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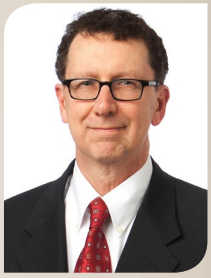

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The Godfrey & Kahn Indian Nations Law Practice Group provides a full range of legal services to Indian nations, tribal housing authorities, tribal corporations and other Indian country entities, with a focus on business and economic development, energy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

Selected court decisions

In *Havasupai Tribe v. Provencio*, 906 F.3d 1155 (9th Cir. 2018), the Ninth Circuit had previously upheld the decision of the Secretary of the Interior to withdraw, for 20 years, more than one million acres of public lands around Grand Canyon National Park from new mining claims, subject to "valid existing rights." The Havasupai Tribe and three environmental groups - Grand Canyon Trust, Center for Biological Diversity and Sierra Club - sued to challenge the determination of the United States Forest Service (USFS) that Energy Fuels Resources (USA), Inc., and EFR Arizona Strip LLC (collectively, Energy Fuels) had a valid existing right to operate a uranium mine on land within the withdrawal area that was near **a site of religious and cultural significance** to the Tribe. The district court rejected the challenges. On appeal, the Ninth Circuit held that

(1) the plaintiffs had Article III standing to assert claims under National Environmental Policy Act (NEPA) and National Historic Preservation Act (NHPA),

(2) USFS' conclusion that mining company had valid existing rights to mine uranium ore on public lands that were established prior to mineral withdrawal was "final agency decision" for purposes of the Administrative Procedure Act,

(3) USFS' mineral report was not major federal action requiring preparation of environmental impact statement nor was it an "undertaking" triggering NHPA's consultation process,

(4) the plaintiffs' claim that USFS improperly determined that the mining company had valid existing rights to mine uranium ore on public lands fell outside zone of interests protected by General Mining Act, but

(5) the plaintiffs' claim that Forest Service improperly determined that the mining company had valid existing rights to mine uranium ore on public lands fell within zone of interests protected by Federal Land Policy and Management Act (FLPMA):

"[T]he Tribe does not dispute that Red Butte was not a 'historic property' eligible for inclusion on the National Register until 2010. As a result, the NHPA did not obligate the Forest Service to take the site into account when it conducted a full section 106 consultation in 1986. And while we agree that eligibility for inclusion on the National Register is not exactly a 'discovery,' there is no other regulation requiring an agency to consider the impact on newly eligible sites after an undertaking is approved."

In *Napoles v. Rogers*, 2018 WL 6130279 (9th Cir. 2018), the Ninth Circuit affirmed the district court's denial of a petition for habeas corpus under the **Indian Civil Rights Act** filed by seven members of the Bishop Paiute Indian Tribe:" The district court may not exercise jurisdiction over a habeas petition arising under 25 U.S.C. § 1303 unless Plaintiffs have exhausted their tribal remedies. … Plaintiffs argue they

were detained within the meaning of § 1303 because they have been evicted from property in which they claim a possessory right and because the tribal police issued trespass citations against them. Plaintiffs conceded, both in their motion for a stay before the district court and at oral argument, however, that a tribal court decision considering the validity of the trespass citations and their claim to the property is currently on appeal before the recently reinstated tribal appellate court. Because an appeal is pending in tribal court regarding the subject of Plaintiffs' § 1303 habeas claim, Plaintiffs have not exhausted their tribal remedies and the district court did not have jurisdiction."

In *Oklahoma Intrastate Transmission, LLC v. 25 Foot Wide Easement*, 2018 WL 5993558 (10th Cir. 2018), the Department of Interior (DOI) in November 1980 had granted a twenty-five-foot-wide **easement**, containing approximately 0.73 acres through a 136.25-acre tract of land located in Caddo County, Oklahoma (Allotment 84) to Producer's Gas Company for $1,925.00 to install and maintain a 20 ft. natural gas pipeline for a term of 20 years. In June 2002, Enogex Inc. sought to acquire a new 20-year easement for $3,080 through Allotment 84 to continue the operation of the pipeline. The agency superintendent granted the easement, despite the lack of consent by a majority of land owners but the BIA's regional director vacated the superintendent's decision on the grounds that the compensation was too low and the required consent was lacking. Enogex' successor in interest sued to condemn the easement under 25 U.S.C. § 357, which provides: "Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned..." The district court dismissed on the grounds that Section 357 could not support a condemnation of the ROW because the Kiowa Tribe, as of April 2013, owned an undivided 1.1% interest in Allotment 84 and because the Tribe was a necessary party that could not be joined because of its sovereign immunity. The court also awarded the defendants' attorney fees under an Oklahoma statute permitting fees "where the final judgment is that the real property cannot be acquired by condemnation." On the merits, the Tenth Circuit affirmed on the first ground identified by the district court: "A parcel's status as tribal land does not depend upon the size of the tribe's interest in the land. The two parcels at issue in Barboan involved a 13.6% and a 0.14% tribal interest, id. at 1110, and it is equally irrelevant that the land at issue here involves only a 1.1% tribal interest. Because the tribe has an undivided ownership interest in this land, Kiowa Allotment 84 is tribal land not subject to condemnation under § 357 and the district court correctly dismissed Enable's action for lack of subject matter jurisdiction." The Court also affirmed the award of attorney fees.

In *Delebreau v. Danforth*, 2018 WL 6169201, Fed.Appx., (7th Cir. 2018), Delebreau was fired from her employment with the Oneida Housing Authority of the Oneida Nation of Wisconsin after reporting that a co-worker had misappropriated a grant from the U.S. Department of Housing and Urban Development (HUD). She sued tribal officials in their personal capacities, alleging violations of federal and state law, including claims under 42 U.S.C. § 1983 and the whistleblower anti-retaliation provisions of the National Defense Authorization Act (NDAA). The district court dismissed and the Seventh Circuit affirmed, holding that the relevant provisions of the NDAA became effective after Delebreau's claim arose, that the defendants were not, in any event, "employers" within the meaning of the NDAA and that **Section 1983** does not apply to actions under color of tribal law: "[B]ecause the purpose of section 1983 is to enforce the Fourteenth Amendment, and Indian tribes are 'distinct sovereignties' not addressed by that Amendment, they are beyond the statute's reach. … Nothing in the text of statute contradicts this conclusion."

In *Cheykaychi v. Geison*, 2018 WL 6065492 (D. Colo. 2018), Cheykaychi, petitioned for habeas corpus relief in federal court, asserting that his uncounseled tribal court convictions were obtained in violation of his rights under the **Indian Civil Rights Act** (ICRA). The Kewa Pueblo, whose court had entered the conviction, did not contest the petition but asserted that Cheykaychi would still be subject to the Tribe's banishment order if the petition were granted. The court granted the petition but left the banishment intact: "Petitioner is released from the terms of supervision imposed by the Court on December 28, 2017. However, Petitioner remains subject to a banishment order issued by the Kewa Pueblo authorities."

In *Maine v. Wheeler*, 2018 WL 6304402 (Me. 2018), the Environmental Protection Agency

(EPA) in 2015 had disapproved Maine **water quality standards** that adversely impacted fishing rights of the Houlton Band of Maliseet Indians and the Penobscot Nation (collectively, the Tribes) in tribal waters. The State sued. The Trump administration decided not to defend EPA's 2015 decision and asked the Court to remand the case to EPA for reconsideration of its decision. The court granted the motion, while also granted the motion of the Penobscot Nation to amend its answer to add a counterclaim against Maine for declaratory and injunctive relief requiring Maine to recognize and protect tribal sustenance fishing rights when setting water quality standards: "Although the EPA has not specified what its revised decision will be, it has made clear that it intends to make substantive changes to the original agency decision that is challenged in this case. This kind of reevaluation is well within an agency's discretion, … and the law favors remand to allow such reevaluation. … The EPA has also identified several intervening events that it believes justify remand, … including the replacement of three key EPA officials; an April 2018 letter from the Department of the Interior revising its earlier letter upon which the EPA's February 2015 decision was based in part; and the filing of Maine's opening brief for judgment on the administrative record which, the EPA claims, helped crystalize the issues. … These intervening events present a reasonable basis for the EPA to have doubts about the correctness of its decision." (Internal citations, quotations and emendations omitted).

In *Fort Sill Apache Tribe v. National Indian Gaming Commission*, 2018 WL 6200974 (D.D.C. 2018), the Fort Sill Apache Tribe sued the National Indian Gaming Commission (NIGC) under the Administrative Procedure Act, challenging NIGC's determination that certain lands owned by the Tribe were ineligible for gaming under the **Indian Gaming Regulatory Act**. NIGC refused to disclose an opinion by the Department of Interior Solicitor, upon which it had based its decision, on the ground that the opinion was a "predecisional and deliberative document." The court disagreed and ordered that the document be added to the administrative record. "As recited above, the Tribe submitted documents upon request from DOJ, acting as counsel for NIGC and DOI, to DOJ, and DOI relied on those documents to draft the Solicitor's Letter. As memorialized in this Court's order, NIGC committed to review the Solicitor's Letter and, upon that basis, to decide whether to reconsider its 2015 Decision. See 9/17/2016 Order. DOJ now contends that the 39 documents submitted by the Tribe itself, referenced liberally in the Solicitor's Letter, are not part of the record. Specifically, it argues that NIGC was not in 'possession' of the 39 documents and did not rely upon or consider the 39 documents during the decisionmaking process.' … The argument concerning possession is unpersuasive. DOJ was most certainly in possession of the documents because the Tribe provided them to DOJ directly. Clearly, DOI had possession of the 39 documents because it studied them assiduously and cited them in the Solicitor's Letter sent to NIGC."

In *Miller v. United States*, 2018 WL 6179494 (D. Nev. 2018), the Reno-Sparks Indian Colony (Tribe) operated a police force through a Self-Determination Act contract with the Bureau of Indian Affairs (BIA) that designates the department's employees as federal employees for the limited purpose of **Federal Tort Claims Act** (FTCA) liability. Miller sued the United States under the FTCA, alleging he was wrongfully terminated from his employment as a tribal police officer. The federal district court dismissed based on the discretionary function exception to FTCA liability: "There is a two-part test for determining whether the discretionary function exception applies: (1) whether the challenged actions involve any element of judgment or choice; and (2) whether that judgment is of the kind that the discretionary function exception was designed to shield. … If the exception applies to a plaintiff's claims, the court must dismiss them for lack of jurisdiction. … Defendant has satisfied both parts of this test because the core decision from which all of Plaintiff's claims flow was the Tribe's decision to fire Plaintiff. '[D]ecisions relating to the hiring, training, and supervision of employees usually involve policy judgments of the type Congress intended the discretionary function exception to shield.'"

In *BP America Inc. v. Yerington Paiute Tribe*, 2018 WL 6028697 (D. Nev. 2018), the Yerington Paiute Tribe had sued BP America Inc. (BPA) and Atlantic Richfield Company (ARC) in Tribal Court, alleging that the BPA's and ARC's activities at the Yerington Anaconda Mine Site caused contamination of the ground water and surface water on Tribal lands and exposed tribal members to hazardous dust, threatening the Tribe's health and

welfare, and their very subsistence, thus supporting jurisdiction under the **Second Montana Exception**. BPA and ARC sued the tribal court and tribal officials in federal court seeking an injunction against the tribal court proceedings based on its alleged lack of jurisdiction. The district court declined to enjoin tribal court proceeding and required the plaintiffs to exhaust tribal court remedies: "[T]he Tribe alleges that plaintiffs' conduct caused contamination of the ground water and surface water on Tribal lands and exposed tribal members to hazardous dust. … The Tribe argues that these events directly threaten the Tribe's health and welfare and their very subsistence. Given that the Tribe indicates 'localized groundwater is the sole source of drinking water ... and groundwater is used to supplement surface water for irrigation,' the court finds that jurisdiction is plausible. The court stresses that it is not deciding whether the Tribal Court has jurisdiction, but simply whether the Tribal Court 'can make a colorable claim that' it does. Whether these allegations are sufficiently catastrophic to fall under the second Montana exception should be determined in the first instance by the Tribal Court." (Citations omitted.)

In *Pueblo of Jemez v. United States*, 2018 WL 6002913 (D. N.M. 2018), the Jemez Pueblo had sued under the federal common law and the Quiet Title Act, 28 U.S.C. § 2409a (QTA), seeking a judgment that Jemez Pueblo "has the exclusive right to use, occupy and possess the lands of the Valles Caldera National Preserve pursuant to its continuing aboriginal title to such lands." During trial, Jemez Pueblo elicited oral tradition testimony regarding historical Jemez Pueblo activity in and around the Valles Caldera. The court ruled that in the absence of an exception, the testimony was inadmissible hearsay: "The Court concludes that the Federal Rules of Evidence do not permit admission of out-of-court statements contained in American Indian oral tradition evidence when offered for the truth of the matter asserted, because the rule against hearsay prohibits such statements. … The Court may adopt **oral tradition evidence** for non-hearsay purposes, if Jemez Pueblo can establish a non-hearsay purpose, such as background, for why Jemez people believe things, do things, draw or paint things. The Court also will admit hearsay statements in oral tradition evidence for the truth of the matter asserted pursuant to the hearsay exceptions enumerated in rule 803, provided such statements conform to the limited scope of each enumerated exception, as the Federal Rules of Evidence define the exception. See Fed. R. Evid. 803. The Court will not admit hearsay, however, in oral tradition evidence pursuant to rule 807, the residual exception to the rule against hearsay, because the Court concludes that oral tradition evidence is not sufficiently exceptional to warrant admission pursuant to this rule."

In *Enrolled Members of the Blackfeet Tribe v. Crowe*, 2018 WL 6012442 (D. Mont. 2018), members of the Blackfeet Tribe sued in federal court to challenge the Blackfeet Water Compact entered into by the Tribe, the State of Montana and the United States, alleging that the Blackfeet Tribe Business Council lacked authority under tribal law to negotiate and ratify the Compact on behalf of the Blackfeet Tribe and that the referendum election through which the Tribal membership adopted the Compact violated Article IX of the Blackfeet Constitution, given that less than one-third of the eligible voters of the Blackfeet Tribe voted in the election. The district court dismissed: "All of Plaintiffs' claims are grounded in Blackfeet tribal law and the Blackfeet Constitution. Resolution of Plaintiffs' claims necessarily would require the Court to interpret Blackfeet tribal law and the Blackfeet Constitution. Federal courts lack jurisdiction to resolve intra-tribal disputes that require the court to interpret tribal law or a tribal constitution. … Tribal election disputes represent intra-tribal matters. Federal courts lack **jurisdiction over tribal election** disputes that require interpretation of tribal law or a tribal constitution to resolve."

In *Watterson v. Fritcher*, 2018 WL 5880776 (E.D. Cal. 2018), Watterson, a member of the Lone Pine Tribe, sued Fritcher, also a member of the Tribe, in federal court, alleging trespass and other claims relating to tribal land whose possession was disputed by the parties. The court dismissed based on the plaintiff's failure to **exhaust tribal remedies**: "[W]hether tribal jurisdiction is colorable depends on whether plaintiff's claim 'bears some direct connection to' tribal land. … The connection to tribal land here is obvious: the dispute in this case concerns ownership of a parcel of tribal land, and the dispute is between two tribal members. … Plaintiff acknowledges the existence of the Lone Pine Tribal Council, but fails to explain what steps he has taken (if any) to have his claim heard and resolved by that tribal body. … [I]t is not at all clear whether any

competent law-applying tribal body has attempted to resolve this dispute between plaintiff and defendant. Indeed, this case demonstrates the wisdom of requiring individuals such as plaintiff to exhaust their remedies prior to filing suit, because doing so necessarily generates a record for the district court to review."

In *Indigenous Environmental Network v. United States*, 2018 WL 5840768 (D. Mont. 2018), the Indigenous Environmental Network and Northern Plains Resource Council (Plaintiffs) sued the United States Department of State and various other governmental agencies and agents in their official capacities, alleging that the Department violated the Administrative Procedure Act (APA), the National Environmental Policy Act (NEPA), and the Endangered Species Act (ESA) when it published its Record of Decision (ROD) and National Interest Determination (NID) and issued the accompanying Presidential Permit to allow defendant-intervenor TransCanada Keystone Pipeline, LP to construct a cross-border oil pipeline known as Keystone XL (Keystone). The court partially granted and partially denied the Plaintiffs' motion for summary judgment, finding that (1) the Department's 2014 Supplemental Environmental Impact Statement (SEIS) analysis fell short of the "hard look" required by NEPA with respect to the effects of current oil prices on the viability of Keystone, the cumulative effects of greenhouse gas emissions from the Alberta Clipper expansion and Keystone, the survey of potential cultural resources contained in 1,038 acres not addressed in the 2014 SEIS and modeling of potential oil spills and recommended mitigation measures and (2) the Department failed to provide a detailed justification for rejecting its prior factual findings regarding impacts on climate change and other issues and reversing course by adopting a policy that "rests upon factual findings that contradict those which underlay its prior policy," as required by the NEPA and the APA. The court enjoined further activities on the pipeline and remanded for further consideration consistent with its order.

In *Cook Inlet Tribal Council v. Mandregan*, 2018 WL 5817350 (D. D.C.2018), the Cook Inlet Tribal Council (CITC) and the Indian Health Service (IHS) entered into a self-determination contract pursuant to the **Indian Self-Determination and Education Assistance Act** (ISDEAA) under which IHS provided funding for CITC's substance abuse programs serving Alaskan Native patients. In 2014, CITC proposed a contract amendment for additional contract support costs (CSC) funding to account for increased facility support costs but IHS declined the proposed amendment in part on the ground that CITC receives payment for facility support costs as part of IHS' annual "Secretarial" funding rather than from CSC. The court concluded that CITC's interpretation of the statute requiring that the additional funding be made from CSC funds was correct and remanded to IHS for a determination in light of the court's ruling: "In defining direct contract support costs, IHS states that 'facility support costs' may be eligible as contract support costs 'to the extent not already made available.' … Since IHS itself provides guidance that asserts that facility support costs may also be eligible as contract support costs, the Court is persuaded that the ISDEAA funding provision is ambiguous. … Because the Court finds the provision at issue to be ambiguous, the Court must liberally construe it in CITC's favor."

In *Thompson v. United States*, 2018 WL 5833062 (D. Nev. 2018), factions of Duckwater Shoshone Tribe contested for control. Thompson and others sued the BIA, the Western Nevada Agency of the BIA (WNA), the Eastern Nevada Agency Superintendent, the Phoenix Area Director, the Intertribal Council of Nevada, and nine individual Defendants. The Plaintiffs contended that the federal officials violated the Administrative Procedure Act and Indian Civil Rights Act (ICRA) by failing to intervene in various tribal disputes, following a tribal ordinance improperly enacted thirty years earlier, denying Plaintiffs of a venue to file appeals from tribal court decisions and withholding funding for the Intertribal Court of Appeals (ITCA). Tribal officials were accused of corrupt electoral and judicial practices in violation of the ICRA. The court rejected all of the Plaintiffs' arguments, dismissing the tribal officials on the ground of **sovereign immunity** and the others on jurisdictional grounds: "[T]he federal Defendants are not amenable to any ICRA claim, and because the claim [related to funding of the ITCA] does not seek habeas corpus relief against any tribal entity, the claim cannot be cured by any set of facts concerning the funding issue and is therefore dismissed, without leave to amend. … This claim is based on various Defendants' alleged corrupt political practices relating to tribal electoral and judicial practices. A federal court has no subject matter jurisdiction to entertain a suit based on the alleged

violation of the law of tribal governance, which is 'an internal controversy among Indians over tribal government.'" The court permitted the Plaintiffs to amend the complaint to identify a particular federal law requiring the government to fund the ITCA.

In *Hopi Tribe v. Arizona Snowbowl Resort Limited Partnership*, 2018 WL 6205003 (Ariz. 2018), the City of Flagstaff had contracted to sell reclaimed wastewater to Arizona **Snowbowl Resort** Limited Partnership (Snowbowl) for artificial snowmaking at its ski area on the Peaks. Tribes and other opposed issuance of permits by United States Forest Service on environmental and religious grounds but the permits were ultimately issued. (Cf. *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058 (9th Cir. 2008) (en banc). The Arizona Court of Appeals upheld the Tribe's state law nuisance claim against a motion to dismiss, concluding "interference with a place of special importance can cause special injury to those personally affected, even when that place of special importance is upon public land." The Arizona Supreme Court disagreed and reversed: "Contrary to the Tribe's assertion that the place-of-special-importance form of special injury is consistent with Arizona law, the only public nuisance cases in which we have recognized special injury involved property or pecuniary interests not present here. … [B]ecause a particular place's religious importance is inherently subjective, courts are ill-equipped to determine whether one form of incidental interference with an individual's spiritual activities should be analyzed differently from that of another, … This renders courts unable to comparatively weigh the adverse effects of an alleged interference with a place of religious importance, potentially allowing every member of the public ... to sue for a common wrong when that is precisely what the special injury requirement is meant to prevent." (Internal quotations and citations omitted.)

In *Kulic v. Lansdowne Pub-MS, LLC*, 2018 WL 6314670 (Conn. Sup. 2018), Lansdowne Pub—MS, LLC (Lansdowne), Patrick Lyons, and Lyons Group, LTD (Lyons Group) were permittees or owners of the Landsdowne Pub located at the Mohegan Sun Casino in Uncasville, Connecticut. Kulic sued them under Connecticut's dram shop law, contending that he was injured by an intoxicated driver negligently served drinks by employees of the pub. The court rejected the defendants' motion to dismiss: Here, despite the reference to the defendants as 'Mohegan tribal entities' in their motion to dismiss, the real parties in interest are private individuals and entities. Lansdowne is a limited liability company established under the laws of the state of Connecticut, Lyons Group is a corporation established under the laws of the commonwealth of Massachusetts, and Lyons is an individual resident of the commonwealth of Massachusetts. Nothing in the plaintiff's complaint alleges that the Lansdowne Pub was either owned or operated by a tribal member. … In *Lewis v. Clarke*, 137 S.Ct. 1285, 197 L.Ed.2d 631 (2017), the United States Supreme Court recently addressed the issue of who the real party in interest is for purposes of tribal **sovereign immunity**. … In applying *Lewis* to the present case, the court finds that the real parties in interest are Lansdowne, Lyons and Lyons Group, not the Mohegan Tribe. Accordingly, this court finds that tribal sovereign immunity is not implicated here."

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