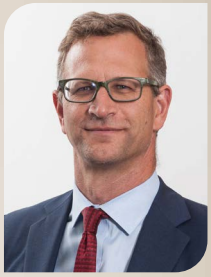
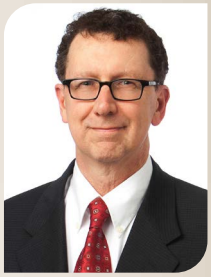
GODFREY & KAHN S.C.

Indian Nations Law *Focus*

March 2020, Volume 15, Issue 3



John L. Clancy
414.287.9256
jclancy@gklaw.com



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.

Updated Court Decisions

The Arizona Supreme Court's decision in *Hwal'Bay Ba: J Enterprises, Inc. v. Jantzen* merits special mention among the cases summarized in our March update. The Court declined to extend the sovereign immunity of the Hualapai Indian Tribe to its wholly owned subsidiary Hwal'Bay Ba: J Enterprises, Inc., citing, among other factors, the lack of evidence that the company's revenues funded government operations. The decision reflects increasing judicial scrutiny of the sovereign immunity claims of tribal subsidiaries and unwillingness to acknowledge immunity based solely on tribal ownership.

In *Littlefield v. Mashpee Wampanoag Indian Tribe*, 2020 WL 948895 (1st Cir.), the Mashpee Wampanoag Tribe (Tribe) had been recognized by the Department of Interior (DOI) in 2007. In 2015, the Bureau of Indian Affairs (BIA) acquired **land in trust** for the Tribe under the Indian Reorganization Act, which authorizes acquisition in trust for Indians and defines Indians to include "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood." BIA concluded that "such members" referred solely to the phrase "members of any recognized Indian tribe" in the preceding clause and not including the additional "now under Federal jurisdiction," thus avoiding the potentially fatal interpretation of "now" adopted by the Supreme Court in its 2009 decision in *Carcieri v. Salazar*. The plaintiffs sued. The federal district court rejected the BIA's interpretation and the First Circuit Court of Appeals affirmed: "Nothing about the text suggests that the word 'such' refers to only a portion of the prior phrase. Rather, the plain meaning is that the 'such members' referred to in the second definition are limited in the same way as the 'members' in the first definition, but with the addition of those members' 'descendants ... who were, on June 1, 1934, residing within the present boundaries of any Indian reservation.' Thus, the second definition is not redundant of the first definition. It newly encompasses certain descendants of such members."

In *Menominee Indian Tribe of Wisconsin v. Environmental Protection Agency*, 947 F.3d 1065 (7th Cir. 2020), the Environmental Protection Agency (EPA) and Army Corps of Engineers (ACE) in 1984 had delegated to the State of Michigan the authority to issue dredge-and-fill permits pursuant to Section 404 of the **Clean Water Act**. Aquila Resources, Inc. applied to Michigan for a fill permit for purposes of operating a gold and zinc mine at a site along the Menominee River known as the Back Forty. Pursuant to its retained oversight authority, EPA initially objected to Aquila's permit application but later determined that its objections had been addressed and withdrew them. Concerned that the mine would disrupt sites of great cultural and religious importance, the Menominee Indian Tribe requested that the EPA and ACE reconsider their decision to delegate authority to the State of Michigan. When they declined, the Tribe sued under the Administrative Procedure Act (APA), challenging both the refusal to revisit the 1984 decision and the decision to withdraw objections to the Michigan permit application. The district court dismissed for lack of a final agency action reviewable

under the APA, and also rejecting the Tribe's argument that the federal agencies had a duty under the Historic Preservation Act to consult with the Tribe. The Seventh Circuit affirmed: "The EPA and Corps's responses did little but restate what the Tribe already knew—that Michigan, as a result of the 1984 delegation, had permitting authority over the section of the Menominee River near the Back Forty site. A letter 'purely informational in nature' is not a final agency action because it 'imposes no obligations and denies no relief.' … Letters restating earlier interpretations likewise do not carry legal consequences for purposes of the 'final agency action' requirement. … The Tribe does not point to any regulations governing the withdrawal of objections. We searched too and came up empty, finding no statute, regulation, or guideline that instructs the EPA how to decide whether a state has tendered a satisfactory resolution to a previous permitting objection. … The proper conclusion, then, is that, in the absence of any regulation addressing the basis for the decision to withdraw an objection, the choice is as committed to the agency's discretion as the decision to object in the first instance. If the EPA finds a shortcoming in the state's response to a particular objection, the agency must again make a judgment call about whether to maintain the objection. … The Tribe reads the Preservation Act as obligating the EPA and Army Corps to consult with it about the Back Forty mine project. But … the Preservation Act applies only to undertakings that are 'federal or federally assisted.' … The Tribe alleged neither federal funding nor federal assistance." (Quotations and emendations omitted.)

In *Gilbert v. Weahkee*, 2020 WL 779460, (D.S.D. 2020), tribal members residing in Rapid City, South Dakota, sued officials of the Indian Health Service (IHS), challenging its decision to enter into a self-determination contract with the Great Plains Tribal Chairmen's Health Board (Health Board), under which the Health Board would receive funds to operate portions of IHS's facilities in Rapid City. Plaintiffs asserted that the contract violated the Fort Laramie Treaty of 1868 and the **Indian Self-Determination and Education Assistance Act** (ISDEAA). The federal district court dismissed the action, holding that (i) the plaintiffs lacked "zone-of-interest" standing to sue under the ISDEAA, (ii) the Fort Laramie Treaty provided no private right of action, and (iii) the Health Board was an indispensable party that could not be joined due to sovereign immunity: "ISDEAA case law, while not specifically resolving whether individuals have a right of action to challenge self-determination contracts, does confirm the law is concerned primarily with interactions between tribes and federal agencies. The United States Courts of Appeal for the Eighth, Ninth and Eleventh Circuits, as well as the Court of Federal Claims, have each held the ISDEAA does not permit private parties to sue for harms incurred pursuant to a self-determination contract. … Given the text and judicial interpretations of the ISDEAA, the court concludes its right of action does not encompass suits by individuals seeking to challenge a self-determination contract. … The Health Board is an entity organized under South Dakota law controlled by 17 separate federally recognized tribes. … As it relates to the present self-determination contract, the Health Board is authorized by the OST and CRST, both federally recognized tribes, to assume IHS functions at the Rapid City Service Unit. … Accordingly, the ISDEAA does not require the Health Board to be democratically accountable to the Rapid City Native American community to qualify as a tribal organization able to enter into a self-determination contract.… Plaintiffs have not successfully stated a breach of trust claim as individuals. As defendants point out, the Treaty of Fort Laramie was negotiated between two sovereigns—the United States and the Great Sioux Nation—not between the United States and individual Indians. … Stated differently, plaintiffs have not shown the treaty—or any other source of law—creates an individual trust duty the United States breached by entering into a self-determination contract with the Health Board. … The Health Board cannot feasibly be joined due to its sovereign immunity."

In *United States v. Two Bulls*, 2020 WL 729260 (D.S.D. 2020), the government moved to foreclose on a home located on leased tribal trust land on the Oglala Sioux Reservation after the borrower defaulted on a loan guaranteed by the Department of Housing and Urban Development (HUD) and secured by a leasehold mortgage under the **Section 184 program**. The magistrate judge recommended that the district court deny the government's motion for default judgment without prejudice, with the intent of encouraging the government to modify its decree of sale to provide for sale of the foreclosed home to an eligible purchaser (i.e. tribe, tribal member or housing authority) within 180 days. The district court rejected the recommendation and granted default judgment on the condition that the property be sold within one year: "There appears to be no statute or regulation governing how long the government may possess a foreclosed leasehold interest in trust land. … The OST's concern that foreclosure could result in the government possessing the leasehold interest for an unlimited period of time—'effectively preclud[ing] the Tribe ... from using the leasehold interest—and the underlying trust property—for housing or other

purposes'—is well-placed. … A limit on the amount of time the government may possess the leasehold interest is warranted. However, as noted in the appraisal report, the real estate market in Pine Ridge is challenging due to the lack of fee land and the high levels of unemployment. … The court agrees with the government that 180 days may be insufficient to transfer the leasehold. The court finds a period of a year to transfer the leasehold is appropriate."

In *Spirit Lake Tribe v. Jaeger*, 2020 WL 625279 (D.N.D. 2020), the Spirit Lake and Standing Rock Sioux Tribes, with certain of their members, sued Jaeger, North Dakota's Secretary of State (Secretary) before the November 2018 election, contending that the Secretary's implementation of a North Dakota law requiring persons wishing to vote to provide a valid form of identification, including name, current residential street address, and date of birth, violated their rights under the First and Fourteenth Amendments to the United States Constitution. Following the election, the plaintiffs filed an amended complaint, alleging additional defects in the North Dakota law, including that it places an undue burden on the plaintiffs' right to vote in violation of the Fourteenth Amendment and First Amendment, causes arbitrary disenfranchisement of the plaintiffs in violation of the Fourteenth Amendment, constitutes intentional discrimination in voting on account of race in violation of Section 2 of the **Voting Rights** Act, has a discriminatory effect on voting on account of race in violation of Section 2 of the Voting Rights Act, and violates the plaintiffs' Fourteenth and Fifteenth Amendment rights because its purpose and effect is to deny the plaintiffs the right to vote on account of race. The defendant moved to dismiss for lack of standing and failure to state a claim. The Court denied the motion: "The Tribes allege they have been forced to divert resources to ensure their members have an ID which complies with the requirements of N.D.C.C. § 16.1-01-04.1. They further allege these expenditures are ongoing and substantial both in terms of time and money. … It is well-established that an organization has standing in its own right to challenge an election law when it expends or diverts resources to educate voters about the new law or assist them in complying with the new law. … Having determined that the Tribes have standing on a diversion of resources basis, the Court need not determine whether they have associational standing or standing as *parens patriae*. … [T]he Secretary contends the Tribes are not 'persons' or 'citizens of the United States' and therefore are not entitled to bring the constitutional or Voting Rights Act (VRA) claims asserted in this lawsuit… The Court can see no reason why a federally recognized Indian Tribe would not have standing to sue to protect the voting rights of its members when private organizations like the NAACP and political parties are permitted to do so. … The second argument, that the Tribes cannot state claims to recover the money they voluntarily expended assisting their members with efforts to comply with North Dakota's voter ID law, also fails as the Tribes do not seek money damages but rather only seek injunctive relief. … The Plaintiffs allege, among other things, that the burden which the voter ID law imposes on them is undue and severe and have backed up that assertion with factual allegations which the Court must accept as true."

In *Narragansett Indian Tribal Historic Preservation Office v. Federal Energy Regulatory Commission*, 2020 WL 593866 (D.C. Cir. 2020), the Narragansett Indian Tribal Historic Preservation Office (Tribe) petitioned for review of an order of the Federal Energy Regulatory Commission denying its motion to intervene in a natural gas pipeline certificate proceeding after the certificate to build a pipeline had issued. The Tribe argued that, in authorizing Tennessee Gas Pipeline Company, LLC (Tennessee Gas) to build a pipeline across landscapes that hold sacred significance to the Tribe, the Commission violated the **National Historic Preservation Act** (NHPA). While the petition was pending, Tennessee Gas completed its pipeline, irreparably destroying more than twenty ceremonial stone features. The petitioned-for judicial review sought only an order compelling the Commission to amend its regulations so that it cannot repeat the alleged violations of the NHPA in the future. The Court dismissed for lack of jurisdiction: "The problem for the Narragansett Tribe is that it lacks standing to seek such relief. By the time the Narragansett Tribe filed its petition for review, the ceremonial landscapes had been irremediably destroyed. And the Narragansett Tribe has not shown a substantial risk that a similar disagreement between it and the Commission will recur."

In *Unkechauge Indian Nation v. Paterson*, 2020 WL 553576 (W.D. N.Y. 2020), the Unkechauge Indian Nation and St. Regis Mohawk Tribe sued New York officials in 2020, challenging New York's laws requiring them to collect **taxes on cigarettes** sold by reservation retailers to nonmembers of the tribes. The tribes alleged that the laws imposed excessive burdens on tribal retailers and violated tribal sovereignty, tribal tax immunity and the Indian Commerce Clause of the U.S. Constitution. The Second Circuit had previously affirmed the trial court's denial of the plaintiffs' motion for injunctive relief. On remand, the district court, citing the Second Circuit's implicit rejection of the plaintiffs' claims in its

analysis of likelihood of success on the merits, granted summary judgment to the state. The Court also denied the plaintiffs' motions to dismiss certain of their claims without prejudice.

In *Hawkins v. Bernhardt*, 2020 WL 516036 (D.D.C. 2020), the Klamath Tribes had ceded twelve million acres to the United States by treaty in 1864, reserving 800,000 acres and the exclusive right to hunt and fish within the reservation. In the 1954 Klamath Termination Act, Congress terminated federal supervision but expressly disclaimed any intention to diminish the Tribes' treaty fishing rights. Congress restored the Tribes in 1986 and the government sued in 1975 to obtain a declaration of the Tribes' **water rights**. The Ninth Circuit affirmed that the Tribes had implied water rights "necessary to preserve their hunting and fishing rights" under the 1864 Klamath Treaty and those rights took priority over those of private landowners and allowed the Tribes to "prevent other appropriators from depleting the streams and waters below a protected level in any area where the[ir] non-consumptive right applies." Many, but not all, of the rights to water in the Klamath Basin were determined in subsequent Oregon administrative proceedings. In 2013 and 2019, the Bureau of Indian Affairs (BIA) and the Tribes entered into two protocols prescribing procedures for the enforcement of the Tribes' water rights. A group of landowners in the Upper Klamath Basin sued, arguing that in signing the agreements, the BIA unlawfully delegated federal power to the Tribes and violated the National Environmental Policy Act (NEPA). The federal district court dismissed for lack of standing: "Here, the plaintiffs complain about harms derived from the enforcement of the rights of an independent third party not before the Court, namely, the Klamath Tribes. In these circumstances, plaintiffs lack standing because they have demonstrated neither causation nor redressability. To understand why this is the case, the nature of the tribal water rights enforced by the tribes, the BIA, and [Oregon Water Resource Department] are explained first. … The water rights of the Klamath Tribes are reserved treaty rights of exactly the nature expressly protected in *Winters*. In *Adair*, the Ninth Circuit held that the 1864 Klamath Treaty, which explicitly gave the Tribes a right to maintain their traditional hunting and fishing practices, implicitly created a water right necessary to fulfill that purpose. The Tribes' water right is 'non-consumptive,' meaning that the Tribes are not entitled to 'withdraw water from the stream for agricultural, industrial, or other consumptive uses.' … The priority date of the Tribes' water rights—meaning the date at which the rights were perfected—is 'time immemorial.'"

In *Hwal'Bay Ba: J Enterprises, Inc. v. Jantzen*, 2020 WL 891158 (Ariz. 2020), Fox was seriously injured while white-water rafting on the Colorado River through the Grand Canyon, in a boat operated by employees of Hwal'Bay Ba: J Enterprises, Inc., doing business as Grand Canyon Resort Corporation (GCRC), a tribal corporation whose sole shareholder is the Hualapai Indian Tribe (Tribe). Fox and her husband sued the Tribe and GCRC, who moved to dismiss on the ground of **sovereign immunity**. The trial court dismissed the Tribe but declined to dismiss GCRC. The Arizona Supreme Court affirmed, adopting a six-factor test taking into consideration (1) the entity's creation and business form, (2) the entity's purpose, (3) the entity's business relationship with its tribal parent, (4) whether the tribe intended the entity to be immune, (5) the financial relationship between the entity and the tribe, and (6) whether immunizing the entity furthers federal policies underlying sovereign immunity. The Court concluded that GCRC did not qualify as a subordinate economic entity: "GCRC is a tribal corporation; GCRC's assets do not belong to the Tribe; although GCRC 'initially' intended to 'creat[e] economic development opportunities' for the Tribe, it was 'organized for the purpose of conducting all lawful affairs for which corporations may be organized'; control and operation of GCRC is vested in a board of directors, which can hire officers, make investment decisions, borrow funds, and enter in contracts; GCRC may 'merge, consolidate, reorganize, [and] recapitalize' without tribal council participation if necessary to maintain its exemption from federal tax; and the Tribe is prohibited from 'interfer[ing] with or giv[ing] orders or instructions to the officers or employees of GCRC' regarding day-to-day operations. The record does not contain evidence addressing several significant functional attributes of the relationship between the Tribe and GCRC. … we do not know whether GCRC's revenues fund any governmental functions of the Tribe or, if they do, the extent to which the Tribe depends on GCRC revenues for these functions. The record does not reflect whether GCRC's business is confined to operating rafting trips or is broader in scope. We also cannot discern how GCRC contributes to the general tribal and economic development. Does it train Tribal members? Employ them? We do not know. And nothing reflects the level of control and oversight the Tribe actually exercises over GCRC as the plan of operation authorizes the Tribe to do. In sum, on this record, we are unable to conclude that GCRC has carried its burden to show it is a subordinate economic organization of the Tribe so that a denial of immunity would 'appreciably

impair' the Tribe's 'economic development, cultural autonomy, or self-governance.'"

In *Julianna G, Stanislaus County Community Services Agency v. AG*, 2020 WL 598055 (Cal. App. 2020), the parental rights of the parents of Julianna G, a minor, were terminated on the petition of Stanislaus County Community Services Agency after Julianna's mother tested positive for methamphetamine, amphetamine, MDMA, THC, morphine and cocaine, and her father had been found to be abusing alcohol and drugs and was subject to an arrest warrant. The tribal court rejected the father's argument that Julianna was an Indian child for purposes of the **Indian Child Welfare Act** (ICWA) based on the father's DNA test showing Indian ancestry. The Court of Appeals affirmed: "Father also apparently contends that an ancestry DNA test indicating 'Native America' ancestry establishes that the minor is an Indian child. This is not the case. The ICWA applies only to federally recognized tribes and only a child who is a member of, or eligible for membership in, a federally recognized Indian tribe falls within the ICWA. … The DNA testing company 23 and Me includes North and South America, Greenland, and parts of Asia in its Native American classification. These definitions include many indigenous people that are not within a federally recognized tribe, as not even all tribes in the United States are federally recognized."

In *Herpel v. County of Riverside*, 2020 WL 614894 (Cal. App. 2020), the Agua Caliente Band of Cahuilla Indians (Tribe) and some of its members leased out their trust lands in Riverside County to non-Indians, who conducted various businesses on the properties. In 1971, state and federal courts upheld the County's right to impose its possessory interest tax on the non-Indian lessees. In 2014, lessees sued to enjoin the tax, arguing that the tax was preempted by federal law under the balancing test of *White Mountain Apache Tribe v. Bracker* and federal leasing regulations. The trial court rejected these arguments and upheld the tax. The Court of Appeals affirmed: "Plaintiffs here do not argue that the federal government's interest is to help the Tribe maximize profits. Rather, they point to the federal government's 'established policy of encouraging tribal self-governance and tribal economic self-sufficiency.' … But this policy, important as it is as a lofty goal, was also raised in *Cotton Petroleum* and ultimately deemed insufficient. … Under these circumstances, we see no stronger federal interest than in *Cotton Petroleum*. … The parties do not dispute that the burden of the tax here falls only on the possessory interest holder: they stipulated before the trial court that 'the non-Indian lessee of Tribal Trust Land or of Allotted Land is responsible for paying the possessory interest tax, and the County has no recourse against the lessor for non-payment' of the tax. … the fact that marginal demand for leases on Allotted Land or Tribal Trust Land could go down if the Tribe also collected its own possessory interest tax alone is not enough to show harm." The Court also declined to give effect to the prohibition against taxation of leased interests found at section 162.017 of the leasing regulations. (Internal quotations, citations and emendations omitted).

Indian Nations Practice Group Members

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

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

Rebeca López, Labor & Employment
rlopez@gklaw.com

Carol Muratore, Real Estate
cmuratore@gklaw.com

Andrew S. Oettinger, Litigation
aoettinger@gklaw.com

Brian Pierson, Indian Nations
bpierson@gklaw.com

Jonathan Smies, Litigation
jsmies@gklaw.com

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

Justin Webb, Data Privacy & Cybersecurity
jwebb@gklaw.com

Mike Wittenwyler, Government Relations
mwittenwyler@gklaw.com