Godfrey & Kahn S.C.: Indian Nations - July 2022

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In *Oklahoma v. Castro-Huerta*, 2022 WL 2334307 (US 2022), the Supreme Court addressed the General Crimes Act, 18 U.S.C. 1152, which, "[e]xcept as otherwise expressly provided by law," extends the "general laws of the United States" to "the Indian country." The State of Oklahoma prosecuted and convicted Castro-Huerta, a non-Indian residing in Tulsa, for criminal neglect of his step-daughter, a Cherokee Indian. Castro-Huerta challenged his conviction on the ground that, pursuant to the Supreme Court's 2020 holding in *McGirt v. Oklahoma*, the site of the offense was Indian country, and the state lacked jurisdiction under the General Crimes Act. The Supreme Court disagreed, holding that the state and federal governments had concurrent jurisdiction over offenses committed in Indian country by non-Indians against Indians: "Indian country is part of the State, not separate from the State. To be sure, under this Court's precedents, federal law may preempt that state jurisdiction in certain circumstances. But otherwise, as a matter of state sovereignty, a State has jurisdiction over all of its territory, including Indian country. … Under the Court's precedents, as we will explain, a State's jurisdiction in Indian country may be preempted (i) by federal law under ordinary principles of federal preemption, or (ii) when the exercise of state jurisdiction would unlawfully infringe on tribal self-government. … [T]he General Crimes Act does not say that Indian country is equivalent to a federal enclave for jurisdictional purposes. Nor does the Act say that federal jurisdiction is exclusive in Indian country, or that state jurisdiction is preempted in Indian country. … Under the General Crimes Act, therefore, both the Federal Government and the State have concurrent jurisdiction to prosecute crimes committed in Indian country. The General Crimes Act does not preempt state authority to prosecute Castro-Huerta's crime. … Moreover, if Castro-Huerta's interpretation of the General Crimes Act were correct, then the Act would preclude States from prosecuting any crimes in Indian country—presumably even those crimes committed by non-Indians against non-Indians—just as States ordinarily cannot prosecute crimes committed in federal enclaves. But this Court has long held that States may prosecute crimes committed by non-Indians against non-Indians in Indian country." The four dissenting justices, in an opinion by Justice Gorsuch, pointed out that the majority ignored over two hundred years of jurisdictional congressional enactments that were based on the principle that states lacked jurisdiction in Indian country unless expressly granted by Congress.

In *Ysleta Del Sur Pueblo v. Texas*, 142 S.Ct. 1929 (US 2022), the Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act of 1987 (Restoration Act) had the effect of restoring those tribes to recognition. At the same time, the Restoration Act prohibited as a matter of federal law "all gaming activities which are prohibited by the laws of the State of Texas," while cautioning that the Act should not be "construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas." After Congress enacted the **Indian Gaming Regulatory Act of 1988 (IGRA)**, the Ysleta del Sur Pueblo commenced efforts to develop and conduct a gaming enterprise on its reservation, triggering years of litigation with the State of Texas. In 2021, the Fifth Circuit Court of Appeals rejected the Tribe's argument that the IGRA, not the Restoration Act, controlled, but the U.S. Supreme Court, in a 5-4 decision authored by Justice Gorsuch, reversed: "[A] full look at the [Restoration Act's] structure suggests a set of simple and coherent commands. In subsection (a), Congress effectively federalized and applied to tribal lands those state laws that prohibit or absolutely ban a particular gaming activity. In subsection (b), Congress explained that it was not authorizing the application of Texas's gaming regulations on tribal lands. In subsection (c), Congress granted federal courts jurisdiction to entertain claims by Texas that the Tribe has violated subsection (a). Texas's competing interpretation of the law renders individual statutory terms duplicative and whole provisions without work to perform. … Even if fair questions remain after a look at the ordinary meaning of the statutory terms before us, important contextual clues resolve them. Recall that Congress passed the Act just six months after this Court handed down Cabazon. See Part I–B, supra. In that decision, the Court interpreted Public Law 280 to mean that only 'prohibitory' state gaming laws could be applied on the Indian lands in question, not state 'regulatory' gaming laws. The Court then proceeded to hold that California bingo laws—laws materially identical to the Texas bingo laws before us today—fell on the regulatory side of the ledger. Just like Texas today, California heavily regulated bingo, allowing it only in certain circumstances (usually for charity). Just like Texas, California criminalized violations of its rules. Compare Cabazon, 480 U.S. at 205, 107 S.Ct. 1083, with Tex. Occ. Code Ann. § 2001.551. Still, because California permitted some forms of bingo, the Court concluded that meant California did not prohibit, but only regulated, the game. Cabazon, 480 U.S. at 211, 107 S.Ct. 1083. … For us, that clinches the case. This Court generally assumes that, when Congress enacts statutes, it is aware of this Court's relevant precedents. … And at the time Congress adopted the Restoration Act, Cabazon was not only a relevant precedent concerning Indian gaming; it was the precedent."

In *Denezpi v. United States*, 2022 WL 2111348 (U.S. 2022), a Bureau of Indian Affairs (BIA) officer against Denezpi, a member of the Navajo Nation, charging Denezpi with three crimes alleged to have occurred at a house located within the Ute Mountain Ute Reservation: assault and battery, in violation of 6 Ute Mountain Ute Code § 2; terroristic threats, in violation of 25 C.F.R. § 11.402; and false imprisonment, in violation of 25 C.F.R. § 11.404. The complaint was filed in one of the Courts of Indian Offenses established under the Code of Federal Regulations (C.F.R. court) a court which for Indian tribes in certain

parts of Indian country "where tribal courts have not been established." § 11.102. Denezpi pleaded guilty to the assault and battery charge and was sentenced to time served—140 days' imprisonment. Six months later, a federal grand jury in the District of Colorado indicted Denezpi on one count of aggravated sexual abuse in Indian country, an offense covered by the federal Major Crimes Act. Denezpi moved to dismiss the indictment, arguing that the **Double Jeopardy** Clause barred the consecutive prosecution. The District Court denied Denezpi's motion. Denezpi was convicted and sentenced to 360 months' imprisonment. The Tenth Circuit affirmed and, in the instant case, the United States Supreme Court affirmed the Tenth Circuit's decision: "The Double Jeopardy Clause protects a person from being prosecuted twice 'for the same offense.' An offense defined by one sovereign is necessarily different from an offense defined by another, even when the offenses have identical elements. Thus, a person can be successively prosecuted for the two offenses without offending the Clause. We have dubbed this the 'dual-sovereignty' doctrine. … This case presents a twist on the usual dual-sovereignty scenario. The mine run of these cases involves two sovereigns, each enforcing its own law. This case, by contrast, arguably involves a single sovereign (the United States) that enforced its own law (the Major Crimes Act) after having separately enforced the law of another sovereign (the Code of the Ute Mountain Ute Tribe). Petitioner contends that the second prosecution violated the Double Jeopardy Clause because the dual-sovereignty doctrine requires that the offenses be both enacted and enforced by separate sovereigns. … We disagree. By its terms, the Clause prohibits separate prosecutions for the same offense; it does not bar successive prosecutions by the same sovereign. So even assuming that petitioner's first prosecutor exercised federal rather than tribal power, the second prosecution did not violate the Constitution's guarantee against double jeopardy." "Federal prosecutors tried Merle Denezpi twice for the same crime. First, they charged him with violating a federal regulation. Then, they charged him with violating an overlapping federal statute. Same defendant, same crime, same prosecuting authority. Yet according to the Court, the Double Jeopardy Clause has nothing to say about this case. How can that be? To justify its conclusion, the Court invokes the dual-sovereignty doctrine. For reasons I have offered previously, I believe that doctrine is at odds with the text and original meaning of the Constitution. … But even taking it at face value, the doctrine cannot sustain the Court's conclusion."

In *Hill v. Nunn*, 2022 WL 2154997, Not reported in Federal Reporter (10th Cir. 2022), the Tenth Circuit Court of Appeals rejected a state prisoner's argument that the statute of limitations for his filing of a habeas corpus petition challenging the state court's jurisdiction should begin running as of the date that the United States Supreme Court ruled in ***McGirt v. Oklahoma***, … that the Muskogee Creek reservation continued to exist: "A state prisoner must file a § 2254 petition within one year of the state court's judgment becoming final. See 28 U.S.C. § 2244(d)(1). … Hill's latest convictions became final on June 12, 1991—when the 90-day period for seeking review in the United States Supreme Court expired. … [A]bsent tolling, Hill's deadline for filing his habeas petition was April 24, 1997. Hill did not file his petition until December 30, 2021. … On

appeal, Hill seems to argue that he is entitled to statutory tolling under 28 U.S.C. § 2244(d)(1)(C) until the date of the Supreme Court's decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) (holding that the territory in Oklahoma reserved for the Creek Nation since the 19th century remains 'Indian country' for purposes of exclusive federal jurisdiction over 'certain enumerated offenses' committed 'within the Indian country' by an 'Indian') (internal quotations omitted). He also contends that, as applied here, AEDPA is unconstitutional because the state court lacked jurisdiction when he was prosecuted. … Hill's first argument is unpersuasive. As both the magistrate judge and district court correctly explained, *McGirt* did not recognize a new constitutional right. See In re White, No. 21-7062 (10th Cir. Dec. 13, 2021). Hill thus cannot rely on the date of McGirt's publication as the triggering date for the limitations period. … Hill's second argument is also meritless. This is because, as the district court noted, … a claim predicated on a convicting-court's lack of subject matter jurisdiction 'is subject to dismissal for untimeliness.'"

In *Grondal v. United States*, 2022 WL 2112793 (9th Cir. 2021), Evans, the owner of a 5.4% interest in a trust allotment known as MA-8 near the Confederated Tribes of Colville Reservation, obtained the consent of a majority of the other allottee interest holders to a lease of MA-8 for 25 years, with an option to renew for an additional 25 years (Master Lease), for purposes of operating a campground. Campground residents organized as the Mill Bay Members Association (Mill Bay). BIA approved the lease in 1984. Upon Evans' death in 2003, Wapato Heritage LLC (Wapato) acquired Evans' interest. Evans, Wapato and Mill Bay all believed that Evans had renewed the lease for an additional 25 years by sending a renewal notice to BIA but BIA informed Wapato in 2009, before the expiration of the initial lease term that the notice of renewal to BIA was ineffective because the lease required that individual allottees (IA) also be given notice. Mill Bay and Wapato contested the BIA's interpretation in court but lost. Grondal (Wapato's sublessee under the Master Lease) and Mill Bay filed a new suit seeking a declaratory judgment that would recognize their right to remain on MA-8, naming as defendants the fractionated owners of MA-8 (IAs, Wapato Heritage, and the Tribe) as well as the BIA. BIA counterclaimed with a suit in trespass. In defense, Wapato and Mill Bay asserted, for the first time, that BIA had no standing to pursue trespass because M-8 had lost its trust status in the early 20th century. In separate decisions, lower courts dismissed the defendants' arguments and granted summary judgment in favor of BIA. The Ninth Circuit affirmed. On remand, the district court dismissed Wapato's cross-claims against the Colville Tribes on grounds of sovereign immunity: "[T]he Tribes did not waive their sovereign immunity to Wapato Heritage's cross-claims as to the 2009 and 2014 Replacement Leases. Wapato Heritage went on the offensive by asserting these cross-claims against the Tribes in answering the complaint filed by Grondal and Mill Bay. And the Tribes invoked their immunity from suit in two Rule 12(b)(1) motions to dismiss Wapato Heritage's cross-claims for lack of jurisdiction, which were granted. Considering this participation of the Tribes in the case, they retained their sovereign immunity to Wapato Heritage's cross-claims and the district court did not need to rule on the merits of these cross-

claims. See Quinault Indian Nation, 868 F.3d at 1097–98 (explaining that the scope of a tribal sovereign immunity waiver is restricted by 'the nature and bounds of the dispute that the tribe put before the court'); Bodi, 832 F.3d at 1016–18 (holding that a tribe did not waive its tribal sovereign immunity to certain claims by removing a lawsuit to federal court then moving to dismiss those claims for lack of subject-matter jurisdiction)."

In *Cayuga Nation v. Parker*, 2022 WL 1813882 (N.D.N.Y. 2022), the Cayuga Nation of New York manufactured and sold cigarettes, without New York state tax stamps, at locations on the Tribe reservation in New York. The Seneca-Cayuga Nation of Oklahoma owned real property on the Cayuga reservation, which it leased to Meyer who, in turn, subleased to Parker, a Cayuga tribal member. Parker began selling Native-manufactured tobacco products from the site that did not display New York tax stamps. Cayuga Nation officials sought to terminate Parker's business because it had not received authorizations required under tribal law. After purchasing the property from the Seneca-Cayuga Nation, the Cayuga Nation shut down Parker's shop, confiscated his inventory and opened its own smoke shop. After Parker sought to open a new smoke shop at another location on the Cayuga reservation, the Tribe sued him and related entities in federal court, alleging violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), specifically asserting that the defendants were engaged in an unlawful scheme to co-opt the Nation's sovereign rights, erode its business and customer base, and steal its revenues through the sale of "untaxed and unstamped cigarettes and marijuana, and various other merchandise" on the reservation. The Tribe had previously filed an action in its tribal court. The Tribe moved for a preliminary injunction in federal court. The defendants moved to dismiss for lack of jurisdiction. The court denied the motion to dismiss and stayed the action pending the parties' notification of the exhaustion of proceedings in Cayuga Nation Civil Court: "The Court … concludes that these circumstances—the presence of a proceeding in Cayuga Nation Civil Court, the concern about the Nation Court's authority to enforce the injunction, and the scope of that injunction, the presence of a dispute between Cayuga Nation and Parker, a member of the Cayuga Nation and owner and operator of Pipekeepers, regarding the operation of a commercial business governed by the Ordinance on reservation land—militate in favor of the application of the **tribal exhaustion rule**."

In the case of *In re Juul Labs Product Liability Litigation*, 2022 WL 1955678 (N.D.Cal. 2022), the Saint Regis Mohawk Tribe (SRMT) and Grand Traverse Band of Ottawa and Chippewa Indians (Grand Traverse Band) sued entities involved in the distribution of **JUUL vaping products**, contending that the defendants knowingly or negligently and deceptively marketed and promoted addictive and harmful JUUL products to the Tribe and its members within the Tribe's territory geographic areas controlled and occupied by the Tribe and its members and that SRMT suffered damages through lost productivity of the Tribe's members, increased administrative costs, lost opportunities for the Tribe's community growth and self-determination, and substantial damages relating to its ability to govern itself, the Tribe's members, and territory as a

direct result of Defendants' wrongful acts and omissions and that the defendants created a growing hazardous waste problem on SRMT's property because of improperly disposed JUUL devices and other vaping products in its parks and on other tribal property. Various defendants moved to dismiss on various grounds, included the exemption from liability available to regulated businesses, failure to state a claim, lack of jurisdiction and deficiencies in the plaintiffs' pleadings. The Court dismissed Grand Traverse Band's claim based on the Michigan Consumer Protection act, permitted Grand Traverse Band to amend its negligence claim and otherwise denied the defendants' motions to dismiss: "For present purposes, the allegations of injury to property made by SRMT and injury to business made by both Tribes are sufficient. How closely or directly connected those injuries are to the conduct of defendants is better determined on a complete record. Similarly, whether the expenditures the Tribal plaintiffs claim they incurred are sufficiently "extraordinary" and directly connected to defendants' conduct to convince me to follow Judge Polster's reasoning and distinguish Judge Breyer's is better determined on a full evidentiary record."

In *Kiowa and Comanche Tribe v. United States*, 2022 WL 1913436 (W.D. Okla. 2022), 160 acres within the Kiowa and Comanche Reservation in Oklahoma was allotted to Tsalote, a Kiowa member in 1901. In 2001, the allotment, as deeded by a member of the Fort Sill Apache Tribe (FSAT) to the FSAT. When FSAT sought to open a casino on the allotment, the Kiowa and Comanche tribes sued officials of the FSAT under the doctrine of Ex Parte Young, contending that their permission was required for the acquisition of land in trust for another tribe within their former reservation and that the proposed casino would violate the **Indian Gaming Regulatory Act** and the Racketeering Influenced and Corrupt Organizations (RICO) Act. The court denied the plaintiff's motion for a temporary restraining order: "Plaintiffs' theory of liability under RICO rests upon the premise that if FSAT, an 'enterprise,' runs the Casino, it will be knowingly operating 'an illegal gambling business' and engaging in money laundering because the Casino is not authorized under IGRA (and therefore also not authorized under Oklahoma law). … Plaintiffs have not shown a substantial likelihood of success on their claim that FSAT's acquisition of the Tsalote Allotment was invalid or on their claim that operation of the Casino will violate IGRA. Plaintiffs therefore cannot show a substantial likelihood that they could successfully show that the FSA Defendants' intent to open and operate the Casino amounts to a RICO conspiracy and agreement to conduct FSAT's affairs 'through a pattern of racketeering activity.'"

In *McKinsey & Co. v. Boyd*, 2022 WL 1978735 (W.D. Wis. 2022), the Red Cliff Band of Lake Superior Chippewa (Band) sued McKinsey & Co (McKinsey) in Tribal Court, seeking to hold it accountable for consulting work with opioid companies and the ensuing, resultant opioid epidemic on the Red Cliff Reservation. McKinsey sued in federal district court to enjoin the tribal court litigation and the district court granted McKinsey's motion for injunctive relief on the ground that McKinsey's actions were outside the tribe's jurisdiction for

purposes of the rule of ***Montana v. United States*** and its second exception to the general rule: "McKinsey has no offices on the Red Cliff Reservation nor anywhere else in Wisconsin; none of its opioid-related engagements originated within the Reservation or this state; and none of its consultants could have been based in an office there. ... Here, there is no suggestion that any activity took place on tribal land. While defendants broadly argue that McKinsey's aid to the opioid industry contributed to addiction on the reservation, threatening the health of the tribe, that is too attenuated to be considered 'conduct of non-Indians on fee lands within its reservation.' Opioid addiction certainly plagues tribal lands, along with the majority of the rest of the country, but McKinsey is being sued for advising pharmaceutical companies selling opioids, who in turn manufacture, distribute and prescribe the use of these drugs to physicians, dentists and patients throughout the country, arguably creating demand and addiction that would not be there otherwise. However, defendants do not point to any action by plaintiff taking place on tribal land, and the court is skeptical that any such evidence exists given McKinsey's lack of ties to state of Wisconsin, much less the Red Cliff Tribe. Accordingly, the strong general rule against the exercise of tribal jurisdiction over non-tribe members plainly applies here."

In *Pueblo of Pojoaque v. Biedscheid*, 2022 WL 174920 4 (D. N.M. 2022), Pena sued the Pueblo of Pojoaque (Tribe) in state court after he allegedly suffered injuries at the Tribe's Buffalo Thunder's casino. The Tribe sued in federal court to enjoin the state court judge, Biedscheid, from hearing the case, arguing that the **Indian Gaming Regulatory Act (IGRA)** preempted state court jurisdiction. The federal court denied the Tribe's motion for summary judgment, holding that the Anti-Injunction Act, 28 U.S.C. § 2283, and the abstention doctrine of *Younger v. Harris* barred the Court from issuing the requested injunction and rejecting the Tribe's underlying argument that fall within the scope of IGRA: "Simply because an accident occurs at a casino on Tribal land does not necessarily mean that the accident's victim is engaged in Class III gaming activity under IGRA. ... Because Pena was not participating in a Class III gaming activity when he fell, therefore, the tort claims arising from Pojoaque Pueblo and Buffalo Thunder's conduct are not 'directly related to, and necessary for, the licensing and regulation' of Class III gaming activities. 25 U.S.C. § 2710(d)(3)(C)(I. ... Judge Biedscheid concluded correctly that, because Pena's accident was 'proximately caused by the conduct of the Gaming Enterprise,' he has jurisdiction over Pena's State tort suit."

In *Mohegan Tribal Gaming Authority v. Factory Mutual Insurance Company*, 2022 WL 2303841 Not Reported (Sup. Ct. CT 2022), a Connecticut Superior Court dismissed the Mohegan Tribal Gaming Authority's claims that its insurer, Factory Mutual Insurance Company, breached its contract by denying **claims for compensation for losses the Authority sustained as a result of COVID-19**: "Because the Authority's complaint does not allege 'physical loss or damage' as required for coverage under the 'Protection and Preservation of Property Time Element' coverage and its assertion that the placement of the Communicable Disease coverage in section 6, 'Additional

Coverages,' compels the conclusion that the Policy defines communicable disease as 'physical loss or damage' is erroneous, no coverage is provided by the Policy under the 'Protection and Preservation of Property Time Element' coverage. Further, because the Authority has failed to sufficiently allege that the cessation of its operations was due to the 'actual not suspected presence" of COVID-19 at the Resort, FM's motion to strike is granted in its entirety."