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MEMORANDUM

March 14, 2017

To: Tribal Clients

From: HOBBS, STRAUS, DEAN & WALKER, LLP

Re: ***Brief Filed in Opposition of Supreme Court Review of Decision to Take Land into Trust for Cowlitz Tribe***

On March 1, 2017, the Cowlitz Indian Tribe (Tribe) and federal defendants filed briefs urging the Supreme Court to deny review in a case challenging the Secretary of Interior's decision to take land into trust for the Tribe for gaming purposes. The case was originally filed against the Secretary of the Interior and other federal defendants in the United States District Court for the District of Columbia (District Court), and the plaintiffs included the Confederated Tribe of the Grande Ronde Community of Oregon; Clark County, Washington; City of Vancouver, Washington; Citizens Against Reservation Shopping (CARS); and private individuals and businesses. The Tribe intervened as a defendant in that litigation. Ultimately, the District Court and the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) rejected the challenges to the land-into-trust decision. The Confederated Tribe of the Grande Ronde Community and the county and city chose not to pursue the case further. However, on October 27, 2017, CARS and the private plaintiffs filed a petition for a writ of certiorari, requesting Supreme Court review.

The Indian Reorganization Act (IRA) authorizes the Secretary of Interior to acquire land in trust for "Indians", defined in Section 19 of the IRA to include "members of any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. § 5129 (formerly §479). In *Carcieri v. Salazar*, 555 U.S. 379 (2009), the Supreme Court held that "now under federal jurisdiction" means that a tribe must have been under federal jurisdiction in 1934, the year the IRA was enacted, for the Secretary to take land into trust for it.

The plaintiffs challenging Interior's decision to take land into trust for the Tribe argue that the Tribe was neither "recognized" nor "under federal jurisdiction" in 1934. The District Court held that the Tribe did not have to demonstrate that it was recognized in 1934 and that the Secretary reasonably concluded the Tribe was under federal jurisdiction in 1934. The District Court upheld the Secretary's two-part test for whether a tribe was under federal jurisdiction in 1934. Under this test, a tribe may qualify as "under federal jurisdiction" if: (1) at some point before the IRA's 1934 enactment, the United States had taken action establishing or reflecting federal obligations, duties, responsibility

for, or authority over the tribe; and (2) such jurisdictional status remained intact at the time of the IRA's enactment. On appeal, the D.C. Circuit unanimously affirmed the District Court's decision in its entirety.

CARS and the private plaintiffs in the case now request that the Supreme Court overturn the decisions of the two lower courts. The plaintiffs argue that the language of the IRA requires that a tribe have been both recognized and under federal jurisdiction in 1934. They also seek a ruling that the IRA requires that the tribe was residing in Indian country in 1934.

The Tribe and the federal defendants' briefs in opposition to the petition for a writ of certiorari argue that the courts have correctly determined that a tribe need not have been federally recognized in 1934 to be under federal jurisdiction. Additionally, they argue that a tribe need not have been located on a federal reservation in 1934, pointing to the distinction between the first clause of Section 5129 which is at issue (tribes "now under Federal jurisdiction") and the second clause which explicitly refers to reservation status ("all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation"). The defendants further assert that the courts have been properly deferential to the Secretary's interpretations of the IRA and that there is no circuit split or other compelling reason for the Supreme Court to take up review.

We will continue to update you as this case develops. For more information, please contact Geoff Strommer (gstrommer@hobbsstrauss.com or 503-242-1745), Joseph Webster (jwebster@hobbsstrauss.com or 202-822-8282), or Jennifer Hughes (jhughes@hobbsstrauss.com or 202-822-8282).