

## Indian Nations update



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### Selected Court Decisions

In *Newtok Village v. Patrick*, 2021 WL 6061565 (9th Cir. 2021), two factions, the “New Council” and the “Old Council,” each insisted that it, and not the other, was the **legitimate government** of Newtok Village, a federally recognized tribe. The Department of Interior determined in 2013 that it would recognize the claim of the New Council solely for purposes of administering contracts under the Indian Education and Self-Determination Act. In 2015, the New Council sued the Old Council seeking an injunction to prohibit former Old Council members and tribal administrators from misrepresenting themselves as the Tribe’s legitimate governing body to federal, state, and private agencies and persons. When the Old Council failed to appear, the district court concluded it had subject matter jurisdiction, entered a default judgment and granted injunctive relief. Five years later, the Old Council moved to set aside the default judgment and vacate the permanent injunction as void for lack of federal jurisdiction. The district court again found that subject matter jurisdiction existed, denied the Old Council’s motion, and awarded the New Council its attorneys’ fees. On appeal, the Ninth Circuit reversed, holding that the intra-tribal dispute did not arise under federal law: “[E]xamining the particular facts of the claims asserted and applying the well-pleaded complaint rule—we hold that subject matter jurisdiction has not been shown. The New Council’s claims as pleaded, simply do not arise under the Constitution, laws, or treaties of the United States. ... [T]he ongoing dispute between competing political factions in the litigation is intra-tribal at its core and presents nothing more than common law claims. Indeed, the New Council sought to enforce the default judgment against fellow tribal members in 2020, notwithstanding the fact that members of the Old Council could potentially be eligible for tribal office but for the injunction. Continuing to enforce the permanent injunction here risks the federal court’s impermissible involvement in interpreting the Tribe’s constitution and laws.”

In *White Mountain Apache Tribe v. United States*, 2021 WL 5983806 (Fed. Cl. 2021), the White Mountain Apache Tribe (Tribe) sued the United States under various laws, including the Indian Lands Open Dump Cleanup Act of 1994 and the Indian Tucker Act, contending that the government had breached its fiduciary duty to the Tribe by mismanaging trust funds and timber resources and by allowing third parties to dump hazardous waste on the reservation. The split the Tribe’s claim relating to dumping, designated “Phase I,” from Tribe’s other claims and dismissed for lack of jurisdiction: “The Indian Tucker Act provides the Court of Federal Claims with jurisdiction over any claim of an American Indian tribe against the United States ‘whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe ....’ It provides no enforceable substantive rights; it only waives sovereign immunity for claims against the Government based on other money-mandating sources of law. ... Whether jurisdiction is satisfied depends on a two-part analysis.

*The information contained herein is based on a summary of legal principles. It is not to be construed as legal advice and does not create an attorney-client relationship. Individuals should consult with legal counsel before taking any action based on these principles to ensure their applicability in a given situation.*

First, the Tribe must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed to faithfully perform those duties.' ... If the Tribe satisfies the first request, the Court must then determine whether the substantive source of law can be fairly interpreted as mandating compensation for damages sustained as a result of a breach of the duties the governing law imposes.' ... In this case, the trust-related language of [Dump Cleanup Act] ... merely states the general principle that the Government holds most Indian lands in trust and makes no further specifications relating to open dumps in general or the Tribe's land specifically. It does not, therefore, 'unambiguously provide that the United States has undertaken full fiduciary responsibilities' as to the control, management, or cleanup of the Tribe's open dumps." (Citations omitted.)

In *Shoshone Bannock Tribes v. United States*, 2021 WL 5988635 (D. Idaho 2021), agreements between the United States and the Shoshone Bannock Tribes (Tribes) in the 1880s created conditional **rights of way** for railroad use. The railroad abandoned its rights of way in stages at the end of the 20th century and various portions of the former rights of way, designated Parking Lot, Bus Depot, Credit Union, City Creek Trail, and 3.27 Acres, were devoted to other purposes by the federal government and third parties. The Tribes sued the United States to quiet title and for injunctive relief requiring the federal government to take various actions to protect the Tribes' alleged reversionary interests in the five parcels. The Tribes had, however, entered into an agreement with the federal government in 2012, approved by the federal district court for the District of Columbia, in which the Tribes waived "any and all claims, causes of action, obligations, and/or liabilities of any kind or nature whatsoever, known or unknown, regardless of legal theory, for any damages or any equitable or specific relief, that are based on harms or violations occurring before the date of this Court's entry of this Joint Stipulation of Settlement as an Order and that relate to Defendants' management or accounting of Plaintiff's trust funds or Plaintiff's non-monetary trust assets or resources." The D.C. court had held that the Tribes thereby waived any right of way claims arising before the date of settlement but left to the Idaho district court to determine which of the Tribes' claims were barred. The district court dismissed the Tribes' claim as to two of the parcels under the 12-year statute of limitations applicable to claims brought under the Quiet Title Act, dismissed the Tribes' claim seeking mandamus, dismissed the Tribes' claim under the Administrative Procedure Act based on that statute's six-year statute of limitations and reserved the Tribes' remaining claims pending further discovery and/or trial.

In *State of Oklahoma v. United States Department of Interior*, 2021 WL 6064000 (W.D. Okla. 2021), the Department of Interior (DOI), following the Supreme Court's determination in the *McGirt* case that the Muscogee (Creek) Nation's reservation in eastern Oklahoma had not been disestablished, informed the State of Oklahoma that the State could no longer regulate surface mining on the Nation's Reservation. Oklahoma sued, contending that *McGirt's* impact was limited to federal criminal jurisdiction under the Major Crimes Act. The district court disagreed and denied the plaintiffs' motion for injunctive relief: "[T]he contentions advanced by Oklahoma in this case collide directly with the plain language of federal legislation governing surface mining on the newly-recognized Creek Reservation. ... Here, [Surface Mining Control and Reclamation Act] SMCRA plainly precludes a state from administering either a Title IV reclamation program or a Title V regulatory program on Indian land. ... 'lands within such State' is defined as 'all lands within a State other than Federal lands and Indian lands.' ... Reading these provisions together, then, Title IV authorizes a State to submit a reclamation plan pursuant to an approved State Program, which by definition excludes Indian lands."

In *Accohannock Indian Tribe v. Tyler*, 2021 WL 5909102 (D. Md. 2021), members of the self-styled Accohannock Indian Tribe became embroiled in litigation in the state courts of Maryland. When the state court ruled in favor of one group, the other sued in federal court, seeking a declaratory judgment that the Tribe enjoyed sovereign immunity and nullifying the state court judge's order, in addition to money damages and other relief. Applying the criteria prescribed by the United States Supreme Court in *Montoya v. United States*, 180 U.S. 261 (1901), the court determined that the group was not an Indian Tribe and, therefore, not entitled to sovereign immunity: "To enjoy immunity from suit, an Indian tribe must be recognized as such under federal law. A group of Indians is a tribe for purposes of sovereign immunity if it has been recognized by (1) Congress; (2) the Executive Branch, through the Bureau of Indian Affairs, or; (3) by the courts as meeting the federal common law definition first articulated in *Montoya v. United States*, 180 U.S. 261 (1901). ... Plaintiffs bear the burden of demonstrating by a preponderance of the evidence that the Tribe is: (1) a body of Indians of the same or a similar race, (2) united in a community under one leadership or government

and (3) inhabiting a particular though sometimes ill-defined territory.' ... Plaintiffs fail to establish by a preponderance of evidence that the Tribe or Tribal Corporation presently maintains any semblance of a functioning government. Although the Tribal Corporation is organized in a hierarchal manner reminiscent of the historic Accohannock—with a tribal council, tribal chief, and a series of clan mothers—there is little evidence that the Tribe's leadership or governing documents are imbued with any meaningful authority. ... Plaintiffs here cannot demonstrate continuity between the Tribe and the historic Accohannock. Put differently, Plaintiffs fail to carry their burden of showing that the Tribe is a modern-day successor to, rather than a recreation of, a historic sovereign entity. ... Plaintiffs fail to demonstrate that the Tribe has continuously survived as a unified, governed community in an identifiable area or territory, such that it can fairly be construed as meeting the federal common law definition of a tribe under Montoya." (Citations omitted.)

In *Smith v. Martorello*, 2021 WL 5910652 (D. Ore. 2021), Smith brought a class action lawsuit on behalf of himself and others against Martorello and others in connection with an **internet lending** business associated with the Lac Vieux Desert Chippewa Tribe that allegedly violated Oregon law by offering loans at rates exceeding permissible rates. The defendants moved to dismiss on the grounds that, Under Rule 19, Federal Rules of Civil Procedure, the Tribe was a necessary party that could not be added because of its sovereign immunity. The magistrate judge recommended that the motion be denied and the district court accepted the recommendation: "Martorello maintains that continuing this action in their absence infringes on the Tribe's sovereign immunity, despite the fact that the Tribal Entities negotiated a Settlement Agreement and the Settled Parties stipulated to their dismissal from this action. Martorello's objections appear to rely almost entirely on the argument that Judge Acosta's analysis was incomplete because he did not address the Tribe's interests in this litigation. Judge Acosta specifically noted, however, that the only Tribe-affiliated parties to this lawsuit—Big Picture and Ascension—filed motions to dismiss early in this litigation based on sovereign immunity, but ultimately opted to negotiate their dismissal through the Settlement Agreement. The Court agrees with Judge Acosta that it is not for Martorello to decide what infringes on a Tribe's sovereign immunity, when the Tribe and its affiliated entities have not elected to rely on that immunity."

In *Seneca Nation v. State of New York*, 2021 WL 5907898 (W.D.N.Y. 2021), the Seneca Nation had entered into a gaming compact in 2002 with a 14-year term. The Compact provided the Nation make revenue-sharing payments to the State in exchange for exclusive gaming rights and, provided, further, that the Compact would automatically renew for an additional seven years if neither party objected to renewal. Since the Compact did not provide a schedule of revenue sharing payments for the extension period, the Nation contended that none were required. The dispute was submitted to arbitration under the terms of the Compact. The arbitration panel concluded that the Nation was required to continue making payments, rejecting the argument that the Department of Interior (DOI) had not approved payments during the extension period, as required by the **Indian Gaming Regulatory Act (IGRA)**. The Nation challenged the panel's decision, but the district court affirmed the panel and the Second Circuit affirmed the district court. The Nation then moved the district court under Rule 60 of the Federal Rules of Procedure to vacate its previous judgment based on new circumstances, including a letter from the DOI essentially agreeing with the position the Nation had taken in the arbitration and a letter from the National Indian Gaming Commission (NIGC) informing the Nation that it was reviewing the legality of the revenue sharing payments. The Nation argued that the NIGC might order it to cease operations based on the purported violation of the IGRA. The district court denied the Nation's motion: "Overall, the position reflected in the Department's letters fails to recognize the import of the Second Circuit's decision. The Second Circuit has settled that the arbitration award is the product of straightforward contract interpretation not subject to the Secretary's approval. ... An enforcement action premised on the Department's infirm position, which this Court understands is at the review stage, ... is thus on weak footing and unlikely to ultimately result in extreme and undue hardship to the Nation."

In *Pala Band of Mission Indians v. Maduros*, 2021 WL 5860750 (S.D. Cal. 2021), the Pala Band of Mission Indians (Tribe) owned a retail gasoline station located on tribal trust land in Pala, California. The California Department of Tax and Fee Administration and its director (CDTFA or Defendants) sought to require the Tribe to report, collect and remit **California state sales** and use taxes from the sale of fuel products sold by the Tribe to non-Indians and to Indians residing outside the Tribe's reservation and threatened property seizure, notices of lien, pre-intercept collection, collection fees, and late penalties if the Tribe did not comply. The Tribe sued to invalidate and enjoin the tax. The court granted the CDTFA's motion to dismiss: "The 'legal incidence' of an excise tax refers to determining which entity or

person bears the ultimate legal obligation to pay the tax to the taxing authority. ... Identifying legal incidence requires a court to analyze the taxing statute and its implementation to determine which entities or individuals will likely face detrimental legal consequences if the tax is not paid. ... In conducting this analysis, the Ninth Circuit has considered various factors, including (1) express statements of legislative intent, (2) whether the statute includes an explicit pass through which moves incidence down the distribution chain, (3) whether an entity is compensated for collecting and remitting the tax on behalf of the state, (4) what invoices show regarding payment of the tax, (5) whether a retailer may recoup tax paid for unsold products, (6) whether a retailer is refunded when a consumer fails to pay the tax, and (7) who the statute penalizes for nonpayment of the tax. ... Accordingly, because the legal incidence of the use tax falls on consumers and the collection and remittance duties placed on Plaintiff are a minimal burden, Plaintiff has failed to raise a right to relief supported by a cognizable legal theory." (Internal quotations and citations omitted.)

In *Cal-Pac Rancho Cordova, LLC v. United States Department of Interior*, 2021 WL 5826776 (E.D. Cal. 2021), the Estom Yumeka Maidu Tribe of the Enterprise Rancheria (Tribe) applied to the Department of Interior to take land in Yuba County (Yuba Parcel) into trust under Section 5 of the Indian Reorganization Act (IRA) and for a determination that the Tribe could conduct casino gaming on the newly acquired land under the Indian Gaming Regulatory Act (IGRA). In 2011, the Assistant Secretary issued a Record of Decision (ROD) concluding that once in trust, the Yuba Parcel would be eligible for gaming pursuant to IGRA's "two-part determination" that gaming on newly acquired lands would be in the Tribe's best interest and not detrimental to the surrounding community. The governor of California concurred in the determination, as required by IGRA and, the same day, signed a compact with the Tribe and forwarded it to the California legislature for ratification. After the Compact became ineligible for ratification by virtue of the legislature's non-action, the Tribe then filed suit under IGRA's remedial scheme. The Court ordered the State and the Tribe to conclude a gaming compact within 60 days and, when they failed to do so, ordered mediation. The mediator found the Tribe's proposed Compact best comported with IGRA and forwarded it to the State for its consent. The State failed to consent within the IGRA-mandated 60 days, and the Tribe's Compact was then submitted to the Secretary who, in 2016, issued **Secretarial Procedures** prescribing the parameters under which the Tribe may conduct Class III gaming activities on the Yuba Parcel. State licensed card clubs in the same area sued, contending that the Tribe's casino would have a competitive advantage over them and alleging that the Secretarial Procedures were issued in violation of IGRA because the Tribe purportedly never acquired jurisdiction or exercised governmental power over the Yuba Parcel and, even if it had, the provision of the Indian IGRA permitting the Secretary of Interior to acquire land for tribes violated the Tenth Amendment by reducing the State's jurisdiction over land within its territory without its agreement. The district court granted the government summary judgment, observing that it was bound by the Ninth Circuit's decision rejecting similar arguments in *Club One Casino, Inc. v. Bernhardt*, 959 F.3d 1142, 1145 (9th Cir. 2020), cert. denied sub nom. *Club One Casino, Inc. v. Haaland*, 141 S. Ct. 2792 (2021). The court also rejected the argument that the California legislature's failure to ratify the Compact negated the governor's concurrence in the two-part determination.

In *Rincon Band of Luiseño Mission Indians of Rincon Indians v. Flynt*, 70 Cal.App.5th 1059 (Cal. App. 2021), the Rincon Band of Luiseño Mission Indians of Rincon Indians, Santa Ynez Band of Chumash Mission Indians and related entities (Tribes) sued operators of competing non-Indian gaming establishments, asserting claims for public nuisance, unfair competition, declaratory and injunctive relief, and tortious interference with contractual relationship and prospective economic advantage based on allegations that operators and companies were offering banked card games in violation of the Tribes' exclusive right to offer such games. The trial court dismissed and the California Court of Appeals affirmed, holding that (1) the Tribes were not "persons" with standing to sue under California's unfair competition law (UCL), (2) the Tribes were not "private persons" with standing to pursue public nuisance claims, (3) the provision of the state constitution stating that the legislature had no power to authorize casinos was not self-executing or directly judicially enforceable, (4) Tribes had failed to allege actual breach or disruption of their performance of their gaming compacts with the State and thus failed to state claim for tortious interference with contractual relations and (5) the Tribes had failed to allege actual disruption of their economic relationship with the State and thus failed to state a claim for tortious interference with prospective economic advantage.

In *Sipp v. Buffalo Thunder, Inc.*, 2021 WL 5823820 (N.M. App. 2021), the Pueblo of Pojoaque (Tribe) operated Buffalo Thunder gaming enterprise pursuant to a Tribal-State Class III Gaming Compact with the State of New Mexico, as required by the federal Indian Gaming Regulatory Act (IGRA). Section 8(A) of the Compact addressed claims brought by “visitors to a gaming facility” for “bodily injury or property damage proximately caused by the conduct of the Gaming Enterprise” and included a waiver of sovereign immunity for such claims and an express agreement to **state court jurisdiction** “unless it is finally determined by a state or federal court that IGRA does not permit the shifting of jurisdiction over visitors’ personal injury suits to state court.” Sipp, an employee of a vendor that sold lights to Buffalo Thunder for the facility’s parking lot, was injured when a Buffalo Thunder employee abruptly lowered a garage door, causing Sipp to hit his head. Sipp sued the Pueblo of Pojoaque and several Pueblo-owned entities in New Mexico state district court. The Tribe argued that Sipp was not a visitor, that the accident did not occur in a “gaming facility” and that two federal decisions, *Pueblo of Santa Ana v. Nash*, 972 F. Supp. 2d 1254 (D.N.M. 2013) and *Navajo Nation v. Dalley*, 896 F.3d 1196 (10th Cir. 2018) had held that jurisdiction over tort claims arising in Indian country lay in tribal court and could not be shifted. The district court dismissed but the court of appeals, in a decision likely to be challenged in federal court, reversed: “The Tenth Circuit [in *Dalley*] reasoned that IGRA authorized tribes to shift jurisdiction for tort claims to state court only when the claims arose from gaming activity—i.e. ‘the stuff involved in playing class III games.’ ... The Tenth Circuit concluded that the slip-and-fall on a wet bathroom floor—an act that involved no class III gaming activity—could not be heard in state court because IGRA did not authorize the Navajo Nation to shift jurisdiction for the claim. ... Because both *Nash* and *Dalley* explicitly restricted their holdings to their case-specific facts, and both cases left open the possibility that IGRA permits jurisdiction shifting for tort claims under different circumstances, neither can be said to have ‘finally determined ... that IGRA does not permit the shifting of jurisdiction over visitors’ personal injury suits to state court.’ Accordingly, under the plain language of the Compact, the jurisdiction-shifting provision has not terminated by its own terms, and the district court in this case was not stripped of subject matter jurisdiction on these grounds.” (Citations omitted.)