IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NORTHERN ARAPAHO TRIBE, on its own behalf and on behalf of its members, Plaintiff-Appellant, v. ALEX M. AZAR, II, Secretary of Health and Human Services, et al., Defendants-Appellees.	)	Civil Action No. 15-8099

STATUS REPORT

On December 28, 2018, the Court granted the parties' request to continue to hold this matter in abeyance, but ordered the parties to file a particularized status report on or before January 17, 2019. This report is filed in response.

This case concerns the applicability of certain provisions of The Patient Protection and Affordable Care Act of 2010 ("ACA") and its implementing regulations to Native American Tribes. *See* Order, *Northern Arapaho Tribe v. Burwell*, No. 14-CV-00247-SWS, Dkt. No. 41. More specifically, the case concerns whether Indian Tribes, such as Appellant, are subject to the ACA's large employer shared responsibility provision, 26 U.S.C. §4980H.

In the December 28, 2018 order, the Court directed the parties to file a status report that (1) describes with specificity where the S.B. 2943 stands in the legislative process and whether there is any legislation pending in the 116th Congress that will

impact this appeal; (2) provides the parties' best assessment of the possible timeline for definitive legislative action that will impact this appeal; and (3) addresses with a specific and substantive argument why the Court should continue abatement. The undersigned addresses each of these point in turn as follows:

1. On May 23, 2018, Senator Daines introduced legislation that would expressly exclude Indian Tribes from the definition of "large employer" under §4980H, retroactive to December 31, 2014. The bill is technically no longer pending in the Senate because the 115th Congress concluded, and the 116th Congress has commenced. A replacement bill has not yet been introduced. The Tribe is advised that some sort of replacement bill will probably be introduced during the 116th Congress.

2. In light of the current government shutdown, the Northern Arapaho Tribe finds it difficult to predict when definitive legislative action may be taken that affects this appeal. Although the legislative branch remains technically unaffected by the shutdown, it seems likely that Congress will remain preoccupied with budgetary matters until the shutdown concludes.

The stated position of the executive branch is that it will actively promote such legislation. Executive Order 13765 of January 20, 2017, provides that the current administration will "seek the prompt repeal of the Patient Protection and Affordable Care Act (Public Law 111-148)."

3. Setting aside conundrums that flow from the government shutdown, there are significant recent developments that do affect this appeal. On December 14, 2018, in

Texas v. United States, 340 F.Supp.3d 579 (N.D. Tex. 2018), the Court ruled that the Individual Mandate, 26 U.S.C. §5000A(a), is "UNCONSTITUTIONAL," and further declared that "the remaining provisions of the ACA, Pub. L. 111-148, are INSEVERABLE and therefore INVALID." Appeal has been taken. *See* https://www.washingtonpost.com/national/health-science/democratic-attorneys-general-appeal-ruling-that-invalidated-affordable-care-act/2019/01/03/0ca0daa6-0f7d-11e9-831f-3aa2c2be4cbd_story.html?noredirect=on&utm_term=.48337d847702. The executive branch is apparently not defending against the appeal. *Id.* The House of Representatives has taken steps to participate in the appeal in its own right. *Id.*

The undersigned counsel for the Tribe has not had the opportunity to fully confer with representatives for the United States on these developments. Recent email to Mr. Sinzdak, counsel for the United States in this matter, has been returned by automatic reply explaining that "[t]he appropriation that funds my salary has lapsed, and as a result I have been furloughed . . . I will respond after funding has been restored."

Therefore, there are specific and substantive reasons why the Court should continue the abatement. The law at issue has recently been declared unconstitutional by a U.S. District Court. The extent to which the United States will participate in the appeal is not clear. Counsel for the United States in this matter has been furloughed. It appears more likely than not that the 116th Congress will consider bills that touch on the subject matter of this case. In light of these reasons, continued abatement would serve the interest of judicial economy.

Accordingly, the undersigned respectfully request that the Court continue to hold this appeal in abeyance, with a status report due in 60 days, so as to provide both the Congress and counsel for the United States with additional time to act.

Dated this 17th day of January, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2019, I electronically filed the foregoing motion with the Clerk of Court by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system.

/s/ Kelly A. Rudd
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