GODFREY KAHN S.C.

Client Alert

Indian Nations Law Update - September 2022

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In *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Evers*, 2022 WL 3355076 (7th Cir. 2022), Wisconsin Ojibwe Bands had entered into a treaty with the United States in 1854. The Treaty provided for the cession of certain lands and the establishment of reservations for the Bands at Red Cliff, Bad River, Lac Courte Oreilles and Lac du Flambeau. Article 11 provided that the Ojibwe “shall not be required to remove from the homes hereby set apart for them.” The reservations were later allotted to individual tribal members, subject to restrictions against alienation for a period of years. Following the expiration of the restrictions, lands were either held in fee simple by tribal members or passed into non-Indian hands. Over time, certain lands that had been sold to non-Indians were reacquired by the Tribes or their members. The state of Wisconsin and its subdivisions commenced imposing **property taxes** on the reservation lands as soon as restrictions against alienation were lifted, asserting that, under US Supreme Court decisions, the alienability of reservations lands provided full and sufficient authorization for state taxation. The Tribes sued, arguing that taxation of Indians in Indian country required explicit congressional authorization and that such authorization was lacking where allotment occurred under treaty rather than under an act of Congress. The district court held that state taxation of Indian-owned fee property was impermissible if the property had remained in tribal hands but that, once the chain of title was broken by non-Indian ownership, it became taxable, even if it was later reacquired by the Tribe or a member. The Seventh Circuit Court of Appeals disagreed, holding that that the tribal argument was the current one: “Had Congress enacted the text of the 1854 Treaty in the form of a statute, all the lands in question would be fully taxable under the reasoning of *Yakima*. In this sense the distinction the Supreme Court’s cases have drawn here—between congressionally authorized alienability (which renders lands taxable) and alienation in fact (which does not)—might seem needlessly formalistic and leading to an odd practical result. … No doubt the distinction is formalistic, but not needlessly so. The Constitution makes clear that Congress alone may diminish the inherent sovereignty of the Indian tribes, particularly where taxes are concerned. Here, Congress has not authorized the State to tax Ojibwe lands. The 1854 Treaty, in light of the historical evidence in the record, is best read to promise tax immunity for even reacquired lands.”

In *Silva v. Farrish*, 2022 WL 3650689 (2d Cir. 2022), members of the Shinnecock Indian Nation sued the New York State Department of Environmental Conservation (DEC) and several DEC officials, alleging that colonial-era deeds established members’ **aboriginal right to fish** in the waters of a certain bay, that the application of state fishing regulations to members violated those fishing rights, and that DEC’s continued enforcement of the regulations amounted to continuing pattern of discrimination based on members’ race as Native Americans. The district court granted summary judgment to the defendants. On appeal, the Second Circuit Court of Appeals affirmed in part, vacated in part and remanded, holding that (1) the plaintiffs had standing based on the threat of enforcement, (2) the state officials could be sued under the *Ex Parte Young*

doctrine, (3) the plaintiffs' discrimination claims were properly dismissed but (4) the case would be remanded for further consideration of the plaintiffs' fishing rights claims.

In *Caremark, LLC v. Chickasaw Nation*, 2022 WL 3206683 (9th Cir. 2022), the Chickasaw Nation and five Nation-owned pharmacies entered into an agreement with Caremark under which Caremark served as the pharmacies' pharmacy benefit manager (PBM) for health-insurance plans that cover many tribal members served by the Nation's pharmacies. As a PBM, Caremark managed prescription drug benefits for health insurers, Medicare Part D drug plans, large employers, and other healthcare payers by enrolling individual pharmacies in pharmacy networks providing for reduced costs. The parties' contract incorporated Caremark's manual, which included a clause stating that "[a]ny and all controversies in connection with or arising out of the Provider Agreement ... will be exclusively settled by arbitration before a single arbitrator in accordance with the Rules of the American Arbitration Association." The Rules of the American Arbitration Association contained a delegation clause stating that the "arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." In 2020, the Nation sued Caremark in an Oklahoma federal court, claiming violations of 25 U.S.C. § 1621e, a provision of the Indian Health Care Improvement Act known as the "Recovery Act," alleging that Caremark improperly denied claims. Caremark petitioned a federal court in Arizona to order the Nation to arbitrate and the Ninth Circuit affirmed: "The district court explained that, in light of a clause in the parties' contract delegating to the arbitrator the authority to resolve threshold issues regarding the scope and enforceability of the arbitration provision, the Nation's arguments that its claims are not arbitrable must be resolved by the arbitrator. … The Nation argues that agreeing to arbitration would have waived its **tribal immunity**, and because the Nation did not take the clear and unequivocal steps necessary to waive immunity, it cannot have agreed to the arbitration provisions. We reject that argument. [E]very version of the Provider Manual has included an arbitration provision delegating gateway questions of arbitrability to the arbitrator. The pre-2014 Manuals did so by incorporating the Rules of the American Arbitration Association, which contain a delegation clause. We have held that incorporation of the AAA rules constitutes clear and unmistakable evidence that contracting parties agreed to arbitrate arbitrability. … Given that history—and considering the hundreds of thousands of claims the Nation has submitted to Caremark over the last several years—the Nation cannot plausibly deny that it formed contracts with Caremark. And the language of those contracts includes arbitration provisions with delegation clauses." (Quotation and citation omitted.)

In *Swinomish Indian Tribal Community v. BNSF Railway Company*, 2022 WL 3597439 (W.D. Wash. 2022), BNSF had, since 1991, operated a rail line over the Swinomish Indian Reservation pursuant to a **right-of-way (ROW) Easement Agreement** which provided that BNSF would "keep the Tribe informed as to the nature and identity of all cargo transported by Burlington Northern across the Reservation" and that "unless otherwise agreed in writing, only one eastern bound train, and one western bound train, (of twenty-five (25) cars or less) shall cross the Reservation each day." The Easement Agreement further provided that the number of trains and cars "shall not be increased unless required by shipper needs. The Tribe agrees not to arbitrarily withhold permission to increase the number of trains or cars when necessary to meet shipper needs. It is understood and agreed that if the number of crossings or the number of cars is increased, the annual rental will be subject to adjustment." When BNSF breached the Agreement by failing to update the Tribe regarding the nature of the cargo that was crossing the Reservation

and by increasing the number of trains and the number of cars without the Tribe's written agreement, the Tribe sued. BNSF argued that the increases were permissible under the "shipper needs" provision in the easement. The Court held that BNSF had committed a trespass by violating the conditions of the easement and reserved for trial the issue whether the trespass was willful: "Federal common law governs an action for trespass on Indian lands …. A trespass occurs if permission to enter the property is conditioned or restricted and the defendant violates those conditions or restrictions. … There is no real dispute that BNSF engaged in an intentional trespass under the Restatements and is therefore liable for the damages caused by its overburdening of the easement. In the absence of injury to the property, an award of nominal damages would be appropriate. The Tribe further argues, however, that it is entitled to equitable remedies for the trespass, such as restitution and/or disgorgement. While a restitutionary award is generally considered an appropriate remedy for trespass in that it gives to the property owner what should properly have been the subject of negotiation and payment, it may not be sufficient where the trespass was knowing, conscious, and willful. … If liability in restitution were limited to the price that would have been paid in a voluntary exchange, the calculating wrongdoer would have no incentive to bargain. … if a defendant is a willful trespasser, the owner is entitled to recover from him the value of any profits made by the entry. … The lack of evidence regarding BNSF's evaluation of its common carrier obligations combined with the significant income associated with the transportation of Bakken crude oil for Tesoro/Marathon creates a fact issue regarding BNSF's consciousness that the Court declines to resolve in the context of a motion for summary judgment. Thus, whether disgorgement is an available remedy for the trespass at issue here will have to be decided at trial." (Internal quotations and citations omitted.)

In *Stimson Lumber Company v. Coeur d'Alene Tribe*, 2022 WL 3446084 (D. Idaho 2022), Stimson Lumber Company sued the Coeur d'Alene Tribe in federal court for breach of a contract relating to a sawmill. The district court granted Stimson's motion for preliminary injunction but subsequently dismissed for lack of subjection matter jurisdiction, rejecting Stimson's argument that the Tribe was a corporate entity and, as such, ought to be considered a citizen of Idaho for purposes of **diversity jurisdiction**: "As evidence that the Tribe is not a corporation, the Tribe points to the Lease Agreement, attached as an exhibit to the Amended Complaint, which states at Section 19.4.1 that 'Lessor is a federally recognized Indian tribe duly and validly organized under a constitution and bylaws ratified by members of the Tribe.' … Stimson does imply the Tribe worked through a corporation in this Agreement. Stimson points to an appraisal of the sawmill property that was prepared for the Coeur d'Alene Tribal Planning and Development Corporation ('Planning and Development Corporation') … and three Tribal Council Resolutions recorded on paper with a 'CDA Tribal Development Corporation' … . However, this is not evidence that the Tribe, the entity actually being sued, is a corporation. Notably, Stimson does not even provide any corporate documents as evidence that the Planning and Development Corporation is actually a corporation. … Even assuming the Planning and Development Corporation is a corporation, Stimson's evidence at best shows that the Tribe muddied the corporate waters by involving the Planning and Development Corporation in the Agreement. Stimson's evidence does not overturn or even contradict the evidence the Tribe has provided regarding its status as a federal Indian Tribe. … There is no need for exhaustive analysis here—the Tribe has provided an overwhelming amount of evidence that it is a federally recognized Indian tribe. Stimson has provided no substantive evidence that the Tribe is a corporation, which is a necessary condition for its suit to continue. The weighing of the evidence speaks for itself. Like the tribes in American Vantage and Zims Hot Springs, the fact that the Tribe engaged in

corporate activity does not render the Tribe a corporation or automatically endow citizenship (and consequently, jurisdiction)."

In *Lamar Central Outdoor, LLC v. Mike*, 2022 WL 3287900 (C.D. Cal. 2022), Lamar Central Outdoor, LLC (Lamar) entered into an agreement with the Twenty-Nine Palms Band of Mission Indians (Band) to lease land on the Band's reservation to erect and maintain billboards. After the Band allegedly tortiously terminated the lease, Lamar sued Band officials in state court. The defendants removed to federal court but the federal court remanded for lack of **subject matter jurisdiction**, rejecting the defendants' argument that federal enclave jurisdiction applied: "Because California law applies to this case, there is no basis for federal enclave jurisdiction. … Furthermore, a defendant cannot use activities on federal enclaves to create instant jurisdiction for a state-law claim. … Federal enclave jurisdiction is applied narrowly. … Here, the connection between Plaintiff's injury (lost billboards) and Defendants' conduct (interference and fraud) is too attenuated and remote." (Citations and internal quotations omitted.)

In *Pueblo of Pojoaque v. Wilson*, 2022 WL 3139089 (D. N.M. 2022), Martinez slipped and fell while visiting the Cities of Gold Casino, which is located on Pueblo of Pojoaque land and is operated by Plaintiff Pojoaque Gaming, Inc., which in turn is owned by Plaintiff Pueblo of Pojoaque (collectively, the Pueblo). The Pueblo had entered into a gaming compact with the state of New Mexico pursuant to the Indian Gaming Regulatory Act (IGRA). The compact provided for state court jurisdiction over tort claims arising out of gaming activities "unless it is finally determined by a state or federal court that the IGRA does not permit the shifting of jurisdiction over visitors' personal injury suits to state court." When Martinez sued the Pueblo in state court, the Pueblo sued in federal court to enjoin the state court proceedings. The district court granted the injunction, relying on the Tenth Circuit's holding in *Navajo Nation v. Dalley*, that the IGRA does not authorize tribes to shift **jurisdiction over slip-and-fall tort claims** to state courts unless those claims arise from "the actual playing of Class III games."

In *Lower Brule Sioux Tribe v. Lyman County*, 2022 WL 3274236 (D.S.D. 2022), the Lower Brule Sioux Tribe and others sued Lyman County and county officials, contending that the County's system of electing five at-large commissioners, rather than commissioners elected from districts, violated tribal members' voting power in violation of Section 2 of the Voting Rights Act (VRA). The district court determined that the Tribe was likely to succeed in its claim and granted the Tribe's motion for a preliminary injunction requiring the county to submit a remedial plan: "Native Americans constituted 46.9% of the County's total population in 2020 and non-Hispanic Native Americans constituted 39.2% of the voting age population. … Non-Hispanic whites comprised 58.4% of the voting age population in 2020. … The Chairman for the Lower Brule Tribe … testified at the preliminary injunction hearing that no Native American has ever been elected to a Lyman County position and that the Tribe experiences poor voter turnout in such elections because tribal members feel as if their voices simply are not heard. … To establish a Section 2 violation, the plaintiffs must prove by a preponderance of the evidence three elements, often referred to as the '*Gingles* preconditions' (1) The racial group is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) the racial group is politically cohesive; and (3) the majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate. Failure to prove each of the preconditions defeats a Section 2 claim. If the three preconditions are met, the court proceeds to consider the totality of the circumstances. … The first factor—that the Tribal members on the Reservation are

sufficiently large and geographically compact to constitute a majority in a single district—is indisputable. … The second Gingles factor—that Tribal members on the Reservation are 'politically cohesive'—is borne out by the data in Plaintiffs' expert report. For instance, in the 2020 elections for President, U.S. Senate, State Senate, State House of Representatives, and Public Utilities Commissioner, over 80% of Native voters in Lyman County voted for Native-preferred candidates. … The third Gingles factor—that white residents of Lyman County vote 'sufficiently as a bloc to enable [them] usually to defeat the minority's preferred candidate' for the Commission—likewise is borne out by historical data. … Plaintiffs have made a strong preliminary showing that the Gingles factors are satisfied. … Here, as a preliminary matter, the totality of the circumstances supports Plaintiffs' VRA claim."

In *Rabang v. Gilliland*, Not Reported in Pac. Rptr. 2022 WL 3351499 (Wash. App. 2022), Margretty and Robert Rabang had occupied a home on trust land of the Nooksack Tribe, located off the Tribe's reservation, under a rent-to-own lease with the Tribe under the US Department of Housing and Urban Development's (HUD) Mutual Help Occupancy Program. The Tribe disenrolled and evicted the Rabangs in 2016. After their federal lawsuit challenging their disenrollment was rejected by the Ninth Circuit Court of Appeals. The Rabangs filed a lawsuit in Washington state court against tribal officials, alleging tort claims arising out of their eviction. The court dismissed for lack of jurisdiction and the Court of Appeals affirmed on the ground of sovereign immunity: "The Rabangs contend that sovereign immunity does not apply to these personal capacity claims against four non-members. But the court looks to the activity, not the pleaded defendant. … And here, the activities complained of—issuing and enforcing eviction orders—are squarely official in their scope. … In the context of Judge Dodge's argument about judicial immunity, the Rabangs contend that **immunity** did not apply because Judge Dodge was not properly appointed. … [W]e cannot analyze the tribal process that was used to appoint Judge Dodge. "In general, Indian tribes possess inherent and exclusive power over matters of internal tribal governance. … We cannot analyze if Judge Dodge was acting in his official capacity during the eviction proceeding without first considering whether he was appointed appropriately under Nooksack law. Determining whether a tribal official had general authority to act on behalf of the tribe in a governmental capacity is a pure question of tribal law, beyond the purview of the federal agencies and the federal courts. … That other tribal officials—most notably the Nooksack Council and police departments—viewed Judge Dodge as acting under color of tribal law is as far as this court can or should inquire into the propriety of his appointment. State and federal courts have a long and shameful history of ignoring tribal sovereignty, and we will not add to that history today." (Citations, quotations and internal emendations omitted.)

In *Simmons v. State*, 2022 WL 3365394 (Wash. App. 2022), a state appellate court rejected arguments by members of the Cowlitz tribe residing on the Quinault reservation that they retained **aboriginal fishing rights**: "Viewing the historical record, including our de novo review of the consequences of the 1863 Lincoln Proclamation and the related congressional action facilitating the sale of the Cowlitz Tribe's land, and consistent with the interpretation made by *Confederated Tribes* and *Plamondon*, the Cowlitz Tribe's off-reservation aboriginal rights to fish have been extinguished. Accordingly, we determine that the superior court did not err in making this same determination. … We agree that much of the historical mistreatment of indigenous peoples in this country has been a product of racial prejudice.… Here, there was no treaty, and as explained above, the off-reservation rights of the Cowlitz Tribe to fish have been extinguished. Accordingly, we determine this argument fails."