GODFREY & KAHN S.C.

Indian Nations Law Focus

October 2017, Volume 12, Issue 10

Brian L. Pierson
414.287.9456
bpierson@gklaw.com

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.

Alabama Supreme Court blows a hole through tribal sovereign immunity armor

In its 2014 decision in *Michigan v. Bay Mills,* 134 S.Ct. 2024 (2014), the U.S. Supreme Court, in a 5-4 decision, affirmed that tribal sovereign immunity protects tribes from suits arising from both governmental and commercial activities regardless whether the suit arises on-or off-reservation.The majority based its decision largely on the ground that it had affirmed tribal sovereign immunity in its 1998 *Kiowa Tribe v. Manufacturing Technologies* decision and that there were insufficient grounds to reverse so recent a precedent. The Court acknowledged policy objections to tribal sovereign immunity and, in a footnote, all but invited lower courts to create an exception:

> We need not consider whether the situation would be different if no alternative remedies were available. We have never, for example, specifically addressed … whether immunity should apply in the ordinary way if a tort victim, or other plaintiff who has not chosen to deal with a tribe, has no alternative way to obtain relief for off-reservation commercial conduct. The argument that such cases would present a "special justification" for abandoning precedent is not before us.

On Sept. 30, the Alabama Supreme Court became the first court to exploit the opening created in the *Bay Mills* case. In *Wilkes v. PCI Gaming Authority,* 2017 WL 4324948 (Alabama 2017), Wilkes and Russell were injured in a traffic accident on an Alabama highway when an intoxicated employee of the PCI Gaming Authority (PCI), an instrumentality of the Poarch Band of Creek Indians (Tribe), crossed into oncoming traffic and struck the plaintiffs' vehicle. The trial court dismissed the plaintiffs' suit against the PCI on sovereign immunity grounds, but the Alabama Supreme Court, citing the *Bay Mills v. Michigan* footnote, as well as the policy arguments advanced by the dissenting justices in *Kiowa* and *Bay Mills,* reversed:

> In light of the fact that the Supreme Court of the United States has expressly acknowledged that it has never applied tribal sovereign immunity in a situation such as this, we decline to extend the doctrine beyond the circumstances to which that Court itself has applied it; … As Justice Stevens aptly explained in his dissent in *Kiowa,* a contrary holding would be contrary to the interests of justice, especially inasmuch as the tort victims in this case had no opportunity to negotiate with the tribal defendants for a waiver of immunity. … We … hold that the doctrine of tribal sovereign immunity

affords no protection to tribes with regard to tort claims asserted against them by non-tribe members.

The new "Alabama exception" to tribal sovereign immunity apparently applies where (1) the claim arises under the law of tort, (2) the tort occurs off reservation, (3) the claim arises out of a tribal commercial activity, (4) the plaintiff is non-member of the Tribe and (5) in the absence of the exception, the plaintiff would have no means of obtaining relief. The exception would presumably not apply where plaintiffs have a remedy under tribal law.

While the *Wilkes* decision represents a dramatic departure from established assumptions regarding the scope of sovereign immunity, it is binding only on the state courts of Alabama. It directly impacts just one of the 567 federally acknowledged tribes.

Other selected court decisions

In *Guidiville Rancheria of California v. United States,* 2017 WL 3327828 (9th Cir. 2017), Upstream Point Molate, LLC (Upstream) and the Guidiville Band of Pomo Indians (Tribe) had entered into a Land Disposition Agreement (LDA) with the City of Richmond, California (Richmond) to develop a gaming enterprise at Point Molate, the site of a decommissioned United States Navy fuel depot located on the coast of the City. The Tribe and Upstream sued the United States and City officials alleging that the City violated the LDA and the implied covenant of good faith and fair dealing by interfering with Appellants' ability to obtain federal approval of the site under the **Indian Gaming Regulatory Act's** (IGRA) "restored lands" exception to the prohibition against gaming on lands acquired after the 1988 enactment of the IGRA, thereby preventing Appellants from satisfying a condition precedent of the LDA. The district court dismissed. On appeal, the Ninth Circuit (1) reversed the district court's grant of judgment on the pleadings and remanded for further proceedings regarding whether the City violated the LDA by interfering with the Tribe's ability to fulfill a condition precedent, (2) affirmed the district court's dismissal of the express breach of contract claims, (3) reversed the district court's order denying leave to amend the Proposed Fourth Amended Complaint and (4) vacated the district courts amended judgment "and the case is remanded for further proceedings consistent herewith, including consideration of a legal fee award against the Tribe." The Ninth Circuit left in place the district court's stay of the Tribe's federal claims against the United States arising from its denial of approval of federal gaming authorization under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 et seq.

In *United States v. Osage Wind, LLC,* 2017 WL 4109940 (10th Cir. 2017), Congress had severed the Osage mineral estate in Osage County from the surface estate by the Osage Act of 1906, allotting the surface estate to individual tribe members, which became alienable, while reserving the mineral estate for the Osage Nation, with the United States as trustee. When Osage Wind LLC sought to pursue a wind energy project, the United States sued, contending that the excavation, modification, and use of rock and soil during the installation of wind turbines constituted "mining" under the pertinent federal regulations, which defined "mining" to mean "mineral development" and that the excavation required a **federal mining permit**. The district court disagreed and granted Osage Wind summary judgment, but the 10th Circuit reversed: "We hold that the term 'mineral development' has a broad meaning. While it includes commercial mineral extractions and offsite relocations, which are not at issue here, it also encompasses action upon the extracted minerals for the purpose of exploiting the minerals themselves on site. … Osage Wind did not merely dig holes in the ground—it went further. It sorted the rocks, crushed the rocks into smaller pieces, and then exploited the crushed rocks as structural support for each wind turbine."

In *Eagleman v. Rocky Boys Chippewa-Cree Tribal Business Committee,* 2017 WL 2684129 (9th Cir. 2017), Glenn and Celesia Eagleman and Theresa Small (Eaglemans) sued the Chippewa Cree Tribe Housing Authority and two of its employees. The Chippewa Cree Tribal Court dismissed on the ground of sovereign immunity. The Eaglemans then sued in federal court seeking a declaratory judgment that the tribal court erred in dismissing their claims. The federal district court dismissed for lack of

subject matter jurisdiction, and the Ninth Circuit affirmed: "To be sure, tribal sovereign immunity is a matter of federal law, … and questions of the scope of tribal sovereignty are, in certain circumstances, reviewable in federal court, ... For example, a tribal court's assertion of jurisdiction over a non-tribal-member is a question that is answered by reference to federal law and is a federal question under § 1331. Id. But here, Appellees are not non-tribal-members; they are part of the Chippewa–Cree Tribe. Nor is there any suggestion that the tribal court lacked jurisdiction over the Eaglemans' claims. … The Eaglemans essentially ask the district court to sit as a general appellate body to review the decision of the tribal court. This miscomprehends the relationship between the federal government and Indian tribes. Tribal courts are not vertically aligned under the federal judicial hierarchy. They are institutions within coordinate sovereign entities vested with the power to regulate internal tribal affairs. … Asserting jurisdiction here would effectively expand this court's authority to superintend matters of tribal self-governance." (Citations and internal quotations omitted.)

In *Lummi Tribe of the Lummi Reservation, Washington v. United States*, 2017 WL 3996365 (Fed. Cir. 2017), the U.S. Department of Housing and Urban Development (HUD) had determined that the Lummi Nation, Lummi Nation Housing Authority, Hopi Tribal Housing Authority, Fort Berthold Housing Authority and Fort Peck Housing Authority (Tribes) had over-reported their formula current assisted stock (FCAS) under the **Native American Housing Assistance and Self-Determination Act** (NAHASDA) and, as a result, received more Indian Housing Block Grant Funds than they were entitled to receive. HUD recouped the overpayment by reducing the Tribes' IHBG in subsequent years. The Tribe sued in the Claims Court under the Tucker Act and the Indian Tucker Act, 28 U.S.C. §§ 1491(a)(1) and 1505, respectively, alleging that (1) HUD misapplied the NAHASDA formula by inappropriately removing housing units from the FCAS data, which led to decreased grant amounts, and (2) HUD was obligated by 25 U.S.C. § 4165 to provide the Tribes with a hearing during which they could respond to the HUD report, but HUD failed to do so. HUD moved to dismiss, contending that NAHASDA's provision for block grants is not a "money mandating" statute within the Claims Court's jurisdiction. The Claims Court denied the motion but the Federal Circuit Court of Appeals reversed: "A statute is money mandating if either: (1) it can fairly be interpreted as mandating compensation by the Federal Government for ... damages sustained; or (2) it grants the claimant a right to recover damages either expressly or by implication. … NAHASDA does neither, as revealed by the ultimately equitable nature of the Tribe's claims. … Under NAHASDA, the Tribes are not entitled to an actual payment of money damages, in the strictest terms; their only alleged harm is having been allocated too little in grant funding. Thus, at best, the Tribes seek a nominally greater strings-attached disbursement. But any monies so disbursed could still be later reduced or clawed back. … Here, the underlying claim is not for presently due money damages. It is for larger strings-attached NAHASDA grants—including subsequent supervision and adjustment—and, hence, for equitable relief. Indeed, any such claim for relief under NAHASDA would necessarily be styled in the same fashion; the statute does not authorize a free and clear transfer of money. Accordingly, the Claims Court erred in finding NAHASDA to be money mandating."

In *Northern New Mexicans Protecting Land, Water and Rights v. United States*, 2017 WL 3081630 (10th Cir. 2017), the Bureau of Indian Affairs (BIA) had sent Santa Fe County a letter declaring that certain county roads crossing San Ildefonso Pueblo lands were unauthorized trespasses and encouraging the County to negotiate with the Pueblo for a **right-of-way** easement. Northern New Mexicans Protecting Land, Water and Rights (the Northern New Mexicans), a nonprofit organization comprised of landowners who use the roads to access their homes (Plaintiffs), sued the Pueblo and the government, contending that the BIA letter clouded title to their properties. The district court dismissed the complaint without prejudice on the ground that Plaintiffs' organization lacked standing to bring its takings and quiet title claims, that the quiet title action was barred by sovereign immunity

and that the Quiet Title Act provided the exclusive remedy for claims challenging the United States' title to real property. The Tenth Circuit affirmed, holding that the Plaintiffs' Administrative Procedure Act (APA) and Takings claims were not ripe for review, the Plaintiffs waived their quiet title claim, and their claims based on the Equal Protection Clause and the Fifth Amendment Due Process were not viable.

In *Jamestown S'Kallam Tribe v. McFarland,* 2017 WL 4155043 (E.D. Cal. 2017), McFarland, trustee of the chapter 11 bankruptcy estate of International Manufacturing Group, Inc. (IMG), initiated an adversarial proceeding against appellant Jamestown S'Klallam Tribe (Tribe) under 11 U.S.C. § 544(b), seeking to avoid and recover the value of certain allegedly fraudulent transfers. The bankruptcy court denied the Tribe's motion to dismiss, and the district court, on appeal, affirmed, rejecting the Tribe's argument that any claim brought by an unsecured creditor under Section 544(b) would be barred by the Tribe's sovereign immunity: "[T]he great weight of authority is to the contrary. The Ninth Circuit recently held that 'the text of Section 106(a)(1) is unambiguous and clearly abrogates **sovereign immunity** as to Section 544(b)(1), including the underlying state law cause of action.' … This explicit abrogation of sovereign immunity means that in order to bring a § 544(b) claim, the trustee need only identify an unsecured creditor who, but for sovereign immunity, could have brought this claim against the Tribe. Accordingly, the court finds the Tribe's argument regarding actual creditor to be meritless."

In *Public Service Company of New Mexico v. Approximately 15.49 acres,* 2017 WL 4011149 (D.N.M. 2017), the Tenth Circuit had determined that the Public Service Company of New Mexico (PSC) could not condemn land owned in part by the Navajo Nation under 25 U.S.C. § 357, which authorizes the condemnation of "lands allotted in severalty to Indians" because lands owned by the Nation could not be considered "allotted." On remand, the PSC asked that the action be stayed pending the U.S. Supreme Court's decision whether to grant the PSC's petition for certiorari, but the court denied the motion on the grounds that grant of the petition seemed unlikely and that, even if the petition were granted, the Navajo Nation's immunity posed an additional obstacle to the relief sought by the PSC.

In *Flandreau Santee Sioux Tribe v. Gerlach, 2017* WL 4124242 (D.S.D. 2017), the State of South Dakota denied the Flandreau Santee Sioux Tribe (Tribe) a liquor license because it failed to collect and remit **sales taxes on beverages sold to non-tribal customers** at Royal River Casino & Hotel (Casino) and the First American Mart (Store), enterprises owned by the Tribe. The Tribe sued, contending that the taxes constituted an state impermissible tax on "gaming activity" under the Indian Gaming Regulatory Act (IGRA) and an infringement on the Tribe's right of self-government under the rule of *White Mountain Apache v. Bracker.* On cross-motions for summary judgment the district court held for the Tribe with respect to sales at the Casino but not with respect to Store sales: "This Court now finds that related amenities, the only significant purpose of which is to facilitate gaming activities at the Casino, also fall within the purview of 25 U.S.C. § 2710(d)(3)(C)(vii). The Court is convinced that but for the existence of the Casino, the gift shop, hotel, RV park, food and beverage services, and live entertainment events would not exist in the sleepy but pleasant little town of Flandreau, population 2,332. Nor could the Casino operate without the existence of these amenities. Unlike other casinos, Royal River is far from a substantial population center and, in fact, provides the only hotel service in town. Without a hotel or RV park, the Casino simply could not operate in order to further the self-sufficiency of the Tribe. Similarly, the gift shop would be of little worth without the Casino's apparel. When purchases take place at these amenities, the state is not 'losing tax revenues it would otherwise obtain from sales made outside of tribal boundaries,' nor is the Casino and its related facilities undermining the state economy or tax base. ... The product of value is not a tax exemption, but a 'form of entertainment that is wholly created, sold, and consumed within the boundaries' of the Flandreau Indian Reservation. Id. The product of value is a form of entertainment the only significant purpose of which is to facilitate gaming activities at the Casino. … However, the mere fact that the convenience store falls

within the same business enterprise operated by the Tribe is not sufficient to equate such services as directly related to the operation of gaming. … The Tribe has not presented sufficient evidence to the Court to show that the Store is sufficiently complementary to gaming, thus the Court finds that the Store, though it may benefit from its proximity to the Casino, is not in existence but for the tribe's operation of a Casino and it cannot be said that the only substantial purpose of a convenience store is to facilitate gaming. … The Court finds the State's interests outweigh the general interests of the Federal Government and the Tribe with respect to a tax imposed on nonmember purchases made at the Store." Further, the court (1) rejected the Tribe's argument that the State's taxation on sales that were also subject to a tribal tax without crediting the amount of the tribal tax was discriminatory, (2) and agreed with the Tribe that the State could not condition issuance of a liquor license on payment of taxes unrelated to liquor sales.

In *Capay Valley Coalition v. Jewell,* 2017 WL 4124182 (E.D. Cal. 2017), Capay Valley Coalition, a mutual benefit, non-profit corporation whose members consist of residents, citizens, and farmers in the Capay Valley, sued the Secretary of the Interior and other Department of Interior officials (DOI), challenging their decision to acquire approximately 853 acres of **land into trust** for the Yocha Dehe Wintun Nation (Tribe) under Section 5 of the Indian Reorganization Act (IRA) and the Part 151 regulations implementing Section 5. The district court granted the defendants summary judgment, holding that the DOI had properly considered the Tribe's need for the land and the jurisdictional issues arising from the acquisition: "The Tribe may acquire land in trust to expand its land base without being required to develop the land. … Indeed, nothing requires the BIA to consider why the Tribe needs the land in trust as opposed to in fee. … Moreover, nothing requires the BIA to individually evaluate each and every acre in the Tribe's application, or to consider the possibility of transferring less than the total requested acreage. … Plaintiff contends the BIA did not consider that the transfer of 853 acres would allow the Tribe to extensively develop land that is currently agricultural land. Such development would have a large impact on land use, transportation, water resources, habitat, and special status species, to which the local government would have no recourse. … [T]he NOD provides that since the State of California possesses criminal/ prohibitory jurisdiction over Indian lands pursuant to 18 U.S.C. § 1162 and 28 U.S.C. § 1360, the State's jurisdiction would remain unchanged by the acceptance of the land in trust. … Moreover, because the Tribe has stated its intent to continue the agricultural use of the 754 acres, the fact that Yolo County would lose regulatory jurisdiction over the lands was found not to be a concern. ... In as much as Plaintiff's argument hinges on the BIA's failure to consider that the Tribe might someday develop the agricultural acreage, the BIA is not required to speculate as to future use of the land beyond what the Tribe avers."

In *Pawnee Nation Of Oklahoma v. Zinke*, 2017 WL 4079400 (N.D. Okla. 2017), plaintiffs, the Pawnee Nation of Oklahoma and a group of individual members of the Pawnee Nation who owned partial interests in allotted tracts of land within the boundaries of the former Pawnee reservation, sued the Secretary of Interior and other federal officials (Defendants), contending that the Defendants' approval of 17 **leases for oil and gas development** violated the Administrative Procedure Act, The National Environmental Policy Act (NEPA), the American Indian Agricultural Resource Management Act (AIARMA), the National Historic Preservation Act (NHPA) and the federal trust obligation. The district court dismissed for failure to state a claim and for failure to exhaust administrative remedies, as required by the APA, and that the suit was, therefore, barred by sovereign immunity: "Plaintiffs have failed to identify a final agency action that is subject to judicial review under the APA. The Court therefore lacks jurisdiction over Plaintiffs' challenges to the BIA's approval of the Pawnee leases. … AIARMA does not apply to oil and gas leasing and permitting activities that Plaintiffs challenge in their Amended Complaint. Oil and gas leasing and permitting activities are governed by 25 U.S.C. § 396 and the regulations at 25 C.F.R. Part 212. … Here, Plaintiffs have not identified any statutes or regulations that give rise to a specific fiduciary duty. Plaintiffs allege only that the Federal Respondents have not

complied with NEPA, Executive Order 11,988, NHPA, and AIARMA. … None of these statutes set forth specific fiduciary trust duties. None of these generally applicable statutes set forth the specific enforceable trust duties that are required to state a valid claim for breach of trust.”

In *Navajo Nation Human Rights Commission v. San Juan County,* 2017 WL 3972481 (D. Utah 2017), the Navajo Nation Human Rights Commission sued San Juan County and County officials, alleging that the county’s adoption, for the 2014 election, of mail-in voting and closure of eight polling stations where Navajo language assistance had previously been provided (2014 Procedures) violated the **Voting Rights Act** (VRA) and the Equal Protection Clause of the Fourteenth Amendment. For the June 2016 elections, the County maintained the mail-in voting system but also opened three physical polling locations on the Navajo Reservation in addition to the election center in Monticello, for a total of four physical polling locations, while also providing Navajo interpreters at all four locations (2016 Procedures). In October 2016, the court denied a motion for preliminary injunction filed by plaintiffs seeking to enjoin the 2016 Procedures which were followed for the general election in November 2016. On cross motions for summary judgment, the court dismissed as moot the plaintiffs’ claims relating to the 2014 Procedures but held that the plaintiffs’ challenges to the 2016 Procedures could proceed under the VRA but not under the Equal Protection Clause.

In *Forsythe v. Reno-Sparks Indian Colony*, 2017 WL 3814660 (D. Nev. 2017), Forsyth, a woman-owned construction business, sued the Reno-Sparks Indian Colony (RSIC), officials of RSIC and Wood-Rogers, an engineering firm retained by RSIC, after RSIC failed to award Forsythe construction contracts for projects funded in part by the federal Economic Development Administration (EDA) and the U.S. Department of Housing and Urban Development (HUD), respectively. The court dismissed claims against the tribal defendants based on **sovereign immunity** and dismissed the claims against Wood-Rogers for failure to state claim: “[T]here is no express waiver, RSIC did not consent to the suit, and there is no express congressional authorization for Plaintiffs to sue. Accordingly, RSIC has sovereign immunity and the Court does not have jurisdiction over it. … Tribal sovereign immunity further extends to tribal officials when acting in their official capacity and within the scope of their authority but not to individual tribe members generally. … Although Plaintiffs basely allege that ‘Plaintiffs sue all RSIC Defendants (except RSIC) in their individual and official capacities,’ Plaintiffs only allege causes of action against RSIC Officers for conduct that occurred while RSIC Officers were acting in their official capacity and within the scope of their authority. … Pursuant to Plaintiffs’ pleadings, RSIC is the real party in interest and the relief sought from RSIC Officers is nominal. … Because of this, RSIC Officers are entitled to sovereign immunity. … Because § 1983 requires a plaintiff to prove that its deprivation was committed by a person acting under the color of state law, Plaintiffs’ § 1983 claims2 against Wood Rodgers Defendants are dismissed.”

In *Mdewakanton Sioux Indians of Minnesota v. Zinke*, 2017 WL 3841835 (D.D.C. 2017), the plaintiff, although not included in the list of **recognized tribes** published periodically in the Federal Register by the Secretary of Interior, claimed to be acknowledged by the federal government and sued the Secretary for failing to consult on various issues. The court granted the defendant summary judgment on the ground that the plaintiff failed to exhaust administrative remedies under the 25 CFR Part 83 procedures for federal acknowledgment: “Plaintiffs here must complete the Part 83 process before the Court will adjudicate if the Department erred by denying them consultation.”

In *Cherokee Nation v. Nash,* 2017 WL 3822870 (D.D.C. 2017), the Cherokee Nation, which had aligned itself with the Confederacy during the Civil War, entered into a treaty with the United States in 1866 which provided that slaves previously owned by Cherokees would “have all the rights of native Cherokees.” Freedmen’s rights were subsequently limited until 2007, when the Nation voted to amend its constitution “to limit citizenship in the Nation to only those persons who were Cherokee, Shawnee, or Delaware by blood.” When the federal government ruled the amendment illegal, the Nation sued, The Cherokee Nation commenced this civil action by filing

a complaint in the Northern District of Oklahoma on Feb. 3, 2009, seeking a declaration that "the Five Tribes Act and federal statutes modified the Treaty of 1866 thereby resulting in non-Indian Freedman descendants, including the individual defendants, no longer, as a matter of federal law, having rights to **citizenship of the Cherokee Nation** and benefits derived from such citizenship." The court granted the government's motion for summary judgment: " [T]he history of the 1866 Treaty reflects that the United States made clear from the outset that the emancipation and incorporation of freedmen into the Cherokee Nation, or other like provision for their status, was an ultimatum and imperative of any treaty negotiation. … The Cherokee Nation is mistaken to treat freedmen's right to citizenship as being tethered to the Cherokee Nation Constitution when, in fact, that right is tethered to the rights of native Cherokees. Furthermore, the freedmen's right to citizenship does not exist solely under the Cherokee Nation Constitution and therefore cannot be extinguished solely by amending that Constitution. As best the Court can divine, the only ways to extinguish the freedmen's right to citizenship are by (1) extinguishing native Cherokees' rights to citizenship or (2) amending the 1866 Treaty; assuming, again, that Article 9 applies to extant descendants of qualifying freedmen. The Court now turns to that question."

In *Kialegee Tribal Town and Red Creek Holdings,* LLC, 2017 WL 3730998 (N.D. Okla. 2017), Kialegee Tribal Town (Kialegee) and Red Creek Holdings, LLC (Red Creek), sought to develop a Class II gaming enterprise on the trust allotment of Bruner, a member of Kialegee, without the authorization of the Muscogee Creek Nation (MCN), which asserted jurisdiction over the allotment. Both Kialegee and MCN are included in the Department of Interior's list of "entities … acknowledged to have the immunities and privileges available to federally recognized Indian Tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations, and obligations of such Tribes." After MCN officials conducted a raid and ejected Kialegee and Red Creek from the site, Kialegee and Red Creek sued for injunctive relief, but the federal district court dismissed for lack of **federal question jurisdiction**, rejecting the plaintiffs' argument that the MCN was asserting rights to regulate the plaintiffs under the Indian Gaming Regulatory Act (IGRA): "Plaintiffs' complaint identifies an issue of federal law concerning the enforcement of IGRA by an Indian tribe, but plaintiffs have not adequately alleged facts supporting even an inference that the MCN was seeking to enforce IGRA. Dellinger's letter strongly supports the conclusion that the MCN was seeking to enforce its own laws when it took possession of the Bruner allotment. The law is clearly established that federal courts lack the authority to resolve disputes over tribal law, and such disputes fall exclusively within the jurisdiction of tribal courts."

In *Montella v. Chugachmiut,* 2017 WL 4238859 (D. Alaska 2017), Montella, a Native of China, had been employed by Chugachmiut, a non-profit tribal consortium that provides health care services throughout the Chugach Region. Chugachmiut is governed by its member tribes, with each tribe, including Chenega IRA Council of Chenega Bay, electing one individual to sit on the board of directors. After her employment was terminated, Montella sued under Title VII of the 1964 Civil Rights Act and for breach of the implied covenant of good faith. The district court dismissed the Title VII claim, holding that Chugachmiut was immune from suit and that its generic representations that it would follow anti-discrimination laws did not constitute a waiver. "While Defendant itself is not a tribe, it is nonetheless exempt under **Title VII** because it is a consortium organization controlled by its member tribes and operated to benefit those tribes…. While a tribe may waive immunity to suit, the court cannot imply such a waiver. It must be unequivocally expressed. There is a strong presumption against waiver of tribal sovereign immunity. … Defendant's website and application representations relied on by Plaintiff to support her waiver argument only mention being an equal opportunity employer; they do not mention being sued or court enforcement. Any waiver would therefore have to be implied, which is insufficient for the court to exercise jurisdiction over Plaintiff's **Title VII** claim." The court denied the motion for summary judgment on the good faith and fair dealing claim without providing any

explanation as to why it was not barred by sovereign immunity.

In *Harrison v. PCI Gaming Authority,* 2017 WL 4324716 (Ala. 2017), Benjamin was injured when, as a passenger, he was involved in an automobile accident following a high-speed police chase on a portion of a county roadway that traverses land held by the Poarch Band of Creek Indians (Tribe). The driver of the vehicle in which Benjamin was a passenger, Hadley, had consumed alcohol at Wind Creek Casino, an enterprise of the Tribe, that evening. Benjamin later died. His mother, Harrison, sued two individuals, Fountain and Coon (Individual Defendants) and the PCI Gaming Authority d/b/a Creek Entertainment Center; Wind Creek Casino and Hotel (Wind Creek); Creek Indian Enterprises, LLC; and the Tribe (Tribal Defendants), asserting claims under the state's dram shop law and alleging that the defendants were responsible for negligently or wantonly serving alcohol to Hadley despite his being visibly intoxicated. The trial court dismissed the Tribal Defendants on **sovereign immunity** grounds, but the Alabama Supreme Court, citing its decision in the *Wilkes* case, issued the same day, policy-based objections to sovereign immunity as applied to torts and a footnote in the Supreme Court's 2014 *Bay Mills v. Michigan* case that left open the question whether sovereign immunity applies to torts, reversed and remanded: "Reflecting the concerns expressed above, and in the interest of justice, this Court today in the case of *Wilkes,* supra, declines to extend the doctrine of tribal immunity to actions in tort, in which the plaintiff has no opportunity to bargain for a waiver and no other avenue for relief. Based on the foregoing and on our holding in *Wilkes,* we similarly conclude that the judgment entered by the trial court in the present case - extending to the tribal defendants' immunity from responsibility for the life-ending injuries to Benjamin allegedly caused by their negligent or wanton serving of alcohol to a visibly intoxicated patron - is due to be reversed. We remand this case to the circuit court to take up the related issue, which was not addressed by the circuit court, of the asserted lack of adjudicative, or 'direct' subject-matter, jurisdiction by the circuit court. In so doing, we note that the tribal defendants take the position that the claim in this case arose on Indian land. According to the complaint, however, Benjamin's life-ending injuries occurred on Jack Springs Rd., which is Escambia County Road 1, a fact that may bear on the whether adjudicative authority over this case lies in tribal or state courts."

In *Rape v. Poarch Band of Creek Indians,* 2017 WL 4325017 (Ala. 2017), Rape seemed to win a jackpot at Wind Creek Casino, an enterprise operated by PCI Gaming Authority, an instrumentality of the Poarch Band of Creek Indians (Tribe). After the Tribe advised Rape that the machine had malfunctioned and that he had not actually won, he sued. The trial court dismissed and the Alabama Supreme Court affirmed on the ground that the plaintiff was caught in a "Catch 22." If the plaintiff's argument that the Tribe was gaming on land not properly taken into trust was correct, then the casino would be subject to **state jurisdiction** and the plaintiff's gambling would be illegal under state law and his claim untenable for that reason. If the Tribe were correct that the gaming was properly conducted on land subject to the Tribe's jurisdiction, then the claim would arise within Indian country and, on that basis, outsides the court's jurisdiction. Similarly, if the slot machine that purportedly produced Rape's winnings was an illegal "Class III" machine under the IGRA because the Tribe lacked a state compact, then his gambling debt would be unenforceable under state law. If the machine were a permissible Class II device, Rape's claim would fall within the jurisdiction of the Tribe rather than the state.

In *Douglas Indian Association v. Central Council of Tlingit and Haida Indian Tribes*, 2017 WL 3928701 (Alaska 2017), Douglas Indian Association (Douglas) and Central Council of Tlingit and Haida Indian Tribes (Central Council) were both federally recognized Indian tribes. Douglas joined a consortium formed by Central Council to administer federal transportation funds under terms of a Memorandum of Agreement in August 2006. Douglas became dissatisfied, withdrew from the consortium and demanded return of its funds. When Central Council declined, Douglas sued. The trial court dismissed on **sovereign immunity** grounds, and the Alaska Supreme Court affirmed, rejecting Douglas' argument that sovereign

immunity is an affirmative defense rather than a jurisdictional bar: "Tribal immunity is a matter of federal law and is not subject to diminution by the States. We have long held that federally recognized tribes in Alaska are sovereign entities entitled to tribal sovereign immunity in Alaska state court. … Tribal sovereign immunity may be termed quasi-jurisdictional in Alaska because, as we have previously recognized, subject matter jurisdiction is not waivable and can even be raised at a very late stage in the litigation, but an Indian tribe may waive its sovereign immunity from suit. Nonetheless, when a tribal defendant invokes sovereign immunity in an appropriate manner and the tribe is entitled to such immunity, our courts may not exercise jurisdiction. Because tribal sovereign immunity serves as a jurisdictional bar under federal law, we follow the Ninth Circuit in concluding that a motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction is a proper vehicle for invoking sovereign immunity from suit." (Internal quotations, citations and ellipses omitted.)

In *Rosas v. AMG Services,* 2017 WL 4296668 (Cal. App. 2017), Rosas and others sued AMG Services, Inc. (AMG), a wholly owned subsidiary of former defendant Miami Tribe of Oklahoma, and various individuals and corporate entities, charging them with operating an illegal internet payday loan operation. AMG moved to quash a subpoena on grounds of tribal **sovereign immunity**. The trial court granted the motion, but the court of appeals reversed and remanded so that the trial court could apply the sovereign immunity standard established by the California Supreme Court in *People v. Miami Nation Enterprises,* 2 Cal.5th 222 (Cal. 2016).

In *Bercerra v. Rose, 2017 WL* 4294074 (Cal. App. 2017), Rose, a member of the Alturas Indian Rancheria, ran two smoke shops, Burning Arrow I and Burning Arrow II, located on allotted lands more than 150 miles from the Alturas Indian Rancheria. Rose held a fractionated interest in the allotments through his previous membership in the Karuk Tribe. When Rose failed to collect state taxes on sales of cigarettes, the California attorney general brought an enforcement action. The trial court found that Rose violated the California tobacco directory law and the California Cigarette Fire Safety and Firefighter Protection Act and failed to collect and remit state cigarette excise taxes and imposed civil penalties of $765,000 under the unfair competition law. On appeal, the Court, applying ***White Mountain Apache v. Bracker*** and related cases, held that (1) federal law and tribal sovereignty did not preempt California's regulation and enforcement of its laws concerning sales of cigarettes and (2) the superior court's imposition of civil penalties was proper: "California's laws promote public health and fire safety both inside and outside Indian country within California's borders. There appear to be no federal statutes or regulations that would preempt California's statutory scheme. And the threat to Indian sovereignty is minimal, especially in a case such as this in which no tribe has expressed an interest in the matter."

In *Sharp Image Gaming, Inc. v. Shingle Springs Band,* 2017 WL 4081751 (Cal. App. 2017), Sharp Image Gaming, Inc. (Sharp) had entered into gaming machine agreement (GMA) in 2006 and an equipment lease agreement (ELA) in 2007 with Shingle Springs Band of Miwok Indians (Tribe) to facilitate the financing and operation of a new casino. When a dispute arose, the Tribe repudiated the agreements and engaged a different developer to assist with its new casino. In 2007, Sharp sued, alleging breach of contract and seeking to recover the funds it had invested under the two contracts. The Tribe then obtained an advisory opinion letter from the Acting General Counsel of the National Indian Gaming Commission (NIGC) that the GMA and ELA were management contracts for purposes of the **Indian Gaming Regulatory Act (IGRA)** and, not having been approved by NIGC, invalid and unenforceable. In 2009, the chairman of the NIGC formally determined the GMA and the ELA to be invalid management contracts, noting that the agreements provided Sharp with "broad operational control," including the exclusive right to provide gaming machines for all of the casino floor space and freedom to configure the gaming floor. The trial court nevertheless declined to grant the Tribe's motion for summary judgment, concluding the Chairman's action violated Sharp Image's due process rights and contravened various IGRA procedural

requirements, that the Tribe's request to NIGC was not a request for approval of a management contract, but a request for an "expression of opinion" and, therefore, not entitled to any deference. A jury determined that the Tribe had breached both contracts and returned a verdict in favor of Sharp Image of approximately $20.4 million on the ELA and approximately $10 million on a related promissory Note. The Court of Appeals reversed: "[T]he trial court was obligated to determine whether the agreements were management contracts or collateral agreements to management contracts under IGRA, a necessary determination related to the question of whether Sharp Image's action was preempted by IGRA. … [T]he ELA is a management contract and the Note is a collateral agreement to a management contract. … Because these agreements were not approved by the NIGC Chairman as required by IGRA and are consequently void under federal law, Sharp Image's action is preempted by IGRA and thus, the trial court did not have subject matter jurisdiction."

Indian Nations Team Members

Kathryn Allen, Financial Institutions
Sault Ste. Marie Chippewa Tribe
kallen@gklaw.com

Mike Apfeld, Litigation
mapfeld@gklaw.com

Marvin Bynum, Real Estate
mbynum@gklaw.com

John Clancy, Environment & Energy Strategies
jclancy@gklaw.com

Todd Cleary, Employee Benefits
tcleary@gklaw.com

Shane Delsman, Intellectual Property
sdelsman@gklaw.com

Rufino Gaytán, Labor, Employment & Immigration
rgaytan@gklaw.com

Arthur Harrington, Environment & Energy Strategies
aharrington@gklaw.com

Lynelle John, Paralegal
Menominee Tribe
ljohn@gklaw.com

Brett Koeller, Corporate
bkoeller@gklaw.com

Michael Lokensgard, Real Estate
mlokensgard@gklaw.com

Carol Muratore, Real Estate
cmuratore@gklaw.com

Andrew S. Oettinger, Litigation
aoettinger@gklaw.com

Brian Pierson, Indian Nations
bpierson@gklaw.com

Jed Roher, Tax & Employee Benefits
jroher@gklaw.com

Timothy Smith, Tax & Employee Benefits
tcsmith@gklaw.com

Mike Wittenwyler, Government Relations
mwittenwyler@gklaw.com