GODFREY & KAHN S.C.

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Indian Nations Law Update

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Applications Due July 1st for up to $2 Million Tribal DOE Energy Grant

Tribes suffering severe economic harm caused by COVID-19 are understandably focused on accessing relief that may be available under the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), including under the Paycheck Protection Program and the Tribal Relief Fund.

Tribes should nevertheless be mindful of opportunities that will enhance tribal sovereignty, reduce costs and promote economic development in the long term, including the Tribal Energy Grant recently announced by the U.S. Department of Energy (DOE) Office of Indian Energy Policy and Programs. DOE will provide up to $15 million in new funding to deploy energy technology on tribal lands. DOE anticipated making individual awards ranging from $50,000 to $2 million, which may be used, among other things, for energy efficiency measures, conversion to solar energy or other renewable energy, or battery storage projects to help assure resiliency during utility outages.

Godfrey & Kahn has assisted tribes and tribal entities with the preparation of renewable energy, energy efficiency, energy-efficient housing and related grant applications that have resulted in total awards of more than $15 million. We have also assisted tribes in meeting DOE's 50% cost-share requirement and driving down project costs by packaging federal grants with other grants and tax incentives, including the federal tax credit for renewable energy projects, state and/or utility grants, New Market Tax Credits or other private funding, often resulting in the construction of projects with no upfront tribal capital costs.

For more information about Godfrey & Kahn's energy-related Indian country experience or a free consultation, contact Energy Strategies and Indian Nations Practice Group leader John Clancy at 414.287.9256 or jclancy@gklaw.com or Indian Nations Practice Group co-leader Brian Pierson at 414.287.9456 or bpierson@gklaw.com.

Coronavirus Coverage

Godfrey & Kahn is closely tracking legal developments relating to COVID-19. Interested persons can subscribe to our coverage at https://www.gklaw.com/COVID-19.htm.

Selected Court Decisions

In *Confederated Tribes of Chehalis v. Mnuchin*, 2020 WL 1984297 (D.D.C. 2020), Congress had enacted the Coronavirus Aid, Relief, and Economic Security Act (Act). Title V of the Act provided $8 billion of emergency aid for "**Tribal governments**" to combat the coronavirus pandemic. The Act defined "Tribal government" as "the recognized governing body of an Indian Tribe" and further provided that "[t]he term 'Indian Tribe' has the meaning given that term in [section 5304(e) of the Indian Self-Determination and Education Assistance

Act, 25 U.S.C. § 5304(e)]." The Indian Self-Determination and Education Assistance Act in turn defines "Indian tribe" as "any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) [43 U.S.C. 1601 *et seq.*], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." Finally, the Act provided that "the amount paid under this section for fiscal year 2020 to a Tribal government shall be the amount the Secretary shall determine, in consultation with the Secretary of the Interior and Indian Tribes, that is based on increased expenditures of each such Tribal government (or a tribally-owned entity of such Tribal government) relative to aggregate expenditures in fiscal year 2019 by the Tribal government (or tribally-owned entity) and determined in such manner as the Secretary determines appropriate to ensure that all amounts available under subsection (a)(2)(B) for fiscal year 2020 are distributed to Tribal governments." After the Secretary of the Treasury determined that for-profit Alaska Native Corporations (ANCs) would be eligible to receive Title V funds, a group of tribes sued, arguing that ANCs were neither governments nor "recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians," as demonstrated by their omission from the list of recognized tribes published by the Department of the Interior in the Federal Register. The court agreed and enjoined the Treasury Department from distributing Title V funds to ANCs: "For purposes of this preliminary injunction, the court is persuaded that, presently, no ANC satisfies the definition of 'Tribal government' under the CARES Act and therefore no ANC is eligible for any share of the $8 billion allocated by Congress for Tribal governments. For starters, neither Defendant nor any ANC amici has identified an ANC that satisfies the eligibility clause under ISDEAA's definition of Indian Tribe; that is, no ANC 'is [presently] recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.' … As no known ANC satisfies ISDEAA's eligibility clause, no ANC can partake in the $8 billion funding set aside for Tribal governments. The court also agrees that the term 'recognition' as used in Indian law statutes is a legal term of art, and that no ANC board of directors qualifies as a 'recognized governing body' of an Indian Tribe. … 'The definition of 'recognition' has evolved over time but historically the United States recognized tribes through treaties, executive orders, and acts of Congress.' *Mackinac Tribe*, 829 F.3d at 755. Today, uniform procedures exist through the Bureau of Indian Affairs for a group to seek formal recognition. *See id*. at 756. As a legal term of art then, Congress's decision to qualify only 'recognized governing bod[ies]' of Indian Tribes for CARES Act funds must be viewed through this historical lens. And no ANC board of directors satisfies that criteria. … Context also supports Plaintiffs' reading of the CARES Act. … Congress placed monies for 'Tribal governments' in the same title of the CARES Act as funding for other types of 'governments.' … Reading the CARES Act to allow the Secretary to disburse Title V dollars to for-profit corporations does not jibe with the Title's general purpose of funding the emergency needs of 'governments.'"

In *Inter-tribal Council of Arizona, Inc. v. United States*, 2020 WL 1897240 (Fed. Cir. 2020), the Bureau of Indian Affairs had decided in 1987, over the objections of the Inter-Tribal Council of Arizona (ITCA), to cease operation of the Phoenix Indian School. The BIA entered into an agreement with Collier Company, Collier Development Corporation, and Collier Enterprises (Collier) to exchange the site of the Phoenix Indian School for wetlands in Florida owned by Collier. Under the parties' agreement, Collier was required to pay $34.9 million to account for the additional financial benefit Collier received in the exchange and 95% of the funds were to be deposited into an Arizona InterTribal Trust Fund (AITF) for the benefit of the ITCA member tribes. The Secretary of the Interior agreed to accept the $34.9 million in the form of 30 annual interest payments with the entire principal amount to be paid at the time of the last annual interest payment. Congress approved the agreement in Title IV of the Arizona–Idaho Conservation Act of 1988 (Act). Collier stopped making payments into the trust and into the annuity fund in 2012. The ITCA sued for **breach of the trust doctrine**, contending that the Act obligated the government to make payments into the trust fund to make good on Collier's default, that the government had failed to adequately monitor and assure Collier's payments and that the government had mismanaged the funds received. The ITCA sued the United States, claiming that the government breached its tribal trust obligations under the Arizona-Florida Land Exchange Act (AFLEA) by failing to ensure sufficient security for full payments to be made. The Federal Claims Court dismissed certain claims but allowed others to proceed. On appeal, the Federal Circuit held that (1) the AFLEA established a specific fiduciary duty owed by the government sufficient to support Indian Tucker Act jurisdiction, (2) the ITCA sufficiently alleged the government's breach of fiduciary duty to support Indian Tucker Act jurisdiction, (3) the AFLEA could be fairly

interpreted to mandate compensation for the government's fiduciary wrongs, (4) failure-to-maintain-sufficient-security breach of fiduciary duty claims accrued, and the six-year limitations period for bringing claims in the Court of Federal Claims began to run, when the government disclosed the deficit of trust, that obligor and had defaulted, and that obligations were under-collateralized, (5) the claim alleging failure to ensure adequate security when the government-negotiated trust fund payment agreement accrued, and six-year limitation period for bringing action in the Court of Federal Claims began to run, when the agreement was executed and the ITCA was made aware of the agreement's terms; and (6) the government did not have a duty under the AFLEA to collect and pay all of the AFLEA's required remaining annual payments and full final payment after default.

In *Penobscot Nation and United States v. Frey*, 2020 WL 1699533 (1st Cir. 2020), the Penobscot Nation had sued the State of Maine and various state officials (State Defendants), claiming rights as to a 60-mile stretch of the Penobscot River, commonly known as the "Main Stem." The United States intervened in support of the Nation. Private interests, towns, and other political entities, intervened in support of the State Defendants' position. The district court had ruled that the Penobscot Indian Reservation, as defined in the Maine Implementing Act (MIA) and **Maine Indian Claims Settlement Act** (MICSA), included the islands of the Main Stem, but not the waters of the Main Stem and that sustenance fishing rights provided in the MIA allowed the Penobscot Nation to take fish for individual sustenance in the entirety of the Main Stem section of the Penobscot River. In a 2017 decision, the First Circuit affirmed the first ruling but vacated the second ruling on the ground that the Nation lacked standing and the issue was unripe, citing the State's representation that it did not intend to take enforcement action against tribal members engaged in subsistence fishing. 861 F.3d 324 (1st Cir. 2017). In the instant decision, on the motion of the government and the Tribe, the Court vacated its 2017 decision, agreed to rehear the matter en banc and directed the parties to brief twelve specified issues relating to the MIA, the interpretive canons against conveyance of navigable waters and favoring tribes, the Supreme Court's 1918 holding in *Alaska Pacific Fisheries v. United States* (applying the Indian Canon in determining whether surrounding waters were within the "body of lands" comprising a reservation), relevance of state common law, the impact of legislative history, the effect of 25 U.S.C. § 1723(a)(2), the doctrines of laches, acquiescence, and/or impossibility, the equitable doctrines applied by the Supreme Court in *City of Sherrill v. Oneida Indian Nation of N.Y.*, the boundaries of the reservation, ripeness and standing.

In *State of Texas v. Ysleta del Sur Pueblo*, 2020 WL 1638408 (5th Cir. 2020), the Fifth Circuit Court of Appeals rejected the argument of the Ysleta del Sur Pueblo that the enactment of the **Indian Gaming Regulatory Act** in 1988 superseded a provision of the Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act of 1987 subjecting the tribes to the anti-gambling laws of the State of Texas: "This latest case poses familiar questions that yield familiar answers: (1) which federal law governs the legality of the Pueblo's gaming operations—the Restoration Act (which bars gaming that violates Texas law) or the more permissive Indian Gaming Regulatory Act (which 'establish[es] ... Federal standards for gaming on Indian lands'); and (2) whether the district court correctly enjoined the Pueblo's gaming operations. Our on-point precedent conclusively resolves this case. The Restoration Act controls, the Pueblo's gaming is prohibited, and we affirm."

In *Fort Sill Apache Tribe v. National Indian Gaming Commission*, 2020 WL 2079532 (D.D.C. 2020), the Fort Sill Apache Tribe, based in Oklahoma, sued the National Indian Gaming Commission (NIGC) and other Interior Department officials (collectively DOI) after the NIGC determined that land the Tribe had acquired at Akela Flats, New Mexico, in 1998 did not meet the criteria for Indian lands acquired after 1988 for purposes of gaming under the **Indian Gaming Regulatory Act**. The district court agreed and granted the DOI summary judgment, holding that the Akela Flats property was neither the Tribe's initial reservation, nor "restored lands," noting that "all major tribal government offices were located over 540 miles away, and no tribal members lived on or near the land."

In *Tsi Akim Maidu of Taylorsville Rancheria v. U.S. Department of Interior*, 2020 WL 1974213 (E.D. Cal. 2020), the Tsi Akim Maidu of Taylorsville Rancheria sued the U.S. Department of Interior (DOI), challenging its 2015 determination that (i) the sale of the Taylorsville Rancheria in 1966 pursuant to the California Rancheria Act of 1958 had **terminated its status as a federally recognized Indian Tribe,** and (ii) Tsi Akim, as a congressionally terminated tribe, could not apply for recognition under the Part 83 regulations. The court dismissed Tsi Akim's claim challenging its termination on statute of limitations grounds, holding that Tsi Akim had notice of its termination at least as of 1979 when it was

omitted from the list of federally recognized tribes published in the federal register. The court denied the government's motion to dismiss Tsi Akim's challenge to the DOI's determination that it was ineligible to apply for recognition: "Plaintiff was on notice as of the first publication of the list of federally recognized tribes in 1979 regardless of its claim that it was unaware until 1994 and regardless of how often it used the land. … Because the FAC and Plaintiff's Opposition, when read together, appear to challenge the Department of the Interior's decision in its 2015 letter that Plaintiff is ineligible for Part 83 acknowledgment, this Court finds that such a claim would not be time-barred under the Administrative Procedure Act's six-year statute of limitations."

In *Adams v. Elfo*, 2020 WL 1929375 (W.D. Wash. 2020), Adams, a member of the Nooksack Tribe residing on allotted trust land outside reservation boundaries, became embroiled in tribal court litigation that began with her motion for a protective order against the father of her child and ended with her arrest at her home by tribal police officers for failing to answer charges of interfering with a tribal court custody order. She sought habeas corpus relief in federal court under the **Indian Civil Rights Act**. The magistrate judge recommended dismissal of the petition but the district court remanded with instructions that the magistrate determine "whether Petitioner has established a plausible claim that her arrest occurred on allotted land outside of the reservation and that therefore the Nooksack Tribal Court lacked jurisdiction over Petitioner at the time of her arrest."

In *Confederated Salish and Kootenai Tribes v. Lake County Board*, 2020 WL 1891263 (D. Mont. 2020), the Confederated Salish and Kootenai Tribes had entered into the Hell Gate Treaty with the United States, ceding many of their lands but reserving 1,275,000 acres, the Flathead Reservation, for their "exclusive use and benefit." The reservation was later allotted over the Tribes' objection and a town, named Big Arm, was platted and removed from the reservation by the Secretary of the Interior in 1910. When the town proved to be unsuccessful, the government returned 260 unsold lots to the Tribes in 1956. Lundeen, the owner of 40 acres adjoining the former town, wishing to open an RV park, obtained authorization from the Lake County Board to build a road through portions of the town restored to the Tribes. The tribes sued to quiet title in the putative **right of way**. The district court granted the Tribes summary judgment: "[T]his is the crux of the Defendants' argument — that because Congress authorized the sale of individual lots, it also authorized the dedication of the streets to public use, and such dedication actually occurred when the townsite was planned and platted. … However, tribal lands cannot be divested by implication. 'The whole purpose of trust land is the protection of land from unauthorized alienation.' … Thus, 'only Congress,' as trustee, 'can divest a reservation of its land and diminish its boundaries.' *Solem*, 465 U.S. at 470. ... Here, the Flathead Reservation was not diminished by the Flathead Allotment Act or the related 1906 townsite-specific legislation." The court concluded that Lundeen would be required to apply for a right-of-way under the 25 C.F.R. Part 169 regulations and also rejected the defendants' arguments that (1) treaty authorization for the United States to build roads through the Reservation divested the Tribes of jurisdiction, and (2) compensation the Tribes received under the Indian Claims Commission confirmed that a takings of the town site lands had occurred.

In *Acres Bonusing, Inc. v. Marston*, 2020 WL 1877711 (N.D. Cal. 2020), Blue Lake Casino & Hotel (Blue Lake Casino) had previously filed a contract fraud action against Acres Bonusing, Inc. and its principal (ABI) in the Blue Lake Rancheria Tribal Court. ABI contested the court's jurisdiction. Marston, the tribal court judge initially assigned to the case, later recused himself and was replaced by Lambden, a retired California Court of Appeals justice. After Lambden dismissed the case, ABI brought a malicious prosecution action against lawyers, law firms, and court personnel associated with the tribal court fraud case, seeking damages against them personally in order to avoid a sovereign immunity defense under the rule of ***Lewis v. Clarke***. The district court dismissed on the ground of sovereign immunity anyway, concluding that the suit was really aimed at the Tribe: "The alleged acts occurred when Attorney Defendants were acting within the scope of their tribal authority, *i.e.*, within the scope of their representation of Blue Lake Casino. Accordingly, the real party in interest here is the tribe because adjudicating this dispute would require the court to interfere with the tribe's internal governance. … [E]ntertaining this suit would require me to question the judicial function of the Blue Lake Rancheria Tribal Court. The real party in interest here is the Tribe itself. … It was the tribe, not any of the individual Blue Lake Defendants, who sued plaintiffs in the underlying tribal court case. The tribe appointed Judge Marston and Clerk Huff and both were exercising tribe judicial powers in operation of court. Acting in his capacity, Judge Marston retained services of Burrrell [sic], Vaughn, and Lathouris to assist in exercising governmental powers in the underlying tribal court case. The tribe then retained Rapport and DeMarse as its general

counsel to provide the tribe with legal advice in defending Acres' subsequent federal suits. Allowing this litigation to proceed will necessarily impact the ways in which tribal employees and officials carry out their official duties and question a tribe's right to set up and operate its own courts under its own rules and laws."

In *United States v. Cline*, 2020 WL 1862595 (W.D. Wash. 2020), the government indicted Cline on one count of domestic assault by a **habitual offender** in violation of 18 U.S.C. § 117(a), relying on previous convictions in the Nooksack tribal court for the predicate convictions. The district court rejected Cline's argument that the prior convictions were categorically overbroad and could not serve as predicates for an habitual offender charge: "The 'willfully strik[ing]' portion of § 20.02.050 requires that the defendant 'strikes another person or otherwise inflicts bodily harm' and that such striking or infliction of bodily harm be willful. *See* Nooksack Crim. Code § 20.02.050. This offense is a categorical match for the 'assault by striking, beating, or wounding' and 'simple assault' offenses enumerated in § 113, as the federal generic offense of assault includes 'a willful attempt to inflict injury upon another' and may be shown upon 'proof of a battery.' 18 U.S.C. § 113(a)(4), (5); *Lewellyn*, 481 F.3d at 697; *Dupree*, 544 F.2d at 1051–52. Therefore, Defendant's Nooksack convictions for violation of § 20.02.050's 'willfully strik[ing]' means may qualify as predicate offenses under § 117(a)(1)."

In *Hall v. Tesoro High Plains Pipeline Co.*, (D.N.D. 2020), members of the Three Affiliated Tribes of the Fort Berthold Reservation sued several companies operating pipelines across allotted lands in which the plaintiffs owned undivided fractionated interests. The plaintiffs alleged that the defendants lacked valid **right-of-way** (ROW) under the BIA's Part 169 regulations and sought trespass remedies. The district court dismissed for failure to exhaust administrative remedies: "Discretionary decisions by the BIA, like the 1993 easement, must first be appealed directly to the BIA. As to the alleged holdover situation, it is of utmost importance to note that the BIA is apparently conducting its investigation. The BIA has not made a final determination. Since 25 C.F.R. § 2.6 allows judicial review only of final decisions by the BIA, this Court must refrain from intervening at this time."

In *Hudson v. Zinke*, 2020 WL 1821120 (D.D.C. 2020), Department of Interior (DOI) officials supervised and approved a **referendum election** held by the Three Affiliated Tribes of Fort Berthold Reservation in North Dakota in 2013 that amended the Tribe's Constitution. Hudson, a member of the Tribe, challenged the approval under the Administrative Procedure Act (APA), contending that, because DOI based its quorum determination on the percentage of "registered," rather than eligible, voters who participated, the election lacked the requisite 30% quorum under the Tribal Constitution and the Indian Reorganization Act, 25 U.S.C. § 5123, and that the DOI sent misleading voting information to tribal members, which discouraged off-reservation voting. The district court granted Hudson summary judgment: "Essentially, the Remand Decision found that Article X's 'entitled to vote' meant one thing (any adult member) when the Tribal Constitution was enacted in 1936, but it 'evolved' and meant something else (members registered to vote) when the BIA promulgated regulations in 1967. … But the BIA does not cite any authority for the proposition that its changing interpretation of its governing statute or regulations necessarily affects the meaning of a separate sovereign's identical constitutional language. Nor does it provide even a common-sense explanation as to why that might be true. Indeed, the reach of this argument is staggering; under the agency's reasoning, whenever the federal government amends regulations that address the same concerns as a tribe's constitution, it also amends the tribe's constitution. Moreover, the BIA's finding that Article X was never amended to remove the 'registration requirement' (*Id.* at 3) gets the amendment process backward: a federal regulation cannot amend a tribal constitution. … [T]he court finds that the agency's decision that Article X's meaning has 'evolved over time' is unsupported by the record. Article X's quorum provision has been unchanged since its enactment and continues to require a 30% quorum of entitled voters—i.e., adult members of the tribe. Because the regulation requires a quorum of only registered voters, it contradicts the Tribe's constitutional provision and therefore the Tribal Constitution's quorum requirement applies."

In *Western Refining Southwest v. Jewell*, (D.N.M. 2020), the BIA had approved Western's application for a 20-year right-of-way easement traversing a .52-mile segment of an allotment on the Navajo reservation based on consents of about 60% of the ownership interests. On an appeal by the non-consenting allottees, the Interior Board of Indian Appeals (IBIA) determined, *sua sponte*, that since one of the owners from whom a consent had been obtained had only a life estate, it was also necessary to obtain consents from a majority of the remaindermen. Based on its conclusion, the IBIA converted the 20-year easement into an easement valid only as long as the life of the life estate

owner. On judicial review under the Administrative Procedures Act, the district court reversed the IBIA on the ground that, while the determination that remaindermen consents was valid interpretation, it was arbitrary and capricious for IBIA to raise the issue *sua sponte*, which no party had previously raised, to deny Western the right to address it.

In *Daphne O v. Alaska Department of Health and Social Services*, 2020 WL 1933651 (Alaska 2020), parents of an Indian child appealed the termination of their parental rights, arguing that the Alaska Department of Health and Social Services Office of Children's Services (OCS) failed to meet its obligation under the **Indian Child Welfare Act** to make "active efforts" to prevent the breakup of an Indian family. After the Alaska Supreme Court had previously remanded the case, the trial court conducted additional proceedings and made supplemental findings reaffirming the termination of parental rights. Reviewing the case again, the Alaska Supreme Court affirmed, concluding that the OCS had "narrowly met its active efforts burden, particularly in light of the parents' unwillingness to cooperate and to maintain regular contact with OCS." The Court also concluded that the court did not commit plain error by qualifying an ICWA expert and determining that returning to the custody of either parent likely would cause the child serious emotional or physical damage.

In *Osceola Blackwood v. Picayune Rancheria of Chukchansi*, 2020 WL 1919583 (Cal. App. 2020), Osceola Blackwood Ivory Gaming Group LLC (Osceola) sued Picayune Rancheria of Chukchansi Indians (Tribe), and the Chukchansi Economic Development Authority and various related officials (collectively Chukchansi), alleging that the defendants fraudulently prevented the execution of a management agreement related to the operation of the Chukchansi Gold Resort and Casino (the casino), resulting in the loss of millions of dollars to Osceola. Osceola relied on an express waiver of sovereign immunity in its proposed, but not NIGC-approved, management contract with Chukchansi. The trial court dismissed on the ground of **tribal sovereign immunity** and the California Court of Appeals affirmed: "The NIGC has not approved the Agreement. Under the plain language of the document, then, the Agreement has not become binding, the effective date has not been set, and thus no waiver of sovereign immunity specifically dependent upon the start of the Agreement has become effective. In this sense, this case is fundamentally different from those cited by Osceola, including cases like *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma* (2001) 532 U.S. 411. In none of the cases cited by Osceola finding a valid waiver of sovereign immunity was there a condition precedent to the initiation of the waiver on par with what exists here. While certain ratifying requirements can be overcome if the intent of a tribe to waive sovereign immunity is clear, we have found no case that suggests such a waiver can be dependent upon the existence of an enforceable contract and at the same time be binding without the presence of an enforceable contract. Yet that is exactly what Osceola would have us hold here."

In *Swinomish Indian Tribal Community v. BNSF Railway Company*, 951 F.3d 1142 (9th Cir. 2020), BNSF Railway Co.'s (BNSF) predecessor had built a railroad line across the reservation of the Swinomish Tribe in 1889 without the Tribe's permission. In the 1970s, the Tribe and the United States sued BNSF. Under a Settlement Agreement and an Easement Agreement, BNSF applied for and obtained a **right-of-way** (ROW) across the Reservation, issued by the Department of the Interior under the Indian Right of Way Act of 1948, incorporating the terms of the Easement Agreement. BNSF agreed to a daily maximum of one train in each direction, with a maximum number of rail cars, unless the Tribe agreed in writing to an increase, and also agreed to submit to the Tribe annual reports of the cargo carried by the trains. After learning that BNSF was violating the Agreement by running more trains and cars across the Reservation than permitted by its terms. BNSF had also failed for many years to submit to the Tribe the required annual cargo reports. When BNSF refused to comply with the Agreement, the Tribe sued. BNSF argued that the Agreement was preempted by 49 U.S.C. § 10501(b) of the Interstate Commerce Commission Termination Act (ICCTA), which gives the Surface Transportation Board broad jurisdiction over rail facilities and provides: "Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." The district court disagreed, holding that the ICCTA did not defeat the Tribe's right to an injunction. The Ninth Circuit Court of Appeals affirmed: "The specific question before us is whether § 10501(b) of the ICCTA repeals the Indian Right of Way Act. For several reasons, we conclude that it does not. First, the ICCTA's preemption applies to "regulation" of railroads. … Right-of-way easements under the Indian Right of Way Act are voluntary agreements between a tribe and a railroad,

approved by the United States in its role as trustee, that grant the railroad access to a tribe's land subject to certain conditions. While it is conceivable that a right-of-way issued under the Indian Right of Way Act could operate as a 'regulation' within the meaning of the ICCTA, the Easement Agreement in this case has not resulted in such a right-of-way; nor have the parties pointed to a right-of-way issued under the Indian Right of Way Act that could operate in such a way. … Second, nothing in the text of the ICCTA or its legislative history indicates that Congress intended that the ICCTA repeal the Indian Right of Way Act or remedies thereunder. … We hold that the Interstate Commerce Commission Termination Act does not repeal the Indian Right of Way Act and does not defeat the Tribe's right to enforce conditions in a right-of-way easement agreement issued pursuant to the Right of Way Act. We hold further that the ICCTA does not abrogate the Treaty of Point Elliott and the Tribe's treaty-based federal common law right to exclude and condition a third party's presence on, and use of, Reservation lands. Finally, we hold that the Tribe has the right to pursue injunctive relief to enforce the terms of the Easement Agreement."

In *Burt Lake Band of Ottawa and Chippewa Indians v. Bernhardt*, 2020 WL 1451566 (D.D.C. 2020), Burt Lake Band of Ottawa and Chippewa Indians (Band) had applied for **federal recognition** under the Part 83 regulations in 1985 and been denied in 2006. In 2015, the Department of the Interior (DOI) considered, but ultimately rejected an amendment to the Part 83 regulations that would have permitted previously rejected tribes to re-apply under certain limited circumstances. The Band sued DOI officials under the Administrative Procedures Act (APA) and the Due Process and Equal Protection Clauses of the Fifth Amendment. On cross motions for summary judgment, the Court held that DOI's decision was arbitrary and capricious and granted the Band's motion under the APA without reaching the constitutional issues: "the Court finds that the Department's ban on re-petitioning in the updated Part 83 regulation is neither well-reasoned nor rationally connected to the facts in the record. For that reason, the ban will be vacated as arbitrary and capricious and the matter will be remanded to the Department of the Interior."

In *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 2020 WL 1441923 (D.D.C. 2020), the Standing Rock, Cheyenne River and Yankton Sioux Tribes and other plaintiffs sued the Army Corps of Engineers challenging its determination that construction of the Dakota Access Pipeline under the Missouri River would have no significant environmental impacts and that an environmental impact statement was, therefore, not required under the **National Environmental Policy Act** (NEPA). The Court had previously remanded to the Army Corps to address certain limited issues. The plaintiffs challenged the sufficiency of the Army Corps' renewed findings under the NEPA. The district court agreed and remanded to the Army Corps for preparation of an EIS: "[T]oo many questions remain unanswered. Unrebutted expert critiques regarding leak-detection systems, operator safety records, adverse conditions, and worst-case discharge mean that the easement approval remains 'highly controversial' under NEPA. As the Court thus cannot find that the Corps has adequately discharged its duties under that statute, it will remand the matter to the agency to prepare an Environmental Impact Statement."

In *Cayuga Nation v. Tanner*, 2020 WL 1434157 (N.D. N.Y. 2020), the Cayuga Nation engaged in Class II gaming activity under the **Indian Gaming Regulatory Act** on fee lands within its 1794 Canandaigua Treaty reservation lands, which had been alienated in violation of the Nonintercourse Act. The Village of Union Springs sought to enforce its anti-gambling ordinance against the Tribe, citing the Supreme Court's decision in *City of Sherrill v. Oneida Nation* to argue that the Tribe could not revive its governmental authority on lands alienated long ago. On cross motions for summary judgment, the district court held that the IGRA preempted the Village's anti-gambling ordinance and that the Village's counterclaims against the Tribe were precluded by the Tribe's sovereign immunity.

In *Cherokee Nation v. Bernhardt*, 2020 WL 1429946 (N.D. Okla. 2020), the Cherokee Nation of Oklahoma (Nation) and Cherokee Nation Entertainment, LLC (CNE), the Nation's gaming enterprise, sued Department of the Interior officials under the Administrative Procedures Act, challenging DOI's decision to take two acres into trust for the Keetoowah Band of Cherokee Indians in Oklahoma Corporation (UKB Corporation). Among other grounds, the Nation argued that the property could not be the "former reservation" of the UKB Corporation for purposes of determining "Indian land" status under the **Indian Gaming Regulatory Act** (IGRA) because the DOI had already determined the area to be the Nation's former reservation. The district court enjoined the DOI from taking the parcel into trust for gaming purposes, holding that (1) it did not matter, for purposes of the *Carcieri* rule, whether UKB Corporation was under federal jurisdiction at the time of the enactment of the Indian Reorganization Act because the DOI could rely

instead on the Oklahoma Indian Welfare Act as authority to take land into trust, (2) DOI did not abuse its discretion by taking land into trust on behalf of the UKB Corporation rather than the UKB government, notwithstanding alleged non-compliance with DOI's **fee-to-trust** Handbook, and (3) potential jurisdictional complications and administrative challenges did not preclude DOI's acquisition, but (4) DOI's determination that the parcel fell within the "former reservation" exception under IGRA was an abuse of discretion because the UKB Corporation had never had a reservation.

In *Wilhite v. Littlelight*, 2020 WL 1332231 (D. Mont. 2020), Wilhite had been employed as a nurse at the Awe Kualawaache Care Center (Care Center), a clinic operated by the Crow Tribe under an Indian Self-Determination Act contract and serving members of the Crow and Northern Cheyenne tribes. After her employment was terminated and she was locked out of her Tribe-provided housing, purportedly for maintaining a firearm in her vehicle, Wilhite sued the Care Center, contending that she was really fired for reported patient abuse (Wilhite I). When the suit was dismissed on **sovereign immunity** grounds, she sued members of the Care Center's board of directors individually under the Racketeer Influenced and Corrupt Organizations Act (RICO) and other laws. The defendants moved to dismiss, arguing that her suit was barred by res judicata and that Wilhite's remedy, if any, lay under the **Federal Tort Claims Act** (FTCA). The Court disagreed and denied the motion, holding that the Attorney General had not certified that the defendants' actions were within the scope of their employment for purposes of the FTCA and that the issue was not addressed in Wilhite's first suit: "The Westfall Act also outlines the procedure for invoking the immunity provided by the FTCA, and for substituting the United States as the proper party in the action. When a federal employee is sued for a wrongful or negligent act, the employee must deliver copies of the summons and complaint to a supervisor to be forwarded to the local United States Attorney, the Attorney General, and to the head of his employing federal agency. … The Attorney General then certifies whether the employee was acting within the scope of his or her employment at the time of the event giving rise to the claim. … Nothing in Judge Watters' prior orders in *Wilhite I* address the test set forth in *Shirk*. Judge Watters did not address the scope of the 638 contract, and whether any of the Defendants were carrying out the contract at the time of the incident alleged in the complaint. As such, *Wilhite I* does not resolve the issue presented here, which is whether Defendants, as tribal employees, are entitled to immunity under the Westfall Act."

In *Snoqualmie Indian Tribe v. State of Washington*, 2020 WL 1286010 (W.D. Wash. 2020), the Snoqualmie Tribe, which the federal government had acknowledged in 1997, sued the State of Washington seeking a declaration that the Tribe retained **off-reservation fishing rights** under Article V of the 1855 Treaty of Point Elliott, which reserves to the signatory tribes the "right of taking fish at usual and accustomed grounds and stations … in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands." The court granted the State summary judgment on the ground that the Tribe's treaty rights had been previously adjudicated in the Boldt determination: "Judge Boldt's decision, as affirmed by the Ninth Circuit, was a final judgment concluding that the Snoqualmie are not political successors to the Treaty of Point Elliott signatories. That issue is dispositive for all claims in this case."

In *Yukon-Kuskokwim Health Corporation v. United States*, 2020 WL 1275726 (D. D.C. 2020), Congress in 1992 had enacted a law requiring the Department of the Interior (DOI) and the Air Force to address environmental issues on a parcel of land and transfer it to the Yukon-Kuskokwim Health Corporation (YKHC), a non-profit corporation established by fifty-eight federally recognized Alaskan Indian Tribes providing healthcare services to 30,000 persons in a 75,000 square mile area, for **housing** purposes. YKHC sued in 2017 after the government failed to comply with the statute. The government moved to dismiss or for summary judgment on the ground that the statute of limitations had expired. The district court denied the motion: "Defendants here had a clear statutory mandate to clean up and convey the property by September 30, 1993; they ignored the deadline for over twenty-five years, and they concede that they have not fulfilled their statutory obligation. … Thus, the court concludes that Public Law 102-497 imposes a 'continuing obligation to act' on Defendants such that they 'continue to violate it until that obligation is satisfied.' … Therefore, YKHC pleads a timely claim."

In *Sault Ste. Marie Tribe of Chippewa Indians v. Bernhardt*, 2020 WL 1065406 (D.D.C. 2020) the Michigan Indian Land Claims Settlement Act (MLCSA), enacted by Congress in 1997, had established a trust fund for the Sault Ste.

Marie Tribe (Tribe) from money judgments awarded under the Act and provided that (i) interest and other investment income from this fund could be used "for consolidation or enhancement of tribal lands," (ii) that "lands acquired using amounts from interest or other income of the [trust fund] shall be held in trust by the Secretary for the benefit of the tribe," and that (iii) "the approval of the Secretary for any payment or distribution from the principal or income shall not be required and the Secretary shall have no trust responsibility for the investment, administration, or expenditure of the principal or income of the trust fund." The Tribe requested that the U.S. Department of the Interior (Department) **take into trust** the "Sibley Parcel," which the Tribe intended to use for gaming under the Indian Gaming Regulatory Act (IGRA), several hundred miles from its reservation. The Department refused on the ground that the tribe had not shown how the parcels would enhance the value of its existing landholdings and that parcels cannot be consolidated unless they are contiguous. The Tribe sued in federal court. Two Michigan tribes and several commercial casinos intervened. On motions for summary judgment, the court held that the Department had no authority to deny the application to take land into trust based on its determination that the acquisition of the Sibley Parcel would not enhance the Tribe's lands. Moreover, the Sibley Parcel would, according to the court, enhance the Tribe's reservation lands. The Department's sole authority, according to the court, was to determine whether trust funds had been used for the acquisition and the case was remanded for consideration of that issue.

In *Patterson v. Calderin*, 2020 WL 1044008 (D. Nev. 2020), Nevada prison officials, acting under official policy, denied Patterson, a non-Indian inmate, access to sweat lodge and pipe ceremonies because she lacked tribal membership. Patterson sued under 42 U.S.C. § 1983 for alleged violations of the Religious Land Use and Institutionalized Persons Act of 2000 (**RLUIPA**), and her First Amendment, Fourteenth Amendment, and state-law rights. The district court denied the defendants' motion to dismiss: "Patterson states a colorable RLUIPA claim for injunctive relief. Based on the allegations, although Patterson is currently able to participate in her Native American religion and ceremonies, the policy that prevented her from participating in her religion are still active prison regulations. Based on the allegations, although prison officials are choosing to ignore the stated regulations, Patterson argues that prison officials could decide to enforce them at any time. … Patterson states a colorable free-exercise of religion claim against Calderin, Williams, and Doe grievance responder. She alleges that these actors initially prohibited her from practicing her chosen religion and accessing the Native American religious grounds. … Patterson states a colorable equal-protection claim. She alleges that prison officials intentionally prevent non-ethnic Native Americans from declaring their religion as American Indian/Native American and from participating in Native American religious practices. These allegations are sufficient at this preliminary screening stage to state a colorable claim."

In *North Carolina v. Nobles*, 2020 WL 967439 (N.C. 2020), Nobles was convicted in state court of murder Preidt on land held in trust for the Eastern Band of Cherokee Indians (EBCI). Nobles, a descendant of a tribal member, challenged his conviction on the ground that, as an Indian charged with a crime in Indian country, he was subject to federal jurisdiction under the **Major Crimes Act**. The North Carolina Supreme Court affirmed the conviction: "To qualify as an Indian under the *Rogers* test, a defendant must (1) have 'some Indian blood,' and (2) be 'recognized as an Indian by a tribe or the federal government or both.' … Under the *St. Cloud* test, a court considers the following factors: 1) enrollment in a tribe; 2) government recognition formally and informally through providing the person assistance reserved only to Indians; 3) enjoying benefits of tribal affiliation; and 4) social recognition as an Indian through living on a reservation and participating in Indian social life. … In essence, the trial court's findings show that (1) defendant is not enrolled in any tribe; (2) he received limited government assistance from the EBCI in the form of free healthcare services on several occasions as a minor; (3) as a child, he attended a Cherokee school that accepted both Indian and non-Indian students; (4) he lived and worked on the Qualla Boundary for approximately fourteen months as an adult; (5) his participation in Indian social life was virtually nonexistent and his demonstrated celebration of his cultural heritage was at best minimal; (6) he has never previously been subjected to tribal jurisdiction; and (7) he did not hold himself out as an Indian. The trial court therefore properly concluded that defendant was not an Indian for purposes of the IMCA. Accordingly, we affirm the court's denial of his motion to dismiss."

In *Min Zhang v. Grand Canyon Resort Corporation*, 2020 WL 1000608 (C.D. Cal. 2020), Zhang sued Hwal'bay Bay Enterprises, Inc., d/b/a Grand Canyon Resort Corporation (GCRC), a wholly-owned tribal corporation of the Hualapai Tribe. Applying the multifactor "arm of the tribe" test prescribed by the Ninth Circuit in *White v. Univ. of California* and the Tenth Circuit in *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d

1173 (10th Cir. 2010), the Court dismissed on **sovereign immunity** grounds: "GCRC was originally established by virtue of funds directly from the Tribe. … GCRC's financial records are subject to a monthly audit by the Tribal Council. … Although there is no provision in the Plan specifically stating revenues flow from GCRC to the Tribe, the Tribe is invested in the GCRC's financial welfare as its sole shareholder and controller. Additionally, as one of its purposes is to provide economic opportunities to Tribe members, GCRC's continued operation directly benefits the tribe by employing its members. Considering all five elements of the *Breakthrough* Test, the Court finds that every elements [sic] weighs in favor of Defendant's claim of sovereign immunity. The Court concludes that GCRC is an 'arm of the tribe' under *White*, 765 F.3d at 1025, and is therefore entitled to sovereign immunity."

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