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# Indian Nations Law Focus

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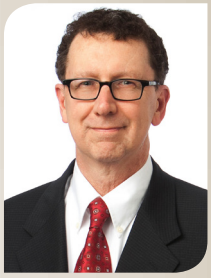

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## Supreme Court agrees to review Washington decision on sovereign immunity

On Dec. 8, The U.S. Supreme Court granted the petition of the Upper Skagit Tribe to review the Washington Supreme Court's decision in *Lundgren v. Upper Skagit Tribe*, 389 P.3d 569 (Wash, 2017). The Tribe, in 2014, had purchased certain fee simple land, outside the Tribe's reservation, adjoining land owned by the Lundgrens. The Lundgrens, who had owned their land since 1947, had long treated a fence that had been on the property since at least 1947 as the boundary of their property. When the Tribe informed the Lundgrens that the fence actually encompassed land owned by the Tribe, the Lundgrens sued to quiet title, arguing they had acquired title to the disputed property by adverse possession or by mutual recognition and acquiescence long before the Tribe bought the land. The Tribe moved to dismiss under CR 12(b)(1) for a lack of subject matter jurisdiction based on the sovereign immunity and the rule that requires joinder of a necessary and indispensable party, which the Lundgrens could not satisfy because of the Tribe's immunity. The trial court denied the Tribe's motion, holding that sovereign immunity did not protect the Tribe from a suit brought in rem. Relying on the U.S. Supreme Court's 1992 decision in *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251 (1992), the Washington Supreme Court affirmed: "A court exercising in rem jurisdiction is not necessarily deprived of its jurisdiction by a tribe's assertion of sovereign immunity. … The Supreme Court held that the Indian General Allotment Act allowed Yakima County to impose *ad valorum* taxes on reservation land. 25 U.S.C. § 334-381. The Court reached that conclusion by characterizing the county's assertion of jurisdiction over the land as in rem, rather than an assertion of *in personam* jurisdiction over the Yakama Nation. In other words, the Court had jurisdiction to tax on the basis of alienability of the allotted lands, and not on the basis of jurisdiction over tribal owners." The question presented for review by the Tribe is:

> Does a court's exercise of in rem jurisdiction overcome the jurisdictional bar of tribal sovereign immunity when the tribe has not waived immunity and Congress has not unequivocally abrogated it?

The Court's decision will resolve an important unresolved federal Indian law question. The Supreme Court has twice, in the above-referenced *Yakima* decision and in its 1998 *Cass County v. Leech Lake Band of Chippewa Indians* decision, held that states may impose property taxes on previously allotted lands that tribes have re-acquired in the modern era and hold in fee simple. The Court has never addressed, however, whether states and municipal governments may bring suit to foreclose tribal title to such lands if the tribe fails to pay the tax. No schedule for hearing the case has been published.

*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.*

## Supreme Court declines to review water rights and internet lending decisions

In other noteworthy actions, the Wisconsin Supreme Court:

- Declined to review the decision of the Ninth Circuit Court of Appeals in *Cahuilla Indians v. Coachella Valley Water District* (2017 WL 894471 [9th Cir. 2017]), recognizing that the right of tribes under the doctrine of *Winters v. United States* to sufficient water resources to carry out the purposes for which lands were reserved extends not only to surface waters but also to ground water.

- Declined to review the decision of the Ninth Circuit Court of Appeals in *Consumer Financial Protection Bureau v. Great Plains Lending* (846 F.3d 1049 [9th Cir. 2017]), holding that tribal lending enterprises are subject to the jurisdiction of the federal Consumer Finance Protection Bureau (CFPB) under the Dodd-Frank Act. The tribe had sought to resist a CFPB investigation into alleged unlawful lending practices on the theory that tribes' co-regulatory role under the Act placed them outside CFPB's jurisdiction.

## Selected court decisions

In *Modoc Lassen Indian Housing Authority v. Department of Housing and Urban Development*, 2017 WL 6544105 (10th Cir. 2017), numerous tribes challenged efforts by the Department of Housing and Urban Development (HUD) to recapture, via administrative offset, Indian Housing Block Grant funds that HUD had allegedly overpaid to the tribes under **Native American Housing Assistance** and **Self-Determination Act** (NAHASDA). The tribes argued that HUD lacked authority to recapture the funds without first providing them with administrative hearings. The district court agreed and ordered the agency to repay the grant recipients. On appeal, the Tenth Circuit held that (1) the recapture did not occur under a statute or regulation that imposed a hearing requirement, (2) HUD lacked the authority to recapture the funds' administrative offset but that (3) the court could not order HUD to repay the funds to the tribes to the extent that HUD had already redistributed recaptured funds because the waiver of the federal government's sovereign immunity under the Administrative Procedure Act does not extend to claims for money damages: "[W]hen the government enters into a series of contracts with a private party, it can deduct any amount it erroneously overpays that private party by means of a later debit to the parties' running accounts. … But this appeal doesn't arise from a contractual relationship. Instead, it arises from a grant program designed to help the Tribes and their members improve their housing conditions and socioeconomic status. … Based on the government's unique trust responsibility to protect and support Indian tribes and Indian people, … we think it would be particularly unfair … to apply common-law contract principles to HUD's recapture of NAHASDA funds. … But this victory for the Tribes is largely a hollow one … because HUD enjoys sovereign immunity from claims for money damages. … Here, the district court awarded the Tribes money damages when it ordered HUD to compensate them using funds from grant years other than the grant years during which HUD wrongfully collected the alleged overpayments. For instance, the very thing to which the Choctaw said it was entitled was additional funding from Congress' 2003, 2004, and 2005 NAHASDA appropriations. … But to the extent that HUD had already distributed the funds from those yearly appropriations to other tribes, HUD couldn't have possibly returned those funds to the Tribes. Thus, the district court instead ordered HUD to pay the Tribes by substituting other funds for the funds to which the Tribes were actually entitled—i.e., funds from past- or future-year NAHASDA appropriations. … Thus, to the extent the district court ordered HUD to repay the Tribes 'from all available sources,' … we hold that those orders constitute awards of money damages unless HUD has at its disposal sufficient funds from the relevant yearly appropriations. Accordingly, we reverse in part and remand to the district court for factual findings regarding whether, at the time of the district court's order, HUD had the relevant funds at its disposal." (Internal quotations, citations, ellipses omitted.)

In *Navajo Nation v. Department of the Interior (DOI)*, 2017 WL 5986567 (9th Cir. 2017), the Navajo Nation sued the Department of the Interior, Interior Secretary, Bureau of Reclamation, Bureau of Indian Affairs, and water districts alleging that the United States failed in its **trust obligation** to assert and protect tribe's water rights and violated the National Environmental Policy Act (NEPA) and the Administrative Procedure Act (APA) by undertaking actions to manage flow of the Colorado River's lower basin. The District Court granted the federal defendants' motion to dismiss. On appeal, the Ninth Circuit reversed in part and affirmed in part, holding that (1) the Nation lacked standing to challenge the DOI's preparation of an environmental impact statement relating to guidelines for determining when there was surplus of water from Colorado River for use within Arizona, California and Nevada and when storage of such surplus water

would threaten the Nation's interests, (2) the Nation's alleged adverse effects on its generalized interest in availability of water did not show sufficient injury needed for Article III standing, (3) the Nation's breach of trust claim was predicated not on affirmative action, but rather failure to act, and (4) the waiver of the federal government's immunity under the Administrative Procedure Act applied to the Nation's claim, notwithstanding that the claim was based on non-action by the government rather than affirmative action: "Here, the Nation in its breach of trust claim against Interior seeks 'relief other than money damages' for claims 'that an agency or an officer or employee thereof acted or failed to act in an official capacity.' 5 U.S.C. § 702. The waiver of sovereign immunity in § 702 applies squarely to the Nation's breach of trust claim." The court dismissed the Nation's NEPA-based claims but remanded for a determination of its claim based on the trust doctrine.

In *Caddo Nation of Oklahoma v. Wichita and Affiliated Tribes*, 2017 WL 6421258 (10th Cir. 2017), the Wichita and Affiliated Tribes (Wichita Tribe), originally located in Kansas but now based in Caddo County, Oklahoma, obtained funds from the Department of Housing and Urban Development to build a Tribal History Center on land the federal government held in trust for the Wichita Tribe and two neighboring tribes, including the Caddo Nation, and which had been the subject of a partition agreement among the tribes. The Caddo Nation sued in federal court, asserting that the site contained graves of Caddo ancestors and that the Wichita Tribe had failed to satisfy the requirements of the **National Historic Preservation Act** (NHPA) and **National Environmental Policy Act** (NEPA). When the district court denied its motion, the Caddo Nation appealed but did not seek an injunction pending appeal. Meanwhile, the Wichita Tribe completed construction. The Tenth Circuit dismissed the appeal as moot: "We thus constrain our analysis to the relief Caddo Nation sought below: a temporary restraining order on construction of the History Center. That relief is now impossible. An appeal of a denial of a temporary restraining order that cannot have any present-day effect is moot." (Internal quotations omitted.)

In *Northern New Mexicans Protecting Land, Water and Rights*, 2017 WL 3081630 (10th Cir. 2017), Northern New Mexicans Protecting Land, Water and Rights (Northern New Mexicans), an organization of non-Indian property owners, used Santa Fe County roads 84, 84a, 84b, 84c, and Sandy Way, all of which cross San Ildefonso Pueblo (Pueblo) lands, to access their property. In August 1999, the Pueblo notified Santa Fe County that, in its view, the County lacked title to the lands, invited the County to negotiate an agreement that would allow the public to use the roads and stated that, absent an agreement, the Pueblo might enforce its right to exclude trespassers on Pueblo lands. In 2013, the Superintendent of the Northern Pueblos Agency of the BIA sent the Count a letter stating the BIA's view that use of the roads by non-Indians constituted a trespass and that it had no record of an application for an **easement or right-of-way across Pueblo lands**. BIA encouraged the County to enter negotiations with the Pueblo to resolve the dispute. The Northern New Mexicans then sued BIA in federal district court, alleging injury, including a cloud on their titles, flowing from the BIA's letter. The district court dismissed on the ground that the Northern New Mexicans lacked standing to pursue their Takings and quiet title claims and that their Quiet Title Act and other claims were barred by sovereign immunity, because the United States does not consent to suits involving Indian lands under the Quiet Title Act. The Tenth Circuit affirmed, holding that (1) there was no final federal action that would support jurisdiction under the Administrative Procedure Act, (2) the plaintiffs had disclaimed any intention to challenge the federal title under the Quiet Title Act, (3) the Northern New Mexicans could not bring a Fifth Amendment "Takings" claim because they had not filed the requisite action for compensation under the Tucker Act, (4) the Northern New Mexicans could not bring an Equal Protection Action based on alleged rights under the Treaty of Guadalupe Hidalgo because "as a general rule, treaties do not create privately enforceable rights in federal courts," and (5) the Plaintiffs had not properly pleaded Fifth Amendment Due Process claim.

In *Wilmington Savings Fund Society v. Fryberg*, 2017 WL 6344185 (W.D. Wash. 2017), the Wilmington Savings Fund Society sued to foreclose land owned by the United States in trust and occupied by Fryberg, a member of the Tulalip Tribes, and located within the Tulalip Indian Reservation, naming the Tribes and Fryberg as defendants. The district court dismissed, holding that (1) **federal jurisdiction** based on diversity was lacking because the Tribes were citizens of no state for diversity purposes, (2) the Tribes were immune from suit, and (3) the Tribes were required to exhaust tribal court remedies.

In *Navajo Nation v. San Juan County*, 2017 WL 6547635 (D. Utah 2017), the Navajo Nation and several individual tribe members (Navajo Nation) had

sued San Juan County, claiming the County Commission and School Board election districts violated the Equal Protection Clause of the Fourteenth Amendment, the Fifteenth Amendment, and Section 2 of the **Voting Rights Act**. The court had previously found both sets of districts unconstitutional under the Equal Protection Clause but did not decide whether the School Board or County Commission districts violated Section 2 of the Voting Rights Act. The Navajo Nation and the County submitted competing remedial plans for the School Board and County Commission, but the district court rejected both plans and appointed a special master, who issued a Final Report recommending remedial election districts for the San Juan County Commission and School Board. The court adopted the special master's plan over the County's objections and ordered their implementation in time for the November 2018 election: "It is critically important that the officials representing the citizens of San Juan County are elected under constitutional districts—not districts that have been racially gerrymandered. The County's objections do not explain how such elections would burden the County, nor does the County address the rights of its citizens to have officials elected from constitutional districts."

In *Pennachietti v. Mansfield*, No. 17-02582 (E.D. Pa. 2017), Pennachietti, a non-Indian resident of Pennsylvania, **borrowed $5,050** from Sovereign Lending Solutions, LLC (Sovereign), a title lending company established under the tribal law of the Lac Vieu Desert Band of Lake Superior Chippewa Indians, through a website operated by Sovereign. After Pennachietti was late making the final balloon payment for the outstanding balance on the loan, Sovereign repossessed his auto and demanded $7,000 for its return, which Pennachietti paid. Pannachietti then sued Mansfield, one of the managers who operated Sovereign, personally, alleging that the interest rate on the loan exceeded limits under Pennsylvania law and asserting claims under the the Racketeer Influences and Corrupt Organizations Act (RICO) and Pennsylvania's Loan Interest and Protection Law. Mansfield move to dismiss on sovereign immunity grounds, alleging Sovereign was the real party in interest because he acted within the scope of his employment and in his official capacity as manager of Sovereign. Relying on the Supreme Court's decision in *Hafer v. Melo* and *Lewis v. Clarke*, the district court denied the motion: "That Mansfield was acting in his official capacity, however, does not make this an official capacity suit. Rather, as Hafer made clear, what matters is not the capacity in which Mansfield acted while employed by Sovereign, but rather the capacity in which he is currently being sued. See *Hafer*, 502 U.S. at 27. Here, Mansfield was sued in his individual capacity to recover for his actions of participating and directing the conduct of Sovereign's affairs, conspiring to violate § 1962 and collecting usurious interest in excess of six percent annually. … Sovereign has not been named as a defendant, and any judgment against Mansfield will not require action by Sovereign. See Lewis." The court also held that Mansfield's contacts with Pennsylvania were sufficient to support the court's exercise of jurisdiction over him: "This Court has personal jurisdiction over Mansfield because he oversaw Sovereign's purposeful direction of activities to Pennsylvania residents, those actives serve as the basis of this lawsuit, and the exercise of jurisdiction over Mansfield comports with fair play and substantial justice based on his contacts with the forum."

In *Wisconsin Department Of Natural Resources v. Timber* and *Wood Products Located In Sawyer County and Lac Courte Oreilles Band,* 2017 AP 181, 2017 WL 6502934 (Wis. App. 2017), the Lac Courte Oreilles Band of Lake Superior Chippewa (Tribe) had purchased certain lands in 1992 and 1993 located within the Tribe's reservation and held under a tax-favored status under the Wisconsin's Forest Croplands program. The Tribe purchased the lands subject to Forest Croplands' program restrictions and held them in fee simple title. When the forest croplands status expired, the DNR sought to impose a $74,819.74 severance tax. When the Tribe declined to pay it, the DNR sued the Tribe directly for the amount of the tax and sued the timber and wood products located on land in rem seeking to recover and sell them to satisfy the tax. The trial court dismissed on **sovereign immunity** grounds, rejecting the DNR's argument that the Tribe weighed its immunity by executing transfer of ownership forms in 1992-93 agreeing to "to comply with the terms of the Forest Crop Law and the contract applicable to the said lands." The Wisconsin Courts of Appeals, District III, affirmed, observing that "courts throughout the country have repeatedly held that a tribe's mere agreement to comply with a particular law does not amount to an unequivocal waiver of the tribe's sovereign immunity." The court rejected the DNR's argument that the Tribe's sovereign immunity did not prevent an action in rem against property owned by the Tribe: "Here, the DNR has attempted to bring the precise type of case against the Tribe that the Supreme Court forbade in Deep Sea Research—that is, a case 'where, in order to sustain the proceeding, the possession of the [Tribe] must be invaded under process of the court.' … DNR asked the

circuit court to issue a writ of assistance directing the Sawyer County Sheriff to: (1) hire a logging company to harvest wood products, including standing timber, from the Real Estate; (2) arrange a private sale of the harvested timber; and (3) collect and distribute the proceeds of the sale. This result would indisputably invade the Tribe's possession of its own property—i.e., the timber and wood products located on the Real Estate.

*In re termination of parental rights to M.J.*, 2017 WL 6623390 (WIs. App. 2017) concerns *M.J.*, an Indian child born in 2010 to *R.I.*, a non-Indian, and *J.J.*, a member of the Lac du Flambeau Chippewa. *R.I.*, *M.J.*'s father, was incarcerated at the time of the birth. *M.J.* was removed from her mother's care in 2013 and, pursuant to the Indian Child Welfare Act (ICWA) and **Wisconsin Indian Child Welfare Act** (WICWA), placed with *M.J.*'s uncle, an Indian, who was granted legal custody in 2015. After *J.J.* died in 2016, the county petitioned for termination of *R.I.*'s parental rights on grounds of abandonment and failure to assume parental responsibility and filed a "Statement of Active Efforts" pursuant to ICWA and WICWA. Relying on the U.S. Supreme Court's 2013 decision in *Adoptive Couple v. Baby Girl*, the county argued that certain provisions of ICWA and WICWA – i.e, those which required findings of fact regarding the likelihood of serious emotional or physical damage from *R.I's* continued custody, and whether any active efforts were made to prevent breakup of an Indian family – did not apply because *R.I.* never had legal or physical custody of *M.J. RI* conceded that he had never had custody of *M.J.* and that he had abandoned *M.J.* but argued that WICWA Section 48.028(4)(e) provided a heightened standard of protection of his parental rights and that, as a result, the Supreme Court's interpretation of ICWA Sections 1912(f) and (d) in *Adoptive Couple* did not apply. The tribal court granted the county summary judgment and the Court of Appeals affirmed: "*R.I.*, as a parent, has never had any custody of *M.J.* that could have been 'continued' or ended, nor could there have been a 'breakup' of any existing family for the same reason. See *Adoptive Couple*, 133 S. Ct. at 2560, 2562. If we adopted *R.I.*'s interpretation of § 48.028(4)(e) and required fact finding to determine the existence of damage to *M.J.* from *R.I.'s* continued custody and if active efforts were made to prevent the breakup of an Indian family, we would read 'continued' out of subdivision 1. and ignore the use of 'breakup' in subdivision 2. as well. We cannot do so."


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