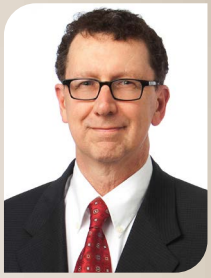
GODFREY & KAHN S.C.

# Indian Nations Law *Focus*

December 2019, Volume 14, Issue 12



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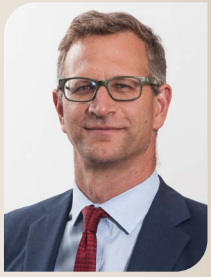

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*The Godfrey & Kahn Indian Nations Law Practice Group provides a full range of legal services to Indian nations, tribal housing authorities, tribal corporations and other Indian country entities, with a focus on business and economic development, energy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

## Indian Nations Housing Development Handbook

Godfrey & Kahn Attorney Brian Pierson has authored the 2020 Indian Housing Development Handbook. The handbook serves as a valuable guide for tribal housing programs, federal and state government agencies, lenders, contractors, investors, attorneys and other housing professionals.

### DOE and HUD Announce Important Grant Opportunities

The U.S. Departments of Energy (DOE) and Housing and Urban Development (HUD) announced important funding opportunities for tribes in November. The Department of Energy's Tribal Energy Grant can be used for energy generation facilities, including community-scale solar and battery storage, as well as energy efficiency measures to reduce electricity costs. DOE will make awards up to $2 million for electrification of tribal buildings. Applications are due Feb. 6, 2020.

The Indian Community Development Block Grant (ICDBG) provides funds for a wide range of uses, including solar for existing low-to-moderate income tribal housing, which can make such housing truly affordable by significantly lowering tribal member energy costs. Because the opportunity combines FY 2019 and 2020 appropriations, maximum grants have been increased to $900,000 for tribes within the HUD ONAP Eastern Woodlands region, $1.5M for tribes in the Northern Plains region, $750,000 for tribes in the Northwest region, $800,000 for Alaska and $1.5M to $7M for tribes in the southwest Region. Applications are due Feb. 3, 2020.

Godfrey & Kahn has assisted tribes in preparing successful DOE and ICDBG grant applications and works with tribes to leverage these grants with tax credits and other sources to help tribes finance the transition to cheap, clean solar energy. For more information, contact Indian Nations Team Leader Brian Pierson or Renewable Energy Strategies Team Leader John Clancy.

### Summaries of Selected Court Decisions

In *McCoy v. Salish Kootenai College, Inc.,* 2019 WL 6185959 (9th Cir. 2019), McCoy's employment discrimination suit against Salish Kootenai College, Inc. (College) under Title VII of the federal Civil Rights Act and the Montana Human Rights Act was dismissed for lack of jurisdiction based on the College's **sovereign immunity**. Applying the five-part analysis prescribed by its decision in *White v. Univ. of Cal.*, 765 F.3d 1010, (9th Cir. 2014), the Court of Appeals determined that the College was an arm of the Confederated Salish and Kootenai Tribes (CSKT) entitled to share the Tribe's sovereign immunity and affirmed the judgment: "Applying the *White* factors, we conclude that only the first factor—the method of creation factor—weighs against finding that the College is an arm of CSKT because this action is against the Montana corporation, not the tribal corporation. The four remaining *White* factors—which assess the College's purpose; its structure, ownership, and management, including the amount of control CSKT has over the College; CSKT's intent to extend its sovereign immunity to the College; and the financial relationship between CSKT and the College—weigh in favor of immunity. Even though the College is incorporated under

Montana law, the record demonstrates that CSKT has significant control over the College and that the College is structured and operates for the benefit of CSKT. Because a proper weighing of the *White* factors demonstrates, by a preponderance of the evidence, that the College is an arm of CSKT, the College is entitled to tribal sovereign immunity."

In *FMC Corporation v. Shoshone-Bannock Tribes*, 2019 WL 6042469 (9th Cir. 2019), FMC Corporation (FMC) had operated an elemental phosphorus plant on fee land within the Shoshone-Bannock Fort Hall Reservation (Reservation), resulting in generation of radioactive, carcinogenic, and poisonous hazardous waste stored at its facility. After the U.S. Environmental Protection Agency (EPA) brought claims against the FMC plant under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and Resource Conservation and Recovery Act (RCRA), FMC entered into a consent decree that required it to obtain permits from the Shoshone-Bannock Tribes (Tribe). An agreement was negotiated under which FMC agreed to pay $1.5 million per year for a tribal use permit allowing storage of hazardous waste. FMC paid the annual use permit fee from 1998 to 2001 but refused to pay the fee in 2002 after ceasing active plant operations, though it continued to store the hazardous waste on the Reservation. The Tribe sued in tribal court seeking to compel FMC's payment of the annual $1.5 million use permit fee for waste storage. The Tribal Court of Appeals held in 2014 that the Tribe had regulatory and adjudicatory jurisdiction over FMC under both *Montana* exceptions and that FMC owed $19.5 million in unpaid use permit fees for hazardous waste storage from 2002 to 2014, and $1.5 million in annual fees prospectively. FMC sued the Tribes in federal court, disputing its jurisdiction. The district court held that the Tribes had regulatory and adjudicatory jurisdiction under both *Montana* exceptions, that the Tribal Court of Appeals had not denied FMC due process, and that the Tribal Court of Appeals' judgment was entitled to comity, and was therefore enforceable, under the first but not the second ***Montana v. United States***, 450 U.S. 544 (1981) exception. On appeal, the Ninth Circuit affirmed and held that the judgment of the Tribal Court of Appeals was enforceable under both *Montana* exceptions: "To establish jurisdiction under *Montana*'s second exception, the nonmember's activities … must 'imperil the subsistence or welfare' of the tribal community. …We conclude that FMC's storage of millions of tons of hazardous waste on the Reservation 'threatens or has some direct effect on the political integrity, the economic security, or the health or welfare' of the Tribes to the extent that it 'imperil[s] the subsistence or welfare' of the Tribes."

In *Baley v. United States*, 2019 WL 5995861 (Fed. Cir. 2019), the United States Department of the Interior's Bureau of Reclamation (Bureau) managed the Klamath River Basin reclamation project straddling California and Oregon. The Project includes Upper Klamath Lake in Oregon and the Klamath River and supplies water to hundreds of farms, comprising approximately 200,000 acres of agricultural land. In 2001, the Bureau temporarily halted water deliveries to farmers and irrigation districts served by the Project in order to meet the requirements of the Endangered Species Act and the federal government's trust obligations to the Klamath Tribes, the Yurok Tribe, and the Hoopa Valley Tribe (Tribes), each of which had non-consumptive (i.e., non-agricultural or industrial) rights to take fish from water sources on their reservations under the doctrine of ***Winters v. United States***, 207 U.S. 564, 28 S.Ct. 207 (1908). In 2001, fourteen irrigation organizations and thirteen individual farmers sued the United States in the Court of Federal Claims alleging that the Bureau's temporary halting of water deliveries in 2001 constituted a taking of their water rights without just compensation, in violation of the Fifth Amendment; that the Bureau's action impaired their water rights under the Klamath River Basin Compact (Compact) and that the action breached certain water delivery contracts they had with the Bureau. The Court of Federal Claims rejected the plaintiffs' claims, holding that the Tribes' rights had priority, and the Federal Circuit Court of Appeals affirmed: "[T]he Klamath Tribes have an implied right to water to the extent necessary for them to accomplish hunting, fishing, and gathering on the former reservation, a primary purpose of the Klamath reservation. … This entitlement includes the right to prevent appropriators from utilizing water in a way that depletes adjoined water sources below a level that damages the habitat of the fish they have a right to take. *Id.* While the Klamath Project did not exist at the time of the creation of the Klamath Tribes' reservation, Upper Klamath Lake undisputedly did exist at that time, as it was the boundary of the reservation as it was created. … The FWS Biological Opinion indicated that maintaining minimum levels in Upper Klamath Lake was 'necessary to avoid jeopardy and adverse modification of proposed critical habitat' for the suckers. … Thus, given the facts of record, the Court of Federal Claims did not err in finding that the Klamath Tribes' implied water rights include Upper Klamath Lake."

In *Confederated Salish and Kootenai Tribes v. Lake County Board*, 2019 WL 6173181 (D. Mont. 2019), the U.S. General Lands Office in 1913 had platted an area

known as Big Arm as a potential town site within the boundaries of the reservation established for the Confederated Salish and Kootenai Tribes (CSKT or Tribes) by the 1855 Treaty of Hellgate. The town site was never developed and the Department of Interior had given notice in 1956 of its intention to restore the site to tribal ownership. Defendant Lundeen obtained a permit from the Lake County, Montana Board of Commissioners to develop a resort on 40 acres she owned adjacent to Big Arm. When she began to build a road to the site through Big Arm, the Tribe sued both Lundeen and the County for trespass and to quiet its title to the Big Arm town site. The defendants counterclaimed seeking a judgment that the Tribes had no title to the site and enjoining interference with the construction of the road. The court dismissed the counterclaims on grounds of **sovereign immunity**, holding that (1) the Tribes had not waived immunity by treaty, (2) the defendants could not bring their counterclaims under a recoupment theory, and (3) the Tribes had not waived immunity by bringing suit: "The County's and Lundeen's counterclaims arise out of the same transaction or occurrence as the Tribes' claims. However, 'recoupment claims must be monetary, not injunctive or declaratory.' … Because Lundeen has not requested monetary damages, the doctrine of recoupment is inapplicable. … Any waiver of tribal immunity 'may be limited to the issues necessary to decide the action brought by the tribe' and 'is not necessarily broad enough to encompass related matters.' … In this instance, the Court can fully resolve the issue of title without considering the Defendants' counterclaims, and so it must conclude that the Tribes' waiver does not extend to the Defendants' title-based counterclaims."

In *Clements v. Confederated Tribes of Colville*, 2019 WL 6051104 (E.D. Wash. 2019), the Confederated Tribes of Colville (Tribes) had hired South Bay Excavating, owned by Clements, to install fiber optic cables on the Tribes' reservation under a contract providing for dispute resolution in the courts of the Tribes. Liquid Networks, Inc. (Liquid Networks), a Washington corporation later informed the Tribes that it had assumed the contract. When South Bay failed to perform, the Tribes sued Clements and Liquid Networks in tribal court. After the tribal court denied their motion to dismiss, plaintiffs sued in federal court, arguing that the Court lacked jurisdiction over them. The court dismissed on the grounds that tribal court jurisdiction was colorable under the first exception to the **Montana** rule and that the plaintiffs in the federal court action had not exhausted their tribal court remedies: "Where colorable questions of tribal jurisdiction exist, a plaintiff must exhaust tribal remedies before pursuing relief in federal court. … In resolving the instant motion, the Court first finds that the Tribal Court has not yet determined whether it has authority to exercise personal jurisdiction over Plaintiffs. … More specifically, the Tribal Court must make factual findings to determine whether the corporate veil should be pierced, which would then provide for personal jurisdiction over the Plaintiffs in the Tribal Court. ... Therefore, the Court finds that Plaintiffs have not exhausted their tribal remedies, because the issue of whether the Tribal Court has personal jurisdiction over the Plaintiffs has not been resolved."

In *Seneca Nation v. State of New York*, 2019 WL 5865450 (W.D.N.Y. 2019), the Seneca Nation and the State of New York had entered into a gaming compact, approved under the **Indian Gaming Regulatory Act (IGRA)**, in 2002. The compact provided for the Tribe to share gaming revenue with the State, in accordance with an escalating schedule of percentage payments, in return for exclusive gaming rights during an initial 14-year term. The compact also provided for an automatic seven-year renewal period if neither side gave notice of objection but did not address the Tribe's obligation to make revenue sharing payments. The Tribe took the position that no such payments were due as of December 2016, upon commencement of the seven-year renewal period. The State disagreed and the parties submitted the matter to arbitration in accordance with the dispute resolution provisions in the compact. An arbitration panel, by a 2-1 vote, sided with the State, concluding that the logic of the parties' agreement weighed in favor of continued payments during the renewal period. The Tribe challenged the arbitration award in federal court. The district court affirmed the panel award and the Second Circuit Court of Appeals affirmed the district court judgment, citing the narrow grounds for challenge of an arbitration award and rejecting the Tribe's argument that the panel ignored requirements of the IGRA: "The Nation contends that the majority exhibited manifest disregard for the IGRA by consciously amending the Compact to impose a payment obligation that was never reviewed and approved by the Secretary. It argues that, if the Compact's renewal provision is ambiguous, as the majority found, it cannot be said that the Secretary approved the ordered payments. And it further maintains that the Secretary approved only 14 years of State Contribution and never had or reviewed the extrinsic evidence the majority relied on to interpret the meaning of the renewal provision. … In rejecting the same Secretary-approval arguments that the Nation lodges here, the majority expressly found that it lacked the legal authority to usurp the Secretary's approval role to enforce a Compact term that the Secretary did not approve. … It further found, however, that its decision did not encroach the Secretary's province, and

therefore the IGRA did not apply. Rather, it viewed its decision as falling squarely within its mandate—to determine whether the Compact provides for revenue-sharing payments upon renewal. It wrote: 'upholding the State's interpretation of the Compact would not be 'approving' an additional seven years of payment without legal or economic warrant to do so; rather, it would simply be finding that the terms of the renewal in the Compact deemed approved by the Secretary included revenue[-]sharing payment obligations."

In *New York v. Mountain Tobacco Company*, 2019 WL 5792487 (2d Cir. 2019), King Mountain Tobacco Company (King Mountain), a company organized under the laws of the Yakama Nation, wholly owned by a member of the Yakama Nation, and located on the Yakama reservation, shipped unstamped, untaxed cigarettes from the Yakama Indian Reservation in Washington State to Indian reservations in the State of New York, where they were sold to tribal and non-tribal members. The State of New York, which lost tax revenue from the sales to non-members, sued King Mountain seeking injunctive relief and damages. The district court dismissed the State's claims under the **Prevent All Cigarette Trafficking Act (PACT Act)** and **the Contraband Cigarette Trafficking Act (CCTA)**, concluding that King Mountain's cigarette shipments were not "interstate commerce" actionable under the PACT Act, and that King Mountain was an "Indian in Indian country" exempt from CCTA liability. The district court granted the State partial summary judgment on its claims that King Mountain violated state laws on cigarette sales, and enjoined future violations. On appeal, King Mountain argued that the State's enforcement practices violated the dormant Commerce Clause, that one state claim was barred by res judicata and that the injunction was a form of state regulation of commerce between Indian nations in violation of federal Indian protections. The Second Circuit Court of Appeals affirmed in part and reversed, holding that (1) there was no dormant commerce clause violation, (2) King Mountain violated New York law § 471 by importing unstamped cigarettes, (3) reservation-to-reservation sales were interstate commerce for purposes of the PACT Act, and (4) King Mountain was an Indian in Indian country for purposes of the exemption for such sales under the CCTA: "A state law or regulation offends the dormant Commerce Clause only if it '(1) clearly discriminates against interstate commerce in favor of intrastate commerce, (2) imposes a burden on interstate commerce incommensurate with the local benefits secured, or (3) has the practical effect of extraterritorial control of commerce occurring entirely outside the boundaries of the state in question.' … King Mountain does not contend that New York's tax statutes are discriminatory on their face. There is no decision of this Court standing for the proposition that discriminatory enforcement of a nondiscriminatory state law violates the dormant Commerce Clause. … The lack of universal enforcement does not bespeak discrimination; and there is no plausible reason New York would encourage or protect a local industry engaged in selling untaxed cigarettes. … King Mountain has conceded that it is a wholesale dealer under § 471, that it is not a licensed stamping agent, and that it sold unstamped cigarettes directly to Indian tribes and companies owned by tribe members. Such conduct clearly violates the implementing regulations of § 471, which require that '[a]ll cigarettes sold by agents and wholesale dealers to Indian nations or tribes or reservation cigarette sellers located on Indian reservations must bear a tax stamp.' 20 N.Y.C.R.R. 74.6(a)(3). … The State argues that the district court erred by ruling that the PACT Act's definition of 'interstate commerce' excludes sales that begin and end on Indian reservations located within the borders of different states. We agree. … Accordingly, the district court's grant of summary judgment for King Mountain on the PACT Act claim is reversed, and because King Mountain does not contest that it failed to make the filings required by the PACT Act, we reverse the district court's denial of summary judgment for the State on the PACT Act claim. … The CCTA allows a State to sue in federal court to prevent and restrain violations of the chapter 'by any person,' but excludes from that authorization such 'civil action[s] ... against ... an Indian.' … The CCTA does not define 'Indian'; but neither does it define 'person,' which under the Dictionary Act includes 'corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.' 1 U.S.C. § 1. We decline to interpret § 2346(b)(1) to mean that an 'Indian' is not a 'person,' with all that that entails. … [W]e conclude on balance that the CCTA's exemption for an 'Indian in Indian country' applies to King Mountain."

In *New York v. United Parcel Service, Inc*, 2019 WL 5792855 (2d Cir. 2019), the State and City of New York charged UPS with violating the Contraband Cigarette Trafficking Act (CCTA), the **Prevent All Cigarette Trafficking Act** (PACT Act), and New York Public Health Law (PHL) as well as with breaching its Assurance of Discontinuance (AOD) with the New York State Attorney General (NYAG). The district court found that UPS had violated its obligations under the AOD and knowingly transported contraband cigarettes from its shipper-customers on Native American reservations to non-Indian consumers residing off-reservation throughout the State and City. The court ordered UPS to pay $9.4 million in unpaid taxes and $237.6

million in total penalties to the plaintiffs. On appeal, the Second Circuit Court of Appeals affirmed the district court's liability rulings but reduced damage and penalty awards: "UPS contends that the district court erred in aggregating separate shipments to meet the CCTA's quantity requirement for certain of the Liability Shippers. It claims that the CCTA's use of *'a quantity'* —singular—'in excess of 10,000 cigarettes' criminalizes only a single act of transporting 10,000 cigarettes. ... Second, UPS contends that it cannot be held liable under this reading of the CCTA because there was no proof that it knew that any one delivery exceeded 10,000 unstamped cigarettes. … We reject UPS's interpretation of the statute. The plain text of the CCTA's definition of 'contraband cigarettes' imposes no per-transaction requirement, and the use of the indefinite article 'a' in the phrase 'a quantity' does not necessarily signify a singular shipment. Referring to 'a quantity' of something does not, in common parlance, preclude aggregation. It makes perfect sense to say that a shipper who makes more than ten 1,000-cigarette deliveries has delivered 'a quantity' of more than 10,000 cigarettes, just as a child receives 'a quantity' of presents for her birthday comprising what she receives from each individual guest at her birthday party, through the mail, or during personal visits from other well-wishers before or after the day of the party." The Court held that the district court had erred in awarding New York only half the taxes that had allegedly been lost but also held that the district court had abused its discretion in awarding per-violation penalties under both the PACT Act and the PHL.

In *Walker v. Windy Boy*, 2019 WL 5700770 (D. Mont. 2019), the Chippewa Cree Tribe owned and operated the Rocky Boy Health Center (Center) on the Rocky Boy's Indian Reservation. After resigning his employment position at the Center, Walker, a member of the Gros Ventre Tribe of the Fort Belknap Indian Reservation, sued the Center's executive director, Windy Boy, a member of the Assiniboine Tribe of the Fort Belknap Indian Reservation, the Chippewa Cree Tribe and other tribal officials, alleging that he was forced to resign as a result of "harassment, admonishment and humiliation" based on his sex and disability in violation of Title VII of the Civil Rights Act of 1964, Title I of the Americans with Disability Act of 1990 (ADA), and Section 504 of the Rehabilitation Act of 1973. The court dismissed without prejudice on the ground that Walker had failed to demonstrate that he qualified under any of the exceptions to the rule that plaintiffs must exhaust tribal remedies when a matter is colorably within the tribal court's jurisdiction: "Principles of comity require a plaintiff to exhaust his tribal court remedies before litigating his claims in federal court, when tribal jurisdiction is 'colorable.' … Courts employ a two-pronged test to determine whether tribal jurisdiction is colorable. Courts first examine whether the claims asserted by the plaintiff 'bear some direct connection to tribal lands.' … Colorable tribal jurisdiction exits [sic] if 'the events that form the bases for [p]laintiff's claims occurred or were commenced on tribal territory.' … Colorable **tribal jurisdiction** generally does not exist if the claims asserted by the plaintiff are based on events that occur 'off tribal lands.' Id. Events that occur off tribal land support colorable tribal jurisdiction only if one of the two exceptions described in *Montana v. United States*, 450 U.S. 544 (1981), are present. … Here, tribal jurisdiction is colorable for at least two reasons. Tribal jurisdiction is colorable because Walker's claims are based on events that allegedly occurred on tribal land. Walker alleges that he was subjected to discrimination and retaliation while he was employed at the Rocky Boy's Health Center. The Rocky Boy's Health Center is located on trust land within the exterior boundaries of the Rocky Boy's Indian Reservation. Second, tribal jurisdiction is colorable because Walker's claims arise out of a consensual employment agreement he had with a tribal entity."

In *Brice v. 7HBF No. 2*, Ltd., 2019 WL 5684529 (N.D. Cal. 2019), plaintiffs, non-Indian borrowers residing in California, sued various entities associated with **internet lending** companies owned by the Chippewa Cree, Otoe-Missouria, and Tunica-Biloxi Tribes, alleging the interest rates in the loan agreements they entered into were illegal under California law. The defendants moved to stay the proceedings and require the plaintiffs to arbitrate the dispute, as required under the loan agreements. The court denied the motion, holding that the agreements were invalid: "The main thrust of both the motions to stay and compel is that because of the clear delegation provision in the loan agreements, giving the arbitrator the right to determine the scope and enforceability of the Arbitration Agreement, and Supreme Court precedent, I should reverse course and stay this case while an arbitrator decides the enforceability of the Arbitration Agreements. … The Second Circuit evaluated this very issue in a case concerning the same tribal lending scheme run through Think Finance. In *Gingras v. Think Fin., Inc.*, 922 F.3d 112 (2d Cir. 2019), it considered some of the same loan agreements as the ones at issue in this case and, despite the presence of a delegation provision, concluded that the arbitration agreements were unenforceable. It rejected the argument made by defendants here that under the *Schein* decision and in light of the delegation provision, the arbitrator must decide the enforceability of the Arbitration Agreements. It explained, 'Defendants would have us believe that the

Supreme Court's recent decision in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, —— U.S. ——, 139 S. Ct. 524 (2019), requires a different outcome. But *Schein* dealt with an exception to the threshold arbitrability question—the so-called 'wholly groundless' exception—not a challenge to the validity of an arbitration clause itself. See *id.* at 529–31. As such, *Schein* has no bearing on this case.' *Id.*, 922 F.3d at 126 n.3. … I agree with and follow the analysis of the Second Circuit in *Gingras*. *Schein* does not require a different approach or outcome."

In *Ute Indian Tribe of Uintah and Ouray Indian Reservation v. United States*, 2019 WL 5688826 (Fed. Cl. 2019), the Ute Indian Tribe of the Uintah and Ouray Indian Reservation (Tribe) sued the United States under the Indian Tucker Act, 28 U.S.C. § 1505, alleging that the government: (1) **breached its trust and fiduciary duties**; (2) violated several congressional acts; (3) took its property in violation of the Fifth Amendment; and (4) failed to account for all land and for all revenue derived from land and resources on its reservation. In a lengthy decision based on a complex factual background, the Court partly granted and partly denied the government's motion to dismiss: "[E]ach of the Tribe's eleven alleged sources of fiduciary duty referenced in its complaint were challenged by the Government. Despite having the burden of establishing jurisdiction, the Tribe did not address each of these objections. Besides neglecting to respond to several arguments challenging the jurisdictional basis of its claims, the Tribe has not shown that the 1880 Act, read in conjunction with the 1868 Treaty, the 1894 Act, and the 1897 Act, establishes a specific fiduciary duty (Count 1). The acts referenced above, likewise, are not money mandating statutes, violations of which would require compensation by the Government (Count 2). … As the Government aptly observed, the Tribe has presented nothing close to the statutory scheme in Mitchell II. The Court in Mitchell II found that a money-mandating duty existed based upon the 'pervasive' role the Department of the Interior played in 'virtually every aspect of forest management including the size of sales, contract procedures, advertisements and methods of billing, deposits and bonding requirements, administrative fee deductions, procedures for sales by minors, allowable heights of stumps, tree marking and scaling rules, base and top diameters of trees for cutting, and the percentage of trees to be left as a seed source.' … The Tribe maintains that it is entitled to monetary damages resulting from the Government's unconstitutional taking of its land, natural resources, and proceeds. It claims that if the court agrees that the 1880 Act created recognized title, then the money the Government received from the land is the Tribe's. … However, the Government contends that the Tribe's taking claim is barred by the six-year limitation periods set forth in § 2501 and the Indian Claims Commission Act of 1946, Pub. L. No. 79-726, § 2, 60 Stat. 1049. Also, the taking claim is barred by the 1965 and the 2012 settlement agreements, according to defendant. … Because the scope of the 2012 Settlement is confined to trust funds or non-monetary trust assets, the Tribe's claim that a taking of non-trust property has occurred arguably is outside the scope of the 2012 Settlement. We find that the 2012 Settlement does not bar the Tribe's claimed taking. ... Section 2501 states that a claim must be filed within six years after such claim first accrues. … Based on the historical background and arguments filed by the parties, it is unclear that the 1897 and the 1948 acts effectuated a taking. Given this uncertainty, we cannot confirm when the alleged taking accrued and therefore whether it is barred by § 2501. Indeed, the Tribe alleged that the Government conducted an oil and gas lease sale in 2017. If the 1897 Act did not result in a taking, those are not claims that the Tribe could have asserted under the ICCA. See Pueblo of San Ildefonso, 206 Ct. Cl. at 656 (stating that the date of a taking 'depends upon the particular facts, circumstances and history of each case'). We must rule that the Government's statute of limitations claims be denied at present."

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