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Texas federal court holds the Indian Child Welfare Act unconstitutional

In *Brackeen v. Zinke* (N.D. Tex. 2018), non-Indian couples residing in Texas, Nevada and Minnesota sought to adopt Indian children subject to the requirement of the **Indian Child Welfare Act (ICWA)** that, absent good cause, Indian children be placed with members of the child's extended family, a member of the child's Indian tribe or another Indian family, in that order, in preference to non-Indian families. Although in two of the three cases, the couples were permitted to adopt the desired children, they sued anyway, contending that they were harmed by the additional hurdles imposed by the ICWA and its implementing regulation (Final Rule) and that ICWA and the Final Rule mandated racial and ethnic preferences in violation of state and federal law. Three states – Texas, Louisiana and Indiana - joined the suit as plaintiffs. The plaintiffs sought an order declaring the Final Rule be declared invalid and set aside as a violation of substantive due process and a declaration that ICWA is unconstitutional under Article One and the Tenth Amendment of the United States Constitution because these provisions violate the Commerce Clause, intrude into state domestic relations and violate the anti-commandeering principle. The Plaintiffs also sought a declaration that ICWA violated the equal protection guarantee of the Fifth Amendment to the United States Constitution. The Court rejected the government's argument that ICWA is based on the political status of tribal governments. The Court granted the Plaintiffs summary judgment on most of their claims, concluding that:

(1) ICWA is based on a racial, not political, classification and the government failed to show that the statute was narrowly tailored to advance a compelling interest,

(2) ICWA "impermissibly grants Indian tribes the authority to reorder congressionally enacted adoption placement preferences by tribal decree and then apply their preferred order to the states" in violation of the non-delegation doctrine,

(3) provisions of ICWA requiring state courts and executive agencies to apply federal standards and directives to state-created claims violated the "Non-commandeering" doctrine under the Tenth Amendment,

(4) the Bureau of Indian Affairs (BIA) lacked authority to adopt the Final Rule, which was, therefore, invalid under the Administrative Procedure Act, and

(5) Congress was without authority under the Commerce Clause to enact the ICWA. The Court's decision is certain to be appealed to the Fifth Circuit Court of Appeals.

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.

Other selected court decisions

In *Pakootas v. Teck Cominco Metals, Ltd.,* 2018 WL 4372973 (9th Cir. 2018), the Confederated Tribes of the Colville Reservation, individual tribal members and the State of Washington sued Teck Cominco Metals, the operator of a Canadian smelting plant under the Comprehensive Environmental Response, Compensation and Liability Act **(CERCLA)**, seeking recovery of response costs and natural resource damages allegedly resulting from dumping of smelter slag and/or effluent into upper Columbia River. The district court held that the Tribes were entitled to $8,253,676.65 in past response costs incurred through 2013, along with prejudgment interest, and the Ninth Circuit affirmed, holding that:

> (1) the Court had personal jurisdiction over Teck,
>
> (2) the district court's determination of the Tribe's "removal" costs, including litigation-related investigation costs, was appropriate,
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> (3) the Tribe was entitled to attorney fees, and
>
> (4) the district court properly rejected Teck's defenses based on divisibility and several liability:

"The district court found ample evidence that Teck's leadership knew the Columbia River carried waste away from the smelter and that much of this waste travelled downstream into Washington, yet Teck continued to discharge hundreds of tons of waste into the river every day. It is inconceivable that Teck did not know that its waste was aimed at the State of Washington when Teck deposited it into the powerful Columbia River just miles upstream of the border. … We conclude that the district court properly awarded the Colville Tribes all investigation expenses as costs of removal, even though many of these activities played double duty supporting both cleanup and litigation efforts."

In *UNITE HERE International Union v. Shingle Springs Band*, 2018 WL 4566299 (9th Cir. 2018), UNITE HERE International Union (Union) demanded arbitration under its Memorandum of Agreement (MOA) with the Shingle Springs Band of Miwok Indians, contending that the Tribe violated the MOA when it terminated the employment of two supporters of the Union. The MOA provided that the parties must submit any disputes over the interpretation of the MOU to arbitration. The Tribe sued, contending that the court should decide the question of arbitrability. The district court ordered the Tribe to arbitrate and the Ninth Circuit affirmed: "Given the broad language of the arbitration provision, we cannot say with positive assurance that it is not susceptible of an interpretation that covers the asserted dispute … the Tribe's challenges to the rest of the contract—regarding the legality of interpreting the MOA to cover the termination dispute, and the scope of the **sovereign immunity waiver**—are for the arbitrator to decide." (Including Court's emendations)

In *Brakebill v. Jaeger*, 2018 WL 4559487 (8th Cir. 2018), plaintiffs, members of North Dakota Indian tribes, challenged North Dakota's voter identification law, asserting violations of the **Equal Protection Clause** of the Fourteenth Amendment and Section 2 of the Voting Rights Act. The district court enjoined the North Dakota Secretary of State (Secretary) from enforcing the requirement that a voter produce identification or a supplemental document with a "current residential street address," and ordered that the Secretary accept "another form of identification that includes either a 'current residential street address' or a current mailing address (P.O. Box or other address) in North Dakota" and also ordered the Secretary to accept any form of tribal identification that sets forth a name, date of birth, and current residential street address or mailing address. Finally, the court required that if a voter's identification does not include a current residential street address, then the Secretary must accept supplemental documents from a tribal government that include either a current residential street address or a mailing address. The Eighth Circuit Court of Appeals stayed the portion of the order barring the state from requiring a street address: "[W]e conclude that the Secretary has established a likelihood of success on appeal. A plaintiff seeking relief that would invalidate an election provision in all of its applications bears a heavy burden of persuasion,' … Even assuming that a plaintiff can show that an election statute imposes 'excessively burdensome requirements' on some voters, … that showing does not justify broad relief that invalidates the requirements on a statewide basis as applied to all voters. … [E]ven assuming that some

communities lack residential street addresses, that fact does not justify a statewide injunction that prevents the Secretary from requiring a form of identification with a residential street address from the vast majority of residents who have residential street addresses."

In *Oglala Sioux Tribe v. Fleming* (8th Cir. 2018), the Oglala Sioux Tribe, parens patriae on behalf of its members, brought civil rights claims against various South Dakota officials under 42 U.S.C. § 1983, alleging that procedures used by the defendants to remove children temporarily from their homes in exigent circumstances deprived parents of a meaningful hearing in violation of the Due Process Clause of the Fourteenth Amendment and the **Indian Child Welfare Act**. The district court denied the defendants' motion to dismiss and granted the Tribe injunctive relief, ordering the defendants to institute remedial measures. The Eighth Circuit Court of Appeals vacated the judgment and remanded with instructions to dismiss the case, holding that "the district court should have abstained from exercising jurisdiction under principles of federal-state comity articulated in *Younger v. Harris*, 401 U.S. 37 (1971), and later cases."

In *Pauma Band of Luiseno Mission Indians v. State of California*, 2018 WL 4680030 (S.D. Cal. 2018), the Pauma Band of Luiseno Mission Indians (Tribe) sought to negotiate a new tribal-state gaming compact with California under the **Indian Gaming Regulatory Act (IGRA)**. When negotiations broke down, the Tribe sued to trigger a remedial scheme designed to result in a new gaming compact, asserting that the State had failed to negotiate in good faith. The court denied the Tribe's motion for summary judgment and granted the State's counter motion: "[T]he joint record does not demonstrate the State has failed to negotiate in good faith. The State met with Pauma several times and expressed a willingness to agree that the Tribe could offer additional forms of gambling at its casino. The State also reached out to other parties for information and obtained sample agreements to help Pauma and the State negotiate a new compact. In addition, to guide the parties' future discussions, the State transmitted a first draft of a new compact. Although Pauma now takes issue with the terms proposed in this initial draft, the Tribe never objected to these terms or otherwise responded to the State's proposal. Finally, at the time Pauma stopped participating in the negotiations and filed this lawsuit, nothing indicated the State was unwilling to continue to negotiate with the Tribe to reach a compromise."

In *Pauma Band of Luiseno Mission Indians v. UNITE HERE International Union*, 2018 WL 4680029 (S.D. Cal. 2018), UNITE HERE International Union, which represents service and manufacturing employees, began an organizing drive at Casino Pauma, a gaming enterprise owned by the Pauma Band of Luiseno Mission Indians. The Tribe sued the Union, the State of California and California Governor Jerry Brown. The Tribe alleged that, by filing the series of unfair labor practice charges directly with the **National Labor Relations Board (NLRB)**, the Union skirted a binding dispute resolution process in the Tribe's labor ordinance that the State required the Tribe to enact in connection with its compact under the Indian Gaming Regulatory Act (IGRA). The Tribe alleged that the State defendants failed to take "reasonable efforts to ensure" the Union would comply with the dispute resolution process, including by failing to 'direct the Union to first file any such unfair labor practice claims through' that process, as opposed to proceeding directly before the NLRB." The Court dismissed for lack of jurisdiction: "[W]hen a party pursues declaratory relief, the court must determine whether Article III's case or controversy requirement is satisfied. … There is no allegation that the State controls the Union or has aided the Union in filing unfair labor practice charges with the NLRB. There is similarly no allegation that the State has taken any action whatsoever against Pauma regarding the Ordinance during the Tribe's ongoing dispute with the Union. The Court recognizes that a model of the Tribal Labor Ordinance is incorporated into Pauma's Compact with the State. Under Section 10.4 and Addendum B of the Pauma Compact, the Tribe was required to adopt the Tribal Labor Ordinance. It did. If Pauma fails to 'maintain the Ordinance in effect during the term of [the] Compact,' the State has the power to terminate the Compact on account of the Tribe's 'material breach.' But, again, there is no claim or evidence that the State has threatened to terminate the Compact or otherwise taken an adverse action against the Tribe. The gravamen of Pauma's pleading

is that the Union—not Pauma—has failed to adhere to the Ordinance."

In *Commonwealth of Pennsylvania v. Think Finance*, 2018 WL 4635750 (E.D. Penn. 2018), the Pennsylvania Attorney General sued Think Finance and others for violations of state lending laws, alleging that the Defendants partnered with Native American tribes in a so-called "rent-a-tribe" scheme to avoid state regulation under the cloak of the tribe's sovereign immunity. Think Finance issued subpoenas to non-parties Plain Green, LLC, a consumer lending business wholly owned and operated by the Chippewa Cree Tribe of the Rocky Boy's Reservation, and its former CEO Joel Rosette. The court granted the Tribe's and Rosette's motion to quash, holding that **sovereign immunity protected them from a subpoena** issued under Fed. R. Civ. Proc. 45: "The parties do not contest that Plain Green is an 'arm of the Tribe' sharing the Tribe's sovereign immunity from suit. … [T]ribal immunity from suit encompasses third-party subpoenas. 'A "suit," for purposes of application of tribal sovereign immunity, includes third-party subpoenas served on a tribe.' … We will follow, as the Dillon court did, the strict rule that in the context of civil subpoenas of non-party tribal entities, only a 'clear, unequivocal waiver' will suffice to waive tribal sovereign immunity. … Rosette is also immune because, contrary to Think Finance's characterization of their subpoena for him to testify in his 'individual capacity,' they seek his knowledge from his role as former CEO for Plain Green, when he was acting in an 'official capacity.' "

In *Nguyen v. Gustafson*, 2018 WL 4623072 (D. Minn. 2018), Nguyen, a non-Indian, and Gustafson, a member of the Shakopee Mdewakanton Sioux Community, married in Las Vegas in 2014. In 2017, Nguyen, then residing in California, filed for dissolution of marriage in California state court in June, 2017. The following month, Gustafson filed for dissolution of marriage in the Shakopee Mdewakanton Sioux Community Tribal Court. Upon receipt of a Tribal Court order dated August 10, 2017, in which that court confirmed its intent to proceed with the case, the California state court dismissed the proceedings before it. Nguyen moved to Minnesota and filed for divorce in state court and moved to dismiss the **tribal court action** on the ground that the court lacked personal and subject matter jurisdiction. The tribal court denied the motion and also denied Nguyen's motion for an interlocutory appeal on the jurisdiction issue. Nguyen then sued the tribal court and Gustafson in federal court to enjoin the tribal court proceedings on the ground that the tribal court lacked jurisdiction. The court denied the motion on the ground that Nguyen had not exhausted his tribal court remedies. After Nguyen voluntarily dismissed the tribal court, Gustafson moved to dismiss the federal court action and the court granted the motion, without prejudice: "The Court recognizes that exhaustion is not required … where an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith, where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of a lack of an adequate opportunity to challenge the court's jurisdiction…. [T]here was no evidence that the Tribal Court was motivated by a desire to harass Nguyen. …Second, this Court found that the assertion of tribal court jurisdiction was not so clear or patently invalid as to render further exhaustion futile. … After the Tribal Court's decision on the merits, if Nguyen wishes to file an appeal, the parties will be required to brief and argue the issues before the Tribal Court of Appeals. Only after the Tribal Court of Appeals has ruled and only if that ruling is unfavorable to Nguyen will review be sought in this Court." (Internal quotations and citations omitted).

In *Navajo Nation v. Wells Fargo*, 2018 WL 4608245 (D.N.M. 2018), the Navajo Nation sued Wells Fargo & Company (WFC) on its own behalf and as parens patriae on behalf of the Navajo people, alleging unlawful sales practices. The court:

> (1) dismissed the five causes of action arising under the Consumer Finance Protection Act, with prejudice, on the ground of res judicata on the basis that the Consumer Finance Protection Bureau had previously brought an action on behalf of all consumers,
>
> (2) dismissed causes of action under the federal Equal Credit Opportunity Act (ECOA), Electronic Funds Transfer Act (EFTA), Truth in Lending Act (TILA) and Fair Credit Reporting Act (FCRA), without prejudice, on the ground that they related to violations of individual tribal members' rights and "Plaintiff does not have standing in its

parens patriae capacity to bring claims that involve injuries to purely private interests," and

(3) dismissed the Nation's state and tribal law claims, without prejudice, for lack of **federal jurisdiction**.

In *Big Horn County Electric Cooperative, Inc. v. Big Man*, 2018 WL 4603276 (D. Mont. 2018), Big Man sued Big Horn Electric Cooperative in the Crow Tribal Court. The Crow trial court held that it lacked jurisdiction, but the Crow Court of Appeals held that it did and remanded, whereupon Big Horn sued in federal court to enjoin further tribal court proceedings for lack of jurisdiction. The magistrate judge recommended that Big Horn's action be dismissed for failure to exhaust tribal court remedies, but the federal district court rejected the recommendation and denied the motion: "The issue squarely presented to the Court is whether a non-Indian has **exhausted its tribal remedies** when a tribal appellate court expressly states the tribal court has jurisdiction over the case but the merits remain to be determined. … [T]he tribal court dismissed Alden Big Man's complaint for lack of subject matter jurisdiction. Big Man appealed. The tribal appellate court reversed the tribal court, stating '[t]his Court rules that the Crow trial court has subject matter jurisdiction over this matter consistent with this opinion ... [t]his case is REMANDED to the Crow trial court to rule on the non-jurisdictional merits of [Big Man's] motion for summary judgment.' … Under Elliott and Ford Motor Co., Big Horn therefore satisfied its exhaustion requirement because the tribal appellate court took the opportunity to rule on the jurisdictional question and expressly held the tribal court had jurisdiction."

In *Aguilar v. Rodriguez*, 2018 WL 4466025 (D. N.M. 2018), Aguilar was convicted in the Pueblo of Santo Domingo Tribal Court of two counts of fraud, two counts of larceny and two counts of conspiracy and sentenced to a total sentence of 2,160 days' incarceration, $20,000 in restitution, and $700 in fines. The federal district court denied his petition for habeas corpus relief based on alleged violations of the **Indian Civil Rights Act (ICRA)**, holding that Aguilar failed to exhaust his tribal remedies, specifically the right to appeal referenced in the Advisement of Rights Order: "The Court accepts that the only indication of a formal tribal remedy is the 'Advisement of Rights Order.' The Court presumes that other indications of a formal tribal remedy, such as written appellate rules or a sitting appellate tribunal, are not present. Based on these facts, the question is whether the Petitioner has shown that no tribal remedy actually exists. He has not. The 'Advisement of Rights Order,' … evidences a formal tribal remedy. Petitioner has made no attempt to exhaust that remedy. The cases Petitioner relies on do not support his position. Petitioner has cited no case—and the Court has searched in vain for one—in which a court proceeded to the merits of a tribal habeas claim where (1) the petitioner had made no attempt to exhaust, even though (2) there was some indication of a formal remedy available to the petitioner."

In *Moncrief v. United States*, 2018 WL 4567136 (D.D.C. 2018), the Department of Interior (DOI *or* Interior) Bureau of Land Management (BLM) in 1993 had issued Moncrief leases to drill for gas and oil in the Badger-Two Medicine area of the Lewis and Clark National Forest in northwestern Montana and approved applications for permission to drill (APD) in areas designated. In 2012, the site of the Moncrief lease was added to a traditional cultural district (TCD), pursuant to the **National Historic Preservation Act (NHPA)**, of the Blackfeet Tribe. In 2014, the U.S. Forest Service determined that the drilling would adversely affect the TCD and that there were no mitigation measures agreeable to the Blackfeet Tribe that would allow for development in the Badger-Two area. In the waning days of the Obama administration, DOI concurrently published a press release noting that all leases in the Badger-Two area were being terminated for non-compliance with the NHPA. Moncrief sued under the Administrative Procedure Act, contending that the cancellation of his lease was arbitrary and capricious. The district court agreed and granted his motion for summary judgment: "The reasonableness of an agency rescission of a leaseholder's right must thus be judged in light of the time that has elapsed and the resulting reliance interests at stake. Even if agencies have the power to rescind decisions made by their predecessors, they must still exercise that power within a reasonable amount of time. An unreasonable amount of time

to correct an alleged agency error, where the record shows that error was readily discoverable from the beginning, violates the APA. … [F]ederal defendants' exercise of authority to cancel Moncrief's lease for pre-lease errors was arbitrary and capricious because of the failure to consider the substantial reliance interests at play. For nearly a decade, Moncrief, along with other leaseholders, received letters from the Secretary suspending their leases under the understanding that Interior was considering the area for wilderness designation. … They received no notice of any supposed violation. It was not until 2002 that Interior began consultation with the Blackfeet Nation under Section 106 of the NHPA. … Even then, leaseholders received no notice that their leases might be subject to cancellation. Defendants cannot hide behind the consultation process as a fair notice to leaseholders that something might be amiss with their leases. The agency's own delinquency in reaching a resolution does not diminish the reliance interests of leaseholders who had been waiting on that resolution for more than thirty years. Thus, I find that federal defendants' failure to consider those interests was arbitrary and capricious in violation of the APA. 5 U.S.C. § 706(2)(A)." Accord, *Solenex LLC v. Jewell*, 2018 WL 4567132 (D.D.C. 2018)

In *Persimmon Ridge, LLC v. Zinke*, 2018 WL 4471775 (N.D. Okla. 2018), the Osage Nation (Tribe) owned subsurface **mineral rights** to approximately 1.5 million acres in Osage County. Under federal regulations, the Tribe may lease its subsurface rights, provided the Secretary of Interior (Secretary) performs an environmental assessment, the lessee submits, and the Secretary approves an application for permit to drill (APD) and the lessee pays the surface owner a commencement fee. Four surface owners sued the Secretary of Interior and Interior Department (DOI) officials, alleging that the Bureau of Indian Affair's (BIA) reliance on a 1979 environmental assessment purporting to cover the Osage Nation "oil and gas leasing program" generally did not satisfy the BIA requirement under the National Environmental Policy Act with respect to specific site leases. The court denied the DOI's motion to dismiss for lack of subject matter jurisdiction but granted the motion to dismiss based on failure to state a claim based on the plaintiff's failure to file claims within the six year statute of limitation applicable to claims under the Administrative Procedure Act: "Complaint fails to allege facts establishing either that the alleged violations occurred after January 17, 2011, or that, with respect to violations occurring before that date, Plaintiff had diligently pursued its rights or that any extraordinary circumstances stood in its way."

In *Kialegee Tribal Town v. Zinke*, 2018 WL 4286406 (D.D.C. 2018), Kialegee Tribal Town had organized under the Oklahoma Indian Welfare Act of 1936 (OIWA) in 1936 and received a corporate charter from the Secretary of Interior in 1942. The Town is included on the Department of Interior's (DOI) list of Indian entities "recognized and eligible for funding and services from the Bureau of Indian Affairs (BIA) by virtue of their status as Indian Tribes." The Town sued Interior Department officials seeking a declaration that the Town, as a successor to the Creek Nation that entered into treaties with the United States, has treaty-protected rights of **shared jurisdiction** over land within the boundaries of the historic Creek Nation reservation, including areas outside the Town itself. The Court dismissed for failure to state a claim, holding that (1) the court had federal question jurisdiction under 28 U.S.C. §§ 1331 and 1362 and (2) the Town failed to state a claim because none of the actions allegedly taken by the federal government contrary to the Town's alleged jurisdictional rights was a "final action" from which the Town could time seek judicial review under the Administrative Procedure Act: "It is not enough for Plaintiff to simply claim that a statute has been violated, which affects Plaintiff in a negative way, and to make conclusory statements regarding Federal Defendants' position. Instead, Plaintiff needs to allege with some specificity the actions allegedly taken by Federal Defendants, which give rise to Plaintiff's cause of action."

In *Romero v. Wounded Knee LLC*, 2018 WL 4279446 (D.S.D. 2018), Romero, a member of the Oglala Sioux Tribe, brought claims under Title VII of 1964 Civil Right Act, the common law of torts and the South Dakota Human Relations Act against Wounded Knee LLC (WK LLC), Wounded Knee Community Development Corporation (WKCDC) and Mark St. Pierre, alleging that she was sexually assaulted and harassed

while employed by defendants. The district court stayed the action and directed the plaintiff to file a declaratory judgment action in tribal court to determine whether WKCDC was sufficiently related to the Tribe to share its sovereign immunity: "Even if the court assumes federal courts possess exclusive Title VII jurisdiction that does not mean plaintiff may disregard tribal court exhaustion in this case. Plaintiff advances Title VII claims—along with torts pursuant to South Dakota law and allegations under the South Dakota Human Relations Act of 1972—against WKCDC. … WKCDC provides a colorable argument for it being entitled to tribal **sovereign immunity**. … Whether tribal sovereign immunity blocks plaintiff's claims against WKCDC is an inquiry antecedent to whether a non-federal court may exercise authority over Title VII claims. If WKCDC is not an entity plaintiff may sue, the latter inquiry does not matter. The law of the Eighth Circuit is clear when a party raises tribal sovereign immunity as a defense and tribal court remedies are not exhausted: the case goes to tribal court."

In *Long v. Barrett*, 2018 WL 4251853 (D.N.J. 2018), Athena Mata, Maria Mata, and Logistic Oil borrowed $25,000 from the Longs, guaranteed by Barrett, a member of the Viejas Band of Kumeyaay Indians, and secured by a pledge of Barrett's per capita payments. The loan agreement provided for payment of Barrett's **per capita** to an escrow agent in the event of default. When the Matas and Logistic failed to repay the loan, Longs sought to enforce the guaranty, but Barrett directed the tribal treasurer not to honor the pledge. Because the loan was not promptly repaid, the Longs incurred a $10,000 fine from the IRS for withdrawing and not replacing IRA funds and lost their home in foreclosure. The Longs sued in federal court. The court had previously held that the tribal treasury who declined to disburse Barrett's per capita payments, was protected by the Tribe's sovereign immunity. Neither Barrett, Matas or Logistic responded to the complaint. The court granted the Longs a $95,000 default judgment, including $50,000 in punitive damages.

In Re: National Prescription Opiate Litigation, 2018 WL 4203536 (N.D. Ohio 2018) involves the Multidistrict Litigation (MDL) consolidating 1150 lawsuits brought by government entities, including 53 by Indian tribes, hospitals, third-party payors and individuals from across the nation against the manufacturers, distributors and retailers of prescription opiate drugs, alleging they are liable for the costs Plaintiffs have incurred and will continue to incur, in addressing the opioid public health crisis. The Cherokee Nation and Lac Courte Oreilles Band of Lake Superior Chippewa Indians (Lac Courte Oreilles) had initially alleged only state common law claims against McKesson Corporation and filed their suits in the Cherokee Nation Tribal Court and Circuit Court for Sawyer County, Wisconsin, respectively. On the motion of one of the defendants, the cases were removed to the federal district courts in Oklahoma and Wisconsin under the Federal Officer Removal Statute, which permits removal from state to federal court of any "civil action or criminal prosecution that is commenced in a State court and that is against or directed to... any officer (or any person acting under that officer) of the United States...in an official or individual capacity, for or relating to any act under color of such office." From the Oklahoma and Wisconsin federal courts, the cases were consolidated in the MDL in Ohio. The MDL court denied the two tribes' motion to remand, holding that McKesson was a "federal officer" for purposes of the statute because of its prime pharmaceutical vendor (PPV) contract with the Veterans Administration (VA): "Federal officer removal requires a private corporate defendant to show that:

> (1) it is a person who acted under the direction of a federal officer,
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> (2) the actions for which it is being sued were performed under the color of federal office, and
>
> (3) there is a colorable federal defense to the plaintiff's claims.
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> …

A private corporate defendant can show that it acted under the direction of a federal officer in situations where 'the relationship between the contractor and the Government is an unusually close one involving detailed regulation, monitoring, or supervision.' … McKesson argues that it acted under the direction of a federal officer because absent the PPV Contract, the VA would have to warehouse and distribute drugs itself, a model it previously abandoned. In this way, McKesson argues, it helps the VA (and IHS)

carry out their duties of providing prescription drugs to the Cherokee Nation and the Lac Courte Oreilles Band of Lake Superior Chippewa Indians. … The Court is persuaded by the Supreme Court's mandate to give the Federal Officer Removal Statue a liberal interpretation and also swayed by the fact that all of the other Native American Tribe cases have been removed to federal court and transferred to the Opioid Crisis MDL, or were filed directly in federal court. As of August 31, 2018, there are 51 Indian Tribe lawsuits consolidated in the MDL, and besides Cherokee and Lac Courte Oreilles, no other tribes have filed remand motions, and if they did, the tribe subsequently withdrew its motion. The Court believes this is in part due to recognition on the part of the tribes that it is in their individual and collective best interest to be part of the MDL."

In *People ex rel. Bercerra v. Huber*, 2018 WL 4579915 (Cal. App. 2018), Huber, a member of the Wiyot Tribe, owned and operated a wholesale and retail business from her home on the Tribe's Table Bluff Reservation selling "cigarettes manufactured by Indians on Indian lands, ... shipped and sold through Indian and tribally-owned distributors to Indian and tribally-owned retail smokeshops located on Indian lands." Retail sales to both member and nonmembers of the Tribe occurred on site. The wholesale business involved over two dozen Indian smokeshops owned either by Indian tribes or individual tribal members and operated within other tribal reservations with deliveries made by truck, using California highways. Huber Enterprises is licensed to do business pursuant to the Wiyot Tribal Business Code and the Wiyot Tribal Tobacco Licensing Ordinance No. 01-10, which required licensees to pay a quarterly excise tax administered through a tribal tax stamp system. Taxes collected in this manner are deposited into a dedicated Tribal Tobacco Fund, earmarked solely for the expenses of "[t]obacco-related school and community health education programs," "[s]moking and tobacco-use prevention measures," and "[a] ssistance to tribal and community members for cessation of smoking and tobacco use."

The California Attorney General (AG) sought to enforce three state laws governing the sale of cigarettes and tobacco products. The Directory Act, enacted pursuant to the 1998 Tobacco Master Settlement Agreement (the MSA), which requires that cigarettes sold in the state be produced by manufacturers who either (a) have signed the MSA and agreed to pay substantial sums to the state to cover, among other things, health care costs generated by tobacco use among Californians, or (b) in lieu of signing the MSA, have agreed to pay sufficient funds into a reserve fund in escrow to guarantee a source of compensation should liability arise. Under the Directory Act, the Attorney General (AG) maintains a published list of all cigarette manufacturers who have annually certified their compliance with the requirements of the MSA or the alternative escrow funding requirements. Under the Fire Safety Act, any manufacturer of cigarettes sold in California must meet specified testing, performance and packaging standards established for the purpose of minimizing the fire hazards caused by cigarettes, including that cigarettes be packaged in a specified manner and certified with the State Fire Marshal as compliant. It is categorically illegal for any "person" to "sell, offer, or possess for sale in this state cigarettes" that do not comply with the Fire Safety Act. The State also imposes an excise tax to be "paid by the user or consumer" but collected by distributors at the time of sale and remitted by them to the state. The trial court granted the AG summary judgment, rejecting Huber's arguments challenging the **State's regulatory authority** over her reservation-based business. The Court of Appeals affirmed in part and reversed in part, holding that:

> (1) the Directory Act, and the Fire Safety Act, rested on statutes that were criminal/prohibitory in nature and could be enforced under Public Law 280's grant of criminal jurisdiction,
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> (2) the court could not enforce the Tax Stamp Act against Huber, and
>
> (3) enforcement of the Directory Act and Fire Safety Act against Huber was not preempted by federal law under Supreme Court decisions: "The trial court correctly concluded that the balance of federal, tribal, and state interests weighs in favor of California.

Huber points to no federal interest, expressed by statute or regulation, in promoting reservation sales of cigarettes and makes no claim that Congress, by statute or regulation, delegated to the Wiyots some form of authority that might oust the authority of the state in this area. To the extent the Wiyot Tribe, independently, has an interest in carving out a domain for its members in the cigarette sales business—Ordinance No. 01-10 appears to evidence just such an interest—the holding in *Colville* tells us that does not matter, absent a direct conflict. The court there rejected an invitation to use tribal cigarette tax and marketing regulations as a consideration weighing in favor of preemption. … Against a nonexistent federal interest and a limited tribal interest, California has a strong health and safety interest in policing cigarette sales. In the end, therefore, we arrive at the same conclusion the Black Hawk court did with respect to the Directory Act and the Fire Safety Act: 'The California tobacco directory law promotes public health by increasing the costs of cigarettes and discouraging smoking. [Citations.] The California Cigarette Fire Safety and Firefighter Protection Act law—providing ignition-propensity requirements—serves the public interest in reducing fires caused by cigarettes. ... [And n]o federal or tribal interest outweighs the state's interest in ... enforcing the California tobacco directory and cigarette fire safety laws.'"

In *Findleton's v. Coyote Valley Band of Pomo Indians*, 2018 WL 4572158, 2018 WL 4611142 (Cal. App. 2018), Findleton had performed work for the Coyote Valley Band of Pomo Indians (Tribe) under a Construction Agreement and Rental Contract as amended by a document known as the "Third Amendment." When the Tribe failed to pay him, he sued to compel arbitration under the agreements. The court awarded Findleton his attorney fees and ordered the Tribe to arbitrate. The California appellate affirmed, holding that:

(1) the Tribe had not raised, and therefore waived, the argument that only one of the two agreements authorized attorney fees but that the Tribe did not waive its sovereign immunity as to claims under that agreement,

(2) the trial court had jurisdiction to award fees against the Tribe, and

(3) the trial court was not obligated to abstain: "[T]here was no evidence before the trial court indicating there was a tribal court in existence in 2012 when Findleton first filed his petition to compel arbitration in the superior court…

Findleton's petition thus did not interfere with the Tribe's sovereignty in the way that filing such a petition in state court rather than initiating one in a functioning tribal court would have done. Nor would requiring exhaustion at this late date serve any purpose other than further delay of a case that is already six years old."

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