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Indian Nations update

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In *Mitchell v. Bailey*, 2020 WL 7329219 (5th Cir. 2020), the Hoopa Valley Tribe (Hoopa Valley) had created the AmeriCorps Hoopa Tribal Civilian Community Corps (Tribal CCC) with a federal grant. Following severe floods and the resulting federal disaster declaration covering certain Texas counties, several AmeriCorps Disaster Response Teams, including Hoopa Tribal CCC, were deployed to Wimberley, Texas. Mitchell, a non-Indian resident of Texas, was injured while participating in the Wimberley disaster relief efforts, allegedly as a result of negligence caused by Bailey, a member of the Hoopa Tribal CCC. Mitchell sued Bailey and the Hoopa Valley Tribe for violations of state tort and contract law. The District Court, ruling on a 12(b)(1) motion to dismiss, held that sovereign immunity barred suit against Bailey, in his official capacity, and the Hoopa Valley Tribe, and dismissed the claims asserted against these parties with prejudice. The Fifth Circuit Court of Appeals vacated in part, affirmed in part, reversed in part and remanded in part, holding that, regardless of immunity, the Court had **neither subject matter nor diversity jurisdiction**: "On the face of Mitchell's complaint, there are no federal questions which might support federal-question jurisdiction. The prospect of a tribal sovereign immunity defense does not, in and of itself, convert a suit otherwise arising under state law into one which, in the statutory sense, arises under federal law. … Although neither the Supreme Court nor the Fifth Circuit has squarely addressed this question, it appears all courts to have considered it agree: Indian tribes are not citizens of any state for the purpose of diversity jurisdiction. … We are persuaded by the weight of authority from sister circuits. Hoopa Valley, a federally recognized Indian tribe, is to be considered a stateless entity when establishing whether there is complete diversity between all parties." (Internal quotations omitted.)

In *Scalia v. Red Lake Nation Fisheries, Inc.*, 2020 WL 7083327 (8th Cir. 2020), the United States Occupational Safety and Health (OSH) Administration sought to penalize Red Lake Nation Fisheries, Inc. (RLNF), an enterprise owned by members of the Red Lake Band of Chippewa Indians, chartered under tribal law and employing only tribal members, for alleged violations of the **Occupational Safety and Health Act** (OSHA). An administrative law judge granted RLNF summary judgment on jurisdictional grounds and the Eighth Circuit Court of Appeals denied OSH's petition for review: "General Acts of Congress apply to Indians as well as to all others in the absence of a clear expression to the contrary. … This general rule in *Tuscarora*, however, does not apply when the interest sought to be affected is a specific right reserved to the Indians. … Treaty rights are a prime example." … "Areas traditionally left to tribal self-government, those most often the subject of treaties, have enjoyed an exception from the general rule that congressional enactments, in terms applying to all persons, includes Indians and their property interests. … Even if OSHA applied to Indian activities in other circumstances, OSHA does not apply to an enterprise owned by and consisting solely of members of perhaps the most insular and independent sovereign tribe." (Citations, quotations and internal emendations omitted.)

In *Yocha Dehe Wintun Nation v. Newsom*, 2020 WL 7075504, Fed.Appx. (9th Cir. 2020), the Yocha Dehe Wintun Nation sued California officials alleging that they breached exclusivity provisions in the Nation's **gaming compact** by not enforcing prohibitions against non-Indian cardrooms. The District Court dismissed and the Ninth Circuit affirmed: "We need not today decide whether exclusivity is a compact term. Even assuming that it is, the remedy the Tribes seek, an injunction requiring the State to enforce its laws against non-Indian cardrooms that allegedly operate illegal banked card games, cannot be granted. Nothing in the compacts purports to impose on the State the obligation to enforce its laws against non-Indian cardrooms, and nothing in the contracts suggests the Tribes may seek that remedy based on an alleged breach of any exclusivity guarantee. … Nothing in the compacts suggests we can order the State to turn its law enforcement priorities towards certain lawbreakers, as individual law enforcement decisions are particularly ill-suited to judicial review." (Citations and quotations omitted.)

In *Cheyenne & Arapaho Tribes v. United States*, 2020 WL 7251080 (Fed. Cl. 2020), the Cheyenne & Arapaho Tribes (Tribes) had entered into two treaties with the United States that included a "bad men" clause under which the United States was required to arrest and punish "**bad men among the whites**" who might "commit any wrong upon the person or property of the Indians" and to "also reimburse the injured person for the loss sustained." The Tribes sued the United States in the Court of Federal Claims, seeking damages allegedly caused by Bad Men, including "corporate pharmaceutical manufacturers, distributors, their agents, individuals serving on their governing boards, and those involved in the management, promotion, sale, and distribution of opioids across the nation." The Court dismissed, holding that the Tribes lacked standing under the parens patriae doctrine and that the Bad Men clause did not apply to off reservation activities of whites: "[P]laintiff's complaint purports to hold the federal government liable for the nation-wide opioid epidemic based on allegations that the Opioid Bad Men manufactured, promoted, distributed, and sold opioids nationally and onto tribal lands. See generally Compl. Although the Court sympathizes with the hardships associated with the opioid epidemic, the Court finds that plaintiff failed to allege a cognizable 'wrong.' As articulated in Jones, 'wrongs' that occur on a tribe's reservation, or off-reservation wrongs resulting directly therefrom, can give rise to a 'bad men' claim. … [A]lthough the Court acknowledges that the bad men provision may take cognizance of off-reservation activities that are a clear continuation of activities on-reservation, … the Court need not engage in such an inquiry in the case at bar, as plaintiff has not made such an argument and has only alleged off-reservation activities." (Cites omitted.)

In *Mille Lacs Band of Ojibwe v. County of Mille Lacs*, 2020 WL 7489475 (D. Minn. 2020), Mille Lacs County (County) terminated an agreement with the Mille Lacs Band of Ojibwe (Tribe), under which the Tribe's police department exercised concurrent jurisdiction on the Tribe's reservation for purposes of enforcement of state criminal law. The County's district attorney issued an opinion concluding that the **jurisdiction** of the Mille Lacs tribal police within the boundaries of the Mille Lacs Band Reservation was limited to conduct on trust lands involving tribal members. A "protocol" for County law enforcement officers severely limited their cooperation with tribal police and potentially subjected tribal police to prosecution for carrying out law enforcement activities contrary to the protocol. The Tribe sued the County's attorney and sheriff in federal court, alleging that county officers' conduct impeded the Tribe's ability to combat crime on the reservation and infringed the Tribe's sovereignty. The Court denied the defendants' motion for summary judgment, holding that (1) the reach of the Tribe's sovereign authority was a federal question vesting the Court with subject matter jurisdiction, (2) plaintiffs had standing to sue, notwithstanding that the State had never prosecuted tribal officials for violating the protocol, and (3) the defendants were not protected from suit by sovereign immunity, prosecutorial immunity or the Eleventh Amendment.

In *Beam v. Naha*, 2018 WL 11256061 (D. Ariz. 2018), Beam, a teacher at the Hopi Junior/Senior High School, a BIA-controlled school located on the Hopi reservation, sued school officials, alleging civil rights violations arising out of disciplinary action taken against him. The District Court rejected the defendants' **sovereign immunity** defense but dismissed for failure to state a federal cause of action under the *Bivens* doctrine: "[E]ven when tribal officials are named as the defendants, the general rule remains intact that officers are liable when sued in their individual capacities. … The situation presented in Plaintiff's complaint is distinguishable from cases where the courts have extended immunity to individual tribal officials who were sued because of their position. In such cases, the actions being challenged involved votes taken during council meetings or decisions made in conjunction with an official's legislative duties. Here, Plaintiff alleges unconstitutional actions taken by Defendants themselves and seeks damages

from them directly as a result of their personal actions. Given the limited relief sought—only personal damages against Defendants—Plaintiffs have not shown how granting such relief would take from the tribe's treasury or otherwise interfere with the tribe's governing. … Allowing a *Bivens* claim to proceed in these circumstances simply because the Hopi School receives federal grants to operate and is subject to government regulations that are not related to the challenged conduct implicates the tribe's inherent sovereignty. A tribe's sovereignty constitutes a special factor militating against extending *Bivens*. Indeed, the Tribally Controlled Schools Act was enacted to promote tribal self-determination in the context of education and to allow increased tribal autonomy in operating its schools. Subjecting administrators of the school who are not federal employees to actions for damages because of personnel decisions would undermine the tribe's autonomy." (Internal quotations and citations omitted.)

In *Pilant v. Caesar's Enterprise Services*, LLC, 2020 WL 7043607 (S.D. Cal. 2020), Caesar's Enterprise Services, LLC and an affiliate (Caesar's) had employed Pilar as senior vice president and general manager of Harrah's Resort SoCal hotel/casino (Resort), an enterprise owned by the Rincon Band of Luiseño Indians (Rincon Band). Pilar resigned his position in May 2020 after Caesar decided to reopen the Resort against the recommendations of California officials who considered the reopening a threat to public health in light of the COVID pandemic. Pilar sued Caesars for construction termination, alleging four causes of action under California law. Caesar's removed the case to federal court and moved to dismiss on the ground that the Rincon Band was a necessary party and could not be named due to its **sovereign immunity**. The Court denied the motion: "Plaintiff seeks only monetary damages, costs and fees from Defendants, his alleged former employers. He does not ask the Court to award any compensation from the Rincon Band, and he does not seek any injunctive relief, let alone any that would be ineffectual if it did not apply to the Rincon Band. This court can accord the relief Plaintiff seeks (monetary damages, costs, and fees from Defendants) in the Rincon Band's absence. … [I]t is of course possible that if Pilant obtains a judgment in this lawsuit, Defendants will seek indemnification from the Rincon Band, or breach an agreement with the Rincon Band, or seek a change in an agreement with the Rincon Band, but the judgment against Defendants would not mandate any such action by Defendants. Put differently, Defendants could pay Pilant while still honoring their agreements with the Rincon Band related to the Resort."

In *UNITE HERE LOCAL 30 v. Sycuan Band of Kumeyaay Indians*, 2020 WL 7260672 (S.D. Cal. 2020), UNITE HERE LOCAL 30, the union representing employees at the casino owned by the Sycuan Band of Kumeyaay Indians (Tribe) sought arbitration under the Tribe's Labor Relations Ordinance (TLRO). The Tribe refused to arbitrate, arguing that its own labor law was preempted by the federal National Labor Relations Ordinance. The union sued to compel arbitration and the Court granted its motion to compel the Tribe to arbitration: "The necessary facts for contract formation are undisputed. The Tribe admits it adopted the TLRO and continues to maintain it. … The Tribe admits the text of the TLRO. … The Tribe admits it received the Union's offer described by Section 7 of the TLRO. Thus, a contract was formed in which the Tribe and the Union agreed to comply with the TLRO's terms. … Having determined the formation of a contract, the Court declines to exercise supplemental jurisdiction over the Tribe's counterclaim, which requests a declaration that the contract is void due to preemption of the TLRO by the NLRA. Doing so would interfere with the arbitrator's authority under Buckeye Check Cashing. … In a challenge involving a contract with an arbitration clause, the issue of a contract's validity as a whole is to be considered by the arbitrator, not the court."

Dunn v. Global Trust Management, 2020 WL 7260771 (M.D. Fla. 2020), non-Indian Florida residents Dunn and McIntosh had borrowed money from Mobiloans, Inc., an **online lending company** purportedly owned by the Tunica-Biloxi Tribe (Tribe). After they defaulted, Global Trust Management, LLC (GTM) and Frank Torres, GTM's chief operations officer, purchased the past-due accounts from Mobiloans and tried to collect. Dunn and McIntosh sued, alleging that the Defendants' collection efforts violated the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692, et seq., and the Florida Consumer Collection Practices Act (FCCPA). The Defendants moved for an order compelling the Plaintiffs to arbitrate pursuant to the arbitration clause in the loan agreements. The Court denied the motion and granted the Plaintiffs partial judgment on the pleadings: "Plaintiffs, by applying for internet payday loans and clicking boxes, did click the agreement to arbitrate all disputes related to their credit accounts. But the proposed arbitration proceeding strips Plaintiffs of the ability to vindicate any of their substantive state-law claims or rights. This renders any agreement to arbitrate unconscionable and unenforceable on these unique facts. In truth, the setup is a scheme to hide behind tribal immunity and commit illegal usury in violation of Florida and Louisiana law. … In

short, the arbitration agreement provides a one-two combination that knocks out Plaintiffs' potential state-law claims. One—the agreement's choice-of-law provision waives substantive Florida law protections in exchange for the Tribe's laws, which allow interest rates more than ten times what would be permitted otherwise. Two—that waiver becomes unchallengeable and unreviewable once the Plaintiffs are forced into arbitration. Simply put, this scheme seeks to abuse the arbitral forum by using it to evade state consumer finance protections and usury laws that Mobiloans (now Defendants) could not otherwise avoid. This sort of charade is not what Congress had in mind when it passed the FAA."

In *Pickerel Lake Outlet Association v. Day County*, 2020 WL 7635840 (S.D. 2020), members of the Pickerel Lake Outlet Association were non-Indians who owned improvements on lakefront property within Day County, South Dakota, owned in trust by the Sisseton-Wahpeton Oyate (Tribe) and they leased from them through the Bureau of Indian Affairs. The Tribe and the County both **taxed the value of the improvements**. Residents sued the County, challenging its right to tax improvements that were subject to tribal taxation and citing a provision of the Indian Civil Rights Act, 25 U.S.C. § 5108, which provides that land taken into trust for a Tribe is exempt from state and local taxation. The Circuit Court upheld the county tax and the State Supreme Court affirmed: "Despite the unique purpose and method of implementation of § 5108, we are unable to find any support in this record to indicate that the land on which the Plaintiffs' structures sit was ever the subject of a fee-to-trust transfer under the IRA. … Without evidence that the land was acquired pursuant to the IRA, the Plaintiffs' additional § 5108 preemption arguments are largely academic. For instance, the Plaintiffs claim that their buildings should be considered part of the trust land because they are so closely connected to the land. However, this question does not present a live controversy if, as we have determined, there is no evidence the land was acquired pursuant to the IRA. Therefore, we need not address Plaintiffs' principal authority for this position—the Supreme Court's decision in *Mescalero Apache Tribe v. Jones*—or subsequent case law interpreting the IRA. … Here, the Plaintiffs contend the current Department of the Interior regulatory scheme, namely, 25 C.F.R. § 162.017, 'clarifies and confirms' that Congress left no room for the County's assessment of taxes here. More specifically, they rely upon § 162.017(a), which provides that '[s]ubject only to applicable federal law, permanent improvements on the leased land, without regard to ownership of those improvements, are not subject to any fee, tax, assessment, levy, or other charge imposed by any State or political subdivision of a State.' … Here, however, Congress has not authorized the BIA to preempt the State's authority to tax structures owned by non-Indians. … Because there is little or no federal regulatory scheme in place with respect to property taxes, and because the State's taxation does not implicate Indians or their tribes, thereby implicating federal law, the State's assessment of nondiscriminatory ad valorem property taxes against structures owned exclusively by non-Indians is not preempted by federal law."