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MEMORANDUM

July 22, 2016

TO: Tribal Clients
FROM: Michael Willis /s/
RE: *Tax Policy Developments*

This memorandum reports on the following tribal tax policy developments:

- *Senators Barrasso and McCain Announce Introduction of Bill to Spur Economic Development in Tribal Communities*
- *NCAI to Host Webinar on the Tribal Tax and Investment Reform Act of 2016 (HR 4943)*
- *The United States Files Brief in the Agua Caliente Litigation Interpreting the Taxation Provisions of the Indian Land Leasing Regulations*
- *Eleventh Circuit Rejects "Carrieri" Claim and Affirms Injunction Barring County from Taxing Lands Held in Trust for the Poarch Band of Creek Indians*

Senators Barrasso and McCain Announce Introduction of Bill to Spur Economic Development in Tribal Communities

Senator John Barrasso (R-WY), chairman of the Senate Committee on Indian Affairs (SCIA), and Senator John McCain (R-AZ) introduced the Indian Community Economic Enhancement Act of 2016 (S. 3234) (attached).

The SCIA press release announcing the bill explains that the legislation responds to concerns raised by Indian tribes, tribal organizations, and businesses in a series of hearings and listening sessions. Chairman Barrasso describes S. 3234 in the press release, noting that: "Accessing capital is paramount for economic development in tribal communities. This bill will break down existing barriers for growth, support loan and bond guarantee programs, expedite Washington's slow approval processes, and increase opportunities for tribal members."

The bill contains a section of findings, which identify some of the barriers to economic development in Indian Country, such as tribes' remote geographic locations, limited infrastructure and difficulty accessing capital. The findings also note that the "essential government functions" test limits tribal government's ability to issue tax-exempt bonds on par with other governments. The findings also point out that federal loan programs are generally underutilized.

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S. 3234 includes amendments to several existing laws intended to overcome these barriers. Among the amendments are those discussed below:

The Native American Business Development, Trade Promotion, and Tourism Act of 2000 would be amended to elevate the Office of Native American Economic Development in the Department of Commerce so it operates within the Office of the Secretary of Commerce. That Office would become the point of contact for tribal consultation throughout the Department of Commerce and would be responsible for the coordination of all Indian programs within that federal agency. The amendments also require inter-agency coordination between the Departments of Interior, Treasury and Commerce on economic development initiatives in Indian Country. The bill would create an Indian Economic Development Fund to stimulate efforts to overcome barriers to investment in tribal communities and provide a source of funding to provide credit subsidies for loan guarantees.

The Indian Trader Act would be amended to authorize the Secretary to waive federal licensing requirements for any tribe that has enacted tribal laws to govern licensing, trade or commerce on its Indian lands. The waiver would serve to authorize tribal licensing procedures to apply rather than the federal Indian Trader licensing process.

The Native American Programs Act of 1974 would be amended to prioritize assistance from the Community Development Banking and Financial Institutions Act to tribes for the development of: (1) commercial and business codes; (2) community development financial institutions; and (3) master plans for community and economic development infrastructure.

The Buy Indian Act would be amended to add provisions intended to expand the use of Indian labor and products and to require reports to Congress every two years to detail the impact of these provisions.

NCAI to Host Webinar on the Tribal Tax and Investment Reform Act of 2016 (HR 4943)

NCAI will hold a webinar with tribal representatives to build support sponsorship for HR 4943. As we reported previously, Representatives Ron Kind (D-WI) and Lynn Jenkins (R-KS) introduced HR 4943 to amend the Internal Revenue Code in order to treat Indian tribal governments in the same manner as state governments for several federal tax purposes. The bill would achieve the following:

- Eliminate the "essential government function" classification for the issuance of Tribal tax-exempt bonds and apply the same Federal tax standards and requirements as states;

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- Allow Tribes to operate a single and comprehensive government pension program for all Tribal employees similar to state government pension plans;
- Provide Tribal Foundations and Charities the same status as state foundations and charities;
- Provide Tribal child support enforcement agencies access to parent locator services and enforcement authority for past due obligations through the garnishment of Federal income tax returns; and
- Grant Tribal courts authority to make a determination of special needs in order to grant tax credits to adoptive parents on par with state courts.

The webinar will be held on August 4, 2016 at 2:00pm eastern time. If you would like to participate, you can register for the Webinar by clicking the following link provided by NCAI: [To register for the webinar click here.](#)

The United States Files Brief in the Agua Caliente Litigation to Clarify Interpretation of the Taxation Provisions of the Indian Land Leasing Regulations

We have reported previously on cases in which tribes have brought federal lawsuits to challenge state and local taxation on Indian lands, including the case of *Agua Caliente v. Riverside County*, in which the tribe opposed the local government's imposition of a possessory interest tax on lessees of reservation trust lands. On July 20, 2016, the Department of Justice (DOJ) filed an *amicus* brief in the *Agua Caliente* case to clarify how the Department of the Interior interprets 25 C.F.R. § 162.017(c). That section of the Indian Land Leasing regulations provides as follows:

"Subject only to applicable Federal law, the leasehold or possessory interest is not subject to any fee, tax, assessment, levy, or other charge imposed by any State or political subdivision of a State. Leasehold or possessory interests may be subject to taxation by the Indian tribe with jurisdiction."

The DOJ brief pointed out that 25 C.F.R. § 162.017(c), as updated in the 2012 regulations, provides the federal courts with the leeway to undertake interest balancing analysis under *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) and is not intended as an outright preemption of state and local taxes. The phrase "subject only to applicable Federal law" was included in the regulation, the brief explained, in order to leave the court room to undertake *Bracker's* "'particularized inquiry into the nature of the state, federal and tribal interests at stake' before determining the validity of a specific tax."

The U.S. Government's brief further underscored that the strong federal and tribal interests associated with Indian land leasing leave little room for taxation by state and local governments. The brief stressed this point in closing as it stated, "the

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comprehensive federal statutory and regulatory schemes that govern leasing of Indian trust and restricted land, combined with the interest in promoting tribal self-determination, self-government and economic wellbeing, weigh heavily against state and local taxation."

Eleventh Circuit Rejects "Carcieri" Claim and Affirms Injunction Barring County from Taxing Lands Held in Trust for the Poarch Band of Creek Indians

Poarch Band of Creek Indians v. Hildreth is another lawsuit brought by a tribe to challenge a county tax on its Indian lands. In the *Poarch Band* litigation, the Tribe has had to seek federal court relief of the local government's efforts to levy taxes on the trust lands of the tribe. On July 11, 2016, the U.S. Court of Appeals for the Eleventh Circuit affirmed the District Court's decision to enjoin Escambia County from its tax assessment imposed on the trust lands of the tribe.

Although the Indian Reorganization Act (IRA) expressly prohibits local taxation of lands held in trust by the United States, Escambia County relied upon the Supreme Court's decision in *Carcieri v. Salazar* to claim that lands taken into trust for the Poarch Band of Creek Indians were not valid because the Tribe was not eligible under the IRA. The County argued that since the Poarch Band was not a federally recognized Indian tribe until 1984, the tribe could not have been "under federal jurisdiction in 1934" as required by *Carcieri* to be eligible to have lands held in trust for it by the federal government. If the Poarch Band lands were not eligible to be held in trust by the United States, the County asserted, those lands would be within the County's tax jurisdiction.

The Eleventh Circuit distinguished the facts from those in the *Carcieri* case. In *Carcieri*, the Secretary took into trust a plot of land for the Narragansett tribe in Rhode Island. The State of Rhode Island first appealed the Secretary's decision to the Interior Board of Appeals, and after losing there, sought review of the decision in federal court under the Administrative Procedures Act (APA), which the State pursued through appeals all the way to the Supreme Court. The Supreme Court interpreted the IRA's land into trust provisions as only applying to tribes under federal jurisdiction in 1934, and held that since the Narragansett tribe was not under federal jurisdiction in 1934, the Secretary lacked the authority to take land into trust for the tribe.

In *Poarch Band*, Escambia County did not bring an APA claim against the Secretary, even though the County was well aware of the Secretary of the Interior's decision to take the tribe's land in Escambia County into trust during the 1980s and 1990s. By asserting the claim nearly 30 years later, the APA's statute of limitations had lapsed, leaving in place the Secretary's decision to take the land into trust. Since the lands the County seeks to tax are trust lands, the Eleventh Circuit upheld the injunction preventing the County from imposing its tax.

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Conclusion

We will continue to monitor tax developments. Please contact us if you have any questions or comments.