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Indian Nations update

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In *Brice v. Plain Green, LLC*, (9th Cir. 2021), non-Indian plaintiffs residing in California had taken short-term, high-interest loans offered over the internet by Plain Green, LLC or Great Plains, LLC, companies owned by the Chippewa Cree Tribe of the Rocky Boy's reservation and the Otoe-Missouri Tribe, respectively. Borrowers entered into contracts explicitly governed by tribal law, delegating to arbitrators the power to decide "any issue concerning the validity, enforceability, or scope" of the loan agreements and requiring the arbitrators to apply tribal law. Plaintiffs sued the lenders in federal court, alleging that the loans violated state usury laws and the federal Racketeering Influenced and Corrupt Organizations (RICO) Act. The district court denied the lenders' motion to compel arbitration but the Ninth Circuit, in a 2-1 decision destined for *en banc* review, reversed, holding that the delegation provision was enforceable because it did not preclude plaintiffs from arguing to an arbitrator that the arbitration agreement was unenforceable under the prospective-waiver doctrine and that the arbitrator, therefore, should address the enforceability issue. The panel further ruled that the choice-of-law provisions requiring application of tribal law were not contrary to the court's holding because they did not prevent plaintiffs' from pursuing their prospective-waiver enforcement challenge in arbitration.

In *Evans Energy Partners, LLC v. Seminole Tribe of Florida, Inc.*, 2021 WL 4244128 (M.D. Fla. 2021), Evans Energy Partners, LLC (EEP) entered into an agreement with Seminole Tribe of Florida, Inc., (STOFI), a wholly owned business arm of the Seminole Tribe, under which Evans would operate STOFI's petroleum distribution business. The contract provided that EEP would be entitled to a termination fee equal to fifty percent of the business's fair market value if STOFI terminated the contract and STOFI agreed to "a limited waiver of its Sovereign Immunity in order to allow Evans Energy to initiate a binding arbitration proceeding administered under the rules of the American Arbitration Association for sole and exclusive purpose of terminating the Management Agreement and compelling the payment of the Termination Fee as set forth in [paragraph] 2 above and said waiver shall include a waiver of immunity for collection of any sum awarded through the binding arbitration proceeding." Three years later, STOFI terminated the agreement and obtained a default judgment against EEP in tribal court for breach of contract. EEP attempted to compel STOFI to arbitrate the termination fee, but the AAA panel dismissed EEP's demand. EEP then sued STOFI in federal district court seeking a declaration that the tribal court had no jurisdiction to enter its final default judgment and an order compelling arbitration. The court dismissed based on STOFI's sovereign immunity. The court rejected STOFI's argument that the waiver did not satisfy the provision in STOFI's bylaws requiring that any waiver be limited to income or chattels "especially pledged or assigned" but determined that the waiver was ambiguous and, therefore, unenforceable: "Under section 7.13, 'the Company, through its parent company [STOFI],' agrees to waive its sovereign immunity for purposes of arbitrating any dispute concerning the termination fee under AAA rules. … Strangely, 'the Company'

is defined earlier in the M&O Agreement to mean 'STOFI,' which creates a glaring redundancy. … If that were not enough, the next sentence provides that neither STOFI nor any affiliated entities shall 'be named a party in any arbitration.' … Instead, EEP is only permitted to compel 'Seminole Energy' into arbitration. Both parties here seem to agree that 'Seminole Energy' was an entity that should have been created under the terms of the M&O Agreement, but for some reason never was. … the Court is left with nothing but the unclear language of the M&O Agreement to support STOFI's purported waiver of tribal sovereign immunity. That is not enough."

In *Native Village of Eklutna v. U.S. Department of Interior*, 2021 WL 4306110 (D.D.C. 2021), the Native Village of Eklutna (Village), a federally recognized Indian tribe based about twenty-seven miles northeast of Anchorage requested the Bureau of Indian Affairs to permit the Tribe to use a parcel of land known as the Ondola Allotment, land previously allotted to a tribal member under the Alaska Native Allotment Act of 1906, for gambling under Indian Gaming Regulatory Act (IGRA) and, for that purpose, submitted a proposed lease and a request for a determination that allotment was **"Indian lands" for purpose of the IGRA**. Relying on a 1993 "M opinion" by then-Solicitor of Interior Thomas Sansonetti (Sansonetti Opinion), the BIA rejected the Tribe's request. The Tribe sued the Department of Interior (DOI) under Administrative Procedure Act, contending that DOI's reliance on the Sansonetti Opinion was arbitrary and capricious and contrary to law. The district court disagreed and granted the government's motion for summary judgment: "In the case of the Alaska Native Allotments (of which the Ondola Allotment is one), Congress created an exception to the general rule that the territorial basis for tribal authority coincides with the federal Indian country status of lands. … The Alaska Native Allotments differed from allotments in the Lower 48 because (1) the Alaska Native Allotment Act did not make tribal membership a criteria for receiving an allotment, A.R. 2267, and (2) these allotments were not carved out of any reservation, A.R. 2268. The text of the Act also provided that the allotment 'shall be deemed the homestead of the allotee and its heirs.' … For these reasons, Sansonetti concluded that the Alaska Native Allotments were 'more similar to homestead act allotments rather than tribal affiliation public domain allotments.'" (Quotations and internal emendations omitted.)

In *Whalen v. Oglala Sioux Tribe*, 2021 WL 4267654 (D.S.D. 2021), Whalen sued various Oglala Sioux Tribe officials in federal court, alleging violations of tribal election law and requesting that the federal court overturn the results of a recent tribal election. The court dismissed for lack of jurisdiction: "Ms. Whalen's complaint challenging the procedures and outcome of the 2020 OST election is a tribal election dispute that is an entirely intra-tribal matter. Ms. Whalen presents no federal question, and the court lacks **subject matter jurisdiction** to address the merits of the case. Resolution of the dispute falls within the exclusive jurisdiction of the OST. … The court may not exercise jurisdiction over this case for an additional reason, which is that, absent a waiver, the Oglala Sioux Tribe enjoys sovereign immunity."

In *Maples v. Whitten*, 2021 WL 4255615 (N.D. Okla. 2021), Maples had pleaded guilty in Oklahoma state court in 2014 of sexually abusing a child and had been sentenced to a 25-year term. In 2019, Maples moved for postconviction relief in state district court. Relying on the Tenth Circuit's 2017 decision in *Murphy v. Royal* that the Muscogee Creek reservation had not been disestablished, he argued that his crime had been committed on the Cherokee reservation and that, as an Indian, he should have been prosecuted in federal or tribal court. The state court denied his motion and Maples failed to appeal within 30 days, as required under Oklahoma law. In March 2021, Maples filed a petition for habeas corpus in federal court, citing the Supreme Court's 2020 decision in ***McGirt v. Oklahoma*** and its simultaneous affirmation of *Murphy v. Royal*. The federal district court denied the petition, holding that Maples had failed to file his petition within one year after his 2014 state court conviction and rejecting Maples' argument that, under the Antiterrorism and Effective Death Penalty Act (AEDPA), he had one year to the date "on which the constitutional right asserted was initially recognized by the Supreme Court:" "[T]he Court agrees with Whitten that the McGirt Court 'did not recognize a new constitutional right' when it relied on clearly established Supreme Court precedent to determine that the Muscogee (Creek) Reservation created long ago by treaties has never been disestablished. … For these reasons, the Court concludes that § 2244(d)(1)(C) does not provide Maples a later commencement date for his one-year limitation period."

In *Easley v. WLCC II*, 2021 WL 4228876 (S.D. Ala. 2021), Easley, a non-Indian resident of Alabama, had **borrowed $5,250 from WLCC**, a corporation owned by, and organized under the laws of, the Oglala Sioux Tribe, at interest rates far exceeding those allowed under Alabama law. After WLCC sought to collect finance charges over $14,000, Easley initiated arbitration proceedings under AAA rules, as required by the loan agreements, and challenged the loan agreements as void under state law. The arbitrator agreed and issued a full and final arbitration award that WLCC had waived any sovereign immunity, the transactions involved off-reservation commercial activities to which sovereign immunity did not apply, and because each of the loans was extended without a license under the ALSA, the loan contracts were void in their entirety and ab initio. WLCC did not seek to vacate or appeal the award. Easley then filed an action in state court seeking confirmation of the arbitration award and, in addition, certification of a class of borrowers and disgorgement by WLCC of all amounts collected under void loan agreements. After WLCC removed to federal court, the court confirmed the arbitration award but ordered arbitration of Easley's class action claims for compensation under Alabama law.

In *Texas v. Alabama Coushatta Tribe*, 2021 WL 3884172 (E.D. Tex. 2021), the Ysleta del Sur Pueblo and Alabama-Coushatta Indian Tribes of Texas Restoration Act (Restoration Act) of 1987 restored the federal recognition of the two subject tribes but prohibited them from engaging in "[a]ll gaming activities which are prohibited by the laws of the State of Texas." When the Alabama-Coushatta Tribe (Tribe) sought to conduct gaming activities under the Indian Gaming Regulatory Act, the State sued and, in 2002, the federal district court issued a permanent injunction ordering the Tribe to "cease and desist operating, conducting, engaging in, or allowing others to operate, conduct, or engage in gaming and gambling activities on the Tribe's Reservation which violate State law." The court's order was affirmed by the Fifth Circuit. In 2015, the National Indian Gaming Commission (NIGC) determined that the Alabama-Coushatta Tribe was entitled to conduct **Class II gaming** under the Indian Gaming Regulatory Act. The Tribe subsequently offered electronic bingo at its Naskila Gaming facility. State officials sued to hold tribal officials in contempt and to enjoin tribal gaming operations. After a trial, the magistrate judge denied both motions, holding that the Tribe's bingo games were not in violation instead of State law because the State permitted charitable bingo: "The Court finds that because the State regulates bingo gaming, that gaming activity is not 'prohibited by the laws of the State of Texas' within the meaning of … the Restoration Act. Section 207(b) of the Restoration Act further emphasizes that nothing in the Restoration Act should be construed as a grant of regulatory jurisdiction to the State over the Tribe's present bingo activities through civil or criminal means. … The Court therefore concludes, based on the evidence presented, that the Tribe's bingo gaming activities conducted at Naskila are not subject to the State's restrictions governing bingo unless and until the State of Texas prohibits that gaming activity by law outright, as it has done with other gaming activities."

In *Apache Stronghold v. United States*, 519 F.Supp.3d 591 (D. Ariz. 2021), Apache Stronghold, a nonprofit purporting to consist of descendants of signatories of an 1852 treaty between the United States and the Western Apache, sued the federal government seeking to prevent conveyance of federal land to mining companies authorized by National Defense Authorization Act (NDAA), alleging that **land was held in trust** by the United States for Western Apaches under the treaty. The district court denied Apache Stronghold's motion for injunctive relief on grounds of standing and non-likelihood of success: "Where a treaty grants rights to an entire tribe rather than to individual tribal members, only the tribe that signed the treaty, or the signatory tribe, can exercise treaty rights. … Here, it is immaterial that Apache Stronghold's members are direct descendants of the signatories to the 1852 Treaty because the Treaty only grants tribal rights, not individual rights. … Here, Mexico ceded the land at issue in this case to the United States via the Treaty of Guadalupe Hidalgo in 1848, four years before the 1852 Treaty was executed. … At that point, the United States took legal title to the land. This Court has carefully examined the 1852 Treaty and supporting documentation in this case and finds no evidence that the United States ever forfeited that title, or that Congress intended the Government to hold the land in trust for the Western Apaches. … The 1852 Treaty certainly did not create a trust relationship. The parties merely agreed that they would, at a later date, designate territorial boundaries. See Treaty with the Apache." (Internal quotations and emendations omitted.)

In *Minnesota Department of Natural Resources v. White Earth Band of Ojibwe*, 2021 WL 4034582 (D. Minn. 2021), the White Earth Band of Ojibwe (Band) and others sued the Minnesota Department of Natural Resources (DNR) and its officials in the White Earth Band of Ojibwe Tribal Court (Tribal Court), contending that, by granting water-

use permits to a company in conjunction with that company's operation of an oil pipeline in northern Minnesota, the DNR violated the Band Parties' rights under the First, Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, the American Indian Religious Freedom Act (AIRFA) and treaties between the United States of America and the Chippewa and other tribes, among other claims. The DNR moved to dismiss the Band Parties' tribal lawsuit, arguing that the Tribal Court lacks subject-matter jurisdiction due to the non-member status of the DNR and its officers, the DNR's sovereign immunity and the fact that the contested actions did not take place on reservation land. After Chief Judge DeGroat of the Tribal Court denied the DNR's motion to dismiss, holding that the DNR's arguments regarding sovereign immunity and subject-matter jurisdiction must give way to the Band's vital interests, the DNR sued in federal court to enjoin the Tribal Court action. The district court denied the DNR's motion for a preliminary injunction: "Plaintiffs commenced this action against the Band and Chief Judge DeGroat in his official capacity. These parties, a tribe and a tribal court, however, are both protected from suit by tribal sovereign immunity…. And Plaintiffs do not allege that Defendants have waived their sovereign immunity or that Congress has authorized this lawsuit. Because both Defendants are immune from suit and Plaintiffs have not identified an applicable waiver or abrogation of tribal **sovereign immunity**, this Court lacks the authority to enjoin Defendants. Plaintiffs, therefore, have failed to demonstrate a likelihood of success on the merits, and the Court need not analyze the remaining Dataphase factors."

In *Bartell Ranch LLC v. McCullough*, 2021 WL 4037493 (D. Nev. 2021), the Bureau of Land Management of the U.S. Department of Interior (BLM) approved Lithium Nevada Corporation's (Lithium Nevada) plan to build a lithium mine near Thacker Pass, Nevada (Project). BLM had formally consulted with several tribes but not with Reno Sparks Indian Colony (RSIC) and Burns Paiute Tribe (Tribes). Contending that the mine area was sacred and might contain graves, the Tribes sued under the Administrative Procedure Act, the National Environmental Policy Act (NEPA), Federal Land Policy and Management Act (FLPMA), and the **National Historic Preservation Act** (NHPA). The district court denied the Tribes' motion for a preliminary injunction requiring BLM to engage in further consultation under the NHPA with the Tribes before BLM and Lithium Nevada may proceed with an archeological survey of the Project area known as the Historic Properties Treatment Plan (HPTP): "[T]he Tribes have not shown they are likely to prevail on their claim that BLM's decision not to consult them on the Project was unreasonable or made in bad faith, have not presented sufficiently specific evidence of irreparable harm that will likely occur if the HPTP proceeds …."

In *Roth v. State*, 2021 WL 4258981 (Okla. Crim. App. 2021), Roth had been convicted in state court of First Degree Manslaughter and Leaving the Scene of a Fatality Accident after the truck he was operating while heavily intoxicated struck and killed Lord, an enrolled Cherokee, within the Creek reservation. Roth appealed on the ground that, under the Indian Crimes Act, exclusive jurisdiction over crimes committed by non-Indians against Indians within the Creek reservation, as confirmed by the US Supreme Court in ***McGirt v. Oklahoma***, lay in federal court. The Oklahoma Court of Criminal Appeals agreed, rejecting the state argument that it had concurrent jurisdiction: "Congress has authorized States to assume criminal jurisdiction over Indian Country in limited circumstances. The State of Oklahoma, however, has never asserted its right under federal law to assume jurisdiction over any portion of Indian Country within its borders. *McGirt*, 140 S. Ct. at 2478. McGirt specifically held that federal law applied in Oklahoma 'according to its usual terms' because the State had never complied with the requirements to assume jurisdiction over the Creek Reservation and Congress had never expressly conferred jurisdiction on Oklahoma. … Pursuant to *McGirt*, the State therefore has no jurisdiction over the crimes committed in this case."

In *Sifferman v. Chelan County*, 2021 WL 4436230 (Wash. App. 2021), non-Indians **subleasing vacation homes on allotted trust lands** challenged the Chelan County's imposition of a real estate excise tax arguing, inter alia, that the tax was prohibited under Section 5 of the Indian Reorganization Act (IRA), 25 U.S.C. § 5108, or preempted by federal law under the rule of *White Mountain Apache v. Bracker*. The Washington court of appeals rejected both arguments: "The parties do not dispute that the allotted lands on which Wapato Point is located were not acquired pursuant to the IRA or pursuant to the Act of July 28, 1955. … Rather the land at issue was allotted to the Wapato family as part of the Moses Agreement in 1884. … The taxpayers counter that because the IRA established a right to lease allotted land held in trust by the United States government in 25 U.S.C. § 415, and that provision refers to the Moses allotments on which Wapato Point is located, the right at issue here was acquired pursuant to the IRA and § 5108 applies. We agree with DOR. … Congress did not describe the authorization to lease previously allotted lands as a right within § 415. Nor is there any indication within the text of § 415 that such leases are exempt from federal

or state taxation. Because the statute is unambiguous and because tax exemptions must be clearly expressed, we conclude that § 5108 does not apply to the allotted lands in this case. … Under the *Bracker* balancing test, courts conduct 'a particularized inquiry,' weighing 'the nature of the state, federal, and tribal interests at stake,' to determine 'whether, in the specific context, the exercise of state authority would violate federal law.' … On balance, the interests weigh in favor of allowing the county to assess a REET on transfers of improvements on subleased property located on Native American land."

In *Findleton v. Coyote Valley Band of Pomo Indians*, 2021 WL 4452323 (Cal. App 2021), Findleton, a construction contractor, sued the Coyote Valley Band of Pomo Indians (Tribe) in state superior court to compel arbitration after the Tribe refused to pay Findleton for construction work and rental services he provided to the Tribe for a casino and infrastructure under two contracts. The first provided for binding arbitration under AAA rules and enforcement of any arbitration award in "any court having jurisdiction" but also explicitly disclaimed that the Tribe was waiving its **sovereign immunity**. The second, supplemental contract, included an express waiver of sovereign immunity limited to arbitration with recourse was limited to casino assets. The state county court initially found that the claims were barred by sovereign immunity but the Court of Appeals reversed and, on remand, the trial court entered an order compelling mediation and arbitration in accordance with the rules of the American Arbitration Association (AAA), as provided for in the parties' contract. The Tribe ignored the court's order, refused to mediate or arbitrate, threatened to disparage AAA if it proceeded, petitioned a recently established tribal court, which reconsidered issues decided by the state court and enjoined the arbitration and served the injunction on AAA, which then declined to mediate or arbitrate the dispute. The superior court issued orders awarding Findleton attorney fees and costs, subsequently it imposed monetary sanctions on the Tribe, issued writs of execution on the monetary judgments and orders to appear for examination of judgment debtor. At those proceedings, the Tribe's representatives refused to answer questions and impeded the examination by filling the room with tribal members who engaged in a vocal demonstration. The Tribe also transferred casino assets that were subject to execution to a corporate entity it created, which the superior court found to be a fraudulent transfer. The Tribe appealed the superior court's various orders but the Court of Appeals, invoking the doctrine of disentitlement, refused to consider the Tribe's appeal: "As our Supreme Court has said, 'A party to an action cannot, with right or reason, ask the aid and assistance of a court in hearing his demands while he stands in an attitude of contempt to legal orders and processes of the courts of this state.' … 'It is contrary to the principles of justice to permit one who has flaunted the orders of the courts to seek judicial assistance.' This doctrine, known as 'disentitlement,' recognizes an appellate court's 'inherent power ... to dismiss an appeal by a party that refuses to comply with a lower court order.' … Application of the disentitlement doctrine here is amply justified. The Tribe has willfully refused to comply with the trial court's order compelling mediation and arbitration on an ongoing basis for four years. There can be no doubt that its failure to comply over this lengthy period is deliberate and willful. It refused to participate in the AAA administrative conference and refused to participate in mediation or arbitration. As the superior court found, it sought 'to intimidate' AAA, which the Tribe itself had chosen to mediate and arbitrate, threatening to publicly announce AAA's 'flippant disregard of tribal law, tribal courts and tribal sovereignty' if AAA continued to assert jurisdiction over the matter. The Tribe then sued AAA (and Findleton) in a tribal court that did not exist when Findleton filed this case and persuaded it to issue a TRO and injunction to prohibit AAA from proceeding with the mediation/arbitration the superior court had ordered. Its actions were, as the superior court found, 'designed to negate this Court's order compelling mediation and/or arbitration.'" (Citations omitted.)