Godfrey & Kahn S.C.: Indian Nations Law Update - November/December 2022

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Selected Court Decisions

In *NUMA Corporation v. Diven*, Not Reported in Fed. Rptr. 2022 WL 17102361 (9th Cir. 2022), the Ninth Circuit reaffirmed its 2004 decision in Krystal Energy Co. v. Navajo Nation, 357 F.3d 1055, 1056 (9th Cir. 2004): "Section 106(a) of the **Bankruptcy Code** abrogates the sovereign immunity of a 'governmental unit' with respect to, as relevant here, the Code's automatic stay provision. 11 U.S.C. § 106(a). The statute's definition of 'governmental unit' includes any 'foreign or domestic government.' 11 U.S.C. § 101(27). In Krystal Energy, we held squarely that the definition of 'governmental unit' includes tribes and that section 106(a) of the Bankruptcy Code unequivocally abrogates tribal sovereign immunity. ... *Krystal Energy* controls here. Because Congress abrogated tribal sovereign immunity with respect to the automatic stay provision, the Tribe cannot assert sovereign immunity to avoid sanctions for violation of the automatic stay."

In *San Carlos Apache Tribe v. Becerra*, 53 F.4th 1236 (9th Cir. 2022), the San Carlos Apache Tribe (Tribe) sued the United States Department of Health and Human Services (DHHS), Indian Health Service (IHS) and federal officials, contending that the defendants violated Indian Self-Determination and Education Assistance Act (ISDEAA) by failing to cover **contract support costs (CSC)** for portions of the Tribe's healthcare program that were funded by revenue from third-party payors. The district court dismissed, but the Ninth Circuit reversed: "Section 5325(a) reads: (a) Amount of funds provided ... (2) There shall be added to the amount required by paragraph (1), contract support costs, which shall consist of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management ... (3)(A). The contract support costs that are eligible costs for the purposes of receiving funding under this chapter, shall include the costs of reimbursing each tribal contractor for reasonable and allowable costs of—(i) direct program expenses for the operation of the Federal program that is the subject of the contract; and (ii) any additional administrative or other expense incurred by the governing body of the Indian Tribe or tribal organization and any overhead expenses incurred by the tribal contractor in connection with the operation of the Federal program, function, service, or activity pursuant to the contract. ... [W]e cannot conclude that § 5325(a) unambiguously excludes those third-party, revenue-funded portions of the Tribe's healthcare program from CSC reimbursement. Indeed, the plain language of this section appears to include those costs."

In *Flandreau Santee Sioux Tribe v. Houdyshell*,50 F.4th 662 (8th Cir. 2022), South Dakota imposed a 2% excise tax on the gross receipts of a contractor if its services "entail the construction, building, installation, or repair of a fixture of realty" within the State. The Flandreau Santee Sioux Tribe (Tribe) hired a nonmember construction company, Henry Carlson Company (Carlson), to carry out the planned

renovation of its casino on the Tribe's reservation. The Tribe challenged the applicability of the tax to Carlson. The district court initially ruled for the Tribe, holding that the tax was preempted by the Indian Gaming Regulatory Act (IGRA) and preempted under the rule of ***White Mountain Apache v. Bracker***. The Eighth Circuit reversed, holding that the district court erred in ruling that the tax was preempted under IGRA and holding that, based on the evidence before the court at the summary judgment stage, the *Bracker* balancing factors did not support preempting the State excise tax. On remand, after conducting a trial to determine remaining disputed issues of fact and to address legal arguments not addressed previously, the district court concluded that the State excise tax was preempted by the extensive regulatory framework of the IGRA and the federal interest in promoting tribal self-sufficiency and tribal governance. On appeal a second time, the appellate court again disagreed and reversed: "The evidence that the district court heard at trial does not change the fact that there is no extensive federal regulation governing the construction of casinos on tribal land. … IGRA is not designed to, nor does it aim to, control construction of tribal casinos. The level of federal involvement in this renovation project does not demonstrate that it occurred due to the dictates of IGRA; the use or involvement of federal entities throughout the project does not mean that IGRA provides extensive regulatory control. Submission to general federal oversight or involvement in the renovation process stands in stark contrast to instances where the Supreme Court has deemed that a specific statutory or regulatory scheme imposes specific obligations on the construction of specific institutions or on contractual agreements."

In *Pakootas v. Teck Cominco Metals, Ltd.*, 2022 WL 17356369 (E.D. Wash. 2022), Teck Cominco Metals (Teck), had discharged millions of tons of slag and liquid effluent directly to the Columbia River from its smelter in British Columbia, contaminating the upper river and surrounding lands (Site). The Confederated Colville Tribes (CCT) occupied reservation lands adjacent to the upper Columbia River and held preferred hunting and fishing rights in the north half of those lands, including the western half of the Columbia River and paramount rights in Lake Roosevelt adjacent to its Reservation, which abutted the western bank of a portion of Lake Roosevelt approximately fifty-six river miles downstream of the international border of Canada, in the southern halves of Okanogan and Ferry Counties. CCT, a member of a four-party Trustee Council comprised of the CCT, the U.S. Department of Interior, the State of Washington, and the Spokane Tribe of Indians, managed fisheries and restoration efforts in the upper Columbia River and Lake Roosevelt. CCT sued Teck under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). Teck moved for summary judgment on CCT's damages claims, contending that CCT lacked standing to sue under CERCLA. The court denied the motion, holding that CCT's hunting rights were sufficient to support standing: "Teck argues that CCT lacks standing to sue for natural resource damages because it is not a trustee authorized to sue under the CERCLA [because] none of the damages sought by CCT are for natural resources 'belonging to, managed by, controlled by, or appertaining to' CCT, in part because Congress revoked CCT's right, title, and interest in the lands in question. … CCT responds that … its trusteeship derives from its reserved fishing right to a portion of harvestable fish in the north half of those lands, including the western half of the Columbia River, and paramount rights in Lake Roosevelt adjacent to its reservation boundaries. … Teck's motion for partial summary judgment is denied. CERCLA provides that, for injury to natural resources, 'liability shall be to … any Indian tribe for natural resources belonging to, managed by, controlled by, or appertaining to such tribe' … CERCLA does not define 'manage,' 'control,' or 'appertain,' and

authority on the meaning of the terms in § 9607(f)(1) is scarce. However, the Court finds persuasive that 'appertaining to' may include **off-reservation usufructuary rights,** such as hunting and fishing rights or paramount use granting a right of benefit."

In *Lexington Insurance Company v. Smith*, 2022 WL 4131593 (W.D. Wash. 2022), the Suquamish Tribe and Port Madison Enterprises (PME), its business arm (collectively, the Tribe), purchased insurance policies from Lexington Insurance Company and other insurance companies to insure against risks related to activities of the Tribe on tribal land. A dispute arose whether the policies covered certain COVID-related losses. The Tribe sued the insurance companies in tribal court whereupon the insurance companies brought the instant action in federal court against the tribal court judge and tribal officials to enjoin them from exercising jurisdiction over the insurance companies. Citing the Tribe's right to exclude and the **First Montana Exception**, which permits tribes to exercise jurisdiction over parties who enter into consensual relations with the Tribe, the court granted summary judgment in the Tribe's favor: "Plaintiffs' insurance policies were issued for the benefit of tribal-owned businesses and properties operating on tribal land. … Because the issuance of the insurance policies arose out of activities occurring on tribal land—namely, tribal-owned business activities on tribal-owned lands—a tribe's sovereign right to exclude as well as the consensual relationship between the parties confers tribal adjudicative authority."

In *Bad River Band v. Enbridge*, 2022 WL 17249085 (W.D. Wis. 2022), the Bad River Band of Lake Superior Chippewa (Band), concerned about a potential failure of **Enbridge Energy's Line 5** crude oil and liquid natural gas pipeline running through the Band's Reservation, sued to enjoin its continued operation under federal common law claims of public nuisance and trespass. The Band's nuisance claim focused on the potential failure of the pipeline near the point it traverses the Bad River and the potentially catastrophic consequences of such a failure. The court had previously concluded that Enbridge had trespassed by operating the pipeline on expired rights-of-way on 12 parcels owned in whole or in part by the Band, dismissing Enbridge's breach of contract counterclaims but denying either side summary judgment on the Band's public nuisance claim. After a bench trial on the Band's public nuisance claim, the court declined to grant the Band injunctive relief and instead directed the parties to "meet and confer regarding: (1) the installation of EFRDs [emergency flow restricting device shutoff valves] on Line 5 on the Reservation; (2) an appropriate shutdown and purge protocol should conditions worsen at the meander; and (3) other reasonable remediation projects that could inhibit further erosion at the meander" and determined that, if the parties could not agree on a reasonable plan, "each should submit their own last, best offer on the shutoff and purge protocols, and the court will consider whether it is appropriate to issue an injunction requiring Enbridge to adopt a plan."

In *Keweenaw Bay Indian Community v. Khouri*, 2022 WL 4103491 (W.D. Mich. 2022), the federal district court had previously enjoined the State of Michigan from collecting from the Keweenaw Bay Indian Community (Tribe) or its members, certain state taxes on the sale or use of personal property because the state did not seek to apportion the tax based on use within and without the Tribe's reservation. In the instant decision, the Court amended its injunction: "The Court will amend the injunction to apply to the Office of the State Treasurer and those assisting the Office in the collection of taxes. The amendment is necessary to avoid Eleventh Amendment immunity. The Court will also amend the injunction to apply to the

manner in which the Department of Treasury presently interprets and enforces the use tax statute. Whether the Department can apportion the use tax under an existing statutory provision or whether the legislature modifies the statute to allow are not disputes presently before the Court."

In *Milne v. Hudson*, 2022 WL 14571338 (Okla. 2022), Milne, a member of the Muskogee Tribe obtained a restraining order from an Oklahoma court after she was beaten and harassed by Hudson, a member of the Cherokee Nation, on the Muskogee reservation. Hudson challenged the order on the ground that the state courts lacked jurisdiction to issue the order. The Oklahoma Supreme Court disagreed: "Hudson primarily argues that the tribal court had jurisdiction to issue a protection order against him. We agree. Federal law clearly gives tribal courts full civil jurisdiction to issue and enforce protection orders involving any person. However, that does not resolve the issue before this Court. Hudson claims that only a tribal court could have exercised jurisdiction over him to issue a protection order. This is not the case. ... Congress has clearly authorized tribal courts to issue civil protection orders. ... 18 U.S.C. § 2265(e). However, the plain language of this statute does not confer exclusive civil jurisdiction. Where Congress intends to give exclusive jurisdiction to federal and/or tribal courts, and to remove state jurisdiction, it has done so explicitly. 18 U.S.C. § 1153 (granting 'exclusive jurisdiction' in certain Indian Country cases to tribes or the federal government). And where Congress has determined that tribes may consent to enter an arrangement offering **concurrent state jurisdiction** over cases which would normally be exclusive to tribal or federal courts, it has done so explicitly. ... Section 2265(e) does not explicitly refer to exclusive tribal court jurisdiction. Moreover, the language does not imply exclusive jurisdiction. Rather, it includes tribal courts within the list of sovereigns which may issue civil protection orders. ... Thus, Section 2265 is not a bar to exercise of state district court jurisdiction to enter civil protection orders."