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Supreme Court Decides Cougar Den

In *Washington State Department of Licensing v. Cougar Den, Inc.*, 2019 WL 1245535 (U.S. 2019), 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 (Yakama Nation), contracted with KAG West, a trucking company, to transport fuel from Oregon to the Yakama Indian Reservation, where Cougar Den sold it to Yakama-owned gas stations on the reservation. The Washington Department of Licensing (Department) sought to assess Cougar Den \$3.6 million in unpaid taxes, penalties, and licensing fees under a state statute taxing persons who import motor fuel into the State using ground transportation. The Washington Supreme Court struck down the statute, as applied to Cougar Den, on the ground that it “taxes the importation of fuel, which is the transportation of fuel” and that “travel on public highways is directly at issue because the tax is an importation tax.”

On March 19th the US Supreme Court affirmed based on two different rationales. Justices Breyer, Sotomayor and Kagan held that the treaty preempted the tax because (1) the Washington Supreme Court’s interpretation of Washington law foreclosed the Department’s argument that the tax was on “possession” rather than on travel, (2) the Indian canon required the court to resolve any ambiguity in the Tribe’s favor, (3) the historical record indicated that the parties to the treaty understood it to include the right to travel with goods for sale or distribution, and (4) taxing travel with goods burdens travel: “our holding rests upon three propositions: First, a state law that burdens a treaty-protected right is pre-empted by the treaty. ... Second, the treaty protects the Yakamas’ right to travel on the public highway with goods for sale. ... Third, the Washington statute at issue here taxes the Yakamas for traveling with fuel by public highway.” Justices Gorsuch and Ginsburg concurred in the judgment, concluding that the treaty includes a right to bring goods to the reservation to sell and that this right preempts the Washington tax. The plurality rejected the dissenters’ parade of horrors regarding the consequences of unregulated tribal use of the highways by strongly suggesting that the State retained the authority to enforce health and safety regulations.

Dissenting, Justice Roberts, joined by Justices Kavanaugh and Thomas, argued that the Washington statute taxed possession of fuel, not transportation, and was, therefore, permissible. Justice Thomas, joined by Justice Kavanaugh, dissented separately to insist that the Tribe bargained for nothing more than the right to travel on the same terms as whites. Justice Gorsuch’s concurrence includes a response to this position: “As the State reads the treaty, it promises tribal members only the right

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to venture out of their reservation and use the public highways like everyone else. But the record shows that the consideration the Yakamas supplied was worth far more than an abject promise they would not be made prisoners on their reservation. In fact, the millions of acres the Tribe ceded were a prize the United States desperately wanted. ... The Yakamas knew all this and could see the writing on the wall: One way or another, their land would be taken. If they managed to extract from the negotiations the simple right to take their goods freely to and from market on the public highways, it was a price the United States was more than willing to pay. By any fair measure, it was a bargain-basement deal.” The takeaways of the decision include: (1) a majority of the court is still willing to apply the canon of construction in a meaningful manner, (2) the States’ authority to regulate off-treaty rights to protect health and safety, previously acknowledged by various lower courts, is also assumed by the Supreme Court, (3) Justice Gorsuch’s hoped-for understanding of tribal perspectives appears to be real, and (4) Justice Kavanaugh has, initially at least, staked out a position with Justice Thomas that is hostile to the tribal perspective.

Other Selected Court Decisions

In *Chemehuevi Indian Tribe v. Newsom*, 2019 WL 1285060 (9th Cir. 2019), the Chemehuevi Indian Tribe’s 1999 Compact with the state provided for the Compact to terminate December 31, 2020, subject to an extension to June 30, 2022 if the parties have not agreed to amend the Compact or entered into a new compact before December 31, 2020.

The Tribe sued the State’s governor, contending that the termination provision violated the **Indian Gaming Regulatory Act (IGRA)**. The district court granted the state’s summary judgment motion and the Ninth Circuit affirmed: “Applying traditional tools of statutory construction, we find that IGRA’s plain language unambiguously permits parties to include durational limits in compacts. The phrases ‘standards for the operation of [gaming] activity’ and ‘any other subjects ... directly related to the operation of gaming activities’ are naturally read as catch-all categories. Viewed in context, those terms are broader than the more specific topics enumerated in paragraphs (3)(C)(i)–(v). And once paragraphs (3)(C)(vi)–(vii) are properly framed as catch-all categories, the inquiry is whether a durational limit is either a ‘standard [] for the operation of [gaming] activity’ or a term ‘directly related to the operation of gaming activities.’ We conclude that, at a minimum, a durational limit is ‘directly related to the operation of gaming activities.’ See 25 U.S.C. § 2710(d)(3)(C)(vii).”

In *United States v. Cooley*, 2019 WL 1285055 (9th Cir. 2019), Saylor, a Crow Tribe police officer, stopped Cooley, a non-Indian, after observing Cooley’s truck parked on the shoulder of US Route 212, a right of way within the Crow Indian Reservation. Saylor questioned Cooley. Suspicious of the responses, Saylor arrested Cooley and, in the course of a vehicle search, discovered drugs and drug paraphernalia. Federal prosecutors ultimately charged Cooley with one count of possession with intent to distribute methamphetamine and one count of possession of a firearm in

furtherance of a drug trafficking crime. Cooley moved to suppress evidence, arguing that Saylor was acting outside the scope of his jurisdiction as a Crow Tribe law enforcement officer when he seized Cooley, in violation of the **Indian Civil Rights Act of 1968 (ICRA)**. The district court granted Cooley’s motion, finding that Saylor had identified Cooley as a non-Indian when Cooley initially rolled his window down, and that Saylor seized Cooley when he drew his gun, ordered Cooley to show his hands and demanded his driver’s license. The court reasoned that a tribal officer cannot detain a non-Indian on a state or federal right-of-way unless it is apparent at the time of the detention that the non-Indian has been violating state or federal law, and that Saylor therefore had no authority to seize Cooley when and where he did. The Ninth Circuit affirmed: “We cannot agree that Saylor appropriately determined that Cooley was a non-Indian just by looking at him. But Saylor did act outside of his jurisdiction as a tribal officer when he detained Cooley, a non-Indian, and searched his vehicle without first making any attempt to determine whether Cooley was in fact an Indian. ... Tribes have less power over non-Indians on public rights-of-way that cross over tribal land — such as Route 212 — than on non-encumbered tribal property. If a tribe has granted an easement allowing public access to tribal land, the tribe cannot exclude non-Indians from a state or federal highway constructed on that easement. ... Tribes also lack the ancillary power to investigate non-Indians who are using such public rights-of-way. ... But where, as here, a public highway is within the boundaries of a tribal reservation,

tribal authorities may arrest Indians who violate tribal law on the public right-of-way. ... Finally, tribal authorities may stop those suspected of violating tribal law on public rights-of-way as long as the suspect's Indian status is unknown. In such circumstances, tribal officials' initial authority is limited to ascertaining whether the person is an Indian. ... If, during this limited interaction, it is apparent that a state or federal law has been violated, the [tribal] officer may detain the non-Indian for a reasonable time in order to turn him or her over to state or federal authorities. ... Saylor never asked Cooley whether he was an Indian or otherwise ascertained that he was not. ... When a tribal officer exceeds his tribe's sovereign authority, his actions may violate ICRA's Fourth Amendment counterpart because, when the Fourth Amendment was adopted, officers could not enforce the criminal law extra-jurisdictionally in most circumstances. The tribal officers' extra-jurisdictional actions do not violate ICRA's Fourth Amendment parallel only if, under the law of the founding era, a private citizen could lawfully take those actions. Whether the officer's actions violate current state, federal, or tribal law is not the fulcrum of this inquiry." (Quotations and citations omitted).

In *Texas v. Alabama-Coushatta Tribe of Texas*, 2019 WL 1199564 (5th Cir. 2019), Congress had enacted the Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act (Act) in 1987, which restored the tribes to federal recognition but expressly prohibited gaming in violation of Texas law. A year later, Congress enacted the **Indian Gaming Regulatory Act**

(IGRA). The Alabama Coushatta Tribe sought to conduct gaming activities and sued for a declaratory judgment that the State had no authority to regulate its activities. The district court held otherwise and enjoined the Tribe's gaming activities. The Fifth Circuit Court of Appeals affirmed in 2003 (*Ysleta I*), holding that the Tribe had essentially agreed to forego gaming in order to obtain enactment of the Restoration Act and rejecting the argument that the IGRA superseded the Act. In 2016, the National Indian Gaming Commission (NIGC) determined that the Tribe was authorized to conduct Class II gaming on its lands under the IGRA and that the Restoration Act did not bar such activities. The Tribe moved the district court to dissolve the injunction. The court denied the motion and the Fifth Circuit affirmed: "[T]he NIGC's decision that IGRA applies to the Tribe does not displace *Ysleta I*. We thus reaffirm that the Restoration Act and the Texas law it invokes—and not IGRA—govern the permissibility of gaming operations on the Tribe's lands. IGRA does not apply to the Tribe, and the NIGC does not have jurisdiction over the Tribe."

In *Knighton v. Cedarville Rancheria of Northern Paiute Indians*, 2019 WL 1145150 (9th Cir. 2019), the Cedarville Rancheria of Northern Paiute Indians (Tribe), a tribe with twelve adult members and a 17-member Rancheria, employed Knighton as its general manager from 2009 to 2016. Knighton, a non-member, had never resided on the Rancheria. Following the termination of Knighton's employment, the Tribe established a tribal court, enacted a court code and sued Knighton in tribal court for violations of tribal law. After

the tribal trial and appellate courts had both rejected her jurisdictional challenges, Knighton sued in federal court. The district court held that the tribal court had jurisdiction based on the Ninth Circuit's holding in *Water Wheel* that tribes' inherent authority to exclude nonmembers included the right to regulate their conduct on tribal land. The Ninth Circuit affirmed both on the grounds of the Tribe's right to exclude and under the *Montana* exceptions: "A tribe's power to exclude nonmembers from tribal lands permits a tribe to condition a nonmember's entry or continued presence on tribal land ... but this inherent power does not permit the Tribe to impose new regulations upon Knighton's conduct retroactively when she is no longer present on tribal land. However, ... Knighton's alleged conduct violated the Tribe's regulations that were in place at the time of her employment. ... [O]ur caselaw states that an Indian tribe has power to regulate nonmember conduct on tribal land incident to its sovereign power to exclude nonmembers from tribal land, regardless of whether either of the *Montana* exceptions is satisfied. ... However, the Court has made clear that a tribe also has sovereign authority to regulate nonmember conduct on tribal lands independent of its authority to exclude if that conduct intrudes on a tribe's inherent sovereign power to preserve self-government or control internal relations. The *Montana* exceptions are (rooted) in the tribes' inherent power to regulate nonmember behavior that implicates these sovereign interests. ... Accordingly, although we conclude that the Tribe had authority to regulate Knighton's conduct on tribal land pursuant to

its sovereign exclusionary powers, a separate question remains as to whether the Tribe also had regulatory authority over Knighton's conduct pursuant to *Montana*. ... In the present case, the Tribe's authority to regulate Knighton's conduct derived not only from its sovereign power to exclude nonmembers from tribal lands, but also from its inherent sovereign power to regulate consensual relations with nonmembers 'through taxation, licensing, or other means,' and to protect the 'political integrity, the economic security, [and] the health [and] welfare' of the Tribe.'

In *Frank's Landing Indian Community v. National Indian Gaming Commission*, 2019 WL 1119912 (9th Cir. 2019), Congress had enacted the Franks Landing Act in 1994 recognizing Frank's Landing Indian Community (FLIC), an Indian community located along the Nisqually River near Olympia, Washington, as a "self-governing dependent Indian community that is not subject to the jurisdiction of any federally recognized tribe" but providing further that "[n]othing in this section may be construed to constitute the recognition by the United States that the Frank's Landing Indian Community is a federally recognized Indian tribe" and that the Community "shall not engage in any class III gaming activity" under the Indian Gaming Regulatory Act (IGRA). In 2014, FLIC submitted a purported Class II gaming ordinance to the National Indian Gaming Commission (NIGC) for the Chairman's review and approval along with a resolution from the Community's governing body, enacting the ordinance. After the Assistant Secretary – Indian Affairs

determined that FLIC was not a federally recognized tribe, the NIGC informed FLIC that the ordinance was not approvable under the IGRA. FLIC sought judicial review under the Administrative Procedure Act but the federal court upheld the NIGC's determination and the Ninth Circuit affirmed, holding that (1) "IGRA clearly and unambiguously requires federal recognition by the Secretary of the Department of the Interior before a tribe may qualify to participate in Indian gaming" and (2) "the Frank's Landing Act does not authorize the Community to engage in class II gaming. ... Interior points to IGRA's requirement that a tribe be recognized as eligible by the Secretary, and argues that no such recognition has been made for the Community ... [T]he Community's status—as set forth in the Frank's Landing Act—is unique."

In *Oneida Nation v. Village of Hobart*, 2019 WL 1429580 (E.D. Wis. 2019), the Oneida Nation (Nation) sued for declaratory relief to challenge the authority of the Village of Hobart to impose its regulations on the Nation's annual Big Apple Festival, held on fee land within the boundaries of the 65,400 acre reservation established pursuant to the Nation's 1838 Treaty with the United States (Reservation). Hobart counterclaimed for a judgment that the Reservation had been disestablished or diminished by virtue of its allotment and issuance of fee patents pursuant to the General Allotment Act of 1887 (Allotment Act), as well as for \$5,000 in fines that Hobart had assessed for violation of its land use ordinance. The district court held that the reservation had been diminished to the extent that patents in fee simple had been issued

to tribal members. The necessary congressional intent to **diminish the reservation under the rule of *Solem v. Bartlett***, according to the court, could be found in the Allotment Act and a 1906 act specifically authorizing the Secretary to issue fee simple patents to fifty-six named Oneida allottees and, in addition, to "any Indian of the Oneida Reservation." As additional support for its conclusion, the court cited the subsequent treatment of the Reservation by federal authorities following allotment, including references to the "former" reservation, demographic changes. The court did not attempt to reconcile its decision with the *Montana v. United States* line of cases, which are premised on the continued Indian country status of lands within reservation boundaries that have been patented in fee simple.

In *City of Council Bluffs, Iowa v. United States Department of Interior*, 2019 WL 1368561 (S.D. Iowa 2019), Congress had enacted the Ponca Restoration Act (PRA or Act) in 1990. Section three of the Act restored federal recognition to the Ponca Tribe (Tribe) and provided that "[a]ll Federal laws of general application to Indians and Indian tribes ... shall apply with respect to the Tribe and to the members." Subsection 4(c) provided that the Secretary of Interior "shall" accept not more than 1,500 acres located in Knox or Boyd Counties, Nebraska in trust for the Tribe and also authorized, but did not require, the Secretary to accept additional acreage in Knox or Boyd Counties pursuant to Section 5 of the Indian Reorganization Act (IRA). Section 4(e) of the Act provided that "[r]eservation status shall not be granted any land acquired by or for the Tribe" and designated as the

Tribe’s “service area” tribal members residing in Sarpy, Burt, Platte, Stanton, Holt, Hall, Wayne, Knox, Boyd, Madison, Douglas, or Lancaster Counties of Nebraska, Woodbury or Pottawattamie Counties of Iowa, or Charles Mix County of South Dakota. In 1999, the Tribe purchased the Carter Lake Parcel in Pottawattamie County, Iowa, within the service area. In 2000, the BIA Regional Director, at the Tribe’s request, agreed to acquire the Parcel in trust. The State of Iowa and Pottawattamie County appealed but the Interior Board of Indian Appeals (IBIA) affirmed the Regional Director’s decision (IBIA Trust Decision). In 2002, pursuant to an oral agreement between the State and the Tribe’s attorney (2002 Agreement), the Tribe’s attorney sent IBIA an email requesting that the IBIA include in its publication of its Federal Register notice of intent to acquire the property that the acquisition “has been made for non-gaming related purposes, as requested by the Ponca Tribe and discussed in the September 15, 2000 decision under the Regional Director’s analysis of 25 C.F.R. § 151.10(c). As an acquisition occurring after October 17, 1988, any gaming or gaming-related activities on the Carter Lake lands are subject to the Two-Part Determination under 25 U.S.C. § 2719. In making its request to have the Carter Lake lands taken into trust, the Ponca Tribe has acknowledged that the lands are not eligible for the exceptions under 25 U.S.C. § 2719(b)(1)(B). There may be no gaming or gaming-related activities on the lands unless and until approval under the October 2001 Checklist for Gaming Acquisitions, Gaming-Related Acquisitions and Two-Part Determinations Under

Section 20 of the [IGRA] has been obtained.” In 2006, the Tribe submitted a gaming ordinance to the National Indian Gaming Commission (NIGC) for gaming at the Carter Lake Parcel under the **restored lands exception** to the IGRA prohibition against gaming on lands acquired after October 1988. The NIGC Chair denied the application, concluding that the Carter Lake Parcel did not fall within the exception, but the IBIA reversed. A federal court reversed the IBIA. The Eighth Circuit reversed the federal court and remanded for consideration of the validity of the 2002 Agreement. In 2012, without applying the IGRA Part 292 regulations adopted in 2008, the DOI provided NIGC with its opinion that the Tribe’s restored lands were not limited to lands in Knox and Boyd Counties. In 2017, the NIGC concluded that the 2002 Agreement was invalid and that the Tribe could seek to conduct gaming on the Carter Lake Parcel under IGRA’s restored lands exception. The City of Council Bluffs sued under the Administrative Procedure Act to challenge NIGC’s decision. On summary judgment motions, the court held that (1) the Tribe was not estopped by the 2002 Agreement from asserting that the Carter Lake Parcel qualified for the restored lands exception, (2) NIGC did not err in determining that the Part 292 regulations were inapplicable, and (3) the NIGC erred in failing to consider the impact of the 2002 Agreement and Federal Register Notice on the Carter Lake Parcel’s status as restored lands: “NIGC must consider the facts and circumstances surrounding the agreement as part of its restored lands analysis. As the district court found in Nebraska

I—and Defendants conceded on appeal—“those events were crucial to the completion of the conveyance” of the Carter Lake Parcel. As to how crucial they were, and how they balance against other factual, temporal, and geographic factors, the Court leaves that determination to the NIGC.”

In *Solomon v. American Web Loan*, 2019 WL 1324490 (E.D. Va. 2019), non-Indians residing off reservation had obtained loans from American Web Loan (AWL), an internet lender owned by the Otoe-Missouria Indian Tribe (Tribe), at interest rates exceeding the rates allowed under state law. The plaintiffs sued AWL, various non-Indian entities who were involved in the origination, processing and funding of the AWL loans, including AWL, Inc., MacFarlane Group, Medley Management, Inc., Medley Group, LLC, Medley LLC, Medley Capital Corp., Medley Opportunity Fund II, LP (Medley or Medley Defendants), Brook Taube, Seth Taube (Taubes), Middlemarch Partners, Inc. (Middlemarch), DHI Computing Service, Inc. d/b/a GOLDPoint (GOLDPoint), and Sol Partners, Inc. (Sol). The plaintiffs contended that the defendants violated federal and state laws by offering loans at interest rates exceeding the rates allowed under state law. The defendants moved in the alternative to dismiss on **sovereign immunity** grounds, transfer jurisdiction or enforce arbitration provisions in the loan agreements. The district court denied all of their motions: “After thoroughly examining the record and considering the *Breakthrough* factors, it appears that rather than AWL II being an arm-of-the-Tribe, the Tribe is an arm of AWL II and its acquired

and related entities. Significantly, the agreements that seek to indemnify Curry for his intentional bad acts and waive immunity with respect to Curry and his entities would have a substantial impact on Tribe's governance and treasury. Accordingly, as the *Breakthrough* factors weigh against extending sovereign immunity to Curry and his AWL Defendants, the Court FINDS that American Web Loan, Inc., AWL, Inc. and MacFarlane Group are not entitled to sovereign immunity as an arm of the Otoe-Missouria Tribe. ... AWL II is an entity separate from the Tribe, and is therefore not entitled to assert tribal immunity. ... There is no immunity for Sol Partners to invoke, derivative or otherwise. ... [W]hile an arbitration agreement is valid where it delegates federal statutory rights to an arbitrator, it has cautioned that the freedom does not extend to a 'substantive waiver of federally protected civil rights' in an arbitration agreement." (Internal quotations and citations omitted.)

In *Solomon v. American Web Loan*, 2019 WL 1320790 (E.D. Va. 2019), non-Indians residing off reservation had obtained loans from American Web Loan (AWL), an internet lender owned by the Otoe-Missouria Indian Tribe (Tribe), at interest rates exceeding the rates allowed under state law. The plaintiffs sued various non-Indian entities who were involved in the origination, processing and funding of the AWL loans. On the defendants' motion to dismiss, the court held that plaintiffs had adequately alleged claims under (1) the unlawful debt collection provisions of the Racketeer Influenced and Corrupt Organizations (RICO) Act, (2) the Electronic Funds Transfer

Act (EFTA), (3) the Truth in Lending Act and (4) the common law of unjust enrichment. The court also held that it could exercise personal jurisdiction over several of the defendants based in other states and that the Tribe was not a necessary party: "The overall lending scheme at issue here uses the Tribe as a conduit through which the named Defendants seek to escape liability. The Tribe was not involved in granting the loans or collecting them. Furthermore, AWL has no liability to the Tribe, because the property of the Tribe, Directors, and officers are 'exempt' from the liabilities of AWL. ... While the promissory note contains a clause which purports to require the Tribe to indemnify Curry, it seems dubious to argue that that provision is enforceable, given the substantial impact that would have on the Tribe's treasury. The cost of this litigation is sure to be substantial, and to require the Tribe to pay the Curry Defendants' bills – or worse, join the Tribe as a Defendant – would drain the Tribe's apparently limited resources. In other words, the Tribe likely cannot afford to be a party to this litigation, and their joinder is not necessary to give complete relief to the Plaintiffs. Therefore, the Tribe need not be joined under Rule 19."

In *Gibbs v. Haynes Investments, LLC*, 2019 WL 1314921 (E.D. Va. 2019), Gibbs and others, non-Indian residents of Virginia, **borrowed money over the internet** from Plain Green and Great Plains Lending. Both companies, owned by Indian tribes, offered loans at interest above the rates permissible under Virginia law. The plaintiffs brought claims under state and federal laws, alleging that Haynes Investments, LLC (Haynes) played a key role in formulating a

"rent-a-tribe" strategy and funding loans nominally made by the tribal companies. Haynes moved in the alternative to dismiss the complaint, transfer jurisdiction or enforce the arbitration provisions in the loan agreements. The court denied all three motions: "These provisions within the Arbitration Agreements plainly support a finding that the Arbitration Agreements sought to prospectively exclude the application of federal law. Because any such attempt runs afoul of the prospective waiver doctrine, the Court finds the choice of law provisions unenforceable. ... Just as the Arbitration Agreements cannot prospectively waive federal law in these circumstances, the Loan Contracts as a whole cannot prospectively waive federal law. Because the choice of law provisions throughout the Loan Contracts are unenforceable, the Haynes Defendants cannot rely on them for their state-law related arguments, either. Plaintiffs plausibly allege that the Haynes Defendants collected or received payments on loans that violated Virginia's statutory limits as part of their involvement with the alleged RICO enterprise, which implicates both Plain Green and Great Plains."

In *Pasaye v. Dzurenda*, 2019 WL 1308707 (D. Nev. 2019), Pasaye, a non-Native inmate at High Desert State Prison (HDSP), sued prison officials under the First Amendment Free Exercise Clause and the **Religious Land Use and Institutionalized Persons Act** (RLUIPA) after they denied him access to Native American ceremonies, including the sweat lodge or sacred pipe. The district court granted Pasaye preliminary injunctive relief: "Whether

guaranteed under RLUIPA or the First Amendment, the free exercise of religion forbids the government from deciding who may or may not ascribe to a set of religious beliefs. Indeed, several courts addressing challenges to similar Native American lineage requirements have found them unconstitutional under both the First Amendment and Equal Protection Clause. As the district court for the Western District of Louisiana poignantly stated, such policies are ‘akin to a requirement that practicing Catholics prove an Italian ancestry, or that Muslims trace their roots to Mohammed. Under the Constitution, the freedom to believe, or not to believe, in a religious faith is reserved not to a select class of citizens, but to all.’”

In *State of Texas v. Ysleta del Sur Pueblo*, 2019 WL 1254016 (W.D. Tex. 2019), Texas sued the Ysleta del Sur Pueblo (Tribe) to enjoin alleged violations of Texas **anti-gambling laws** and the congressional Restoration Act by which the Tribe had been restored. The Tribe moved for a jury trial but the court denied the motion, holding that the State’s action was in equity rather than at law: “[T]he Court considers whether the claims at issue would be brought in common law or Chancery (i.e., a court of equity) in 18th-Century England prior to the merger of the courts of law and equity. ... Of course, no cause of action existed in 18th-Century England regarding a State-initiated lawsuit seeking to enjoin gaming operations on Tribal lands pursuant to a federal compact and the State’s gaming law. And no cause of action existed regarding whether the enforcement of certain gaming laws violated the constitutional rights of

indigenous persons. Nonetheless, the Court considers what might have been the most analogous cause of action. ... This case’s closest historical analogue appears to be an action for specific performance. Specific performance actions were brought in Chancery when damages were wholly inadequate for the purposes of justice as a remedy in contract cases.” (Internal quotes and citations omitted.)

In *Outliers Collective v. Santa Ysabel Tribal Development Corporation*, 2019 WL 1200232 (S.D. Cal. 2019), Outliers Collective (Outliers) and Santa Ysabel Tribal Development Corporation (SYTDC), a corporation chartered and wholly owned by the Iipay Nation of Santa Ysabel, entered into an agreement under which Outliers would lease land from the SYTDC for the purpose of cultivation, harvesting, and processing of medical cannabis pursuant to the Santa Ysabel Tribal Medicinal Cannabis Enterprise Act. The agreement allegedly included a waiver of SYTDC’s immunity in any federal court of competent jurisdiction. When a dispute arose, SYTDC terminated the agreement. Outliers sued in federal court but the court dismissed for lack of **federal jurisdiction**: “Plaintiff references no federal law or regulation essential to the adjudication of its claims. Federal question jurisdiction does not exist merely because an Indian tribe is a party or the case involves a contract with an Indian tribe, ... [T]he rights Plaintiff seeks to enforce are based on an agreement, interpretation of which is governed by local (tribal) law, not federal law; leaving this Court devoid of subject-matter jurisdiction.” (Citations and internal quotations omitted.)

In *Pueblo of Jemez v. United States*, 2019 WL 1128359 (D.N.M. 2019), the Jemez Pueblo had sued under the federal common law and the Quiet Title Act, 28 U.S.C. § 2409a (QTA), seeking a judgment that Jemez Pueblo “has the exclusive right to use, occupy, and possess the lands of the Valles Caldera National Preserve pursuant to its continuing **aboriginal title** to such lands.” The federal district court denied the government’s motion for judgment on the pleadings, holding that (1) whether other Tribes also used the Valles Caldera did not defeat the Pueblo’s claim to aboriginal title and the Pueblo would be permitted to present evidence that its use was dominant, (2) the Pueblo’s admission that third-party owners interfered with its Valles Caldera use did not defeat its aboriginal title claim, (3) neither laches nor the statute of limitations barred the Pueblo’s claim, and (4) the Santa Clara Pueblo was not a necessary party.

In *Pueblo of Jemez v. United States*, 2019 WL 1139724 (D.N.M. 2019), the Jemez Pueblo sued to confirm its **aboriginal title to Banco Bonito and Redondo Mountain**. The court denied the Pueblo’s motion for partial summary judgment: “dispute remains regarding whether Jemez Pueblo, the Pueblo of Zia, and the Pueblo of Santa Ana jointly used the Banco Bonito, which, if true, could defeat Jemez’ claim to exclusive use. ... [T]he Pueblo of Santa Clara and the Pueblo of Zia have stated that they hold Redondo Mountain sacred, and continue to use it for traditional purposes without concern for Jemez Pueblo’s use, which, if true, could defeat Jemez Pueblo’s aboriginal title claim. ... Although other Tribes’ Redondo Mountain use does not per

se defeat Jemez Pueblo's claim to aboriginal title over that land, at this stage in these proceedings, the Court cannot, as a matter of law, grant Jemez Pueblo's motion for partial summary judgment."

In *Cayuga Nation v. Bernhardt*, 2019 WL 1130445 (D.D.C. 2019), the Bureau of Indian Affairs of the Department of the Interior (DOI) had **recognized Halftown Group as the governing body** of the Cayuga Nation for the purposes of certain Indian Self-Determination after it had received a statement of support (SOS) by referendum reflecting the support of a majority of the Tribe's members. A rival faction, claiming to be the Nation's rightful government following the purported removal of the Halftown Group by clan mothers, sued under the Administrative Procedure Act (APA) to reverse the DOI's decision. The Halftown Group, now designating itself the Cayuga Nation Council, intervened. The court denied the Plaintiff's summary judgment motion and granted summary judgment to the government and the Council: "[T]he Court determines that Assistant Secretary Black was not required to conduct a de novo review of Cayuga law. But, even if he had been so required, Assistant Secretary Black conducted an independent review of the parties' arguments concerning Cayuga law and concluded that Regional Director Maytubby's determinations were valid. The standard of review used by Assistant Secretary Black was not contrary to law. ... [I]t was reasonable for Defendants to conclude that Cayuga law supported the use of the SOS to determine the membership of the Nation Council. ... [T]he Court notes that its review

of Defendants' determination of Cayuga law is constrained by the APA. The Court's role is to determine whether or not Defendants' decision to recognize Defendant-Intervenor as the rightful Nation Council has 'some rational basis.' ... The constraints on the Court's review are especially important in this case as courts owe deference to the judgment of the Executive Branch as to who represents a tribe. ... And, given the particular circumstances facing the Nation, Defendants' determination that the SOS was a valid mechanism for selecting members of the Cayuga Nation Council was not contrary to Cayuga law."

In *Little Traverse Bay Bands of Odawa Indians v. Whitmer*, 2019 WL 687882 (W.D. Mich. 2019), the Little Traverse Bay Bands of Odawa Indians (Tribe) sued the governor of Michigan claiming that the State had failed to recognize the continued existence of the Tribe's **300-square mile reservation** established by treaty between the United States and the Tribe's predecessor in interest in 1855. The affected counties and the city of Petoskey intervened and moved for judgment on the pleadings, arguing that the Tribe's suit was barred by the doctrines of estoppel, issue preclusion and statute of limitations. The Court denied the motion, holding that (1) the position previously taken by the Tribe in proceedings before the Indian Claims Commission under the Indian Claims Commission Act (ICCA) that it had been deprived of title to lands without adequate compensation was not necessarily inconsistent with its assertion of jurisdiction in the instant lawsuit, and (2) judgments in the ICCA litigation did not preclude the

court from exercising jurisdiction in the instant case: "[T]he Indian Claims Commission Act only bars federal court litigation when the claims could have been brought prior to 1946 and are brought against the United States. While the Tribe's claim in this case relates to rights under a treaty with the United States, it has sued the State of Michigan for failing to recognize its alleged reservation. Such a claim meets neither of ICCA's prerequisites."

In *Blue Lake Rancheria v. Commissioner*, 152 T.C. No. 5 (Tax Court 2019), the Blue Lake Rancheria had obtained a corporate charter from the Department of Interior for Blue Lake Rancheria Economic Development Corp. (BLREDCo) pursuant to Section 17 of the Indian Reorganization Act (IRA). The charter permitted BLREDCo to "[c]reate subdivisions of the Corporation for the purpose of legally segregating the assets and liabilities of discrete business endeavors of the Corporation regardless of common directorship; provided, that each such subdivision shall have the rights and privileges granted by and be subject to the limitations of this Charter." BLREDCo created Mainstay Business Solutions (MBS) as a division. When MBS failed to pay **unemployment taxes**, the Commissioner of the IRS sued both MBS and BLREDCo. The U.S. Tax Court held that (1) the power to create subdivisions was permissible for a Section 17 corporation, (2) MBS was separate from BLREDCo and there were no grounds to pierce the corporate veil, and (3) the Commissioner could pursue MBS for the unpaid taxes but not BLREDCo.