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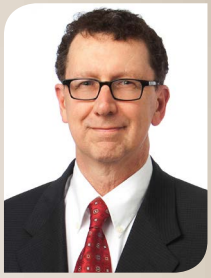

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What the Supreme Court Didn't Decide

The Supreme Court's 2018-19 term has ended. Tribes scored major victories in *Washington State Department of Licensing v. Cougar Den, Inc.*, 139 S.Ct. 1000 (U.S. 2019), a treaty tax case, and *Herrera v. Wyoming*, 139 S.Ct. 1686 (2019), a treaty off-reservation hunting rights case. Those decisions are summarized in our April and June updates. Also worth noting are a couple of cases the Court chose not to decide:

The outcome of *Carpenter v. Murphy* will determine whether the Creek and other Indian reservations within the former Indian Territory continue to exist in the State of Oklahoma, a matter of tremendous significance. The Court heard arguments in November, requested supplemental briefing, which was completed in January, yet still couldn't reach a decision. On June 27th, the case was "restored to the calendar for reargument" during the term beginning in October. Justice Gorsuch, who supported the tribal position in both the *Cougar Den* and *Herrera* cases, has recused himself from the case, which may account for the Court's difficulty in deciding it.

On June 24, 2019, the Court denied the certiorari petition of the Poarch Band of Creek Indians in *Poarch Band v. Wilkes*. The Alabama Supreme Court had held that the Tribe's sovereign immunity did not protect it from tort claims arising out of an automobile accident allegedly caused by a tribal employee. The Court had invited the Solicitor General of the United States to file a brief expressing the government's view of the issue. The Solicitor filed a brief taking the unusual position that if the Tribe amended its tort claims law to provide for a tribal court forum for tort claims, as was purportedly under consideration, then the petition should be granted, the judgment vacated and the case remanded to the Alabama courts for further proceedings. If the Tribe did not enact the amendment, the Solicitor argued, the Court should deny the petition for certiorari because "[a]lthough the Alabama Supreme Court's decision is erroneous, it is an outlier." It is no wonder that the Tribe and the Wilkeses disagreed with the Solicitor's advice and even less surprising that the Court ignored it and instead simply denied the petition.

The Tribe had little choice but to seek Supreme Court review since it would otherwise be stuck forever with diminished sovereign immunity. Attorneys representing tribes will nonetheless be forgiven for heaving a sigh of relief that the Supreme Court chose *not* to hear the case. The last time the Court upheld tribal sovereign immunity, in 2014 in *Michigan v. Bay Mills*, the vote was 5-4. The decision featured a footnote hinting at the tort exception embraced by the Alabama Supreme Court. The risks of presenting the issue to the Court again are obvious.

Selected Court Decisions

In *United States v. Washington*, 2019 WL 2608834 (9th Cir. 2019), the United States and certain Washington tribes had sued the State of Washington in 1970

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to enjoin the State's violation of the tribes' **treaty-reserved right to fish off reservation**, within the territories ceded by the tribes, at "usual and accustomed" (U&A) places, in common with the citizens of Washington. The litigation, often referred to as the "Boldt Litigation" after the district court judge who initially presided over it, resulted in numerous district, appellate and U.S. Supreme Court decisions establishing the tribes' off-reservation rights. In the instant case, the Skokomish Tribe sought a ruling as part of a Boldt Litigation "subproceeding" that it enjoyed U&A fishing rights in the Satsop River to the exclusion of other tribes. The Squaxin Island, Jamestown S'Klallam and Port Gamble S'Klallam Tribes and the state of Washington disputed the Skokomish's Satsop River claim and moved for summary judgment. The District Court granted their motion and the Ninth Circuit affirmed, holding that the Skokomish Tribe could not invoke the district court's continuing jurisdiction because the issue had already been resolved: "The U&A of the Skokomish Tribe was announced in six paragraphs of the Boldt Decision that detailed the lineage, history, and customs of the tribe. … The Skokomish admit there was no ambiguity in Judge Boldt's determination. … Judge Boldt also issued a permanent injunction, articulating rules under which parties could invoke the court's continuing jurisdiction in future disputes. … Under Paragraph 25(a), later modified by an August 23, 1993 Order (Case No. 70-9213, Dkt. # 13599), parties are authorized to invoke the continuing jurisdiction of the court to determine (1) Whether or not the actions intended or effected by any party (including the party seeking a determination) are in conformity with [the Boldt Decision]; (2) Whether a proposed state regulation is reasonable and necessary for conservation; (3) Whether a tribe is entitled to exercise powers of self-regulation; (4) Disputes concerning the subject matter of this case which the parties have been unable to resolve among themselves; (5) Claims to returns of seized or damaged fishing gear or its value, as provided for in this injunction; (6) The location of any of a tribe's U&A fishing grounds not specifically determined by [the Boldt Decision]; and (7) Such other matters as the court may deem appropriate. … The Boldt Decision also lays out mandatory pre-filing requirements before initiating a subproceeding. … The Boldt Decision mandates that parties must attempt to resolve their disputes with opposing parties at a meet-and-confer before initiating an RFD. In particular, parties are required to discuss "the basis for the relief sought" under ¶ 25(b)(1)(A), and "whether earlier rulings of the court may have addressed or resolved the matter in issue" under ¶ 25(b)(1)(F). The Skokomish did not abide by this provision. … At bottom, the Skokomish attempt an end-run around Judge Boldt's unambiguous determination of its U&A by arguing that the 1984 Subproceeding, dealing solely with primary fishing rights, somehow amended its U&A to include the Satsop River. Nothing could be further from the truth. The 1984 Subproceeding had nothing to do with the boundaries of the Skokomish's U&A."

In *Western Shoshone Identifiable Group v. United States*, 2019 WL 2480154 (Fed.Cl. 2019), the Yomba Shoshone Tribe, Timbisha Shoshone Tribe, the Duckwater Shoshone Tribe and threemembers of the Western Shoshone Identifiable Group sued the United States for allegedly mismanaging plaintiffs' three tribal trust funds, received as a result of three separate cases before the Indian Claims Commission (ICC) and its successors for the government's taking of the plaintiffs' ancestral lands in Nevada and California without just compensation over a thirty-three-year period. In a 107-page decision, the Federal Claim Court determined that the government had breached its **fiduciary duty** in some respects but not in others: "Defendant, at all times during the approximately thirty-three-year investment period for the 326-K Fund and twenty-one-year investment period for the 326-A Funds, had the fiduciary duty to prudently invest plaintiffs' tribal trust funds by using a combination of reasonable care, skill, and caution, when trying to maximize the trust income, while also reasonably managing any risk of loss. Having extensively and carefully reviewed the lengthy record in this case, including the documents and expert reports in evidence, the trial testimony, and the post-trial filings, the court finds that there were various times during the investment periods at issue for both the 326-K Fund and for the 326-A Funds when the government's investment of all three tribal trust funds fell below the required standard of prudence." The court determined that a hearing would be held to determine damages.

In *Confederated Tribes and Bands of the Yakama v. Klickitat County*, 2019 WL 2570540 (E.D. Wash. 2019), the State of Washington had **retroceded**

"full civil and criminal jurisdiction" under Public Law 280 to the Tribe in 2014 to the Confederated Tribes and Bands of the Yakama (Tribe). After the county officials arrested and charged a tribal member for assaulting a nonmember within an area of the reservation known as Tract D, the Tribe sued to enjoin state enforcement and moved for injunctive relief. Relying on its recent interpretation of the retrocession, the court "viewed the plain language of Governor Inslee's retrocession proclamation, DOI's acceptance of retrocession, and federal and state law governing the retrocession process as properly establishing the limitations of the States' retrocession. Reading the plain language of the Governor's use of the sentence 'The State retains jurisdiction over criminal offenses involving non-Indian defendants and non-Indian victims' in context, both historical and in the context of the entire retrocession proclamation, made clear that the State retained jurisdiction in two areas—over criminal offenses involving non-Indian defendants and over criminal offenses involving non-Indian victims. Accordingly, the Court found that Plaintiff failed to establish success on the merits of its claims because Defendants City of Toppenish and Yakama County have criminal jurisdiction over offenses committed by or against non-Indians within the Yakama Reservation. Consistent with this Court's prior ruling in *Confederate Tribes v. City of Toppenish*, the Court again rejects Plaintiff's argument that Defendants no longer have criminal jurisdiction over Indians within the Yakama Reservation following retrocession." See also, *Confederated Tribes and Bands of the Yakama v. Klickitat County*, 2019 WL 8620412 (E.D. Wash. 2019) (denying county's motion to dismiss for failure to state a claim and failure to join indispensable parties, and holding that tribes could seek injunction against the county: "Merely because the County may not be able to prevent the Department of the Prosecuting Attorney or the Sheriff's Office from arresting or prosecuting enrolled Yakama Members does not mean that an injunction against the County is inappropriate.")

In *Yocha Dehe Wintun Nation v. Newsom*, 2019 WL 2513788 (E.D. Cal. 2019), the Yocha Dehe Wintun Nation, Sycuan Band of the Kumeyaay Nation, and Viejas Band of Kumeyaay (Tribes) sued the State and governor of California, contending the Defendants breached their **gaming compacts** with the Tribes by not enforcing the state's ban on "banking and percentage card games" against cardrooms in California's non-tribal casinos. The plaintiffs relied on references in the compact preamble to "exclusive rights the Tribe will enjoy under this Compact" and "the exclusive rights enjoyed by the Tribe to engage in the Gaming Activities" and a provision in the compacts that provided recourse if "the exclusive right of Indian tribes to operate Gaming Devices in California is abrogated." The federal district court dismissed: "The Court finds that neither the terms in the Preamble nor those in Section 4.8 create an enforceable right of exclusivity. A plain reading of the Preambles exposes these paragraphs as merely recognizing the veneer of exclusivity given by the California constitution to the Class III gaming rights conferred by the Compact. Section 4.8 supports this reading, delineating Plaintiffs' available remedies if the constitutional right of exclusivity is lost, and undermining Plaintiffs' claims that the right is inextricably woven into the fabric of the agreement. Section 4.8(b) more closely supports Plaintiffs' reading of the Compact. Nevertheless, this provision—although ensuring the Compact does not preclude the Yocha Dehe Wintun Nation from invoking the Compacts' dispute resolution provisions—does not give Plaintiffs' right of exclusivity an enforceable foothold in the Compact. Nor could it. Basic contract principles explain that, to be a legally-enforceable agreement, a contract must be supported by consideration."

In *Commonwealth v. Wampanoag Tribe of Gay Head (Aquinnah)*, 2019 WL 2525470 (D. Mass. 2019), the Commonwealth of Massachusetts, the Town of Gay Head, the Taxpayers' Association of Gay Head, Inc. and the Wampanoag Tribal Council of Gay Head, Inc. had entered into a Settlement Agreement to resolve the Tribe's land claims. The Town and the Taxpayers' Association conveyed to the Wampanoag Tribal Council approximately 485 acres of land (Settlement Lands) to be held "in the same manner, and subject to the same laws, as any other Massachusetts corporation." The Settlement Agreement provided that "[u]nder no circumstances, including any future recognition of the existence of an Indian tribe in the Town of Gay Head, shall the civil or criminal jurisdiction of the Commonwealth ... over the settlement lands ... be impaired or otherwise altered" and that "no Indian tribe or band shall ever exercise sovereign jurisdiction"

over those lands, which would be "subject to all Federal, State, and local laws, including Town zoning laws." Congress approved the settlement in the **1987 federal Settlement Act**, which provided that "[e]xcept as otherwise expressly provided in this subchapter or in the State Implementing Act, the settlement lands and any other land that may now or hereafter be owned by or held in trust for any Indian tribe or entity in the town of Gay Head, Massachusetts, shall be subject to the civil and criminal laws, ordinances, and jurisdiction of the Commonwealth of Massachusetts and the town of Gay Head, Massachusetts (including those laws and regulations which prohibit or regulate the conduct of bingo or any other game of chance)." The Tribe argued in subsequent litigation that the 1988 Indian Gaming Regulatory Act (IGRA) effectively repealed the Settlement Act's gaming prohibitions. The district court granted judgment to the Commonwealth that the Tribe was subject to state and local permitting requirements (such as building permits, zoning, regional commission approval, and the like) not directly involving gaming and that the IGRA did not repeal the gaming prohibitions of the Settlement Act. The Tribe appealed the IGRA issue, but not the more general ruling on non-gaming regulations, to the First Circuit, which reversed, holding that the IGRA superseded the Settlement Act's gaming prohibitions and remanding "for entry of judgment in favor of the Tribe." On remand, the district court held that the Tribe had not appealed the portion of the judgment confirming the Tribe's subjection to state law generally and that it was not entitled to judgment on that issue: "[T]he Tribe could have appealed those portions of the judgment that provided that it must comply with state and local permitting and other regulatory requirements. Instead, it only appealed those portions addressing gaming issues. An amended final judgment in favor of the Tribe as to the gaming issues is of course required. The remainder of the judgment, however, will be reinstated in substance. If the Tribe seeks to construct and operate a gaming facility, it need not comply with state and local gaming laws, but it must comply with all state and local laws and regulations of general applicability to the construction and operation of a commercial building."

In *Rincon Mushroom Corporation v. Mazzetti*, 2019 WL 2341376 (S.D. Cal. 2019), Rincon Mushroom Corporation of America (RMCA) operated a mushroom factory on fee land within the boundaries of the reservation of the Rincon Band of Luiseno Mission Indians (Tribe). When the Tribe sought to regulate the factory, Rincon sued tribal officials, in their official capacities, in federal court, asserting ten causes of action, including contract, tort and claims under the Racketeering Influenced and Corrupt Organizations (RICO) Act. In 2010, the district court, without addressing whether the Tribe had jurisdiction, dismissed for failure to **exhaust tribal remedies**. The Ninth Circuit partially affirmed in 2012 but held that the action in the district court should be stayed pending exhaustion. In April 2019, the Intertribal Court of Southern California held that the Tribe had jurisdiction and ordered RMCA to comply with tribal regulations. RMCA filed an appeal, accompanied by a motion to stay the tribal court judgment, with the Court of Appeals for the Intertribal Court of Southern California. At about the same time, RMCA filed an ex parte motion seeking a federal court order enjoining the Tribe from enforcing the April tribal court judgment. The district court denied the motion for failure to exhaust tribal remedies: "Based on the record before this Court, the tribal appellate court has not conducted any review of the issues of tribal jurisdiction or a stay of the tribal court's April 2019 Judgment. RMCA fails to establish that the tribal court's decisions on jurisdiction or the motion to stay would not be subject to tribal appellate review during tribal court proceedings."

In *Stathis v. Marty Indian School*, 2019 WL 2528032 (S.D. 2019), Stathis had been employed as the high school principal at the Marty Indian School (MIS) in Marty, South Dakota, on the Yankton Sioux Indian Reservation. The school was chartered by the Yankton Sioux Tribe and operates under a constitution approved by the Yankton Sioux Tribal Business and Claims Committee that designates MIS as "a legal entity of the Yankton Sioux Tribe, from whom Marty Indian School, Inc. has been delegated authority to operate and maintain the Marty Indian School." After MIS terminated Stathis's employment, he sued MIS and other parties in state court for breach of contract, breach of settlement agreement, wrongful termination, libel and slander, and requested punitive damages. The circuit court dismissed Stathis's complaint on the grounds of tribal sovereign immunity, immunity of tribal officials and employees, federal preemption, and infringement of tribal sovereignty. The South Dakota Supreme Court

affirmed solely based on lack of subject matter jurisdiction based on **federal preemption under the rule of *White Mountain Apache v. Bracker***: "The nature of this case presents the question whether a non-Indian may sue a tribal entity, tribal employees, and tribal members in state court for contractual and other civil claims which arose from conduct that occurred on the reservation. There are two distinct barriers to a state's assumption of jurisdiction over reservation Indians: infringement and preemption. ... it is well settled that civil jurisdiction over activities of non-Indians concerning transactions taking place on Indian lands presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute. ... The [circuit] court concluded, among other things, that it lacked jurisdiction over Stathis's complaint based on both the grounds of infringement and federal preemption. We agree with the circuit court's determination that it lacked jurisdiction on the ground of federal preemption. As only one ground is necessary to deprive this Court of subject matter jurisdiction, we decline to make a conclusion regarding infringement. … Together, the Self-Determination Act and the Tribally Controlled Schools Act show a clear intent of Congress to preempt state court entanglement into the education of Indians living on the reservation. MIS is a legal entity of the Yankton Sioux Tribe. According to its own constitution, MIS was chartered by the tribe to maintain and continually upgrade the educational process for children living on the Yankton Sioux Reservation in the Marty community. The ability of MIS and the tribe to resolve disputes regarding employment contracts is inherently part of maintaining an educational process. State court action in this dispute is preempted by federal law, and therefore, the circuit court did not err in dismissing Stathis's complaint on that basis." (Internal quotations, citations and emendations omitted.)

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