GODFREY KAHN S.C.

Client Alert

Indian Nations Law Update - October 2022

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Selected Court Decisions

In *United States v. Fowler*, 2022 WL 4138598 (9th Cir. 2022), the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation (Fort Peck Tribes) had entered into a **cross-deputization agreement** with the State of Montana and various local governments authorizing state and local law enforcement officers to be deputized to enforce tribal law against Indians on the Reservation, and, conversely, allowing tribal officers to be deputized to enforce state law there. While driving on a highway that runs through the Fort Peck Indian Reservation, Fowler, an Indian, was stopped by a Montana state trooper and later charged with federal crimes based on evidence revealed by the stop. He moved to suppress on the ground that, based on the Tribe's lack of authority to delegate authority and other technical defects in the agreement, the state trooper lacked jurisdiction to stop him on the Reservation. The district court denied the motion and the Ninth Circuit affirmed: "[T]he Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation have a cross-deputization agreement with the State of Montana under which the Tribes have agreed to commission state police to act as tribal police where there is a gap between their respective criminal jurisdictions. Under that agreement, the state trooper who stopped Fowler was permitted to enforce tribal law, not just state law. We reject Fowler's challenges to the validity of the agreement, and we affirm the judgment of the district court. …"

In *Metlakatla Indian Community v. Dunleavy*, 2022 WL 4101799 (9th Cir. 2022), Congress had enacted a statute in 1891 that recognized Metlakatla Indian Community and established the Annette Islands Reserve of Alaska as its reservation. In 1972, Alaska amended its constitution to authorize the State to restrict the entry of new participants into commercial fisheries in state waters. Pursuant to the amendment, Alaska enacted a statute creating a limited entry program for commercial fishing. In 2020, in response to Alaska's attempt to subject the Community to its limited entry program, the Community sued, contending that an 1891 Act guaranteed the Community and its members the right to fish in the off-reservation waters where Community members have traditionally fished. The district court dismissed but the Ninth Circuit Court of appeals reversed: "We thus know from *Alaska Pacific Fisheries* that there is an **implied fishing right** stemming from the 1891 Act. The question before us is the scope of that right. A central purpose of the reservation, understood in light of the history of the Community, provides the answer. … [S]ince time immemorial Metlakatlans have fished outside the boundaries of their current reservation. Before the arrival of European settlers, they fished throughout the waters of Southeast Alaska for ceremonial purposes, for personal consumption, and for trade. Shortly before

they came to the Annette Islands, Metlakatlans established a commercial fish cannery to adapt their mode of trade to modern conditions. When Metlakatlans moved to the Islands in the late 1880s at the invitation of President Cleveland, they did so with the understanding that they would be able to support themselves by fishing, as they had always done. … When Congress passed the 1891 Act establishing the Metlakatlans' reservation, it did so with the expectation that the Metlakatlans would continue to support themselves by fishing. … Congress passed the Act with the expectation not only that Metlakatlans would catch fish for ceremonial purposes and personal consumption, but that they would also pursue the commercial fishery that had provided, and continued to provide, essential economic support for the Community. Congress clearly contemplated that Metlakatlans would continue to fish off reservation toward those ends. Congress also expected fishing to support the Community not only at the time the reservation was created, but in the future. … We therefore hold that the 1891 Act preserved for the Community and its members an implied right to non-exclusive off-reservation fishing for personal consumption and ceremonial purposes, as well as for commercial purposes."

In *Scotts Valley Band of Pomo Indians v. United States Department of Interior*, 2022 WL 4598687 (D. D.C. 2022), the federal district court, relying on the Indian canon of construction requiring courts to interpret ambiguous statutes in favor of tribes, rejected as arbitrary and capricious an opinion by the Secretary of Interior that lands acquired by the Scotts Valley Band of Pomo Indians for gaming purposes did not fall within the "restored lands" exception to the general **Indian Gaming Regulatory Act** (IGRA) prohibition against gaming on lands acquired after the enactment of the IGRA because of the Band's lack of significant historical connection: "Even when courts have found that the terms 'restore' and 'restoration' as used in section 2719 are unambiguous and should be construed in accordance with their plain meanings, they have also acknowledged that the terms may be read in 'numerous ways.' … [T]he agency's application of its regulation to the Band under the particular factual circumstances of this case was inconsistent with the canon of Indian construction and clear policy behind the IGRA and the restored lands exception. …"

In *Kialegee Tribal Town v. U.S. Department of Interior*, 2022 WL 4547528 (D. D.C. 2022), the Kialegee Tribal Town (KTT) within the exterior boundaries of the Muskogee Creek Reservation in Oklahoma, sought approval of a liquor control ordinance, when the Assistant Secretary – Indian Affairs rejected the request on the ground that the Town had no jurisdiction to enact such an ordinance. The D.C. District Court affirmed on the ground of res judicata since the issue of the Town's authority had already been addressed and determined: "[T]he 1991 BIA decision concerned KTT's request to the Bureau of Indian Affairs for the trust acquisition of two pieces of land in Tulsa County, Oklahoma, that were part of the Creek reservation. … BIA affirmed the denial of KTT's request based on its conclusion that the lands in question were part of a reservation under the jurisdiction of the Muscogee Nation and, as a result, the Muscogee Nation's consent to the trust acquisition was required by federal regulations. … [T]he plain text of the regulations makes clear that the legal standard governing the jurisdiction issue arising under the land trust

acquisition regulation in the 1991 dispute is the same standard at issue here. The authority on which BIA reached its conclusion that **KTT lacked jurisdiction over the lands within the Creek reservation** was not unique to the particular regulation at issue and included the fact of the federal government's lack of recognition of KTT's jurisdiction, the Treaty of 1856, and the Treaty of 1866, among other authorities speaking to the general question of jurisdiction over land. Under each provision, the issue is which tribe the federal government recognizes as having jurisdiction over the land within the Creek reservation. The BIA squarely decided that issue and concluded the Muscogee Creek Nation exercises exclusive jurisdiction over the Creek reservation. … Finally, the fact that the 1991 decision was made by an administrative agency does not bar the application of issue preclusion in this case."

In *Eagle Bear, Inc. v. Blackfeet Indian Nation*, 2022 WL 4465000 (D. Mont. 2022), the Blackfeet Nation in 1997 had leased 53.6 acres of tribal trust land to Eagle Bear, Inc. to operate a KOA campground within the exterior boundaries of the Nation's reservation. The Nation, taking the position that the BIA had cancelled the lease, sued Eagle Bear in tribal court for trespass. Eagle Bear then sued in federal court to enjoin the tribal court proceedings. The district court determined that the status of the lease was a disputed issue of fact. Before the court could resolve it, Eagle Bear filed for bankruptcy protection and the bankruptcy court ruled that the automatic stay applicable to claims against debtors in bankruptcy applied to the tribal court proceedings against Eagle Bear. The district court disagreed, holding that the status of the lease was outside the **bankruptcy court's jurisdiction**: "The bankruptcy stay provision applies only to claims against the debtor. Eagle Bear's claim rests against the Blackfeet Nation and the Blackfeet Tribal Court. The Blackfeet Nation alleges no counterclaims against Eagle Bear. The outcome of this case—the Court's decision whether the Blackfeet Tribal Court plainly lacks jurisdiction—therefore, does not represent a proceeding against Eagle Bear. … The question of whether the lease has been cancelled should remain before the Court to deter potential forum shopping."

In *Birdbear v. United States*, 2022 WL 4295326 (Fed. Cl. 2022), Birdbear and others (Plaintiffs) were members of the Three Affiliated Tribes of the Fort Berthold Indian Reservation (Reservation) who were beneficial owners of allotted land on the Reservation held in trust for them by the United States. Portions of Plaintiffs' allotted lands are subject to oil and gas leases that the Secretary of the Interior (Secretary) approved and managed pursuant to federal statutes and regulations. Plaintiffs sued in the Court of Federal Claims under the Indian Tucker Act, contending that the United States breached its **fiduciary duties** to them with respect to the approval and management of mineral leases on their allotted lands and that the United States has breached those obligations in numerous respects. On motions for summary judgement, the court held that (1) jurisdiction under the Indian Tucker Act was supported by the federal government's specific fiduciary obligations to subject leases for oil and gas development on tribal land to competitive process, to protect tribal members against uncompensated drainage of oil and gas held in trust for them and to ensure timely drilling of oil and gas wells on tribal members' leased land, (2) for purposes of Indian Tucker Act jurisdiction, the government did not have specific fiduciary duty to lease all

allotted lands for oil and gas development upon request, (3) the Plaintiffs' class action lawsuit did not toll six-year limitations period for breach of fiduciary duty claims, (4) the government did not breach fiduciary duties to collect and pay to tribal members royalty payments by allowing lessees to deduct transportation costs from members' royalties and (5) the government was not liable on the claim that it approved communitization and unitization agreements without obtaining consent from owners in violation of Fort Berthold Mineral Leasing Act.

Bad River Band of Lake Superior Chippewa v. Enbridge Energy Company, 2022 WL 4094073 (W.D. Wis. 2022), Enbridge Energy Company, Inc. (Enbridge) operated a 645 mile pipeline, part of which was constructed through the reservation of the Bad River Band of Lake Superior Chippewa Indians (Band) on parcels of land allotted to individual Indians, owned by non-Indians and owned in whole or in part by the Band. When **right-of-way easements** over the Band-owned parcels expired in 2013, the Band, concerned about the environmental risks associated with the pipeline, declined to renew the easement on 12 parcels now owned in whole or in part by the Band. When Enbridge refused to remove the pipeline from the Band's parcels, the Band sued, asserting claims for trespass, unjust enrichment as well as nuisance, ejectment, and a violation of the Band's regulatory authority. Enbridge counterclaimed that the Band breached its contract granting an easement and its related duty of good faith and fair dealing. On the parties' cross-motions for summary judgment, the district court held the Band was entitled to judgment on its trespass and unjust enrichment claims, Enbridge's counterclaims and the Band's entitlement to a monetary remedy. The court denied the Band's request for an automatic injunction on grounds of the "significant public and foreign policy implications" of such a shutdown, electing to solicit the parties' views as to terms of the pipeline's removal. The granted Enbridge's motion for judgment on the Band's state law nuisance, ejectment and regulatory authority claims, but not as to the Band's federal nuisance claim. The court rejected Enbridge's argument that in approving a 50-year easement on certain Band-owned lands in 1992, the Band had obligated itself to renew 20-year easements on allotted lands with respect to which it had acquired an interest after 1992: "To succeed on its trespass claim, the Band must prove three elements: (1) it has an ownership interest in the parcels; (2) Enbridge physically entered or remained, or it caused something to enter or remain, upon the property; and (3) Enbridge lacked a legal right -- express or implied -- to enter or remain. … Certainly, Enbridge's 50-year easement over the Band-owned tribal land is of little import unless Enbridge has permission to operate its pipeline across the entire Reservation, and without the Band's consent to easements on the 12 Band-owned allotment parcels, Enbridge cannot obtain the permission that it needs. Still, Enbridge's argument ultimately fails for at least two reasons. First, the only purpose or objective shared by and expressed in the 1992 Agreement was to grant Enbridge an easement to operate across the then Band-owned parcels for 50 years. As discussed above with respect to § 3, the agreed upon purpose was not, as Enbridge now asserts, to permit it to operate across the entire Reservation for 50 years. Moreover, Enbridge knew of the risk that its 20-year easements contemporaneously granted by the BIA might not be renewed, and yet failed to protect itself from that risk. In the end, the duty of good faith and fair dealing cannot be used to add obligations and conditions to an agreement that goes beyond the agreement reached

by the parties. … Second, and as important, the implied duty of good faith and fair dealing cannot be applied to deprive the Band of its sovereign authority over its land. Rather, the court must interpret all contracts in light of the Band's sovereign power and must construe contracts to avoid, if possible, foreclosing the exercise of sovereign authority. … In this case, nothing in the 1992 Agreement clearly and unmistakably surrenders the Band's power to exclude Enbridge from parcels of land acquired after the agreement was signed; nor are there explicit or unmistakable terms in the 1992 Agreement by which the Band agreed to grant Enbridge a right-of-way across all parcels owned by the Band for the next 50 years. … Accordingly, the court is persuaded that restitution or a profits-based remedy is appropriate and necessary in this case, both to address the violation of the Band's sovereign rights and to take away what otherwise would be a strong incentive for Enbridge to act in the future exactly as it did here. If Enbridge was required to pay only what it would have paid the Band for an easement, the court would essentially be granting Enbridge a de facto condemnation power, and excusing it from complying with the bargaining and easement process for Indian lands established by federal law." See also, In *Bad River Band of Lake Superior Chippewa v. Enbridge Energy Company, Inc.*, 2022 WL 4285707 (W.D. Wis. 2022) (holding that Enbridge was not entitled to a jury trial on the Band's nuisance claims.)

In *Chegup v. Ute Indian Tribe of the Uintah and Ouray Reservation*, 2022 WL 4290110 (D. Utah 2022), the Ute Indian Tribe of the Uintah and Ouray Reservation (Tribe) banished Chegup and three others, all members of the Tribe, for five years following a hearing. The four sued the Tribe and certain tribal officials in federal district court for habeas corpus relief under the **Indian Civil Rights Act** of 1968 (ICRA). The individual defendants moved to dismiss and the court granted the motion on the ground that because the plaintiffs were not "in custody" for purposes of the ICRA, the court lacked subject matter jurisdiction. The Tenth Circuit reversed and remanded, directing the court to first determine whether the plaintiffs had exhausted tribal remedies. On remand, a different federal judge dismissed for failure to exhaust tribal remedies: "It is clear to the court that Plaintiffs have failed to exhaust their tribal remedies. Plaintiffs have not made a substantial showing as to why this failure to exhaust should be excused. In the interest of comity, this matter belongs in the tribal courts of the Ute Indian Tribe, not here."

In *Solenex LLC v. Haaland*, 2022 WL 4119776 (D. D.C. 2022), Plaintiff Solenex, LLC ("Solenex") held a federal oil and gas lease, first issued in 1982, on a parcel in the Badger Two Medicine Area of the Lewis and Clark National Forest in Montana. An application for permit to drill (APD) was approved in 1985. The Blackfeet Tribe and others challenged the issuance of the APD as violative of the National Environmental Policy Act (NEPA) and National Historic Preservation Act (NHPA). In 2002, the Forest Service designated the more than 165,000 acres of the Badger Two Medicine Blackfoot **Traditional Cultural District** (TCD), including the entire land area covered by the Lease, as eligible for listing in the National Register of Historic Places and, in 2003, designated approximately 5,000 acres surrounding Solenex's proposed drilling operation as the relevant Area of Potential Effects (APE.) After Solenex sued to compel issuance of the final APD, the US Forest Service revised the APE relevant to the review of the APD to

include a 165,000-acre tract identified by the Tribe as having great significance to the spiritual and religious power of the Two Medicine Area. The Department of Interior then canceled Solenex's lease and formally disapproved the APD. The district court granted Solenex motion for summary judgment: "The Secretary lacked authority to cancel the Lease because the Secretary only has the power to administratively cancel improperly issued leases, which the Lease here was not. Issuance of the Lease violated neither NEPA nor NHPA. And even if the Lease did suffer from some legal infirmity that would have made the Lease voidable in 1982, the Government subsequently affirmed the Lease and, as such, waived any right to cancel it before 2016. Therefore, the decision to rescind the Lease must be set aside."

In *State v. Ward*, 516 P.3d 261 (Okla. Crim. App. 2022), the Oklahoma Court of Criminal Appeals that, notwithstanding the Supreme Court's holding in McGirt that the Cherokee Reservation had not been disestablished, Oklahoma had **concurrent jurisdiction**, with the Tribe, over a non-Indian's assault and battery of a tribal police officer: "The Supreme Court held that States have jurisdiction to prosecute crimes committed in Indian Country unless pre-empted by federal law; and that neither the General Crimes Act, 18 U.S.C. § 1*152, nor Public Law 280, 67 Stat. 588, have pre-empted Oklahoma's concurrent jurisdiction to prosecute non-Indians for crimes against Indians in Indian Country. ... The Court reasoned that the reservations recognized as Indian Country in* McGirt and our post-*McGirt* cases remain part of Oklahoma, rather than separate territories or federal enclaves; and that these federal statutes have not vested the United States with exclusive jurisdiction to prosecute non-Indians for crimes on the reservations."

In *Schaghticoke Tribal Nation v. State*, 2022 WL 4453342 (Ct. App. 2022), the Connecticut Court of Appeals rejected a takings claim brought by the Schaghticoke Nation against State agencies, holding that the Nation's alleged **colonial era title** was insufficient to support its claim: "In 1736, in response to the tribe's settlement of an area along the Housatonic River, the General Assembly enacted a resolution (1736 resolve) permitting the tribe to '[continue] where they are [now settled during] the [pleasure] of this [governmental body] ....' The General Assembly further addressed the tribe's rights with respect to that area in 1752, when it enacted another resolution (1752 resolve) permitting the tribe's use of additional land for 'improvement and for the cutting of wood and timber for their own use ... during the pleasure of this Assembly.' … In our view, the court properly concluded that the plain text of the 1752 resolve granted the tribe no more than a right to occupy the land which the state could revoke at any given time." (Emendations in original).

In *State v. McCormack*, 321 Or. App. 551 (Ore. App. 2022), Article III of the Nez Perce Treaty of 1855 provided that members of the Nez Perce Tribe have a **reserved right to fish** at "all usual and accustomed places." In 2019, Oregon law enforcement cited two members of the Tribe for using illegal gillnets to fish at a "usual and accustomed" fishing ground in the Columbia River. The two were tried and convicted of unlawfully taking food fish with prohibited fishing gear. The Oregon Court of Appeals reversed, holding that the evidence did not support a finding that a prohibition on gillnets was necessary for the conservation of the river's salmon: "[T]he United State Supreme Court has held that 'the manner of fishing, the size of the take, the restriction of commercial

fishing, and the like may be regulated by the State in the interest of conservation,' … However, 'no regulation applied to off-reservation treaty fishing can be valid or enforceable unless and until it has been shown reasonable and necessary to conservation as defined by federal law.' … [T]he state presented little, if any, evidence about the Nez Perce Tribe's own conservation measures, much less evidence demonstrating clearly and convincingly that any such measures are insufficient to ensure the perpetuation of the fish in the Columbia River. To the contrary, testimony from the ODFW fisheries manager showed that the tribes had not violated the catch amounts for any threatened or endangered fish species during the 2019 spring run, and that he was not aware of any instance where treaty fishers had impeded the recovery of any of the fish populations in the Columbia River. Thus, we do not think the state met its burden with respect to that point. … [N]othing in the record shows that the state was unable to preserve the spring-run Chinook by forbidding the catching of fish by other individuals under its ordinary police power and, therefore, had to adopt this particular gillnet regulation." (Citations and internal emendations omitted.)

In *Ahtna, Inc. v. Department of Natural Resources*, 2022 WL 4283097 (Alaska 2022), the State of Alaska asserted a 100-foot, all-purpose right-of-way along a road on land belonging to Ahtna, Inc., an Alaska Native Corporation, under an 1866 federal law, R.S. 2477, providing that "[t]he right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." The Secretary of Interior withdrew Alaska lands from RS 2477 **right of way** eligibility in 1969 and Congress repealed RS 2477 in 1976 but left existing rights of way intact. Ahtna sued, arguing that its prior aboriginal title prevented the federal government from conveying a right of way to the State or, alternatively, if the right of way existed, that construction of boat launches, camping sites, and day use sites, the State's intended uses, exceeded its scope. The lower state court held that any preexisting aboriginal title did not disturb the State's right of way over the land but that the right of way was limited to ingress and egress. The Alaska Supreme Court affirmed the former determination but reversed and remanded as to the latter, holding that the Alaska Native Claims Settlement Act of 1971 extinguished Ahtna's aboriginal title: "Akin to typical right of way easements, where the holder is limited to reasonable use of the easement, the holder of an RS 2477 right of way is 'authorized to make any use ... reasonably necessary for the convenient enjoyment of the easement' subject to the terms and "purposes for which the servitude was created.' The State may maintain and modernize the road, but any expansions must be consistent with the scope of the federally granted right of way: as a highway defined and limited by relevant state law. … Fact finding is necessary to determine which of the State's proposed projects along Klutina Lake Road are reasonably necessary for and within the scope of a highway, as the term was used in 1969. … And the superior court must use its discretion to determine whether the State's proposed projects would unreasonably interfere with Ahtna's reasonable use of the land. Because the State has not had an opportunity to present its proposed projects to the court and litigate Ahtna's opposition to those proposed projects, a remand for further proceedings on this aspect of the dispute is required." (Citations omitted.)