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TRIBAL GOVERNMENT LEGISLATIVE — CLIENT ALERT

TO: TRIBAL LEADERS AND BUSINESS CLIENTS
FROM: BIG FIRE LAW & POLICY GROUP
DATE: OCTOBER 9, 2020
RE: U.S. SUPREME COURT VACANCY

On September 26, the President nominated Judge Amy Coney Barrett to fill the late Justice Ruth Bader Ginsberg's seat on the United States Supreme Court. Judge Barrett has been a federal judge since 2017. Prior to that, she was a professor at Notre Dame Law School for 15 years. Shortly after law school, Judge Barrett worked as a law clerk for Justice Antonin Scalia on the United States Supreme Court. Judge Barrett received her law degree from Notre Dame Law School.

In recent memory, tribes have not had a great track record in federal Indian law cases in the Supreme Court. Over the past few years, however, the Supreme Court has ruled in favor of tribes more often, due to Justice Neil Gorsuch being appointed to the Supreme Court. Justice Gorsuch had significant experience with Indian law cases as a federal judge for the United States Court of Appeals for the Tenth Circuit which includes Oklahoma, Colorado, Kansas, New Mexico, Wyoming and Utah and also had a positive track record on federal Indian law cases. Currently, the Supreme Court, due in part to the presence of Justice Gorsuch, has made reasonably positive decisions in regard to treaty rights, tribal sovereignty, and other Native American issues.

I. Judge Barrett's Nomination Schedule

Upon the President's swift nomination of Judge Barrett, the Senate Majority Leader pledged to confirm Judge Barrett before the presidential election. The Senate Judiciary Committee will hold her confirmation hearing the week of October 12. The hearing will be held at 9am eastern time each day. If the Senate Judiciary Committee votes in favor of the nomination, the Senate as whole will vote on Judge Barrett's nomination. A simple majority of the Senate needs to vote in favor of Barrett's nomination to be confirmed. It usually takes two to three months for the nomination process of a Supreme Court justice, however, in order to confirm Judge Barrett before the General Election on November 3, the Judiciary Committee hearing and Senate vote are scheduled to be expedited.

II. Judge Barrett's Indian Law History

In examining her record, Judge Barrett has little to no experience with Indian law cases so it is difficult to determine how she may decide on cases impacting Indian Country on the Supreme Court. Judge Barrett has stated publicly that Justice Scalia's judicial philosophy is the same as her own. It is important to note that Justice Scalia was not particularly favorable to tribes. Often when Justice Scalia ruled in favor of tribes, he did so on grounds other than federal Indian law. Justice Scalia was a strict constructionist and favored the plain language of the law over canons and precedent.

Since 2017, Judge Barrett has served as a federal judge on the United States Court of Appeals for the Seventh Circuit, which includes Wisconsin, Illinois, and Indiana. In her three years on the bench, Judge Barrett did not hear any cases dealing with federal Indian law or tribal interests. When Judge Barrett served as a law clerk for Justice Scalia on the Supreme Court in 1999 there was only one major federal Indian law case before the Supreme Court, *Minnesota v. Mille Lacs Band of Chippewa Indians*. The Supreme Court ruled in favor of the Tribe but Justice Scalia did not rule with the majority and instead ruled against the Tribe. Justice Scalia did not write a dissenting opinion, so it is likely Judge Barrett played little to no role in this case.

Although Judge Barrett wrote several law review articles during her time as a professor at Notre Dame, she did not write anything directly applicable to tribes. Her writing focused on constitutional jurisprudence and statutory interpretation. She taught constitutional law, federal courts, and statutory interpretation.

Judge Barrett has no apparent experience with federal Indian law, so it is difficult to determine or speculate how she would rule on Federal Indian law cases before the Supreme Court if she is confirmed.

If you have questions, concerns, or would like to submit a letter to your Senators expressing your views on the nomination of Judge Barrett please contact your Big Fire Attorney.

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