GODFREY & KAHN S.C.

Indian Nations Law Focus

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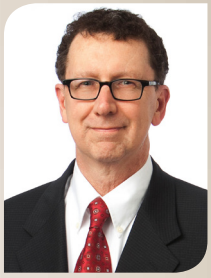

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The Godfrey & Kahn Indian Nations Law Practice Group provides a full range of legal services to Indian nations, tribal housing authorities, tribal corporations and other Indian country entities, with a focus on business and economic development, energy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

Godfrey & Kahn's 11th Annual Corporate Counsel Symposium to be held in Madison and Milwaukee in November

Godfrey & Kahn will offer its 11th Annual Corporate Counsel Symposium addressing current issues and challenges facing in-house legal departments. We will apply for CLE credits through the Wisconsin and Illinois Boards of Bar Examiners and will apply for other states upon request. This event will be held at the following locations:

- **Madison**: Nov. 8, 2017, 1:30 - 6:30 p.m.at the Madison Club (Lake Room)
- **Milwaukee:** Nov. 15, 2017, 1:30 - 6:30 p.m. at Pier Wisconsin at Discovery World (Pilot House)

Schedule:

1:30 – 2 p.m. Registration
2 – 5 p.m. Program
5 – 6:30 p.m. Cocktail reception & networking

This event is intended for in-house counsel only. For more information, please click here.

Wisconsin State Bar Indian Law Section CLE Sept. 29, at Red Cliff

The State Bar's Indian Law Section will hold its annual continuing legal education program on Friday, Sept. 29, 2017, at the Legendary Waters Resort on the Red Cliff Reservation. In addition to the traditional legislative and case law updates (Tom Springer and Brian Pierson), topics will include:

- View from Washington, prospects for Indian legal initiatives under the Trump Administration
- Legal implications of the protests at Standing Rock
- Pipelines & rights of way
- Litigation challenges to reservation boundaries
- Impact of the Supreme Court's decision in *Lewis v. Clarke*
- Reciprocity bar admission for attorneys with in-house tribal experience outside of Wisconsin

For more information, or to register, visit the State Bar website here.

Selected court decisions

In *Enerplus Resources (USA) Corporation v. Wilkinson,* 865 F.3d 1094 (2017), Wilkinson, a member of the Three Affiliate Tribes of the Fort Berthold Reservation (Tribe), had entered into an agreement with Peak North Dakota, LLC, the

predecessor-in-interest of Enerplus Resources (USA) Corporation (Enerplus), under which Peak North had assigned Wilkinson an overriding royalty interest (ORRI) in certain oil and gas leases located in North Dakota. The agreement provided that any disputes would be resolved in the United States District Court for the District of North Dakota Northwest Division and that "no party shall have the right to contest such jurisdiction or venue." Enerplus subsequently determined that it had overpaid Wilkinson and sued in the prescribed court to recover the overpayment. When Wilkinson filed a competing suit in tribal court, the federal court enjoined him from pursuing it, rejecting Wilkinson's argument that the tribal court should be afforded the opportunity to determine its own jurisdiction because the underlying leased interests involve tribal lands. The Eighth Circuit affirmed on the ground that "[t]he tribal **exhaustion doctrine** does not apply when the contracting parties have included a forum selection clause in their agreement."

In *Quinault Indian Nation v. Pearson*, 2017 WL 3707898 (9th Cir. 2017), the Quinault Indian Nation sued Edward A. Comenout, Jr (Comenout) and other defendants in 2010, claiming that the Indian Country Store they operated on the Nation's reservation had defrauded the Nation of $90 million in unpaid cigarette tax revenue by selling untaxed cigarettes and tobacco products in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO). After Comenout died, his estate asserted counterclaims against the Nation seeking a declaratory judgment that Edward had not violated the Cigarette Sales and Tax Code, an order compelling the grant of building and business permits, mandamus relief, lost profits, and damages due to an alleged antitrust and price-fixing scheme perpetrated by the Nation. The Nation moved for voluntary dismissal of its claims against Comenout, which the district court granted over the estate's objection. The Ninth Circuit affirmed: "[A] **sovereign-immunity** waiver is effective only if it is unequivocally expressed. … Here, the Nation filed the underlying suit but took no further action that unequivocally waived its immunity to the Estate's counterclaims. Nor do the Estate's counterclaims qualify as claims for recoupment. Accordingly, we reject the Estate's contention that the Nation has waived its sovereign immunity." (Internal quotations and citation omitted.)

Becker v. Ute Indian Tribe of the Uintah and Ouray Reservation, 2017 WL 3659020 (10th Cir. 2017) (*Becker*) and *Ute Indian Tribe of the Uintah and Ouray Reservation v. Lawrence*, 2017 WL 3658838 (10th Cir. 2017) (*Lawrence*) arise from the same events. Becker in 2005 had entered into a contract with the Ute Indian Tribe of the Uintah and Ouray Reservation (Tribe) under which Becker would manage the Tribe's Energy and Minerals Department and receive compensation that included a salary of $200,000 and 2% of "net revenue distributed to Ute Energy Holding, LLC from Ute Energy, LLC," tribal entities "capitalized with ... oil and gas interest[s] ... held in trust for the Tribe by the United States." Becker sued in state court to enforce the contract. After the state court denied the Tribe's motion to dismiss, the Tribe sued in federal court to enjoin the state court suit (*Lawrence* case), but the court dismissed on the ground that it lacked subject matter jurisdiction. The Tribe also sued in tribal court, seeking declarations (1) that the Contract is void because it grants Mr. Becker a tribal trust asset without federal-government approval, in violation of both federal and tribal law, and (2) that its purported waiver of sovereign immunity in the Contract was executed in violation of tribal law. Becker then filed his own suit in federal court to enjoin the tribal court action (*Becker* case). The Tribe moved to dismiss, arguing that the contract was invalid for lack of federal approval under 25 U.S.C. §§ 81, 85, 177, 464, and 2102 (a) and that the federal court action should be dismissed under the rule requiring exhaustion of tribal court remedies. The Tribe also filed a counterclaim against Becker and a third-party complaint against the judge in Becker's state court action, alleging a due process violation under 42 U.S.C. § 1983. The federal district court denied the motion and granted Becker's motion for a preliminary injunction. In the *Becker* case, the Tenth Circuit reversed the district court's denial of the Tribe's motion to dismiss based on the exhaustion doctrine but affirmed its dismissal of the Tribe Section 1983 claim on the ground that the tribe "has not stated a claim under § 1983 because it is not a 'person' entitled to relief under that statute when it is seeking, as here, to vindicate only a sovereign interest." The Court rejected Becker's argument that the Tribe waived exhaustion of tribal court remedies in the parties' contract. Citing the provision of the contract entitling Becker to 2% of revenues, the Court found the contract to be "a **transfer of property held in trust by the United**

States for the Tribe" requiring the approval of the United States. Since no approval had been made, the contract, including its waiver of sovereign immunity and exhaustion, was invalid according the Court. In the *Lawrence* case, the Tenth Circuit reversed the federal district court's dismissal, on jurisdictional grounds, of the Tribe's challenge to the exercise of jurisdiction by the state court in Becker's state court contract action: "Thus, it is clear that whether the state court has jurisdiction to hear Mr. Becker's claim is a matter of federal law. The only remaining question is whether the Tribe's suit seeking an injunction to halt the proceedings in state court is an action 'arising under' federal law (so that there is jurisdiction under 28 U.S.C. § 1331) or whether 'the matter in controversy [in this suit] arises under' federal law (so that there is jurisdiction under 28 U.S.C. § 1362). … We hold that the jurisdictional predicate is satisfied."

In *Murphy v. Royal*, 2017 WL 3389877 (10th Cir. 2017), Murphy was convicted of a murder in Oklahoma state court and sentenced to death. He challenged his conviction on the ground that the crime was allegedly committed in the Nation's Indian country, that he and his alleged victim were both members of the Muscogee (Creek) Nation and that he should consequently have been tried in federal court under the Major Crimes Act, which provides for federal jurisdiction over "[a]ny Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder ... within the Indian country." The Tenth Circuit agreed. Applying the four-part test prescribed by the U.S. Supreme Court in *Solem v. Bartlett*, the Court held that Congress had never **diminished or disestablished the reservation** established for the Tribe under treaties in the 19th Century: "The demographic evidence does not overcome the absence of statutory text disestablishing the Creek Reservation. … When steps one and two fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands, courts must accord traditional solicitude to Indian tribes and conclude the old reservation boundaries remain intact." (Internal quotes and cites omitted.)

In *Howard v. Plain Green*, LLC, 2017 WL 3669565 (E.D. Va. 2017), the Chippewa Cree Indians of the Rocky Boy's Reservation (Tribe) Business Committee formed Plain Green LLC (Company), an internet lending company, in 2010, according to the authorizing resolution, as an "economic arm" of the Tribe to "increase tribal revenues; serve the social, economic, educational, and health needs of the Tribe; and to 'enhance the Tribe's economic self-sufficiency and self-determination." The Company is owned by the Tribe though a holding company, Atoske Holding Company. Its Board of Directors was composed of five Managing Members appointed by the Tribe's Business Committee, at least three of whom were required to be members of the Tribe and at least one of whom was required to be a member of the Tribe's Business Committee. The company was regulated by the Tribe's Lending and Regulatory Code. Howard, a non-Indian resident of Virginia, borrowed money from Plain Green. After a dispute arose, Howard sued, alleging violations of the Fair Credit Reporting Act (FCRA). The district court adopted the magistrate judge's recommendation that the case be dismissed on **sovereign immunity** grounds. Applying the Tenth Circuit's six-part test in the *Breakthrough Management* case, the judge concluded that "[b]ecause the uncontroverted evidence shows that Plain Green was created and is largely controlled by the Tribe, it should be considered 'an arm of the tribe,' and thus entitled to tribal immunity."

In *United States v. Tucker and Muir*, 2017 WL 3610587 (S.D. N.Y.), the government indicted Tucker and Muir under the Racketeer Influenced and Corrupt Organizations Act (RICO), charging that their **internet lending** business was an unlawful enterprise that charged usurious debt in violation of the laws of various states, including New York. The defendants moved to dismiss, arguing that the debts described in the Indictment could not be unlawful because their rates were set by federally recognized Indian tribes, which have sovereign powers that can be abrogated only through direct Congressional action and that charges were an unlawful intrusion into tribal sovereignty. The court denied the motion: "[T]he Indictment alleges that the enterprise controlled and led by Tucker and Muir was not a tribal entity. Instead, the enterprise entered into superficial, 'sham' relationships with three sovereign tribes for the purpose of invoking immunity. Whether this was, in fact, the case is a matter to be decided at trial based on the evidence. Moreover, the Second Circuit has concluded that a tribe-run lender doing business over the internet is not necessarily exempt from state usury laws. … A tribe's actions going

beyond the reservation boundaries must comply with non-discriminatory state laws if those laws are unlikely to affect tribal self-government. … A tribe's interest peaks when a regulation threatens a venture in which the tribe has invested significant resources. In contrast, a tribe has no legitimate interest in selling an opportunity to evade state law. ... A court must weigh the record to assess whether a regulation threatens a significant investment ... or whether a tribe has merely masked a legal loophole in the cloak of tribal sovereignty. ... Relevant considerations include whether loan approvals, processing and underwriting took place on a reservation, and whether funds were loaned from tribal banks, as opposed to bank accounts the tribe maintained at outside, non-tribal banks. … Even if those considerations weigh in favor of a tribe, courts may still consider a state's interest in regulating the lending practices offered to its citizens." (Internal quotes and ellipses omitted.)

In *El Paso Natural Gas Company LLC v. United States*, 2017 WL 3492993 (D. Ariz. 2017), El Paso Natural Gas Company LLC (EPNG) sued the United States, Department of the Interior, Bureau of Indian Affairs, U.S. Geological Survey, Department of Energy, and the Nuclear Regulatory Commission (United States) under §§ 107 and 113 of the Comprehensive Environmental Response, Compensation, and Liability Act (**CERCLA**). El Paso sought to recover response costs incurred in remediating 19 historical uranium mines located on trust land on the Navajo Reservation. On summary judgment, the court found that the United States was an "owner" for purposes of owner liability under the CERCLA, rejecting the government's argument that it was merely a title owner and that the Navajo Nation held the meaningful ownership interest: "While the United States has granted a significant property interest to the Navajo Nation—exclusive use and possession of reservation land, amounting to a compensable interest—the fact remains that the United States holds fee title and substantial powers over the land, including the power to enter, control alienation, and take. Given CERCLA's broad remedial purposes, its simple declaration that facility owners are liable, and the Court's obligation to construe 'owner' liberally, … a fee title holder with such plenary and supervisory powers is an owner for purposes of CERCLA."

In *Stillaguamish Tribe of Indians v. Washington*, 2017 WL 3424942 (W.D. Wash. 2017), Stevenson, an environmental engineer of the Stillaguamish Tribe of Indians (Tribe), had executed, on behalf of the Tribe, a Salmon Project Agreement, including a waiver of the Tribe's **sovereign immunity**, with the State of Washington. The Agreement provided for the State to grant the Tribe $497,000 to execute a project entitled "Steelhead Haven Landslide Remediation" that included construction of a retaining wall. The waiver of immunity provided that the Tribe would "indemnify, defend and hold harmless the State ... against all claims, actions, costs, damages, or expenses of any nature arising out of or incident to the Sponsor's or any Contractor's performance or failure to perform the Agreement." Years later, the retaining wall failed, damages resulted and the State was sued. The State sought to enforce its indemnification rights against the Tribe, but the court found that the purported waiver of immunity by Stevenson was ineffective: "The agreement was not entered into with the requisite authority, because neither the Tribe's constitution, prior policies and practices, nor any resolution delegating the Board's plenary waiver power show an unequivocal waiver of sovereign immunity."

In *Picayune Rancheria of Chukchansi Indians v. United States Department of Interior,* 2017 WL 3581735 (E.D. Cal. 2017), the governor of California State in 2012 had concurred in the determination of the Secretary of the Interior that the acquisition of land in Madera County for gaming by the North Fork Rancheria of Mono Indians (North Fork) would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, the "Two-Part Determination" required by the **Indian Gaming Regulatory Act** (IGRA) to authorize gaming on lands acquired for gaming after 1988. The governor signed a compact in 2012 permitting North Fork to conduct gaming on the newly acquired site and the property was taken into trust by the Department of Interior in 2013. California voters, however, disapproved the compact by referendum I 2014. When the State refused to enter into negotiations for a new compact, North Fork sued in federal court in 2015, alleging the State's failure to bargain a gaming compact under the Indian Gaming Regulatory Act (IGRA). After the State failed to enter into a compact based on "last best offer" mediation ordered by the court, the Department of Interior (DOI) issued Secretarial Procedures in

lieu of a state compact to govern North Fork's gaming. In the instant litigation, the Picayune Rancheria of Chukchansi Indians (Picayune) challenged the decision by the Secretary of Interior to take the Madera Site into trust on the principal ground that the Governor's 2012 concurrence in the Two-Part Determination was invalid under California law. The court granted the government's motion for summary judgment, holding that Picayune was bound by a 2016 decision of the D.C. District Court, in litigation brought by Picayune, that the State of California was a necessary party in litigation challenging the validity of the governor's concurrence.

In *Perkins v. United States*, 2017 WL 3326818 (W.D.N.Y. 2017), Perkins, a member of the Seneca Nation, and her husband, extracted and sold gravel they had removed from Seneca Territory under a lease and permit issued by the Nation. When the Internal Revenue Service claimed they owed **income taxes** on the proceeds of the sale, the Perkinses sued, contending the income was protected from taxation by the 1794 Treaty of Canandaigua, which provides that "the United States will never ... disturb the Seneka nation," or "their Indian friends residing thereon and united with them, in the free use and enjoyment" of the Seneca land, and by the treaty of 1842, which provides that the parties to the treaty "agree to solicit the influence of the Government of the United States to protect such of the lands of the Seneca Indians … from all taxes, and assessments for roads, highways, or any other purpose… ." The government moved to dismiss, but the court denied the motion, rejecting the magistrate judge's recommendation that the 1842 treaty applied solely to taxes on real property: "Given the liberal principles of treaty construction that apply here, there is no reason to believe that one rule would apply to taxing the dirt, gravel, and foliage that make up the property and another to the property itself—if 'the property' can even be distinguished from the dirt, gravel, and foliage that comprise it. In other words, the language of the 1842 Treaty provides no reason to distinguish between exemptions from what we think of as a real property tax and exemptions from a tax on what makes up that real property."

In *Doe v. Piper*, 2017 WL 3381820 (D. Minn. 2017), plaintiffs challenged the constitutionality of certain features of the Minnesota Indian Family Preservation Act (MIFPA), the Minnesota law intended to complement the federal **Indian Child Welfare Act** (ICWA). The court dismissed for lack of jurisdiction on mootness grounds but suggested the plaintiffs' claims might be valid: "This case presents significant constitutional questions, including whether MIFPA's extension of the tribal notice requirement and intervention right to voluntary adoption proceedings implicates the biological parents' fundamental right to care, custody, and control of their children,… whether those portions of MIFPA are entitled to rational-basis review because they are authorized by federal law or further a federal policy benefitting Indians, … and whether the statute could survive strict scrutiny, if applicable, under either theory. Presented in the proper context, these questions merit careful consideration. But the Court cannot reach them due to jurisdictional constraints."

In *Miccosukee Tribe of Indians of Florida v. Lewis Tein, P.L.*, 2017 WL 3400029 (Fl. App. 2017), plaintiff attorneys sought to sue the Miccosukee Tribe of Indians of Florida in tort, contending that the Tribe filed false lawsuits, suborned perjury, and obstructed justice, in an effort to damage their finances, reputations and law firm. The Florida Court of Appeals held that the Tribe was protected by **sovereign immunity**, rejecting the plaintiffs' arguments that the Tribe's participation in previous litigation constituted a waiver in the instant suit: "Where the prior litigation ends and the new case begins is the point that the waiver becomes unclear and not explicit. As in all the cases cited in footnote seven, the Tribe's conduct and active participation opened itself up to litigation in the same cases in which the conduct occurred and the participation happened—the Bermudez case, the first and second state court actions, and the federal court action—but it did not act as a clear, explicit, and unmistakable waiver in a subsequent case on the same subject matter, like this one."

In *Wingra Redi-Mix, Inc. v. State Historical Society*, 2017 WL 3228611 (Wis. App. 2017), Wingra Redi-Mix, Inc. (Wingra) owned property that included the Ward Effigy Mounds, identified in 1914 and added to the Wisconsin catalog of burial sites in 1991 pursuant to State's **Burial Sites** Preservation statute enacted in 1985. The director of the State Historical Society referred Wingra's petition to disturb the site for purposes of sand and gravel mining to the Division of Hearings and Appeal (DHA), which denied Wingra's petition, finding that Wingra failed to show that "the

benefits to the permit applicant … outweigh the benefits to all other persons shown on the registry … to have an interest in not disturbing the burial site," as required by the statute. Wingra sought judicial review. The circuit court held for Wingra, but the Wisconsin Court of Appeals reversed, holding that the DHA properly considered oral tradition testimony by a Ho-Chunk clan elder and the Ho-chunk Historic Preservation Officer to establish the Nation's affiliation with the mounds, and with all mounds in the Nation's southern Wisconsin ancestral homelands, and properly weighed the competing interests: "[T]he gravamen of Wingra Stone's argument is simply that DHA did not properly weigh the public interests that it asserted, namely roads and jobs. However, DHA's decision shows that it did consider those public interests and reasonably found on the record before it that denying the permit would not harm those interests. Wingra Stone fails to show that DHA's finding of no harm is unsupported by substantial evidence. It also fails to point to anything in the decision suggesting that DHA gave greater weight to a lower 'priority' interest as listed in the statute. … [W]e conclude that there was substantial evidence to support DHA's conclusion that the Ho-Chunk people have a cultural, tribal or religious affiliation with the Ward Mounds specifically." (Internal quotes omitted.)

In *Wingra Redi-Mix, Inc. v. Burial Sites Preservation Board*, 2017 WL 3228538 (Wis. App. 2017), Wingra Redi-Mix, Inc. (Wingra) owned property that included the Ward Effigy Mounds, identified in 1914 and added to the Wisconsin catalog of burial sites in 1991 pursuant to State's **Burial Sites** Preservation statute enacted in 1985. In 2010, wishing to engage in gravel and sand mining activities, Wingra requested that the Mounds be removed from the catalog on the ground that there was insufficient evidence of human remains. When the Burial Sites Preservation Board (Board) denied the request, Wingra sought judicial review. The circuit court upheld the Board's decision and the Court of Appeals affirmed: "The Board reviewed [Wingra's expert's] literature and pointed out that the authors cited by Wingra Stone clearly state … that 'most effigy mounds contain human burials.' … We conclude that there was substantial evidence to support the Board's conclusion that Wingra Stone failed to provide sufficient evidence that the Ward Mounds do not contain human remains."

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