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Indian Nations update

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In *Yellen v. Confederated Tribes of the Chehalis Reservation*, 2021 WL 2599432 (U.S. 2021), Congress had enacted the Coronavirus Aid, Relief, and Economic Security (CARES) Act, which provided $8 billion in COVID relief funds to "**tribal governments**," defined as the "recognized governing body of an Indian tribe" as defined in the Indian Self-Determination and Education Assistance Act (ISDA). The ISDA defines an "Indian tribe" as "any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act [(ANCSA)], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. § 5304(e). When the U.S. Treasury Department announced that Alaska Native regional and village corporations (ANC) would share in the $8 billion, tribes sued on the grounds that the ANCs are not governments, are not included by the Interior Department on its list of entities that are eligible for special programs provided by the United States because of their status as Indians and do not provide services to citizens. The D.C. Circuit Court ruled against the ANCs but the Supreme Court reversed, holding, by a 6-3 vote, that 'eligibility for the benefits of ANCSA counts as eligibility for 'the special programs and services provided by the United States to Indians because of their status as Indians.'"

In *Deschutes River Alliance v. Portland General Electric Company*, 2021 WL 2559477 (9th Cir. 2021), Portland General Electric (PGE) and the Confederated Tribes of the Warm Springs Reservation of Oregon (Tribe) co-owned and co-operated the Pelton Round Butte Hydroelectric Project (Project) on the Deschutes River, partly within the Warm Springs Indian Reservation. Deschutes River Alliance (DRA) filed a citizen suit against PGE alleging that PGE was operating the Project in violation of the Clean Water Act (CWA), which authorizes citizen suits "against any person," 33 U.S.C. § 1365(a)(1), defines "person" as "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body," 33 U.S.C. § 1362(5), and defines "municipality" to include "an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 1288 of this title." 33 U.S.C. § 1362(4). PGE moved to dismiss for failure to join the Tribe as a required party. The District Court denied the motion, holding that the Tribe was a required party but feasible to join because the CWA had abrogated the Tribe's **sovereign immunity**. DRA filed an amended complaint joining the Tribe as an additional defendant. The District Court held that the Project was not in violation of the CWA and granted summary judgment in favor of PGE and the Tribe. On appeal, the Ninth Circuit Court of Appeals held that the Tribe was a required party but disagreed with the District Court's sovereign immunity ruling. Declining to reach the question of liability under the CWA, the Court remanded with instructions to vacate the judgment and dismiss the suit: "We must be able to say with perfect confidence that Congress meant

to abrogate sovereign immunity. … The text of the CWA does not provide the required perfect confidence. …Indian tribes and States are both 'persons' within the meaning of § 1365(a), given the definitional chains in § 1362(4) and (5). But it does not follow that unconsenting Indian tribes and States are subject to citizen suits under the CWA. We have already concluded as much for States. … There is little reason to conclude to the contrary for Indian tribes. Because Indian tribes and States both may waive their sovereign immunity and thus consent to suit under the CWA, the inclusion of Indian tribes and States in the definition of 'person' is not meaningless." (Internal quotations, citations and emendations omitted.)

In *Big Sandy Rancheria Enterprises v. Bonta*, 2021 WL 2448226 (9th Cir. 2021), California imposed an excise tax on the distribution of cigarettes. Distributors pay the tax by purchasing stamps from the state to affix to each package of cigarettes before distribution. The law recognizes that the state may not tax certain sales to Indians on their tribes' reservations. California law also imposes reporting requirements on manufacturers and additional obligations under its 1998 settlement agreement with the Big Four manufacturers. Big Sandy Rancheria Enterprises, a corporation wholly owned by Big Sandy Rancheria and chartered by the Secretary of Interior under **Section 17 of the Indian Reorganization Act**, challenged California's attempt to impose its regulations. Big Sandy argued that the Tax Injunction Act, which prohibits federal courts from enjoining the collection of state taxes where state remedies are available, was superseded by 28 U.S.C. § 1362, which gives federal courts jurisdiction over claims brought by "any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior." The District Court rejected Big Sandy's challenge and the Ninth Circuit Court of Appeals affirmed: "Based on the relevant statutory language, legislative history, and circuit precedent narrowly construing § 1362, we conclude that the Corporation is not an 'Indian tribe or band' within the meaning of § 1362, and that the Corporation therefore may not invoke § 1362 to avoid the Tax Injunction Act's jurisdictional bar. These conclusions align with Congress's purpose in enacting Section 17—'giving tribes the power to incorporate,' including 'enabl[ing] tribes to waive sovereign immunity, thereby facilitating business transactions.' *Am. Vantage Cos., Inc. v. Table Mountain Rancheria*, 292 F.3d 1091, 1098 (9th Cir. 2002). In light of this purpose, it would be odd to allow a Section 17 corporation to selectively claim the benefits of sovereignty in order to challenge a tax."

In *Confederated Tribes and Bands of Yakama Nation v. Klickitat County*, 2021 WL 2386396 (9th Cir. 2021), the Federal District Court sided with the Confederated Tribes and Bands of Yakama Nation (Yakama), applying the Indian canon of construction in holding that the **Yakama reservation** included an area ambiguously-described in the Tribe's 1855 Treaty with the United States, encompassing 121,465.69 acres 'and known as Tract D.' The Ninth Circuit affirmed: "The district court reasonably found that the materials from the Treaty negotiations demonstrate that the Yakamas understood the Treaty to include Tract D in the Reservation, even if the Tribe did not press that understanding for several decades after the Treaty's signing. For example, the district court gave significant weight to the Treaty minutes, observing that they 'are the best evidence remaining of what occurred and what Governor Stevens told the Yakama Nation's representatives.' It made sense for the district court to emphasize the minutes because the Yakamas depended almost entirely on oral communication to understand the Treaty's contents. According to the minutes, the Yakamas were told that the Reservation's boundary would run down the main chain of the Cascade Mountains south of Mount Adams.' This suggests that the Yakamas were made to understand the boundary as running south of Mount Adams, thereby including territory directly south of the mountain within the Reservation's boundaries. Tract D meets that description. … Fundamentally, the County's argument is that there can only be one way to understand this Treaty, and that the one correct understanding of the Treaty is different from the ICC's determination and from the conclusions of all federal surveys since the rediscovery of the map. Any such argument is at the very least an uphill climb. … For all of these reasons, we conclude that the Treaty language is inherently ambiguous. Consequently, in light of the Indian canon of construction, we agree with the district court's interpretation that the Treaty included Tract D within the Reservation."

In *Ohlsen v. United States*, 2021 WL 2252270 (10th Cir. 2021), a large fire, later known as the Dog Head Fire, caused in part by forest-thinning work performed by members of the Isleta Pueblo working under an agreement with the Forest Service authorized by the Cooperative Funds and Deposits Act (CFDA). Insurance companies and several owners of destroyed property sued the federal government, alleging negligence under the **Federal Tort Claims Act (FTCA)** by Forest Service employees and by the Pueblo crewmembers. The district court granted the government

summary judgment concluding that the plaintiffs had failed to exhaust administrative remedies and that the Pueblo crewmembers had acted as independent contractors of the government and the government, therefore, was not liable for their actions under the FTCA liability based on the Pueblo crewmembers' negligence. The court barred claims against Forest Service employees under the FTCA's discretionary-function exception. The Tenth Circuit affirmed: "Previously, we have concluded that an individual was an independent contractor for the Forest Service despite a 'detailed contract' describing 'exactly what the job entailed' and precise specifications outlining the requirements for performance. *Curry*, 97 F.3d at 413. In *Curry*, for example, we concluded that the Forest Service had acted only as a 'general supervisory authority' by monitoring his job performance without telling him 'how or when to do his work' or 'whom to hire or how to operate his equipment.' … So too, here. Surely the government exercised control over the results of the Pueblo's thinning work by requiring the Pueblo to meet daily quotas, establishing starting and ending times for the Pueblo's work, specifying the size and types of trees to be cut, and marking specific trees for removal. But even taken together, this control doesn't result in an employer-employee relationship, particularly when balanced against the control retained by the Pueblo to 'manage,' 'supervise,' and 'direct the work of its employees, volunteers, and other program participants,' … as well as its duty to 'establish and maintain a complete Quality Control Plan ... to ensure the requirements of the agreement were provided as specified.'"

In *Kalispel Tribe of Indians v. U.S. Department of the Interior*, 2021 WL 2197718 (9th Cir. 2021), the Department of Interior (DOI) in 2001 had taken 145 acres into trust for the Spokane Tribe, two miles from the Kalispel Tribe's Northern Quest casino. The Spokane Tribe sought a determination from the Secretary of the Interior, as required by the **Indian Gaming Regulatory Act (IGRA)** for gaming on land acquired after IGRA's enactment, that gaming on the parcel would be in the best interest of the Tribe and not detrimental to the surrounding community. When the DOI issued a Secretarial Determination in 2015, the Kalispel Tribe sued, contending that the DOI's determination was arbitrary and capricious under the Administrative Procedure Act and that the DOI violated the National Environmental Policy Act and the federal government's trust obligation. The District Court granted judgment to the government and the Ninth Circuit affirmed: "We agree with Kalispel that lost gaming revenue, discontinued or diminished PCEPs, and a smaller tribal governmental budget are real and cognizable detriments. But the administrative record does not support Kalispel's contention that the Secretary failed to consider these negative impacts to Kalispel in making the two-step determination. The District Court correctly ruled that Kalispel did not meet its burden of showing that the Secretarial Determination was arbitrary and capricious."

In *Butler v. Leech Lake Band of Ojibwe*, 2021 WL 2651981 (D. Minn. 2021), Butler sued officials of the Leech Lake Band of Ojibwe (Tribe) for violations of the Age Discrimination in Employment Act of 1967 (ADEA), Equal Pay Act (EPA), retaliation, harassment, intimidation, and wrongful demotion and termination, under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e; and unidentified violations of state law. The federal District Court dismissed on grounds of sovereign immunity: "[T]he Band has not waived immunity and the statutes on which Butler bases her claim - the ADEA, EPA, and Title VII – lack Congressional abrogation of the Band's **sovereign immunity**. … Even if the Band were not immune from suit, Butler cannot establish that the court has jurisdiction over the subject matter of this action. Butler's claims arise under three federal statutes – the ADEA, the EPA, and Title VII. None of those statutes applies to Indian tribes when the matters at issue are purely internal, as here. … Butler likewise is unable to proceed against the individual defendants. Butler sued each individually named defendant in their individual capacities. But Title VII and the ADEA do not provide for liability of individually named defendants in any capacity."

In *JW Gaming Development, LLC v. James*, 2021 WL 2531087 (N.D. Cal. 2021), JW Gaming Development LLC (JW) and Pinoleville Pomo Nation (PPN) had entered into a loan agreement under which PPN waived sovereign immunity and exhaustion of tribal court remedies. When PPN failed to pay, JW sued in federal court and obtained a judgment, which JW sought to enforce, in part by subpoenaing a bank holding PPN's assets. Shortly after the judgment was entered, PPN constituted a tribal court and filed claims against JW, its attorneys and the bank seeking to enjoin them from executing on the federal court judgment and seeking a **tribal court order nullifying the federal court judgment**. In response, JW sought an order from the federal court enjoining the tribal court proceedings, which, except for a claim outside the scope of the federal judgment, the court granted: "The existence of the Tribal Court Action casts a pall over the judgment in this case, and if it were litigated, it would seek to invalidate and interfere with the judgment and enforcement here. Federal court judgments cannot be invalidated by a state or Tribal Court

declaring it is so. … The attempt here to invalidate this federal judgment is not subtle or masked. As explained in detail above, the express terms of the complaint in the Tribal Court Action ask for declaratory relief that the writ of execution and abstract of judgment are invalid because the judgment itself is invalid. It also seeks to interfere with the execution proceedings by limiting what can be executed upon and imposing liability for going beyond that. Although the reasons PPN offers are irrelevant to the reality that the Tribal Court lacks authority over this claim, I note that the reasons in the Complaint boil down to PPN's assertion that I got it wrong on the merits of this case. It argues that my interpretation of the contract at issue was incorrect. The Tribal Court Complaint not only seeks to invalidate a federal court judgment, it seeks to relitigate the same basic arguments made and rejected in federal court. The proper place to make those arguments is in the Ninth Circuit."

In *United Houma Nation, Inc. v. Terrebonne Parish*, 2021 WL 2291145 (E.D. 2021), the Terrebonne Parish School District of Louisiana had formerly maintained separate schools for Whites, African-Americans and Indians. The United Houma Nation, Inc. (Tribe), a tribe recognized by the State of Louisiana, entered into an agreement (Agreement) with Terrebonne Parish School Board under which the Tribe would have the right to use the Daigleville School, formerly used to educate the Tribe's children, for housing and educational and cultural events, provided the Tribe would repair and maintain the building. The Agreement was renewable "every five (5) years thereafter so long as [United Houma] utilizes the Daigleville School Property for the purposes set forth herein and [United Houma] repairs and maintains the building and grounds of the Daigleville School." After the initial five-year period, the District sold the building to Guidry. The Tribe sued, contending that the Agreement had renewed automatically and further that the sale of the property violated the spirit of the **National Historic Preservation Act**, under which the property, at the Tribe's initiative, was now listed. The Court disagreed and granted the Parish's motion to dismiss on the grounds that the Agreement lapsed due to the Tribe's failure to meet its obligations: "While United Houma alleges it made some repairs in 2016 and made plans for additional repairs to be made in 2022, it makes no allegation and has provided no evidence that it has maintained the property in the condition of 'good repair' required by the Agreement. To be sure, the School Board Defendants assert that the property was in 'total disrepair' and without electrical power at the time of its sale to Guidry. At the TRO hearing, Guidry was uncontradicted in confirming that the property was in a diminished state, including roof damage and rotting floors. By all indications, the Agreement lapsed in May 2020 as a result of United Houma's failure to perform its obligations. … Despite the prestige that may come with the designation, a '[l]isting of private property on the National Register does not prohibit under Federal law or regulations any actions which may otherwise be taken by the property owner with respect to the property.' 36 C.F.R. § 65.2(b). It primarily functions as a planning tool to control the actions of federal agencies in relation to these properties. *Id.* § 65.2(c)(1) (emphasis added). The NHPA does not have teeth to curtail the rights of private owners with respect to a nationally designated private property."

In *Noem v. Haaland*, 2021 WL 2221728 (D.S.D. 2021), the United States National Park Service (NPS) denied a request from the governor of South Dakota for a permit to display fireworks at Mount Rushmore, which lies within the Black Hills, on July Fourth. The NPS cited five reasons, including COVID-related health concerns, objections by Lakota tribes who consider the Black Hills sacred, and potential environmental harms. The governor sued Department of Interior officials under the Administrative Procedure Act, seeking a preliminary injunction ordering the NPS to issue the permit and contending that the denial was arbitrary and capricious. The Cheyenne River Sioux Tribe intervened. The District Court denied the motion, holding that the governor was unlikely to succeed on the merits and, therefore, not entitled to an injunction: "Here, the NPS denied the permit request for five reasons. … To evaluate whether such reasons provide a satisfactory explanation for the NPS's decision, … this Court will focus on three questions: (1) whether the reasons were proper considerations under 36 C.F.R. §§ 1.6(a) and 2.50; (2) whether the reasons are based on relevant data or instead run counter to the evidence before the NPS; and (3) whether the reasons are rational or instead so implausible that they could not be ascribed to a difference in view or the product of expertise. … The second reason for the NPS's permit denial relates to tribal concerns. Some additional facts deserve mention to describe what the NPS knew at the time of the denial. Under 54 U.S.C. § 306108, commonly referred to as § 106 of the National Historic Preservation Act, the NPS had invited 20 tribal nations to consult prior to the proposed fireworks event that ultimately took place in 2020. … During one of the consultation meetings, the NPS invited tribal historic cultural preservation officers to do an on-site **Tribal Cultural Properties** (TCP) survey to identify significant

tribal cultural resources in the park. A 2006-2008 archeological survey of the Memorial had identified two prehistoric cultural sites and an isolated artifact listed as a prehistoric lithic found within the Memorial's boundaries. … [T]he tribes raised thirteen separate concerns, … and then felt betrayed when during the tribal consultation in 2020 over whether any fireworks display at the Memorial should occur, the President announced that there would be a 'big fireworks display' at the Memorial for Independence Day in 2020, …. The planned TCP survey was delayed due to the COVID-19 pandemic, had not been completed when the NPS denied the 2021 permit application, and is to be completed in spring and summer of 2021. … Section 1.6(a) authorizes consideration of 'cultural resources' and 'management responsibilities' in deciding whether NPS should grant a permit, and § 2.50(a)(2) directs denying a permit that would 'unreasonably impair the atmosphere of peace and tranquility maintained in ... natural, historic, or commemorative zones.' There is some data supporting the tribal concerns for their cultural sites within the Memorial, and this Court cannot say that NPS's choice to honor those tribal concerns as one ground for permit denial was not rational, or was so implausible that it could not be ascribed to a genuine difference of view." (Internal quotations and citations partially omitted.)

In the *Matter of the Dependency of GJA*, No. 98554-5 (WA 2021), en banc., the Washington Appellate Court had ruled that the State's Department of Children, Youth, and Families (Department) had met its obligation under the federal **Indian Child Welfare Act (ICWA)** and Washington Indian Child Welfare Act (WICWA) to make "active efforts" to prevent the breakup of an Indian family before terminating the parental rights of an Indian child. The Washington Supreme Court reversed: "The 'active efforts' requirement is distinct from the 'reasonable efforts' requirement in non-Indian child custody cases because it requires both a higher level of engagement from the Department and culturally appropriate services. To ensure that the Department meets the minimum requirements of ICWA and WICWA, every dependency court that oversees cases involving Indian families has the responsibility to evaluate the Department's actions. WICWA requires the court to conduct this evaluation at every hearing when the Indian child is placed out of the home, and the BIA recommends this at every hearing. … ICWA and WICWA do not permit the application of the futility doctrine. The Department is not excused from providing active efforts unless it can demonstrate to the court it has made sufficient efforts and those efforts 'have proved unsuccessful.' 25 U.S.C. § 1912(d); RCW 13.38.130(1). The Department has the burden to provide active efforts, and it also has the burden to prove that those efforts were in fact unsuccessful before the matter can proceed to termination. A parent's action, inconsistency, or inaction does not excuse the Department from providing active efforts. At issue in this case is whether the Department met its burden to provide active efforts to reunify C.A. with her children. We hold that the Department failed to provide active efforts when it provided untimely referrals and only passively engaged with C.A. from January through June 2019. We also hold that the dependency court impermissibly applied the futility doctrine when it speculated that even had the Department acted more diligently, C.A. would not have been responsive."

In *State v. Towessnute*, 486 P.3d 111 (Wash. 2021), Towessnute, a Yakama tribal member, had been charged by state prosecutors in 1915 with multiple fishing crimes. He argued that he was fishing in the "usual and accustomed waters" of the Yakama tribe and that such activities were explicitly protected under the Tribe's **1855 Treaty** with the United States. The trial court agreed and dismissed the charges but the Washington Supreme Court reversed and reinstated them. Towessnute's descendants moved for the Supreme Court to vacate the conviction, which the Court agreed to do: "The opinion [1916] in *State v. Towessnute* is an example of the racial injustice … and it fundamentally misunderstood the nature of treaties and their guarantees, as well as the concept of tribal sovereignty. For example, that old opinion claimed, 'The premise of Indian sovereignty we reject. ... Only that title to land was esteemed which came from white men, and the rights of these have always been ascribed by the highest authority to lawful discovery of lands occupied, to be sure, but not owned, by any one before.' … And that old opinion rejected the arguments of Mr. Towessnute and the United States that treaties are the supreme law of the land. It also rejected the Yakama Treaty's assurance of the tribal members' right to fish in the usual and accustomed waters, in the usual and accustomed manner, as the tribe had done from time immemorial. This court characterized the Native people of this nation as 'a dangerous child,' who 'squandered vast areas of fertile land before our eyes.' … Today, we take the opportunity presented to us by the descendants of Mr. Towessnute; their counsel, Mr. Fiander; the Washington State Attorney General Robert Ferguson; and by the call to justice to which we all committed on June 4, 2020, to repudiate this case; its language; its conclusions; and its mischaracterization of the Yakama people, who continue the customs, traditions,

and responsibilities that include the fishing and conservation of the salmon in the Yakima River. … We cannot forget our own history, and we cannot change it. We can, however, forge a new path forward, committing to justice as we do so."

In *Matter of Enbridge Energy, Limited Partnership*, 2021 WL 2407855 (Minn. App. 2021), the Minnesota Public Utilities Commission (PUC) granted a certificate of need to Enbridge Energy Limited Partnership (Enbridge) authorizing the construction of an **oil pipeline** to replace its deteriorating Line 3, which traversed the Leech Lake Chippewa Reservation. Trade and union intervenors supported the replacement pipeline, while environmental organizations opposed it. The Leech Lake Band of Ojibwe, whose reservation is traversed by existing Line 3, opposed replacing Line 3 in its current corridor and declared its determination to decline a renewal of Enbridge's right-of-way easement in 2029. The White Earth Band, Red Lake and Mille Lacs Bands, whose off-reservation hunting, fishing, and gathering rights in ceded territories would be impacted, opposed Enbridge's proposed route for the replacement pipeline. On judicial review, the trial court upheld the PUC's decision and the Court of Appeals, in a 2-1 decision, affirmed: "In making its decisions, the commission did not write on a clean slate. With an existing, deteriorating pipeline carrying crude oil through Minnesota, there was no option without environmental consequences. The challenge: to balance those harms. There was no option without impacts on the rights of indigenous peoples. The challenge: to alleviate those harms to the extent possible. And there was no crystal ball to forecast demand for crude oil in this ever-changing environment. … When balancing harms and predicting future demand, the commission is due deference. It is the agency tasked with these difficult decisions. With this deference in mind we affirm the commission's adequacy decision regarding the revised FEIS and its decisions to issue a certificate of need and routing permit for the Line 3 replacement."

In *Neshaminy School District v. Pennsylvania Human Relations Commission*, 2021 WL 2307278 (Pa. App. 2021), the Pennsylvania Human Relations Commission (Commission) had issued an opinion and cease and desist order banning related images and logos finding that the Neshaminy School District (District) had violated Section 5(i)(1) of the Pennsylvania Human Relations Act (Act), 43 P.S. § 955(i)(1), through the District's use of **Native American imagery and the term "Redskins"** on the grounds that such use was harmful to non-Native American students as they create impermissible stereotypes. While the Commission found that the evidence of harassment of, or a loss of educational opportunities to, Native American students was either speculative or insufficient, it concluded that the harm to non-Native American students constituted unlawful discrimination under the Act. The District appealed and the Commonwealth Court reversed: "Section 5(i)(1)'s plain language provides that the 'unlawful discriminatory practice' required to establish a violation of the Act is linked to the denial of a public accommodation (harm) to the person that is actually the target of the discrimination based, inter alia, on that person's protected characteristic, such as race or ancestry. 43 P.S. § 955(i)(1). The Commission determined that the PHRC did not meet its burden of proving that an unlawful discriminatory practice as defined by the plain language of Section 5(i)(1) occurred here. The Commission instead, based on the evidence before it, found that any harm to Native American students by the District's actions was either speculative or not supported by the evidence, and, therefore, could not support a finding of unlawful discrimination. Although dismissing the claims of unlawful discrimination against Native Americans, the Commission nonetheless, apparently conflictingly, held that the discrimination of Native American students caused harm to non-Native American students. … However, the Commission cannot both dismiss claims as unsubstantiated or speculative and then rely on those claims to find harm to others. … In the absence of a finding that the District engaged in unlawful discriminatory practices against Native American students based on those students' race/ancestry, the Commission exceeded its authority when it found that the harm to non-Native American students constituted an unlawful discriminatory practice under Section 5(i)(1)."