GODFREY & KAHN S.C.

Indian Nations Law Focus

May 2018, Volume 14, Issue 5

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G&K to present on renewable energy for tribal housing at NAIHC

Godfrey & Kahn Indian Nations team leader Brian Pierson and Renewable Energy Strategies team leader John Clancy will present May 30 at the annual convention of the National American Indian Housing Council (NAIHC) in San Diego on financing the transition of energy from coal-fired plants to clean, renewable, cheap solar energy. Our presentation will include leveraging federal grants with investment tax credits, net metering, interconnection agreements and power purchase agreements. For more information, contact Brian Pierson at 414.287.9456 or bpierson@gklaw.com. To register for the NAIHC convention, see here.

Ninth Circuit joins D.C. and Sixth Circuits in holding that NLRA applies to tribal gaming enterprise

In *Pauma v. National Labor Relations Board*, 2018 WL 1955043 (9th Cir. 2018), Casino Pauma, an enterprise owned by the Pauma Band of Mission Indians (Tribe) disciplined employees engaged in union organizing activities on behalf of Unite Here International Union. The General Counsel of the National Labor Relations Board (NLRB) filed several complaints. An administrative law judge found that Casino Pauma committed unfair labor practices in violation of the **National Labor Relations Act** (NLRA) by trying to stop union literature distribution in guest areas at the casino's front entrance and in non-working areas near its employees' time clock. A three-member panel of the Board affirmed (*Casino Pauma II*) and petitioned the Ninth Circuit to enforce its orders. The Tribe also appealed. In its decision on the consolidated appeals, the Ninth Circuit rejected the Tribe's argument that the NLRB was without jurisdiction over the Tribe. Applying the criteria it had established in *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985), the court cited the general rule that tribes are subject to federal laws of general applicability and that none of the exceptions identified in the *Coeur d'Alene* case applied: "NLRA's application to a tribe-owned casino such as Casino Pauma does not affect 'purely intramural matters' or the Tribe's 'self-government.' *Coeur d'Alene*, 751 F.2d at 1116. Casino Pauma is not 'the tribal government, acting in its role as provider of a governmental service'; rather, '[i]t is ... simply a business entity that happens to be run by a tribe or its members.' *Karuk Tribe*, 260 F.3d at 1080. The labor dispute that gave rise to this case is not an 'intramural' one 'between the tribal government and a member of the Tribe,' *id*. at 1081, but rather one between a tribe-owned business and its employees, '[t]he vast majority' of whom 'are not members of any Native American Tribe.' In this regard, Casino Pauma is much like the tribe-owned farm in *Coeur d'Alene*—a business that 'employs non-Indians as well as Indians,' and 'is in virtually every respect a normal commercial ... enterprise,' such that 'its operation free of federal [labor law] is 'neither profoundly intramural ... nor essential to self-government.'" The court rejected the Tribe's arguments that (1) consistent with the principles that apply to waivers of sovereign immunity, a

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.

federal law should be assumed not to apply to tribes in the absence of clear evidence of congressional intent to apply it and (2) it could avoid NLRA jurisdiction based on its sovereign right to exclude non-members: "This suggestion misconceives the nature of the right actually at issue in this variety of case. 'Here, as in *Republic Aviation*, petitioner's employees are 'already rightfully on the employer's property,' so that in the context of this case it is the 'employer's management interests rather than [its] property interests' that primarily are implicated.' … As a proprietor of a commercial enterprise, the Tribe's management interests do not differ from those of other employers; we so concluded in applying the *Coeur d'Alene* standards to Casino Pauma." The D.C. and Sixth Circuits have also held that the NLRA applies to tribal gaming enterprises. See, *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306 (D.C. Cir. 2007); *NLRB v. Little River Band of Ottawa Indians Tribal Gov't*, 788 F.3d 537 (6th Cir. 2015).

Selected court decisions

In *Sisseton–Wahpeton Oyate of Lake Traverse Reservation v. United States*, 2018 WL 1936356 (8th Cir. 2018), Drake and the Sisseton–Wahpeton Oyate Tribe (Tribe) both owned land adjacent to Enemy Swim Lake in South Dakota. During 1998-2009, the United States Corps of Army Engineers (Corps) issued permits under the **Clean Water Act** (CWA) to allow Drake to dredge portions of the lake as part of a project to build a road across his property for agricultural purposes. In 2010, the Tribe requested that the Corps recapture Drake's road project and order Drake to remove the entirety of his road. The Corps concluded that Drake was continuing to use his land for agricultural purposes and declined to intervene. The Tribe sued, claiming that the dredging threatened harm to the lake's historical and cultural value to the Tribe. With one exception, the District Court dismissed the Tribe's claims and the Eighth Circuit affirmed, holding that (1) the Corps' letter to the Tribe indicating that the roadways met the requirements for CWA's farm-road exemption and that each constituted a single and complete project did not constitute "final agency action," (2) the Tribe's claim that the Corps' determination that the roadway had not been recaptured was a nonjusticiable challenge to an enforcement decision, (3) the Tribe was not entitled to equitably toll the statute of limitations, (4) the Corps did not unlawfully stack permit and exemption verifications, and (5) the the district court's determination that the Corps did not unlawfully stack permit and exemption verifications was a final appealable decision.

In *Diné Citizens Against Ruining Our Environment v. Jewell*, 2018 WL 1940992 (D. N.M. 2018), Diné Citizens Against Ruining Our Environment (Diné CARE), an organization dedicated to "protect[ing] all life in its ancestral homeland by empowering local and traditional people to organize, speak out, and ensure conservation and stewardship of the environment through civic involvement," and other plaintiffs sued the Secretary of Interior alleging that, in approving certain applications to drill (APD), the Department of Interior Bureau of Land Management (BLM) violated the **National Environmental Policy Act** (NEPA) and National Historic Preservation Act (NHPA) by failing to adequately consider the environmental impacts of hydraulic fracturing and horizontal drilling in developing the Mancos Shale in the San Juan Basin, by failing to adequately involve the public in its NEPA process, and by failing to consider the indirect effects that well pads would have on the Chaco Culture National Historic Park, Chacoan Outliers, the Chaco Culture Archaeological Protection Sites, and the Great North Road (collectively Chaco Park and its satellites). The court dismissed the plaintiffs' claims, holding that (i) the Plaintiffs had standing to pursue their NEPA and NHPA claims, (ii) the Plaintiffs could challenge most, but not all, of the APDs under the APA, (iii) the Plaintiffs' APD challenges were not moot, except as to permanently abandoned wells, (iv) the BLM complied with NEPA's requirements, (v) the BLM adequately involved the public in its NEPA process, as it gave notice of finalized Environmental Assessments' availability through its online NEPA logs, and sent notices of and hosted public meetings at each proposed well's site, and (vi) the BLM did not violate the NHPA, because it considered the effects on historical sites within the wells' areas of potential effects.

In *Butte County, California v. Chaudhuri*, 2018 WL 1769130 (D.C. Cir. 2018), the D.C. Circuit rejected a challenge to the determination of the National Indian Gaming Commission (NIGC) that lands acquired for the Mechoopda Tribe following its recognition in 1992 were "**restored lands**" that fell within the exception to the prohibition against gaming on

lands acquired after the enactment of the Indian Gaming Regulatory Act: "In 2008, the Secretary promulgated a regulation codifying an updated test for determining whether lands qualified as 'restored lands.' … That test likewise calls for considering three factors: (i) 'modern connections to the land,' (ii) 'historical connection[s] to the land,' and (iii) 'a temporal connection between the date of the acquisition of the land and the date of the tribe's restoration.' … The thrust of the County's challenge is that members of the modern Mechoopda Tribe are not biological descendants of members of the pre-1850 Mechoopda Tribe. Instead, the County argues, Indians from many tribes lived together at the Rancheria in the late 1800s and early 1900s, in a 'multi-ethnic, polyglot group.' … Appellant's Opening Br. 12. According to the County, the descendants of that group—not the pre-1850 Tribe—are what we now know as the Mechoopda Tribe. … The Secretary then explained why that information did not change her analysis. Although many Indians at the Rancheria descended from non-Mechoopda tribes, those Indians, over time, 'integrated themselves into the Mechoopda culture.' … The Secretary observed that the Rancheria had a kúm, a ceremonial hut forming the central feature of Mechoopda villages….The Rancheria also had a dance society, the most important social organization in Mechoopda communities. *Id.* And the primary language spoken on the Rancheria was Maidu, the Mechoopda Tribe's native tongue. The Secretary concluded for those reasons that the Mechoopda Tribe, despite the influx of new members, lived on."

In *Long v. Barrett*, 2018 WL 1617702 (D. N.J. 2018), the Longs made a loan in an oil venture. Barrett, a member of the Viejas Band of Kumeyaay Indians (Tribe) agreed to guarantee repayment and pledged his monthly $4,017.50 per capita to secure the guarantee in the event that the borrowers defaulted. Attached to the parties' promissory note and escrow agreement was an assignment allegedly prepared by Barrett and Hans, the Tribe's treasurer. When the borrowers defaulted, the escrow agent advised Hans of the default and directed him to forward the pledged per capita payments. Hans refused on the ground that Barrett instructed him not to. The Longs sued the borrowers, Barrett and Hans. On Hans' motion, the court dismissed … Hans on the ground of **sovereign immunity**: "Hans' conduct was specifically in his role as a tribal officer. Plaintiffs specifically allege that Hans provided Barrett with a letter stating Barrett's monthly tribal dividend, helped prepare a document to facilitate the assignment of Barrett's dividend, and told Barrett that he would notify the Viejas Tribal Council of the assignment. Hans then allegedly failed to forward Barrett's monthly dividend from the tribal treasury to the plaintiffs. These are all official actions that Hans could undertake only as the tribe's Director of Finance. He could not do these tasks as an individual. '[T]ribal officials are immunized from suits brought against them because of their official capacities—that is, because of the powers they possess in those capacities enable them to grant the plaintiff relief on behalf of the tribe.' (Cites omitted.) …Here, a suit cannot be brought against Hans except for the powers he possessed as the Director of Treasury for the tribe. … *Ex parte Young* permits federal jurisdiction, despite claims of sovereign immunity, when the suit seeks only prospective injunctive relief in order to 'end a continuing violation of federal law.' (Cites omitted.) … Plaintiffs do not allege a continuing violation of federal law. Moreover, plaintiffs cannot seek a declaratory judgment ordering that Hans must forward Barrett's tribal dividends to the plaintiffs; that is just a request for damages by another name."

In *Wopsock v. Dalton*, 2018 WL 1578086 (D. Utah 2018), Veronica Wopsock, a member of the Ute Indian Tribe, had sued Dalton, a former Duchesne County Deputy Sheriff, and Duchesne County, Utah (Duchesne Defendants) for Mr. Dalton's alleged sexual assault of her during a traffic stop in 2011. Dalton counterclaimed against Ms. Wopsock "for civil rights violations and conspiracy to violate civil rights pursuant to 42 U.S.C. §§ 1985 and 1986, for defamation and for intentional infliction of emotional distress." The Duchesne Defendants served subpoenas on Pike, a former Tribal Business Committee member, and Ron Wopsock and Irene Cuch, current Business Committee members, seeking to learn whether Wopsock had discussed the alleged assault. They also subpoenaed the Tribe, seeking information regarding the funding of Wopsock's lawsuit. The subpoenaed parties (Wopsock Parties) moved to quash. Citing the Supreme Court's decision in ***Lewis v. Clarke***, the court held that (1) the Tribe itself was protected by sovereign immunity from the Duchesne Defendants' subpoena, (2) sovereign immunity did not protect R. Wopsock, Cuch

or Pike because their testimony was sought in their individual capacities and not as representatives of the Tribe, (3) the Wopsock Parties failed to support their argument that the service of the subpoenas was defective because the process server lacked a tribal permit to enter the reservation, (4) the Wopsock Parties failed to support their argument that Wopsock's communications with them were privileged under Ute law, and (5) the subpoenas were proper discovery.

In *Burt Lake Band of Ottawa and Chippewa Indians v. Zinke*, 2018 WL 1542418 (D. D.C. 2018), the Burt Lake Band of Ottawa and Chippewa Indians (Tribe) sued the Secretary and other officials of the U.S. Department of the Interior (DOI), alleging violations of the Administrative Procedure Act (APA), Equal Protection and Due Process Clauses of the Fifth Amendment arising out of the DOI's failure to grant the Tribe's 1935 petition for **federal recognition** and its adoption of revised Part 83 regulations in 2015 precluding the Tribe from re-applying. The district court dismissed the Tribe's challenge the DOI's denial of its 1935 petition based on the Tribe's failure to file within the six year statute of limitations and rejected the Tribe's request that the court order the Secretary to add the Tribe to the list of recognized tribes but denied the government's motion to dismiss the Tribe's challenge to the 2015 regulations: "The Court does not have free-standing authority to by-pass the entire federal recognition process and order the agency to add plaintiff to the List, and the avenue to seek review of agency action is under the APA."

In the case of *In re: Money Centers of America, Inc.*, 2018 WL 1535464 (D. Del. 2018), the debtor in bankruptcy, Money Centers of America (MCA), had provided debit card and credit card processing for patrons of Thunderbird Entertainment Center, Inc. (Thunderbird), a wholly owned gaming entity of the Absentee Shawnee Tribe of Oklahoma. When MCA filed for protection under chapter 11, the trustee in bankruptcy sued Thunderbird, seeking to avoid and recover certain transfers to Thunderbird within the 90-day preference period preceding the bankruptcy filing. The bankruptcy court dismissed on sovereign immunity grounds and the district court affirmed, rejecting the trustee's argument that the sovereign immunity waiver applicable to "domestic governments" applied included tribes: "Absent a specific mention of 'Indian tribes' in the Bankruptcy Code, any finding of abrogation under § 106(a) necessarily relies on inference or implication, both of which are prohibited by the Supreme Court."

In *Nipmuc Nation v. Zinke*, 2018 WL 1570164 (D. Mass. 2018), the Nipmuc Nation (Plaintiff) sued the Secretary of the Interior and Interior Department (DOI) for review of a final administrative determination by the DOI, Office of **Federal Acknowledgment**, rejecting the Plaintiff's petition for federal acknowledgment. The court granted the DOI's motion for summary judgment, finding that there was evidence to support DOI's conclusion that the Plaintiff failed to meet four of the seven criteria for recognition. The court also rejected the Plaintiff's claim that the DOI failed to provide adequate assistance: "Plaintiff's argument focuses on the Defendants' alleged failure to provide assistance with respect to only the Section 83.7(b) and 83.7(e) criterion. Accordingly, even if I were to find in Plaintiff's favor on this issue, it cannot prevail given that, as I have previously found, it cannot establish that the Defendants' decision that it failed to satisfy the Section 83.7(a) and Section 83.7(c) criterion was arbitrary and capricious."

In *Olson v. North Dakota Department of Transportation*, 2018 WL 1722354 (N.D. 2018), a police officer employed by the Mandan, Hidatsa and Arikara Nation (MHA Nation) had found Olson asleep and parked in the middle of a road on the MHA Nation reservation. Believing Olson to be non-Indian, the officer requested assistance from the Mountrail County Sheriff's Department. A sheriff's deputy arrested Olson, whose driving privileges were eventually revoked for two years as a penalty for refusing a breath test and driving while intoxicated. The North Dakota Supreme Court reversed, holding that the **state had no jurisdiction** to arrest Olson, a member of the Turtle Mountain Chippewa Tribe, on the MHA reservation, citing the MHA's criminal jurisdiction over non-member Indians under the Indian Civil Rights Act and concluding that exercise of jurisdiction by the state would violate federal law: "Therefore, whether a foreign peace officer has jurisdiction to arrest an individual in a neighboring state depends on the law of the state where the arrest was made. *Id.* at 715. The Department offered no authority that would support that the State can unilaterally extend its criminal jurisdiction inside

the boundaries of the MHA through N.D.C.C. § 44–08–20. … Regardless of whether the State has jurisdiction to conduct the administrative hearing itself, a valid arrest is an essential prerequisite to revocation of Olson's license. The State is required to have criminal jurisdiction to effectuate a valid arrest, and in this case, it lacked criminal jurisdiction over a non-member Indian on the MHA's tribal land."

In *State of New Mexico Ex Rel. State Engineer v. United States*, 2018 WL 1616612 (N.M. App. 2018), the New Mexico Court of Appeals rejected multiple challenges to a district court decision approving a 2005 settlement agreement among the United States, the State of New Mexico and the Navajo Nation, resolving **Navajo water rights** in the San Juan River: "Appellants argue inter alia that the Settlement violates the New Mexico Constitution's separation of powers. This is based on the premise that Governor Richardson lacked the power to sign the Settlement without prior legislative approval. They further contend that through the Settlement, Governor Richardson attempted to infringe the plenary jurisdiction of the New Mexico Courts under Article VI of the New Mexico Constitution. … This contention, like Appellants' entire appeal, is based on a failure to understand the nature of the relationship between Indian nations and the United States government as well as the structure of federalism. … First, water is a commodity that can move in interstate commerce, and does so as the San Juan River crosses several state boundaries. Thus, it is ultimately subject to the control of the federal, not the state, government. …. Although the state has an interest in regulating water within its boundaries, it lacks any ownership claim in such water. … Second, the creation of an Indian reservation generally involves the reduction and definition of a tribe's traditional homelands in return for a guarantee of permanent and protected territory. See Winters v. United States, 207 U.S. 564, 576 (1908). Indian tribes thus have a proprietary interest in waters recognized by federal reservation treaties. It follows that the creation of an Indian reservation creates a strong presumption that state law does not apply to the Indians or their property. … It is therefore federal, not state, law that governs the validity and interpretation of water settlements between states and tribes. … Third, intergovernmental agreements are particularly useful because they provide benefits beyond what 'ordinary state regulation' allows. New Mexico's entry into the congressionally sanctioned intergovernmental agreement as part of the Settlement involved herein reinforces federal preemption of state control over the Navajo Nation's portion of the waters of the San Juan."

In *Irv's Boomin' Fireworks, LLC v. Muhar*, 2018 WL 1702862 (Minn. App. 2018), Irv Seelye, a member of the Leech Lake Band of Ojibwe (Band), managed Irv's Boomin' Fireworks, LLC. The Band issued the LLC a permit to sell both safe-and-sane and explosive fireworks from its business location inside the Band's territory. When the Itasca County Sheriff threatened to charge Seelye criminally for selling explosive fireworks, Seelye sued for an injunction to prevent the county attorney from bringing charges. The district court denied the motion on the ground that the prohibition against explosive fireworks was a criminal/prohibitory Minnesota law enforceable in Indian country under **Public Law 280**. The court of appeals affirmed: "With certain exceptions, Minnesota law criminalizes the sale of explosive fireworks, stating that 'it shall be unlawful for any person to offer for sale, expose for sale, sell at retail or wholesale, possess, advertise, use, or explode any fireworks.' … The district court determined, based upon its interpretation of the statute, that appellants had not established a likelihood of success on the merits because appellants were engaged in the sale of explosive fireworks and did not meet one of the enumerated exceptions. A district court's denial of an injunction is generally within its discretion, and we will not reverse unless the record as a whole reveals an abuse of discretion. …We cannot say, based on the scant record before us, that the district court abused its discretion by determining that appellants failed to carry their burden of demonstrating the propriety of injunctive relief because they failed to establish a likelihood of success on the merits."

In *Mendoza v. Isleta Resort*, 2018 WL 1725023 (N.M. App. 2018), Mendoza was injured in the course of her employment with Isleta Pueblo Resort and Casino (Isleta Casino), an enterprise of the Isleta Pueblo (Tribe). After Isleta Casino's third party administrator, Tribal First, denied her claim for worker's compensation, she filed a claim with the New Mexico Worker's Compensation Administration (WCA). The WCA Worker's Compensation Judge (WCJ) dismissed her claims based on **tribal sovereign immunity**. The New

Mexico Court of Appeals reversed, holding that (1) a provision in the Tribe's gaming compact stating that adverse worker's compensation decisions "shall be decided ... in an administrative or judicial proceeding ... as to which no defense of tribal sovereign immunity would be available" was a waiver of sovereign immunity, (2) it was unclear whether the Tribe's administrative procedures satisfied the compact, (3) regardless whether the Tribe's procedures satisfied the compact, Mendoza was free to pursue claims against the Tribe's third party Administrator and its insurer, Hudson. The Court rejected the Tribe's argument that, as the party that had contracted with the insurer, it was an indispensable party and could not be joined because of sovereign immunity: "[I]nterpretation of the duties created under the workers' compensation insurance policy executed between Isleta Casino and Hudson is not at issue. Rather, to succeed on the merits in her claim for workers' compensation benefits before the WCA, Worker need only establish that at the time of her accident: (1) Isleta Casino had complied with workers' compensation laws regarding obtaining insurance; (2) Worker was performing 'service arising out of and in the course of employment'; and (3) her injury was 'proximately caused by accident arising out of and in the course of' her employment and was 'not intentionally self-inflicted.' NMSA 1978, § 52-1-9 (1973). Additionally, workers' compensation law, unlike the common law of contract, generally requires that both a worker's employer and his or her employer's insurer shall be directly and primarily liable to the worker to pay to him or her work injury benefits where the aforementioned elements of a workers' compensation claim are satisfied. See NMSA 1978, § 52-1-4(A), (C) (1990). As a result, even assuming Isleta Casino was determined to enjoy tribal sovereign immunity in the context of Worker's workers' compensation claim, Isleta Casino is not an indispensable party without which Worker's claim cannot go forward under Gallegos—as both Isleta Casino and Hudson may be directly and primarily liable to her for work injury under workers' compensation law. … [A]llowing Hudson and Tribal First to deny Worker's claim in this case by hiding behind Isleta Pueblo's sovereign immunity renders the Pueblo's insurance policy illusory and inane and permits Hudson and Tribal First to arbitrarily evade judicial review of its determination in any forum. …"

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