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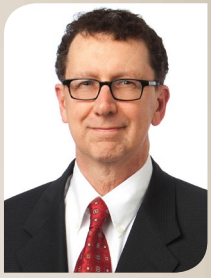

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The Godfrey & Kahn Indian Nations Law Practice Group provides a full range of legal services to Indian nations, tribal housing authorities, tribal corporations and other Indian country entities, with a focus on business and economic development, energy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

Selected court decisions

In *Seminole Tribe of Florida v. Biegalski*, 2018 WL 6437564 (11th Cir. 2018), the Seminole Tribe in 2012 had filed a federal suit seeking declaratory and injunctive relief against Stranburg, interim director of Florida's Department of Revenue (DOR), complaining that the DOR's imposition of Florida's tax "on gross receipts from utility services that are delivered to a retail consumer" (Utility Tax) was preempted by federal law under the rule of *White Mountain Apache Tribe v. Bracker*. The district court had initially held for the Tribe but the Eleventh Circuit in 2013 reversed, *Seminole Tribe of Florida v. Stranburg*, 799 F.3d 1324, 1351–52 (11th Cir. 2015), concluding that "no pervasive federal interest or comprehensive regulatory scheme covering on-reservation utility delivery and use sufficient to demonstrate a congressional intent to preempt state taxation of a utility provider's receipts derived from on-reservation utility service." The Court observed that the Tribe had argued generally that the tax was preempted because the Tribe used electricity in connection with various activities whose regulation was preempted by federal law, including the provision of essential government services, leasing of Indian land and Indian gaming, but had failed to introduce evidence of a substantial federal interest in regulating Indians' utility use specifically. On remand, the district court granted Stranburg's motion for summary judgment. The Tribe did not appeal but instead sued Stranburg's successor challenging the same tax but presented more "particularized" arguments. The district court dismissed on the ground that the Tribe's claim was precluded by the judgment in the previous suit. The Eleventh Circuit agreed and affirmed: "[T]he Tribe had a full and fair opportunity to litigate its claim that the Utility Tax was preempted to the extent it was applied to the specific activities the Tribe claims are exclusively and pervasively regulated by federal law. The final judgment on the merits in Seminole I precludes the Tribe from relitigating issues that were or could have been raised in that action." (Internal quotations omitted.)

In *Comanche Nation of Oklahoma v. Zinke*, 2018 WL 6601858 (10th Cir. 2018), the Secretary of Interior (Secretary) had approved the acquisition of thirty acres in trust for the Chickasaw Nation for gaming purposes under a provision of the **Indian Gaming Regulatory Act** (IGRA) that permits gaming on the former reservations of Oklahoma tribes, concluding that the Chickasaw Nation did not have a reservation and that the site was within the boundaries of its former reservation. The Comanche Nation, which operated a gaming enterprise 45 miles from the Chickasaw property, sued under the Administrative Procedure Act, contending that the Secretary's decision to acquire the property violated the National Environmental Policy Act (NEPA). The court denied the Comanche Nation's motion for preliminary injunction, concluding that it was unlikely to succeed on the merits of its claim: "The Oklahoma exception delegates to the Secretary the authority to define 'former reservation,' … and the Secretary did so in 2008. … Comanche Nation does not identify any statutory

language in either IRA or IGRA that contravenes the Secretary's treatment of former reservations. Nothing in the text of those statutes suggests that a tribe must have governmental jurisdiction over land within its former reservation to make it eligible for the Oklahoma exception. Instead, Comanche Nation argues that the regulation contravenes Congress' intent by treating Oklahoma tribes more favorably than non-Oklahoma tribes, in that only the latter are required to demonstrate governmental jurisdiction. But the Secretary does not impose an independent requirement on non-Oklahoma tribes to make an affirmative showing of governmental jurisdiction on a tract-by-tract basis. The term 'governmental jurisdiction' is included in the regulatory definition of 'reservation.' § 151.2(f). And the Bureau of Indian Affairs (BIA) presumes that a tribe has governmental jurisdiction over any parcel within the borders of its reservation. See *Atkin Cty. v. Bureau of Indian Affairs*, 47 I.B.I.A. 99, 106-07 (June 12, 2008)."

In *United States v. Zander*, 742 Fed. Appx. 358 (10th Cir. 2018), the Tenth Circuit upheld the conviction of Zander on counts of mail fraud, wire fraud, money laundering and willful failure to file federal tax returns based on his fraudulent diversion of funds from the Paiute Indian Tribe of Utah. The Court held that the Tribe fell within the definition of a "victim" under the Mandatory Victims Restitution Act (MVRA) and was, therefore, entitled to restitution: "We and our sister circuits have consistently held that governmental entities, such as the Tribe, can be "victims" for purposes of restitution under the MVRA."

In *Inter-Tribal Council of Arizona, Inc. v. United States*, 140 Fed.Cl. 447 (Ct. Cl. 2018), the Inter-tribal Council of Arizona, Inc. (ITCA) representing Arizona Indian tribes sued the United States, claiming that the government breached its **tribal trust obligations** under the Arizona-Florida Land Exchange Act (AFLEA) by failing to ensure sufficient security for full payments to be made by landowner for land exchange involving sale of land that was the former site of an Indian boarding school. The plaintiff contended that the government failed to collect and deposit or make up trust payments on which landowner defaulted, and failed to prudently invest trust funds. The Court of Federal Claims partially granted and partially denied the government's motion to dismiss, holding that

(1) the claim based on insufficient initial security requirements was time barred,

(2) the government fulfilled its trust obligation to ensure adequate security,

(3) the government was not required to make up defaulted payments,

(4) a portion of the prudent investment claim was time barred, and

(5) the timely portion of the prudent investment claim was sufficiently alleged:

"The court finds that with regards to ITCA's claim that the government has failed to prudently invest the trust funds in the six years prior to filing suit because it has invested the funds in short-term low interest yielding investment vehicles within the last six years, ITCA has alleged sufficient facts to establish a claim upon which relief can be granted. This court on numerous occasions has found that the government can be liable for failing to prudently invest in accordance with 25 U.S.C. § 162a9 when it has invested in low-yielding short-term investment vehicles."

In *Seneca Nation v. Cuomo*, 2018 WL 6682265 (W.D. N.Y. 2018), the Seneca Nation had granted the State of New York a permanent **easement** over a portion of its Cattaraugus Reservation in 1954, in exchange for $75,500. Despite the requirement of 25 U.S.C. § 323 that the Secretary of the Interior approve rights of way across Indian lands, the parties did not obtain secretarial approval. The State constructed the New York State Thruway, which eventually became part of the federal interstate highway system, in the easement (Thruway Easement.) The Nation challenged the validity of the easement in a federal case filed in 1993 but the claim was dismissed because the State of New York was an indispensable party that could not be sued because of Eleventh Amendment sovereign immunity. The Second Circuit affirmed the dismissal. In the instant case, the Nation sued state officials under the *Ex Parte Young* doctrine, contending that the easement was void ab initio and seeking to compel state officials to obtain a valid easement. The defendants moved to dismiss, arguing res judicata based on the 1993 case. The magistrate judge concluded that the Second Circuit's decision in the 1993 case included findings that the State owned the easement and that any attack on the validity of the easement required that the State be joined as a party, which could not occur because of the State's immunity: "For all that the Court knows, the State of New York very

well might have pressured the Seneca Nation into a procedurally improper and grossly unfair easement back in 1954. Fourteen years ago, however, the Second Circuit definitively resolved issues that make further litigation here impossible. This Court has to respect that. The Seneca Nation might still have remedies at the New York Court of Claims or perhaps through the political process. Those potential remedies, if available, are beyond this Court's ability to address."

In *HCI Distribution, Inc., v. Peterson*, 2018 WL 6659539 (D. Neb. 2018), HCI Distribution, Inc. (HCI) and Rock River Manufacturing Inc. (Rock River), were tribally-chartered, wholly owned subsidiaries of Ho-Chunk, Inc., the economic development arm of the Winnebago Tribe. HCI purchased and resold tobacco goods, bearing tribal tax stamps in accordance with tribal law, to reservation-based wholesalers and retailers exclusively in Indian country. HCI employed tribal members and allocated 20% of its net profits to support tribal welfare programs, which in 2017 allowed HCI to contribute $157,381 to the Tribe. Rock River, a federally licensed cigarette manufacturer with its facilities on the Tribe's reservation, manufactured tribally-stamped tobacco products on the Tribe's reservation for distribution through HCI and other distributors. Citing the Indian commerce clause of the Constitution and federal Indian law principles, HCI and Rock River sued Nebraska officials, seeking to prevent them from enforcing against HCI and Rock River Nebraska's statutes regulating tobacco product manufacturing and requiring the imposition of a tax under the 1998 Master Settlement Agreement with major manufacturers (MSA). The court partially denied and partially granted the defendants' motion to dismiss, holding that

(1) the court had federal question subject matter jurisdiction,

(2) plaintiffs could sue the state officials under the *Ex Parte Young* doctrine,

(3) the plaintiffs failed to allege an Equal Protection claim, and

(4) the plaintiffs' constitutional and Indian law claims would not be dismissed:

"Thus, whether framed as taxation or as regulatory, the facts alleged in the complaint would allow the Court to conclude that Nebraska's MSA laws infringe on 'the right of reservation Indians to make their own laws and be ruled by them.' **Bracker**, 448 U.S. at 142. What is clear is that the plaintiffs' Indian Commerce Clause claims may not be resolved on a summary basis. Resolution of the issues concerning Indian country and tribal member taxation and regulation are exceedingly complex and context-dependent. The Court cannot determine whether the MSA laws impose a tax or regulation, or both, or the extent to which the tax or regulations interfere with a tribe's right to make and be ruled by its own laws, on the plaintiffs' complaint standing alone. The Court anticipates that a full evidentiary record will be required before it may undertake a complete resolution of the parties' claims and contentions pursuant to the Indian Commerce Clause. Accordingly, the Court finds that the plaintiffs have alleged a plausible factual basis to give rise to a claim pursuant to the Indian Commerce Clause."

In *Menominee Indian Tribe v. U.S. EPA*, 2018 WL 6681397 (E.D. Wis. 2018), the Menominee Indian Tribe of Wisconsin sued the United States Environmental Protection Agency and the United States Army Corps of Engineers (Federal Defendants) under the Administrative Procedure Act, contending that their refusal to exercise jurisdiction over a **Clean Water Act Section 404** permit to conduct mining operations at the Back Forty Mine in Menominee County, Michigan, near the Menominee River separating Michigan from Wisconsin, violated federal law. The permit process was instead supervised by the Michigan Department of Environmental Quality (MDEQ). The Tribe argued that federal jurisdiction was mandatory based on the interstate status of the river. The defendants moved to dismiss and the Tribe moved to amend its complaint to further allege that EPA's withdrawal of its objections to the permit was arbitrary and capricious and that the EPA's failure to consult with the Menominee Tribe pursuant to the National Historic Preservation Act (NHPA) before the permit for the mine was issued was also arbitrary and capricious. The court denied the motion to amend and dismissed the case: "EPA's discretionary decision to object and subsequently withdraw those objections is not reviewable under the APA, as the statute is drawn in such broad terms that there is no clear law to apply and there is no meaningful standard against which to judge the agency's exercise of discretion. The Tribe therefore fails to state a claim upon which relief can

be granted, and any amendment to the complaint to add such a claim would be futile. … Federal Defendants were not required to consult with the Tribe about the Back Forty Mine Project because § 106 only applies when a project is federally funded or federally licensed. … The Tribe has not alleged that the Back Forty Mine Project is federally funded or licensed. To the contrary, the record reflects that the project was proposed by and will be funded by Aquila and its investors and the state of Michigan has jurisdiction over the Section 404 permitting process." The court also found that the citizen suit provisions of the Clean Water Act did not waive the immunity of the Army Corps of Engineers.

In *Navajo Nation v. United States Department of the Interior*, 2018 WL 6506957 (D. Ariz. 2018), the Navajo Nation sued the Department of the Interior in 2003, seeking to strike down various regulations governing the **use of water from the Colorado River** in its Lower Basin (River), alleging that the United States breached its duties to the Nation as trustee. The district court dismissed but the Ninth Circuit remanded the breach of trust claim with instructions to "fully consider the Nation's breach of trust claim in the first instance, after entertaining any request to amend the claim more fully to flesh it out." On remand, the district court entertained but denied the Nation's request to file a Third Amended Complaint (TAC): "In *Arizona v. California*, the Supreme Court determined the rights of various entities to water from the River. Subsequent to its initial decree in the case, the Court declared that absent some showing of unforeseeable change in circumstances, the rights to the water that had been adjudicated would not be altered. … The Nation also notes that by creating the Navajo Reservation, the United States also by implication reserved a sufficient amount of water for the benefit of the Navajo Nation to carry out the purposes for which the Navajo Reservation was created, specifically to make the Reservation a livable homeland for the Nation's present and future generations. … [T]his Court need not decide whether the Nation's rights under *Winters* would give rise to a trust claim if the Tribe did not take the further step of requiring the Court to determine that the Trustee had an obligation to satisfy such rights out of the mainstream of the Colorado River. In the past, however, the United States has taken the position that *Winters* water rights can be held in trust for a Tribe. ... The Court need not decide such matters here, however, because the TAC as written requires the Court to determine whether the Nation has rights in the Colorado River." (Internal emendations omitted.)

In *Cayuga Indian Nation v. Seneca County*, 2018 WL 6510728 (W.D.N.Y. 2018), The Cayuga Indian Nation (Tribe) had purchased five parcels of land in Seneca County. When the Tribe refused to pay property taxes imposed by the County, the County sued to foreclose. The Tribe sued in federal court to enjoin the foreclosure action arguing that the properties were within the 64,000-acre reservation reserved by the 1794 Treaty of Canandaigua. Since those lands had been lost through sales that violated the Indian Non-Intercourse Act, 25 U.S.C. § 177, the Tribe contended, they were still Indian lands and, as such, protected from alienation by that Act. Alternatively, the Tribe argued that the foreclosure was barred by the Tribe's **sovereign immunity**. The court dismissed solely on the ground of sovereign immunity: "Plaintiff's application for summary judgment is granted insofar as it is based upon tribal sovereign immunity from suit and is otherwise denied. Seneca County may not foreclose on, acquire, convey, sell or transfer title to the Nation-owned properties in Seneca County based on the Tax Enforcement Notification and Petition annexed to the Amended Complaint, and all efforts of Seneca County to do so and to thereby interfere with the Nation's ownership, possession and occupancy of such lands are null and void."

In *Everi Payments, Inc. v. Washington State Department of Revenue*, 2018 WL 6497601 (Wash. App. 2018), Everi Payments, Inc. (Everi) provided cash access services at tribal casinos. When the Washington Department of Revenue (DOR) sought to impose its Business and Occupational Tax on Everi's receipts, Everi sued, arguing that the tax was preempted by the Indian Gaming Regulatory Act (IGRA), the Indian Trader Statutes, and the rule of ***White Mountain Apache v. Bracker***. The trial court granted the DOR's motion for summary judgment and the Court of Appeals affirmed: "IGRA states that 'nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity.' 25 U.S.C. § 2710(d)(4). The B&O tax here is not a tax on class III activities. The tax is assessed upon Everi for

providing cash access services. Such services are not class III gaming themselves and Everi admits as much. … Here, the taxed activity is the cash access service that Everi, a non-Indian, provides to non-Indians. In doing business within Washington, Everi and its employees use a variety of government services. When providing cash access services, Everi used Washington's telecommunication infrastructure to communicate with Everi's processor in California. Everi employed Washington residents and also employed nonresidents who travelled to Washington, using Seattle-Tacoma Airport resources and Washington roads. As a result, the State has a strong interest in assessing the B&O tax against Everi to generate revenue to support the services it provides to Everi and its employees. … We hold that the State's interests outweigh the interests of the tribes and federal government. … The federal interest here is low. Tribal economic independence is not affected by this B&O tax because the legal incidence falls on Everi by law and by contract. Tribal sovereignty interests are moderate because the activity occurred on tribal lands, but the tax does not interfere with a tribe's governance of its own gaming, nor does it prevent the tribes from doing business with Everi. Here, tribal economic interests are low and sovereignty interests are moderate."

In *State v. Roy*, 920 N.W.2d 227 (Minn. App. 2018), Roy, a member of the Red Lake Band of Chippewa Indians and a resident of the Red Lake Indian Reservation, in 2011 had been convicted of third-degree sale of a controlled substance in Beltrami County District Court. She received a stay of imposition of sentence and was placed on supervised probation for up to 20 years. In 2017, she was arrested on the Red Lake reservation and held at the Red Lake detention center from July 15 to August 10, facing two criminal charges. She was subsequently convicted in the Red Lake Court of Indian Offenses and served her Red Lake sentence from October 22 to November 12, at which time she was released to Beltrami County on a pending probation violation in her 2011 matter. The district court revoked the stay of imposition and sentenced Roy to the 21-month presumptive prison sentence, awarded her credit for time served at the Beltrami County jail but denied her jail credit for time served at the Red Lake detention center. The Minnesota Court of Appeals affirmed, holding that neither intrajurisdictional rule for jail credit, the interjurisdictional rule for jail credit nor the limited exception to the interjurisdictional rule allowing for concurrent sentencing in multi-state context applied: "[T]he record shows that appellant's custody at the Red Lake detention center was solely related to her criminal charges and convictions for her conduct on the Red Lake reservation; it did not arise out of, or relate to, her 2011 conviction in Beltrami County."

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