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Congress passes Indian Employment, Training and Related Services Consolidation Act of 2017

On Nov. 30, the Senate approved the Indian Employment, Training and Related Services Consolidation Act, which the House of Representatives had approved earlier. President Trump is expected to sign the bill. The Act amends the Indian Employment, Training and Related Services Demonstration Act of 1992, Pub. L. 102-477, commonly known as the "477 Program," which authorizes tribal governments to consolidate programs funded by the Department of the Interior, Department of Labor, Department of Education, and Department of Health and Human Services into a single plan, approved by the Secretary of the Interior, to foster employment and economic development in Indian Country.

The 2017 Act amends the 477 Program by (1) revising the process for federal agencies to grant or deny a tribe's request to waive statutory, regulatory, or administrative requirements to efficiently implement an integration plan, (2) revising the process for Department of the Interior (DOI) to approve or disapprove an integration plan, including addition of tribal hearing and appeal rights if the DOI disapproves its plan, (3) authorizing tribes to use funds to place participants in training positions with employers, (4) requiring the Bureau of Indian Affairs to receive and distribute funds for use in accordance with an approved integration plan and (5) requiring that funds transferred to a tribe be treated as non-federal funds for purposes of meeting matching requirements, except funds administered by the Department of Labor or the Department of Health and Human Services.

Supreme Court denies review of challenges to Ninth Circuit water rights and Second Circuit fee-to-trust decisions

By declining to accept review, the U.S. Supreme Court in November allowed two important lower appellate court decisions to stand:

- In *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District*, 849 F.3d 1262 (9th Cir. 2017), the Ninth Circuit held that the doctrine of *Winters v. United States*, 207 U.S. 564 (1908), which maintains that the establishment of a reservation for a tribe includes reservation of sufficient water to accomplish the purposes for which the reservation was established, encompasses not only surface water but also groundwater appurtenant to reserved land.
- In *Upstate Citizens for Equality, Inc. v. United States,* 2016 841 F.3d 556 (2d. Cir. 2016), the Second Circuit rejected a challenge to the acquisition by the Secretary of Interior of 13,000 acres of land in central New York in trust for the benefit of Oneida Indian Nation (OIN) under the Indian Reorganization Act (IRA). Justice Thomas published a dissent questioning whether the Indian Commerce Clause of the U.S. Constitution authorized Congress to permit acquisitions of land within state boundaries for tribes free from state jurisdiction.

The Godfrey & Kahn Indian Nations Law Practice Group provides a full range of legal services to Indian nations, tribal housing authorities, tribal corporations and other Indian country entities, with a focus on business and economic development, energy and environmental protection, and housing development.

Selected court decisions

In *United States v. Lummi Nation*, 2017 WL 5907899 (9th Cir. 2017), as part of the decades long "Boldt Litigation" to determine **off-reservation fishing rights** under the Treaty of Point Elliott between the United States and the northwest Washington tribes, the Lummi Tribe sought a declaration that its "usual and accustomed" (U&A) fishing grounds included waters west of Whidbey Island, Washington. The Ninth Circuit held for the Lummi Tribe, rejecting the contrary arguments of tribes asserting competing claims and reversing the district court: "[T]he Treaty secures the Lummi's right to fish in Admiralty Inlet because the Lummi would have used the Inlet as a passage to travel from its home in the San Juan Islands to present-day Seattle. The same result holds here because the waters at issue are situated directly between the San Juan Islands and Admiralty Inlet and also would have served as a passage to Seattle."

In *Darnell v. Merchant*, 2017 WL 5889754 (D. Kans. 2017), Darnell, a member of the Kickapoo Tribe, was charged and convicted in Kickapoo Tribal Court of violations arising under the Tribe's criminal law. The court sentenced her to 22 months incarceration. Rather than moving for a new trial or appealing to the Kickapoo appellate court, she filed a petition for habeas corpus in federal district court, contending that the sentence imposed by the Tribe violated provisions of the **Indian Civil Rights Act** (ICRA) prohibiting tribes from denying equal protection and due process and from imposing excessive fines and cruel and unusual punishments. The court dismissed on the ground that Darnell had failed to exhaust tribal court remedies: "ICRA does not expressly require a petitioner to exhaust her claims before filing a petition for writ of habeas corpus in federal court. Nonetheless, federal courts, including the Tenth Circuit, impose an exhaustion requirement in habeas corpus cases filed under § 1303 … Petitioner has not exhausted the remedies available to her in Kickapoo Tribal Court. She has not filed a notice of appeal for her convictions or sentence, and she has not shown that any of the five exceptions to the exhaustion requirement apply in this case.

In *United States v. Tucker*, 254 F.Supp.3d 620 (S.D.N.Y. 2017), the U.S. government indicted Scott Tucker and his attorney, Timothy Muir, on counts of conspiracy to collect unlawful debts, collection of unlawful debts, wire fraud, money laundering and violation of the Truth in Lending Act related to the collection of usurious interest on **internet-generated loans** to non-Indians residing outside Indian country, alleging, among other things, that Tucker managed and controlled several lending businesses that were nominally owned by American Indian tribes. On the government's motion, the court ruled that the crime-fraud exception to the attorney-client privilege applied to documents and communications possessed by Tucker's attorneys relating to the state-court action of *Tucker v. AMG Services, Inc*., in Kansas state court, because the government had shown probable cause that such documents and communications possessed by Tucker's attorneys were made in furtherance of a crime or fraud: "The continuation of an unlawfully usurious lending business was the crime or fraud attempted, and the communications and documents concerning *Tucker v. AMG* were in furtherance thereof because they were part of an effort to baselessly invoke the protections of tribal immunity. As the Second Circuit once observed, 'a tribe has no legitimate interest in selling an opportunity to evade state law.'"

In *Allen v. United States*, 2017 WL 5665664 (N.D. Cal. 2017), Indians residing on the Pinoleville Rancheria (Rancheria), established in 1911 under a 1906 act of Congress, had been terminated as a tribe under the Rancheria Act of 1958 then restored in 1983 under the consent judgment in the *Tillie Hardwick v. United States*. In 2003 the Secretary of Interior approved the formation of the Pinoleville Pomo Nation (PPN) under the Indian Reorganization Act (IRA), approving a constitution and a tribal roll. In 2008, certain individuals residing on the Reservation dissatisfied with the leadership of the PPN petitioned the Secretary of Interior to permit them to organize a separate government under a different IRA constitution. When the Secretary refused to call an election, they sued. The suit was settled on the basis that the group would be permitted to apply for recognition, which they proceeded to do. The Secretary denied their application on the ground that "the Department does not interpret the Indian Reorganization Act as permitting splinter groups or factions of a tribe to set up independent tribal government." The plaintiffs sued. The district court granted the government's motion for summary judgment, affirming the Secretary's determination that the **plaintiffs were ineligible to organize under the IRA**: "[W]hen read as a whole the IRA indicates that a tribe must be comprised of more than a subset of the Indians for whom a reservation was established. Indeed, adopting plaintiffs' approach would

permit any two Indians living on a reservation to organize as a tribe, so long as they were among the people for whom the reservation was set aside — or, as is the case here, would permit any number of members to voluntarily disenroll from their tribe and form a new tribe of defectors. To repeat, this would be an absurd result, and thus is not a reasonable interpretation of the statute or regulation at issue." The court held that the Indian canon of construction was irrelevant in view of the PPN's opposition to the plaintiff's suit.

In *Redding Rancheria v. Hargan*, 2017 WL 5157235 (D.D.C. 2017), the Redding Rancheria (Tribe) established a tribally funded self-insurance program under which the Tribe sought reimbursement of certain expenditures for health care provided to tribal members from the Indian Health Service (IHS), a division of the U.S. Department of Health and Human Services (HHS) pursuant to the Tribe's compact under the Indian Self–Determination and Education Assistance Act (ISDEAA). HHS and IHS denied the reimbursement requests, claiming they were foreclosed by the "payor of last resort" provision in the **Indian Health Care Improvement Act** (IHCIA). The federal district court disagreed and remanded to the agency to reconsider the question in view of the court's opinion, holding that (1) the canon of construction requiring that ambiguous statutory provisions be interpreted favorably to tribes takes precedence over the canon requiring deference to the interpretation of the administrative agency and (2) IHS' interpretation of the payor of last resort provision was "inconsistent with a plain reading of the statute and congressional intent." The Court remanded to the IHS to reconsider the Tribe's applications under the Catastrophic Health Emergency Fund "[i]n light of the plain meaning of the payor of last resort provision in IHCIA."

In *Harvey v. Ute Indian Tribe of the Uintah and Ouray Reservation*, 2017 WL 5166885 (Utah 2017), Harvey and two businesses owned by him (Plaintiffs), located outside the Ute Reservation, provided goods and services to oil and gas companies doing business on the Reservation. The Plaintiffs had resisted the Ute Tribe's insistence that it obtain a permit to operate on the reservation but eventually acquiesced. After the Plaintiffs' tribal permit was revoked, tribal officials sent a letter to the oil and gas companies operating on tribal land informing them that they would be subject to sanctions if they used any of Harvey's businesses. The Plaintiffs brought claims in state court against the Tribe, the tribal officials, various companies owned by the tribal officials, oil and gas companies, and other private companies that allegedly participated in blackballing the Plaintiffs. The Supreme Court held that (1) the Tribe was properly dismissed based on sovereign immunity but was not a necessary party, (2) individual tribal officials sued for money damages were improperly dismissed under the rule of *Lewis v. Clarke*, (3) the Plaintiffs could sue tribal officials under the *Ex Parte Young* doctrine for exercising jurisdiction in violation of federal law but could not sue them for violations of tribal law, (4) claims against certain of the oil and gas companies were properly dismissed for failure to state a claim and (5) the Plaintiffs were required to **exhaust tribal court remedies** and the case would be remanded to the trial court to consider whether the case should be dismissed or stayed under the tribal exhaustion doctrine, with the proviso that if the district court stayed the proceedings, state law claims against tribal officials in their individual capacities and against three companies would survive and that the Plaintiffs' federal claims that the tribal officials exceeded the scope of the Ute Tribe's jurisdiction would also survive.

In *Coeur d'Alene Tribe v. Johnson*, 2017 WL 5017083 (Idaho 2017), the Johnsons, non-Indians, owned property on the bank of the St. Joe River, with a dock and pilings, on fee land within the Coeur d'Alene Indian reservation. The Coeur d'Alene Tribe sued the Johnsons in tribal court to compel them to remove their dock or obtain a tribal permit. When they failed to appear, the tribal court imposed a civil penalty of $17,400 and a judgment that the Johnsons were trespassing upon tribally controlled lands and that the Tribe was entitled to remove the encroachment. The Tribe then filed a motion for an order recognizing the foreign judgment in the district court in Benewah County. The Johnsons objected, arguing that their dock and pilings are located above the high water mark as it existed when the Reservation was set aside in 1873 and that the tribal court lacked jurisdiction. The district court held that the tribal court judgment was entitled to recognition and enforcement. The Idaho Supreme Court affirmed in part and reversed in part, holding that the tribal court's judgment that the Johnsons' structures trespassed tribal property and could be removed, but not its money judgment, could be given effect under principles of comity: "Following the creation of

the Reservation, the lands on both sides of the St. Joe River within the boundaries of the Reservation were held in trust by the United States for the use and benefit of the Tribe. A transfer of such lands conveys title only to the high water mark. … [T]he Johnsons assert that the Tribal Court is dominated by the Tribe. They point to the tribal law stating that the **Tribe has jurisdiction** over the river and to the amount of the fine imposed against them. As discussed above, the Johnsons have failed to show that the Tribe does not have jurisdiction over the bed of the St. Joe River adjoining their property. Further, while the fine was large, it was only one-fifth of that authorized by the tribal code. ... We hold that the Johnsons have failed to show that the Tribal Court was biased. … The courts of no country execute the penal laws of another. … The test whether a law is penal is whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual. … The civil penalty is not enforceable under principles of comity. However, the penal law rule does not prevent courts from recognizing declaratory judgments of foreign courts." (Internal quotes and citations omitted.)

In *Brown v. Garcia,* 2017 WL 4940146 (Cal. App. 2017), Plaintiffs, a faction of the Elem Indian Colony Pomo Tribe (Tribe) known as the "Brown Faction," sued their rivals, the "Garcia Faction," in state court for defamation relating to an order that led to their disenrollment. Relying in part on the Supreme Court's recent decision in *Lewis v. Clarke*, the Plaintiffs contended that **sovereign immunity** did not apply because the defendants were sued in their individual capacities for actions outside the scope of their official duties and that the matter did not intrude upon the Tribe's internal affairs. The trial court granted the Defendants' motion to dismiss and the Court of Appeals affirmed: "[P]laintiffs contend their lawsuit falls under the remedy-focused general rule applied in *Maxwell, Pistor and Lewis*, and hence that the court erred in finding the action barred by sovereign immunity. We disagree. The wrongs alleged in those cases were garden variety torts with no relationship to tribal governance and administration. In those circumstances, sovereign immunity does not shield individually named tribal officers or employees from state tort liability. … Here, substantial evidence established that defendants were tribal officials at the time of the alleged defamation and that they were acting within the scope of their tribal authority when they determined that, for the reasons stated in the allegedly defamatory Order of Disenrollment, plaintiffs should be disenrolled from the Tribe pursuant to a validly enacted tribal ordinance. … [T]he trial court concluded that plaintiffs sought to hold defendants liable for actions they took as tribal officials in pursuing plaintiffs' disenrollment from the Tribe on the basis of plaintiffs' alleged unlawful acts. The court further found that adjudicating the dispute would require the court to determine whether tribal law authorized defendants to publish the Order and disenroll plaintiffs, 'which itself requires an impermissible analysis of Tribal law and constitutes a determination of a non-justiciable inter-tribal dispute.' We agree."

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