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Indian Nations update

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In *Seneca Nation of Indians v. New York*, 2021 WL 667557 (2d Cir. 2021), the Seneca Nation had entered into a Class III Gaming Compact with the State of New York under the **Indian Gaming Regulatory Act** (IGRA) in 2002 providing for an initial term of 14 years and, in the absence of objection by either party, "an additional period of seven (7) years." The Compact gave the Nation exclusive rights to maintain certain gaming machines in a large portion of Western New York (Exclusivity Zone) in exchange for graduated revenue-sharing payments to New York from those machines (State Contribution). The State Contribution was 18% of the "net drop" of these machines (money dropped into machines, after payout, but before expenses) during years 1-4, 22% during years 5-7 and 25% during years 8-14. The Compact did not address the State Contribution during the seven-year renewal period. The Secretary of Interior declined to approve or disapprove it or disapprove the Compact, which was, therefore, considered to have been approved "but only to the extent the compact is consistent with the provisions of [IGRA]." At the end of 14 years, the Nation stopped making State Contributions on the grounds that the Compact provided for none, relying in part on a technical assistance letter from the Department of Interior (DOI) stating the DOI's understanding that the Compact contained 14 years of revenue sharing in exchange for 21 years of exclusivity. The State invoked the arbitration clause of the Compact, whereupon the DOI withdrew its technical assistance letter. By a 2-1 vote, an arbitration panel found that the Compact was ambiguous with respect to the Nation's payment obligations during the seven-year renewal period and concluded that it would be "commercially unreasonable and against common sense to find that the word 'renew' would extend the Nation's exclusivity without obligating the Nation to provide any continuing consideration to New York." The Nation filed a federal court petition to vacate the arbitration award, arguing that the panel majority manifestly disregarded IGRA's requirement that the Secretary review and approve Compact obligations or amendments—in this case, any payments beyond the 14-year initial term. Alternatively, the Nation argued that if the district court was uncertain as to whether the Secretary reviewed and approved the payments during the renewal term, it should stay the case and refer the question to DOI pursuant to the primary jurisdiction doctrine. The district court confirmed the arbitration award and the Second Circuit Court of Appeals affirmed: "Section 10 of the FAA allows a court to vacate an arbitration award in four circumstances, primarily involving fraud, corruption, partiality, misconduct, or imperfect execution or exceeding of arbitral powers. … In this case, we are not asked to make pronouncements regarding the wisdom of the panel decision or of the Secretary's view of the disputed term. The Nation attempts to draw the court into these disputes and the competing policy interests of the Nation and the State. However, the parties agreed to leave these difficult questions to the arbitrators."

In *Standing Rock Sioux Tribe v. United States Army Corps of Engineers*, 985 F.3d 1032 (D.C. Cir. 2021), the U.S. Army Corps of Engineers had issued an easement to allow Enbridge to construct the **Dakota Access Pipeline** under Lake Oahe in order to bring crude oil from North Dakota to Illinois. Lake Oahe, the result of the previous construction of the Oahe Dam on the Missouri River, provided several successor tribes of the Great Sioux Nation, including the Standing Rock Sioux Tribe (Tribe), with water for drinking, industry, and sacred cultural practices. The Tribe and others sued, asserting that the Army Corps granted the easement without preparing an environmental impact statement despite substantial criticisms from the Tribes. The district court agreed and vacated the easement pending the Corps' preparation of an EIS and enjoined operation of the pipeline. The D.C. Circuit Court of Appeals affirmed but reversed the district court's shut-down order: "Doing away with the obligation to prepare an EIS whenever a project presents a low-probability risk of very significant consequences would wall off a vast category of major projects from NEPA's EIS requirement. After all, the government is not in the business of approving pipelines, offshore oil wells, nuclear power plants, or spent fuel rod storage facilities that have any material prospect of catastrophic failure. In this case, although the risk of a pipeline leak may be low, that risk is sufficient that a person of ordinary prudence would take it into account in reaching a decision to approve the pipeline's placement, and its potential consequences are therefore properly considered here. … [W]e affirm the vacatur of an easement authorizing the pipeline to cross federal lands. With or without oil flowing, the pipeline will remain an encroachment, leaving the precise consequences of vacatur uncertain. In fact, the parties have identified no other instance—and we have found none—in which the sole issue before a court was whether an easement already in use (rather than a construction or operating permit) must be vacated on NEPA grounds. That makes this case quite unusual and cabins our decision to the facts before us. … It may well be—though we have no occasion to consider the matter here—that the law or the Corps' regulations oblige the Corps to vindicate its property rights by requiring the pipeline to cease operation and that the Tribes or others could seek judicial relief under the APA should the Corps fail to do so. But how and on what terms the Corps will enforce its property rights is, absent a properly issued injunction, a matter for the Corps to consider in the first instance, though we would expect it to decide promptly. To do otherwise would be to issue a de facto outgrant without engaging in the NEPA analysis that the Corps concedes such an action requires."

In *United States v. Murphy*, 2021 WL 646799 (E.D. Okla. 2021), the Federal Criminal Code provides that there is no statute of limitations for "any offense punishable by death," 18 U.S.C. § 3281, but a provision of the **Federal Death Penalty Act**, 18 U.S.C. § 3598, provides that "no person subject to the criminal jurisdiction of an Indian tribal government shall be subject to a capital sentence ... unless the governing body of the tribe has elected that this chapter have effect over land and persons subject to its criminal jurisdiction." Murphy, an Indian, was prosecuted in Oklahoma state court and sentenced to death in 2000 for crimes, including murder, that he committed in 1999 on land that, at the time, was assumed to be the former Muskogee Creek Indian reservation. After the U.S. Supreme Court held in its 2020 decision in *McGirt v. Oklahoma* that the reservation continued to exist, Murphy moved to invalidate his conviction based on Oklahoma's lack of jurisdiction. The federal government, however, promptly indicted Murphy under federal criminal law. Since the Creek Nation had not agreed to application of the death penalty within its territory, the government did not seek the death penalty. Murphy moved to dismiss on the ground that his offenses were not punishable by death and the government was, therefore, subject to a five-year statute of limitations and could not rely on the unlimited charging authority of 18 U.S.C. § 3281. The district court denied the motion: "The death penalty's unavailability due to a jurisdictional quirk does not, and cannot, affect the statute of limitations for charging the offense. To hold otherwise risks a grave injustice: killers may permanently escape justice simply because their victims were killed on lands associated with a Native American tribe that objects to the death penalty." In a companion decision, the court rejected Murphy's motion to dismiss based on the government's delayed indictment. See also, 2021 WL 646775.

In *Red Lake Band of Chippewa v. United States Army Corps*, 2021 WL 430054 (D.D.C. 2021), Red Lake Band of Chippewa Indians, White Earth Band of Ojibwe, Honor the Earth, and the Sierra Club (Plaintiffs) sued the U.S. Army Corps of Engineers (Corps), alleging violations of the National Environmental Policy Act (NEPA), the Clean Water Act (CWA), the Rivers and Harbors Act (RHA), and the Corps' permitting regulations arising out of the Corps' issuance of a permit to Enbridge Energy, Limited Partnership (Enbridge), authorizing Enbridge to discharge dredged and fill material into waters of the United States under Section 404 of the CWA and to cross waters protected by the

RHA in its construction of a replacement for the **Line 3 oil pipeline**, which transports oil from Canada to Wisconsin, traversing North Dakota and Minnesota. Plaintiffs sought a preliminary injunction, challenging the adequacy of the Corps' discussion of the effects of potential oil spills, alternative construction routes, and alternative construction methods. The Court denied the motion, on the ground that Plaintiffs failed to demonstrate a likelihood of success on the merits and that they will suffer irreparable harm: "Court finds that the Corps adequately considered the effects of a potential oil spill to discharge its duties under NEPA and the CWA. Accordingly, Plaintiffs have not demonstrated a likelihood of success on the merits of their claims that the Corps' oil spill analysis was deficient under either statute."

In *United States v. Patterson*, 2021 WL 633022 (E.D. Okla. 2021), Youngblood, a McIntosh County sheriff's deputy, in 2019 investigated Patterson, an Indian, for alleged sexual contact with a minor, including interviewing Patterson's girlfriend and taking a DNA swab. The federal government indicted Patterson in September 2020, charging him with one count of Sexual Abuse of a Minor in Indian Country. Patterson moved to suppress all evidence derived from Youngblood's investigation on the ground that he lacked jurisdiction to conduct it. The District Court denied the motion based on the good faith exception to the exclusionary rule, observing that the site of the investigation was only determined to be Indian country with the Supreme Court's 2020 decision in ***McGirt v. Oklahoma***.

In *Allegany Capital Enterprises v. Cox*, 2021 WL 534803 (W.D.N.Y. 2021), Allegany Capital Enterprises (ACE) was a 100% Indian-owned limited liability company formed under the laws of the Sac and Fox Nation of Oklahoma and doing business on the Seneca Territory in New York. Seneca Manufacturing Co. (SMC) was a general partnership owned by New York residents and doing business on the Seneca Territory. ACE and SMC were in the business of tobacco manufacturing, licensing, and sales and helping other Native nations establish tribally owned and licensed tobacco manufacturers. ACE and SMC entered into manufacturing and distribution agreements with Diamond Mountain Manufacturing (DMM), a wholly owned subsidiary of Susanville Indian Rancheria Corporation (SIRCO), wholly owned holding company of the Susanville Indian Rancheria (SIR). ACE and SMC relied on representations by DMM executives that **waivers of sovereign immunity** in the agreements did not require approval by the SIR government. When a dispute arose and an arbitrator concluded otherwise, SMC and ACE sued DMM and SIRCO executives personally in federal court, invoking diversity jurisdiction, alleging fraud and misrepresentation under state law. The executives moved to dismiss on the ground that the plaintiffs actually sought relief from DMM and SIRCO, who, the executives asserted, shared SIR's sovereign immunity. The Court denied the motion, holding that the record was insufficient to support the conclusion that SIRCO was an arm of the Tribe under the applicable criteria: "[T]his record … does not establish the ownership, management, and board membership of SIRCO (DMM's owner) and whether it requires a majority of the board be SIR members. This Court has the bare, unsworn assertion of defense counsel that SIR wholly owned SIRCO … Also unknown on the present record is where the economic benefit from SIRCO (or DMM, for that matter) would go, whether SIR benefits from SIRCO's (or DMM's) revenue. The Amended Complaint does not allege the ownership of SIRCO …, while alleging DMM's ownership by SIRCO …. It also does not allege that SIRCO acted for SIR and the extra-pleading documents considered by this Court in this motion do not establish SIRCO's relationship with SIR. … Neither side stated the title ownership of SIRCO's property to show whether it was affiliated with the tribe. The record is also silent where SIRCO operated, that is whether it functioned solely on SIR territory. … As to alignment of tribal purpose with these enterprises, see Breakthrough Management Group, supra, 629 F.3d at 1195, SIRCO's purpose relative to the tribe SIR is not disclosed in this record. As a sign that SIRCO is an arm of SIR, the record does not show SIRCO was so closely related to the SIR (for example, in economic development) that the purposes of sovereign immunity are met. … In this case, the parties are not contending that the SIR tribe would indemnify Defendants if held liable in this case. This is a further ground for directing liability upon the Defendants individually rather than whatever official roles they may have within the SIR nation. … Therefore, Defendants' Motion to Dismiss (Docket No. 17) on official capacity grounds is denied because Plaintiffs alleged claims against them in their individual capacities. … Defendants next claim that this case should be dismissed under Rule 19 because the necessary party DMM for this (essentially) contract dispute was not named and, due to DMM's tribal sovereign immunity, cannot be named. This Court disagrees; complete relief can be afforded with the present parties and the Court does not need DMM to effect relief. … Plaintiffs have alleged with particularity the specific misrepresentation that Defendants (particularly Cox) made that Cox had the authority to waive sovereign immunity for DMM without further action by another entity, the Tribal Business Council. … Thus, Defendants' Motion to Dismiss (Docket No. 17) the Second Cause of Action is denied."

In *Pilant v. Caesars Enterprise Services*, LLC, 2021 WL 424280 (S.D. Cal. 2021), Pilant sued Caesars Enterprise Services, LLC (CES) and Caesars Entertainment, Inc. (CEI) jointly employed Pilant as senior vice president and general manager of Harrah's Resort SoCal hotel/casino (Resort), an enterprise owned by the Rincon Band of Luiseno Indians (Tribe). When the Tribe decided to reopen the Resort following a COVID-related shutdown, Pilant, citing safety concerns, resigned and sued CES and CEI in state court for various violations of state law. The Defendants removed the case to federal court, alleging federal question jurisdiction under the Indian Gaming Regulatory Act (IGRA). The Tribe moved to intervene on the ground that a decision in the Plaintiff's favor might infringe the Tribe's right of self-government. The Court denied the motion: "A judgment in favor of Pilant will not impair any of the interests listed by the Rincon Band. Pilant does not assert any claims under tribal or federal law, so the second interest is not implicated. … The complaint does not ask for, and this case will not result in, a declaration that California state law generally applies to the governance of activities on the Rincon Band's land. Pilant contends only that California law applies to his employment relationship with CES, and the Rincon Band is not a party to that relationship. Moreover, even if this case results in a written opinion concerning Pilant's rights against CES that the Rincon Band does not like or believes to be incorrect, that opinion itself would not harm the Rincon Band's interests."

In *Grondal v. United States*, 2021 WL 354414 (E.D. Wash. 2021), Evans, the owner of a 5.4% interest in a trust allotment known as MA-8 near the Colville Reservation, obtained the consent of a majority of the other allottee interest holders to a lease of MA-8 for 25 years, with an option to renew for an additional 25 years, for purposes of operating a camp ground. Camp Ground residents organized as the Mill Bay Members Association. BIA approved the lease in 1984. Upon Evans' death in 2003, Wapato Heritage LLC acquired Evans' interest. After BIA determined that the lease had not been properly renewed and had, therefore, expired in 2009, BIA sued on behalf of the allottees for trespass. The court granted the government summary judgment on the trespass claim and ordered further proceedings to determine damages. When the federal government voluntarily dismissed its damage claim, Wapato, claiming "allottee" status, sought to continue its cross-claim against Mill Bay for trespass damages and sought discovery from the Tribe and from the Confederated Tribes of Colville. The Court dismissed Wapato and denied its motion to compel discovery as moot: "Wapato Heritage may be most properly described as a 'non-Indian successor to an Indian allottee.' Therefore, the Court rejects Wapato Heritage's claim that it is an 'allottee.' However, even if Wapato Heritage were an 'allottee,' it is not an 'allottee' who suffered an "injury in fact" by Mill Bay's trespass. … Although Wapato Heritage has argued against the Federal Defendants' authority to assert a trespass claim and the trust status of MA-8, Wapato Heritage now asserts that it is entitled to a portion of the judgment for trespass as an 'allottee.' … Wapato Heritage cannot deliberately change its position that MA-8 is trust land and that Wapato Heritage has been injured by Mill Bay's trespass, subsequent to an adverse judgment and because the changed position is now monetarily advantageous. … As this Court previously has decided and discussed at length, the Colville Tribe has neither waived its sovereign immunity by contract nor by its conduct in this matter. … Wapato Heritage's discovery requests were 'served directly on the Tribe,' as opposed to a tribal official. … 'Suit' includes 'judicial process' and discovery and the subsequent motion to compel are forms of judicial processes. … Therefore, the Court concurs with the Colville Tribes that the attempted discovery is barred by tribal sovereign immunity which the Tribes did not expressly waive." (Citations omitted.)

In *Barnett v. State of Oklahoma*, 2021 WL 325716 (W.D. Okla. 2021), Barnett, relying on the Supreme Court's 2020 decision in ***McGirt v. Oklahoma***, challenged his state court conviction on the ground that the State of Oklahoma lacked jurisdiction over him because his offense was committed in Indian country and because the State had failed to establish that he was not an Indian subject to federal jurisdiction. The district court rejected Barnett's petition on procedural grounds as well as on the ground that *McGirt* did not apply generally to the entire state of Oklahoma: "By its terms, *McGirt* only applies to defendants who commit certain crimes within the Muscogee (Creek) Nation Reservation. … As the Report and Recommendation notes, Oklahoma County lies outside of the boundaries of the Creek Nation, and therefore *McGirt* does not apply."

In *North Dakota v. Cherokee Services Group*, LLC, 2021 WL 630357 (N.D. 2021), Cherokee Services Group, LLC; Cherokee Nation Government Solutions, LLC; Cherokee Medical Services, LLC; Cherokee Nation Technologies, LLC (collectively, Cherokee Entities) were wholly owned entities of the Cherokee Nation. Bilby served as executive general manager of the Cherokee Entities. Hudson Insurance provided workers' compensation coverage to the Cherokee Nation, and the Cherokee Entities are named insureds on the policy. The Cherokee Nation has no sovereign land in North Dakota, and the Cherokee Entities were operating within the state but not on any tribal lands. North Dakota's Workforce Safety and Insurance agency (WSI) determined the Cherokee Entities were employers subject to North Dakota's workers' compensation laws and were liable for unpaid workers' compensation premiums and that Bilby, as executive general manager, was personally liable for unpaid premiums. WSI ordered the Cherokee Entities to pay the unpaid premiums. WSI also ordered Hudson Insurance to cease and desist from writing workers' compensation coverage in North Dakota. An administrative law judge ruled that the Cherokee Entities and Bilby were protected by sovereign immunity. The state district court reversed the ALJ's determination but the North Dakota Supreme Court reversed the district court and reinstated the ALJ's cease and desist order against WSI and remanded to the ALJ for further proceedings on the issue of sovereign immunity: "Cherokee Nation is entitled to sovereign immunity. Whether this sovereign immunity extends to the Cherokee Entities and shields them from liability for the unpaid premiums relies on an analysis determining if the entities are **arms of the tribe**. If the Cherokee Entities are liable, WSI can hold Bilby personally liable …. If the Cherokee Entities are not liable due to sovereign immunity, WSI cannot hold Bilby personally liable for the unpaid premiums. Additionally, WSI does not have the statutory authority to issue a cease and desist order to Hudson Insurance."

In *Warehouse Market, Inc. v. State of Oklahoma*, 2021 WL 345414 (Okla. 2021), Warehouse Market, Inc., a non-Indian firm, operated a business under a long-term, BIA-approved lease of restricted land on the Muscogee (Creek) Nation reservation. When both the Tribe and the Oklahoma Tax Commission demanded that WMI pay **sales tax**, WMI filed an interpleader action in state court, asking the Court to determine which entity was entitled to the taxes. The trial court dismissed the Tribe on sovereign immunity grounds and retained jurisdiction to determine the rights of the OTC. The Oklahoma Supreme Court reversed on the ground that, the Tribe having been dismissed, WMI's interpleader action was essentially a tax protest against the OTC and, as such, required that WMI exhaust its administrative remedies.

In *Cayuga Nation v. Showtime Networks Inc.*, 2021 WL 683344 (N.Y. App. 2021), Showtime Networks, Inc. (Showtime) aired an episode of the series Billions in which the "Cayuga Iroquois" tribe and a tribal official named Jane Halftown were allegedly depicted as engaging in an illegal casino land deal, bribery of a public official, and blackmail. The actual Cayuga Nation and its elected leader, Clinton Halftown, sued, alleging that the show defamed them. The lower court dismissed and the New York Appellate court affirmed the dismissal: "To the extent asserted by plaintiff Cayuga Nation, their claims were correctly dismissed on the ground that a governmental entity cannot maintain a libel claim …. Contrary to Cayuga Nation's contention, First Amendment principles are applicable to cases involving libel claims arising from fictional works of entertainment …. Supreme Court reasonably rejected plaintiffs' conclusory contention that the episode referred to plaintiff Halftown individually, and the episode can reasonably be said to concern how the Cayuga Nation 'governs,' as it depicts the Nation's involvement in a land deal and its decision to support a particular character in connection with a mobile voting program that he seeks to implement. While plaintiffs argue that Native American tribes are a unique kind of government entity, they do not explain how that uniqueness bears on the libel analysis at issue. … The claims asserted by plaintiff Halftown were also correctly dismissed. Supreme Court correctly found that the allegedly defamatory matter in the episode was not 'of and concerning' Halftown, that is, the fictional character Jane Halftown was not 'so closely akin' to plaintiff that a viewer 'would have no difficulty linking the two.' … The facts that the fictional character Jane Halftown and plaintiff Halftown are both Cayuga, have the same surname, and hold the same or similar positions within the Cayuga tribe do not alter that conclusion … As noted by the Supreme Court, the requisite connection could also not be drawn between the fictional character Jane Halftown and plaintiff Halftown, given plaintiff's failure to allege that plaintiff Halftown was involved in negotiating real estate deals or in electoral issues. (Citations omitted.)

In *People v. Caswell*, 2021 WL 519712 (Mich. App. 2021), Caswell was a member of the Mackinac Tribe of Odawa and Ojibwa Indians (Mackinac Tribe), a tribe not recognized by the federal government. In 2018, the Michigan Department of Natural Resources (DNR) cited Caswell for spear fishing in a closed stream in violation of Michigan conservation laws. Caswell moved to dismiss on the ground that he was a member of an Indian tribe or band granted **hunting and fishing rights by 1836 and 1855 treaties** with the United States federal government. The county district court granted the motion but the circuit court held that the motion should be denied on the ground that the Mackinac Tribe was not federally recognized and that federal tribal recognition is a matter for initial determination by the United States Department of the Interior. The Michigan Court of Appeals vacated and remanded, holding that the issue was not whether the Mackinac Tribe was federally recognized but whether it was a successor in interest to one of the tribes that signed the 1836 treaty: "[A] modern-day tribe is not entitled to exercise treaty rights simply because its members descended from members of a signatory tribe. The dispositive issue in this case is whether the Mackinac Tribe is the political successor in interest to the signatory tribe from which it claims descent. To be a political successor in interest requires demonstrating that 'some defining characteristic of the original tribe persists in an evolving tribal community.' Washington II, 641 F.2d at 1373. The district court erred by assuming that the Mackinac Tribe possessed treaty rights merely because some of its members were descended from signatory tribes of the relevant treaty, and that defendant's entitlement to exercise those rights as a member of the Tribe provided him with a valid affirmative defense to the charges against him."