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Indian Nations update

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In *Caballero v. United States*, 2021 WL 4938112 (9th Cir. 2021) (Not Reported), Caballero sued the United States to claim land that the United States holds in trust for the Shingle Springs Band of Miwok Indians (Band) and land that the Band owns in fee simple. Caballero claimed the properties were really owned by the Miwok Nation, with which he was associated. The district court dismissed the case against the United States for lack of subject matter jurisdiction under the **Quiet Title Act**, 28 U.S.C. § 2409a(a), which waives the federal government's sovereign immunity for claims challenging United States' title to real property but which explicitly does not waive such immunity for claims relating to trust or restricted lands. The court also dismissed the claim against the Miwok Tribe. The Ninth Circuit affirmed. "Caballero's claim to the land held in fee simple by the Band was correctly dismissed as posing a non-justiciable political question, as it was premised on the claim that Caballero's group, the Miwok Nation, should have been recognized instead of the Band as representing the Miwok people. This Court generally refuses to intrude on the traditionally executive or legislative prerogative of recognizing a tribe's existence. (Quotations and citations omitted.)

In *Chase v. Andeavor Logistics, L.P.*, 12 F.4th 864 (8th Cir. 2021), Andeavor Logistics L.P. and its co-defendants (Andeavor) own and operate the High Plains Pipeline System, a 500-mile oil pipeline that transports oil from North Dakota's oil-rich Bakken region to a refinery in Mandan, North Dakota. A portion of the Andeavor's **right-of-way (ROW)** crossed the Fort Berthold Reservation of the Three Affiliated Tribes (Tribes), including trust land held for the Tribes and individual member trust allotments. After ROWs obtained by Andeavor's predecessor-in-interest expired, Andeavor continued to operate. After several years, the Three Affiliated Tribes granted a new ROW over the tribal trust parcels upon payment of trespass damages. Certain Allottees, however, would not agree to a renewal and brought a punitive class action against Andeavor in federal court, seeking compensatory and punitive damages for ongoing trespass and injunctive relief requiring Andeavor to dismantle the pipeline. The trial court granted Andeavor's motion to dismiss, concluding the Allottees failed to exhaust administrative remedies with the Bureau of Indian Affairs (BIA). The Eighth Circuit Allottees reversed and remanded with instructions that the district court stay the case to give the BIA opportunity to take address various issues raised by the complaint: "Ultimately, the key question is not whether federal law supplies Allottees a cause of action for trespass on individual Indian allotments, but whether there is a common law or statutory claim they have standing to assert and if so, what is the source of the law that will define whether continuing trespass is occurring and what remedies are available to what parties that have rights in the trust lands. The judicial process should be stayed to give the BIA a further opportunity to address these issues. But dismissal is not appropriate because the administrative process will not resolve the Allottees' claims. Rather, the district court should stay the action for a reasonable period of time to see what action the agency may take. The court can then lift the stay, or further suspend the judicial process depending

on what action, if any, the agency takes. We leave the details of this process, including the solicitation of views from many parties with disparate interests, to the district court's discretion."

In *Guardado v. State of Nevada*, 2021 WL 2750732 (D. Nev. 2021), Guardado, a non-Indian inmate, sued Nevada prison officials after they denied his request to participate in Native American religious ceremonies, including sweat lodge, on the grounds that, under Department of Corrections administrative rules, such participation was limited to inmates who could (1) show proof of being enrolled in a federal recognized tribe, (2) demonstrate a credible association with tribal living via written documentation from a recognized tribe, (3) demonstrate a credible association with tribal living via written documentation from a tribe recognized by the United States government as having existed prior to 1887 (Dawes Act enacted) but not necessarily registered with the federal government, or (4) obtain written verification of Native American ethnicity from the Nevada Indian Commission. The court largely granted preliminary injunctive relief to Guardado, order prison officials to allow him to participate in sweat lodge, prayer circle, drum circle, smudging, sacred pipe, and also to access to the Native Indian grounds, but declined to extend the order to "all similarly situated" inmates. The court denied Guardado's motion for reconsideration.

In *Danks v. Slawson Exploration Company*, 2021 WL 4783258 (D. N.D. 2021), the Dankses, members of the Three Affiliated Tribes of the Fort Berthold Reservation, sued Slawson Exploration Company for trespass and nuisance damages arising out of Slawson's alleged release of oil onto the Dankses' trust allotment from one of its wells. Slawson moved to dismiss for lack of jurisdiction, citing a forum selection clause in a right-of-way agreement that purportedly authorized its activities. The court denied the motion, holding that it had "at least **federal question jurisdiction** based upon plaintiff allottees having federal common law claims for the torts of trespass and nuisance and that plaintiffs can pursue these claims without the United States, as owner and trustee for plaintiffs' allotments, being a party."

In *Nygaard v. Taylor*, 2021 WL 4772012 (D.S.D. 2021), Nygaard and Stanley were fathers of children born several years apart to Tricia Taylor, an enrolled member of the Cheyenne River Sioux Tribe ("Tribe"). Nygaard and Stanley initiated custody proceedings in the North Dakota court of Tricia's residence in March and July of 2014, respectively. Pending resolution, Tricia was forbidden from removing the children. She nevertheless took the children to the Cheyenne River Sioux reservation and initiated proceedings in the Cheyenne River Sioux Tribal Court which, over a seven-year period, including three trips to the Tribal Court of Appeals, declined to credit state court orders finding Tricia in contempt and awarding custody to the fathers. Under tribal court orders, the children were placed with Tricia's sister while Tricia served jail time for parental kidnapping. In 2019, the fathers filed a petition for writ of habeas corpus under the **Indian Civil Rights Act (ICRA)**, 25 U.S.C. § 1303, against the Cheyenne River Sioux Tribal Court and Appellate Court and numerous judicial officers in their official capacities. The defendants moved to dismiss but the court denied the motions, holding that sovereign immunity did not protect the individual judicial officials, that the plaintiffs had sufficiently exhausted tribal remedies and that their petition fell within the parameters of Section 1302 habeas corpus: "[T]he Eighth Circuit has held that a § 1303 habeas corpus action can challenge a tribal custody order in limited circumstances, particularly if the tribal court acts outside of its jurisdiction and refuses to give full faith and credit to the determination of another court. … Tricia, an enrolled member of the Cheyenne River Sioux Indian Tribe then living in North Dakota and amid custody litigation in North Dakota, violated an order of the North Dakota state court by taking C.S.N. out of North Dakota. Thereafter, the North Dakota state court granted temporary custody of C.S.N. and T.R.S. to each of their fathers and ordered Tricia to return the children to North Dakota. Eventually, the North Dakota state court held full trials, and both fathers were granted full permanent custody. Meanwhile, after Tricia was arrested, the Tribal Court granted temporary custody of the children to a non-parent relative without giving notice to either father. Since learning of the Tribal Court proceeding, the fathers have contested the Tribal Court's jurisdiction and argued that the North Dakota state court custody orders must be given full faith and credit under the PKPA. In bringing this action, Nygaard and Stanley do not question the Tribal Court's wisdom in placing the children with their aunt, but rather challenge the Tribal Court's jurisdiction to make that decision in the first place and their refusal to give full faith and credit to the North Dakota state court custody orders. … Because Nygaard and Stanley contest the Tribal Court's jurisdiction over the children and refusal to grant full faith and credit to the North Dakota state court custody orders, they have satisfied the jurisdictional prerequisites to maintain a § 1303 action against the Tribal Defendants. … Although ICRA does not waive a tribe's sovereign immunity, it does authorize suits against tribal officers. … Here, the Tribal Court and the Tribal Court of Appeals have been given a full opportunity to determine whether tribal

jurisdiction exists as part of the third appeal. The issues in this case have bounced back and forth between the Tribal Court and the Tribal Court of Appeals for roughly five years in multiple Tribal Court cases, resulting in three appeals to the Tribal Court of Appeals. … Because the Tribal Court of Appeals had a full opportunity to review the Tribal Court's decision as to jurisdiction, Nygaard and Stanley may now challenge that ruling in this Court."

In *Fish Northwest v. Thom*, 2021 WL 4744768 (W.D. Wash. 2021), Fish Northwest, a non-profit corporation "committed to the conservation and preservation of Puget Sound salmon and restoring and expanding fishing opportunities for Washington's anglers," sued multiple federal officials and federal agencies, including the Bureau of Indian Affairs (BIA), alleging that the BIA failed to enforce the **Endangered Species Act** by permitting Washington treaty tribes to take fish in the Sound without issuing incidental take statements. The court dismissed on the ground that the plaintiff failed to satisfy procedural requirements: "Pursuant to 16 U.S.C. § 1540(g)(2)(A), a plaintiff may not bring an action under the citizen-suit provision of the ESA without first providing written sixty-day notice of the alleged violations. The notice is a jurisdictional requirement for commencing an action under the ESA."

In *Muscogee (Creek) Nation v. Poarch Band of Creek Indians*, 525 F.Supp.3d 1359 (M.D. Ala. 2021), the Oklahoma-based Muscogee (Creek) Nation sued the Alabama-based Poarch Band of Creek Indians, its gaming authority and officials, as well as federal agencies, alleging violations of the Indian Reorganization Act (IRA), Native American Graves Protection and Repatriation Act (NAGPRA), and other federal statutes, arising out of the excavation and clearing of a tract of land, which once interred human remains and cultural items, for construction and operation of a casino. The Court dismissed, holding that (1) inter-tribal litigation is not exempt from principles of **sovereign immunity**, (2) claims against the Poarch Band and its representatives did not come within *Ex parte Young* exception to sovereign immunity and the Poarch Band officials were necessary parties whose inability to be joined required dismissal of the lawsuit.

In *State of Texas v. Astorga*, 2021 WL 4988310 (Tex. App. 2021), a tribal police officer stopped Astorga, a non-Indian, for a traffic infraction committed on the Isleta Pueblo and, after discovering drug paraphernalia in his car, handcuffed, Mirandized, and transported him to tribal police headquarters, where, following a strip search, tribal police discovered methamphetamine on his person. Tribal police then contacted the El Paso Police Department (EPPD). The trial court concluded that the tribal police acted outside the bounds of tribal law enforcement authority prescribed by the U.S. Supreme Court in its decision in ***U.S. v. Cooley***, 141 S.Ct. 1638, 1646 (2021) and that the evidence obtained was inadmissible. The Texas Court of Appeals agreed: "We conclude that the State has failed to present a record showing the tribal police acted within the limited authority that *Cooley* allows respecting the detention of non-Indians. … We agree with the trial court that the tribal officers had the authority to conduct the initial traffic stop and to engage in a limited detention and investigation at the scene of the stop, as part of their policing authority. … The stop was initiated just before 12:30 p.m. The stop and investigation at the scene took some 40 minutes. Yet, the EPPD incident report notes that the first call to them was made at 5:10 p.m. And the call reported possession of a controlled substance, meaning that the EPPD was not contacted until after the tribal officers discovered the methamphetamine on Astorga's person during the strip search that occurred at tribal police headquarters. Officer Alarcon made the same admission in his suppression hearing testimony. So unlike the tribal officers' actions in *Cooley*, the State here is unable to show that the initial detention of Astorga--for more than four hours--was for the purpose of contacting the EPPD to let them take control of the situation, or to take custody of Astorga on the alleged state law violation."

In *State of Oklahoma v. Lawhorn*, 2021 WL 4929270 (Okla. Crim. App. 2021), the Oklahoma Criminal Appeals Court affirmed the ruling of an Oklahoma trial court dismissing charges brought against Lawhorn, an Indian, for an offense committed within the boundaries of the Quapaw Reservation, based on the Supreme Court's holding in *McGirt v. Oklahoma*: "'To determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress.' *McGirt*, 140 S.Ct. at 2462. While no particular words or verbiage are required to disestablish a reservation, evidence of a clear expression of congressional intent to terminate the reservation is required. Sizemore, 2021 OK CR 6, ¶ 13, 485 P.3d at 870…. The record before the district court in this case, similar to that in *McGirt*, showed Congress, through a treaty, removed the Quapaws from one area of the United States to another where they were promised certain lands. A subsequent treaty redefined the geographical boundaries of those lands, but nothing in any of the documents showed a congressional intent to erase the boundaries of the Reservation and terminate its existence. Congress, and Congress alone, has the power to abrogate those treaties, and 'this Court will not lightly infer such a breach once Congress has established a reservation.'" (internal emendations omitted.)