

MEMORANDUM

June 26, 2017

TO: TRIBAL CLIENTS

FROM: HOBBS, STRAUS, DEAN & WALKER, LLP

RE: *National Congress of American Indians Panel on the Federal Trust Responsibility to Tribal Lands and Resources and Land & Natural Resources Subcommittee Updates*

The June 13, 2017 panel served as a forum to address current issues with tribal lands and natural resources. The Department of Interior (DOI or “Interior”) has been considering new directions for the future of tribal lands, but will need to work with tribal leadership to produce lasting changes that benefit Indian Country. Interior has announced a new direction on land to trust, and is considering new priorities for the Buy Back Program and the Office of Special Trustee. The federal trust responsibility during infrastructure permitting continues to be a priority issue, and litigation continues over the “now under federal jurisdiction” component of the Indian Reorganization Act. Panelists included National Congress of American Indians (NCAI) President Brian Cladoosby, Chairwoman Cheryl Andrews-Maltais (Wampanoag Tribe of Gay Head (Aquinnah)), Acting Deputy Secretary James Cason, and Attorney Brian Gunn.

NCAI President Cladoosby opened the panel with an overview of the history of the Dawes Act and its impact on tribal land ownership in the United States. He noted that the Obama Administration put over 500,000 acres into trust and encouraged the Trump Administration to continue this policy. However, President Cladoosby acknowledged that the Trump Administration is looking at “off-reservation” and acquisitions for the purposes of gaming “a little bit differently” than the Obama Administration.

Mr. Cason noted that David Bernhardt has been nominated to be Deputy Secretary but he will be filling that position until Mr. Bernhardt is confirmed by the Senate and then will move back as Associate Deputy Secretary. Jamestown S’Klallam Tribe Chairman Ron Allen asked Mr. Cason why the Administration has pulled back on land into trust acquisitions. Mr. Cason stated that he was not sure that he can give a position on land into trust at this time as what has changed is more “process” than policy at this point by moving the final decision from the region to D.C. headquarters and discussing each application with the Assistant Secretary for Indian Affairs as it reaches a decision point. He stated that the DOI has been working on land into trust issues for a “long long time” but that Secretary Zinke is not familiar with DOI processes so he has

assigned someone in his senior political team to look at these issues so that all decisions are consistent with the Trump Administration's view. To that end, Mr. Cason is assigned to review land into trust applications, gaming decisions and cooperative agreements and grants so that "someone who knows how the DOI is supposed to work" reviews and makes the decision. He stated that he personally has reviewed 1,500 grants, several Records of Decision and while he has made no land into trust decisions yet, including off-reservation decisions, he is close to answering the Shawnee application. However, he said that the Secretary has not embraced a land into trust policy decision yet.

Attendees asked Mr. Cason to provide an overview as to why the land into trust process came to being. Mr. Cason stated that the United States relationship with Tribes has gone through "fits and starts" and "not every decision done as thoughtfully as it should". He discussed the Indian land loss in the 1880's and the federal government's decision at that time to take all remaining Indian land into trust in order to stop additional land loss. When the land is acquired into trust, it loses its distinction as fee and takes on different character because the United States holds title on behalf of the Tribe or individual. An attendee stated that the federal government needs to remember to protect both the surface and subsurface rights of tribal trust land.

Mr. Cason defended Secretary Zinke's comments regarding "termination" and stated that he did not mean "termination" as it is understood by Tribes – the termination of the federal trust relationship. He said that one challenge for BIA is that it is an organization where all rules and regulations are set up as one-size-fits-all when actually he knows that there are 567 Tribes and 567 different points of view regarding how they conduct their business. The question becomes how to set up a BIA regulatory scheme to do its job and for Tribes to manage within that scheme even if it is "one size fits all". Mr. Cason said that under that type of regulatory structure, Tribes do not get to exercise as much independence as they would like to. He noted that there are some Tribes that expect the BIA to fulfill the tribal role on the reservation and at other end, Tribes who want to do everything themselves and the BIA has to respond to that full range of governance. The Trump Administration is looking at what can they do to help Tribes be "truly independent domestic sovereigns" not "dependent" sovereigns. They want to allow Tribes to have more autonomy and are analyzing how to carve the BIA out of the picture in order to let those Tribes who want to grow and have more independence do their own thing. He stated that they "do not want to get thumped for promoting termination" when their true intention is to help Tribes have more independence and sovereignty.

Chairman Allen stated that the Administration needs to distance itself from the concept of termination. For land into trust there has to be a process that makes sense and is timely and that Tribes also want to improve the process. Chairman Allen noted that the perception about the process changes is that these decisions will be bottlenecked in D.C. Mr. Cason stated that if the land is adjacent to or within the reservation then those decisions are going forward but the second review in D.C. will occur if the land is outside the reservation.

He also stated that the Secretary has said he wants to make sure that the land into trust acquisition is beneficial for both the community and the tribe. An attendee asked Mr. Cason what that statement means and reminded him that counties and cities often face the same community backlash and just because someone says they are opposed then that should not stop the process. Mr. Cason stated that he understands the desire for some predictable process that would make everyone more comfortable but that he often ends up in complicated situations where parties are opposed and the decision becomes more uncomfortable. He said that off-reservation acquisitions are more challenging and the Department has to manage other communities' concerns and work through those issues. But he also noted that he recently signed off a reservation proclamation for the Jamestown S'Klallam Tribe.

Mr. Lance Gumbs, Shinnecock Indian Nation stated that "one size doesn't fit all". He said that the Shinnecock Nation owns its own land and are looking for a process that embraces that notion. He said they were upset that Oneida land went into trust in New York but that the Shinnecock are not going through the trust land process. Mr. Cason responded that he is happy to talk about the trust relationship issue and the part the United States has to play as "referee" when dealing with objections from one tribe about another. He said the U.S. has to balance out all tribal interests. He referred to the *Cobell* litigation as influencing how he is approaching the land into trust policy issue because in that litigation individual allottees were "suing me" because the Department was not doing a good job of managing their interests and he has to think about potential litigation when he makes decisions. He stated that "*Cobell* boiled down to [the Department of Interior], as a land steward, was not doing a very good job. Then I have to put that into context when some Tribes want more land put into trust. Why would we do that if you [Tribes] are saying I don't manage it well?" He said that the DOI has gotten better at managing these issues but this is another consideration when dealing with the land into trust issue.

When asked whether the land into trust regulations will be changed and if there is a commutability component, Mr. Cason responded that the BIA is looking at possible options for land into trust policy but not looking particularly at the "Artman commutability doctrine rather looking at each particular circumstances." A representative of the Tejon Tribe in California commented that they do not have any land so are unable to exercise its jurisdiction. Mr. Cason said there is a different argument for landless Tribes and discussed the Shawnee application. He stated that the fact they were landless was a big consideration when analyzing the application. The application will be approved even though it is 300 miles away because of "the other equities at play". He said there will not be a "hard rule or set of rules that will govern every decision" but will look at each consideration for each application to make good decisions based on facts.

Mr. Cason discussed his assignment in the Secretary's office and noted that he spends a lot of time working on tribal issues generally. He said he worked on the *Cobell* issue for 8 years on the government side and observed all the things that the federal government could have done to avoid the *Cobell* litigation. He stated that there will be

an Assistant Secretary of Indian Affairs (AS-IA) in the “near future” but that they just hired Gavin Clarkson to be an advisor on economic development. He stated that Mr. Clarkson brings energy into the BIA ranks to move the process along more quickly. He said they are looking for a Chief of Staff and another Deputy Secretary for the AS-IA hallway and, once those positions are filled, the AS-IA will take the lead on tribal issues. Until then he [Cason] is filling and will continue to be involved because he likes the issues and people.

A representative from the Pueblo of Laguna said that the Secretary’s comments on reducing regulations conflicts with the reality of pulling the land into trust decisions back into D.C. which will just cause more delays. He recommended putting those decisions back into the Regional offices and emphasized the importance of trust lands to Tribes. Mr. Cason acknowledged the delays and stated that he is actually the bottleneck in D.C. because he is responsible for so many decisions and delay will be inevitable.

A member of the Seneca Nation recommended the development of a restricted fee process so that Tribes can lease land without federal oversight. They argued that this would empower Tribes to utilize their own lands. Mr. Cason responded that to the extent Tribes want more control and more autonomy, the Secretary is interested in knowing the “what” and “how” that is needed so the DOI can be helpful to accomplishing the end goal of tribal independence and the BIA worked out of a job. He said the question is “how to get there and who goes first?” He stated that there is an Indian subgroup lead by Quapaw Tribal Chairman John Berrey to talk about how to make this happen.

President Cladoosby stated that many Tribes would do a pilot project and it just takes a tribe that has the infrastructure in place to come to DOI and ask them to let them do it. Chief Lynn Malerba of the Mohegan Tribe asked Mr. Cason to not let “*Cobell* PTSD” flavor the issue of land into trust. She stated that Tribes need good consultation and that consultation should continue until an agreement is reached. She said that Tribes do not want to move to becoming like state governments because the federal government is our trustee and we depend on the fee to trust process. She is not in favor of moving Tribes to corporations approach. A member of the Tulalip Tribes commented that all Tribes are unique but Indian Country needs a quick process to place land into trust. She encouraged Mr. Cason to not take lawsuits personally and instead remember that litigants are simply people trying to fight for their rights. She encouraged him to move past *Cobell* and forward to developing a solution that is more than just “one-tribe-fits-all”.

A member of the Ute Mountain Ute stated that we need to remember those Tribes whose majority of their funding is through grants. He stated that racism still exists and states and counties are constantly fighting to keep Tribes down. He argued that DOI should be on the tribal side of the table when Tribes and states/counties have a dispute. He recommended that the Trump Administration build on the gains of the Obama Administration and to remember that the federal government and Tribes are partners to bringing prosperity to Indian Country. Mr. Cason stated that the DOI is happy to partner to make Indian Country better but that Tribes each have different interests and plans and

that the DOI has to do its best to accommodate all interests. He said that they are not doing anything to get away from direct service but also want to recognize those Tribes that want the DOI to get out of their way.

A member of the Spokane Tribe expressed concern that the *Cobell* buyback will not proceed and asked about the Administration's position on cannabis on tribal lands. Mr. Cason discussed his testimony to Congress on *Cobell* and noted that the Trump Administration's position on *Cobell* is different than the Obama Administration's position. He said that the responsibility to fix *Cobell* and truly solve the land fractionation issue lies with Congress. Because Indian country is in a "trading range for appropriations" if appropriated money is "wasted" then no one benefits. He said that the *Cobell* process costs more than the money coming in and want to instead leverage the money to "get more bang for the buck". He said that the DOI should buy the most land at the lowest prices. Mr. Cason stated his view is that the underlying problem - preventing the growth in fractionation - has not been addressed. He criticized the DOI's current efforts to restore land but noted that unless the legislation gets changed the process will "keep poking along".

Regarding cannabis on tribal lands, Mr. Cason stated that is a "tricky" issue because the federal government has so far ignored the inconsistency between state and federal law. His opinion is that the federal government should opine about what it is going to do about the disconnect but it is "not good to do nothing". However, at this point the DOI has not taken any position on cannabis grown on Indian land. Acting AS-IA Black noted that if a lease for cannabis is brought to BIA it cannot be processed because cannabis is still contrary to federal law and cannabis ordinances likewise will be disapproved.

A member of the Karuk Tribe stated they need land because they have over 700 people on the housing waiting list and that they do not have a proclaimed "reservation". Due to their location, they are faced with forest fire issues. They requested the DOI help them work with their local municipalities on their trust land application because the conflict is a waste of resources on both sides. Mr. Cason noted the timber issue and said that they will need to work with Congress on fire suppression because there is no integration on good quality forest programs and its impact on fire.

Chairwoman Andrews-Maltais provided an overview of the Wampanoag Nation's long history with Europeans and the United States. She argued that Indian Country is in the same place as it was at the time of contact – Tribes are fighting for their land. She stated that taking land into trust is one of most important things a Tribe can do to support their growing populations. Tribes need land and a process that all Tribes can rely on. She asked him to remember that states do not have a fiduciary responsibility to Tribes but the federal government does. She said Tribes need to be at the table consulting before any changes are made.

Brian Gunn provided an overview of the Indian Trust Asset Reform Act (ITARA), PL 114-178, that allows Tribes to enter into agreements with the federal government for how assets will be managed. He noted that in these agreements, Tribes can change the standards of care and even waive federal regulations over tribal trust lands. The drafters intended that Tribes could even waive National Environmental Policy Act regulations. No agreements have been made yet but some Tribes have submitted letters of intent. Mr. Cason asked Tribes to submit their proposals for implementing the agreements. John Dossett, from NCAI, suggested putting together a workgroup to jumpstart the implementation of the Act. Title 3 of the ITARA also creates an Under-Secretary of Indian Affairs which would have supervisory authority over non-Indian agencies such as BLM within the Department. The position is intended to see that Indian Affairs has the opportunity to participate in all Department decisions that affect Tribes. Panel members recommended that Tribes ask the DOI to create that position.

An attendee asked whether President Trump will sign Executive Order 13175 on tribal consultation. Mr. Cason stated he does not know but that consultation is a day-to-day reality for the Interior. Attendees asked about the BIA's efforts to combat opioid addition in Indian country and drug enforcement resources. Acting AS-IA Black noted that the BIA is involved in an inter-agency coordinated effort to address this issue.

The *Land & Natural Resources Subcommittee* noted that NCAI is collecting recommendations for the Administration regarding tribal lands. Tribes should contact NCAI with their suggestions. The Land and Natural Resources Subcommittee also passed two resolutions: (1) Calling Upon U.S. Department of Agriculture and Congress to Examine the Impacts of the Proposed U.S. Department of Agriculture Reorganization and Budget on Indian Country; and (2) Continued Support for the Paris Climate Agreement and Action to Address Climate Change.

Conclusion

If you have questions or would like additional information regarding this report or the information contained in it, please contact Geoff Strommer (at 503-242-1745 or gstrommer@hobbsstrauss.com), Joe Webster (at 202-822-8282 or jwebster@hobbsstrauss.com), Jennifer Hughes (at 202-822-8282 or jhughes@hobbsstrauss.com), or Lael Echo-Hawk (at 202-822-8282 or lechohawk@hobbsstrauss.com).