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Indian Nations Update

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Supreme Court Holds that Creek Reservation is Intact

The U.S. Supreme Court ruled July 9, 2020, in *McGirt v. Oklahoma*, 2020 WL 3838063 (2020), that the reservation established for the Creek Nation under 19th century treaties survives today, and, despite Oklahoma's century-long assertion of criminal jurisdiction, McGirt, a member of the Seminole Nation, could be tried for his criminal offenses only by the federal government under the Major Crimes Act. In an opinion authored by Justice Gorsuch and joined by Justices Ginsburg, Breyer, Sotomayor and Kagan, the Court, citing the well-established standards of *Solem v. Bartlett* and its progeny, held that the Creek Nation Reservation, once established, presumptively persisted and that, notwithstanding allotment of the reservation and multiple acts that reduced the authority of the Creek Nation government, Congress had failed to express a clear intent to diminish or disestablish the reservation:

> Missing in all this, however, is a statute evincing anything like the "present and total surrender of all tribal interests" in the affected lands. Without doubt, in 1832 the Creek "cede[d]" their original homelands east of the Mississippi for a reservation promised in what is now Oklahoma.1832 Treaty, Art. I, 7 Stat. 366. And in 1866, they "cede[d] and convey[ed]" a portion of that reservation to the United States. Treaty With the Creek, Art. III, 14 Stat. 786. But because there exists no equivalent law terminating what remained, the Creek Reservation survived allotment.
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> … For years, States have sought to suggest that allotments automatically ended reservations, and for years courts have rejected the argument. Remember, Congress has defined "Indian country" to include "all land within the limits of any Indian reservation . . . notwithstanding the issuance of any patent, and, including any rights-of-way running through the reservation." 18 U.S.C. §1151(a). So the relevant statute expressly contemplates private land ownership within reservation boundaries. Nor under the statute's terms does it matter whether these individual parcels have passed hands to non-Indians. To the contrary, this Court has explained repeatedly that Congress does not disestablish a reservation simply by allowing the transfer of individual plots, whether to Native Americans or others. See *Mattz*, 412 U. S., at 497 ("[A]llotment under the . . . Act is completely consistent with continued reservation status");
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> The federal government issued its own land patents to many homesteaders throughout the West. These patents transferred legal title and are the basis for much of the private land ownership in a number of States today. But no one thinks any of this diminished the United States's claim to sovereignty over any land. To accomplish that would require an act of cession, the transfer of a sovereign claim from one nation to another. 3 E. Washburn, American Law of Real Property

> *521–*524. And there is no reason why Congress cannot reserve land Supreme Court holds Creek Nation Reservation undiminished for tribes in much the same way, allowing them to continue to exercise governmental functions over land even if they no longer own it communally. Indeed, such an arrangement seems to be contemplated by §1151(a)'s plain terms. Cf. *Seymour*, 368 U. S., at 357–358.

While *McGirt* relates to criminal jurisdiction, the Indian country jurisdictional implications are broad and important. Tribes will find Justice Gorsuch's reference to tribes "continu[ing] to exercise governmental functions over land even if they no longer own it communally" helpful in responding to attempted regulatory incursions by state and municipal governments.

Other Selected Court Decisions

In *Confederated Tribes and Bands of Yakama Nation v. Yakima County*, 2020 WL 3495307 (9th Cir. 2020), the State of Washington in 2014 had **retroceded its "full" Public Law 280 jurisdiction** with respect to Compulsory School Attendance; Public Assistance; Domestic Relations; and Juvenile Delinquency" and its remaining Public Law criminal and civil jurisdiction "in part," back to the United States and the Tribe, reserving jurisdiction over matters "involving non-Indian defendants and non-Indian victims." In a cover letter to the Department of Interior (DOI) forwarding Washington's Proclamation of Retrocession, Governor John Inslee had advised that "and" in this context was intended to mean "and/or," and asked DOI to make this intent clear in its notice accepting the retrocession Proclamation. DOI's published acceptance simply acknowledged that the United States was accepting "partial civil and criminal jurisdiction over the Yakama Nation which was acquired by the State of Washington under [Public Law 280]," but did not address the Governor's proposal. When the matter came to a head over a reservation arrest, the district court concluded that the disjunctive interpretation was correct, leaving the State with jurisdiction if any party is a non-Indian. The Ninth Circuit affirmed: "[O]nly one interpretation of the Proclamation is plausible because only one interpretation gives meaning to every word. We therefore conclude, based on the Proclamation as a whole, and to give the phrase 'in part' meaning, that the word 'and' in the phrase 'non-Indian defendants and non-Indian victims' in Paragraphs 2 and 3 should be interpreted as the disjunctive 'or.' Interpreted as such, the State retained criminal jurisdiction in Paragraphs 2 and 3 over cases in which any party is a non-Indian."

In *Solenex LLC v. Bernhardt*, 2020 WL 3244004 (D.C. Cir. 2020), the Secretary of the Department of the Interior (Secretary) in 2016 had canceled Solenex's oil and gas lease of a portion of the "Two Medicine Area," a region of unique **cultural, religious, spiritual, historical, and environmental significance** to the Blackfeet Tribe, citing DOI's failure to conduct the proper pre-lease analyses required under the National Environmental Policy Act (NEPA) and National Historic Preservation Act (Historic Preservation Act). Solenex sued. The district court held that the amount of time that had elapsed between the Lease's issuance and its cancellation violated the Administrative Procedure Act (APA) and that the Secretary failed to consider Solenex's reliance interests before cancelling the Lease. The D.C. Circuit reversed, holding that "delay by itself is not enough to render the Lease cancellation arbitrary or capricious" and that "the Secretary did consider, and in fact compensated, Solenex's identified reliance interests."

In *Winnemucca Indian Colony v. United States*, 2020 WL 3170850, Unpublished (9th Cir. 2020), the Wasson faction and the Ayer faction disputed their claims to lead the Winnemucca Indian Colony. The district court ruled for the Wasson faction but the Ninth Circuit vacated and remanded with instructions to dismiss for lack of **subject matter jurisdiction** under the Administrative Procedure Act in view of the lack of a final administrative decision: "There was no final agency action here because at the time the complaint was filed, the Bureau of Indian Affairs (BIA) had not reached a final decision on whether it would recognize any group as the Colony's tribal council, or whether any such recognition was warranted. Instead, the BIA was in the middle of complying with a remand order from the Interior Board of Indian Appeals (IBIA) to answer those very questions. Any decision by the BIA would have been appealable to the IBIA, further demonstrating that the Wasson faction failed to exhaust administrative remedies to secure a final decision. … The district court erred in concluding that further exhaustion of remedies before the BIA and IBIA would be futile. Futility is among the 'exceptional circumstances' when exhaustion of administrative remedies is not required. … Exhaustion is futile where continuing administrative proceedings 'would clearly be of no avail,' … where there is 'certainty of an adverse decision,' … or where there is 'undisputed evidence of administrative bias' …. In this case,

and at the time the Wasson faction filed its complaint, the BIA was complying with the IBIA's remand order and had sought briefing and evidence in an effort to determine whether it needed to recognize an interim tribal government and, if so, which faction it would recognize. Nothing in the record indicates that allowing the BIA to continue with its process would have been futile, that there was certainty of a decision adverse to the Wasson faction, or that the BIA was biased." (Citations omitted)

In *United States v. Grote*, 2020 WL 2843880 (2d Cir. 2020), Tucker and Muir, his attorney, working with several Indian tribes who received a percentage of profits earned by Tucker and Muir, made **loans over the internet** to non-Indians residing outside of Indian country at rates of interest exceeding those permitted under New York law. They were criminally convicted in the Federal District Court for the Southern District of New York on three counts of conducting an enterprise's affairs through the collection of unlawful usurious debt, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), one count of conspiracy to do the same, one count of wire fraud and one count of wire fraud conspiracy, three counts of money laundering and conspiracy to launder money, and five counts of making false statements in disclosures required by the Truth in Lending Act (TILA). The jury rejected the defendants' arguments that because the lending business was operated by tribes, the loans were not subject to state usury laws, and that even if the loans were unlawful, the defendants had a good faith belief that they were lawful by virtue of the tribal involvement, so that their conduct was not "willful, the standard for criminal liability." The Second Circuit Court of Appeals affirmed: "We reject Defendants' argument that the loans were not 'unlawful debt' as defined by RICO because, due to principles of tribal sovereign immunity, state usury laws are not enforceable against tribal loans. The district court correctly concluded (in its opinion denying Defendants' motion to dismiss the indictment) based on the facts alleged in the indictment—and subsequently demonstrated at trial—that the Tribes' involvement in the lending business was a sham, so that principles of tribal sovereign immunity had no application to Tucker's non-tribal business."

In *Club One Casino, Inc. v. Bernhardt*, 959 F.3d 1142 (9th Cir. 2020), plaintiff cardroom operators sued Department of Interior officials (DOI), challenging the DOI's **acquisition in trust** of certain property (Madera Parcel) for the North Fork Rancheria of Mono Indians (Tribe) and its approval of Class III gaming on the acquired property under Secretarial procedures prescribed under the Indian Gaming Regulatory Act (IGRA) after DOI concluded that the State had refused to negotiate a gaming compact in good faith. Plaintiffs argued that (1) the Secretarial Procedures were issued in violation of IGRA, as the Tribe purportedly never acquired jurisdiction or exercised governmental power over the Madera Parcel; and (2) assuming the Tribe acquired jurisdiction and exercised governmental power, Section 5 of the Indian Reorganization of 1934 (IRA), the source of the DOI's fee to trust acquisition, violates the Tenth Amendment by reducing the State's jurisdiction over land within its territory without its agreement. The district court granted the DOI summary judgment and the Ninth Circuit affirmed: "[W]hile there is no Ninth Circuit precedent precisely on point, other circuits have logically concluded that, as a matter of law, the federal government confers tribal jurisdiction over lands it acquires in trust for the benefit of tribes. We agree. … As a general matter, too, off-reservation trust land like the Madera Parcel is 'Indian country' with all the jurisdictional consequences that attach to that status. Federal law defines 'Indian country,' in part, as 'all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state.' 18 U.S.C. § 1151(b). Off-reservation trust land set aside for Indian use is Indian country under subsection (b) of the Indian country statute. Off-reservation trust land is, by definition, land set aside for Indian use and subject to federal control. … As to governance, the Tribe most certainly exercises governmental power over the Madera Parcel. … [T]he Tribe entered into 'enforceable and binding' agreements with the County of Madera and the City of Madera for the provision of law enforcement and fire protection services at the Madera Parcel. …The Tribe's jurisdiction over the Madera Parcel operates as a matter of law and the Tribe clearly exercised governmental power when it entered into agreements with local governments and enacted ordinances concerning the property. … The Secretary's acquisition of land in trust for the benefit of a tribe does not result in the creation of a federal enclave or violate the Enclave Clause. … State jurisdiction is ... only reduced, and not eliminated, when the federal government takes land into trust for a tribe. Because federal and Indian authority do not wholly displace state authority over land taken into trust pursuant to § 5 of the IRA, the Enclave Clause poses no barrier to the entrustment that occurred here. … The Tenth Amendment to the Constitution reserves to the states those powers not expressly delegated to the federal government. The

powers delegated to the federal government and those reserved to the states by the Tenth Amendment are mutually exclusive. … Because Congress has plenary authority to regulate Indian affairs, contrary to Plaintiffs' argument, IRA does not offend the Tenth Amendment." (Quotations and citation omitted.)

In *Confederated Tribes of the Chehalis Reservation v. Mnuchin*, 2020 WL 3489479 (D.D.C. 2020), tribes had challenged a determination by the Department of the Treasury that **Alaska Native Corporations (ANCs) were "tribal governments"** for purposes of Title V of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) and, therefore, eligible for a share of the $8 billion appropriated by Congress to help tribal governments combat the COVID-19 pandemic. The CARES Act defined "Tribal government" as "the recognized governing body of an Indian tribe" and provided that "'Indian Tribe' has the meaning given that term" in section 4(e) of the Indian Self-Determination and Education Assistance Act (ISDEAA). The ISDEAA, in turn, defined "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 … which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." Acknowledging that ANCs were not eligible for federal programs because of their status as Indians, the court nonetheless concluded that Congress intended the qualifying clause to apply only to "any Indian tribe, band, nation, or other organized group or community" and to Alaska Native Villages, but not to ANCs. Discounting the series qualifier rule that "[w]hen there is a straightforward, parallel construction that involves all nouns or verbs in a series,' a modifier at the end of the list 'normally applies to the entire series," the Court rested its conclusion on the rule against superfluity: "[T]he series-qualifier canon runs headlong into another canon of interpretation: the rule against superfluity. It is 'the 'cardinal principle' of interpretation that courts 'must give effect, if possible, to every clause and word of a statute.' … As a result, courts are "reluctant to treat statutory terms as surplusage in any setting…. Such reluctance is particularly apt here, where adopting Plaintiffs' construction would render Congress's purposeful inclusion of ANCs in the ISDEAA definition wholly superfluous. … ANCs would become wholly superfluous under the Confederated Tribes' preferred reading, because all agree (except the ANCs themselves) that ANCs never have, and almost certainly never will, satisfy the eligibility clause. ANCs cannot be recognized as 'eligible for the special programs and services provided by the United States to Indians *because of their status as Indians*.'" (Citations and quotations partially omitted.) "No ANC has ever been federally recognized by the United States as an Indian tribe under the List Act because no ANC is 'recognize[d] to be eligible for the special programs and services provided by the United States to Indians because of [its] status as Indians.' The court agrees that the nearly identically worded eligibility clauses in both statutes are terms of art that convey the principle of federal recognition, and thus reading the eligibility clause to apply to ANCs would render as surplusage their listing in the ISDEAA definition of 'Indian tribe.'"

In *Cadet v. Snoqualmie Casino*, 2020 WL 3469222 (W.D. Wash. 2020), the federal district court dismissed tort claims filed against Snoqualmie Casino by a patron on **sovereign immunity** grounds. Applying the five-part test prescribed by the Ninth Circuit in *White v. Univ. of Cal.*, 765 F.3d 1010 (9th Cir. 2014) (relying on *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173 (10th Cir. 2010), the court determined that the casino was an arm of the tribe entitled to share its immunity from suit and that the Tribe's Tort Claims Act waived immunity solely for suits filed in tribal court.

In *Mashpee Wampanoag Tribe v. Bernhardt*, 2020 WL 3034854 (D.D.C. 2020), the Department of Interior (DOI) in 2015 had taken **fee land into trust** (FTT) for gaming purposes for the Mashpee Wampanoag Tribe (Tribe) under Section 5 of the Indian Reorganization Act (IRA) and determined that the property was Indian land for purposes of the Indian Gaming Regulatory Act (IGRA). DOI had recognized the Tribe in 2007. DOI relied on an interpretation of Section 5 that avoided the Supreme Court's decision in *Carcieri v. Salazar*, 555 U.S. 379, 381-82 (2009), limiting FTT eligibility to tribes under federal jurisdiction in 1934. In 2018, the Trump Administration issued a Record of Decision (ROD) determining that the Tribe was not under federal jurisdiction for purposes of the IRA under a DOI Solicitor M-Opinion issued in 2014. The Tribe sued under the Administrative Procedure Act. Meanwhile, in a separate lawsuit, persons opposed to the Tribe sued the DOI to challenge its 2015 acquisition, resulting in a 2020 decision by the First Circuit (*Littlefield* Decision) rejecting the DOI's rationale for finding that the Supreme Court's *Carcieri* decision did not bar the 2015 acquisition. The First Circuit had remanded for further consideration. In the instant case, the DOI informed the Tribe, post-*Littlefield* Decision, that it would take steps immediately to take the

properties acquired in 2015 out of trust status, revoke its reservation proclamation and revoke its gaming eligibility determination. In 2020, DOI replaced the 2014 M-Opinion with a memorandum that imposed a stricter standard for determining whether a tribe was under federal jurisdiction for purposes of IRA FTT acquisitions. On the Tribe's motion, the Court granted summary judgment on the Tribe's APA claim, enjoined the DOI from taking the property out of trust and remanded to DOI for further consideration under the 2014 M-Opinion: "[S]ome actions may be unambiguous evidence that a tribe was under federal jurisdiction at a certain point in time, while other actions must be viewed in concert with other probative evidence. The Secretary could find that a tribe was under federal jurisdiction before 1934 after viewing all the probative evidence 'in concert,' without the tribe having any unambiguous evidence. It is clear from the 2018 ROD that the Secretary only evaluated each piece of evidence in isolation to see whether it was unambiguous – whether the evidence 'in and of itself' demonstrated that the Tribe was under federal jurisdiction. As articulated by the Secretary, the conclusions about each piece of evidence evaluated in the 2018 ROD show that the Secretary evaluated each piece of evidence in isolation."

In *Booker v. Plain Green LLC and Baker*, 2020 WL 3056586 (M.D. Fla. 2020), Baker, a non-Indian Florida resident, had sued Plain Green, an **internet lender** affiliated with the Chippewa Cree Tribe of Rocky Boy's Indian Reservations, in Florida small claims court, alleging violations of Florida usury laws. Plain Green removed the case to federal court on the ground that the court had "**federal question jurisdiction**," i.e., "the federal doctrine of tribal sovereign immunity." The Court remanded to the state small claims court: "[T]his is yet another tribal predatory lending case, in which the most vulnerable and unsophisticated of consumers is induced to incur predatory internet payday loans, at shocking interest rates, (here alleged, over 378%) by an entity designed to circumvent usury laws through a purported Indian tribal affiliation. … Tribal immunity may provide a federal defense to the plaintiff's claims … but it has long been settled that the existence of a federal immunity to the claims asserted … does not convert a suit otherwise arising under state law into one which, in the statutory sense, arises under federal law." (Internal quotations, citations and emendation omitted.)

In *Mdewakanton Band of Sioux in Minnesota v. Bernhardt*, 2020 WL 2800615 (D.D.C. 2020), plaintiffs, descendants of a person named Robertson allegedly entitled to land on the Lake Pepin reservation in the mid-19th century, identifying themselves as "Mdewakanton Band of Sioux in Minnesota" but distinct from the federally-recognized Shakopee Mdewakanton Sioux Community of Minnesota, petitioned the federal court for a mandamus order directing Department of Interior officials (DOI) to list them as a **federally recognized Indian tribe**, arguing that the United States had already recognized the Mdewakanton Band through various treaties and congressional acts. The court dismissed for failure to exhaust administrative remedies: "Interior's Part 83 provides the procedures for an Indian group to seek formal federal recognition. See 25 C.F.R. § 83.1 et seq. Federal 'recognition' of an Indian tribe is a term of art that conveys a tribe's legal status vis-à-vis the United States–it is not an anthropological determination of the authenticity of a Native American Indian group." (Quotation and citation omitted.)

In *Howard v. MMMG*, LLC, 2020 WL 3443832 (Fla. App. 2020), Howard was a member of the board of directors of the Seminole Tribe of Florida, Inc. (STOFI), a tribal corporation formed by the Seminole Tribe of Florida (Tribe) and chartered by the United States Department of the Interior under section 17 of the Indian Reorganization Act. A tribal ordinance provided that STOFI and its agents should be immune from suit under the Tribe's **sovereign immunity**. In 2011, STOFI and a company owned by non-tribal member Michael Wax entered into a joint venture agreement and formed MMMG, LLC (Joint Venture) to "provide promotional, advertising and marketing services" to STOFI. Wax later sued STOFI and other tribal members, including Howard, individually, alleging that they acted outside the scope of their authority by directing STOFI to divert its business away from the Joint Venture to Redline Media Group, Inc. (Redline), a company owned by fellow tribe member Sallie Tommie. The state circuit court dismissed all claims against STOFI on the ground of sovereign immunity but denied the motion to dismiss as to the STOFI officials, citing disputed factual allegations on the issue of whether they were acting within the scope of their duties. Wax then filed a new action alleging that STOFI officials dishonored the Joint Venture agreement by directing STOFI to divert business. The court granted summary judgment to other STOFI officials but not Howard, concluding that a factual issue remained as to whether he benefitted personally by diverting business. The Florida Court of Appeals reversed and ordered dismissal of the claims against Howard based on **sovereign immunity**: "Howard and the other STOFI officials could have directed STOFI's business affairs as Mobile Mike alleged only by acting in their official capacities as STOFI

board members. The only evidence put forth that Howard acted outside the scope of his authority for personal gain is the Wax affidavit's assertion that 'Larry Howard told me that if he helped kill the deal that 'my sister would take care of me.' The circuit court departed from the essential requirements of law by denying immunity based on the Wax affidavit because it required impermissible inference stacking to conclude that the phrase 'take care of' meant that Howard received an illicit personal benefit and acted outside his authority. … The Wax affidavit failed to establish that Howard received an improper personal benefit. Even when he was questioned directly what he thought 'take care of' means, Wax testified that he did not know. The Wax affidavit did not create a disputed issue of material fact to defeat summary judgment as there is no evidence that Howard acted outside the scope of his authority. Mobile Mike's claims against Howard relate to his acts in an official capacity and actions taken through his administrative role within STOFI."

In *Commissioner v. Polite*, (Unreported) 2020 WL 2829740 (Sup. Ct. Suffolk County, NY 2020), the State of New York and the Commissioner of the State's Department of Transportation (Transportation Commissioner) sued to enjoin the construction and operation of two sixty-foot-tall electronic billboards within, and on opposite sides of, the State's right of way for Route 27, Sunrise Highway, where it bisects a tract, or tracts, of land owned and occupied by the Shinnecock Indian Nation (Nation) in the Town of Southampton. The defendants, officials and Trustees of the Nation and their commercial partners, challenged the state's **jurisdiction** to regulate the property. The court denied the plaintiffs' motion for a preliminary injunction, holding that (1) although the Nation enjoyed sovereign immunity, the plaintiff could proceed against tribal officials under the doctrine of *Ex parte Young* and the Nation was not a necessary party but (2) the plaintiff had not satisfied the standards for injunctive relief: "Ultimately, the burden will be upon the State and Town plaintiffs to refute the defendants' contention that the Nation has sovereign control over the Westwoods property. On the current record, it is impossible to conclude that the plaintiffs will succeed in doing so. Among many other things, the Tribal defendants continue to challenge the validity and effectiveness, particularly in the face of then-existing prohibitions on the acquisition by individuals of tribal land, of the Seventeenth Century instruments that the State relied upon in the earlier federal litigation as the basis for its extinguishment contention, as well as questioning the sufficiency and fairness of the proceeding in which the colonial authority determined that those instruments should be ratified, which is their right. … Further, the electronic signs, however eye catching they may be — which, presumably, is the intent that underlies them — pose none of the disruptive consequences that the federal District Court attributed to the previously proposed gaming venture and, unless constructed and operated without regard to accepted engineering standards, which appears not to be the case — pose no unacceptable safety risk."