislative Branch, Military Construction and Veterans Affairs bills and is beginning the process of conferencing those bills with the House. The Interior and Environment bill most significantly impacts tribal nations, and the odds of it passing Congress before the fiscal year ends on September 30 are starting to look good, with both the House and Senate planning to pass their versions by the end of July. So far, there do not appear to be any cuts to any tribal programs, which is contrary to what President Trump proposed in his FY2019 budget to Congress. Even though Congress is making progress with considering the bills through the normal legislative process, time is running short, and it remains very likely that Congress will fail to pass all 12 bills by September 30, which will result in the need for a Continuing Resolution for some portion of time to finish the remaining bills. An issue that could bog down the appropriations process is President Trump's demand that border-wall funding be included in any spending legislation that he signs for FY2019. The President wants \$5 billion for FY2019, but the Senate and House are anticipated to only provide between \$1.6 billion and \$2.2 billion.

[Back to top](#)

CONGRESS PASSES TWO VERSIONS OF THE FARM BILL AND HEADS TO CONFERENCE

With the current authorization of the Farm bill expiring on September 30 of this year, the reauthorization of agricultural programs remains high on Congress' legislative agenda. The House narrowly passed its version of the bill on June 21, and the Senate passed its bill on June 28. The two chambers now need to resolve the myriad differences between the two competing versions of the Farm bill.

The chambers are expected to resolve such differences and controversial issues in a formal conference committee. Controversial issues that conferees will need to address include how to handle the House bill's work requirements for the Supplemental Nutrition Assistance Program, as well as differing provisions in each bill related to commodity supports, crop insurance and conservation programs.

Both versions of the Farm bill contained key gains for Indian Country, including: the creation of a new Tribal Advisory Council to the Secretary of the Department of Agriculture to advise on tribal issues throughout the Department; self-governance opportunities in the Food Distribution Program on Indian Reservations and Forestry programs; prioritization of tribes and underserved communities in grants and loans for broadband on Indian reservations; a Native American scholarship fund for tribal students attending land-grant universities and colleges; creation of a Tribal Promise Zone program at the Department to stimulate economic development; and increased opportunities for tribes to participate in international U.S. trade delegations. Advocates are working to ensure that such provisions are preserved when the House and Senate conferees determine the final bill language.

[Back to top](#)

COMPREHENSIVE OPIOID LEGISLATION EXPECTED BY THE END OF THE YEAR

Congress is expected to pass comprehensive opioid legislation by the end of the year. Both the House and the Senate have been working on promising legislation, and the leading bills are [H.R. 6, the Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment \(SUPPORT\) for Patients and Communities Act](#) and [S. 2680, Opioid Crisis Response Act of 2018](#).

On Friday, June 22, the House passed H.R. 6 with significant bipartisan support by a vote of 396-14. The bill was referred to the Senate on June 25 and placed on the Senate Legislative Calendar under General Orders on June 26. When it was first introduced, the bill focused on proposing Medicaid and Medicare provisions to address the opioid crisis, but an amendment that was adopted prior to the House vote incorporated dozens of

individual opioid bills that respond to additional aspects of the addiction crisis. The significant provisions in the legislation focus on (1) encouraging nonaddictive or nonopioid pain and addiction therapies, (2) loosening the privacy rules for accessing substance abuse records, (3) expanding Medicaid coverage for inpatient treatment for opioid and cocaine use, (4) preventing overprescription of opioids, (5) expanding telehealth services and (6) expanding the authority of non-physicians to prescribe medications that are commonly used to treat opioid-use disorders. The tribal-specific provisions provide for grants for prevention activities to tackle overdoses and a mandate for the Secretary of Health and Human Services to work with the Secretary of Housing and Urban Development and other stakeholders regarding best practices and minimum standards for operating recovery houses. Other provisions seek to enhance data collection in tribal communities, increase opportunities for loan repayment programs, and increase support for grandparents raising grandchildren affected by the opioid crisis.

Separately, the Senate has been working on its own comprehensive opioid legislation. The leading bill, S. 2680 is bipartisan, with the leaders of the Senate Health, Education, Labor and Pensions Committee (Lamar Alexander (R-TN) and Patty Murray (D-WA)) introducing the bill and being joined by six bipartisan co-sponsors. S. 2680 includes increased access for Tribal Nations into opioid programs across federal agencies and includes specific set-asides for Tribal Nations. Further, this legislation reauthorizes and improves the 21st Century Cures Act by providing direct funding to Tribal Nations; incorporating programs across federal agencies; enhancing support for data sharing; and increasing opportunities for workforce education, capacity, and support for children, families and workers impacted by the opioid crisis. One area of particular interest is a direct set-aside (5 percent of the overall funding or up to \$25 million), for Tribal Nations under the existing Cures Grant program at SAMHSA, which directs federal funds to areas hit hardest by the opioid crisis while also permitting states and Tribal Nations to direct funds to local needs.

With the House version now in the Senate, it is likely that the Senate will combine some of the provisions from the House bill into the Senate version, with a final package expected to be voted on by the end of the year.

[Back to top](#)

PONCA CHIEF STANDING BEAR TO BE HONORED IN THE U.S. CAPITOL

On April 18, 2018, the Nebraska Unicameral voted in support of LB 807 to replace the William Jennings Bryan statue currently in the U.S. Capitol Statuary Hall with a statue of Ponca Chief Standing Bear in honor of his legacy of fighting for the Ponca people and their homelands. On April 23, 2018, Gov. Ricketts signed LB 807 into law.

Chief Standing Bear was born on the banks of the Niobrara River in Nebraska where the Ponca people peaceably lived. In 1877, by Federal Treaty, Chief Standing Bear and the Ponca tribe were forcibly removed from their homeland in Nebraska to Indian Territory in what is now Oklahoma. Chief Standing Bear and the Ponca people walked more than 500 miles from Nebraska to Oklahoma, enduring the hardships of travel, illness and the conditions of Indian Territory. Sadly, many members of the tribe perished during the first year, including Chief Standing Bear's son, Bear Shield. Bear Shield's dying wish to his father was to be buried in his homelands along the Niobrara River in Nebraska. Determined to grant his son his dying wish, Chief Standing Bear led 30 members, including women and children, on the long, 500-mile walk back to their home in Nebraska, only to be arrested just short of their homeland and imprisoned at Fort Omaha for leaving the reservation. In May 1879, with the help of local attorneys, Chief Standing Bear sued the federal government, seeking his freedom and right to return to his homeland. Chief Standing Bear was victorious in court on May 12, 1879, where, for the first time, the court found that Indians are persons within the meaning of the law.

For these reasons, the state of Nebraska chose to honor the legacy of Chief Standing Bear in the U.S. Capitol. The statue has been created by artist Benjamin Victor, and, with the generous donation from Donald Miller Campbell, the necessary funds are dedicated to bringing the statue to the U.S. Capitol. Akin Gump Strauss Hauer & Feld LLP is providing assistance on a pro bono basis to navigate the federal process with the Architect of the Capitol and is optimistic that the unveiling of the statue will take place at the end of 2018.

The 2018 midterm election is fewer than 150 days away, and lawmakers, busy with high-profile legislation and the epic upcoming battle to replace Justice Kennedy on the Supreme Court, are increasingly turning their attention to electoral politics. Analysts are closely scrutinizing polls and other developing patterns to discern who will win in November. Several trends are emerging from the primary season that may foretell what the slate of 2018 candidates will ultimately look like and what the final outcome of the election will be.

Conservatives Stand Behind Trump

The President has kindled a fierce loyalty in the deeply conservative parts of the United States. This is evident by the stumbles and, in some instances, falls of a handful of candidates. In Alabama, Rep. Martha Roby, who criticized candidate Trump during the 2016 presidential election, was forced into a runoff. In a South Carolina Republican primary, former Governor and current Rep. Mark Sanford lost his bid for the renomination after the President published a tweet endorsing Sanford's opponent. While the President's popularity among the general public is shaky, the conservative Republican base stands firmly behind him and expects its Republican candidates to do the same.

Women Dominate Primaries

Across the country, nonincumbent women continue to win in competitive primaries, and that number is likely to increase after the remaining states that have yet to have primaries hold their contests. As of July 10, 110 nonincumbent women have won their parties' nominations to run for a seat in the House or Senate. Eighty-six of these candidates are Democrats, while 24 are Republican. Four are running for the Senate, and the remaining 106 are running for House seats. It is not just political veterans who are winning primaries; women who are first-time candidates are also winning their races. This includes Alexandria Ocasio-Cortez, a 28-year-old woman who beat out long-serving Rep. Joe Crowley (D-NY) in a surprise victory.

Women have never made up more than one-fourth of Congress, and they currently comprise 20 percent (107 women). Passing the one-fourth threshold (133 women) will be a challenge. *The Washington Post* maintains a [database](#) that analyzes the chances of nonincumbent women winning their races. Currently, the database's methodology assumes that eight of the 110 women are favored to win their races; 23 are in competitive races, and 79 are not favored to win.

Presidential Polling

Polling and statistics provide insight into election trends. President Trump's popularity is certain to have an effect on the outcome of the election. Midterm elections traditionally yield poor results for the sitting President's party, and presidential popularity can play a significant role in congressional losses. This is due, in large part, to midterm elections being generally viewed by the voting public as a referendum on the incumbent president's tenure and policies. As of July 10, President Trump has a [Gallup](#) approval rating of 41 percent, four points below where President Obama's approval rating stood on 2010 midterm election day, when the Democratic Party saw the loss of 63 seats in the House and six seats in the Senate.

Despite the parallels, President Trump's approval rating has been ticking upward according to the [RealClearPolitics.com](#) (RCP) polling average. President Trump's approval rating has continued to rise from a low of 37 percent in December to a high of 44.4 percent in early June. The RCP average currently stands at 43.4 percent approval. Historically, Presidents with approval ratings below 50 percent on election day see an average loss of 36 seats in the House. If trends hold and the President's popularity remains in sub-50 percent territory, Democrats could be on par to retake control of the House of Representatives.

Current Projections

Democrats must pick up 25 seats to take control of the House (excluding current vacancies). To flip the Senate, Democrats need to win two seats. The *Cook Report*, a good barometer of the state of play of [House](#) and [Senate](#) races, shows that Democrats have the opportunity to pick up needed seats to regain majorities in the House and Senate.

House Democrats enter the summer months with a much better playing field than Republicans. According to the *Cook Report* House ratings, 22 Republican seats are considered endangered, or “tossup,” races, while only two Democratic seats are considered that vulnerable. The *Cook Report* forecasts that Democrats have a moderate to strong chance of winning nine seats away from Republicans, meaning that they would need only 16 of the tossup seats to win the House majority. Democrats could also pick up some of the next level of vulnerable seats, which the *Cook Report* calls “lean Republican” and which currently includes 25 seats. This is compared to only three “lean Democratic” seats that Republicans could pick up in the election.

On the Senate side, the Republicans have the upper hand. The GOP can afford to lose one seat and maintain its majority with 50 senators, with Republican Vice President Mike Pence casting any tie-breaking vote in his constitutional capacity as President of the Senate. Republicans are buoyed by a favorable map, which has 10 Democrats running in states that President Trump won in the 2016 presidential election. In total, Democrats have 26 seats up for reelection, while Republicans have only nine seats to defend.

Democrats believe that they have a path to the majority in the Senate by preventing losses to the GOP while picking up two to three of the tossup seats. While Democrats are playing defense in five state races that the *Cook Report* deems are tossups—Florida, Indiana, Missouri, North Dakota and West Virginia, they are also playing offense in three Republican tossup seats: Arizona, Nevada and Tennessee.

[Back to top](#)

SUPREME COURT ISSUES TWO TRIBAL DECISIONS, AND JUSTICE KENNEDY RETIRES

President Trump Nominates Brett Kavanaugh to Replace Justice Kennedy

On Monday, July 9, President Trump nominated Brett Kavanaugh to replace retiring Justice Kennedy on the Supreme Court. Kavanaugh, a former clerk to Justice Kennedy, was an appellate attorney who was nominated by President Bush in 2006 to a seat on the D.C. Circuit. Kavanaugh does not have a significant track record deciding cases involving tribal nations, so it is hard to determine what his specific views are regarding tribal sovereignty. However, Kavanaugh was chosen from a list of 25 conservative judges that were vetted by conservative groups and deemed acceptable for Supreme Court vacancies. Key issues that are expected to be debated during his confirmation hearings are the nominee’s views on abortion rights—*Roe v. Wade*; health care and what that could mean for the Affordable Care Act; separation of powers; and executive branch authority.

Both President Trump and Senate Majority Leader McConnell have indicated there will be a confirmation vote for Kavanaugh this fall, prior to the midterm elections. With the Senate so closely divided and Sen. John McCain (R-AZ) absent from the Senate due to health-related issues, it will be necessary for all 50 Republican senators to vote in support of the nominee for confirmation. Key senators being targeted by Democrats are Sens. Susan Collins (R-ME) and Lisa Murkowski (R-AK), both of whom are pro-choice on abortion rights and have shown a willingness to stand apart from their party as evidenced by their votes not to repeal the Affordable Care Act last year. Other senators key to the discussion are those who come from red states won by Trump in the presidential election who are facing difficult reelections for their Senate seats, including Sens. Heidi Heitkamp (D-ND) from North Dakota, Joe Manchin (D-WV) from West Virginia and Joe Donnelly (D-IN) in Indiana.

The timing and partisan nature of the hearings and confirmation vote could make other Senate business more difficult as Congress heads into an already crowded calendar for the fall, with spending bills, the Farm bill, the National Defense Authorization Act and other key confirmations pending.

A Major Victory for Indian Country at the Supreme Court in the “Culverts Case”

On June 11, 2018, the Supreme Court affirmed the 9th Circuit's decision in *Washington v. United States* by an equally divided court (4-4) in a per curiam opinion. Justice Kennedy took no part in the consideration of the case.

The case is a major victory for Indian Country because, while it does not create Court precedent, it does allow the 9th Circuit decision below to stand. The 9th Circuit decision requires the state of Washington to correct culverts that prevent salmon from traveling upstream. The 9th Circuit reasoned that the culverts violate 21 tribes' fishing rights guaranteed under the Stevens Treaties.

At the Court, the state argued that the federal government cannot sue Washington over the culverts when they were built to federal specifications and approved by the federal government, that it would not be fair to force the state to spend approximately \$2 billion on replacing the culverts when it is unclear that the culverts will solve the problem and that the treaties do not require the state to guarantee that the tribes would always have a sustaining amount of fish.

The 21 tribes in the case and the United States, in its capacity as trustee for the tribes, argued that the state has overstated the cost of replacing the culverts. Further, the tribes argued that the state's interpretation of the treaties would provide the tribes with nothing more than "the opportunity to 'dip their nets' into empty waters." The tribes and the U.S. also argued that the 9th Circuit correctly held that the equitable defenses of waiver and estoppel cannot be applied against the federal government's attempt to enforce federal law.

Akin Gump submitted an [amicus brief](#) in the case on behalf of Washington state and local officials (current and former) in support of the tribes' position.

Supreme Court Issues Tribal Sovereign Immunity Decision in *Upper Skagit Indian Tribe v. Lundgren*

On May 21, 2018, the Court announced its decision in *Upper Skagit Indian Tribe v. Lundgren*. The case involved the scope of tribal sovereign immunity in property disputes. In 2013, the Upper Skagit Indian tribe purchased a 40-acre tract of land in the open market. The tribe bought the tract intending to apply for it to be taken into trust status by the federal government. While the tribe was preparing its trust application, a commissioned survey of the tract revealed that a boundary fence was misplaced. The fence divided the tribe's tract from land owned by the plaintiffs in the case, the Lundgrens. The survey revealed that the tribe owned approximately one acre of land on the Lundgrens' side of the fence. The Lundgrens filed a suit to quiet title to the acre of land on their side of the fence, invoking the doctrines of adverse possession and acquiescence. The tribe moved to dismiss the case based on sovereign immunity.

The Court granted certiorari in the case to resolve confusion in the lower courts about whether Indian tribes lack sovereign immunity in *in rem* lawsuits. In this case, the Washington Supreme Court rejected the tribe's immunity claim, reasoning that tribal sovereign immunity does not apply in a case to quiet title to land owned by a tribe. Rather, the Washington Supreme Court held, the courts are not prevented from exercising *in rem* jurisdiction over tribes. The Washington Supreme Court relied heavily on the Supreme Court's decision in *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251 (1992) in its analysis, reading that case to establish jurisdiction over *in rem* proceedings despite claims of tribal sovereign immunity. The Supreme Court, in an opinion delivered by Justice Gorsuch, rejected this reading of *Yakima*.

However, the Court did not dispense with the case after ruling that *Yakima* does not support the exercise of *in rem* jurisdiction over sovereign tribal nations. Instead, the Court remanded the case to the Washington Supreme Court to decide in the first instance whether arguments presented by the Lundgrens late in the case justified the exercise of jurisdiction over the tribe. The Lundgrens argued that there is an "immovable-property" exception to tribal sovereign immunity in cases involving nontrust, nonreservation land. Justices Clarence Thomas and Samuel Alito endorsed the Lundgrens' novel argument in their dissent. Justices John Roberts and Anthony Kennedy, concurring in the opinion, signaled that they will agree with the dissent if the case returns to the Court.

Nonetheless, the Court's opinion is a victory for Indian Country. The Supreme Court, in a 7-2 decision, clarified that its opinion in *Yakima* does not address the scope of tribal

sovereign immunity. Rather, *Yakima* involved only the statutory interpretation of the Indian General Allotment Act of 1887. The holding abrogated precedent in the lower courts that would grant *in rem* jurisdiction over sovereign tribal nations. Further, the immovable-property exception now at issue on remand would extend only to cases involving nontrust, nonreservation property owned by tribes.

[Back to top](#)

11TH CIRCUIT IS FIRST COURT TO INTERPRET TRIBAL GENERAL WELFARE EXCLUSION ACT

On Monday, June 4, 2018, the 11th Circuit Court of Appeals ruled against Miccosukee member Sally Jim and the Miccosukee Tribe of Indians of Florida in *United States v. Jim*, No. 16-17109 (11th Cir. 2018), affirming the lower court's decision. The court held (1) gaming revenue distributed per capita to members through a co-mingled account could not qualify as Indian general welfare benefits under [the Tribal General Welfare Exclusion Act (GWEA), Public Law 113-168] because Congress specifically subjected such distributions [that are derived from gaming revenues] to federal taxation in [the Indian Gaming Regulatory Act (IGRA)]; (2) Jim waived any arguments as to penalties or the tax amount assessed against her; and (3) because Miccosukee intervened as of right, Miccosukee is subject to Internal Revenue Service (IRS) reporting requirements and is obligated to withhold taxes on the distribution of payments made to its members.

GWEA excludes "Indian general welfare benefits" from federal taxation if the benefits meet certain criteria. Specifically, all "payments made or services provided to" Native Nation members are excluded from taxation if they meet certain criteria, including that they are nondiscriminatory, are available to any Native Nation member, promote the general welfare, are not lavish or extravagant, and are not compensation for services. See I.R.C. § 139E. GWEA specifically exempts a particular type of benefit payment meeting certain criteria from federal taxation without regard to the source of the funding. Nothing in that statutory definition mentions casino or gaming revenues or otherwise relates to the source of the benefit funding, although the legislative history reflects that GWEA was intended to codify existing IRS guidance stating that "general welfare programs may be funded from casino revenues." IRS Rev. Proc. 2014-35.

Jim is the first time that a federal appellate court has interpreted GWEA since the law passed in 2014, and the holding of the court is significant: Indian general welfare benefit payments made from gaming revenue are taxable, despite the seeming applicability of GWEA. After this decision, Native Nations within the 11th Circuit are required to report gaming revenue distributed as general welfare payments and to withhold federal taxes on those distributions. The precedential nature of this decision has potentially negative implications for all Native Nation general welfare programs, since it serves as guidance for courts that interpret GWEA in the future.

[Back to top](#)

KEY TRUMP ADMINISTRATION CHANGES IMPACTING INDIAN COUNTRY

Last month, the Senate confirmed two key agency officials to positions that are important to Indian Country.

First, on June 28, the Senate confirmed Tara Sweeney as Assistant Secretary–Indian Affairs (AS-IA) at the Department of the Interior. The AS-IA oversees the Bureau of Indian Affairs and the Bureau of Indian Education, and assists the Secretary of the Interior in carrying out the trust responsibility between the United States and Tribal Nations. Sweeney was nominated for this post in October 2017. The Senate Committee on Indian Affairs held a confirmation hearing on May 9, 2018, and voted favorably on Sweeney's nomination on June 6, 2018. During her confirmation hearing, Sweeney committed to spending the first 180 days of her appointment conducting listening sessions with tribal leaders to ascertain their top priorities and to develop a comprehensive action plan for her tenure as AS-IA. Prior to her nomination, Sweeney was an executive with the Arctic Slope Regional Corporation, and she is the first Alaska Native to hold the position as AS-IA. With

Sweeney's confirmation in order, John Tahsuda, who has served as the interim Acting AS-IA, will resume his prior position of Principal Deputy AS-IA.

Second, on June 21, Jean Carol Hovland was confirmed as Commissioner of the Administration for Native Americans (ANA) at the Department of Health and Human Services. The ANA provides social and economic development opportunities to Native Americans within the Department of Health and Human Services, with a focus on self-sufficiency and cultural preservation. The Commissioner of the ANA co-chairs the Interagency Council on Native American Affairs, which brings together principals throughout the agency to ensure that Native American policies and programmatic issues are represented throughout the agency. Hovland was nominated to be ANA Commissioner on February 13, 2018. She was confirmed through the Senate's special "privileged nomination" process, which is an expedited process that does not require a confirmation hearing. Hovland is an enrolled member of the Flandreau Santee Sioux Tribe and previously served as senior advisor to the AS-IA. Prior to joining the administration, Hovland was the Tribal Affairs Advisor to Sen. John Thune (R-SD).

Separately, the Director of the Indian Health Service remains vacant with no pending nominee; in the meantime, Rear Admiral Michael Weahkee, an enrolled member of the Zuni Tribe, continues to serve as Acting Director. This position has been without a permanent director since 2015. In February 2018, Robert Weaver, an insurance broker and member of the Quapaw Tribe of Oklahoma, withdrew his nomination.

Finally, after the resignation of Scott Pruitt, who stepped down as Administrator of the Environmental Protection Agency on Thursday, July 5, Andrew Wheeler was named the Acting Administrator, pending the nomination and confirmation of the next Administrator. Wheeler has indicated that, while he is heading up the agency, he wants to "depoliticize" environmental issues, work with career scientists at the agency and increase agency transparency.

[Back to top](#)

CONSULTATIONS BEGIN ON THE DEPARTMENT OF THE INTERIOR REORGANIZATION PROPOSAL

On March 13, 2017, President Trump issued Executive Order 13781, which directed each executive agency to develop a comprehensive plan to reorganize their agencies with the goal of improving efficiencies and accountabilities while eliminating unnecessary agencies or programs. In September 2017, the Department of the Interior submitted its reorganization proposal to the Office of Management and Budget. The plan contemplates establishing 13 unified regional offices, which are intended to work across the Department's nine bureaus (Bureau of Indian Affairs (BIA); Bureau of Land Management; Bureau of Reclamation; National Park Service; U.S. Fish and Wildlife Service; U.S. Geological Survey; Bureau of Ocean Energy Management; Bureau of Safety and Environmental Enforcement; and the Office of Surface Mining, and Reclamation and Enforcement) to resolve issues and increase efficiencies. The proposed boundaries of the regions are primarily based on watersheds and basins, and are intended to align with what the Department considers its three primary functions: (1) recreation, (2) conservation, and (3) permitting. The proposal for the BIA contemplates a pilot project of the shared resource and services model for Alaska, with the potential of another unified region pilot in proposed region 8, which includes Colorado, Utah, Wyoming and New Mexico.

Whether the reorganization will impact the BIA and the Bureau of Indian Education (BIE) is not yet known. On May 17, 2018, the Department issued a "Dear Tribal Leader" letter inviting tribal leaders to consult with the Department regarding the proposed reorganization. To date, four consultations have been held (one each in Michigan, Montana, New Mexico and California). Another four consultations will take place before the end of August (one each in California, Alaska, Oklahoma and Mississippi). The main question posed at these consultations is whether Tribal Nations want the BIA to be included in the larger reorganization of the other Interior bureaus or to remain outside of the reorganization.

Following the consultations, the Department will consider all input and written comments, and issue a decision on whether to incorporate the BIA within the larger agency

reorganization. While the purpose of the consultations is primarily focused on whether to incorporate the BIA into the reorganization, Tribal Nations will be impacted in other ways based on their government-to-government interactions with the other bureaus at the Department, especially around management of water and land resources.

The most recent reorganization map can be found [here](#).

[Back to top](#)

DROUGHT DISCUSSIONS RESTART IN ARIZONA

On June 28, 2018, the state of Arizona and the Central Arizona Project co-hosted a briefing on the lower Colorado River basin drought contingency plan to address the shrinking supply of Colorado River water. The Colorado River serves approximately 40 million people in Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming, and Indian tribes have substantial entitlements and claims to this water. The briefing was intended to kick off another round of discussions among Arizona stakeholders, including Indian tribes. The U.S. Bureau of Reclamation Commissioner Brenda Burman served as the keynote speaker for this event.

Reclamation has encouraged Colorado River states to come to an agreement and conclude drought contingency plans by the end of the year. Arizona is considered a key state in the lower basin discussions because any plan must be approved by the Arizona legislature, in contrast to other lower Colorado River basin states that can approve the plan without legislative approval. If states fail to approve a plan, they run the risk of Reclamation officials dictating how reductions will be applied to the states in the event of extreme shortage on the river.

Arizona tribes will play a key role in any drought contingency plan. These tribes support an incentive program that would reduce the risk of shortage by paying water users, including tribes, to leave water in Lake Mead or having tribes store water in Lake Mead under a tribal intentionally created surplus program administered by Reclamation.

[Back to top](#)

For more information, please contact your regular Akin Gump lawyer or advisor, or:

[Donald R. Pongrace](#)

[Allison C. Binney](#)

[Michael G. Rossetti](#)

akingump.com



© 2018 Akin Gump Strauss Hauer & Feld LLP. All rights reserved. Attorney advertising. This document is distributed for informational use only; it does not constitute legal advice and should not be used as such. IRS Circular 230 Notice Requirement: This communication is not given in the form of a covered opinion, within the meaning of Circular 230 issued by the United States Secretary of the Treasury. Thus, we are required to inform you that you cannot rely upon any tax advice contained in this communication for the purpose of avoiding United States federal tax penalties. In addition, any tax advice contained in this communication may not be used to promote, market or recommend a transaction to another party. Lawyers in the London office provide legal services through Akin Gump LLP, practicing under the name Akin Gump Strauss Hauer & Feld. Akin Gump LLP is a New York limited liability partnership and is authorized and regulated by the Solicitors Regulation Authority under number 267321. A list of the partners is available for inspection at Eighth Floor, Ten Bishops Square, London E1 6EG. Lawyers in the Hong Kong office provide legal services through Akin Gump Strauss Hauer & Feld, a firm of solicitors which is regulated by the Law Society of Hong Kong. Their registered office is Units 1801-08 & 10, 18th Floor Gloucester Tower, The Landmark, 15 Queen's Road Central, Central, Hong Kong. Akin Gump Strauss Hauer & Feld LLP, a limited liability partnership formed under the laws of Texas, USA, operates under the laws and regulations of numerous jurisdictions both inside and outside the United States. The Beijing office is a representative office of Akin Gump Strauss Hauer & Feld LLP.

[Update](#) your preferences | [Subscribe](#) to our mailing lists | [Forward](#) to a friend | [Opt out](#) of our mailing lists | [View](#) mailing addresses