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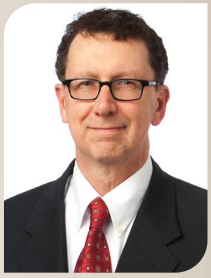

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Fifth Circuit to Review *Brackeen* Decision *En Banc*

The Indian Child Welfare Act of 1978 (ICWA) is a federal law that requires state courts to give tribes notice of child placement proceedings involving Indian children and, under certain circumstances, to transfer jurisdiction to tribal courts and to give placement preference to Indian families. Hostility to the law has engendered strategic lawsuits seeking to strike down both the ICWA statute itself and the Final Rule implementing ICWA, on multiple grounds. A three-judge panel of the Fifth Circuit Court of Appeals had rejected all of the anti-ICWA arguments in a unanimous decision Aug. 9, 2019, *Brackeen v. Bernhardt*, 937 F.3d 406 (5th Cir. 2019), holding that

1. the special rules that ICWA applies to Indian children are not race-based distinctions subject to Fourteenth Amendment strict scrutiny but, rather, a political classification based on the unique relationship between the United States and tribes;
2. the special treatment of Indian children under ICWA "is rationally tied to Congress's fulfillment of its unique obligation toward Indian nations and its stated purpose of "protect[ing] the best interests of Indian children and ... promot[ing] the stability and security of Indian tribes;"
3. the requirements that ICWA places on state courts are consistent with the Supremacy Clause and do not implicate the anti-commandeering mandate of the Tenth Amendment;
4. the requirements that ICWA places on state agencies do not violate the anti-commandeering mandate because they "do not require states to enact any laws or regulations, or to assist in the enforcement of federal statutes regulating private individuals;
5. ICWA, as an exercise of Congress' plenary power over Indian affairs under the Commerce Clause, preempts inconsistent state laws;
6. provisions of ICWA permitting tribes to adopt placement preferences did not run afoul of the non-delegation doctrine since "[t]he Supreme Court has long recognized that Congress may incorporate the laws of another sovereign into federal law without violating the nondelegation doctrine" and the preferences constitute a "'deliberate continuing adoption by Congress' of tribal law as binding federal law;"
7. the Final Rule did not violate the APA because, in promulgating it, "BIA relied on its own expertise in Indian affairs, its experience in administering ICWA and other Indian child-welfare programs, state interpretations and best practices, public hearings, and

tribal consultations. … and … BIA's current interpretation is not 'arbitrary, capricious, [or] an abuse of discretion' because it was not sudden and unexplained;" and

8. the Final Rule's recommendation that a deviation from prescribed placement preferences be supported by "clear and convincing evidence" was entitled to *Chevron* deference and did not contradict Congressional intent.

On Nov. 7, however, all of the Fifth Circuit's judges vacated the Aug. 9, decision and agreed to rehear the case *en banc* (i.e. with all sixteen active status judges participating). The full Court had taken the extraordinary step of deciding to rehear the case on its own motion before deciding instead to grant the plaintiffs' motion for rehearing. Oral arguments have been scheduled for the week of Jan. 20, 2020.

While a judge will not normally vote to rehear a case that he or she believes the panel has correctly decided, predictions are hazardous because of the wide range of issues that may have motivated different judges to vote in favor of rehearing. There is no doubt, however, that the forty-one-year-old ICWA is in jeopardy.

Selected court decisions

In *JW Gaming Development, LLC v. James*, 2019 WL 4858272, --- Fed. Appx. ---- (9th Cir. 2019), JW Gaming Development, LLC (JW Gaming) filed claims against tribal officials in their individual capacities, alleging claims under the Racketeer Influenced and Corrupt Organizations (RICO) Act, and the common law of fraud, seeking damages from the defendants personally. The defendants moved to dismiss on the ground of **sovereign immunity**, arguing that their actions were in the course of their official duties. The District Court denied the motion and the Ninth Circuit, citing its own decision in *Maxwell v. County of San Diego*, 708 F.3d 1075, 1088 (9th Cir. 2013), and the Supreme Court's decision in *Lewis v. Clarke*, 137 S. Ct. 1285 (2017), affirmed: "The claims are explicitly alleged against the tribal defendants in their individual capacities, and JW Gaming seeks to recover only monetary damages on such claims. If JW Gaming prevails on its claims against the tribal defendants, only they personally—and not the Tribe—will be bound by the judgment. Any relief ordered on the claims alleged against the tribal defendants will not, as a matter of law, expend itself on the public treasury or domain, will not interfere with the Tribe's public administration, and will not restrain the Tribe from acting, or ... compel it to act." (Citations, quotations marks and emendation indicators omitted).

In *Oneida Indian Nation v. United States Department of the Interior*, 2019 WL 5302822 (2d Cir. 2019), the Oneida Tribe of Indians of Wisconsin (Wisconsin Oneidas) constitutionally **changed its name to "Oneida Nation."** The U.S. Department of Interior (DOI) recognized the new name in its annual listing of tribes. The Wisconsin Oneidas then petitioned the Trademark Trial and Appeal Board of the United States Patent and Trademark Office (TTAB) to cancel the New York Oneidas' registration of the marks "Oneida" and "Oneida Indian Nation," citing the Wisconsin Oneidas' "federally recognized name—Oneida Nation." The New York Oneidas sued the DOI, asserting injury based on DOI's approval of the Wisconsin Oneidas' new name. The district court dismissed for lack of subject matter jurisdiction and the Second Circuit Court of Appeals affirmed: "Because the Wisconsin Oneidas' prior name also included 'Oneida,' and the Wisconsin Oneidas asserts that it used the 'Oneida' mark in commerce well before its DOI-sanctioned name change, any argument in the TTAB proceeding as to confusion is not dependent on the name change. Oneida Indians have long been separated into two groups: a group that has remained in upstate New York and a group that split long ago from the New York Oneidas and moved to Wisconsin. The group of New York Oneidas, the plaintiff here, claims primacy to the name 'Oneida Nation,' and claims exclusive status as the descendants of the original Oneida Indians. The Wisconsin Oneidas contest these claims. A declaratory judgment invalidating DOI's recognition of the Wisconsin Oneida's name change is therefore not likely to end the TTAB proceeding or materially strengthen Appellant's position in it. Appellant thus fails to show that it is 'likely, as opposed to merely speculative,' that any injury relating to the TTAB proceeding would be redressed by a favorable decision. *Lujan*, 504 U.S. at 561. … In any event, that DOI published the new name does not imply that the federal government regards Appellant as lesser. As Appellant admits, DOI's policy is to approve automatically any name chosen by a tribe."

In *MacDonald v. CashCall*, 2019 WL 5617511 (D.N.J. 2019), CashCall entered into an agreement with Western Sky Financial, LLC (Western Sky), a South Dakota limited liability company run by Webb, a member of the Cheyenne River Sioux Tribe (CRST), under which CashCall purchased **internet consumer loans** that Western Sky originated. Western Sky loans with interest rates ranging from approximately 79% to 200%, above the rates permitted under New Jersey law. Loan agreements included an arbitration clause and a choice-of-law provision asserting that notes were governed

exclusively by CRST law, and would not be subject to either state or federal law. The agreements also provided that the loans would be exclusively subject to the laws and jurisdiction of the CRST and that disputes must be resolved by a CRST-affiliated arbitrator. Plaintiffs, non-Indian residents of New Jersey who borrowed money from Western Sky, sued CashCall and its principals, alleging claims that the agreements violated New Jersey anti-usury laws, New Jersey's Consumer Fraud Act, the common law of restitution and unjust enrichment and the Racketeer Influenced and Corrupt Organizations Act (RICO). Plaintiffs also sought a declaration that tribal law did not apply to the loans and that the arbitration provisions and class waivers were unenforceable. The Court granted plaintiffs' motion for class certification, rejecting defendants' objections: "Defendants argue that Plaintiffs cannot demonstrate causation through common evidence, as the cases Plaintiffs rely on involved schemes where purchasers of products received no value whatsoever for their products, while here Plaintiffs did received [sic] value in the form of a loan. The Court disagrees. Plaintiffs' injury is the payment of usurious interest, which they allege they would not have paid had Defendants not conducted a sham enterprise to appear as if a tribal entity was loaning their money, beyond usurious rates. As noted above, there is substantial similarity between of [sic] the loan agreements here, each of which includes loans of at least twice the usurious rate. ECF Nos. 93.7, 93.16 (showing interest rates of 116% or higher). While the ultimate question of causation remains for the trier of fact, Plaintiffs have carried their burden of demonstrating that injury and causation can be shown on a classwide basis."

In *Fort McDermitt Paiute and Shoshone Tribe v. Azar*, 2019 WL 4711401 (D.D.C. 2019), the Fort McDermitt Paiute and Shoshone Tribe (Tribe) had negotiated with the Indian Health Service (IHS) to take over operations of two health programs that that agency had been providing, as permitted under the **Indian Self-Determination and Education Assistance Act** of 1975 (Act). After the IHS rejected the Tribe's final offer, the Tribe sued, alleging that the IHS had failed to provide a satisfactory ground for rejecting the Tribe's offer. The district court agreed and entered judgment for the Tribe: "Section 5325(a)(1) instructs that the Tribe is entitled to no less than the amount that IHS 'would have otherwise provided for the operation of' the EMS program and the Clinic. The clear and unavoidable meaning of that provision is that IHS must provide in funding to the Tribe an amount that is at least equal to what it otherwise would have spent operating the EMS program and the Clinic itself. Nowhere does the statute provide exceptions based on the source of that funding, even if the particular source IHS had been using, upon transfer of operations to the contracting tribe, dematerializes. Rather, the provision focuses on the continued *operation* of the assumed programs at the same level of service, and it does so by ensuring that IHS provides the same amount in funding, as a recurring base amount, for that continued operation. It does not permit IHS to limit the award on the assumption, no matter how reasonable, that the Tribe will make up the difference elsewhere. … The Court recognizes that this application of § 5325(a)(1)'s language to this situation leads to what may appear an illogical result, in that it seems to lead to double-recovery by the Tribe. But the Court must construe the Act 'liberally ... for the benefit of the Indian tribe participating in self-governance and [resolve] any ambiguity ... in favor of the Indian tribe.' 25 U.S.C. § 5392(f). Moreover, although not invoked by IHS, the general rule that statutes should not be construed to produce absurd results does not require a contrary outcome. … The ISDEAA, first and foremost, is aimed at ensuring that Indian tribes can assume control of their own health services at levels necessary to meet their needs. *See* 25 U.S.C. § 5302(a), (c). The result here—which ensures that the Tribe will receive the necessary funds to provide, at a minimum, the same services that IHS had already been providing—is not contrary to that aim, nor is it so absurd that it warrants disregarding the Act's clear text."

In *Toahty v. Kimsey*, 2019 WL 5104742 (D. Ore. 2019), Toahty sued Kimsey, Assistant Director of Confederated Tribes of Grand Ronde Tribal Employment Rights Office, claiming that Kimsey sexually harassed him and that he suffered retaliation for reporting the harassment. The court dismissed for **lack of federal jurisdiction**: "Plaintiff fails to cite any federal law or constitutional provision in his complaint. To the extent the complaint can be construed to assert a claim for employment discrimination, Title VII excludes Indian tribes. … To the extent that Plaintiff's complaint can be construed to assert a First Amendment retaliation claim under 42 U.S.C. § 1983, Plaintiff fails to allege that any Defendant was acting under color of state law."

In *Stand Up for California v. U.S. Department of Interior*, 2019 WL 4992183 (D.D.C. 2019), Wilton Rancheria had asked the Bureau of Indian Affairs (BIA) to **acquire land in trust** on its behalf, identifying a 282-acre parcel near Galt, California as the proposed site. Shortly after the November 2016, BIA published a notice of the Final Environmental Impact Statement (Final EIS) for a different, 36-acre parcel of land in nearby Elk Grove. Stand Up for California (Stand Up), a group opposed to gaming, sued Interior Department officials (Department) in

federal court seeking a preliminary injunction but its motion was denied. BIA also denied its request for a stay in the acquisition process but the BIA moved forward. The Environmental Protection Agency (EPA) filed a Federal Register notice of the Final EIS, which created a 30-day waiting period that expired Jan. 17, 2019. Two days after the waiting period expired the Department issued a Record of Decision (ROD) approving Wilton's application and authorizing acquisition of the Elk Grove parcel in trust. The Court had previously rejected several of Stand Up's claims. In the instant case, the Court granted summary judgment in favor of the government and Wilton on Stand Up's remaining claims, holding that (1) Stand Up, which included residents of Elk Grove, had standing to sue based on allegations that they would be "affected by the environmental and economic impacts of the Rancheria's proposed trust acquisition and tribal casino," (2) Wilton, whose tribal status had been terminated under the California Rancheria Act but later restored by agreement with the federal government, was a tribe under federal jurisdiction for purposes of Section 5 of the Indian Reorganization Act and, therefore, eligible to have land acquired in trust, (3) Stand Up had no standing to challenge the acquisition of the Elk Grove site based on existing encumbrances, and (4) the Department had complied with the National Environmental Policy Act (NEPA) and the Administrative Procedure Act (APA): "Stand Up argues that encumbrances on the Elk Grove site prevent it from qualifying as 'Indian lands' under the IGRA, … Stand Up claims that the Department violated the APA by failing to resolve the encumbrances. … But Stand Up lacks Article III standing to assert this because they do not have an interest in the Department's title examination process. … The Department's regulations do not require that all encumbrances be eliminated before acquiring land. The key question is whether the Secretary 'determines that the liens, encumbrances or infirmities make title to the land unmarketable.' 25 C.F.R. § 151.13(b). If title will be unmarketable, the Secretary '*shall* require elimination' of the encumbrances before 'taking final action on the acquisition.' *Id*. (emphasis added). But if the Secretary concludes title will remain marketable despite the liens, encumbrances, or infirmities, elimination is discretionary."

In *Johnson v. Oneida Nation Enterprises, LLC*, 2019 WL 5091952 (N.D.N.Y. 2019), Johnson sued Defendant Oneida Nation Enterprises, LLC pursuant to **Title VII of the Civil Rights Act**, as amended, 42 U.S.C. § 2000e *et seq.* (Title VII) alleging sex and race discrimination. The district court accepted the magistrate's recommendation to dismiss: "Judge Baxter correctly determined that Plaintiff's claim pursuant to Title VII relating to alleged sex and race discrimination must be dismissed for lack of subject matter jurisdiction. Title VII prohibits discrimination by an employer based on 'race, color, religion, sex, or national origin.' 42 U.S.C. § 2000e-2(a) (2018). Title VII 'expressly excludes American Indian tribes from its definition of covered employers.' *Tremblay v. Mohegan Sun Casino*, 599 Fed. Appx. 25, 25 (2d Cir. 2015) (citing 42 U.S.C. § 2000e(b)). A casino that is 'owned by an agency of a federally recognized American Indian tribe ... is not an employer under Title VII.' *Tremblay*, 599 Fed. Appx. at 25. The Oneida Indian Nation is a federally recognized Indian tribe. … Defendant is a corporation owned by a federally recognized Indian tribe and, as such, is not an 'employer' under the statutory definition of Title VII. Therefore, the Court does not have subject matter jurisdiction over Plaintiff's claim."

In ***Lumas v. United States***, 2019 WL 5086576 (S.D.Cal. 2019), Lumas was a passenger in a car driven by Antone, who was employed by the Quechan Indian Tribe as a Tribal Language Preservation Coordinator. Lumas sued the United States under the **Federal Tort Claims Act (FTCA)**, alleging that Antone's position, although not funded under the Indian Self-Determination and Education Assistance Act (ISDEAA), was "for the benefit of Indians," and, therefore, within the scope of ISDEAA's provision permitting FTCA claims for claims arising out of the performance of ISDEAA contracts. The Court disagreed: "However, the ISDEAA does not say that all grants for the benefit of Indians must necessarily be a self-determination contract; it specifically provides that a 'self-determination contract' means a contract...entered into under subchapter I of this chapter between a tribal organization and the appropriate Secretary.' … The Native Language Preservation and Maintenance grant funding Antone's position was entered into under an entirely different Title than subchapter I of Title 25. … Lumas has failed to show that an ISDEAA contract underwrote Antone's position with the Quechan Indian Tribe. Accordingly, sovereign immunity has not been waived and Lumas's complaint is dismissed for lack of subject matter jurisdiction."

In *Gibbs v. Stinson*, 2019 WL 4752792 (E.D. Va. 2019), plaintiffs sued individuals and entities that owned and invested in Think Finance and its subsidiaries (Think Finance), which had allegedly formed and operated multiple tribally-owned **internet lending** companies for the purpose of making loans in violation of state usury laws, unjust enrichment, and the Racketeer Influenced and Corrupt Organizations (RICO) Act. The various relevant loan agreements with borrowers provided for arbitration of disputes under the laws of the respective tribal lenders. Citing standards

established by the Fourth Circuit Court of Appeals, the district court held that one of the arbitration clauses was enforceable. With respect to the others, the court denied motions to compel arbitration and denied motions to dismiss claims based on lack of personal jurisdiction and failure to state a claim: "The Court concludes that Plaintiffs' allegations, read favorably, suffice to show that Defendants engaged in the collection of the unlawful debt 'in order to... maintain' its interest in and control over the a [sic] purportedly unlawful lending operation in violation of RICO. 18 U.S.C. § 1962(b). As a result, Count II, the Maintain Control Over Enterprise Claim, survives the Motion to Dismiss."

In *Pueblo of Jemez v. United States*, 2019 WL 4740604 (D.N.M. 2019), the Jemez Pueblo 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." After a bench trial, the district court granted judgment of dismissal to the federal government. In a 200-page decision, the Court concluded that "[a]lthough the evidence proves that Jemez Pueblo has actually and continuously used and occupied the Valles Caldera for a long time, the evidence also shows that many Pueblos and Tribes also used the Valles Caldera in ways that defeat Jemez Pueblo's aboriginal title claim. … Pueblo of Jemez does not possess aboriginal title to the lands that encompass the Valles Caldera National Preserve, and, accordingly, does not have the exclusive right to use, occupy, and possess those lands … title to the Valles Caldera National Preserve is quieted in Defendant United States of America."

In *Cayuga Nation v. Campbell*, 2019 WL 5549801 (N.Y. 2019), one faction of the Cayuga Nation, the Halftown Council, sued another faction, the Jacobs Council, in New York State, alleging that the defendants lacked authority to act on behalf of the Nation. The trial court denied the Jacobs Council's motion to dismiss on jurisdictional grounds but New York's highest court reversed, holding that it lacked **jurisdiction over an internal dispute**: "To resolve these claims, New York courts would have to decide whether defendants were, at various times, or remain legitimate leaders of the tribe, a question that turns on disputed issues of tribal law that are not cognizable in the courts of this state given the Nation's exclusive authority over its internal affairs. Contrary to plaintiff's contentions, we cannot avoid this fundamental jurisdictional problem by decontextualizing a limited recognition determination issued by the Federal Bureau of Indian Affairs (BIA) that recognized the plaintiff faction as the tribal government for the purpose of distributing federal funds. We therefore hold that New York courts lack subject matter jurisdiction to consider this dispute."

In *Lozeau v. Anciaux*, 2019 WL 4786882 (Mont. 2019), Lozeau, allegedly a member of the Confederated Salish and Kootenai Tribes (CSKT), was convicted in Montana state court for an offense he committed on the CSKT's Flathead Reservation. Lozeau challenged his conviction on the ground that the CSKT had never consented to the State's **jurisdiction under Public Law 280**. The Montana Supreme Court rejected the challenge: "In 1993, the Montana Legislature adopted a statute allowing the CSKT to withdraw their consent to the exercise of State criminal misdemeanor and civil jurisdiction. … In September 1994, the CSKT successfully withdrew State concurrent jurisdiction over most forms of criminal misdemeanor jurisdiction in Resolution 94-123. … Governor Racicot then issued a proclamation on September 30, 1994, to give effect to Tribal Resolution 94-123. … Tribal Resolution 94-123 did not affect the State's jurisdiction over felonies and civil matters within the scope of Tribal Ordinance 40-A (Revised). … Recently, during the Montana 2017 legislative session, § 2-1-306, MCA, was amended to allow the CSKT to completely withdraw their consent to be subject to criminal jurisdiction of the State, including felonies. … However, the CSKT has not exercised that authority. Lozeau's argument that PL-280 was never properly consented to by the CSKT is incorrect."

In *Caddo Nation of Oklahoma v. Wichita and Affiliated Tribes*, 2019 WL 4898669, _Fed.Appx._(10th Cir. 2019), the Wichita and Affiliated Tribes (Wichita Tribe), originally located in Kansas but now based in Caddo County, Oklahoma, obtained funds from the Department of Housing and Urban Development to build a Tribal History Center on land the federal government held in trust for the Wichita Tribe and two neighboring tribes, including the Caddo Nation, and which had been the subject of a partition agreement among the tribes. The Caddo Nation sued in federal court, asserting that the site contained graves of Caddo ancestors and that the Wichita Tribe had failed to satisfy the requirements of the National Historic Preservation Act (NHPA) and National Environmental Policy Act (NEPA). The Wichita Tribe asserted sovereign immunity. The district court dismissed the claims as moot because the History Center had been completed. The Tenth Circuit affirmed in part and reversed in part, holding that (1) the Wichita Tribe waived its immunity by agreeing to comply with NEPA requirements as a condition of the grant it received from HUD, and (2) the case would be remanded to determine whether one of the grant project components, a ceremonial dance grounds,

had been completed for purposes of determining mootness: "The APA generally waives the Federal Government's immunity from a suit 'seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority.' 5 U.S.C. § 702. By specifically accepting and assuming HUD's rights, duties, and obligations to act in conformity with NEPA and NHPA, Wichita Tribe waived its **sovereign immunity** for just the type of APA-based suit at issue in this case. … The statutory and regulatory scheme set out above, however, could not be more clear: HUD can condition the provision of a grant to an Indian tribe on the tribe's acceptance of HUD's obligation to comply with NEPA and NHPA, an obligation enforceable via the APA. 5 U.S.C. § 702; 42 U.S.C. §§ 5304(g), 5306(a). Because HUD did so condition the grant to Wichita Tribe, and because Wichita Tribe affirmatively waived its sovereign immunity in the certification included in the EA, this court has subject matter jurisdiction over Caddo Nation's APA-based NEPA and NHPA claims against Wichita Nation."

In *Singer v. Palmer*, 2019 WL 5444792 (Ariz. App. 2019), Singer, an Arizona resident, contended that he was a beneficiary of a contract between two Canadian companies, Mondex and Mercury Terrain & Maison Inc. (Mercury), and sued Mondex in Arizona state court. The court dismissed for lack of personal jurisdiction, holding that Singer had failed to show that Mondex had sufficient contacts with the State. Several months later, Singer filed an identical suit in state court but also included Mondex's founder, Palmer, and served process on Palmer and Mondex by serving Palmer while he was at Scottsdale Community College located within the Salt River Pima-Maricopa Indian Community (Tribe) reservation. The trial court dismissed for lack of personal jurisdiction. The Court of Appeals affirmed in part and reversed in part, holding that the previous judgment precluded a second suit against Mondex but that the court had **jurisdiction** over Palmer and that state, not tribal, rules relating to service of process applied: "[W]hen a non-Indian defendant is served on a reservation within the State and the subject matter concerns off-reservation activities, service of process in compliance with the Arizona Rules of Civil Procedure is valid."

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