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Indian Nations update

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Selected Court Decisions

In *Friends of Alaska National Wildlife Refuges v. Haaland*, 2022 WL 793023 (9th Cir. 2022), the Native Village of King Cove was about 18 miles from the city of Cold Bay, Alaska, but no road connected them. King Cove desired to build a road through the Izembek National Wildlife Refuge to facilitate access to Cold Bay's larger, all-weather airport to facilitate medical evacuations. In 2019, the Secretary of Interior entered into an agreement with King Cove Corporation under which King Cove would transfer to the United States certain lands within the Izembek and Alaska Peninsula National Wildlife Refuges and relinquish its selection rights to certain other lands within the Izembek Refuge and, in exchange, receive a corridor of less than 500 acres through the Izembek Refuge. As authority for the transfer, the Secretary cited a provision of the **Alaska National Interest Lands Conservation Act (ANILCA)**, authorized the Secretary of Interior "in acquiring lands for the purposes of [ANILCA]," to exchange lands with Alaska Native village corporations. Environmental groups challenged the decision under the Administrative Procedure Act. The district court invalidated the agreement, holding that the ANILCA's purposes were "preservation and subsistence." The Ninth Circuit reversed: "[O]ther purposes are set out in section 3101(d), which states that ANILCA 'provides sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska, and at the same time provides adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people'—the purposes the Secretary invoked here."

In *Chegup v. Ute Indian Tribe of Uintah and Ouray Reservation*, (10th Cir. 2022), the Ute Indian Tribe of the Uintah and Ouray Reservation (Tribe) temporarily banished Chegup, Amboh, Jenkins, and Kozlowicz. The banished members responded by filing a petition for habeas corpus relief in federal court, contending that, because they were excluded from the reservation by virtue of their banishment, they were "detained" within the meaning of the Indian Civil Rights Act of 1968 (ICRA). The district court dismissed for **lack of jurisdiction** on the ground that they had not been "detained" for purposes of the ICRA. Tenth Circuit held that the district court should not have reached the detention issue but should have dismissed because the petitioners failed to exhaust tribal court remedies: "Respect for tribal sovereignty required that, before the court below decided this complex and difficult question about the scope of ICRA habeas, the banished members must have either exhausted their tribal remedies or met the heavy burden of demonstrating why they had not. Even though tribal exhaustion is non-jurisdictional, and courts may often choose between threshold grounds for denying relief, we think that under the unique circumstances of this case there was a right choice. … On the Tribe's facial showing of the banished members' failure to exhaust tribal remedies to this degree, combined with the absence of a strong case that an exception applies and the other factors we discuss, we think this is the rare case in which

a district court may not pass over the exhaustion issue in favor of other matters, even when they lead to dismissal. … Our prior discussion of the basis for tribal exhaustion and the interests that it serves illustrates the comparative importance of that doctrine and underscores why the district court should have started with it in a case that so clearly presented the issue, as well as the other features we discuss."

In *Navajo Nation v. U.S. Department of the Interior*, 26 F.4th 794 (2022), the Navajo Nation sued the Department of Interior (DOI), Secretary of Interior, Bureau of Reclamation (BOR), Bureau of Indian Affairs (BIA), and water districts, claiming that United States breached its trust obligation to assert and protect the Nation's reserved water rights and violated National Environmental Policy Act (NEPA) and Administrative Procedure Act (APA) by failing to consider the Nation's as-yet-unquantified water rights in managing the Colorado River in issuing DOI's guidelines clarifying how it determined whether there would be sufficient water to satisfy amounts budgeted among Lower Basin states and whether and how much surplus water would be available. Arizona, Nevada, and various state water, irrigation, and agricultural districts and authorities intervened. The District Court granted government's motion to dismiss for the Nation's suit for lack of subject matter jurisdiction but the Ninth Circuit reversed, holding that the District Court had jurisdiction, the Nation's breach of trust claim was not barred by res judicata based on previous ruling allocating Colorado River waters and the Nation's proposed amended complaint adequately state a breach of trust claim under the *Winters* doctrine: "Although the Supreme Court retained original jurisdiction over water rights claims to the Colorado River in *Arizona I*, the Nation's complaint does not seek a judicial quantification of rights to the River, so we need not decide whether the Supreme Court's retained jurisdiction is exclusive. And contrary to the Intervenors' arguments on appeal, the Nation's claim is not barred by res judicata, despite the federal government's representation of the Nation in *Arizona I*. Finally, the District Court erred in denying the Nation's motion to amend and in dismissing the Nation's complaint, because the complaint properly stated a breach of trust claim premised on the Nation's treaties with the United States and the Nation's federally reserved **Winters rights**, especially when considered along with the Federal Appellees' pervasive control over the Colorado River. … Under the *Winters* doctrine, when the Federal Government withdraws its land from the public domain for the purpose of establishing an Indian reservation, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. … *Winters* rights are necessarily implied in each treaty in which the government took land from Native Americans and established reservations that were to be permanent homes for them. That was the case with the Nation's reservation. Federal Appellees have an irreversible and dramatically important trust duty requiring them to ensure adequate water for the health and safety of the Navajo Nation's inhabitants in their permanent home reservation." (Internal quotations and citations omitted.)

In *Big Horn County Electric Cooperative, Inc. v. Big Man*, Not Reported, 2022 WL 738623 (9th Cir. 2022), Crow tribal law prohibited termination of electric service from November 1st to April 1st. Big Horn County Electric Cooperative (BHCEC) cut off electric service to Big Man, a Crow tribal member residing on trust land and sued in federal court for a declaratory judgment that tribal law did not apply to the BHCEC, a non-tribal entity. The District Court disagreed and held that that the Tribe had jurisdiction over BHCEC under both ***Montana* Exceptions**. The Ninth Circuit affirmed based on the First Montana Exception: "In *Big Horn County Electric Cooperative, Inc. v. Adams*, 219 F.3d 944 (9th Cir. 2000), we determined that the BHCEC's 'voluntary provision of electrical services' on the Tribe's reservation and its contracts with tribal members to provide electrical services created a consensual relationship, within the meaning of Montana. 219 F.3d at 951. In *Adams*, we did not limit the tribal court's jurisdiction to suits on the contract, but merely reaffirmed that the regulation/suit must arise out of the activity that is the subject of the contracts/consensual relationship—the provision of electric services. … The unlawful termination of Big Man's electricity services is directly related to the consensual relationship. BHCEC provides electrical service to tribal members on the reservation and the Tribe is seeking to regulate the manner in which BHCEC provides, and stops providing, that service. Put simply, the winter electric regulation conditions one aspect of the consensual relationship. Finding that the first *Montana* exception applies, we need not reach the other grounds for summary judgment."

In *Allstate Indemnity Company v. Cornelson*, 2022 WL 856863 (W.D. Wash. 2022), Allstate had issued an insurance policy issued to Cornelson on a manufactured home, located on the land of the Lower Elwha Klallam Tribe (Tribe). Cornelson, a non-Indian, resided in the home with his wife, a member of the Tribe. Carillo sued Cornelson for an assault and batter allegedly committed at the Cornelson home and demanded $501,401.62 from Allstate. Allstate, invoking the court's diversity jurisdiction, sued in federal court for a declaration that it was not obligated to pay. The Cornelsons filed a complaint in the Lower Elwha Klallam Tribal Court (Tribal Court) seeking a declaration that the **Tribal Court had jurisdiction** and that Allstate was under a duty to defend and indemnify them. They moved to dismiss the federal action on the ground that Allstate had failed to exhaust Tribal Court remedies. Allstate argued that under the rule of *Montana v. United States* the Tribal Court was clearly without jurisdiction. The District Court disagreed and stayed the case pending the Tribal Court's determination of its own jurisdiction: "In arguing that the Tribal Court does not have jurisdiction over this dispute, Allstate points to the policy's forum selection clause, which provides that lawsuits related to the policy shall be brought 'only in a state or federal court in which the residence premises is located.' … Arguably, the Tribal Court's jurisdiction is a different question than whether it is the proper forum for this dispute. Where, as here, the tribal exhaustion doctrine applies generally to a controversy, an argument that a contractual forum-selection clause either dictates or precludes a tribal forum should not be singled out for special treatment, but should initially be directed to the Tribal Court." (Quotations, citations and internal emendations omitted.)

In *Cayuga Nation v. United States*, 2022 WL 910295 (D.D.C. 2022), factions claiming to be the legitimate government of the Cayuga Nation of New York had clashed throughout the 2010s. In 2019, the Bureau of Indian Affairs recognized the government led by Clint Halftown as legitimate for all purposes. In 2020, the Nation established a police department (PD) and applied to the Federal Bureau of Investigations (FBI) for an Originating Agency Identifier Number (ORI), which would allow the Nation PD to access FBI-administered criminal databases. The Tribal Law and Order Act (TLOA) requires the FBI to treat "tribal justice official[s] serving an Indian tribe with criminal jurisdiction over Indian country" as law enforcement officials and grant them access to federal criminal information databases. The FBI denied the Nation's application on the ground that the PD was "not an authorized criminal justice agency performing the administration of criminal justice," explaining in a follow-up letter that the Tribe had no trust lands, that the New York Court of Appeals had recently identified a "serious dispute" concerning the Nation's lawful government, the Department of the Interior had no relationship with the Nation PD and had not "commissioned it." The District Court, holding that the FBI had relied on factors that were impermissible under the TLOA, vacated the FBI's decision and remanded for reconsideration or explanation of how the factors cited by the FBI relate to the criteria prescribed by the TLOA: "Congress gave the FBI strict instructions, clear criteria, and a duty. Instead of following those instructions, the FBI made its determination based on the surfeit of extraneous factors above. Congress did not mandate that the FBI shall grant an ORI only to a tribal law enforcement agency that operates harmoniously with other governments in the area. It did not instruct the FBI to grant an ORI only to tribes that have FBI-approved 'Tribal laws protecting its members.' AR 950. It did not grant the FBI the authority to deny a tribal law enforcement agency's application based on an 'unwillingness' to use restraint. … Still, the FBI denied the application based on the above-mentioned factors—factors manifestly different from the narrow criteria Congress provided."

In *Hawk v. Burr*, 2022 WL 889385 (E.D. Wis. 2022), Hawk was occupying trust land belonging to his great-aunt on the Stockbridge-Munsee reservation. After the BIA served him with a notice of trespass, Hawk sued to prevent the BIA from proceeding against him. The District Court dismissed, holding that the Bureau of Indian Affairs (BIA) notice was not a final action sufficient to support **federal jurisdiction** under the Administrative Procedure Act: "The BIA does not have the authority to remove Hawk from the property until it institutes an administrative or judicial proceeding against him, and it has not initiated such proceedings. Hawk's attempt to challenge his potential eviction depends on the outcome of a future administrative or judicial proceeding that may not occur. In short, his claims are speculative, are contingent on the occurrence of future events, and are not ripe for judicial review."

In *Canadian St. Regis Band of Mohawk Indians et al. v. State of New York*, 2022 WL 768669 (N.D.N.Y. 2022), the United States had confirmed the Mohawk reservation by a treaty with the Tribe in 1796. The Canadian and U.S. Bands of Mohawk Indians brought claims under the **Non-Intercourse Act**, 25 U.S.C. 177, contending that the sale to New York of a 20000-portion of the reservation, known as the Hogansburg Triangle, in 1824 and 1825 lacked the requisite federal approval. The District Court held that the US-based Band and the United States had prima facie proven violations of the Immigration and Nationality Act (INA). The Court reserved judgement on the Canadian Band's claims and dismissed the defenses raised by the defendant State and municipal governments based on the alleged diminishment of the reservation.

In *Mille Lacs Band of Ojibwe v. County of Mille Lacs*, 2022 WL 675980 (D. Minn. 2022), officials of Mille Lacs County had terminated a law-enforcement cooperation agreement that had acknowledged certain law enforcement authority of Mille Lacs tribal police within the borders of the reservation, established under the Band's 1855 treaty with the United States. County officials took the position that post-1855 treaties and legislation had resulted in the diminishment of the reservation and that the Band's jurisdiction was limited to its trust lands. The District Court, apply the U.S. Supreme Court's **reservation diminishment** jurisprudence, disagreed and held that the Band's reservation was intact: "Over the course of more than 160 years, Congress has never clearly expressed an intention to disestablish or diminish the Mille Lacs Reservation."

In *Red Cloud v. United States*, 2022 WL 702625 (Fed. Cl. 2022), bands of Sioux Indians had entered into the Treaty of Fort Laramie with the United States in 1868, which included the promise that "[i]f **bad men among the whites**, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will ... proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also re-imburse the injured person for the loss sustained." Members of the Oglala Sioux tribe sued in the Court of Federal claims alleging that Weber, a physician employed by the Indian Health Service, had sexually abused them when they were children, beginning in 1995. The Court dismissed the claims against Weber on the ground that the plaintiffs had failed to bring them within the applicable six-year statute of limitations, but permitted them to file a motion for leave to amend their complaint to assert a claim against any other "bad men" who allegedly concealed or failed to report Weber's history of child sex abuse.