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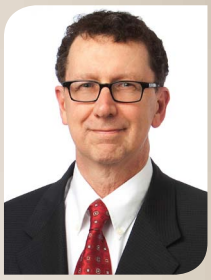

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Wisconsin Indian Law Section Annual Conference in Milwaukee, September 6-7

The Indian Law Section of the State Bar of Wisconsin holds its Annual Indian Law Conference September 6-7 at Potawatomi Hotel & Casino in Milwaukee. This year's conference will include presentations addressing:

- Recent legislation
- Case law update
- The *United States v. Washington* treaty rights decision and its impact across Indian country
- Tribal opportunities for developing renewable energy
- The *Upper Skagit* decision and other recent developments in tribal sovereign immunity
- Indian tax law update
- Indian Child Welfare Act update
- The opioid epidemic in Indian country
- CBD ventures In Wisconsin Indian country
- Tribal economic development
- Ethics panel: tribal elections

Indian Nations Law team leader Brian Pierson will deliver the case law update and moderate the sovereign immunity panel. Register here.

Supreme Court agrees to review Crow treaty hunting rights case

The Supreme Court has agreed to hear the appeal of Crow Tribe member Clayvin Herrera from the Wyoming Supreme Court's affirmance of his criminal conviction for hunting in the Bighorn National Forest. In his defense, Herrera cited The Crow Tribe treaty of 1868, under which the Tribe ceded to the United States most of its aboriginal territory but retained a portion for the establishment of the Crow Reservation and also provided that the Tribe "shall have the right to hunt on the unoccupied lands of the United States." In upholding Herrera's conviction, the Wyoming court had relied on the Tenth Circuit's 1995 decision in *Crow Indians v. Repsis*, 73 F.3d 982, 992 (10th Cir. 1995), holding that hunting rights preserved by the Tribe were "repealed" by the act admitting Wyoming to the union in 1890 or, alternatively, the establishment of the Bighorn National Forest in 1897 meant the forest was no longer "unoccupied." The question presented is:

> Whether Wyoming's admission to the Union or the establishment of the Bighorn National Forest abrogated the Crow Tribe of Indians' 1868 federal treaty right to hunt on the "unoccupied lands of the United

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.

States," thereby permitting the present-day criminal conviction of a Crow member who engaged in subsistence hunting for his family.

Supreme Court agrees to review Washington Supreme Court tax decision

In *Cougar Den, Inc. v. Washington State Department of Licensing*, 2017 WL 1192119 (Wash. 2017), Article III of the **treaty of 1855** between the United States and the Yakama Nation provided: "If necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways." Cougar Den, a corporation owned by Ramsey, a member of the Confederated Tribes and Bands of the Yakama Nation, contracted with KAG West, a trucking company, to transport fuel from Oregon to the Yakama Indian Reservation, when he sold it. The Washington Department of Licensing (Department) sought to assess Cougar Den $3.6 million in unpaid taxes, penalties and licensing fees under state law for hauling the fuel across state lines. The State trial court held that the state tax violated the tribe's right to travel. The Washington Supreme Court, en banc, affirmed: "As determined by the federal courts, any trade, traveling and importation that requires the use of public roads fall within the scope of the right to travel provision of the treaty. The Department taxes the importation of fuel, which is the transportation of fuel. Here, it was simply not possible for Cougar Den to import fuel without traveling or transporting that fuel on public highways. Based on the historical interpretation of the Tribe's essential need to travel extensively for trade purposes, this right is protected by the treaty."

Supreme Court tie in culverts case means Ninth Circuit decision stands

The U.S. Supreme Court's eagerly anticipated decision in *United States v. Washington* ended in a non-decision. Instead, on June 11, the Court issued a one sentence, *per curiam* order that "[t]he Judgment is affirmed by an equally divided Court." Justice Kennedy did not participate, which means that the eight remaining justices were split 4-4. As a result, the Ninth Circuit's decision stands by default but is not binding outside the Ninth Circuit.

The Ninth Circuit's decision addressed the important issue whether there are limits on the right of states to build infrastructure that adversely impacts treaty rights. Tribes in the Pacific Northwest had entered into treaties with the United States in 1854 and 1855 negotiated by territorial governor Isaac Stevens (Stevens Treaties) pursuant to which they ceded tracts of land 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), in what is now the State of Washington. The treaties reserved to the tribes "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 presided over by Judge George Boldt (Boldt Litigation). In 2001, twenty-one 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 very 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, and in 2013, the court issued an injunction ordering Washington to correct its offending culverts. In 2016, the Ninth 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 was "incredibly broad" and could invite "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:

"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."

The Ninth Circuit's decision is binding on federal courts within the Ninth Circuit. State and federal courts in other circuits may choose whether to follow it.

Selected Court Decisions

In *United States v. Jim*, 2018 WL 2473737 (11th Cir. 2018), the Miccosukee Tribe imposed a gross receipts tax on its own gaming enterprise and deposited the proceeds in what it designated a "non-taxable distributable revenue" account (NTDR). Jim, a member of the Miccosukee Tribe, received quarterly per capita distributions from the NTDR on behalf of herself, her husband, and her two daughters. She neither filed a tax return for the 2001 tax year nor paid **federal taxes** on the distributions. The federal government assessed taxes, penalties and interest against the member for the distributions. The member did not pay the assessments. The government sued to reduce the tax assessments to a judgment. The Tribe was allowed to intervene as of right on the ground that the case required a determination as to the taxability of the distributions, which could impair its distribution program and subject it to reporting and withholding requirements. The Tribe filed an answer and affirmative defenses. The district court rejected the Tribes' and Jims' argument that the distributions were exempt from federal taxation under the General Welfare Exclusion Act (GWEA), citing Congress' explicit mandate in the Indian Gaming Regulatory Act that distributions from gaming revenue, and entered judgment against both the Tribe and the Jims ordering the Jims to pay $278,758.83 for unpaid federal income taxes, penalties and interest assessed against her for the 2001 Tax Year, plus statutory additions and interest. The Eleventh Circuit affirmed: "Congress spoke clearly when it imposed federal income taxation on per capita payments derived from gaming revenue. If Congress intended GWEA to undo this arrangement, it knew the words to do so. It chose not to use them. … As an intervenor, the Tribe entered the lawsuit with full knowledge of the Government's claims and asserted affirmative defenses that were resolved by the District Court. The Tribe was also aware that, in its proposed conclusions of law, the Government asked the District Court to declare that the Tribe's distributions were subject to federal income taxation and therefore that the Tribe had an obligation to withhold taxes on them. As a result, the District Court did not abuse its discretion in refusing to amend the judgment."

In *Skokomish Indian Tribe v. Forsman*, 2018 WL 3017052, Fed.Appx. (Ninth Circuit 2018), the Skokomish Indian Tribe sued elected officials of the Suquamish Indian Tribe seeking to confirm Skokomish's right to exclude members from all other **Stevens Treaty** from certain territories. The district court dismissed for failure to join required parties and the Ninth Circuit affirmed: "[T]he district court correctly concluded that deciding Skokomish's claims against the

Suquamish Defendants would necessarily decide Skokomish's hunting rights in relation to the amici tribes and potentially other absent, non-party Stevens Treaty Tribes. …. Skokomish's primary-right claim is at odds with the claimed treaty rights of any tribe—including amici—that seeks to hunt in the land at issue."

In *State of California v. Picayune Rancheria of Chukchansi,* Fed. Appx. 2018 WL 2672343 (9th Cir. 2018), factions within the Picayune Rancheria of Chukchansi (Tribe) contested each other's legitimacy. The district court issued a permanent injunction, enjoining the Tribe and its agents from certain conduct related to ensuring the health, safety and welfare of the public with respect to the Tribe's operation of its Chukchansi Gold Resort and Casino pursuant to the Tribe's obligations under its gaming compact with the state. The Ninth Circuit affirmed, rejecting the argument raised by one of the factions that the court was bound by a tribal court decision: "First, the injuries alleged by the Distributees, recognition of the Interim and New Tribal Councils and failure to recognize tribal court rulings, are not part of the district court's decision. The district court did not determine which disputant tribal faction represented the rightful tribal council or leadership. Rather, the district court summarized the intra-tribal dispute among the factions, the actions taken by the BIA and the IBIA with respect to the 2010 Interim Tribal Council and the October 2015 Tribal Council Election. Further, the tribal court rulings referenced by the Distributees were irrelevant to the issues before the district court: the Tribe's compliance with the provisions of the class III gaming Compact between the Tribe and the State of California requiring the Tribe to ensure the public's health, safety, and welfare in operating its Casino."

In *Chinook Indian Nation v. Zinke*, 2018 WL 3046430 (W.D. Wis. 2018), the Chinook Indian Nation (CIN) had filed a petition for federal acknowledgement under the Part 83 regulations. The petition was granted by the Department of Interior (DOI) Assistant Secretary-Indian Affairs in the final moments of the Clinton administration but reconsidered and reversed by the Bush Administration. The CIN sued the Secretary of the Interior and other federal officials and agencies seeking an order compelling the defendants to add the CIN to the list of **federally acknowledged tribes**, challenging federal regulations that prohibited the CIN from re-petitioning the federal government for tribal acknowledgment and ordering the DOI to provide the CIN access to funds from a 1970 Indian Claims Commission judgment held in trust by the DOI for the Lower Band of Chinook and Clatsop Indians. On the defendants' motion to dismiss, the court held that

(1) acknowledgement of the CIN was a non-justiciable political question,

(2) the CIN had standing to challenge the bar on re-petitions, and

(3) the CIN would be permitted to pursue its claim to ICC funds. According to the court, "the issue of federal acknowledgment of Indian tribes is a quintessential political question that must be left to the political branches of government and not the courts. Absent a clear delegation of authority from Congress, the Court cannot bypass the existing federal acknowledgment process and bestow federal recognition upon the CIN."

In *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 301 F.Supp.3d 50 (D. N.D. 2018), the Standing Rock and Cheyenne River Sioux tribes had challenged the Army Corps of Engineers' (Corps) authorization of the Dakota Access Pipe Line, a crude oil pipeline under the Missouri River, a federally regulated waterway bordering tribes' reservations, under the Administrative Procedure Act. The Yankton Sioux Tribe had brought a similar suit and the court had consolidated the two cases. The court had previously addressed the various claims brought by the Standing Rock and Cheyenne River Sioux tribes, dismissing some and remanding for consideration of other issues. In the instant decision, the district court granted the federal government's motion for summary judgment on the Yankton Sioux Tribe's claims, holding that

(1) the Tribe had standing to sue,

(2) the Tribe's claim that the Corps' authorization of pipeline violated the National Historic Preservation Act was moot since construction was complete,

(3) the decisions of the Corps and Fish and Wildlife Service to issue three environmental assessments (EA), three findings

of no significant impact (FONSI), and one categorical exclusion classification did not violate the anti-segmentation principle of the **National Environmental Policy Act** (NEPA),

(4) the Tribe forfeited the argument that authorizations were "similar actions" for purposes of NEPA's anti-segmentation principle,

(5) the EAs and FONSIs were not "similar actions,"

(6) any violation of anti-segmentation principle was harmless error,

(7) the court would not revisit its previous determination that neither the Fort Laramie Treaty of 1851 nor the federal trust doctrine barred the approval of the pipe line, and

(8) the United Nations Declaration on the Rights of Indigenous Peoples was "a non-binding declaration that does not create a federal cause of action."

In *Williams & Cochrane, LLP v. Quechan Tribe*, 2018 WL 2734946 (S.D. Cal, 2018), Williams & Cochrane (WC), a law firm and certain members of the Quechan Tribe sued the Tribe and certain of its officials (Quechan Defendants) and Rosette & Associates and its principal, and others (Rosette Defendants), alleging

(1) breach of contract, by W&C against Quechan,

(2) breach of the implied covenant of good faith and fair dealing, by W&C against Quechan,

(3) promissory estoppel, by W&C against Quechan,

(4) two violations of the Lanham Act, by W&C against the Rosette Defendants,

(5) violation of the Racketeering Influenced and Corrupt Organizations (RICO) Act, by W&C against the Rosette Defendants,

(6) conspiracy to violate RICO, by W&C against the Rosette Defendants, Escalanti, and White, and

(7) negligence/breach of fiduciary duty, by the Member Plaintiffs against the Rosette Defendants.

The court denied the Quechan Defendants' motion to disqualify W&C as counsel for the Member Plaintiffs, granted the Quechan Defendants' motion to dismiss claims based on breach of contract and promissory estoppel, denied their motion to dismiss WC's implied covenant claim, citing the Supreme Court's decision in ***Lewis v. Clarke*** in rejecting tribal officials' sovereign immunity defense, dismissed one Lanham act claim against the Rosette Defendants but permitted another, based on Rosette's taking credit of a positive result achieved by WC, to go forward and dismissed WC's RICO claims without prejudice and with leave to replead to address deficiencies in the complaint.

In *Delebreau v. Danforth,* 2018 WL 2694527 (E.D. Wis. 2018), Delebreau had been employed by the housing authority of the Oneida Tribe. After her employment was terminated, she sued various tribal officials for violation of her civil rights, asserting that her termination was in retaliation for her reporting malfeasance by the housing superintendent. The district court dismissed: "Delebreau's complaint fails to state any cognizable claim for relief against any defendant. Although the complaint contains multiple allegations that she was not only reassigned to inferior positions but also terminated from employment on two occasions, nothing in the complaint associates those adverse employment actions with particular defendants. Indeed, of the four defendants against whom she makes allegations at all, she makes no allegation that any defendant did more than communicate with her. Further, **tribal sovereign immunity** extends to tribal officials when acting in their official capacity and within the scope of their authority. ... Delebreau cites no federal statute or constitutional provision that overcomes the immunity of the Oneida Nation and its officers and employees to hire and fire tribal employees without outside interference. Consequently, Delebreau's complaint will be dismissed in its entirety." (Citations and internal quotations omitted.)

In *White v. Schneiderman*, 2018 WL 2724989 (N.Y. 2018), White, a member of the Seneca Nation of Indians, operated a convenience store, Native Outlet, located on Seneca Nation lands and sold cigarettes to tribal members and non-members. New York sought to impose **tax** collection obligations on White under Tax Law § 471, which provides that the tax shall be imposed "on all cigarettes possessed in the state by any person for sale," including "all cigarettes sold on an Indian reservation to non-members of the Indian Nation or Tribe," but which also contains an exception for

cigarette "sales to qualified Indians for their own use and consumption on their nation's qualified reservation." The law requires Indian retailers to pre-collect the tax on cigarettes sold to non-members and also permits them to purchase a certain amount tax free based on probable demand by members. White and Native Outlet sued seeking (1) a declaration that Tax Law § 471 violated the Buffalo Creek Treaty of 1842 and was unconstitutional and invalid and (2) a permanent injunction enjoining defendants from enforcing the law against them. The lower court dismissed and the New York Court of Appeals affirmed, holding that, notwithstanding the pre-collection obligation, the incidence of tax was on non-members: "As noted above, the pre-collection mechanism at issue here is not a tax on the retailer and is borne instead by the non-Indian consumer. Neither the Treaty nor the statute supports an argument that any indirect impact on Indian retailers resulting from permissible taxation of non-Indian customers is prohibited."

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