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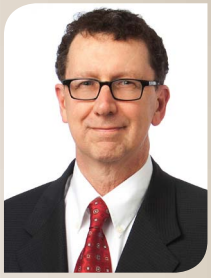

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Supreme Court agrees to review 9th circuit treaty rights decision

On Jan. 12, 2018, the U.S. Supreme Court agreed to review the 9th Circuit's decision in *United States v. Washington*, 2017 WL 21933387 (9th Cir. 2017). The court's decision will likely have a significant impact on treaty rights. The case involves treaties between Pacific Northwest tribes and the United States in 1854 and 1855. The tribes ceded vast territories west of the Cascade Mountains and north of the Columbia River drainage area, including the Puget Sound watershed, the watersheds of the Olympic Peninsula north of the Grays Harbor watershed, and the offshore waters adjacent to those areas (Case Area), but reserved "the right of taking fish, at all usual and accustomed grounds and stations ... in common with all citizens of the Territory." Tribes' off-reservation fishing rights were initially defined in the 1970s through lengthy federal court litigation known as Boldt Litigation after presiding Judge George Boldt. In 2001, 21 tribes, joined by the United States, filed a "Request for Determination" as part of the Boldt Litigation, contending that Washington State had violated, and was continuing to violate, the treaties by building and maintaining culverts that prevented mature salmon from returning from the sea to their spawning grounds; prevented smolt (juvenile salmon) from moving downstream and out to sea; and prevented young salmon from moving freely to seek food and escape predators.

In 2007, the district court held that in building and maintaining these culverts Washington had caused the size of salmon runs to shrink and that Washington thereby violated its obligation under the treaties. In 2013, the court issued an injunction ordering Washington to correct its offending culverts. In 2016, the 9th Circuit affirmed, holding that (1) the State's assertion that it could block any stream without violating the treaties was wrong, (2) the tribes reasonably interpreted the treaties to mean that they would have "food and drink forever," (3) the State's construction of culverts blocked 1,000 linear miles of salmon habitat, prevented many tribal members from earning their living and, as a consequence, violated the Stevens' treaties, (4) the State could challenge culverts maintained by the United States on federal lands because the State had no standing to assert tribal treaty rights and because the United States is immune from suit, (5) the district court's finding that the culverts negatively impacted the salmon fishery was supported by the evidence and justified the scope of the injunctive relief granted and (6) the injunction did not violate principles of equity based on the costs of compliance, intrusion into state government operations or federalism. See 827 F.3d 836. The Court amended its opinion March 2, 2017 (See 853 F.3d 946) and in a summary order issued May 19, 2017, denied a motion for rehearing en banc over a dissenting opinion joined by nine justices. The dissenters thought the panel decision "incredibly broad" and "inviting judges to become environmental regulators" and defective for failing to apply the *quasi laches* doctrine of *City of Sherrill v. Oneida Nation*. Two justices filed an opinion defending the decision:

The Godfrey & Kahn Indian Nations Law Practice Group provides a full range of legal services to Indian nations, tribal housing authorities, tribal corporations and other Indian country entities, with a focus on business and economic development, energy and environmental protection, and housing development.

"Our opinion does not hold that the Tribes are entitled to enough salmon to provide a moderate living, irrespective of the circumstances. We do not hold that the Treaties' promise of a moderate living is valid against acts of God (such as an eruption of Mount Rainier) that would diminish the supply of salmon. Nor do we hold that the promise is valid against all human-caused diminutions, or even against all State-caused diminutions. We hold only that the State violated the Treaties when it acted affirmatively to build roads across salmon bearing streams, with culverts that allowed passage of water but not passage of salmon."

In its petition for certiorari, the State of Washington asked the Court to consider three issues:

- Whether the treaty "right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens" guaranteed "that the number of fish would always be sufficient to provide a 'moderate living' to the Tribes."
- Whether the district court erred in dismissing the State's equitable defenses against the federal government where the federal government signed these treaties in the 1850s, for decades told the State to design culverts a particular way and then filed suit in 2001 claiming that the culvert design it provided violated the treaties it signed.
- Whether the district court's injunction violates federalism and comity principles by requiring Washington to replace hundreds of culverts, at a cost of several billion dollars, when many of the replacements will have no impact on salmon and Plaintiffs showed no clear connection between culvert replacement and tribal fisheries.

Congress recognizes six Virginia tribes

On Jan. 29, the president signed into law H.R. 984, the "Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2017." The Act recognizes the Chickahominy Indian Tribe, the Chickahominy Indian Tribe—Eastern Division, the Upper Mattaponi Tribe, the Rappahannock Tribe, Inc., the Monacan Indian Nation and the Nansemond Indian Tribe. Titles specific to each tribe provide that (1) specified lands may be taken into trust and comprise the tribe's reservation, (2) the tribe may not conduct gaming activities and (3) the act does not affect the hunting and fishing rights of the tribe or its members.

Selected court decisions

In *Pro-Football, Inc. v. Blackhorse*, 2018 WL 460653 (4th Cir. 2018), Blackhorse and others had sued seeking the cancellation of the registrations of six trademarks held by the Washington Redskins football team, including **mascots** and logos, asserting they consisted of "matter which may disparage ... persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute" in violation of the Trademark Act, 15 U.S.C. § 1052(a) (2012). The Trademark Trial and Appeal Board had ordered the cancellation of the marks and the district court had affirmed but the Fourth Circuit Court of Appeals vacated and remanded for further proceedings consistent with the Supreme Court's decision in *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017), in which the Court held that § 1052(a) violates the free speech clause of the First Amendment.

In *Yurok Tribe v. Resighnini Rancheria*, 2018 WL 550233 (N.D. Cal. 2018), the Yurok Tribe (Tribe) sued in federal court for a declaratory judgment that the Resighini Rancheria (Rancheria) and Dowd, a member of the Rancheria, had no right to fish in the Klamath River Indian fishery within the Yurok Reservation. The court dismissed on the ground that the Rancheria was immune from suit and that the suit could not proceed against Dowd in the absence of the Rancheria because the Rancheria was a necessary party for purposes of Fed.R.Civ. Proc. 19, rejecting the Tribe's arguments that the Rancheria had waived immunity by participating in the proceedings and that dismissal would leave the Tribe with no forum:" Resighini Rancheria did not make a belated assertion of immunity so as to gain a tactical advantage. The court further finds that Resighini Rancheria invoked its immunity to suit in a timely manner by asserting sovereign immunity in both its Answer and in the Case Management Statement. … To determine whether it can grant the Tribe the declaratory relief it seeks, the court must necessarily decide whether Dowd 'has no right to fish within the Yurok Reservation without the consent or authorization of the Yurok Tribe, or without a license issued by the State of California.' To do this the court must resolve Dowd's claim that Resighini Rancheria has a federally reserved fishing right. For the court to do so without the Rancheria as a party to the action would not bind the Rancheria with regard to the issue of where it possesses a federally reserved fishing right. The court would therefore be unable to afford complete relief as between Dowd and the Yurok. … Although the Tribe will likely not have an alternative forum to seek resolution of the dispute following dismissal of this action, this does not outweigh the factors favoring dismissal, particularly because the lack of an alternative forum is due to the important doctrine of **sovereign immunity**."

In the case of *Buchwald Capital Advisors, LLC v. Sault Ste. Marie Tribe*, 2018 WL 508471 (E.D. Mich.

2018), the trustee in an adversary action within bankruptcy proceedings sought to void as fraudulent a restructuring and financing transaction whereby the bankruptcy debtor, Greektown Holdings, LLC, directly or indirectly transferred money to multiple parties, including the Sault Ste. Marie Tribe of Chippewa Indians and its political subdivision Kewadin Casinos Gaming Authority (Tribe Defendants). The district court had previously concluded that 11 U.S.C. § 106(a), which abrogates the sovereign immunity of "governmental units" under certain enumerated sections of the Bankruptcy Code, did not waive **tribal sovereign immunity**. On remand, the bankruptcy court held that the Tribe Parties had not themselves waived their immunity. Relying on the Sixth Circuit's decision in the *Memphis Biofuels* case, the bankruptcy court rejected the trustee's argument that, absent a resolution waiving immunity or a contractual waiver, the Tribe Defendants waived immunity by their conduct. The district court affirmed: "[I]t is undisputed that the Tribe Defendants' Tribal Code and Charter required a narrowly tailored board resolution specifically waiving sovereign immunity for an identified limited purpose. It is also undisputed that no such board resolutions were ever adopted. 559 B.R. at 845-46. It is also undisputed that the Tribe Defendants never entered into any contract as relevant here that contained any provision purporting to waive sovereign immunity, conduct that could arguably fall within the waiver provision contained in Section 44.108 of the Tribal Code." The court rejected the trustee's argument that the Memphis Biofuels principles did not apply to a claim sounding in tort: "Although Memphis Biofuels was a case sounding in contract, not tort, the Sixth Circuit did not mention and therefore gave no import to such a distinction." See also, 2018 WL 509471.

In *McKesson Corporation v. Hembree*, 2018 WL 340042 (N.D. Okla. 2018), the Cherokee Nation of Oklahoma (CNO) had filed suit in the District Court for the Cherokee Nation against six corporations, including three pharmacies –CVS, Walgreens, and Wal-Mart (the Pharmacies); and three pharmaceutical wholesale distributors–McKesson, Cardinal Health and AmerisourceBergen (the Distributors) alleging that the defendants knowingly or negligently distributed and dispensed prescription opioid drugs within the Cherokee Nation in a manner that foreseeably injured the Cherokee Nation and its citizens, in violation of the Cherokee Nation Unfair and Deceptive Practices Act (CNUDPA) and contrary to the common law of nuisance, negligence, unjust enrichment and conspiracy. The CNUDPA, which prohibits "deceptive acts or practices," including violations of the federal Controlled Substances Act (CSA), in the conduct of trade or commerce in the Cherokee Nation, was enacted as part of the CNO's Comprehensive Access to Justice Act of 2016 (CAJA), which permits the Cherokee Nation to bring civil actions as *parens patriae* on behalf of tribal members for violations of CNUDPA, enables the Cherokee Nation to recover treble damages and eliminates the statute of limitations when the Cherokee Nation is a party plaintiff. The defendants sued the CNO's attorney general in federal district court to enjoin the tribal court action on the ground that the CNO lacked jurisdiction. The district court granted the injunction, holding that the CNO had no authority to enforce the CSA and had failed to show that its suit fell within either of the two *Montana* Exceptions to the general rule against **tribal jurisdiction over non-tribal members** and that exhaustion of tribal court remedies was not required: "Hembree contends the Cherokee Nation may incorporate the CSA into its own legislation because the CSA expressly allows states to regulate controlled substances. See 21 U.S.C. § 903. … However, unlike states, tribes do not have courts of general jurisdiction. Defendants have cited no provision of the CSA that would provide a tribal court with jurisdiction of a claim asserting rights created by the CSA, even if such a claim were permissible. … Plaintiffs have not consented to be broadly governed by tribal law and tribal courts. Furthermore, there is no apparent nexus between the tort injuries alleged in the Tribal Court Petition and any consensual relationship with respect to any of the Distributors and Pharmacies, which have no contractual relationship with the Cherokee Nation relating to prescription opioids and have not specifically sought out tribal members for business relationships. The Pharmacies and Distributors are not members of the Cherokee Nation, nor is their alleged conduct specifically directed at the Cherokee Nation or its members. … The second *Montana* exception refers to conduct that threatens or has a direct impact on the right of reservation Indians to make their own laws and be ruled by them. ... This exception is a narrow one and applies only to conduct that imperils the subsistence of the tribal community. … While noting Defendants' evidence of the harm opioid abuse has caused to individual tribal members and families, and costs borne by the tribe, the Court cannot plausibly find that such harm is "catastrophic for tribal self-government." Plains Commerce Bank, 554 U.S. at 341. Accordingly, the Court finds that even if the alleged conduct occurred within Indian country, the second *Montana* exception does not confer tribal jurisdiction in the Tribal Court Action. … In addition, because

the tribal court clearly lacks jurisdiction such that further proceedings there would serve no purpose other than delay, the Court finds that litigation of this case through the tribal court system, without an opportunity for interlocutory review, would impose a substantial burden on Plaintiffs." (Internal quotations and citation omitted.)

In *Bishop Paiute Tribe v. Inyo County*, 2018 WL 347797 (E.D. Cal. 2018), Johnson, a police officer employed by the Bishop Paiute Tribe (Tribe), responded to a call from a tribal member on the Tribe's reservation after the member's ex-wife, a non-Indian, appeared at the member's home in violation of state and tribal restraining orders and created a disturbance. County law enforcement officials arrived at the scene and, following an investigation, the County charged Johnson with assault with a stun gun, false imprisonment, impersonating a public officer, and battery and also sent the Tribe an order to "cease and desist all law enforcement of California statutes." The Tribe sued Inyo County, its sheriff, and Inyo County District Attorney Thomas Hardy (Defendants) in federal court, requesting that the court clarify that Defendants' arrest and prosecution of Johnson and threat of criminal prosecution of the Tribe's police officers violated federal common law and directly interfered with the Tribe's inherent authority to maintain a police department and protect public safety on its Reservation and also rule that the **Tribe had authority on its Reservation to stop, restrain, investigate violations of tribal, state and federal law**, detain, and transport or deliver a non-Indian violator to the proper authorities. The district court dismissed for lack of a justiciable controversy based on a letter from the Tribe agreeing to certain of the County's demands but the Ninth Circuit reversed and remanded. On remand, the court denied the county's motion to dismiss, upholding the legality of Johnson's actions: "Because tribal authorities have the power to exclude from the reservation those who violate state or federal law, they necessarily also possess the power to investigate whether those laws have been violated. … Accordingly, upon a determination that a violation of state or federal law has occurred, tribal authorities may detain the violators in order to deliver them to state or federal authorities. … Alternatively, defendants contend that Officer Johnson's actions were improper because Congress has not affirmatively authorized Indian tribes to investigate violations of state law. … The court finds this argument unpersuasive as well. As discussed above, it is well-established that tribes are "unique aggregations possessing attributes of sovereignty," and that that sovereignty is inherent in the tribe's existence rather than solely a creature of statute. … No affirmative grant of state or federal authority to the Tribe is required in the present context." (Internal quotations omitted.)

In *Consumer Financial Protection Bureau v. CashCall, Inc. et al.*, 2018 WL 485963 (C.D. Cal. 2018), the Consumer Financial Protection Bureau (CFPB) sued Cashcall, a non-Indian firm and its owner, Reddam, alleging violations of the Consumer Finance Protection Act (Act). Cashcall had partnered with tribes and other entities to make **high interest loans via the internet** to non-Indians living off reservation via the internet. The district court granted partial summary judgment to the CFPB, holding that representations in loan documents that a tribally6-owned entity was the lender and that tribal law applied were fraudulent: "CashCall was the true lender and, therefore, CashCall, WS Funding, and Delbert engaged in a deceptive practice within the meaning of the CFPA when servicing and collecting on Western Sky loans by creating the false impression that the loans were enforceable and that borrowers were obligated to repay the loans in accordance with the terms of their loan agreements. The Court also held that Reddam is individually liable under the CFPA because he participated directly in and had the ability to control CashCall's, Delbert's, and WS Funding's deceptive acts." After a bench trial on the issue of remedies, the court refused to order Cashcall make restitution to borrowers of $235,597,529.74.and instead imposed a statutory penalty of $10,283,886: "Although the CFPA does not define the terms 'knowingly' or 'recklessly', the FTCA provides some guidance. In the context of the FTCA, the term 'knowing' means 'actual knowledge or knowledge fairly implied ... on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule.' … The term recklessness refers to conduct that leads to 'an unjustifiably high risk of harm that is either known or so obvious that it should be known.' … The evidence at trial failed to demonstrate that Defendants knew at the time they decided to implement the Western Sky Loan Program that the structure of the program would subject them to liability under the CFPA. Indeed, at its inception, there was nothing inherently unlawful about the Western Sky Loan Program. It was not until this Court found that CashCall—not Western Sky—was the true lender that Defendants could have understood that they may be liable under the CFPA."

In *Stand Up For California v. United States*, 2018 WL 385220 (D.C. Cir. 2018), the Department of Interior (DOI) determined to accept a 305.49 acre tract of **land into trust** for the North Fork

Rancheria of Mono Indians (North Fork) in Madera County, California, pursuant to Section 5 of the Indian Reorganization Act, 25 U.S.C. § 465, and determined that the parcel fell within one of the exceptions to the **Indian Gaming Regulatory Act** (IGRA) prohibition of gaming on land acquired after IGRA's enactment. The DOI subsequently approved by non-action North Fork's gaming compact with the State of California. Plaintiffs, including and anti-gambling group and the Chukchansi Indians (Picayune), whose gaming enterprise thirty miles from the Madera site was threatened by the Madera facility, sued under the Administrative Procedure Act (APA), contending that (1) North Fork was not under federal jurisdiction in 1934 and was not, therefore, eligible to have land taken into trust under the IRA pursuant to the Supreme Court's decision in the Carcieri case, (2) the DOI failed to properly assess the detrimental impacts of the proposed gaming facility for purposes of IGRA's two-part determination and (3) DOI's environmental review was deficient under the National Environmental Policy Act (NEPA) and the Clean Air Act. The court rejected all of the arguments and upheld the DOI's decisions and the D.C. Circuit affirmed: "After reviewing thousands of pages of evidence over the span of seven years, the Interior Department took the tract of land at issue into trust for the North Fork and approved the tribe's proposed casino. Viewing the same extensive record and affording the appropriate measure of deference to the Department's supportable judgments, we, like the district court, conclude that this decision was reasonable and consistent with applicable law."

In *Schaghticoke Tribal Nation v. State of Connecticut*, 2017 WL 7038419 Not Reported in A.3d (Ct. Sup. Ct. 2017), the Schaghticoke Tribal Nation (STN), a group not recognized by the United States, sued Connecticut for amounts allegedly due for vast tracts of land that the state took from the STN. The State Superior court dismissed on the ground that the STN never owned the claimed lands in the first place: "The state is right because STN relies for its claim on two legislative resolutions: one in 1736 and one in 1752. Neither of them makes them owners of the land at issue. The 1736 act only allows the Schaghticokes to 'continue' on the land until the General Assembly (then called the "General Court") decides otherwise. . The 1752 act grants the Schaghticokes the 'liberty' to improve and cut wood on the land so long as it pleased the General Assembly to allow it. … Indeed, the legislature has not only demonstrated its knowledge now and in the 18th Century that it knows, that to convey the land, the conveyance must say that it gives and grants the land. ..."

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