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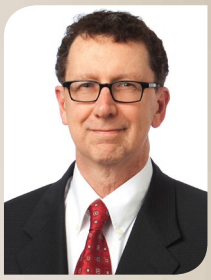

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Justices Hear Arguments in Treaty Rights Case

The Supreme Court heard arguments Apr. 18 in *Washington v. United States*. The State of Washington is asking the Court to overturn an injunction affirmed by the Ninth Circuit that would require the State to replace culverts that interfere with tribes' treaty-reserved right to harvest fish at off reservation fishing grounds. Except for Justice Thomas, all of the justices asked questions, with justices Sotomayor and Gorsuch being especially engaged. The justices' questions focused on the extent of the impact on the fishery that could trigger a potential treaty violation and source of the state's asserted right to balance treaty-reserved rights against other public interests, including the costs of remediation. With respect to the first issue, counsel for the state suggested that no violation could occur unless a state obstruction resulted in a 50% decline in the fishery. Attorneys for the United States and the tribes argued that the standard should be whether state action "substantially degrades" the fishery, determined on a case by case basis. Predicting the outcome of a case before the Supreme Court based on oral arguments is extremely hazardous. It is, however, a good sign for tribes that none of the justices seemed particularly concerned with the alleged extraordinary costs that the injunction would impose on the state. The court will issue its decision before the end of June.

Selected court decisions

In *Kodiak Oil & Gas (USA) Inc. v. Burr*, 2018 WL 1440602 (D.N.D. 2018), members of the Three Affiliated Tribes of the Fort Berthold Reservation (Tribe) had leased their allotments, with the approval of the Department of Interior pursuant to the Indian Mineral Development Act and Indian Mineral Leasing Act, to Kodiak for purposes of drilling for oil and gas. When the lessors sued Kodiak in tribal court for royalties that they claimed they were denied because of gas flaring, Kodiak contested the Tribal court's jurisdiction. After the Tribe's Supreme Court affirmed Tribal jurisdiction, Kodiak sued the lessors and Tribal judges in federal district court to enjoin further tribal court proceedings. Citing the extensive federal regulatory framework governing the leases, the federal court granted Kodiak's motion for preliminary injunction, holding that the rule of *Montana v. United States* precluded the Tribe's exercise of jurisdiction over the non-Indian lessees and that neither of the *Montana* Exceptions applied: "Judge Seaworth and Falcon contend that as tribal court officers they are cloaked in sovereign immunity as there has been no express and unequivocal waiver of immunity by the Tribe. … Pursuant to the holding of Santa Clara Pueblo, 436 U.S. at 59, tribal officials are not protected by the tribe's immunity in this type of suit for declaratory and injunctive relief. … See *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2035 (2014) (concluding 'tribal immunity does not bar such a claim for injunctive relief against individuals, including tribal officers, responsible for unlawful conduct') … The Court recognizes that while commercial activities on a reservation may certainly affect a tribe's self-governance and even intrude on the internal relations of the tribe, the specific activity from which the Tribal

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Court Plaintiffs seek relief in their breach of contract action is wholly regulated, determined, and enforced by the federal government. This characteristic of flaring clearly distinguishes it from other commercial activities that occur on a reservation which are subject to regulation by the tribe. There is no immediate control of flaring by the tribe and whether the mineral lease was breached is, without question, a determination left to the federal government. … The Court concludes the determination of whether royalties are to be paid for the flaring of natural gas pursuant to a mineral lease entered into by an allottee and an oil and gas company pursuant to 25 U.S.C. § 396 is not the type of consensual relationship under *Montana's* first exception over which a tribe may exercise adjudicative authority. … This Court recognizes the flaring of natural gas may jeopardize the health of tribal members. However, the Court nevertheless does not interpret the second *Montana* exception to apply to a claim to recover royalties for flaring arising from a mineral lease entered into pursuant to 25 U.S.C. § 396."

In *Cayuga Nation v. Zinke*, 2018 WL 1512335 (D.D.C. 2018), two factions of the Cayuga Nation disputed claims to be the Nation's **legitimate government**. After the Bureau of Indian Affairs (BIA), by former acting assistant Secretary Michael Black, had recognized the faction known as the "Halftown Group" for purposes of contracting with the United States under the Indian Self-Determination and Education Assistance Act (ISDEAA), the other faction sued Interior Department officials (Federal Defendants). While other Federal Defendants were sued in their official capacities, the plaintiff sued Black individually. The district court granted the Federal Defendants' partial motion to dismiss the claim against Black: "Those claims are improper because this case challenges official government actions, and the relief sought can only be obtained by Defendants in their official capacities. In addition, the Court denies Plaintiffs' Motion to Supplement the Administrative Record. Plaintiffs have not satisfied their burden of demonstrating that the documents they seek to add to the administrative record were considered when the final agency action under review was taken." In *Cayuga Nation v. Zinke*, 2018 WL 1515239 (D.D.C. 2018), the court denied the plaintiff faction's motion for injunctive relief declaring Black's decision be declared unlawful and vacating it: "The Court understands that, absent this relief, Plaintiffs will continue to suffer what they view as a hardship by not being the recognized government of the Cayuga Nation for the purposes of interacting with the federal government. But if their motion were to be granted, that same harm would simply befall Defendant–Intervenor instead. Apart from this type of harm to the rival leadership factions, the Court is persuaded that severing the relationship between the federal government and the Halftown Group would have tangible negative effects on the Cayuga Nation itself and its people. The requested injunction would jeopardize the Nation's receipt of federal funding, as well as interrupt other Nation business pending before the DOI, such as a modification of a funding agreement for the Cayuga Nation, a pending liquor license, and a land to trust application. The Nation's ability to move land into trust is apparently of particular importance, as it is essential for the Nation's sovereignty. … The equities do not favor, and the public interest would not be furthered by, suspending these pursuits and returning the Cayuga Nation to a state of uncertainty and paralyzed government pending the final outcome of this case."

In *Battle Mountain Band of Te–Moak Tribe v. United States Bureau of Land Management*, 2018 WL 1477628 (D. Nev. 2018), the United States Bureau of Land Management (BLM) had approved an application from Carlin, the owner of certain mining rights within the Tosawihi Quarries, to convert certain land within the quarries from an exploratory mining area into a functional mining operation known as the Hollister Mine Project. After the application had been approved the Battle Mountain Band of Te–Moak Tribe (Tribe) successfully persuaded the BLM to determine that certain areas should be included in the National Register of Historic Places under the **National Historic Preservation Act** (NHPA) as traditional cultural properties (TCPs) then sued BLM for declaratory and injunctive relief alleging that defendants violated NHPA by failing to reconsider their decision to allow Carlin to proceed with the project on land that was now considered eligible for the National Register. Carlin intervened and the court denied the Tribe's motion to dismiss his cross-claim: "Here, the court finds that Carlin has prudential standing to pursue its cross-claims because its interests, while partially

economic in nature as it seeks to open a fully functional and operational mine, fall within the underlying purpose of the NHPA. The express purpose of the NHPA is to 'foster conditions under which our modern society and our historic property can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations[.]' 54 U.S.C. § 300101. Carlin's mining project, approved under the requirements of the NHPA, is part of that purpose. Further, it is undisputed that Carlin and the BLM entered into the project PA in order to comply with their various obligations under Section 106 of the NHPA. Where an agency or a party violates a provision of an agreement substituting for Section 106, like the project PA in this case, the violation of the agreement can constitute a violation of the NHPA."

In *Nguyen v. Gustafson*, 2018 WL 1413463 (D. Minn. 2018), Nguyen, a non-Indian, married Gustafson, a member of the Shakopee Mdewakanton Sioux Community (Tribe) in Las Vegas, Nevada, in 2014 and the couple had a child. In 2017, Nguyen, then residing in California, filed for dissolution of marriage in California state court. Gustafson, whose residency is not stated, then filed for dissolution of marriage in the Tribal Court. Upon receipt of a Tribal Court order dated Aug. 10, 2017, in which that court confirmed its intent to proceed with the case, the California state court dismissed the proceedings before it, whereupon Nguyen moved to Minnesota, filed for divorce in state court and moved to dismiss the tribal court action. The tribal court denied the motion and refused Nguyen's request to file an interlocutory appeal. Nguyen then sued in federal court for declaratory judgment that the tribal court was without jurisdiction under the rule of *Montana v. United States,* but the court denied the motion, holding that (1) Nguyen failed to exhaust tribal court remedies because he did not submit to a trial and appeal in tribal court, and (2) the exception to the exhaustion requirement in cases where **tribal court jurisdiction** is plainly lacking because the *Montana* Rule might not apply to divorce proceedings involving issues of child custody and support and because, if *Montana* applies, the exceptions to the *Montana* Rule might apply since Nguyen had entered into a consensual relationship with a tribal member, possibly the First *Montana* Exception, and because Nguyen's actions in connection with child custody and support might satisfy the Second *Montana* Exception for conduct that has "some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."

In *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 2018 WL 1385660 (D.D.C. 2018), the Standing Rock Sioux and Cheyenne River Sioux tribes had previously unsuccessfully challenged the construction of the Dakota Access Pipeline (DAPL), which they asserted would disturb **sites sacred** to the tribes and cause other harms. The tribes argued that in approving the DAPL, federal officials violated the National Historic Preservation Act (NHPA), the 1851 Treaty of Fort Laramie, the National Environmental Policy Act (NEPA) and the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP). The instant decision involves similar claims brought by the Yankton Sioux Tribe and tribal officials. On cross-motions for summary judgment, the court held that (1) claims that the government failed to consult with the tribes in violation of the NHPA were moot in view of the completion of the pipeline's construction, (2) the defendants were entitled to judgment on the plaintiffs' treaty-based claim, notwithstanding the plaintiffs' attempt to withdraw its own motion relative to the treaty and (3) the defendants were entitled to judgment and NEPA-based claims: "Having already held that the Corps did not have to address the 1851 'Treaty rights qua Treaty Rights' and that the 'general trust relationship between the Government and Indian tribes ... alone does not afford an Indian tribe with a cause of action against the Government,' … the Court finds no grounds for letting the Tribe proceed on this portion of Count I. … [C]ourts have consistently held that UNDRIP is a non-binding declaration that does not create a federal cause of action. … [T]he Tribe adequately pled these requisites for standing. Plaintiffs' declarations discuss Tribe members' past use of the areas affected by DAPL's construction and operation, including those surrounding Lake Oahe, as well as the injuries they fear from the pipeline's presence on such lands. … The Tribe alleged in its Complaint that, as a result of this inadequate consultation, DAPL's ongoing construction would pose an impermissible risk to tribal sites. The question now is whether, in light of DAPL's completion, there remains any means by which the Court can

still grant Plaintiffs 'meaningful relief.' The Court concludes that the answer is in the negative. The alleged 'injuries' arising from Defendants' NHPA violations are tethered to the timeline of DAPL's construction and operation; in other words, tribal consultation and the granting of relevant federal permissions are actions that take place prior to the execution of a given project. … Defendants assert that the Tribe has identified 'no concrete environmental impact that was missed by the alleged segmenting of the discrete permissions' by the Corps and FWS. … The Court agrees."

In *Munoz v. Barona Band*, 2018 WL 1245257 (S.D. Cal. 2018), a former employee of the Barona Band of Mission Indians (Tribe) sued in federal court alleging violations of Due Process under the Indian Civil Rights Act (ICRA) after the tribal court had rejected claims alleging personal injury arising out of a work place incident, worker's compensation retaliation, wrongful termination and violations of due process. The district court granted the Tribe's motion to dismiss based on **sovereign immunity**: "Whatever the validity of Plaintiff's questionable allegations that the Tribe intentionally refused to establish a forum to litigate his ICRA due process claims, there is no public policy 'exception' to tribal sovereign immunity in federal court save for whatever policy is expressly reflected in the text of a congressional statute. The only statute on which Plaintiff purports to sue the Tribe is ICRA. The text, structure, and history of that statute affirm that tribal sovereign immunity from suit is not waived save for habeas proceedings."

In *Rideout v. Cashcall, Inc,* 2018 WL 1220565 (D. Nev. 2018), Rideout, a non-Indian resident of Nevada residing outside Indian country had borrowed money over the **internet** under an agreement that required arbitration of any dispute and provided for the law of the Cheyenne River Sioux tribe to apply. Rideout sued in federal court to nullify the agreement as a violation of state lending laws. The district court denied Cashcall's motion to enforce the arbitration clause, holding that the clause was unenforceable because it denied the borrower federal rights and was unconscionable under state law: "the Loan Agreement's terms effect a waiver of substantive federal statutory rights by requiring that the arbitration apply Cheyenne River Sioux law. The Cheyenne River Sioux Tribal Constitution does not incorporate federal statutes or the rights conferred upon individuals by such statutes. … Because the Loan Agreement is both procedurally and substantively unconscionable, the Court finds that there is no valid or enforceable agreement to arbitrate."

In *Matter of L.D.*, 2018 WL 1478565 (Mt. 2018), a Montana court had terminated the parental rights of a mother based in part on her stipulation that the Indian Child Welfare Act (**ICWA**) did not apply. The Montana Supreme Court reversed: "While we appreciate the difficult position in which the District Court found itself as a result of the parties' imprudent agreement or acquiescence that ICWA did not apply, it was ultimately the Court's responsibility to demand and ensure strict compliance with ICWA and due process of law regardless of the parties' invitation and escort down the proverbial garden path. Under the circumstances of this case, we hold that the District Court erred and abused its discretion by proceeding to terminate Mother's rights to L.D. without a conclusive tribal determination of L.D.'s tribal membership status and eligibility."

In *Estate of Ducheneaux v. Ducheneaux*, 2018 WL 1321187 (S.D. 2018), Wayne Ducheneaux, a member of the Rosebud Sioux Tribe residing on the reservation, owned five quarter sections of land, two of which were on tribal trust lands; two vehicles; a certificate of deposit; and a checking account. While a guardianship petition was pending, Wayne transferred two quarter sections of trust land held for his benefit to his son, Douglas Ducheneaux, also a Rosebud Sioux member. After Wayne died, his estate, whose beneficiaries included several other of his children, sued in South Dakota court alleging that Wayne was incompetent when he transferred the property to Douglas and asking that the court order Douglas to apply to the Bureau of Indian Affairs (BIA) to transfer the property back to the estate. The court denied the motion for lack of jurisdiction, and the South Dakota Supreme Court affirmed, holding that Congress had preempted state court jurisdiction over the disposition of Indian trust property. 861 N.W.2d 519, 2015 SD 11 (S.D. 2015). The estate continued to pursue claims unrelated to the disposition of the trust property and a jury ultimately ruled in its favor, awarding damages and invalidating Wayne's deed of fee land to his son on the ground that Wayne was incompetent to execute the deed and the deed was the product of fraud.

Douglas appealed and the South Dakota Supreme Court affirmed the state court's power to dispose of non-trust assets: "Ducheneaux argues that if the federal government possesses jurisdiction over only trust land while the state court holds jurisdiction over fee land, multiple probates would be required. Such a result, Ducheneaux contends, could lead to potentially inconsistent results, a waste of judicial resources, and a violation of sovereignty and the doctrine of res judicata…. Although the bifurcation of property in this manner may lead to some inefficiency, as we explained in Flaws, 'there is no evidence that Congress intended to control probates of **Indian estates involving non-trust land**.' …; see also 25 C.F.R. § 15.10(b)(1) ('[The Secretary of Interior] will not probate ... real or personal property other than trust or restricted land or trust personalty [*sic*] owned by the decedent at the time of death ....'). Res judicata also does not apply."

In *Perkins v. Commissioner*, 150 T.C. No. 6, 2018 WL 1146343, Tax Ct. Rep. Dec. (RIA) 150.6, Perkins, a member of the Seneca Nation (Nation), and her husband, extracted and sold gravel they had removed from Seneca Territory under a lease and permit issued by the Nation. When the Internal Revenue Service claimed they owed **federal income taxes** on the proceeds of the sale, the Perkinses first filed a petition in tax court, then a refund suit in federal court, contending in both fora that the income was protected from taxation by the 1794 Treaty of Canandaigua, which provides that "the United States will never ... *disturb* the Seneka nation," or "their Indian friends residing thereon and united with them, in the free use and enjoyment" of the Seneca land, and the treaty of 1842, which provides that the parties to the treaty "agree to solicit the influence of the Government of the United States to protect such of the lands of the Seneca Indians … from all taxes, and assessments for roads, highways, or any other purpose…." The district court had denied the government's motion to dismiss, holding that the 1842 treaty exemption should be interpreted to include the gravel on the property. 2017 WL 3326818 (W.D.N.Y. 2017). The tax court, however, disagreed and held that the gravel was subject to taxation on the grounds that (1) the 1842 treaty was not intended to benefit individual tribal members, (2) the exemption that applies to income derived directly from allotted trust land does not apply to the Perkinses' property, which was never allotted and (3) gravel is distinct from real property: "[T]he treaty protects the Seneca Nation's lands from being 'disturbed', which is different from creating a tax exemption. The rest of that sentence—'it shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase'--doesn't make sense as a tax-exemption provision, but makes perfect sense as a restriction on alienation of the Nation's lands. … the '*Capoeman* exemption applies only to income derived from allotted land.' …The exemption was intended to ensure Indians received 'unencumbered' land when it was released from trust and became the property of the Indian who received the allotment. … It was not intended to benefit Indians 'simply because the income was derived from land located on an Indian reservation.' … The land here wasn't allotted to the Perkinses. 'Allotted' means land set aside in trust for individual Indians, in contrast to land held by the Nation. … The Perkinses admitted that the '[g]ravel at [i]ssue was taken from land that was part of the common lands recognized by federal treaties to be the territories of the Seneca Nation.'"

In *Bay Bank v. Carr*, 2018 WL 1176870 (Wis. App. 2018), Carr had taken a mortgage loan from Bay Bank under HUD's **Section 184 guaranteed loan program** available to Native borrowers. When Carr failed to make mortgage payments, the Bank filed an action to foreclose. The trial court granted the Bank's motion for summary judgement and the Court of Appeals affirmed, rejecting Carr's argument that the Bank's failure to follow Section 184 procedures precluded the foreclosure: "Federal law requires that the mortgagee have a face-to-face interview with the mortgagor, or 'make a reasonable effort to arrange such a meeting,' prior to payments becoming three months delinquent. 24 C.F.R. § 203.604(b) (2016). A 'reasonable effort' to arrange such a meeting consists of, at a minimum, one letter sent to the mortgagor via certified mail and 'at least one trip to see the mortgagor at the mortgaged property.' 24 C.F.R. § 203.604(d) (2016). …[T]he regulation identifies five circumstances under which a face-to-face meeting is not required, including if the mortgagor has 'clearly indicated that he [or she] will not cooperate in the interview.' See 24 C.F.R. § 203.604(c)(1)-(5) (2016). Bay Bank's supplemental affidavit

included various communications between Carr and bank officials dated between August 2014 and July 2015 in which Carr repeatedly promised to visit a bank branch to make an in-person payment. Bay Bank's submissions show that, despite Carr clearly being aware she was in arrears, she repeatedly failed to appear in person as promised. … This is significant because a factfinder would have no basis on this record to reasonably infer that Carr would have attended and cooperated with an in-person interview."

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