Godfrey & Kahn S.C.: Indian Nations Law Update - August 2022

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In *Chicken Ranch Rancheria of Me-Wuk Indians v. California*, 2022 WL 2978615 (9th Cir. 2022), five California tribes sued the State of California, contending that the State failed to negotiate gaming compacts with them in good faith, as required by the **Indian Gaming Regulatory Act (IGRA)**. The district court granted the tribes summary judgment and the Ninth Circuit Court of Appeals affirmed: "We hold in this case that California failed to act in good faith in its compact negotiations with the plaintiff Tribes. The central problem with California's approach was this: it for years demanded that the Tribes agree to compact provisions relating to family law, environmental regulation, and tort law that were unrelated to the operation of gaming activities and far outside the bounds of permissible negotiation under IGRA. Through its negotiating demands, California effectively sought to use the Class III contracting process as leverage to impose its general policy objectives on the Tribes, which a state may not do. California thereby failed to act in good faith, triggering IGRA's remedial provisions."

In *Evans Energy Partners, LLC v. Seminole Tribe of Florida, Inc.*, 2022 WL 2784604 (11th Cir. 2022), Evans Energy Partners LLC (Evans), a wholesale and commercial distributor of petroleum products operating under the trade name "Askar Energy" entered into an agreement with the Seminole Tribe of Florida by which the Tribe would purchase Askar's assets for a sum of ten-million dollars and a separate "Management and Operations Agreement". The Management Agreement provided for dispute resolution in tribal court but gave Evans the right "to initiate a binding arbitration proceeding … for the sole and exclusive purpose of terminating the Management Agreement and compelling the payment of the Termination Fee…." The agreement provided that "in no event shall the Seminole Tribe of Florida, Inc., or any of its other affiliated entities be named a party in any arbitration…." and instead restricted Evans to "compelling Seminole Energy to participate in an arbitration proceeding for the express purpose set forth herein." The agreement also included a clause stating that "the Company through its parent company the Seminole Tribe of Florida, Inc., agrees to a limited waiver of sovereign immunity in order to allow Evans Energy" to exercise its rights under the arbitration clause. The Tribe terminated the Agreement several years later and obtained a default judgment against Evans for over two and a half million dollars in tribal court. Shortly before the final judgment was issued, Evans served the American Arbitration Association with a demand for arbitration of a breach of contract claim against the Tribe. The arbitral panel determined that it was without jurisdiction to "decide the gateway question of who decides the arbitrability of the dispute." Evans then sued the Tribe in the United States District Court for Middle District of Florida, seeking a declaratory judgment and an order compelling arbitration under the Federal Arbitration Act. The Tribe moved to dismiss under Federal Rule of Civil Procedure 12(b)(1), arguing that it was immune from suit. The district court granted the Tribe's motion and the Eleventh Circuit affirmed: "Although the agreement typically refers to the Tribe as 'the

Company' and the purported waiver expressly states that 'the Company' waives its **sovereign immunity**, we cannot read 'the Company' as 'the Tribe' in the waiver without creating an absurdity. Were we to read the phrase 'the Company' in the waiver clause as a reference to the Tribe, as that phrase is admittedly used elsewhere in the agreement, the new waiver and arbitration provision would read: "[The Seminole Tribe of Florida, Inc.], through its parent company the Seminole Tribe of Florida, Inc., agrees to a limited waiver of sovereign immunity in order to allow Evans Energy to initiate a binding arbitration proceeding ... 'for the sole and exclusive purpose of terminating the Management Agreement and compelling the payment of the Termination Fee....' Because the Tribe cannot be its own parent company, Evans's proposed construction is facially absurd."

In *Turtle Mountain Band of Chippewa Indians v. Jaeger*, 2022 WL 2528256 (D.N.D. 2022), the Turtle Mountain Chippewa Band and the Spirit Lake Tribe sued the officials of the State of North Dakota, contending that the State's redistricting pursuant to the 2020 census diluted their members' voting strength in violation of **Section 2 of the Voting Rights Act** and 42 U.S.C. 1983. The State moved to dismiss but the court denied the motion, holding that the Tribes had standing and that the VRA could be enforced through a private right of action: "The plain language of Section 2 mandates that no government may restrict a citizen's right to vote based on an individual's race or color. It is difficult to imagine more explicit or clear rights creating language. It cannot be seriously questioned that Section 2 confers a right on a particular class of people. And indeed, the Secretary does not argue that Section 2 does not contain rights creating language. When this right is taken collectively with the remedy available through § 1983, an implied private right of action is present, and the motion to dismiss must be denied. ..."

In *Portland General Electric Company v. State of Oregon*, 2022 WL 2527758 (D. Ore. 2022), Portland General Electric Company (PGE) sought condemnation under the Federal Power Act of certain state lands near PGE's hydroelectric generation facility at Willamette Falls between West Linn and Oregon City, Oregon. The Confederated Tribes of the Grand Ronde Community of Oregon (Tribe) sought to intervene on the ground that the resolution of PGE's claim might affect the Tribe's rights to conduct ceremonial fishing and lamprey harvesting on the property at issue. The Court granted the Tribe's motion: "[T]he Tribe's distinct private interests favor intervention. The Tribe seeks to protect its **ceremonial fishing practices**, whereas DSL advances broader public interests held by the State. DSL therefore may not adequately represent the Tribe's private interests."

In *Baker v. Erickson*, 2022 WL 2517178 (N.D. 2022), Baker, an enrolled member of the Turtle Mountain Band of Chippewa Indians (Tribe), and Erickson, a non-member, were divorced in 2016. Baker resided on the Tribe's reservation. Erickson resided with their children in Bismarck. When Erickson relapsed into alcoholism, Baker took the children to the reservation and obtained an order from the Tribal Court granting him custody of the children. On Baker's motion, a judge in Rolette County, where Erickson resided, determined that the tribal court judgment was entitled to **full faith and credit** under 18 USC 2265, which requires the courts, states, tribes and territories to give full faith and credit to each other's protective orders provided the issuing court had jurisdiction over the the subject of the order and certain other conditions are met. The North Dakota Supreme Court disagreed and reversed: "The record does not reflect that Erickson was properly served with the tribal court proceedings under the

Tribal Code. Regarding the temporary ex parte order proceedings, the affidavit of mailing reflects that the tribal court mailed a copy of the order for telephonic hearing, notice of entry of order, and the temporary ex parte protection order to Erickson's Bismarck address via regular mail. Additionally, regarding the permanent protection order, an affidavit of mailing reflects that this was sent to Erickson's Bismarck address, also using only regular mail. The clerk of the tribal court confirmed in an email that the court relied on lack of returned mail as evidence of service. Mailing the documents, without using certified mail or return receipt requested, was insufficient under § 2.0405(1). See also *State ex rel. Olson v. Harrison*, 2001 ND 99, ¶ 13, 627 N.W.2d 153 (refusing to afford full faith and credit to a tribal court judgment because the tribal court failed to properly serve the State of the tribal court proceedings and therefore the tribal court failed to acquire personal jurisdiction over the State). Although the tribal court was not provided with a current address of the treatment program at which Erickson was residing during the time of the proceedings, the tribal court could not lawfully proceed with the proceedings unless Erickson was served 'at least five days prior to the hearing.' § 37.0504(3). Without proper service on Erickson, a hearing should not have been held, and a permanent protection order should not have issued."

In *Block v. Tule River Tribal Council*, 2022 WL 2533483 (E.D. Cal. 2022), Block brought claims against the Tule River Tribal Council (Tribal Council) and Tule River Economic Development Corporation dba Eagle Feather Trading Post #2 (TREDC) arising out of his employment. The district court dismissed based on **sovereign immunity**, holding that TREDC was an arm of the Tribe entitled to share its immunity: "The court agrees with defendants' contention in this regard. Consideration and application of the *White* factors results in the conclusion that defendant TREDC is an arm of the Tribe. As argued in defendants' pending motion, defendant TREDC is a federally chartered corporation under 25 U.S.C. § 5124, wholly owned and formed by the Tribe, as documented in a resolution adopted by the Tribe. ... Not only does the Tribe hold 'one-hundred percent of the voting stock issued in' defendant TREDC, but it also retains a host of other rights, such as the right to all assets upon TREDC's dissolution, the right to examine TREDC's books and records, and the exclusive right to amend TREDC's charter of incorporation, among other rights. ... Quoting from defendant TREDC's charter of incorporation, defendants contend that TREDC's purpose 'is to generate income to create profits to be used to supplement the revenues of the Tribal government, and to provide essential governmental services to those within its jurisdiction, including for the health, education and welfare of tribal members, infrastructure, and to further economic development.' ... The charter of incorporation also explicitly shows the Tribe's intention to share its sovereign immunity with defendant TREDC." The court also rejected the plaintiff's argument that sovereign immunity does not extend to claims brought under federal law.

In *City of Seattle v. Sauk-Suiattle Tribal Court*, 2022 WL 2440076 (W.D. Wash. 2022), the Sauk-Suiattle Tribe sued the City of Seattle in the Sauk-Suiattle Tribal Court, contending that the operation of three dams, located outside the Tribe's reservation, blocked upstream and downstream passage of several species of migratory fish, infringing the Tribe off-reservation fishing rights reserved in its 1855 treaty with the United States, threatening the health, welfare, safety and economic security of the Tribe and causing within the Sauk-Suiattle Reservation and lands and

waters within its Ceded Territory, thus satisfying the Second Exception identified by the Supreme Court in its 1981 decision in ***Montana v. United States***. The City sued in federal court and moved for a preliminary injunction against tribal court proceedings. The Tribe moved to dismiss. The Court denied the City's motion and held that the City must first exhaust tribal court remedies: "In the absence of controlling precedent directly on point, however, it cannot be said that the Tribe's invocation of tribal court jurisdiction in this case is frivolous. To be clear, the Court is not ruling here that the Tribal Court has jurisdiction, and nothing the Court has said about the plausibility of jurisdictional arguments should be construed as commentary on the relative merit of those arguments. The Court holds only that the Tribe is entitled to make these arguments to the Tribal Court first."

In *Mandan, Hidatsa, and Arikara Nation v. United States*, 2022 WL 2612127 (D.N.D. 2022), the Mandan, Hidatsa, and Arikara Nation (MHA Nation) challenged the Bureau of Land Management's issuance of a drilling permit, seeking to enforce a 1000-foot tribal setback requirement on nonmember fee land. Applying the rule of ***Montanta v. United States***, the court rejected the challenge: "At best, the MHA Nation's evidence supports the possibility that, if there is an equipment or other failure resulting in a discharge of contaminants, some amount of contaminant might reach Lake Sakakawea. … the evidence fails to demonstrate a substantial risk that if a contaminant reached Lake Sakakawea, it would cause significant damage—much less than reaching catastrophic proportions or otherwise putting in peril the subsistence of the MHA Nation." (Internal quotations, citations and emendations omitted.)

In *Bird Industries, Inc. v. Business Council Three Affiliated Tribes*, 2022 WL 2666062 (D.N.D. 2022), Bird, a member of the Three Affiliated Tribes of the Fort Berthold Indian Reservation (Tribe) formed Bird Industries Inc., a South Dakota corporation with its principal place of business located in Brookings, South Dakota, and offices located in Bismarck, North Dakota. In 2015, the Four Bears Segment, a constituent geographical and political unit of the Tribe, entered into a Joint Venture agreement with Bird Industries in which Bird Industries agreed to provide funds, equipment, management, and manufacturing knowledge to produce aggregates and ready-mix products for sale. Lakeview Aggregates, LLC, a North Dakota Limited Liability Company, was created for this purpose. The parties' agreement included terms for distribution of revenues between Bird and Four Bears. The Tribal Business Council, which was legally responsible for Four Bears' obligations, defaulted on its agreement to contribute 50% toward the cost of goods and services for the project and Bird was compelled to advance $3,007,888.98 to cover these costs. The Tribe forced Bird out after levelling accusations of mismanagement and compensated Bird based on financial data that Bird later learned was false. Bird sued the Business Council under the Racketeering Influenced and Corrupt Organizations (RICO) act in federal court. On the Council's motion to dismiss, the court rejected the argument that jurisdiction was barred under the intra-tribal dispute doctrine but dismissed on the ground of **sovereign immunity**: "And since tribal courts clearly lack jurisdiction over RICO actions, the tribal exhaustion doctrine is also inapplicable. … the Court concludes, as did the arbitrator, that because the Tribal Business Council never approved the waiver, no valid waiver of the Four Bears Economic Development Corporation's immunity exists. Even if the Four Bears Economic Development Corporation had waived its immunity, such a waiver would not extend to the Tribe or the Tribal Business Council because the Four Bears Economic Development

Corporation's Articles of Incorporation clearly limit the extent of the waiver such that it does not extend to the Tribe. ... In addition, the Tribal Business Council is the Defendant in this case and the Four Bears Economic Development Corporation is not. The Court concludes the Plaintiffs have failed to demonstrate the Tribal Business Council has waived its immunity in relation to this action. ... Even if the arbitration agreement was deemed a valid waiver it is limited to the arbitration of disputes arising out of the purchase agreement. ... The waiver does not pertain to the Joint Venture agreement or any of the other instances of fraud alleged in the complaint which form the basis for the Plaintiff's RICO action. The arbitration clause cannot be read so broadly as to permit or authorize a RICO action in federal court."

In *State v. House*, 2022 WL 2447556 (Wis. App. 2022), House, a member of the Oneida Nation, was convicted in Wisconsin state court of second-degree sexual assault, as a repeater, for an offense occurring at his home on the Oneida reservation. Wisconsin exercised **jurisdiction under Public Law 280**, 18 U.S.C. s 1162. House filed a motion for post-conviction relief, arguing that Public Law 280 is unconstitutional. The trial court denied the motion and the Court of Appeals affirmed: "[W]e reject House's argument that Public Law 280 is unconstitutional because Congress lacked the authority to enact it. The United States Supreme Court has clearly held that Congress has broad, plenary power 'to legislate in the field of Indian affairs.' ... Although the source of that power has been the subject of academic dispute, the existence of the power is not in dispute. We therefore conclude that Public Law 280 was lawfully enacted pursuant to Congress's plenary power to regulate Indian affairs."