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Indian Nations update

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Selected Court Decisions

In *Cayuga Indian Nation of New York v. Seneca County, New York*, 2020 WL 6253332 (2d Cir. 2020), the Cayuga Indian Nation of New York had purchased land in Seneca County in 2007. When the Nation refused to pay property taxes, the County sought to foreclose under Article 11 of the New York Real Property Tax Law. The Nation sued in federal court to enjoin the foreclosure, based on its sovereign immunity. The County argued that the immovable property exception to sovereign immunity discussed by the Supreme Court in its 2018 decision in *Upper Skagit Indian Tribe v. Lundgren* applied. The district court disagreed and enjoined the foreclosure on the ground of tribal sovereign immunity and the Second Circuit Court of Appeals affirmed: "[W]e conclude that, even were we to recognize the County's proposed exception to immunity, the Foreclosure Actions lie outside its bounds. As we explain below, the Foreclosure Actions do not seek to establish Seneca County's *rights* in real estate such as are the animating concern of the immovable-property exception. Rather, because in the Foreclosure Actions the County seeks to seize the Properties as a *remedy* for the nonpayment of taxes, the proceedings are best seen as the functional equivalent of an action to execute on a money judgment. Viewed accordingly, they lie well within the categories of suits from which sovereigns were traditionally immune under the common law, and the existence or not of an immovable-property exception to tribal sovereign immunity is of no moment. … Although a foreclosure action certainly involves real property, the Cayuga Nation observes—and we are convinced—that these 'tax enforcement actions are—fundamentally—about money, not property.' … [We] do not view the Foreclosure Actions as 'actions to *determine* rights in immovable property.' *Upper Skagit*, 138 S. Ct. at 1655 … Rather, we see them as actions to pursue a remedy that is available to Seneca County by virtue of its rights in immovable property. Accordingly, the Foreclosure Actions are not covered by the immovable-property exception to sovereign immunity as it has been recognized at common law." The Court also rejected the County's argument that the Supreme Court had implicitly acknowledged the County's right of foreclosure in its 2005 decision in *City of Sherrill v. Oneida Nation*.

In *Holtz v. Oneida Airport Hotel Corporation*, 2020 WL 6158455 (7th Cir. 2020), the Oneida Nation owned Oneida Airport Hotel Corporation, d/b/a Radisson Hotel & Conference Center of Green Bay (Corporation). Holtz sued the Corporation and several of its managers in state court after her employment was terminated. The defendants removed to federal court and moved to dismiss. The court granted the motion based both on **sovereign immunity** and the plaintiff's failure to allege a federal cause of action. On appeal, the plaintiff argued that the district court should have permitted discovery to determine whether the Corporation was an arm of the Tribe entitled to share its immunity. The Seventh Circuit declined to address the "arm of the tribe" issue and affirmed on the alternative ground: "We have not yet had occasion to consider the application of the 'arm of the tribe' test, and we decline to apply it

here given the thin record and the availability of another basis upon which to resolve this appeal. Even if we set aside the question of the defendants' sovereign immunity, the district court set forth a persuasive alternative analysis that Holtz's complaint must be dismissed for failure to state a claim."

In *South Dakota v. Frazier*, 2020 WL 6262103 (D. S.D. 2020), the Cheyenne River Sioux Tribe (the Tribe) opened a grocery along US Highway 212 in La Plant, a reservation community of approximately 200 residents. To protect the residents crossing the highway to reach the grocery, the Tribe changed signage to reduce the speed limit from 65 mph to 45 mph. The State of South Dakota sued the Tribe's chairman in his official capacity seeking an injunction against the **Tribe's unilateral reduction in the speed limit**, arguing that established procedures for speed limit modification require the State's consent. Applying the preliminary injunction analysis prescribed by the Eighth Circuit in *Dataphase Sys., Inc. v. C.L. Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981), the District Court enjoined the Tribe from reducing the speed limit pending the prescribed procedures: "[T]he claim against Chairman Frazier for injunctive relief is not barred by sovereign immunity, and Chairman Frazier may be sued in his official capacity to the extent that injunctive relief is sought. … [T]he Tribe as well as individual landowners in the area consented to and were compensated for the necessary easements granted to the State to construct U.S. Highway 212 through La Plant. The Tribe did not reserve any right to regulate the land subject to the right-of-way. … The highway is open to the public, and the State is responsible for maintaining the roadway. Thus, under *Strate*, the land is akin to 'alienated non-Indian land.' 520 U.S. at 454. Further, Congress has given the state transportation department the power of final approval of signage on federal highways. Therefore, the State's likelihood of success on the merits here is high. … The public will be best served by a process where the State determines, with the Tribe's input, a speed limit that protects both drivers and pedestrians alike in the area. Based on the assurances from the State of a fair process, this Court determines that the public interest is served by granting the injunction. Thus, the final *Dataphase* factors weighs in favor of granting a preliminary injunction assuming the State's process is fair."

In *Debraska v. Oneida Business Committee*, 2020 WL 6204320 (E.D. Wis. 2020), members of the Oneida Nation of Wisconsin sued the Nation, its Business Committee and its Election Board under 42 U.S.C. § 1983 for actions relating to the Nation's 2020 Oneida Nation Primary Election, alleging that cancelation of the Nation's primary election based on COVID concerns violated their rights under the **First and Fourteenth Amendments, and Due Process Clause of the United States Constitution and the Indian Civil Rights Act (ICRA)**. The District Court dismissed for lack of jurisdiction: "The [Tenth Circuit] explained that the First Amendment only 'places limitations upon the action of Congress and of the States' and that '[no] provision in the Constitution makes the First Amendment applicable to Indian nations nor is there any law of Congress doing so.' … The court finds the Tenth Circuit's reasoning persuasive. The First and Fourteenth Amendments do not apply to the Nation and its officials. … The ICRA imposes 'certain restrictions upon tribal governments similar, but not identical, to those contained in the Bill of Rights and Fourteenth Amendment.' *Santa Clara*, 436 U.S. at 57. The ICRA does not create a private cause of action to secure enforcement of these rights, except for habeas corpus to challenge the legality of a tribe's detention order. … Plaintiffs are not seeking a writ of habeas corpus in this case. As a result, the ICRA does not provide a basis for federal question jurisdiction. … Section 1983 imposes civil liability on any person who, under color of state or territorial law, 'subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction [of the United States] to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws' of the United States. … Plaintiffs allege that Defendants were acting under color of territorial law, but the Nation is not a territory organized under the laws of the United States. … Defendants were acting under color of tribal law in deciding to cancel the primary election. … Finally, the court lacks jurisdiction over Plaintiffs' claims based upon tribal law. … Any claims based on tribal law are within the jurisdiction of the tribal courts." (Citations omitted.)

In *Pascua Yaqui Tribe v. Rodriguez*, 2020 WL 6203523 (D. Ariz. 2020), the Pascua Yaqui Tribe sued the Pima County, Arizona Recorder under the **Voting Rights Act** to compel her to open an in-person early voting site within the boundaries of the Tribe's Reservation no later than Oct. 26, 2020, for the upcoming General Election on Nov. 3, 2020. The Tribe argued that tribal members had unequal access to in-person early voting sites in Pima County as compared to non-minority communities, and that this unequal access encompasses issues particularly impacting the Tribe such as higher rates of poverty and poor health (diabetes, obesity), fewer transportation options (decreased rates of car ownership and less public transit options), and longer distances to in-person early voting sites from the Reservation,

and that these issues have been exacerbated during the COVID-19 pandemic. The District Court denied the Tribe's motion for a preliminary injunction, holding that sufficient alternative means of voting, including mail, were available and that the Tribe had failed to show irreparable harm in the absence of an early in-person site: "Even assuming that not voting via a mail-in ballot was justified by evidence, legitimate fears, unavailable, or one just preferred to deliver their ballot in-person to a voting site, this would not be a barrier to voting in the 2020 General Election. For example, as the majority of Tribal members on the Reservation already receive a ballot in the mail as they previously signed up for the PEVL [Arizona's Permanent Early Voting List], they can simply fill out their ballot at home, go to the nearest Early Voting Site, drop off their ballot in a box guarded by an election official, or hand it directly to an election official. Moreover, any Pima County resident can walk into a full-service Early Voting Site, immediately request and receive a ballot (regardless of their residential address and precinct – there are 249 precincts in Pima County), and vote in advance for the General Election."

In *Rosebud Sioux Tribe v. Trump*, 2020 WL 6119319 (D. Mont. 2020), the Rosebud Sioux Tribe (Rosebud) and Fort Belknap Indian Community (Fort Belknap) (collectively Plaintiffs) sued President Trump and various government agencies and agents in their official capacities (Federal Defendants), challenging Trump's decision to issue a Presidential Permit in 2019 (2019 Permit) to Defendant-Intervenors TransCanada Keystone Pipeline, LP and TC Energy Corporation (collectively, TC Energy) to construct a cross-border segment of the **oil pipeline** known as Keystone XL (Keystone). Plaintiffs contended that the permit violated the 1851 Fort Laramie Treaty, 1855 Lame Bull Treaty, 1868 Treaty of Fort Laramie, Commerce Clause of the United States Constitution, Plaintiffs' inherent tribal sovereign powers and various federal statutes and regulations. The Court denied the Plaintiffs' motion for injunctive relief, partially granted TC Energy's and the Federal Defendants' Motions for Summary Judgment and partially denied the Plaintiffs' motion for summary judgment, consistent with its determination that, contrary to the Plaintiffs' assertions, the 2019 Permit related to just the 1.2-mile border crossing section of Keystone. The Court required additional briefing with respect to the Plaintiffs' arguments that the President exceeded his constitutional powers in issuing a permit after President Obama had vetoed the Pipeline Approval Act in 2015.

In *Manzanita Band of the Kumeyaay Nation v. Wolf*, 2020 WL 6118182 (D. D.C. 2020), the Manzanita Band of the Kumeyaay Nation (Nation) sued Department of Homeland Security (DHS) officials, contending that construction of the Trump administration's Mexican border wall may disturb **Native American gravesites**. Citing authority conferred on the government by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) to build a "border barrier infrastructure along the southern border," the District Court denied the Nation's motion for preliminary injunction: "The evidence shows that construction is proceeding on a narrow strip of federal land. And there are some consultation and protections in place to avoid damage if Kumeyaay cultural and religious resources are discovered within the construction zones, which has yet to occur. Against this evidence, the Kumeyaay have not made a clear showing that they will suffer imminent, irreparable injury in the absence of an injunction here. The Court thus declines to consider the other three factors for a preliminary injunction."

In the case of *In re Coughlin*, 2020 WL 6140388 (D. Mass. 2020), Coughlin had filed for protection under chapter 13 of the federal bankruptcy code. When internet lending entities owned by the Lac du Flambeau Chippewa Tribe allegedly continued to seek repayment of alleged debts from him, Coughlin moved the bankruptcy court to determine that the lending entities were in violation of the automatic stay provisions of the bankruptcy code. The court dismissed on the ground of **sovereign immunity**: "Section 101(27) defines 'governmental unit' as follows 'United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States ... , a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or *other foreign or domestic government*.' … Section 101(27) does not specifically include federally recognized Indian tribes as a 'governmental unit.' This brings me to the question of whether sovereign immunity is abrogated by 11 U.S.C. ¶106(a) as to Indian tribes. … At the center of the circuit split is whether an Indian tribe is an 'other foreign or domestic government' whose sovereign immunity is 'unequivocally' abrogated by section 106(a) of Title 11. … In this case, Coughlin argues that I should follow the reasoning of the Ninth Circuit in *Krystal Energy*, which has been rejected by three other circuit courts, and find that sections 101(27) and 106 abrogate the immunity upon which the Alleged Violators rely. See *Buchwald Capital Advisors, LLC. v. Sault Ste. Marie Tribe of Chippewa Indians* (*In re: Greektown Holdings*), *LLC*, 917 F.3d 451 (6th Cir. 2019); *Meyers v. Oneida Tribe of Indians Wisc.*, 836 F.3d 818, 824 (7th Cir. 2016): *In re*

Whitaker, 474 B.R. 687 (8th Cir. 2012). I agree with the three circuits that have rejected the Ninth Circuit."

In *Flandreau Santee Sioux Tribe v. Terwilliger*, 2020 WL 6158920 (D. S.D. 2020), South Dakota imposed a 2% excise tax on the gross receipts of a contractor if its services "entail the construction, building, installation, or repair of a fixture of realty" within the State. The Flandreau Santee Sioux Tribe (Tribe) hired a nonmember construction company, Henry Carlson Company (Carlson), to carry out the planned renovation of its casino on the Tribe's reservation. The Tribe challenged the applicability of the tax to Carlson. The district court had initially ruled for the Tribe, holding that the tax was preempted by the Indian Gaming Regulatory Act (IGRA) and preempted under the rule of ***White Mountain Apache v. Bracker***. The Eighth Circuit, applying the analytical framework prescribed by *White Mountain Apache v. Bracker*, reversed, holding that the District Court erred in ruling that the tax was preempted under IGRA and holding that, based on the evidence before the court at the summary judgment stage, the *Bracker* balancing factors did not support preempting the State excise tax. On remand, after conducting a trial to determine remaining disputed issues of fact and to address legal arguments not addressed previously, the District Court concluded, in a 40-page opinion, that the State excise tax was preempted under the *Bracker* rule: "Considering all the *Bracker* factors, the evidence presented at trial demonstrated: (1) a strong historical backdrop of tribal sovereignty and sovereignty in the field of Indian trading; (2) a strong federal interest in Indian trading, as evidenced by 25 U.S.C. §§ 261-64; (3) the Tribe's own regulation of business licenses and trading goods and services with the Tribe is extensive; (4) the economic burden of the State excise tax falls on the Tribe; (5) the State excise tax places a burden on the Tribe's ability to generate gaming revenue, commerce, and trade; (6) there is no nexus between the services or regulations funded by the State general fund and provided by the State to the Tribe or Henry Carlson Company and the taxed service of the Casino renovation project; (7) any State services provided to the Tribe, tribal members, the Casino, or Henry Carlson Company off-reservation are not connected to the renovation project and are minimal; and (8) that because the State provides little government services funded from the general fund to the Tribe, tribal members, the Casino, or Henry Carlson Company, and the State does not uniformly apply the tax, the State can only demonstrate a general interest in raising revenue."

In *Smith v. Landrum*, 2020 WL 6370477 (Mich. App. 2020), Perrault, a member of the Keweenaw Bay Indian Community (Tribe), had owned land in trust on the Tribe's L'Anse Reservation. After his death, title was transferred to his non-Indian wife in fee simple title through BIA probate proceedings. Perrault's wife transferred the property to Perrault's three tribal member children who, in turn, transferred it to Landrum, a non-Indian. The Smiths sued Landrum in Michigan court to quiet title to an easement that he claimed over Landrum's property. Landrum contested the court's jurisdiction, arguing that the Tribe's law provided for tribal jurisdiction over all lands within reservation boundaries and that, consequently, only a tribal or federal court could adjudicate interests in his property. The trial court agreed but the Court of Appeals reversed. Applying the principles of *Williams v. Lee*, 358 U.S. 217, 220, 79 S. Ct. 269 (1959), and *Montana v. United States*, 450 U.S. 544, 565, 101 S. Ct. 1245 (1981), the Court determined that the **state court had jurisdiction**: "*Williams* and its progeny stand for the rule that a state may assert jurisdiction over an activity or a dispute involving a non-Indian and arising within the boundaries of a tribal reservation if: 1) the state's exercise of authority is not preempted by incompatible federal law; and 2) the state's exercise of authority does not infringe on the right of reservation Indians to make their own laws and be ruled by them. … Neither party has pointed to any federal law that would be incompatible with a state court's exercise of jurisdiction over an easement dispute between non-Indians on the reservation. … [We] readily conclude that the exercise of state jurisdiction over this easement dispute would in no way interfere with the tribe's power to control and govern its members and internal affairs. *Williams*, 358 U.S. at 220. … First and foremost, neither party is an Indian, and the land is neither land held in trust for the tribe (or a tribal member) nor owned individually by an Indian. Instead, it is fee land located within the reservation, or what the Supreme Court has termed 'non-Indian fee land.' … *Montana* articulated a " 'general proposition that the inherent sovereign powers of an Indian tribe do not extend to activities of nonmembers of the tribe', [and thus] efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are 'presumptively invalid.' "