



Litigation and Regulatory Update

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2019 *Legal Symposium* DEC 9-10 BALLY'S LAS VEGAS

Treaty Rights: Hunting

Herrera v. Wyoming (U.S. Supreme Court) (off-reservation treaty hunting rights upheld against State challenge)

State prosecuted Crow Tribal hunter on National Forest Lands

Argued that Treaty right to hunt on unoccupied lands was abrogated by Wyoming Statehood

Supreme Court: Treaty rights cannot be abrogated by implication.

Treaty Rights: Fishing and Water

Baley v. United States (Fed. Cir. 2019) (Tribal reserved water rights pre-empt takings claims by irrigators with junior water rights in Klamath Basin)

California Trout v. Hoopa Valley Tribe (D.C. Circuit, cert pending to U.S. Supreme Court) (Clean Water Act certifications for the Klamath River dams)

Treaty Rights: Taxation

Washington State Dep't of Licensing v. Cougar Den (U.S. Supreme Court) (Indian treaty preemption of state fuel taxes)

Yakama Treaty right to freely travel and bring goods to market

Preempts State fuel tax assessed against Tribal member owned fuel station importing gas from outside of state without an importer's license

Reservation Lands

Carpenter v. Murphy (U.S. Supreme Court) (argued last term, to be reargued again this term)

Do the 1866 territorial boundaries of the Muscogee (Creek) Nation within the former Indian Territory of eastern Oklahoma constitute an “Indian reservation” today under 18 U.S.C. § 1151(a)?

Or was the reservation disestablished?

Reservation Lands

Carpenter v. Murphy (U.S. Supreme Court)

Fact pattern: State prosecuted Creek Nation member in State Court for the murder of another member committed within the Creek Nation's historic territory.

Conviction challenged for lack of jurisdiction.

10th Circuit threw out the conviction (Judge Gorsuch was on the 10th Circuit at the time and has recused himself)

Reservation Lands

Terry v. Oklahoma (OK Court of Appeals; cert pending to U.S. Supreme Court) (State jurisdiction over crimes committed by Tribal member on historic reservation).

Cherokee Nation v. Bernhardt (10th Cir.) (land taken into trust for one tribe within the historic reservation boundaries of another)

Indian Child Welfare Act

Brackeen v. Bernhardt, (5th Circuit)

Challenge to constitutionality of ICWA on various grounds

Definition of “Indian child” in ICWA is “racial.”

ICWA “commandeers” State courts (10th amendment)

ICWA violates “non-delegation doctrine” (Tribes determine who is a Tribal member).

Indian Child Welfare Act

Brackeen v. Bernhardt, (5th Circuit)

Three-judge panel upheld ICWA on all grounds.

Not a “racial” but a “political” classification; Supremacy clause governs; no violation of non-delegation doctrine but a recognition of longstanding Congressional policy of recognizing tribes as sovereigns.

However, the case will be re-heard “en banc” by the entire 5th Circuit

FCC Tribal Subsidy

National Lifeline Assoc. v. Federal Communications Commission (D.C. Cir.) (FCC policy on Tribal subsidy)

FCC program making voice and broadband services more available and affordable on Tribal lands.

FCC changed policy in 2017 to limit Tribal subsidy.

Held that changes were “arbitrary and capricious”, failed to provide adequate notice and failed to follow proper rulemaking procedures.

Indian Gaming Regulatory Act

Alabama-Coushatta Tribe of Texas v. State of Texas (5th Circuit) (cert pending to U.S. Supreme Court) (conflict between limited restoration act language and subsequent NIGC decision)

Flandreau Santee Sioux Tribe v. Noem (8th Cir)

State use tax on non-gaming purchases made at Tribal casino are preempted by IGRA

Alcohol license requirement is “reasonably necessary to further its interest in collecting valid state taxes”

Indian Gaming Regulatory Act

Frank's Landing Indian Community v. National Indian Gaming Commission (9th Cir.) (non-federally recognized Indian community not eligible for Class II gaming under IGRA)

Chemehuevi Indian Tribe v. Newsom (9th Cir.)
(termination provision in Tribal-State Class III Gaming Compact is valid under IGRA)

Sovereign Immunity

Dine Citizens Against Ruining Our Environment v. Bureau of Indian Affairs (9th Cir.) (Tribal sovereign immunity and indispensable party)

Stillaguamish Tribe of Indians v. Washington (9th Cir) (cannot use tribal sovereignty as an anticipatory defense to create federal question jurisdiction)

Sequoia Capital Operations v. Gingras (2nd Circuit, cert pending to U.S. Supreme Court) (arbitration clause in Tribal entity's loan contract; "individual capacity" suit)

Opioid Litigation

Multi-District Litigation (N.D. Ohio)

Settlement negotiations ongoing; “bellwether” cases continue to settle.

Remand of Cherokee Nation case (and several others) as part of “hub and spoke” process.

Potential Purdue Pharma settlement and bankruptcy proceeding.

Clean Water Act: Section 401 Regs

Section 401 requires applicants seeking permits and licenses for any activity that may result in a discharge to water to obtain a certification that the activity will be conducted in a manner that will not violate applicable water quality standards.

Federal agencies are prohibited from issuing licenses for the proposed activity unless the state or authorized Tribe issues a 401 water quality certification or waives the certification requirement.

Clean Water Act: Section 401 Regs

On August 22, 2019, EPA proposed a rule amending the Clean Water Act section 401 regulations related to state and Tribal water quality certification.

The Proposed Rule makes substantive and procedural changes that would limit the ability of Tribes and states to ensure compliance with state water quality standards.

Clean Water Act: Section 401 Regs

Tribal/state certification process of Section 401 would be triggered by only those activities that involve a discharge from a point source, rather than by “any discharge into navigable waters”

Would also limit a tribe/state’s ability to place conditions unrelated to water quality on the applicants by potentially treating such conditions as a waiver of the state or Tribe’s certification right.

EPA also proposes that “[p]otential discharges into state or Tribal waters that are not waters of the United States do not trigger the requirement to obtain section 401 certification.”



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