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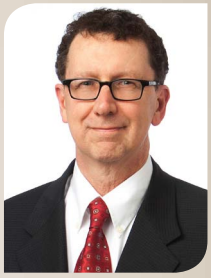

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Supreme Court vacates Washington Supreme Court Decision in Upper Skagit Case

In *Upper Skagit Indian Tribe v. Lundgren*, 2018 WL 2292445 (U.S. 2018), the Upper Skagit Tribe, in 2014, had purchased certain fee simple land, outside the Tribe's reservation, adjoining land owned by the Lundgrens. The Lundgrens, who had owned their land since 1947, had long treated a fence that had been on the property since at least 1947 as marking the boundary of their property. When the Tribe informed the Lundgrens that the fence actually encroached land owned by the Tribe, the Lundgrens sued to quiet title, arguing they had acquired title to the disputed property by adverse possession or by mutual recognition and acquiescence long before the Tribe bought the land. The Tribe moved to dismiss under CR 12(b)(1) for a lack of subject matter jurisdiction based on the sovereign immunity and the rule that requires joinder of a necessary and indispensable party, which the Lundgrens could not satisfy because of the Tribe's immunity. The trial court ruled that sovereign immunity did not protect the Tribe from a suit brought *in rem,* and the Washington Supreme Court, purportedly relying on the U.S. Supreme Court's 1992 decision in *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251 (1992), affirmed. In the course of briefing the case before the U.S. Supreme Court, the attorney for the Lundgrens argued that the Washington Supreme Court should be affirmed on the alternative ground that, under the common law of sovereign immunity applicable to the United States and the individual states, the sovereign has no immunity with respect to immovable property that it holds within the jurisdiction of another sovereign. During oral arguments March 26, several justices found the Lundgrens' alternative theory appealing but expressed concern that it had not been fully litigated. On May 21, the Court vacated the Washington Supreme Court's decision and remanded, clarifying that "Yakima sought only to interpret a relic of a statute in light of a distinguishable precedent; it resolved nothing about the law of sovereign immunity" but declining to affirm based on the immovable property exception. The Court instead remanded to the Washington Supreme Court to consider that issue:

> The Tribe and the federal government disagree. They note that immunity doctrines lifted from other contexts do not always neatly apply to Indian tribes. See *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc*., 523 U.S. 751, 756, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998) ("[T]he immunity possessed by Indian tribes is not coextensive with that of the States"). And since the founding, they say, the political branches rather than judges have held primary responsibility for determining when foreign sovereigns may be sued for their activities in this country. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983); *Ex parte Peru*, 318 U.S. 578, 588, 63 S.Ct. 793, 87 L.Ed. 1014 (1943).

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.

> We leave it to the Washington Supreme Court to address these arguments in the first instance. Although we have discretion to affirm on any ground supported by the law and the record that will not expand the relief granted below, *Thigpen v. Roberts*, 468 U.S. 27, 30, 104 S.Ct. 2916, 82 L.Ed.2d 23 (1984), in this case we think restraint is the best use of discretion. Determining the limits on the sovereign immunity held by Indian tribes is a grave question; the answer will affect all tribes, not just the one before us; and the alternative argument for affirmance did not emerge until late in this case. In fact, it appeared only when the United States filed an amicus brief in this case—after briefing on certiorari, after the Tribe filed its opening brief and after the Tribe's other amici had their say. This Court has often declined to take a "first view" of questions that make their appearance in this posture and we think that course the wise one today.

Justices Alito and Thomas dissented from the decision to remand on the ground that the immovable property exception to sovereign immunity was clearly applicable and that the Court, therefore, should have decided the case on that ground.

Assuming, as seems likely, that the Washington Supreme Court on remand decides for the Lundgrens based on the common law immovable property exception to sovereign immunity, the result will be a slight diminishment of tribal sovereign immunity with respect to off-reservation property. On the other hand, the Court's implicit disavowal of an *in rem* exception to tribal sovereign immunity will likely strengthen tribes' ability to assert sovereign immunity to avoid tax foreclosures and similar actions relating to on-reservation property.

Supreme Court will review status of Oklahoma Muskogee Creek Reservation

The U.S. Supreme Court on May 21 agreed to review the a decision by the Tenth Circuit affirming the continued existence of the Muscogee Creek Nation reservation in Oklahoma. In *Royal v. Murphy*, Murphy had been convicted of a murder in Oklahoma state court and sentenced to death. He challenged his conviction on the ground that the crime was allegedly committed in the Nation's Indian country, that he and his alleged victim were both members of the Muscogee (Creek) Nation and that he should consequently have been tried in federal court under the Major Crimes Act, which provides for federal jurisdiction over "[a]ny Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder ... within the Indian country." The Tenth Circuit, en banc, 875 F.3d 896, affirmed. Applying the four-part test prescribed by the U.S. Supreme Court in *Solem v. Bartlett*, the Court held that Congress had never diminished or disestablished the reservation established for the Tribe under treaties in the 19th Century: "The demographic evidence does not overcome the absence of statutory text disestablishing the Creek Reservation. … When steps one and two fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands, courts must accord traditional solicitude to Indian tribes and conclude the old reservation boundaries remain intact." (Internal quotes and cites omitted.) In an amicus curiae brief, the U.S. Solicitor General urged the Court to accept the case for review and reverse the Tenth Circuit's decision, arguing that Congress, before admitting Oklahoma as a state, "broke up and allotted the Creek Nation's lands, displaced tribal jurisdiction, and provided for application of state law and state jurisdiction" and that "[i]f left uncorrected, the decision below will radically shift criminal jurisdiction in cases involving Indians in vast areas of eastern Oklahoma from the State to the federal government, and affect state taxing and other jurisdiction."

Other selected court decisons

In *Bay Mills Indian Community v. Snyder*, 720 Fed.Appx. 754 (6th Cir. 2018), the Bay Mills Indian Community (BMIC) sued the governor of Michigan seeking a judicial determination that land purchased by BMIC in Vanderbilt, Michigan, upon which BMIC operated a gaming enterprise, was "Indian land" for purposes of the BMIC's compact with the State and the **Indian Gaming Regulatory Act** (IGRA) because it was purchased with accrued interest from a federal appropriation under the Michigan Indian Land Claims Settlement Act (MILCSA), which states that any land acquired with the appropriated funds "shall be held as Indian lands are held." The district court denied a motion by the Saginaw Chippewa Tribe to intervene and the Sixth Circuit affirmed: "[A]s the district court correctly noted, the court is actually interpreting MILCSA, not IGRA. Since Saginaw is not a party to the MILCSA, nor to the Bay Mills-Michigan compact, it does not share any common questions with this case. … Here, the court was reasonable to conclude that the circumstances of this case did not warrant an intervention

by Saginaw. The district court pointed out that Michigan has filed a summary judgment motion representing Saginaw's view that the Vanderbilt land is not 'Indian land' simply because it was purchased with MILCSA funds. The fact that Saginaw's position is being represented counsels against granting permissive intervention. … Additionally, the long history of the dispute and the extensive litigation that has already occurred between Bay Mills and Michigan also suggest that intervention would not be appropriate."

In *Cachil Dehe Band of Wintun Indians v. U.S. Department of Interior*, 2018 WL 2033762 (9th Cir. 2018), the Cachil Dehe Band of Wintun Indians (Wintun Tribe) had challenged the decision of the U.S. Department of Interior (DOI) to take **land into trust** for gaming purposes for the Estom Yumeka Maidu Tribe of the Enterprise Rancheria (Maidu Tribe) pursuant to the two-part determination prescribed in the Indian Gaming Regulatory Act (IGRA). Wintun argued that the DOI failed to adequately consider the potential adverse impacts on the Wintun Tribe's existing casino. The district court had previously granted the United States Department of Interior summary judgment. The Wintun Tribe moved for summary judgment, arguing that the DOI's record of decision failed to consider an alternative site for the casino and failed to establish the Maidu Tribe's need for the land. The court denied the motion, holding that the DOI's decision was not arbitrary or capricious and that the rule limiting consideration to "surrounding communities" within 25 miles was not arbitrary or capricious. The Ninth Circuit affirmed, holding that (1) the Bureau of Indian Affairs (BIA) had authority under the Indian Reorganization Act (IRA) to take the parcel of land into trust because the Maidu Tribe was under federal jurisdiction when Congress enacted the IRA, (2) the BIA's determination that the Maidu Tribe needed the land for economic development was not arbitrary and capricious, (3) the BIA satisfied the IGRA's requirement for consultation with the Wintun Tribe, (4) the regulatory definition of "nearby" Indian tribe was not arbitrary or capricious, (5) the BIA's determination that mitigation measures would prevent detrimental harm to the surrounding community from the new Indian casino was not arbitrary and capricious, and (6) the BIA's final environmental impact statement (FEIS) satisfied the National Environmental Policy Act (NEPA) requirements.

In *Oviatt v. Reynolds*, 2018 WL 2094505 --- Fed.Appx. --- (10th Cir. 2018), four individuals sued officials of the Ute Tribe after the Tribe ordered them removed from tribal buildings and arrested, alleging claims under the **Indian Civil Rights Act** (ICRA) and the Fourth Amendment to United States Constitution. The district court dismissed for lack of jurisdiction and the Tenth Circuit affirmed, holding that the plaintiffs failed to demonstrate that the Tribe's actions constituted detention for purposes of habeas corpus relief under the Indian Civil Rights Act and that the Fourth Amendment does not apply to tribes: "But habeas relief is limited to individuals who are detained when the petition is filed and the plaintiffs have not alleged they were detained when they filed the habeas petition. And to otherwise invoke 28 U.S.C. § 1331, the plaintiffs must invoke a colorable basis for a federal claim. In our view, the plaintiffs have not alleged a colorable claim under the Indian Civil Rights Act or any other federal provision."

In *United States of America, ex rel. Cherwenka v. Fastenal,* 2018 WL 2069026 (D. Minn. 2018), Wells Technology, Inc. (Wells Technology), an industrial distribution company owned by a member of the Red Lake Chippewa Tribe, was eligible for federal contracting preferences under the business development program authorized by **Section 8(a) of the Small Business Act** and administered by the Small Business Administration (SBA). Wells Technology became an authorized distribution channel for Fastenal company, a multi-billion dollar company under a mentor/protégé agreement approved by the SBA following an investigation to assure that the relationship was not merely a means by which Fastenal could obtain 8(a) contracts. Cherwenka, a competitor of Wells Technology, sued Fastenal and Wells Technology under the False Claims Act, asserting that the relationship was a sham and that Wells Technology was merely a front for Fastenal. The court granted the Defendants' motion for summary judgment, holding that Cherwenka's claim (1) failed to satisfy the requirement of Fed. R. Civ. Proc. 9(b), which requires that the claimant state with particularity "the circumstances constituting fraud " and (2) was barred by the rule requiring that "an FCA claim to be dismissed where the allegations are based on information that has been publicly disclosed, unless the person making the claim 'is an original source of the information. … Here, Wells Technology published the details of its Fastenal distribution channel on its website as a downloadable presentation. … Even if the information on these websites does not encompass

the essential elements of his alleged fraud, the documents and information disclosed to the SBA surely do."

In *FSS Development Co., LLC v. Apache Tribe of Oklahoma*, 2018 WL 2248457 (W.D. Okla. 2018), FSS had entered into an agreement with the Apache Tribe of Oklahoma (Tribe) to develop a casino called the Red River Project on Apache land and loaned the Tribe $2.2 million to cover development expenses in exchange for a promissory note. The Agreement included (1) a "Construction Management Fee" equal to 4% of the total amount of the Red River Project's construction and development costs and 12% of the net winnings from the Project and (2) a waiver of sovereign immunity. In the summer of 2017, Plaintiff sued the Tribe, the Apache Business Committee (ABC) that allegedly negotiated the contracts for the Tribe, four individual ABC members, and a tribal consultant for tortious interference with contract, breach of contract, and declaratory judgment. The Tribe then sued FSS in Apache tribal court for declaratory judgment that the agreements were void under the **Indian Gaming Regulatory Act**'s (IGRA) provisions relating to management contracts and proprietary interest and tribal law and, alternatively, for breach of contract. On the parties' motions, the court held that (1) FSS's state law claims were not preempted by IGRA, (2) the Tribe and ABC were non-diverse parties and the court was without jurisdiction to hear claims against them, (3) and the court could hear claims against the non-diverse parties but the claims would be stayed to allow the FSS to first exhaust tribal court remedies: "By proceeding with FSS's tortious interference claim against the individual Defendants only if the Tribal Court has declared the development agreement valid and enforceable, the Court ensures that Plaintiff will have a remedy to recover based on this contract, be it in federal court or a subsequent state court action."

In *Van Pelt v. Giesen*, 2018 WL 2187375 (D. N.M. 2018), Van Pelt was arrested for possession of narcotics on the Pueblo of Santo Domingo Reservation. He entered a plea of guilty in the tribal court, was judged guilty and sentenced to one year of jail and assessed various fines and fees. Petitioner filed a Petition for Writ of Habeas Corpus, alleging violations of the **Indian Civil Rights Act** of 1968 (ICRA) 25 U.S.C. §§ 1301-1303, specifically that he was (1) denied the right to assistance of counsel, in violation of 25 U.S.C. § 1302(a)(6); (2) denied the right to a trial by jury, in violation of 25 U.S.C. § 1302(a)(10); and (3) subjected to cruel and unusual punishment, in violation of 25 U.S.C. § 1302(a)(7)(A). The respondents, including a Bureau of Indian Affairs (BIA) warden and the governor and lieutenant governor of the Pueblo, eventually conceded that the writ should be granted but objected to the petitioner's assertion that the conviction should be reversed rather than merely vacated. The magistrate judge, 2018 WL 2187658, agreed and recommended that the sentence be vacated: "A sentence reversal, then, as Petitioner requests, would require the Court to act in its appellate capacity and would run afoul of the confines of habeas corpus review. As the Tribal Respondents highlight in their brief, the terms 'vacate' and 'reverse' have, at times, been used almost interchangeably in ICRA actions. However, the terms implicate very different results. In light of the sanctity of tribal sovereignty, and the need to safeguard not just the rights of the individual, but also the rights of the tribe, it is imperative that the Court stay within its own lane when crafting appropriate relief in this case." The district judge adopted the magistrate's recommendation.

In *Ute Indian Tribe of the Uintah and Ouray Reservation v. Lawrence*, 2018 WL 2002477 (D. Utah 2018), Becker in 2005 had entered into a contract with the Ute Indian Tribe of the Uintah and Ouray Reservation (Tribe) under which Becker would manage the Tribe's Energy and Minerals Department and receive compensation that included a salary of $200,000 and 2% of "net revenue distributed to Ute Energy Holding, LLC from Ute Energy, LLC," tribal entities "capitalized with ... oil and gas interest[s] ... held in trust for the Tribe by the United States." In connection with the contract, the Tribe adopted the Ute Energy Operating Agreement, for which the Tribe received certification from the United States Department of the Interior, Bureau of Indian Affairs, that no federal approval was required because it created no interest in trust lands subject to approval. The parties' contract provided for dispute resolution in the "(i) U.S. District Court for the District of Utah, and appellate courts therefrom, and (ii) if, and only if, such courts also lack jurisdiction over such case, to any court of competent jurisdiction and associated appellate courts" and the Tribe expressly waived "any requirement of Tribal law stating that Tribal courts have exclusive original jurisdiction over all matters involving the Tribe and waives any requirement that such Legal Proceedings be brought in Tribal Court or that Tribal remedies be exhausted." When a dispute arose, Becker sued in federal court, which dismissed on the ground that federal

jurisdiction over his state contract law claims was lacking, whereupon Becker sued in state court. After the state court denied the Tribe's motion to dismiss, the Tribe sued in federal court to enjoin the state court suit, but the court dismissed on the ground that it lacked subject matter jurisdiction. The Tenth Circuit reversed, holding that "the Tribe's claim—that federal law precludes state-court **jurisdiction** over a claim against Indians arising on a reservation—presents a federal question that sustains federal jurisdiction" under §§ 1331 and 1362. On remand, after first enjoining the state court proceedings February 17, 2018, 289 F.Supp.3d 1242, the court revisited the matter on April 30th and, in the instant decision, denied the tribal parties' motion for a preliminary injunction barring Becker's state court action, concluding that (1) the tribal parties were unlikely to succeed on the merits of their jurisdiction claims, (2) the Utah state court had subject matter jurisdiction over the parties' claims pursuant to 25 U.S.C. § 1322(a), (3) it was substantially likely that the Tribe selectively and appropriately waived its sovereign immunity in Resolution 05-147 under tribal law, (4) the Becker Independent Contractor Agreement did not involve restricted property held in trust for the Tribe and was, therefore, valid under both federal and tribal law, (5) the Tribal Court's February 28 opinion to the contrary should not be given preclusive effect or comity and (6) because the contract was valid, tribal exhaustion, which was explicitly waived in the contract, was both unnecessary and futile. In a decision issued the same day in the companion case, *Becker v. Ute Indian Tribe*, 2018 WL 2002476 (D. Utah 2018) decision, the court granted Becker's motion for a preliminary injunction "enjoining the parties from proceeding in the Tribal Court action and from the Tribal Court orders having preclusive effect in other proceedings on these facts."

In *Kettle Butte Trucking LLC v. Kelly*, 2018 WL 2111965 (N.D. 2018), Kelly, a member of the Three Affiliated Tribes of the Fort Berthold Reservation (Tribe) and his company, Spirit Energy LLC (collectively "Spirit") leased vehicles from Kettle Butte Trucking (KBT). When Spirit failed to make lease payments, KBT sued in state court and obtained an order that Spirit stop using the vehicles and deliver them to KBT and that, if Spirit failed to perform either act, the sheriff of the county or counties where the vehicles were located could take possession of the vehicles and deliver them to KBT. When Spirit refused to return the vehicles, KBT moved for contempt. Spirit argued that the court lacked jurisdiction because the vehicles were stored on the Fort Berthold Indian Reservation and the tribal code provided specific procedures for repossession of personal property which KBT had not followed. The court disagreed and held Spirit in contempt, imposing a forfeit of $100 for each day the vehicles were not returned. The North Dakota Supreme Court affirmed: "Although the vehicles may be located on the reservation and the district court may not have jurisdiction to order and enforce repossession of the vehicles, the court may order Spirit, over whom it has jurisdiction, to act in relation to the property. See Restatement (Second) of Conflict of Laws §§ 53, 55 (Am. Law Inst. 1971). Cf. *Carpenter v. Strange*, 141 U.S. 87, 105-06 (1891) (stating 'while, by means of its power over the person of a party, a court of equity may, in a proper case, compel him to act in relation to property not within its jurisdiction its decree does not operate directly upon the property, nor affect the title, but is made effectual through the coercion of the defendant'). Because Spirit has consented to the **district court's personal jurisdiction** and conceded the district court's subject matter jurisdiction over the underlying claims, the district court has the authority to order Spirit to return the property to KBT and to hold Spirit in contempt for failing to comply with the court's directive to return the vehicles to KBT."

In the case of *In re Williams*, 2018 WL 2294103 (Mich. 2018), Williams, a member of the Sault Sainte Marie Chippewa Tribe, voluntarily terminated his parental rights but then intervened in adoption proceedings to withdraw the termination. The Michigan Supreme Court held that (1) a specific adoptive placement was not required for Williams' consent to termination of his parental rights to be valid, (2) Williams was not required to have executed any additional consent in order to be statutorily-entitled, under the Michigan Indian Family Preservation Act (MIFPA), to withdraw his consent to termination of his parental rights, and (3) Williams' status as a participant in the previous child protection proceeding did not preclude him from benefiting from the consent-withdrawal provision of the **Michigan Indian Family Preservation Act**.

In *Barrett v. Department of Tax and Fee Administration*, 2018 WL 2252657 (Cal App. 2018), Barrett, a resident of Imperial County, filed a petition for writ of mandate in Imperial County Superior Court against the California State Board of Equalization (the Board), the California State Controller's Office, the Office of the California Attorney General, and

various government officials, seeking a writ of mandate to compel the Board to collect various sales and use taxes he claimed were owed by the Torres-Martinez Tribe of Desert Cahuilla Indians (Tribe) and Selnek-is Tem-Al (Selnek), a corporation formed under the tribe's corporate ordinance of mandate in Imperial County Superior Court against the California State Board of Equalization (the Board), the California State Controller's Office, the Office of the California Attorney General, and various government officials, seeking a writ of mandate to compel the Board to collect various sales and use taxes he claimed were owed by the Torres-Martinez Tribe of Desert Cahuilla Indians (Tribe) and Selnek-is Tem-Al (Selnek), a corporation formed under the tribe's corporate ordinance. The superior court dismissed and the California Court of Appeals affirmed, holding that mandamus was not appropriate because the tax-related duties were discretionary rather than ministerial: "These determinations are, by their nature, discretionary, not ministerial, because they require the Board to act officially according to the dictates of their own judgment … —that is, to exercise judgment in determining how the tax laws apply to a taxpayer's particular circumstances and, therefore, in deciding whether taxes are owed and in what amount. As such, the duties imposed by this section are not enforceable by a writ of mandate. … [R]espondents believe that an Indian tribe's retail sale of fuel on a reservation to a non-Indian is subject to use tax. However, respondents have elected not to pursue enforcement action against the tribe and Selnek because, pursuant to Oklahoma Tax Commission, the state has no effective means of collecting the tax owed if the Indian tribe chooses not to self-report and pay these taxes to the Board. In order to bring suit against the Indian tribe, the Board would have to receive tribal or Congressional consent, and this has not yet occurred. … Barrett urges that Selnek is subject to suit because the tribe waived its sovereign immunity through Selnek's corporate charter. Whatever the merits of this contention, they are beside the point because the question before us is not the tribe's sovereign immunity, but rather the reasonableness of respondents' decision not to expend their limited resources to attempt to collect taxes arguably beyond their reach. Under the current state of the law, respondents' decision in this regard manifestly is not an abuse of discretion as a matter of law. … Accordingly, the trial court correctly concluded that the petition did not state a claim against respondents for mandate." (Internal quotations and citation omitted.)

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