

## A View from American Courts: The Year in Indian Law 2017

*Grant Christensen\**

INTRODUCTION .....	807
I. SOME STATISTICS .....	809
II. THE SUPREME COURT.....	811
A. <i>The 2016–2017 Term</i> .....	811
Application of <i>Lewis v. Clarke</i> in 2017 .....	813
B. <i>The 2017–2018 Term</i> .....	816
1. Cases Docketed for the 2017–2018 Term .....	816
2. Dissent from Denial of Certiorari.....	818
III. IMPORTANT DEVELOPMENTS IN 2017 .....	819
A. <i>Civil Jurisdiction Over Nonmembers: Developments in         Montana and Its Progeny</i> .....	821
1. <i>Montana</i> and Its Exceptions .....	822
2. Forum Selection Clauses .....	825
3. State Interference with Tribal Jurisdiction .....	826
B. <i>Civil Jurisdiction: Exhaustion and Its Exceptions</i> .....	827
1. Cases Dismissed Based on Comity .....	828
2. Exceptions to Exhaustion .....	829
a. <i>Bad Faith</i> .....	830
b. <i>Futility</i> .....	830
c. <i>Serve No Purpose Other than Delay</i> .....	831
C. <i>Criminal Jurisdiction</i> .....	835
1. Who Is an Indian .....	835
2. Tribal Police .....	838

---

\* Grant Christensen is an Associate Professor of Law at the University of North Dakota, where he is also the director of North Dakota's Indian Law Certificate program. He holds an LL.M. in Indigenous Peoples Law & Policy from the University of Arizona and a J.D. from Ohio State. The author is indebted to the University of North Dakota and the Webb family for the support of the Webb Professorship award during the 2017–2018 school year, which provided assistance for the completion of this piece. The author wants to specifically extend thanks to Melissa Tatum and Mike Hanson whose support and advice has been invaluable through this process.

3. Extradition.....	839
4. Public Law 280.....	841
<i>D. Dakota Access Pipeline (DAPL)</i> .....	842
<i>E. Effect of a Tribal Court Judgment</i> .....	846
1. Application of Tribal Court Conviction as a Predicate Offense.....	846
2. How to Treat a Tribal Court Conviction.....	848
3. The Recognition of a Tribal Court Judgment in State Court.....	849
<i>F. Enrollment</i> .....	851
<i>G. Gaming</i> .....	855
1. Indian Gaming Regulatory Act (IGRA).....	855
2. Other Gaming Opinions.....	859
3. Non-Indian v. Indian Gaming.....	861
<i>H. Housing</i> .....	862
<i>I. Hunting &amp; Fishing</i> .....	865
<i>J. Indian Civil Rights Act</i> .....	866
<i>K. Indian Child Welfare Act (ICWA)</i> .....	868
1. Constitutionality of ICWA.....	869
2. Jurisdiction § 1911.....	870
3. Notice § 1912(a).....	872
4. Active Efforts § 1912(d).....	873
5. Procedure for a Foster Care Placement (§ 1912(e)) or Termination of Parental Rights (§ 1912(f)).....	875
6. Other ICWA Issues.....	876
7. Scope.....	880
<i>L. Indian Country</i> .....	881
1. In the Context of Criminal Jurisdiction.....	882
2. In the Context of Civil Jurisdiction.....	884
<i>M. Land Into Trust</i> .....	887
<i>N. Payday Lending</i> .....	890
<i>O. Recognition of Indian Tribal Status</i> .....	892
1. Federal Recognition.....	893
2. State Recognition.....	895
<i>P. Religion</i> .....	896
1. Prisoners.....	896
2. Other Religion Cases.....	898
<i>Q. Sovereign Immunity</i> .....	900
1. Waiver of Immunity.....	901
2. <i>In Rem</i> Jurisdiction.....	904

2018]	<i>The Year in Indian Law 2017</i>	807
3.	Drug Patents .....	906
4.	Scope of Immunity (Alabama Cases).....	907
R.	<i>Taxation</i> .....	909
S.	<i>Treaty Rights</i> .....	914
T.	<i>Voting</i> .....	917
U.	<i>Water</i> .....	922
V.	<i>Other Developments</i> .....	925
	CONCLUSION.....	936

#### INTRODUCTION

This Article is the first of what is intended to be an annual discussion of cases decided by American Courts regarding Federal Indian Law. This collected work was inspired by the work of Symeon Symeonides and the *American Journal of Comparative Law*, who have produced a summary of cases discussing choice of law and conflict of laws for the last thirty years,<sup>1</sup> as well as Steve Wise and Stephen Sepinuck’s coauthored survey of personal property secured transactions published annually by *The Business Lawyer*.<sup>2</sup>

The law changes. To keep current on the law and to avoid the dangers of malpractice, most states require licensed attorneys to complete Continuing Legal Education (CLE) courses. However, no amount of CLEs can perfectly capture all of the changes in an area of law in a given year. Moreover, there is a benefit to everyone involved in the field (scholars, practitioners, students, judges, and even interested observers) having a collected compendium of recently decided cases.

To ensure that the project identified all eligible cases, the author has searched Lexis for all cases containing the words “Indian” or “Tribe” published between January 1, 2017, and December 31, 2017. Invariably, this search produced thousands of false-positives: cases involving Indian Harbor Insurance, the city of Indian Springs, Nevada, and persons from the country of India, as well as cases citing to noted Harvard law professor Laurence Tribe. Admittedly, the project misses the hundreds of cases that may involve aspects of Indian law that are settled and then dismissed, in which a plea agreement is reached or where the judge decides the relevant

---

1. Symeon C. Symeonides, *Choice of Law in the American Courts in 2016: Thirtieth Annual Survey*, 65 AM. J. COMP. L. 1 (2017).

2. Steve Wise & Stephen L. Sepinuck, *Personal Property Secured Transactions*, 71 BUS. LAW. 1323 (2016). The author is personally indebted to Stephen Sepinuck, who presented on the importance to legal scholars of maintaining an active reading list of cases in their given subject area during the 2016 Central States Law School Association annual conference held at the University of North Dakota in September 2016.

issue(s) from the bench without a written opinion.<sup>3</sup> The project also misses opinions issued by tribal courts.<sup>4</sup> However, this collection is otherwise an excellent representation of the written opinions by state and federal courts in 2017 and thus captures the fact patterns and legal reasoning that have precedential value. While there is admittedly a risk of missing a relevant case that does not use either “Indian” or “Tribe” anywhere in the opinion, the risk is acceptably small.

Such a broad search contains many cases that apply existing law to a very similar set of facts and therefore do not add anything to the current canons of Indian law. It also includes many unpublished opinions. These cases were selectively included based on the author’s understanding of how helpful their inclusion might be to an annual collection of the law. Invariably, such search terms also yield court orders, summary dismissals, interlocutory rulings, and other court decisions that may not be opinions on the merits but, if given sufficient discussion, speak to important aspects of federal Indian law. These were included based on the author’s judgment of their usefulness to the intended audience.

The end result is a comprehensive review of Indian law for 2017 that necessarily makes some judgment calls about the inclusion of material. It does not include a citation to every case related to Indian law issued by the courts but tries to incorporate the majority of opinions into its catalog to provide a robust discussion of the changes in Indian law over the course of 2017. The discussion here is provided as objectively as possible. It is intended to be a faithful summary of the relevant cases without judgment on whether the court got the law right or whether the case is consistent with previous authority.

Part I of this Article provides some general statistics about Indian law in 2017. Part II focuses on activity at the U.S. Supreme Court, which is the most watched forum for Indian law cases for obvious reasons. Part III groups cases by subject area and arranges those subject areas alphabetically. The goal of such an organization is to provide easier access to new, relevant materials for readers who may be specifically interested in a certain area of Indian law. Part IV covers some other developments

---

3. Capturing these cases is literally impossible. When a judge rules from the bench or a settlement agreement is shared only between the parties, the decisions are not written and therefore cannot be captured through any method of case collection.

4. There are also cases published by tribal courts, which are certainly relevant to Indian law but are not collected and indexed by Lexis. These cases are not included in this survey given the difficulty of obtaining and organizing all of their important insights. This would be an excellent project for future scholars but is outside the scope of this undertaking. The Indian Law Reporter does publish some decisions from tribal courts—but not all. Other tribes have their own reporters (for example, the Navajo Nation and the Muscogee (Creek) Nation). However, no effort to read and report all of these cases has been made here.

often touched on by just one or two cases the entire year, but they are included in this Article for purposes of completeness. Finally, the Conclusion provides just a few short concluding remarks. Given that this is the first year the author has collected and published a list of cases, the author encourages and welcomes feedback from every reader with suggestions for how future iterations of this catalog could be edited to be more useful.

### I. SOME STATISTICS

A thorough search of the literature shows there has been almost no attention paid to an annualized survey of Indian law cases—the two notable exceptions being Nell Jessup Newton’s *One Year in the Life of Twenty Tribal Courts*, in which Professor (now Dean) Newton provides her insights from reading the eighty-five tribal court opinions published in the *Indian Law Reporter* in 1996,<sup>5</sup> and Professor Kathryn Fort’s *The Cherokee Conundrum: California Courts and the Indian Child Welfare Act*, in which Professor Fort uses Westlaw to survey the Indian Child Welfare Act (ICWA) opinions decided by courts between January 1, 2007, and February 29, 2008.<sup>6</sup>

Having carefully searched and read all of the cases in Lexis using the terms “Indian” or “Tribe,” I can provide some interesting statistics about the landscape of Indian law in 2017. There were 646 written opinions in cases that substantively addressed Indian law issues. This omits many cases in which an Indian was a party to the proceedings but the case did not involve questions of Indian law. Among the most common omitted scenarios were criminal appeals where Indians were convicted and then appealed for ineffective assistance of counsel, where individuals claimed employment discrimination on the basis of their Indian status, or procedural cases against the Bureau of Indian Affairs or the Indian Health Service that raised purely administrative or procedural questions but did not require the interpretation of Indian law.

Of the 646 opinions, 252 of them involved the ICWA, and 176 of those came out of California. This is in keeping with Professor Fort’s analysis on ICWA from 2007, both in terms of the large number of cases and California’s disproportionate share of those cases.<sup>7</sup> Of the 646 opinions, 74 of them were issued by federal appellate courts, and only two

---

5. Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 290 (1998).

6. Kathryn E. Fort, *The Cherokee Conundrum: California Courts and the Indian Child Welfare Act* 18 (Mich. State Univ. Coll. of Law Legal Studies Research Paper Series, Research Paper No. 07-07, 2009), <https://turtletalk.files.wordpress.com/2012/12/ssrn-id13922931.pdf> [https://perma.cc/2Y7N-V7TB].

7. *Id.* at 18–19.

were decided by the U.S. Supreme Court.<sup>8</sup> The following charts provide a catalog of the number of Indian law opinions decided by each federal appellate court and the ten federal district courts that decided seven or more substantive Indian law opinions. Generally the charts provide few surprises, with the Ninth and Tenth Circuits having the busiest Indian law caseloads from an appellate perspective and federal district courts in California, Washington, South Dakota, New Mexico, and Arizona, which all have large Indian populations,<sup>9</sup> carrying the largest Indian law caseloads among district courts in the country.

Federal Circuit Ct.	# Cases
First	2
Second	1
Third	0
Fourth	1
Fifth	0
Sixth	0
Seventh	1
Eighth	4
Ninth	36
Tenth	22
Eleventh	0
D.C.	2
Federal	5

Federal District Ct.	# Cases
E.D. Cal.	32
W.D. Wash.	27
D.S.D.	22
D.N.M.	21
D. Ariz.	18
D.D.C.	16
N.D. Cal.	8
S.D. Cal.	7
D. Mont.	7
Fed. Cl.	7

The number of Indian law cases decided in state courts is skewed substantially by the large number of ICWA cases. In addition to

8. *Infra* Part II. The Supreme Court issued one full length opinion on an Indian law question in 2017: *Lewis v. Clarke*, 137 S. Ct. 1285 (2017) (discussing the ability of a tribal employee to raise sovereign immunity as a defense to a suit brought against him in his personal capacity). The other opinion is actually a denial from certiorari: *Upstate Citizens for Equal. v. United States*, 199 L. Ed. 2d 372 (2017). Justice Thomas wrote a dissent from the denial of certiorari on the basis that the Indian Commerce Clause should not be read to give Interior the broad power to take land into trust. His dissent was not joined by any other Justice.

9. See TINA NORRIS, PAULA L. VINES & ELIZABETH M. HOEFFEL, U.S. CENSUS BUREAU, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010, at 7 (Jan. 2012), <https://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf> [<https://perma.cc/876D-M3DU>] (noting the total and comparatively large relative numbers of American Indians in states like California, Washington, South Dakota, New Mexico, and Arizona). While states like New York and Texas also have large Indian populations, they do not have as many reservations and so their native populations are much less likely to get involved in questions of Indian law, which are inherently tied to tribal governments and reservation or allotted lands.

California's 176 decisions, state courts in Alaska issued 11 ICWA opinions, Arizona issued 8, Michigan issued 6, and Washington, Kansas, and Colorado all issued 5. While most of Indian law raises federal questions due to the unique and complicated nature of the relationship between tribes, the several states, and the federal government, state courts also decided a number of tax cases, jurisdictional questions in Public Law 280 cases, and cases where the tribe invoked sovereign immunity as a defense to litigation.

The statistics presented here are offered only to present an overview of Indian law in the year 2017. The following Parts provide more detailed discussion on the evolution of the various Indian law doctrines across state and federal courts during the calendar year.

## II. THE SUPREME COURT

Since 1953, the U.S. Supreme Court has heard an average of between two and three Indian law cases a year.<sup>10</sup> However, during the 2016–2017 term the Supreme Court decided a single Indian law case, *Lewis v. Clarke*, in the spring of 2017.<sup>11</sup> The 2017–2018 term has proved more fruitful. As of December 31, 2017, the Supreme Court had granted certiorari in two Indian law cases,<sup>12</sup> and Justice Thomas had issued a lone dissent from denial of certiorari in a third.<sup>13</sup>

### A. *The 2016–2017 Term*

The sole Indian law case decided by the Supreme Court in 2017 was an appeal from the Connecticut Supreme Court that raised the question of when a tribal employee can assert sovereign immunity to avoid liability in civil litigation. In *Lewis v. Clarke*, non-Indian petitioners were driving on a Connecticut highway when they were struck from behind by a vehicle driven by the respondent, an employee of the Mohegan Sun Casino, while he was transporting casino patrons.<sup>14</sup> Petitioners brought a negligence action in Connecticut state court against the respondent in his personal

---

10. Grant Christensen, *Judging Indian Law: What Factors Influence Individual Justice's Votes on Indian Law in the Modern Era*, 43 U. TOL. L. REV. 267, 290 n.121 (2012). Professor Matthew Fletcher has an excellent piece discussing the Supreme Court's behavior concerning accepting cases for review. See Matthew L.M. Fletcher, *Factbound and Splitless: The Certiorari Process as Barrier to Justice for Indian Tribes*, 51 ARIZ. L. REV. 933 (2009).

11. *Lewis*, 137 S. Ct. 1285.

12. *Patchak v. Jewell*, 828 F.3d 995 (D.C. Cir. 2016); *Lundgren v. Upper Skagit Indian Tribe*, 187 Wn.2d 857, 389 P.3d 569 (Wash. 2017). On January 12, 2018, just after the first draft of this Article was submitted, the Supreme Court granted certiorari to a third case to be decided during the 2017–2018 term: *United States v. Washington*, 853 F.3d 946 (9th Cir. 2017), *cert. granted*, 138 S. Ct. 735 (2018). For a discussion of this case, see *infra* Part III.S.

13. *Upstate Citizens for Equal.*, 199 L. Ed. 2d 372.

14. *Lewis*, 137 S. Ct. at 1286.

capacity.<sup>15</sup> The Connecticut Supreme Court held that the defendant could assert sovereign immunity because he was acting within the scope of his employment when the accident occurred.<sup>16</sup> Moreover, the petitioners had an available forum in tribal court where the tribe had waived immunity from suit.<sup>17</sup>

Justice Sotomayor wrote the majority opinion, which reversed the decision of the Connecticut Supreme Court and limited the scope of tribal sovereign immunity by focusing on the real party in interest.<sup>18</sup> The Court clarified that in tort cases where plaintiffs seek liability not from the tribe but against the tribal employee in their personal capacity, sovereign immunity is not designed to shield that defendant for liability for what is, essentially, their own personal negligence.<sup>19</sup>

However, the Court cautioned that not all cases that name the individual employee as the defendant are necessarily cases that are seeking to recover against the employee in their personal capacity. The Court reasoned that a proper inquiry needs to be made into who is the real party in interest.<sup>20</sup> The Court explained that while sovereign immunity is a defense in official capacity suits, it is not available when a defendant is sued in their personal capacity.<sup>21</sup> Applying those principles to this case, Justice Sotomayor reasoned that here, a claim was made against the driver in his personal capacity for his personal negligence while operating an

---

15. *Id.*

16. *Id.* at 1290–91 (“The Supreme Court of Connecticut reversed, holding that tribal sovereign immunity did bar the suit. 320 Conn. 706, 135 A. 3d 677 (2016). The court agreed with Clarke that ‘because he was acting within the scope of his employment for the Mohegan Tribal Gaming Authority and the Mohegan Tribal Gaming Authority is an arm of the Mohegan Tribe, tribal sovereign immunity bars the plaintiffs’ claims against him.’”).

17. *See id.* at 1290 (“Of particular relevance here, Mohegan law sets out sovereign immunity and indemnification policies applicable to disputes arising from gaming activities. The Gaming Authority has waived its sovereign immunity and consented to be sued in the Mohegan Gaming Disputes Court. Mohegan Const., Art. XIII, § 1; Mohegan Tribe Code § 3-250(b).”).

18. *Id.* at 1288–94 (“We hold that, in a suit brought against a tribal employee in his individual capacity, the employee, not the tribe, is the real party in interest and the tribe’s sovereign immunity is not implicated. That an employee was acting within the scope of his employment at the time the tort was committed is not, on its own, sufficient to bar a suit against that employee on the basis of tribal sovereign immunity.”).

19. *Id.* at 1292 (“This is a negligence action arising from a tort committed by Clarke on an interstate highway within the State of Connecticut. The suit is brought against a tribal employee operating a vehicle within the scope of his employment but on state lands, and the judgment will not operate against the Tribe. This is not a suit against Clarke in his official capacity. It is simply a suit against Clarke to recover for his personal actions . . .”).

20. *Id.* at 1291–93 (“In an official-capacity claim, the relief sought is only nominally against the official and in fact is against the official’s office and thus the sovereign itself. . . . Personal-capacity suits, on the other hand, seek to impose *individual* liability upon a government officer for actions taken under color of state law. . . . [A]nd the real party in interest is the individual, not the sovereign.”).

21. *Id.* at 1292.

automobile, and therefore, he was the real party in interest.<sup>22</sup> Accordingly, the Court found that the defendant was not able to avail himself of the tribe's sovereign immunity.<sup>23</sup>

The Court further held that, although tribal law required the tribe to indemnify the defendant, indemnification does not change either the real party in interest or the ability of the driver to claim sovereign immunity.<sup>24</sup> Essentially, the court suggested that when determining who is the real party in interest, the question is not who ultimately pays but rather whose liability the plaintiff is seeking to recover under. When the plaintiff assumes the liability regardless of any pre-arranged indemnification, the plaintiff—not the tribe—is the real party in interest. While the tribe may indemnify Clarke for any negligence that occurred as a result of his driving a vehicle on Connecticut roads as a part of his employment, that indemnification does not convert a claim against him in his personal capacity to an official capacity case.

Justices Thomas and Ginsburg each contributed a short concurrence expressing their views that tribal sovereign immunity should be more narrowly construed than the Court's current jurisprudence allows, but because they agreed with the outcome as applied to an employee of a tribal enterprise, they each concurred in the judgment. Justice Thomas wrote to express his view that "tribal immunity does not extend 'to suits arising out of a tribe's commercial activities conducted beyond its territory.'"<sup>25</sup> Justice Ginsburg added that "tribes, interacting with nontribal members outside reservation boundaries, should be subject to nondiscriminatory state laws of general application."<sup>26</sup> Despite the separate concurrences, the ultimate decision was an 8–0 victory for the appellant.<sup>27</sup>

#### Application of *Lewis v. Clarke* in 2017

Although it was only decided on April 25, 2017, the *Lewis v. Clarke* opinion has already been cited in written opinions by many lower courts.<sup>28</sup>

---

22. *Id.* at 1291–93 (“[H]ere, that immunity is simply not in play. Clarke, not the Gaming Authority, is the real party in interest.”).

23. *Id.* at 1295.

24. *Id.* at 1293–94 (“The Tribe’s indemnification provision does not somehow convert the suit against Clarke into a suit against the sovereign; when Clarke is sued in his individual capacity, he is held responsible only for his individual wrongdoing.”).

25. *Id.* at 1294.

26. *Id.*

27. *Id.* at 1287–88. The case was argued on January 9, 2017, and so Justice Gorsuch had not yet been nominated, let alone confirmed, to his seat on the Supreme Court. In accordance with Supreme Court practice, because he did not participate in the argument, he did not vote on the final issued opinion.

28. See *Pennachietti v. Mansfield*, No. 17-02582, 2017 U.S. Dist. LEXIS 203005 (E.D. Pa. Dec. 11, 2017); *Stanko v. Oglala Sioux Tribe*, No. CIV. 16-5105-JLV, 2017 U.S. Dist. LEXIS 149120

In *Pennachietti v. Mansfield*, the plaintiff, who had borrowed money from a payday lender owned by the Lac Vieu Desert Band of Lake Superior Chippewa Indians, brought suit against the manager of the lender in his personal capacity for a series of tortious claims under state and federal law.<sup>29</sup> The Eastern District of Pennsylvania cited to *Lewis v. Clarke* as part of its refusal to grant the defendant summary judgment on the basis of sovereign immunity.<sup>30</sup>

The federal court in South Dakota applied *Lewis v. Clarke* to a 42 U.S.C. § 1983 action brought by an Indian against several officers of the Oglala Sioux Tribe, including a former tribal judge, related to his detention after he was arrested pursuant to two different tribal warrants issued for failing to appear in tribal court to address speeding tickets.<sup>31</sup> In *Stanko v. Oglala Sioux Tribe*, the federal court dismissed claims against the individuals acting in their official capacity because “[t]he Tribe’s immunity extends to its officers acting in their official capacities.”<sup>32</sup> To justify its conclusion the court cited directly to *Lewis v. Clarke*: “‘Defendants in an official-capacity action may assert sovereign immunity.’”<sup>33</sup> The court dismissed the claims for failure to state a claim against the tribal officers in their individual capacity because the alleged violations of the plaintiff’s constitutional rights by the individual defendants were not conducted under color of “state” law as required in a § 1983 action but instead under “tribal” law.<sup>34</sup> One week later the court dismissed a nearly identical set of claims against employees of the Kyle jail and tribal employees in the criminal justice system.<sup>35</sup>

---

(D.S.D. Sept. 14, 2017); *Alexander v. New York*, No. 6:17-CV-725 (GTS/ATB), 2017 U.S. Dist. LEXIS 108745 (N.D.N.Y. July 12, 2017); *Harvey v. Ute Indian Tribe of the Uintah & Ouray Reservation*, 2017 UT 75, 851 Utah Adv. Rep. 19 (Utah 2017); *Harrison v. PCI Gaming Authority*, No. 1130168, 2017 Ala. LEXIS 98 (Ala. Sept. 29, 2017).

29. *Pennachietti*, 2017 U.S. Dist. LEXIS 203005, at \*1–3.

30. *Id.* at \*4–11. The defendant argued that he was acting within the scope of his employment and therefore this is really a suit against him in his official capacity, but the district court disagreed:

This is a personal capacity suit to recover money damages solely from Mansfield for his personal actions, and extending tribal sovereign immunity to him simply because he was acting within the scope of his employment would extend that immunity beyond what common-law sovereign immunity principles would recognize for government employees.

*Id.* at \*8.

31. *Stanko*, 2017 U.S. Dist. LEXIS 149120, at \*1–3.

32. *Id.* at \*8.

33. *Id.* (citing *Lewis v. Clarke*, 137 S. Ct. 1285, 1291 (2017)).

34. *Id.* at \*12 (“There is no allegation in the complaint that the Individual Tribal Defendants were acting under color of state law. It is also improper for the court to infer from the complaint that the Individual Tribal Defendants were acting under color of state law. Section 1983 does not provide jurisdiction for plaintiff’s claims against the Individual Tribal Defendants.”).

35. *See Stanko v. Oglala Sioux Tribe*, No. CIV. 17-5008-JLV, 2017 U.S. Dist. LEXIS 152933 (D.S.D. Sept. 20, 2017).

The effects of *Lewis v. Clarke* are already prolonging litigation. In *Harvey v. Ute Indian Tribe of the Uintah & Ouray Reservation*, the Utah Supreme Court partially reversed a state appellate court opinion that had dismissed the plaintiff's claims against tribal officials related to interference with contract and extortion. The Utah Supreme Court affirmed the dismissal of the claims against the tribe on the basis of sovereign immunity but remanded the claims against the tribal officials in their individual capacities.<sup>36</sup> It cited *Lewis v. Clarke*: "We do not hold that Harvey has valid claims against the tribal officials in their individual capacities, merely that they do not enjoy sovereign immunity at this stage of the litigation."<sup>37</sup>

Similarly, in *Alexander v. New York*, the Northern District of New York dismissed claims against the Oneida Indian Nation, its police department, and its officers in their official capacity but allowed the claims against the officers in their individual capacity to continue.<sup>38</sup> The court reasoned:

The Supreme Court has recently held that sovereign immunity does not apply to individual capacity suits. . . . In *Lewis*, the Court used the general principles of sovereign immunity, taken from lawsuits against state and federal employees or entities. . . . Thus, a suit against the individual officers in this case would not be barred by tribal immunity.<sup>39</sup>

The federal district court affirmed the decision of the magistrate and ordered that summonses be sent to the tribal officers for claims alleged against them in their individual capacities.<sup>40</sup>

Finally, the Alabama Supreme Court has used *Lewis v. Clarke* and other recent Supreme Court cases on sovereign immunity to conclude that tribal sovereign immunity does not exist at all in cases of tort where the defendant did not have an opportunity to negotiate for a waiver of that immunity.<sup>41</sup>

---

36. *Harvey v. Ute Indian Tribe of the Uintah & Ouray Reservation*, 2017 UT 75, 851 Utah Adv. Rep. 19 (Utah 2017).

37. *Id.* ¶ 33.

38. *Alexander v. New York*, 6:17-CV-725 (GTS/ATB), 2017 U.S. Dist. LEXIS 108745, at \*11–14 (N.D.N.Y. July 12, 2017).

39. *Id.* at \*13.

40. *Id.* at \*17.

41. See *Harrison v. PCI Gaming Authority*, No. 130168, 2017 Ala. LEXIS 98 (Ala. Sept. 29, 2017). For a more complete discussion on a series of three Alabama Supreme Court cases all decided after *Lewis v. Clarke* and each questioning the doctrine of tribal sovereign immunity, see *infra* Part III.Q.4.

B. *The 2017–2018 Term*

By December 31, 2017, the Court was halfway through its 2017–2018 term and had granted certiorari in two more Indian law cases: *Patchak v. Zinke*<sup>42</sup> and *Upper Skagit Indian Tribe v. Lundgren*.<sup>43</sup> On January 12, 2018, the Court added one additional Indian law case to its 2017–2018 docket, *United States v. Washington*.<sup>44</sup> In addition, in November 2017 Justice Thomas issued a lone dissent from denial of certiorari of the Second Circuit’s opinion in *Upstate Citizens for Equality v. United States*.<sup>45</sup>

1. Cases Docketed for the 2017–2018 Term

*Patchak v. Zinke* was decided in 2016 by the D.C. Circuit Court of Appeals<sup>46</sup> and argued in front of the Supreme Court on November 7, 2017.<sup>47</sup> It is actually the second time petitioner Patchak has been heard by the Supreme Court. In 2012, Patchak prevailed in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, when the Supreme Court recognized<sup>48</sup> his ability as a local resident to challenge the decision by the Department of the Interior (Interior) to take land into trust for the Band.<sup>49</sup> After the Supreme Court’s decision, in 2014, Congress enacted the Gun Lake Trust Land Reaffirmation Act, which removed the jurisdiction of the federal courts to hear challenges to the decision of Interior to take land into trust for the Band and ordered any pending litigation dismissed.<sup>50</sup> Patchak challenged the ability of Congress to order his suit dismissed and the D.C. Circuit unanimously affirmed Congress’s power to alter the jurisdiction of

---

42. *Patchak v. Jewell*, 828 F.3d 995 (D.C. Cir. 2016). The respondent was replaced with the change in administrations. Sally Jewell, the Secretary of Interior, was replaced with Ryan Zinke, and the parties were appropriately substituted in accordance with Court rules.

43. *Lundgren v. Upper Skagit Indian Tribe*, 389 P.3d 569 (Wash. 2017).

44. *United States v. Washington*, 864 F.3d 1017 (9th Cir. 2017). This opinion was a denial of rehearing en banc with a strong dissent against granting the rehearing; for a discussion, see *infra* Part III.S.

45. *Upstate Citizens for Equal. v. United States*, 199 L. Ed. 2d 372 (2017).

46. See *Patchak*, 828 F.3d 995.

47. For a thorough discussion of the argument, see Ronald Mann, *Argument Analysis: Justices Struggle to Find the “Beef” in Challenge to Congressional Authority to Resolve Pending Litigation*, SCOTUSBLOG (Nov. 7, 2017, 8:15 PM), <http://www.scotusblog.com/2017/11/argument-analysis-justices-struggle-find-beef-challenge-congressional-authority-resolve-pending-litigation/> [<https://perma.cc/64L6-6XE6>].

48. The decision was 8–1 with Justice Sotomayor dissenting on the basis that the United States did not waive immunity to suit to challenge the land-to-trust decision under the Quiet Title Act. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 228–38 (2012).

49. *Id.* at 228 (“The QTA’s reservation of sovereign immunity does not bar Patchak’s suit. Neither does the doctrine of prudential standing. We therefore affirm the judgment of the D.C. Circuit, and remand the case for further proceedings consistent with this opinion.”).

50. See Gun Lake Trust Land Reaffirmation Act, Pub. L. No. 113-179, 128 Stat. 1913 (2014).

the federal courts.<sup>51</sup> The Supreme Court agreed to review the case with a decision expected by June 2018.<sup>52</sup>

Unlike *Patchak*, the second Indian law case the Court has docketed in 2017 is making its first appearance before the bench and, like *Lewis v. Clarke*, is an appeal from a state supreme court. In *Lundgren v. Upper Skagit Indian Tribe*, the tribe purchased title to real property.<sup>53</sup> During a survey preparatory to taking the land into trust, the tribe learned of a fence on the property that the adjoining landowner had long treated as the boundary line between their property and the property purchased by the tribe.<sup>54</sup> The tribe contested the fence as the boundary line, asserting rights to the full property it purchased as established by the survey.<sup>55</sup> The adjoining landowner filed suit to assert a right in the disputed property by adverse possession.<sup>56</sup> The tribe asked the court to dismiss the case on the basis of sovereign immunity, either for lack of subject matter jurisdiction or for failure to join an indispensable party.<sup>57</sup>

The majority of the Washington Supreme Court (5–4) affirmed the lower court’s conclusion that sovereign immunity is irrelevant when the court has jurisdiction over the property in rem. It cited the U.S. Supreme Court’s decision in *County of Yakima v. Confederated Tribes and Bands of the Yakima Nation*, for the proposition that the county had jurisdiction to impose an ad valorem tax over Indian lands “on the basis of alienability of the allotted lands, and not on the basis of jurisdiction over tribal owners.”<sup>58</sup> Accordingly, the Washington Supreme Court concluded that state courts “have subject matter jurisdiction over in rem proceedings in certain situations where claims of sovereign immunity are asserted.”<sup>59</sup> Additionally, the majority reasoned that because the adverse possession

---

51. *Patchak*, 828 F.3d at 1003 (“In passing the Gun Lake Act, Congress exercised its ‘broad general powers to legislate in respect to Indian tribes, powers that [the Supreme Court] ha[s] consistently described as ‘plenary and exclusive.’” *United States v. Lara*, 541 U.S. 193, 200, 124 S. Ct. 1628, 158 L.Ed.2d. 420 (2004). Accordingly, we ought to defer to the policy judgment reflected therein. Such is our role. Indeed, “[a]pplying laws implementing Congress’ policy judgments, with fidelity to those judgments, is commonplace for the Judiciary.”).

52. The Supreme Court granted certiorari on May 1, 2017. *Patchak v. Zinke*, 137 S. Ct. 2091 (Mem) (2017).

53. *Lundgren v. Upper Skagit Indian Tribe*, 187 Wn.2d 857, 861–62, 389 P.3d 569 (Wash. 2017).

54. *Id.* at 862.

55. *Id.* (“In September 2014, the Tribe notified the Lundgrens in a letter that the fence did not represent the boundary and that they were asserting ownership rights to the entire property deeded to them in 2013. The Lundgrens initiated this lawsuit in March 2015. They asked the court to quiet title in the disputed property to them and sought injunctive relief.”).

56. *Id.*

57. *Id.* at 862–63.

58. *Id.* at 866 (internal citations omitted) (citing *Cty. of Yakima v. Confederated Tribes and Bands of the Yakima Nation*, 502 U.S. 251 (1992)).

59. *Id.* at 868.

occurred long before the tribe took title to the property, the tribe was not a necessary party, and so the lawsuit could not be dismissed for failure to join an indispensable party under Washington's Rule of Civil Procedure 19.<sup>60</sup>

Four members of the court dissented: "While the existence of in rem jurisdiction gives a court authority to quiet title to real property without obtaining personal jurisdiction over affected parties, Civil Rule (CR) 19 counsels against exercising this authority in the face of a valid assertion of sovereign immunity."<sup>61</sup> The dissent reasoned that since the tribe claims to own a recorded interest in the property, it has a legally protected property interest in the quiet title action decided after it purchased the disputed property.<sup>62</sup> The dissent would have held that in a proceeding to quiet title to land over which the court admittedly has personal jurisdiction, the claim should not have been able to survive a Rule 19 motion because the tribe's property interest makes it a necessary party, and it has not waived its sovereign immunity.<sup>63</sup> On December 8, 2017, the U.S. Supreme Court granted the tribe's petition for certiorari.<sup>64</sup>

## 2. Dissent from Denial of Certiorari

In addition to the two cases docketed by the Court, there was one notable lone dissent from denial of certiorari in an Indian law case in 2017. The Second Circuit Court of Appeals decided *Upstate Citizens for Equality v. United States* in 2016.<sup>65</sup> The case involved a challenge by the petitioner to a decision by Interior to take 13,000 acres of land into trust for the Oneida Nation of New York.<sup>66</sup> The Second Circuit had upheld the power of Interior under the Indian Reorganization Act.<sup>67</sup>

Appellants, a group of towns and residents in the area near the trust acquisition, appealed to the Supreme Court. The Court refused to grant their petition for an appeal but Justice Thomas issued a lone dissent from the denial of certiorari.<sup>68</sup> Justice Thomas would have granted certiorari as an opportunity to revisit the ability of the United States to take land into

---

60. *Id.* at 871–73.

61. *Id.* at 874.

62. *Id.* at 880.

63. *Id.* at 880–81.

64. *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 543 (2017).

65. *See Upstate Citizens for Equal., Inc. v. United States*, 841 F.3d 556 (2d Cir. 2016).

66. *Id.* at 560.

67. *Id.* at 577 ("[W]e conclude that the federal government's plenary power over Indian affairs extends to taking historic reservation land into trust for a tribe. That the entrustment deprives state government of certain aspects of jurisdiction over that land does not run afoul of general principles of state sovereignty, the Indian Commerce Clause, or the specific guarantees of the Enclave Clause.>").

68. *Upstate Citizens for Equal. v. United States*, 199 L. Ed. 2d 372 (2017).

trust.<sup>69</sup> His dissent argues that such power may be outside the power imposed by the Indian Commerce Clause because the acquisition of land by Interior of land already owned by the tribe cannot properly be understood as “commerce” within the meaning of the Indian Commerce Clause.<sup>70</sup>

Justice Thomas further argued that such an interpretation would have been against the intent of the founders when they wrote the Indian Commerce Clause.<sup>71</sup> The Justice looked at the broad language of the Indian Reorganization Act’s authorization, holding “[u]nder our precedents, Congress has thus obtained the power to take any state land and strip the State of almost all sovereign power over it ‘for the purpose of providing land for Indians.’”<sup>72</sup> Justice Thomas expressed concern at the breadth of this language.

This means Congress could reduce a State to near nonexistence by taking all land within its borders and declaring it sovereign Indian territory. It is highly implausible that the Founders understood the Indian Commerce Clause, which was virtually unopposed at the founding, as giving Congress the power to destroy the States’ territorial integrity.<sup>73</sup>

Accordingly, Justice Thomas would have granted certiorari to reconsider the ability of Interior to take land into trust.

### III. IMPORTANT DEVELOPMENTS IN 2017

While the Supreme Court’s developments in Indian law are likely to be those that capture the largest headlines and that students, practitioners, and scholars are certainly the most familiar with, there are more than 600 unrelated cases decided in 2017 that are slowly changing the landscape of Indian law. This third and longest Part of the annual year in review attempts to capture some of the most important and most interesting developments in Indian law during 2017.

---

69. *Id.* at 373–74.

70. *Id.* at 373 (“Understood this way, the Indian Commerce Clause does not appear to give Congress the power to authorize the taking of land into trust under the IRA. Even assuming that land transactions are ‘Commerce’ within the scope of the Clause . . . many applications of the IRA do not involve trade of any kind. . . . [I]n cases like these, where the tribe already owns the land, neither money nor property changes hands. Instead, title is slightly modified by adding ‘the United States in trust for’ in front of the name of ‘the Indian tribe or individual Indian’ who owns the land. . . . In short, because no exchange takes place, these trust arrangements do not resemble ‘trade with Indians.’”)

71. *Id.* at 373–74 (“Applying our precedents, the Second Circuit concluded that the Indian Commerce Clause empowered the Federal Government to take into trust the land at issue here. In so doing, it showed how far our precedents interpreting the Indian Commerce Clause have strayed from the original understanding, and how much Congress’ power has grown as a result.”)

72. *Id.* at 373 (citing 25 U.S.C. § 5108 (2012)).

73. *Id.*

Among the more interesting observations, 2017 saw Leonard Peltier return to the federal courts.<sup>74</sup> A powerful opinion on choice of law and tribal exhaustion was issued from the Honorable Diane Humetewa, the first Native American woman appointed to the federal bench.<sup>75</sup> The year included continuing challenges to the allocation of the \$99 million in attorney's fees under the *Cobell* settlement related to the mismanagement of Individual Indian Money Accounts,<sup>76</sup> and yet another reaffirmation that prosecution by a tribe and by the United States does not violate the Double Jeopardy Clause of the Fifth Amendment.<sup>77</sup>

The remainder of this Part is divided up around constituent themes, attempting to provide a concise discussion and thorough set of citations to the Indian law developments of 2017.

---

74. See *Peltier v. Sacks*, No. C17-5209-RBL, 2017 U.S. Dist. LEXIS 116434 (W.D. Wash. July 25, 2017). Leonard Peltier, an American Indian actively involved in the American Indian Movement and convicted of the murder of two FBI agents on the Pine Ridge Reservation in 1975, brought suit against the Washington State Department of Labor and Industries, which had removed some of his artwork from a display commemorating Native American Heritage month after objections from the public. In addition to the Department of Labor, Peltier sued two former FBI agents who had written letters expressing their concerns that Peltier's artwork was prominently displayed for defamation. The FBI agents asked the court to dismiss, arguing that their letters were protected speech under the Washington anti-SLAPP statute. The court agreed:

The letters Woods and Langberg wrote to Saks and Inslee regarded a matter of public concern to the State and to the L&I department specifically. Each communicated his displeasure with L&I's public display of Peltier's artwork, as it seemed to condone his murderous past. How the public receives a state-sanctioned public display is a matter reasonably of concern to the State and to its agency housing the display. . . . Under the anti-SLAPP statute, Woods and Langberg are immune from suit for these communications, which regarded L&I's public display of Peltier's paintings.

*Id.* at \*8. The Court dismissed the claims against the individual FBI agents.

75. See *Progressive Advanced Ins. Co. v. Worker*, No. CV-16-08107-PCT-DJH, 2017 U.S. Dist. LEXIS 19283 (D. Ariz. Feb. 8, 2017).

76. See *Cobell v. Jewell*, 234 F. Supp. 3d 126 (D.C. Cir. 2017) (holding that withdrawal of counsel before the litigation ends in settlement does not prevent that counsel from being compensated for the time actually spent on the litigation—counsel in the case was awarded \$2,878,612.52); *Cobell v. Jewell*, 260 F. Supp. 3d 1 (D.D.C. 2017) (holding that the same counsel was entitled to an additional six percent in prejudgment interest to fully compensate him for waiting more than four years to be paid for his work); *Lannan Foundation v. Gingold*, No. 13-01090 (TFH), 2017 U.S. Dist. LEXIS 176671 (D.D.C. Oct. 25, 2017) (refusing to grant summary judgment and ordering supplemental pleadings where the plaintiff sought recovery on several reimbursable grants it had extended to Eloise Cobell to cover costs during the litigation).

77. See *United States v. Bearcomesout*, 696 F. App'x 241 (9th Cir. 2017). Defendant argued that the Double Jeopardy Clause of the Constitution prevented the United States from prosecuting her for involuntary manslaughter after she had been previously prosecuted by the Northern Cheyenne Tribe for the same offense. The Ninth Circuit held that the Double Jeopardy Clause does not bar a prosecution by different sovereigns and dismissed her appeal.

A. *Civil Jurisdiction Over Nonmembers: Developments in Montana and Its Progeny*

The question of a tribal court's jurisdiction has long occupied federal courts. The Supreme Court decided a pair of cases in 1981 and 1982 that established the modern tests for tribal authority. In 1981, the Supreme Court announced a presumptive rule that a tribe lacked authority over nonmembers when the activity occurred within the outer boundary of the reservation but on land held in fee by the state or by nonmembers.<sup>78</sup> However, the Court also announced a pair of exceptions permitting tribal jurisdiction when there existed a "consensual relationship" between the tribe and the nonmember, or when the conduct would have a "direct effect" on the tribe's political integrity, economic security, health, or welfare.<sup>79</sup> The following year, in 1982, the Court clarified that when the activity occurred on tribal land, even when the offending party was non-Indian, the tribe retained inherent authority to regulate the conduct of the nonmember unless Congress were to explicitly divest the tribe from its jurisdiction.<sup>80</sup>

Thus, for years the status of the land seemed to control which of two Supreme Court cases controlled the outcome of a challenge to the tribe's jurisdiction. But in 2001 the Supreme Court decided *Nevada v. Hicks*, which prohibited tribal jurisdiction over a state police officer who entered the reservation pursuant to a tribal warrant to investigate a crime that had occurred outside the reservation.<sup>81</sup> The Court questioned the previously presumptive role of the status of land.<sup>82</sup> *Hicks* was very unusual in that it was both unanimous and sharply divided. The vote was 9–0 that the tribe lacked jurisdiction but with five separate written opinions.<sup>83</sup> Ever since,

---

78. *Montana v. United States*, 450 U.S. 544, 564 (1981) ("[E]xercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.").

79. *Id.* at 565–66 ("Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. . . . A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.").

80. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141–42 (1982) ("[T]he . . . authority that a tribe may exercise over nonmembers does not arise until the nonmember enters the tribal jurisdiction. We do not question that there is a significant territorial component to tribal power: a tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe.").

81. *Nevada v. Hicks*, 533 U.S. 353 (2001).

82. *Id.* at 358–60 ("The ownership status of land, in other words, is only one factor to consider in determining whether regulation of the activities of nonmembers is 'necessary to protect tribal self-government or to control internal relations.' It may sometimes be a dispositive factor.").

83. *Id.* at 375–404. Justices Scalia, Souter, Ginsburg, O'Connor, and Stevens all wrote separate opinions.

lower federal courts have struggled to reconcile how *Hicks* effects the framework first established by *Montana/Merrion*.

1. *Montana* and Its Exceptions

In 2017, a number of courts continued to try to reconcile these conflicting opinions, with a consensus emerging that *Hicks* is generally intended to be limited to its facts. In *Knighton v. Cedarville Rancheria of N. Paiute Indians*, the Eastern District of California, citing a prior Ninth Circuit case, held that “*Montana*’s exceptions ‘do[ ] not apply to jurisdictional questions’ over nonmembers for claims arising on tribal land within a reservation, except ‘where a state has a competing interest in executing a warrant for an off-reservation crime.’”<sup>84</sup> Instead, the district court otherwise affirmed the importance of the status of the land, concluding that the tribe had jurisdiction over nonmembers for activity that occurred on tribal land without needing to reference the *Montana* exceptions.<sup>85</sup> The court reasoned that the tribe has regulatory authority over nonmembers for events that occur on tribal land whenever the nonmembers’ conduct might “intrude on the internal relations of the tribe or threaten tribal self-rule.”<sup>86</sup> The petitioner admitted that the tribe had regulatory authority over tribal employees and that her alleged conduct “directly interfered” with the tribe’s power to control internal relations or protect its members.<sup>87</sup>

In the context of exhaustion, the Ninth Circuit reaffirmed the principle that the status of the land gives tribes at least “plausible” or “colorable” jurisdiction over nonmembers and, in so doing, also rejected the broader suggestion that *Hicks* has changed the jurisdictional analysis.<sup>88</sup> In *Window Rock Unified School District v. Reeves*, the Ninth Circuit suggested that *Hicks* should be read narrowly and “is limited to the

---

84. *Knighton v. Cedarville Rancheria of N. Paiute Indians*, 234 F. Supp. 3d 1042, 1051 (E.D. Cal. Feb. 15, 2017) (citing *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 813 (9th Cir. 2011)).

85. *Id.* at 1053 (“This record demonstrates that *Knighton*’s activities in question did not occur on non-Indian fee lands within the Tribe’s reservation, and thus under *Water Wheel*, the *Montana* exceptions do not apply.”).

86. *Id.* at 1054 (citing *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 335 (2008)).

87. *Id.* at 1055.

88. *See Window Rock Unified Sch. Dist. v. Reeves*, 861 F.3d 894, 896 (9th Cir. 2017) (“Because the claims arise from conduct on tribal land and implicate no state criminal law enforcement interests, we conclude that tribal jurisdiction is colorable or plausible under our court’s interpretation of *Nevada v. Hicks*.”(internal citation omitted)).

question of tribal-court jurisdiction over state officers enforcing state law.”<sup>89</sup>

The Tenth Circuit similarly limited the *Hicks* exception. In *Norton v. Ute Indian Tribe of the Uintah & Ouray Reservation*, state law enforcement officers argued that even if tribal jurisdiction was plausible on the tribe’s trespass claim, exhaustion should not be required because they are law enforcement officers like in *Hicks*.<sup>90</sup> The Tenth Circuit disagreed, and like the Ninth Circuit above, limited *Hicks* to cases where state law enforcement investigated off-reservation conduct or were cross-deputized.<sup>91</sup>

The District of Idaho had occasion to articulate different standards for the appropriate award of damages in a review of the application of *Montana*’s two exceptions. In *FMC Corporation v. Shoshone-Bannock Tribes*, the plaintiff objected to the enforcement of a tribal appellate court judgment imposing a \$1.5 million annual permit fee on the plaintiff.<sup>92</sup> The plaintiff had operated a phosphorous production plant on land owned in fee mostly located within the Shoshone-Bannock Reservation.<sup>93</sup> The Environmental Protection Agency (EPA) declared the site a superfund cleanup site.<sup>94</sup> To avoid extensive litigation, the plaintiff sought a Consent Decree with the EPA.<sup>95</sup> As a condition of the Consent Decree, the EPA required the plaintiff to obtain permits from the tribe for the work done on the reservation.<sup>96</sup> The tribe demanded \$100 million for the permits or, alternatively, \$1.5 million a year and a consent to tribal jurisdiction.<sup>97</sup> The plaintiff consented to jurisdiction and then challenged the \$1.5 million fee in tribal court, arguing that the waste was contained and posed no health

---

89. *Id.* at 902. For a more thorough discussion of *Reeves*, see *infra* Part III.B.2 dealing with tribal exhaustion.

90. *Norton v. Ute Indian Tribe of the Uintah & Ouray Reservation*, 862 F.3d 1236 (10th Cir. 2017). For a more thorough discussion of *Norton*, see *infra* Part III.B.2 dealing with tribal exhaustion.

91. *Id.* at 1248–49 (“Given that the chief concern driving the Court in *Hicks* was the state’s paramount interest in investigating off-reservation crimes, we cannot say that a similar state interest is implicated when state officers pursue a tribal member on tribal land for an on-reservation offense over which they lack authority.”).

92. *FMC Corp. v. Shoshone-Bannock Tribes*, No. 4:14-CV-489-BLW, 2017 U.S. Dist. LEXIS 161387, at \*2–3 (D. Idaho Sept. 28, 2017).

93. *Id.* at \*2 (“FMC’s operations produced 22 million tons of waste products stored on the Reservation in 23 ponds. This waste is radioactive, carcinogenic, and poisonous. It will persist for decades, generations even, and is so toxic that there is no safe method to move it off-site.”).

94. *Id.*

95. *Id.*

96. *Id.* at \*2–3 (“As a condition of agreeing to that Consent Decree, the EPA insisted that FMC obtain Tribal permits for work FMC would do under the Consent Decree on the Reservation. The Tribes, however, were demanding \$100 million for those permits, although they would drop the fee to \$1.5 million a year if FMC consented to Tribal jurisdiction. To get the lower permit fee, and to satisfy the EPA’s condition that they obtain Tribal permits, FMC consented to Tribal jurisdiction.”).

97. *Id.*

problems to the tribe.<sup>98</sup> The tribal appellate court affirmed the \$1.5 million annual fee given the highly dangerous nature of the waste and the inability of the waste to be moved.<sup>99</sup> The plaintiff challenged the tribal appellate court's decision in federal court.

The federal court looked first at whether the tribal court had jurisdiction over the plaintiff when it imposed the \$1.5 million annual fee. The court recognized that for activity located on privately owned fee land on the Reservation, the tribe lacks jurisdiction except for the two *Montana* exceptions.<sup>100</sup> The plaintiff argued that the agreement it entered into with the tribe was the product of duress, but the court disagreed.<sup>101</sup> It held that the consensual relationship entered into between the plaintiff and the tribe confers jurisdiction upon the tribe and was simply the price of settlement and not the product of duress.<sup>102</sup>

While the first *Montana* exception provided sufficient jurisdiction for the tribal court, the federal court continued to discuss the second exception: whether the conduct of non-Indians would have some direct effect on the political integrity, economic security, health, or welfare of the tribe. Here, while the EPA had taken steps to contain the waste, the EPA itself concluded that the toxic waste "may constitute an imminent and substantial endangerment to public health or welfare or the environment."<sup>103</sup> The court concluded that the waste poses a direct effect on the tribe of exactly the kind that falls within *Montana*'s second exception.<sup>104</sup>

---

98. *Id.* at \*3.

99. *Id.* at \*4.

100. *Id.* at \*28 ("The first exception provides that 'a tribe may regulate through taxation, licensing, or other means, the activities of non-members who enter into consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.'").

101. *Id.* at \*30.

102. *Id.* ("FMC complains that this agreement was a product of duress, but the Tribes only took advantage of their bargaining leverage, a long-standing practice in the sharp-elbowed corporate world in which FMC does business every day. FMC had a strong desire to obtain a Consent Decree from the EPA, but the EPA was insisting that FMC obtain Tribal permits. The Tribes, recognizing their superior bargaining position, used that leverage to extract a high price for the permits. FMC paid the price because the Tribal permit was a key component to obtaining the Consent Decree, which in turn was worth the price of the Tribal permit. This was a simple business deal, not the product of illegal duress or coercion. FMC cites no case law holding that *Montana*'s exception does not apply when the consensual relationship is formed begrudgingly or by one party taking advantage of bargaining leverage.").

103. *Id.* at \*32.

104. *Id.* at \*34-37 ("[T]hese sites are generating lethal gases that accumulate under pressure beneath the pond covers. In other words, they pose a constant and deadly threat to the Tribes, a real risk of catastrophic consequences should containment fail. And despite the best efforts of the EPA, there have been releases of these lethal gases. . . . the record shows conclusively that a failure by the EPA to contain the massive amount of highly toxic FMC waste would be catastrophic for the health and welfare of the Tribes. This is the type of threat that falls within *Montana*'s second exception.").

The court then proceeded to discuss how the source of the jurisdiction relates to the possible award that a tribal court may legitimately impose. The court reasoned that when jurisdiction is premised on consent, the amount agreed between the parties must be fair because it was the result of the consensual relationship.<sup>105</sup> However, the court warned that if the jurisdiction of the tribal court is premised on the second exception, then the damages awarded must have some relation to the amount of risk or effect that the tribe will experience.<sup>106</sup> “The scope of the Tribes jurisdiction depends on its source. If the source is the second Montana exception, the permit fee must have some relationship to the Tribe’s obligation to protect the health and safety of Tribal members.”<sup>107</sup> Because the tribes have never explained how the \$1.5 million is related to tribal action to supplement efforts by the EPA to keep the tribe safe, the \$1.5 million figure would be improper under the direct effects exception.<sup>108</sup> However, because the tribe can also assert jurisdiction under the consensual relationship exception, and the parties have agreed to a \$1.5 million annual fee, the district court held that the tribal court had jurisdiction to impose such a fee.<sup>109</sup>

## 2. Forum Selection Clauses

In 2017, a couple courts had to remind parties that the jurisdiction of tribal courts is subject to forum selection clauses or other agreements between the parties that may make an otherwise proper assertion of jurisdiction unlawful. In *Enerplus Resources (U.S.) v. Wilkinson*, the Eighth Circuit reaffirmed that the exhaustion requirement, and tribal jurisdiction in general, may be waived through a forum selection clause.<sup>110</sup> “It is well-established in the Eighth Circuit that parties may waive tribal court jurisdiction and compliance with the tribal exhaustion doctrine through a forum selection agreement. . . . The tribal exhaustion doctrine

---

105. *Id.* at \*39–41 (“The scope of the Tribes jurisdiction depends on its source. . . . Under Montana’s first exception, Tribal jurisdiction is based on the consensual relationship between FMC and the Tribes. FMC agreed to obtain a use permit under the Amendments to Chapter V of the Fort Hall Land Use Operative Policy Guidelines, and pay a \$1.5 million annual fee for that permit. . . . Thus, FMC agreed to pay the annual permit fee for as long as it stored the waste on the site.”).

106. *Id.* at \*39–40.

107. *Id.* at \*39.

108. *Id.* at \*40 (“There may be legitimate reasons justifying the Judgment amount, but they have never been explained, and FMC has never had an opportunity to address them. Under *Marchington*’s comity analysis, it would be unfairly prejudicial to enforce the permit fee imposed by the Tribal Appellate Court under the second *Montana* exception.”).

109. *Id.* at \*43.

110. *Enerplus Res. (U.S.) Corp. v. Wilkinson*, No. 1:16-cv-103, 2017 U.S. Dist. LEXIS 181579, at \*9-11 (D.N.D. Nov. 2, 2017).

does not apply when the contracting parties have included a forum selection clause in their agreement.”<sup>111</sup> In *Amerind Risk Management Corporation v. Blackfeet Housing*, the District of New Mexico held that when the parties agreed in a contract to litigate any disputes in New Mexico, the assertion of jurisdiction by the Blackfeet Tribal Court was improper.<sup>112</sup>

### 3. State Interference with Tribal Jurisdiction

Finally, there were several cases where the state was alleged to have interfered with the jurisdiction of the tribe. In *Bishop Paiute Tribe v. Inyo County*, the tribe brought a complaint against Inyo County, alleging that the county’s threat to criminally prosecute tribal police who are enforcing tribal ordinances and protection orders interferes with the tribe’s inherent right to operate a police department on its reservation, and it sought an order clarifying that the tribe has an inherent right to enforce its laws.<sup>113</sup> The district court dismissed the complaint sua sponte for lack of subject matter jurisdiction,<sup>114</sup> and the tribe appealed.

The Ninth Circuit reversed. “The Tribe alleges that federal common law grants the Tribe the authority to ‘investigate violations of tribal, state, and federal law, detain, and transport or deliver a non-Indian violator to the proper authorities.’”<sup>115</sup> The Ninth Circuit reasoned that the tribe’s request raises a federal question because it alleges that the state has violated federal common law.<sup>116</sup> The Ninth Circuit further confirmed that the case was ripe for judicial review and remanded the case to the district court for further proceedings on the merits of the tribe’s claim.<sup>117</sup>

In *Ute Indian Tribe of the Uintah & Ouray Reservation v. Lawrence*, a nonmember former contractor with the tribe brought suit in state court

---

111. *Id.* at \*10–11.

112. *Amerind Risk Mgmt. Corp. v. Blackfeet Hous.*, No. 16 CV 1093 JAP/KK, 2017 U.S. Dist. LEXIS 172764, at \*12–21 (D.N.M. Oct. 17, 2017). “When consent to be sued is given, the terms of the consent establish the bounds of a court’s jurisdiction.” *Id.* at \*13.

113. *Bishop Paiute Tribe v. Inyo Cty.*, 863 F.3d 1144 (9th Cir. 2017).

114. *Bishop Paiute Tribe v. Inyo Cty.*, No. 1:15-CV-00367-GEB-JLT, 2015 U.S. Dist. LEXIS 90684 (E.D. Cal. July 10, 2015).

115. *Bishop Paiute Tribe*, 863 F.3d at 1152.

116. *Id.* (“Because the Tribe has alleged violations of federal common law, the Tribe has adequately pleaded a federal question that provides federal courts with subject matter jurisdiction pursuant to 28 U.S.C. § 1331.”).

117. *Id.* at 1153–54 (“The Tribe has already seen one of its officers arrested and prosecuted based on Defendants’ interpretation of the Tribe’s lawful authority. Since the Tribe covers the legal costs of defending its Tribal PD officers from prosecution, this dispute has cost the Tribe money. And Defendants’ interference with the Tribe’s alleged inherent authority has, according to Tribe, interfered with the Tribe’s ability to maintain peace and security on the reservation.”).

to enforce the contractual terms of their agreement.<sup>118</sup> The tribe responded by filing suit in federal court seeking a determination that the state has no jurisdiction over the tribe.<sup>119</sup> The federal district court held that it lacked subject matter jurisdiction over the tribe's challenge to the jurisdiction of the state court.<sup>120</sup> The Tenth Circuit reversed.<sup>121</sup> The Tenth Circuit reasoned that the Supreme Court has long held that states have only limited jurisdiction over Indians.<sup>122</sup> The Court relied on *National Farmers*<sup>123</sup> as definitive evidence that whether a tribal court may assert jurisdiction over a nonmember of the tribe is a question that "arises under" federal law for the purposes of § 1331<sup>124</sup> and remanded the case for further proceedings.

### B. *Civil Jurisdiction: Exhaustion and Its Exceptions*

In a pair of U.S. Supreme Court cases decided during the 1980s,<sup>125</sup> the Court articulated a common law rule that requires parties contesting the jurisdiction of the tribal court to first exhaust their tribal remedies.<sup>126</sup> The court reasoned that such a policy will encourage tribal court development and provide a record for federal courts to review.<sup>127</sup>

---

118. *Ute Indian Tribe of the Uintah & Ouray Reservation v. Lawrence*, 875 F.3d 539 (10th Cir. 2017).

119. *Id.* at 540.

120. *Id.*

121. *Id.* ("We hold that the Tribe's claim—that federal law precludes state-court jurisdiction over a claim against Indians arising on the reservation—presents a federal question that sustains federal jurisdiction.")

122. *Id.* at 542–44 (citing *Williams v. Lee*, 358 U.S. 217 (1959)) ("[T]he Supreme Court has made clear that state adjudicative authority over Indians for on-reservation conduct is greatly limited by federal law. . . . If a suit to enjoin a tribe from exercising jurisdiction contrary to federal law is an action 'arising under' federal law, then so is a suit to enjoin a State from exercising jurisdiction contrary to federal law.")

123. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985).

124. *Ute Indian Tribe*, 875 F.3d at 543–48 ("Because petitioners contend that federal law has divested the Tribe of this aspect of sovereignty, it is federal law on which they rely as a basis for the asserted right of freedom from Tribal Court interference. *They have, therefore, filed an action 'arising under' federal law within the meaning of § 1331.* . . . Here, the Tribe likewise relies on federal law 'as a basis for the asserted right of freedom from [state-court] interference.'")

125. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987); *Nat'l Farmers*, 471 U.S. 845.

126. *Iowa Mut. Ins. Co.*, 480 U.S. at 19 ("Although petitioner must exhaust available tribal remedies before instituting suit in federal court, the Blackfeet Tribal Courts' determination of tribal jurisdiction is ultimately subject to review. If the Tribal Appeals Court upholds the lower court's determination that the tribal courts have jurisdiction, petitioner may challenge that ruling in the District Court.")

127. *Nat'l Farmers*, 471 U.S. at 856 ("We believe that examination should be conducted in the first instance in the Tribal Court itself. Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge. Moreover the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed.")

In a textbook example of why exhaustion of tribal remedies is important, in *Board of Education for the Gallup-Mckinley County School v. Henderson*, the Tenth Circuit heard a case where terminated employees of a school district located on the Navajo Reservation brought suit in Navajo tribal court alleging a violation of the Navajo Preference in Employment Act.<sup>128</sup> The Navajo Supreme Court had dismissed the case for lack of subject matter jurisdiction, but the school district appealed anyway, seeking a declaratory judgment from the federal courts that as a matter of law, the Navajo court system lacked jurisdiction over the school board.<sup>129</sup> The Tenth Circuit affirmed the dismissal; because the school district won, there was no reason to consider the Navajo Supreme Court's conclusion that it had subject matter jurisdiction over the defendant school district.<sup>130</sup> *Henderson* illustrates that tribal courts are not always protective of the tribal parties that appear before them, to the detriment of nonmembers, but instead are thoughtful about the constraints on their own jurisdiction. By exhausting its tribal remedies, the Gallup-McKinley County School District won the outcome that it was seeking, the dismissal of claims against it, without needing to resort to federal courts.

#### 1. Cases Dismissed Based on Comity

Judge Diane Humetewa decided another well-reasoned Indian law case on the basis of exhaustion. In *Progressive Advanced Insurance Co. v. Worker*, an insurance company filed for a declaratory judgment that having paid the policy's maximum limit, it owed no further money to the defendant.<sup>131</sup> The defendant, a Navajo tribal member with cars garaged on the reservation, argued that he was entitled to stack the underinsured motorist coverage on three other vehicles covered under the policy and recover additional funds.<sup>132</sup> The contract says disputes will be governed by Arizona law, which the plaintiff argued is a forum selection clause and the defendant argued is a choice of law clause.<sup>133</sup> The defendant moved to have the case dismissed because the plaintiff had not exhausted its tribal

---

128. *Bd. of Educ. for the Gallup-McKinley Cty. Sch. v. Henderson*, 696 F. App'x 355 (10th Cir. June 19, 2017).

129. *Id.* at 357.

130. *Id.* at 359 (“[T]here is no ‘substantial controversy . . . of sufficient immediacy and reality’ to warrant a court issuing a declaratory judgment. The school district will suffer no legal or financial penalty from the dismissal of its suit. Its legal victory will stand, and it will be where it was before *Henderson* sought recourse in the Navajo legal system. And if the school district thinks it is improperly subjected to Navajo jurisdiction in the future, it can pursue its legal remedies then.”).

131. *Progressive Advanced Ins. Co. v. Worker*, No. CV-16-08107-PCT-DJH, 2017 U.S. Dist. LEXIS 19283 (D. Ariz. Feb. 8, 2017).

132. *Id.* at \*3.

133. *Id.* at \*2–3.

remedies.<sup>134</sup> The plaintiff argued no exhaustion was required because under *Nevada v. Hicks*, there is an exception to the exhaustion doctrine if a proceeding in federal court would serve no purpose other than delay.<sup>135</sup>

Judge Humetewa's opinion recognized that generally a tribal court has no civil jurisdiction over a non-Indian defendant but that there are two exceptions created by *Montana* that may give the tribe jurisdiction: (1) whether there is a consensual relationship between the plaintiff and the tribe or its members, or (2) whether there is a direct effect on the health or welfare of the tribe.<sup>136</sup> Judge Humetewa cited *LaPlante* for the proposition that legal and factual questions relating to jurisdiction should be decided in the first instance by the tribal court.<sup>137</sup> "[T]he parties in this case entered into a contractual agreement. Whether this contract created a consensual relationship between Plaintiff and a member of the tribe such that tribal courts have jurisdiction under *Montana*'s consensual relationship exception is not clear."<sup>138</sup> Because the court could not conclude that the tribal court plainly lacked jurisdiction, comity required the plaintiff's action be dismissed until it has exhausted Navajo tribal court remedies.<sup>139</sup>

## 2. Exceptions to Exhaustion

In *National Farmers*, the U.S. Supreme Court noted that there are several exceptions to the exhaustion doctrine: when jurisdiction is motivated by a desire to harass or is conducted in bad faith, where jurisdiction is patently violative of express jurisdictional provisions, or where jurisdiction would be futile.<sup>140</sup> The Supreme Court has subsequently added a fourth exception: where nonmember activity occurred on land not controlled by the tribe and under *Montana*, neither exception could apply such that exhaustion would serve no purpose other than delay.<sup>141</sup> In 2017,

---

134. *Id.* at \*1.

135. *Id.* at \*9 ("The question for this Court is whether jurisdiction is plainly lacking in the tribal court such that exhaustion 'would serve no purpose other than delay.'").

136. *Id.* at \*4.

137. *Id.*

Progressive issued an insurance policy that listed a tribal member as a named insured and covered vehicles that were kept on tribal lands. . . . however, Progressive never mailed anything to an address on tribal lands. To the extent that factor is dispositive, it may be that the tribal court lacks jurisdiction. But this is a question that must be answered first by the tribal courts of the Navajo Nation.

*Id.* at \*9.

138. *Id.* at \*10.

139. *Id.*

140. Nat'l Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 856 n.21 (1985).

141. *Nevada v. Hicks*, 533 U.S. 353, 369 (2001) ("[I]t is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana*'s main rule, so the exhaustion requirement 'would serve no purpose other than delay.'") (internal citations omitted).

a number of cases were decided on the basis of whether the exceptions to exhaustion applied.

*a. Bad Faith*

In *Acres v. Blue Lake Rancheria*, the tribe brought suit in tribal court against the plaintiff for breach of contract.<sup>142</sup> The tribal judge failed to disclose that he had an attorney–client relationship with the tribe, and so the plaintiff filed in federal court seeking a declaration that the tribe was acting in bad faith, and therefore an exhaustion of his tribal remedies was not required.<sup>143</sup> Subsequently, the tribal judge recused himself and named a retired California appellate judge with no previous ties to the tribe to hear the case.<sup>144</sup> The court noted that “no court has ever found that the bad faith exception applies”<sup>145</sup> and recognized that the tribe took “real effort” to address the plaintiff’s concern by appointing an outside judge with no tribal connection and not one of the other tribal judges.<sup>146</sup> It held that the actions of the tribe cured any errors related to its bad faith and accordingly dismissed the case with instructions for the plaintiff to exhaust his tribal remedies.<sup>147</sup> The Ninth Circuit subsequently affirmed the decision.<sup>148</sup>

*b. Futility*

In *Rabang v. Kelly*, a group of allegedly disenrolled members of the Nooksack Nation brought suit against the acting tribal council, contesting their disenrollment.<sup>149</sup> Interior had made three separate determinations that the actions of the tribal council after March 24, 2016 were not to be recognized by the United States because tribal elections had been canceled and the remnant council lacked a quorum.<sup>150</sup> The remnant council had attempted to appoint itself as a new Nooksack Supreme Court to overturn decisions of the tribe’s existing appellate court.<sup>151</sup> The federal district court recognized that ordinarily tribal plaintiffs are required to exhaust their tribal court remedies, but that in some cases “exhaustion would be futile because of the lack of adequate opportunity to challenge the [tribal] court’s

---

142. *Acres v. Blue Lake Rancheria*, No. 16-cv-05391-WHO, 2017 U.S. Dist. LEXIS 26447 (N.D. Cal. Feb. 24, 2017).

143. *Id.* at \*2.

144. *Id.* at \*4.

145. *Id.* at \*7.

146. *Id.* at \*9.

147. *Id.* at \*8–9.

148. *Acres v. Blue Lake Rancheria*, 692 F. App’x 894 (9th Cir. 2017).

149. *Rabang v. Kelly*, No. C17-0088-JCC, 2017 U.S. Dist. LEXIS 63515 (W.D. Wash. Apr. 26, 2017).

150. *Id.* at \*6–7.

151. *Id.* at \*14–15.

jurisdiction.”<sup>152</sup> The court gave great deference to the decision of Interior not to recognize the tribal council.<sup>153</sup> It held that where Interior does not recognize the tribal council’s ability to create a new tribal court, there is no adequate opportunity to challenge the court’s jurisdiction, and so the federal court can assert subject matter jurisdiction over the claims.<sup>154</sup>

*c. Serve No Purpose Other than Delay*

In *Window Rock Unified School District v. Reeves*, the Ninth Circuit was asked whether it was “colorable” or “plausible” that the tribe would have jurisdiction over employment-related claims against two public school districts who operate schools on land leased from the tribe.<sup>155</sup> A group of current and former employees of the Window Rock and Pinon Unified School District had filed claims with the Navajo Labor Commission.<sup>156</sup> The school districts filed in federal court, seeking a declaratory judgment that the Commission lacks jurisdiction over their employment decisions at schools located on the reservation.<sup>157</sup> The district court held that jurisdiction was so plainly lacking that no exhaustion was required.<sup>158</sup>

The Ninth Circuit, in a divided opinion, reversed. It reasoned that jurisdiction was “colorable” or “plausible” because the schools were operated on lands leased from the tribe: “Tribal jurisdiction is plausible in this case because (a) the schools operated by the Districts are located on tribal land over which the Navajo Nation maintains the right to exclude, and (b) state criminal law enforcement interests are not present here.”<sup>159</sup> The majority opinion started with the proposition that the status of the land controls questions of tribal jurisdiction because if the activity occurs on tribal land, the tribe retains the absolute right to exclude even nonmembers from their land.<sup>160</sup> The school district asked the Court to read *Hicks* broadly as not requiring exhaustion when nonmember activity occurs on tribal land, but the court expressly refused to do so. It held that *Hicks* should be read narrowly and “is limited to the question of tribal-court

---

152. *Id.* at \*13.

153. *Id.* at \*16–17 (“Although the sovereign nature of American Indian tribes cautions the Secretary of the Interior not to exercise freestanding authority to interfere with a tribe’s internal governance, the Secretary has the power to manage ‘all Indian affairs and [ ] all matters arising out of Indian relations.’”).

154. *Id.* at \*18–19.

155. *Window Rock Unified Sch. Dist. v. Reeves*, 861 F.3d 894 (9th Cir. 2017).

156. *Id.* at 896.

157. *Id.*

158. *Id.* at 897.

159. *Id.* at 904.

160. *Id.* at 899 (“We begin with the general principle that a tribe’s right to exclude non-tribal members from its land imparts regulatory and adjudicative jurisdiction over conduct on that land.”).

jurisdiction over state officers enforcing state law. Because ‘the specific concerns at issue in that case,’ are not present here, it is at least plausible that tribal jurisdiction exists. Exhaustion is therefore required.”<sup>161</sup>

In dissent, Judge Christen would have affirmed the district court. She would have read *Hicks* to say that the general presumption is that tribal jurisdiction does not extend to nonmembers even if their activity occurs on tribal land.<sup>162</sup> Essentially, Judge Christen reasoned that absent the *Montana* exceptions, there is no tribal jurisdiction over nonmembers.<sup>163</sup> Her opinion emphasized the status of the parties (nonmembers of the tribe) and not the status of the land (tribally controlled) as the relevant lens through which to view the question of jurisdiction.<sup>164</sup> Her opinion also ignored the alternate source of plausible/colorable jurisdiction provided by the right to exclude in *Merrion*, arguing that the Navajo Nation ceded its right to exclude nonmembers from its territory in the Treaty of 1868.<sup>165</sup> Because she would conclude that there is no plausible tribal jurisdiction under either of the *Montana* exceptions, the dissent would not require exhaustion but instead would affirm the district court and grant a declaratory judgment that the Navajo Labor Commission lacks jurisdiction over the school districts.<sup>166</sup>

The Tenth Circuit reached a similar conclusion on a very different set of facts. In *Norton v. Ute Indian Tribe of the Uintah & Ouray Reservation*, the Ute Tribe, the estate of a deceased member, and his parents, brought suit in tribal court against state police officers involved in a police chase that started just outside the reservation, continued for almost twenty miles into the reservation, and ended with the passenger being fatally shot.<sup>167</sup> The passenger died of a bullet to the head.<sup>168</sup> The

---

161. *Id.* at 906.

162. *Id.* at 910 (“Supreme Court precedent and our own case law makes clear that at least where there are competing state interests, tribes generally *lack* jurisdiction over the conduct of non-tribal members within the boundaries of a reservation, regardless of the status of the land on which nonmember conduct occurs.”).

163. *Id.*

164. *Id.* at 910–14.

165. *Id.* at 916 (“[T]he Navajo Nation has ceded the right to exclude the school districts from the Navajo Reservation by: (1) expressly agreeing that the federal government must enter to provide a system of compulsory education for Navajo children; and (2) consenting to state enforcement of compulsory education on the Navajo Reservation.”).

166. *Id.* at 919–21.

167. *Norton v. Ute Indian Tribe of the Uintah & Ouray Reservation*, 862 F.3d 1236, 1242 (10th Cir. 2017) (“After finding Murray, Norton ordered him to the ground but Murray did not obey. Norton fired two shots toward Murray. Murray died from a gunshot wound to the head. The parties disagree whether Murray shot himself or was shot by officers. Raymond Wissiup, a Ute tribal member and certified law enforcement officer, arrived shortly thereafter, but the officers prevented him from accessing the scene.”).

168. *Id.*

parties dispute whether police fired that bullet or whether the tribal member shot himself.<sup>169</sup> The tribe asserted that the officers prevented a tribal law enforcement officer from accessing the scene of the shooting or providing medical assistance.<sup>170</sup> The tribal court claims included (1) trespass and (2) other torts related to the conduct including false arrest, wrongful death, spoliation of evidence, and conspiracy.<sup>171</sup> The officers then filed in federal court seeking a preliminary injunction to halt the tribal court action claiming that because they were state law enforcement officers the tribal court had no jurisdiction over their conduct.<sup>172</sup> The federal district court enjoined the tribal court action on the basis that *Nevada v. Hicks* bars tribal civil jurisdiction, making exhaustion unnecessary.<sup>173</sup>

The Tenth Circuit reversed in part. On the trespass claim, it held that tribal court exhaustion was required unless it was automatically foreclosed by a federal statute or a decision of the Supreme Court.<sup>174</sup> As long as tribal jurisdiction is “colorable” or “plausible,” the federal court should require exhaustion.<sup>175</sup> The Tenth Circuit reiterated that tribes have long had the right to exclude non-Indians from their land.<sup>176</sup> The court cited *Montana* and its second exception, noting that the tribe’s jurisdiction needs to implicate its political integrity, economic security, health, or welfare, but found it “colorable” that the state’s action in this case did so through allegations of trespass and interference with a tribal law enforcement officer on the reservation.<sup>177</sup> The court thus required tribal court exhaustion of the trespass claim.<sup>178</sup>

The state law enforcement officers also argued that exhaustion in tribal court was unnecessary due to either the “bad faith” or “intent to

---

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* (“[T]he officers’ motion for a preliminary injunction was granted by the district court. It concluded that the Tribal Court clearly lacked civil jurisdiction over the officers, and thus exhaustion of tribal court remedies was not required.”).

174. *Id.* at 1243.

175. *Id.* (“Exceptions typically will not apply so long as tribal courts can ‘make a colorable claim that they have jurisdiction.’”).

176. *Id.* at 1245 (“In light of these repeated confirmations of tribes’ right to exclude nonmembers from tribal lands, we think it plausible that the Tribal Court possesses jurisdiction over the trespass claim. . . . ‘[W]here tribes possess authority to regulate the activities of nonmembers, civil jurisdiction over disputes arising out of such activities presumptively lies in the tribal courts.’”).

177. *Id.* at 1246 (“[The tribe] asserts that the officers prevented Wissiup, a tribal member and certified law enforcement officer, from accessing the site of the shooting or attending to Murray as he bled to death. Thus, in addition to impinging upon a ‘hallmark of Indian sovereignty’ by trespassing, the officers colorably threatened the ‘political integrity’ of the tribe, by improperly asserting their own authority as superior to that of a tribal official on tribal lands.”).

178. *Id.*

harass” exceptions.<sup>179</sup> The Tenth Circuit disagreed. It explained that the bad faith exception applies to the actions of a tribal court’s misconduct, not to the actions of any party in tribal court proceedings, and since the defendants had not alleged that the tribal court had acted improperly, the bad faith exception was inapplicable.<sup>180</sup> The court also rejected the harassment claim, suggesting that the defendant’s claim substantially amounted to an “attack” on the general premise that tribal courts can hear claims involving non-Indians, which was contrary to Tenth Circuit precedent.<sup>181</sup>

On the other claims, the Tenth Circuit held that the alleged injuries occurred to a single tribal member and did not arise to a level that would threaten the tribe itself, as required by *Montana*’s section exception.<sup>182</sup> The Tenth Circuit therefore did not require exhaustion of the other claims.

Like both the Ninth and Tenth Circuits this year, district courts also refused to find that non-Indian plaintiffs were excused from exhausting their tribal remedies on the basis of the *Montana* exceptions. In *Rincon Mushroom Corporation of America v. Mazzetti*, plaintiff corporation RMCA sued tribal officials to stop them from asserting tribal environmental regulation over non-Indian-owned fee lands located on the reservation of the Rincon Band of Luiseno Mission Indians.<sup>183</sup> After the tribal court determined that it had jurisdiction, RMCA appealed to the federal district court.<sup>184</sup> The district court concluded that the tribe had not exhausted its tribal remedies because exhaustion includes proceedings at the appellate level.<sup>185</sup>

---

179. *Id.* at 1249.

180. *Id.* (“[W]e agree with the Ninth Circuit that ‘the interpretation most faithful to National Farmers is that it must be the tribal court that acts in bad faith to exempt the party from exhausting available tribal court remedies.’”).

181. *Id.* (“We also reject the officers’ arguments that they will suffer undue bias and a lack of due process if subjected to tribal jurisdiction. The officers offer little support for their allegations, which boil down to baseless ‘attacks’ on the competence and fairness of the Ute Tribal Court. . . . The Court has also ‘repeatedly’ recognized tribal courts ‘as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and *non-Indians*.’”).

182. *Id.* at 1246–47 (“[W]e are bound by our prior precedent holding that *Montana* governs both Indian and non-Indian lands. . . . [W]hen a tribal member hales a nonmember into tribal court as a defendant, a tribe’s interest in self-government is less direct because the suit concerns nonmember conduct.”).

183. *Rincon Mushroom Corp. of Am. v. Mazzetti*, No. 09cv2330-WQH-JLB, 2017 U.S. Dist. LEXIS 117179 (S.D. Cal. July 26, 2017).

184. *See id.* at \*13.

185. *Id.* at \*17–18 (“While the tribal court has made an initial determination on jurisdiction following the first portion of the bifurcated trial, exhaustion of tribal remedies includes tribal appellate review on the issue of jurisdiction. . . . While RMCA contends that these rulings are interlocutory and therefore not appealable, RMCA fails to establish that the tribal court’s decision on jurisdiction would not be subject to tribal appellate review at a later point during tribal court proceedings.”).

The district court then proceeded to ask whether any exception might excuse RMCA from exhausting its remedies.<sup>186</sup> It asked whether the tribal court plainly lacked jurisdiction under *Montana*, such that exhaustion would serve no purpose but delay, but concluded that jurisdiction was plausible under the second *Montana* exception.<sup>187</sup> Development of the land could affect ground water, and Ninth Circuit precedent suggests that threats to water could meet *Montana*'s second exception of affecting the health or welfare of the tribe.<sup>188</sup> Since RMCA failed to exhaust its tribal remedies, and none of the exceptions to exhaustion were present, the court denied the motion to reopen the proceedings in federal court.

### C. Criminal Jurisdiction

The Supreme Court long ago announced a presumptive rule that Indian tribes lack criminal jurisdiction over non-Indian persons.<sup>189</sup> Such a bright-line rule seems easy to learn for many law students, but its ramifications result in a steady stream of criminal cases involving Indian law issues arriving in front of state and federal courts. The year 2017 saw a couple noteworthy cases address the questions of who is an Indian, and how does the government prove the defendant is an Indian when Indian status is a required element of the offense. Other issues included the role of tribal police in protecting the rights of the accused and how states and tribes handle questions of extradition from one sovereign to the other.

#### 1. Who Is an Indian

The last time the U.S. Supreme Court answered the question of who is an Indian was in 1846;<sup>190</sup> however, state and federal courts have continued to try to refine the doctrine, and new cases are decided every year. From *Rogers* there has emerged a two-part test for determining who is an Indian: (1) the individual must have some degree of Indian blood, and (2) the individual must be recognized as an Indian by their tribe and/or the United States.<sup>191</sup> Four cases were decided in 2017 involving Indian

---

186. *Id.* at \*18–19.

187. *Id.* at \*19–22 (“[T]hreats to water rights may invoke inherent tribal authority over non-Indians’ pursuant to *Montana*’s second exception. . . .” ‘Defendants have shown that conduct on Plaintiff’s property plausibly could threaten the Tribe’s groundwater resources and could contribute to the spread of wildfires on the reservation.’”).

188. *Id.* at \*20–22.

189. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

190. See *United States v. Rogers*, 45 U.S. 567 (1846) (suggesting that to be an “Indian” required some degree of Indian blood and that the individual was recognized as an Indian by their tribe or the federal government).

191. For a discussion of the emergence of this two-part test from *Rogers*, see Daniel Donovan & John Rhodes, *To Be or Not to Be: Who is an ‘Indian Person,’* 73 MONT. L. REV. 61, 66 (2012).

status, but this summary will touch on the two most notable. The first concerned a dismissal of state criminal charges, and the second concerned the Ninth Circuit's dismissal of federal criminal charges.<sup>192</sup>

In *Idaho v. George*, the defendant was initially arrested by Coeur d'Alene tribal police on the Coeur d'Alene Indian Reservation for possession of a controlled substance and possession of drug paraphernalia with intent to use, both misdemeanors under tribal law.<sup>193</sup> Upon learning that the defendant was not an enrolled member of the tribe, she was transferred to the State of Idaho, where the state brought three felony charges against her.<sup>194</sup> The defendant contested the jurisdiction of the state court, arguing that although she was not enrolled, she met the legal definition of an Indian under *Rogers* and, therefore, the state had no criminal jurisdiction over her on-reservation activity.<sup>195</sup> The Idaho state trial court agreed.

The state court recognized that Ms. George was at least twenty-two percent Indian by blood and descended from a Coeur d'Alene tribal member.<sup>196</sup> The court further acknowledged that this status confers upon her all of the benefits of membership except for sharing in the proceeds of the tribe's casino.<sup>197</sup> Her children are enrolled members because their fathers are enrolled, and she is the adoptive daughter of another tribal member.<sup>198</sup> Therefore, the court reasoned the defendant met the first part of the test from *Rogers*—that she have some degree of Indian blood.<sup>199</sup> The court went on to reason that while Ms. George was not eligible for enrollment based on her known blood quantum, she is eligible for tribal adoption given her adoptive parent's enrollment and her own blood quantum.<sup>200</sup> The court concluded and that the defendant otherwise has a

---

192. For reference, the other two are *Martin v. United States*, Nos. 12-206(1) (DWF/LIB), 15-3310 (DWF), 2017 U.S. Dist. LEXIS 25508 (D. Minn. Feb. 17, 2017) (defendant stipulated to his Indian status even though he may not have been enrolled), and *United States v. Tsosie*, No. 12-10624, 2017 U.S. App. LEXIS 18513 (9th Cir. Sept. 25, 2017) (holding that even though there was an unauthenticated certificate of Indian blood, any error was harmless because countless other evidence demonstrated the defendant was an Indian, including testimony about his blood quantum from his wife, his participation in Navajo ceremonies, and his use of a Navajo language interpreter throughout the proceedings).

193. *Idaho v. George*, No. CR-16-21089, 2017 Ida. LEXIS 230 (First Judicial Dist. Court of Idaho, Kootenai Cty. May 9, 2017).

194. *Id.* at \*2.

195. *See id.* at \*19.

196. *Id.* at \*4.

197. *Id.* at \*5–7.

198. *Id.* at \*4–6.

199. *Id.* at \*28 (“It is undisputed that Ms. George has 22% Indian blood. There is some question whether she has a greater percentage of Indian blood based both on her biological father’s ancestry and any errors in her maternal Family Ancestry chart. . . . [But] the first prong requires only ‘some’ Indian blood.”).

200. *Id.* at \*39.

“significant” or “substantial” amount of Indian blood for purposes of the first prong of the analysis determining her Indian status.<sup>201</sup>

The court began its analysis of the second prong by recognizing that “[t]ribal enrollment is ‘the common evidentiary means of establishing Indian status, but it is not the only means nor is it necessarily determinative.’”<sup>202</sup> Accordingly, the court looked to the Coeur d’Alene tribe’s recognition of Ms. George as an Indian and its provision of tribal services to her in order to determine that she did indeed meet the second prong of the test; the tribe had recognized her as an Indian.<sup>203</sup> Because the court concluded Ms. George was an Indian, it dismissed the state criminal charges against her for lack of jurisdiction.

In *United States v. Seymour*, the defendant appealed from his conviction under the Major Crimes Act involving the sexual abuse of three minor children on the White Mountain Apache Reservation.<sup>204</sup> Even though he was an enrolled member of the White Mountain Apache Tribe, the defendant argued that the United States failed to prove that he was an Indian because it presented no evidence that he had any Indian blood.<sup>205</sup> The Ninth Circuit agreed and remanded the case with instructions to enter an acquittal.<sup>206</sup> The government relied upon the testimony of the tribal enrollment officer who stated the defendant was a member, but it made no representation about any Indian blood.<sup>207</sup> The court held that the government had failed to prove the first element of being an Indian: “But without any evidence regarding the basis for Seymour’s enrollment in the tribe or about Seymour’s ancestry, even construing the facts in the light most favorable to the prosecution, we cannot say that any rational trier of fact could find that Seymour has ‘some quantum of Indian blood.’”<sup>208</sup>

---

201. *Id.*

202. *Id.* at \*42.

203. *Id.* at 45–46 (“[I]t is apparent to the Court that the Tribe recognizes her as an Indian. She has lived virtually her whole life on the Coeur d’Alene Reservation as an Indian. She is the adopted daughter of an enrolled member of the Coeur d’Alene Tribe and an enrolled member of the Flathead Tribe. Throughout her life she has received benefits from the Tribe or through the Tribe reserved for Indians and these benefits include health care, substance abuse treatment, housing assistance, job assistance, education, social benefits . . . and food assistance. She has worked on the reservation. Throughout her life she has participated in Tribal social and cultural events. Thus, while case law indicates that tribal enrollment is an important consideration, and if it exists, is determinative of the second element of the status test, it is not an absolute requirement for recognition as an Indian.”).

204. *United States v. Seymour*, 684 F. App’x 662 (9th Cir. 2017).

205. *Id.* at 663.

206. *Id.*

207. *Id.* (“The government now contends that the Tribal Affidavit, along with other circumstantial evidence, proves Seymour’s blood quantum when considered in light of the White Mountain Apache Tribe’s constitution, which establishes criteria for tribal membership.”).

208. *Id.*

## 2. Tribal Police

Although numerous cases raised questions of the appropriate powers of tribal police, this annual review has selected two of them to provide an overview of the kinds of issues that were litigated this year. Both cases raise issues of the admissibility of evidence obtained by tribal police. For purposes of variety, I've selected one case where the evidence was excluded and one case where it was admitted.<sup>209</sup>

Voluntary statements made to tribal law enforcement, even by non-Indians, are admissible in federal court. In *United States v. Peters*, a non-Indian was detained by a tribal law enforcement officer and placed in handcuffs while on the Cheyenne River Sioux Reservation.<sup>210</sup> Eventually a federal officer completed a probable cause arrest.<sup>211</sup> During the five and a half hours he was detained by tribal police, which included a trip to the hospital and to Pierre, the defendant made comments that were recorded on both a lapel and a dashboard camera.<sup>212</sup> At trial the defendant filed a motion to suppress the statements he made to officers on the grounds that he was unlawfully detained in violation of the Fourth Amendment or that he made statements without being given his *Miranda* warnings in violation of the Fifth Amendment.<sup>213</sup> A federal magistrate recommended the motion be denied.<sup>214</sup> The magistrate reasoned that even if the tribe lacks jurisdiction, tribal law enforcement can arrest and detain an offender until he can be turned over to the proper authorities.<sup>215</sup> It further recommended that no Fifth Amendment violation occurred because there had been no “interrogation”—the statements were made either voluntarily or in response to questions tribal law enforcement asked to clarify what had already been said.<sup>216</sup> A month later the district court adopted the magistrate’s recommendation.<sup>217</sup>

---

209. For an honorable mention, see *United States v. Tepiew*, 859 F.3d 452 (7th Cir. 2017) (upholding evidence obtained by tribal law enforcement when they entered a home without a warrant on the basis of the emergency in aid doctrine). The case provides an excellent discussion of the difficulty in obtaining a tribal court warrant on some reservations.

210. *United States v. Peters*, No. 3:16-CR-30150-RAL, 2017 U.S. Dist. LEXIS 56754 (D.S.D. Mar. 15, 2017).

211. *Id.* at \*4.

212. *Id.* at \*5.

213. See *id.* at \*1.

214. *Id.* at \*10–11.

215. *Id.* at \*6–7 (“[T]ribal police officers have the authority to arrest an offender within Indian country and to detain him until he can be turned over to the proper authorities, even if the tribe itself lacks jurisdiction. Federal and state courts (including the Eighth Circuit) have likewise regularly upheld tribal police actions, including stopping, investigating and detaining non-Indians suspected of criminal conduct.”).

216. *Id.* at \*9.

217. *United States v. Peters*, No. 3:16-CR-30150-RAL, 2017 U.S. Dist. LEXIS 56488 (D.S.D. Apr. 13, 2017).

Evidence obtained by tribal police regarding a non-Indian is not always deemed admissible. In *United States v. Cooley*, a tribal law enforcement official stopped to offer assistance to a vehicle stopped along the side of a state highway running through the Crow Reservation.<sup>218</sup> The officer quickly identified that the driver was not an Indian but continued to ask for identification.<sup>219</sup> During the course of the conversation, the tribal officer observed firearms and methamphetamines.<sup>220</sup> The tribal officer detained the driver and notified state police, who then confiscated the drugs and weapons.<sup>221</sup> The driver moved to suppress the evidence on the basis that the tribal officer had no jurisdiction over him, a non-Indian, and therefore had no authority to prolong the police stop after the officer had ascertained that the driver was not an Indian.<sup>222</sup> The federal district court agreed that the tribal police officer had conducted an unlawful search and excluded the evidence.<sup>223</sup>

### 3. Extradition

As a general rule, state law enforcement does not have the right to enter a reservation and remove individuals accused of violating state law without following tribal rules for extradition.<sup>224</sup> Whether the state acted appropriately in removing an individual from a reservation was at the heart of a pair of 2017 cases.

Federal courts are less likely to get involved in extradition proceedings when the extradition from tribal to state custody was subject to a tribal court order. In *Henry v. McMahan*, a California state police officer engaged the assistance of CRIT (tribal) police to assist in taking a tribal member into custody.<sup>225</sup> Tribal police arrested the tribal member and later, subject to an order from the tribal court, the member was turned over to California state police and charged with multiple felonies.<sup>226</sup> The petitioner filed a petition for writ of habeas corpus, alleging that he was

---

218. *United States v. Cooley*, No. CR 16-42-BLG-SPW, 2017 U.S. Dist. LEXIS 17276 (D. Mont. Feb. 7, 2017).

219. *Id.* at \*2–4.

220. *Id.* at \*3–6.

221. *Id.* at \*6.

222. *Id.* at \*8–9.

223. *Id.* at \*11–12. “The remedy for evidence obtained by a tribal officer acting outside the scope of his authority is suppression. ‘No Indian tribe in exercising powers of self-government’ shall ‘violate the right of the people to be secure . . . against unreasonable search and seizures . . . .’” *Id.* at 8.

224. For a discussion of the complicated area of tribal–state relations in the context of extradition, see Kerstin G. LeMaire & Mark D. Tallan, *Issues Involving Extradition and Their Impact on Tribal Sovereignty*, 76 U. DET. MERCY L. REV. 803 (1999).

225. *Henry v. McMahan*, No. EDCV 15-02384-CAS (DTB), 2017 U.S. Dist. LEXIS 56153 (C.D. Cal. Mar. 1, 2017).

226. *Id.* at \*2–3.

not extradited in accordance with tribal law and seeking release from his pre-trial detention by the state of California.<sup>227</sup> The federal court refused to consider the writ because it was reluctant to interfere with state criminal proceedings and the habeas claim failed to raise any immediate constitutional concerns.<sup>228</sup> Accordingly, the magistrate recommended that the petitioner's writ be denied, and the district court adopted the findings and dismissed the petition.<sup>229</sup>

Extradition agreements between states and tribes require close examination as to the scope of the extradition procedures. In *State v. Carpio*, the defendant was charged with unlawful flight after a city police officer signaled for him to stop.<sup>230</sup> A chase ensued, in which the defendant, a member of the Gila River Indian Community, drove from the city of Chandler, Arizona, and onto the reservation.<sup>231</sup> The defendant alleged that the city police officer arrested and removed him from the reservation without complying with the extradition requirements of the Community.<sup>232</sup> The state replied that the officer was in hot pursuit of the defendant for a crime that was committed in the state of Arizona and therefore extradition was not necessary.<sup>233</sup> The court agreed with the state.<sup>234</sup> The court concluded that an agreement between the City and the Community that required extradition of member defendants only applied when the offense was committed on the reservation.<sup>235</sup> Here, the offense was committed off the reservation, so the state had properly obtained jurisdiction over the defendant.<sup>236</sup>

---

227. *Id.* at \*3.

228. *Id.* at \*7–8 (“Such a claim does not fall within the established exceptions [violation of speedy trial or double jeopardy], nor otherwise constitute ‘extraordinary circumstances’ such that immediate intrusion into state criminal proceedings by a federal habeas court would be warranted. Framed another way, the harm petitioner alleges does not embody a right that is necessarily forfeited by delaying review until after petitioner’s trial . . . . Indeed, the Constitution does not prohibit petitioner’s prosecution as, ‘an illegal arrest, without more, has never been viewed as a bar to subsequent prosecution, nor as a defense to a valid conviction.’”).

229. *Henry v. McMahon*, No. EDCV 15-02384-CAS (DTB), 2017 U.S. Dist. LEXIS 56151 (C.D. Cal. Apr. 10, 2017).

230. *State v. Carpio*, No. 1 CA-CR 15-0635, 2017 Ariz. App. Unpub. LEXIS 817 (Ariz. Ct. App. June 22, 2017).

231. *Id.* at \*2.

232. *Id.* at \*1.

233. *See id.* at \*1.

234. *Id.* at \*6 (“[T]he State has a particularly strong policy interest in not allowing suspects to narrowly escape arrest and avoid this State’s jurisdiction over offenses committed within this State by fleeing across the border to another jurisdiction.”).

235. *Id.* at \*6–8.

236. *Id.* at \*8–10 (“Carpio’s arrest therefore did not interfere with tribal sovereignty, and the superior court properly exercised jurisdiction over Carpio with respect to the unlawful flight offense.”).

## 4. Public Law 280

Public Law 83-280 (PL-280) was enacted by Congress in 1953 to expressly permit states to assert some authority on the reservation.<sup>237</sup> While the law applied to five (later six) states in full,<sup>238</sup> it allowed other states to “opt in” to assert jurisdiction over some or all of the Indian country land within their jurisdiction.

In 2017, there was one notable case about criminal jurisdiction from Washington State that extended criminal jurisdiction under PL-280 over Indian allotments located outside the reservation. In *State v. Comenout*, members of federally recognized Indian tribes appealed from their criminal convictions in state court related to the possession and illegal sale of cigarettes without a license from their store on a trust allotment but not within any Indian reservation.<sup>239</sup> The defendants argued that as Indians in Indian country, the state had no criminal jurisdiction over them.<sup>240</sup>

The Washington appellate court disagreed and upheld their criminal convictions.<sup>241</sup> The appellate court recognized that the property was “Indian country” for purposes of federal jurisdiction.<sup>242</sup> However, because the allotment at issue was not within the borders of a reservation, the court reasoned that Washington’s assumption of jurisdiction under PL-280 in 1963 conferred jurisdiction on the state.<sup>243</sup> The appellate court noted that the Washington Supreme Court has had several occasions to interpret Washington’s assumption of jurisdiction over Indian persons on allotments not within a reservation, including in a case involving the exact store at issue here, and had regularly upheld jurisdiction.<sup>244</sup> Because the

---

237. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified at 18 U.S.C. § 1162 (2012) and 25 U.S.C. § 1321 (2012)) (commonly referred to in Indian law circles in its abbreviated form as PL-280).

238. *Id.* The mandatory states are California, Minnesota, Nebraska, Oregon, and Wisconsin. Alaska was subsequently added when it entered the Union in 1959.

239. *State v. Comenout*, Nos. 48990-2-II, 48994-5-II, 49000-5-II, 49004-8-II, 2017 Wash. App. LEXIS 2945 (Wash. Ct. App. Dec. 27, 2017).

240. *Id.* at \*1.

241. *Id.*

242. *Id.* at \*5 (“Allotment property held in trust by the United States, such as the property at issue here, constitutes ‘Indian country.’”).

243. *See id.* at \*7. The relevant Washington statute reads:

The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with [federal legislation] . . . but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States.

WASH. REV. CODE § 37.12.010 (2016).

244. *Id.*

allotment fell within Washington's expansion of PL-280, the Washington appellate court concluded that the state had criminal jurisdiction over the defendant's activity.<sup>245</sup>

*D. Dakota Access Pipeline (DAPL)*

Perhaps the Indian law issue that caught the greatest amount of attention in the national media during 2017 was the conflict over the construction of the Dakota Access Pipeline (DAPL) between the Standing Rock and Cheyenne River Sioux Tribes on one side, and Energy Transfer Partners and the U.S. Army Corps of Engineers on the other.<sup>246</sup> The Sioux tribes fought vehemently against the decision by the Army Corps to permit an oil pipeline to pass under Lake Oahe.<sup>247</sup> The tribes collectively raised environmental, social justice, and even religious arguments against the construction, and they won a limited reprieve at the end of 2016 when the Obama Administration agreed to further study the environmental impacts.<sup>248</sup> However, with the inauguration of President Trump, the administration reversed course and the pipeline was eventually completed.<sup>249</sup>

While DAPL litigation predated 2017, the first challenge decided that year involved the tribes' claim that the routing of the pipeline was a violation of the Religious Freedom Restoration Act (RFRA).<sup>250</sup> In *Standing Rock Sioux Tribe v. United States Army Corps of Engineers*, the tribes argued that the mere presence of the DAPL under Lake Oahe would cause irreparable harm to the religious exercise of their members.<sup>251</sup> Specifically, the tribes referenced a traditional Lakota belief:

The Lakota people believe that the mere existence of a crude oil pipeline under the waters of Lake Oahe will desecrate those waters and render them unsuitable for use in their religious sacraments. . . . The Lakota people believe that the pipeline correlates with a terrible Black Snake prophesied to come into the Lakota homeland and cause destruction. . . . The Lakota believe that the very existence of the Black Snake under their sacred waters in Lake Oahe will unbalance and desecrate the water and

---

<sup>245.</sup> *Id.*

<sup>246.</sup> *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 239 F. Supp. 3d 77 (D.D.C. 2017).

<sup>247.</sup> *Id.* at 80.

<sup>248.</sup> *Id.* at 80–82.

<sup>249.</sup> *Id.* at 82.

<sup>250.</sup> *Id.* at 83.

<sup>251.</sup> *Id.* at 82.

render it impossible for the Lakota to use that water in their Inipi ceremony.<sup>252</sup>

The tribes sought an injunction from the district court, which was denied based upon both laches and the unlikelihood that the tribe would prevail on the merits.<sup>253</sup>

Laches is a defense available when a party has inexcusably or unreasonably delayed filing their claim.<sup>254</sup> The court noted that while the tribe was made aware of the pipeline's proposed route in October 2014, it waited until February 2017 to raise its RFRA objection.<sup>255</sup> Because the tribes had both notice of the route and an opportunity to voice their concerns, including concerns about contamination from a potential oil spill, the court held that the tribes had no excuse for delaying their claim.<sup>256</sup>

The court also held that the tribes were unlikely to prevail on the merits. To prevail, the tribes would have to show that the government's action implicated the tribe's religious exercise, that their religious belief is sincere, and that the government's action presented a substantial burden on their religious practice.<sup>257</sup> While the court concluded that the tribes would likely be able to demonstrate that their religious belief is sincere, it concluded that it is unlikely the tribes would be able to show that their religious practice would be substantially burdened.<sup>258</sup> For authority the court cited the Supreme Court's decision in *Lyng*: "[T]he incidental effect on religious exercise of a government action undertaken in furtherance of the management and use of government land, even if extreme, is not alone enough to give rise to a Free Exercise claim."<sup>259</sup> Because of both the inexcusable delay and the unlikelihood that the tribes will prevail on the merits, the court denied their request for a preliminary injunction.<sup>260</sup> One

---

252. *Id.*

253. *Id.* at 80.

254. *See id.* at 84.

255. *Id.* at 85–87.

256. *Id.* at 86–87. As proof the tribe was aware of the dangers earlier but did not object to the mere presence of the pipeline under the river, the court cited the tribal chairmen:

When the pipeline leaks, the Missouri river—the source of our drinking water, where we fish, swim, and conduct ceremonies—will be contaminated. Our Sundance, a spiritual ceremony sacred to us, is performed on the banks of the river. The source of life, as well as spiritual continuity, would be damaged.

*Id.* at 88 (internal citation omitted).

257. *Id.*

258. *Id.* at 89–92. The Court reasoned that the pipeline “does not impose a sanction on the Tribe’s members for exercising their religious beliefs, nor does it pressure them to choose between religious exercise and the receipt of government benefits.” *Id.* at 91.

259. *Id.* at 91–92.

260. *Id.* at 100.

week later the tribes filed a notice of appeal, and the court denied the tribes' request for an injunction pending appeal for the same reasons.<sup>261</sup>

Even after the pipeline was completed, the parties continued to argue in court over a variety of ongoing issues. In *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, Dakota Access LLC sought a protection order to prevent public disclosure of eleven documents in the record on the grounds that "terrorists" or others could use the information to inflict environmental injury.<sup>262</sup> The court agreed to protect only those redactions in five spill reports suggested by the Pipeline and Hazardous Materials Safety Administration that corresponded to the information that it would redact subject to a FOIA request.<sup>263</sup> The court refused to redact the names of waterways expected to be impacted by a spill or the location of containment booms.<sup>264</sup>

The tribes also saw limited success from a challenge to the Environmental Assessment (EA). In *Standing Rock Sioux Tribe v. United States Army Corps of Engineers*, the D.C. District Court heard the third major challenge to the pipeline brought by the Standing Rock Sioux Tribe and the Cheyenne River Sioux Tribe.<sup>265</sup> The court began by placing these new claims within the context of the larger litigation<sup>266</sup> and concluded that while the tribes' previous two challenges had failed, this third attack held some merit.<sup>267</sup> The Army Corps completed an EA, in which it determined that the pipeline presented no significant impact on the environment and, therefore, a much more detailed Environment Impact Statement (EIS) was not prepared.<sup>268</sup> The D.C. District Court concluded that while the Army

---

261. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, No. 16-1534 (JEB), 2017 U.S. Dist. LEXIS 93908 (D.D.C. Mar. 14, 2017).

262. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 249 F. Supp. 3d 516, 517–18 (D.D.C. 2017).

263. *Id.* at 522–23.

264. *Id.* at 523–24.

265. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 255 F. Supp. 3d 101 (D.D.C. 2017).

266. *Id.* at 111–12 ("The Tribes have since mounted two substantial legal challenges to DAPL, neither of which yielded success. The first contended that the grading and clearing of land for the pipeline threatened sites of cultural and historical significance, and that the U.S. Army Corps of Engineers had flouted its duty to engage in tribal consultations pursuant to the National Historic Preservation Act. The second maintained that the presence of oil in the pipeline under Lake Oahe would desecrate sacred waters and make it impossible for the Tribes to freely exercise their religious beliefs, thus violating the Religious Freedom Restoration Act. . . . Now that the Court has rejected these two lines of attack, Standing Rock and Cheyenne River here take their third shot, this time zeroing in on DAPL's *environmental* impact.") (internal citations omitted).

267. *Id.* at 112.

268. *Id.* at 116 ("Given those measures and its evaluation of DAPL's 'anticipated environmental, economic, cultural, . . . social[, and] . . . cumulative effects,' the Corps concluded that the crossing at Lake Oahe would not 'significantly affect the quality of the human environment,' and preparation of an EIS was therefore not required.").

Corps complied with the National Environmental Policy Act (NEPA) in many areas, it failed to account for the potential effects a spill could have on fishing rights, hunting rights, and environmental justice when it issued its EA and, therefore, the EA in certain respects was inadequate.<sup>269</sup>

The court remanded the case back to the Army Corps to reconsider the EA in light of the court's discussion of the failures in the original analysis.<sup>270</sup> Whether the pipeline must cease its operation during the reevaluation on remand was not decided by the court but was assigned to the parties for further briefing.<sup>271</sup>

In *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, the court decided that the pipeline did not need to cease its operation while the Army Corps reevaluated the EA.<sup>272</sup> The district court ultimately decided that revoking the easement was not an appropriate remedy because the deficiencies of the agency's action were not sufficiently serious and the agency had a high probability of being able to cure them and justify its prior determinations on remand.<sup>273</sup> However, the court cautioned that its conclusion to continue to allow oil to flow does not reduce the burden on the Army Corps from complying with the NEPA errors that were previously identified.<sup>274</sup>

---

269. *Id.* at 132–34. The Court recognized that the Tribe had raised the issue of hunting and fishing rights before the Corps had made its final determination in the Environmental Assessment (EA):

Standing Rock, though, had alerted the Corps to its fishing—and hunting—related concerns after the agency published the Draft EA. . . . The Director of Standing Rock's Department of Game, Fish, and Wildlife Conservation, moreover, explained that many of the Tribe's members rely on fishing as 'an important supplemental source of food and nutrition' . . . . An oil spill, he said, could 'cause extensive fish kills.' He also spelled out the ways in which an oil spill could seriously affect game along the Oahe shoreline, including by poisoning animals that ingest, inhale, or are otherwise externally exposed to oil and preventing those birds and mammals whose feathers or fur are coated with oil from maintaining their body temperatures.

*Id.* at 134 (internal citations omitted).

270. *Id.* at 112.

271. *Id.* at 160–61.

272. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, No. 16-1534 (JEB), 2017 U.S. Dist. LEXIS 167569 (D.D.C. Oct. 11, 2017).

273. *Id.* at \*13 ("Defendants argue that the three inadequacies identified by the Court—namely, the Corps' failure to adequately address the degree to which the project's effects are likely to be highly controversial, the impacts of a spill on fish or game, and the environmental-justice impacts of a spill—are not significant deficiencies in the agency's prior analysis.")

274. *Id.* at \*45 ("In light of the 'serious possibility' that the Corps will be able to substantiate its prior conclusions, the Court finds that vacatur is not the appropriate remedy in this case. That determination does not, however, excuse Defendants from giving serious consideration to the errors identified in this Court's prior Opinion. Compliance with NEPA cannot be reduced to a bureaucratic formality, and the Court expects the Corps not to treat remand as an exercise in filling out the proper paperwork *post hoc*. After the agency's further work on remand, the parties may well disagree over the sufficiency of its conclusion. If and when such a dispute arises, they will again have the opportunity to address whether Defendants have in fact fulfilled their statutory obligations.")

Despite the fact that the court refused to stop active use of the pipeline, it recognized that the threat of a spill would have a serious effect on tribal communities and ordered enhanced public reporting of the pipeline's status.<sup>275</sup> In *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, the tribe asked the court to impose a series of reporting and monitoring measures to ensure ongoing compliance.<sup>276</sup> The federal court approved all of the measures requested by the tribe.<sup>277</sup> The court recognized the need for ongoing monitoring measures and rejected the Army Corps' suggestion that such monitoring was unwarranted.<sup>278</sup> The reporting requires that Dakota Access file bi-monthly reports on the status of the pipeline beginning at the end of December 2017 and specifically include any repairs and incidents involving the portion of the pipeline crossing Lake Oahe.<sup>279</sup>

### E. *Effect of a Tribal Court Judgment*

The U.S. Supreme Court decided *United States v. Bryant* in 2016, which held that a tribal court conviction for domestic violence, even if uncounseled, could qualify as a predicate offense for purposes of federal criminal prosecution.<sup>280</sup> Several courts in 2017 have applied *Bryant*'s principles to build a canon of law on the effect of a tribal court judgment outside of the tribal courts.

#### 1. Application of Tribal Court Conviction as a Predicate Offense

Conviction for an improper sexual offense in tribal court, even if uncounseled, is a sufficient offense to require the convicted party to register as a sex offender with the state.<sup>281</sup> In *State v. Lopez*, the defendant was convicted of "child molesting" in Tohono O'odham tribal court and

---

275. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, No. 16-1534 (JEB), 2017 U.S. Dist. LEXIS 198603 (D.D.C. Dec. 4, 2017).

276. *Id.*

277. *Id.* at \*11 ("Plaintiffs request three specific conditions during the remand period: (1) the finalization and implementation of oil-spill response plans at Lake Oahe; (2) completion of a third-party compliance audit; and (3) public reporting of information regarding pipeline operations. The Court agrees that each of these measures is appropriately tailored to monitoring the status of the pipeline during remand.") (internal citations omitted).

278. *Id.* at \*9–11 ("Recent events have made clear, moreover, that there is a pressing need for such ongoing monitoring. Earlier this month, the Keystone Pipeline leaked 210,000 gallons of oil in Marshall County, South Dakota. The spill occurred near the boundaries of the Lake Traverse Reservation, home of the Sisseton Wahpeton Oyate Tribe, thus highlighting the potential impact of pipeline incidents on tribal lands.") (internal citations omitted).

279. *Id.* at \*12–14.

280. *United States v. Bryant*, 136 S. Ct. 1954 (2016).

281. *State v. Lopez*, Nos. 2 CA-CR 2016-0076, 2 CA-CR 2016-0122, 2017 Ariz. App. Unpub. LEXIS 1097 (Ariz. Ct. App. July 27, 2017).

sentenced to 360 days in a proceeding in which he was uncounseled.<sup>282</sup> He subsequently pled guilty in state court for failure to register as a sex offender.<sup>283</sup> Three years later he was again charged with failure to register, and this time he contested the charge, arguing that his tribal court conviction was unconstitutional because it was uncounseled and, therefore, he had no duty to register as a sex offender.<sup>284</sup> The state court agreed and threw out the conviction.<sup>285</sup>

The U.S. Supreme Court then decided *Bryant*, which held that uncounseled convictions in tribal court could still be used in state or federal court without violating constitutional rights.<sup>286</sup> Accordingly, the state in *Lopez* appealed the dismissal.<sup>287</sup> Applying *Bryant*, the Arizona appellate court reversed: “[*Bryant*] makes clear that an otherwise valid but uncounseled tribal court conviction, where a defendant is sentenced to a term of less than one year, comports with both the Constitution and ICRA.”<sup>288</sup>

The defendant in *Lopez* argued that his conviction in tribal court should still be construed as unlawful because his guilty plea was involuntarily extracted.<sup>289</sup> However, the court concluded that because this issue was raised for the first time on appeal, it was improper for the appellate court to review it here, and so it remanded the issue to the trial court.<sup>290</sup>

In *United States v. Long*, the defendant was charged with, among other things, being a prohibited person in possession of a firearm.<sup>291</sup> The predicate offense upon which his status as a prohibited person was based was a tribal court conviction for domestic violence where the defendant was represented by someone approved as a lay advocate but not licensed

---

282. *Id.* at \*2.

283. *Id.*

284. *Id.* at \*2–3.

285. *Id.* at \*3.

286. See *United States v. Bryant*, 136 S. Ct. 1954, 1959 (2016).

287. *Lopez*, 2017 Ariz. App. Unpub. LEXIS 1097, at \*3 (“In light of the Supreme Court’s reversal in *Bryant*, the state requests that we vacate the trial court’s dismissal order.”).

288. *Id.* at \*6.

289. *Id.*

290. *Id.* at \*7–8 (“Accordingly, we decline *Lopez*’s request to entertain his alternate basis for upholding the dismissal order, vacate that order, and remand to the trial court with instructions to reinstate the indictment.”).

291. *United States v. Long*, 870 F.3d 741, 743 (8th Cir. 2017) (“Under 18 U.S.C. § 922(g)(9), it is unlawful for any person ‘who has been convicted in any court of a misdemeanor crime of domestic violence’ to possess a firearm in or affecting interstate commerce . . . . Section 921(a)(33)(B), however, provides: (B)(i) A person shall not be considered to have been convicted of such an offense for purposes of this chapter, unless— (I) the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case.”).

as an attorney in tribal court.<sup>292</sup> A divided panel of the Eighth Circuit ruled that the tribal court conviction was sufficient to trigger the federal statute.<sup>293</sup> The court reasoned that the statute's requirement that the defendant be represented by counsel "in the case" meant he only needed to be represented by someone recognized to appear before the court prosecuting the criminal case.<sup>294</sup>

Judge Colloton dissented. He argued that a lay advocate should not qualify as counsel for purposes of the federal statute.<sup>295</sup> The dissent would have reversed the conviction of the prohibited person in possession of a firearm claim because the defendant was not represented by counsel when he was convicted of domestic violence.<sup>296</sup>

## 2. How to Treat a Tribal Court Conviction

Because tribes do not always use the same labels as state and federal courts, it can be difficult to determine how to treat a tribal court conviction when in a different court system. In *State v. Horselooking*, the defendant appealed his sentence after being convicted of DUI and aggravated battery.<sup>297</sup> The district court assigned him a criminal history score of B based on his prior conviction by the Kickapoo Nation Tribal Court for residential burglary, treating it like a felony conviction.<sup>298</sup> The tribal code does not classify residential burglary as either a felony or a misdemeanor.<sup>299</sup> The sole issue on appeal was whether it was proper to treat the tribal court conviction as a felony for criminal history purposes.<sup>300</sup> A divided Kansas appellate court determined that it was improper.<sup>301</sup>

The court began by noting that criminal convictions by a tribal court in Kansas are treated as out-of-state convictions.<sup>302</sup> Under Kansas law, if

---

292. *Id.* at 745.

293. *Id.* at 747.

294. *Id.* at 746–47 (“Long has presented no evidence that his counsel at the tribal-court proceeding was not admitted to practice as lay counsel in the tribal court, arguing only that Ms. White Pipe is not a licensed attorney. Because lay counsel are admitted to practice before the tribal court, we conclude that Long was represented by counsel in the tribal-court proceeding within the meaning of 18 U.S.C. § 921(a)(33)(B) . . .”).

295. *Id.* at 749–50 (“The ordinary meaning of ‘counsel’ in the legal context conveyed by the phrase ‘represented by counsel’ is a lawyer. . . . When Long was convicted of a misdemeanor in the tribal court, he was not represented by a lawyer in the case. Therefore, he was not ‘represented by counsel in the case’ within the meaning of § 921(a)(33)(B)(i)(I), and he ‘shall not be considered to have been convicted’ of a ‘misdemeanor crime of domestic violence’ for purposes of § 922(g)(9).”).

296. *Id.* at 750.

297. *State v. Horselooking*, 400 P.3d 189 (Kan. Ct. App. 2017).

298. *Id.* at 191.

299. *Id.*

300. *Id.*

301. *See id.*

302. *Id.* at 192.

the out-of-state jurisdiction treats a crime as a felony, that crime will be treated as a felony in Kansas, but the tribal code does not use the terms “misdemeanor” or “felony.”<sup>303</sup> Because the legislative sentencing scheme is silent in situations like the defendant’s, the majority applied the rule of lenity and determined that the ambiguity should be resolved in favor of the accused.<sup>304</sup>

The dissent looked at the possible consequences the tribal court could impose for the offense. It noted that felonies are “serious” or “major” crimes while misdemeanors are “less serious.”<sup>305</sup> In order to determine whether a tribal court conviction is equivalent to a felony or misdemeanor, the dissent suggested looking to the punishment the tribe may impose.<sup>306</sup> Because the punishment for residential burglary in the tribal code could include banishment, the dissent would have concluded that the lower court correctly accounted for the defendant’s criminal history.<sup>307</sup>

### 3. The Recognition of a Tribal Court Judgment in State Court

No federal law or constitutional provision has been held to require state courts to enforce tribal court judgments. The issue of how and when to enforce tribal court judgments comes up often in the interplay between the powers of competing sovereigns. One particularly notable case discussed the issue in 2017. In *Coeur d’Alene Tribe v. Johnson*, the Coeur d’Alene Tribe brought suit in tribal court against non-Indians who owned land in fee within the outer boundary of their reservation.<sup>308</sup> The tribe enforced a tribal ordinance that requires a tribal permit before a landowner can install a dock on the portion of the St. Joe River running through the reservation.<sup>309</sup> The Johnsons were served with notice but failed to appear.<sup>310</sup> The tribal court issued a default judgment for \$17,400 and declared that the tribe was entitled to remove the dock and pilings.<sup>311</sup> The tribe then sought to enforce the judgment in state court.<sup>312</sup>

---

303. *Id.* (“The complicating issue here is that the Kickapoo Nation Tribal Code does not differentiate between felonies and misdemeanors. . . . [And] there is no explicit language in the KSGA explaining how a court is to classify an out-of-state conviction as either a felony or a misdemeanor when the convicting jurisdiction does not distinguish between the two.”).

304. *Id.* at 196.

305. *Id.* at 198.

306. *Id.* (“[T]he types of punishment that may be imposed for various wrongs under the Kickapoo Nation criminal code create an obvious line of demarcation between those considered serious crimes and those considered to be lesser offenses. The serious crimes include banishment from the tribe for a term of years or for life as a potential punishment. Other offenses do not permit banishment.”).

307. *Id.* at 201.

308. *Coeur d’Alene Tribe v. Johnson*, 405 P.3d 13 (Idaho 2017).

309. *Id.* at 15.

310. *Id.*

311. *Id.*

312. *See id.*

The state trial court upheld the enforcement of the civil judgment.<sup>313</sup> On appeal, the Idaho Supreme Court clarified that Idaho would no longer give full faith and credit to tribal court judgments but would instead apply the principles of comity.<sup>314</sup>

The Idaho Supreme Court provided guidance going forward for when Idaho state courts should extend comity to tribal court opinions: “[A]s a general principle, ‘courts should recognize and enforce tribal judgments.’ However . . . a tribal judgment is not entitled to enforcement if the tribal court did not have both personal and subject matter jurisdiction or the defendant was not afforded due process of law.”<sup>315</sup> The court briefly mentioned four additional instances in which a court may decline to exercise jurisdiction on the basis of equitability.<sup>316</sup>

After reversing its prior guidance that tribal court judgments are entitled to full faith and credit, the court considered whether the Coeur d’Alene Tribal Court’s judgment should be entitled to comity under this new analysis. The court identified that the tribal court had jurisdiction over the dock because the U.S. Supreme Court, in *Idaho v. United States*, 533 U.S. 262 (2001), held that the riverbed was held in trust for the tribe.<sup>317</sup> The court reasoned that the petitioners had failed to meet their burden to show that the tribe lacked jurisdiction over the dock and held that the due process rights of the petitioners were not violated because they had received notice of the claims against them and were afforded an opportunity to appear in tribal court.<sup>318</sup> However, the Idaho Supreme Court still refused to extend comity to the \$17,400 civil fine because the penalty

---

313. *Id.*

314. *Id.* at 17 (“Although we value good relations with the tribal courts within Idaho, we are unable to continue to apply the strained construction of 28 U.S.C. section 1738 that we adopted in *Sheppard* in order to advance that important objective. Therefore, we overrule the holding in *Sheppard* that tribal judgments are entitled to full faith and credit and adopt the reasoning of the Ninth Circuit in *Wilson* and hold that tribal court judgments are entitled to recognition and enforcement under principles of comity. We do not overrule *Sheppard* in its entirety. We will continue to apply its requirement that a party attacking the validity of a tribal court’s judgment bears the burden of proving its invalidity.”).

315. *Id.* at 17–18 (internal citations omitted).

316. *Id.* at 18 (“[There are] four equitable grounds upon which a court may decide not to recognize a tribal judgment. Those grounds are: ‘(1) the judgment was obtained by fraud; (2) the judgment conflicts with another final judgment that is entitled to recognition; (3) the judgment is inconsistent with the parties’ contractual choice of forum; or (4) recognition of the judgment, or the cause of action upon which it is based, is against the public policy of the United States or the forum state in which recognition of the judgment is sought.’”) (internal citations omitted).

317. *Id.* at 19–20 (“In this case, the ownership of the land is dispositive. Unlike the situation in *Hicks*, the State here does not have any interests that would weigh against the Tribal Court exercising jurisdiction. This case is similar to *Water Wheel* in that there are no competing State interests. We hold that the Johnsons have failed to meet their burden of demonstrating that the Tribal Court lacked subject matter jurisdiction.”).

318. *Id.*

was penal in nature.<sup>319</sup> Accordingly, the Idaho Supreme Court reversed the decision of the lower court awarding the monetary penalty but affirmed the lower court's recognition of the declaratory relief—that the tribe may remove the Johnsons' dock and pilings from the river.<sup>320</sup>

#### F. Enrollment

Federal law gives great deference to tribal courts to determine for themselves who is and who is not a member. Despite this deference, federal courts often hear cases when a tribal member has been disenrolled by their tribe. Many of these cases were brought in 2017, but this Section will focus on the Nooksack disenrollments and the Cherokee Freedmen.<sup>321</sup>

The right to membership in an Indian tribe cannot be entirely controlled by the tribe when a treaty with the United States establishes some criteria for membership. In *Cherokee Nation v. Nash*, the U.S. District Court for the District of Columbia addressed the disenrollment by the Cherokee Nation of the “Freedmen”—members who had traced their ancestry back to slaves owned by Cherokee citizens and then freed by treaty.<sup>322</sup> In 2007, the Cherokee voted to limit citizenship to only those persons who were Cherokee, Shawnee, or Delaware by blood.<sup>323</sup> The Cherokee Nation argued that it was only the Cherokee Nation Constitution that had guaranteed citizenship to the Freedmen and that the Constitution could be changed in accordance with its amendment provisions.<sup>324</sup> The Cherokee Freedmen brought suit alleging that their attempted disenrollment violated the Treaty with the Cherokee in 1866 and that their Cherokee citizenship is instead conferred by the Treaty, which has never been abrogated.<sup>325</sup>

---

319. *Id.* at 22 (“The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the state for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue, or other municipal laws, and to all judgments for such penalties.”).

320. *Id.* (“In this case the judgment comprises two parts. The first part is a civil penalty of \$17,400. The second part is a declaration that the Tribe has the right to remove the offending encroachment. The civil penalty is not enforceable under principles of comity. However, the penal law rule does not prevent courts from recognizing declaratory judgments of foreign courts.”).

321. Other interesting cases presenting issues of enrollment include a dispute among members of the San Pasqual Band. *See Alegre v. United States*, No. 17-CV-0938-AJB-KSC, 2017 U.S. Dist. LEXIS 76136 (S.D. Cal. May 18, 2017) (granting a temporary restraining order to enjoin changes to the Tribe's membership ordinance); *Alegre v. Jewell*, No. 16-CV-2442-AJB-KSC, 2017 U.S. Dist. LEXIS 130918 (S.D. Cal. Aug. 15, 2017) (lifting that injunction); *see also* *Collins v. Salinan Heritage Pres. Ass'n*, No. B267301, 2017 Cal. App. Unpub. LEXIS 5325 (Cal. Ct. App. Aug. 3, 2017) (a defamation action against the Salinan Heritage Preservation Association for publically claiming the plaintiff was not an Indian).

322. *Cherokee Nation v. Nash*, 267 F. Supp. 3d 87 (D.D.C. Aug. 30, 2017).

323. *Id.* at 111.

324. *Id.* at 114.

325. *See id.* at 112.

The 1866 Treaty with the Cherokee contained a provision that discussed the enrollment of the Cherokees' freed slaves as members of the Cherokee Nation.<sup>326</sup> The court was called upon to resolve whether the 1866 Treaty guarantees a continuing right to Cherokee Nation citizenship for descendants of Freedmen listed on the Final Roll of Cherokee Freedmen as compiled by the Dawes Commission.<sup>327</sup>

The court reasoned that the 1866 Treaty's guarantee of "all the rights of Native Cherokee" included the right of citizenship.<sup>328</sup> It also concluded that the language "and are now residents therein, or who may return within six months, and their descendants" included the current class of Freedmen petitioning the court.<sup>329</sup> Therefore, the court held that the 2007 amendment to the Cherokee Constitution violated the Treaty and was therefore unlawful.<sup>330</sup>

The court explicitly rejected the Cherokee Nation's argument that citizenship in the nation is conferred solely by the Cherokee Constitution and is therefore subject to amendment.<sup>331</sup> Instead, it held that the Cherokee have the right to determine their own membership and to change their membership criteria, but any changes must accord the rights conferred to the Freedmen by the 1866 Treaty.<sup>332</sup>

Unlike the definitive answer *Nash* provided to the Cherokee Freedmen, the Western District of Washington had to issue repeated

---

326. *Id.* at 90 ("[T]he Cherokee Nation promised that 'never here-after shall either slavery or involuntary servitude exist in their nation' and 'all freedmen who have been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the country at the commencement of the rebellion, and are now residents therein, or who may return within six months, and their descendants, shall have all the rights of native Cherokees . . . .").

327. *Id.* at 89.

328. *Id.* at 123 ("The Cherokee Nation Constitution defines native Cherokees' right to citizenship in the Nation. Accordingly, by virtue of Article 9 of the 1866 Treaty, qualifying freedmen have a right to citizenship as defined by the Cherokee Nation Constitution to the same extent that native Cherokees have that right. Thus, the 1866 Treaty grants qualifying freedmen the right to citizenship but the Cherokee Nation Constitution actually makes them citizens. The history, negotiations, and practical construction of the 1866 Treaty do not suggest that the parties believed otherwise.")

329. *Id.* at 129.

330. *Id.* at 140.

331. *Id.* at 127 ("The Cherokee Nation is mistaken to treat freedmen's right to citizenship as being tethered to the Cherokee Nation Constitution when, in fact, that right is tethered to the rights of native Cherokees. Furthermore, the freedmen's right to citizenship does not exist solely under the Cherokee Nation Constitution and therefore cannot be extinguished solely by amending that Constitution.")

332. *Id.* at 140 ("The Cherokee Nation's sovereign right to determine its membership is no less now, as a result of this decision, than it was after the Nation executed the 1866 Treaty. The Cherokee Nation concedes that its power to determine tribal membership can be limited by treaty. The Cherokee Nation can continue to define itself as it sees fit but must do so equally and evenhandedly with respect to native Cherokees and the descendants of Cherokee freedmen. By interposition of Article 9 of the 1866 Treaty, neither has rights either superior or, importantly, inferior to the other. Their fates under the Cherokee Nation Constitution rise and fall equally and in tandem.") (internal citations omitted).

opinions related to the alleged disenrollment of 306 Nooksack tribal members. On March 24, 2016, the Nooksack Tribal Council lost a quorum of recognized members, and since then Interior has refused to recognize the Council's actions, including the attempt to disenroll the 306 tribal members.<sup>333</sup> Litigation has proceeded, raising several different causes of action.

In *Nooksack Indian Tribe v. Zinke*, the remnant Council sued Interior, seeking an order to restore federal funding for tribal programs under its 638 contracts.<sup>334</sup> The disenrolled tribal members moved to intervene in the proceedings, and the court granted the intervention.<sup>335</sup> In *Nooksack Indian Tribe v. Zinke*, the court reached the merits of the tribe's claim, determining that federal courts should not interpret tribal law.<sup>336</sup> Instead, courts take their signal from the federal government, and "no Nooksack tribal leadership group is currently federally recognized."<sup>337</sup> Therefore, the court reasoned that the acting Council lacks the ability to bring its claims in federal court.<sup>338</sup>

In November 2017, the Nooksack Indian Tribe filed for reconsideration.<sup>339</sup> The federal court denied the motion for reconsideration.<sup>340</sup> The tribe asserted the federal court committed manifest error when it refused to defer to tribal law that a holdover group of the Tribal Council could bring suit on behalf of the tribe.<sup>341</sup> The court rejected the tribe's argument, again deferring to Interior.<sup>342</sup>

---

333. Rabang v. Kelly, No. C17-0088-JCC, 2017 U.S. Dist. LEXIS 63515, at \*6-7 (W.D. Wash. Apr. 26, 2017).

334. *Nooksack Indian Tribe v. Zinke*, 321 F.R.D. 377 (W.D. Wash. 2017).

335. *Id.* at 383 ("[T]he Court sees no reason why intervention would be inappropriate. The intervention will not cause undue delay and Intervenor has a very probable relation to the merits of the case. Moreover, the Supreme Court has indicated that American Indian tribes' 'participation in litigation critical to their welfare should not be discouraged.'").

336. *Nooksack Indian Tribe v. Zinke*, No. C17-0219-JCC, 2017 U.S. Dist. LEXIS 72364 (W.D. Wash. May 11, 2017).

337. *Id.* at 13.

338. *Id.* at 17 ("[T]he Court concludes deference is owed to the DOI decisions and the holdover Council does not have authority to bring this case against the federal government in the interim period where the tribal leadership is considered inadequate by the DOI.").

339. See *Nooksack Indian Tribe v. Zinke*, No. C17-0219-JCC, 2017 U.S. Dist. LEXIS 188398, at \*2 (W.D. Wash. Nov. 14, 2017).

340. *Id.* at \*7.

341. *Id.* at \*4.

342. *Id.* at \*4-6 ("[T]he Court believes that it is appropriate to defer to DOI's refusal to recognize Nooksack Tribal leadership and find that the holdover Council lacked authority to bring this lawsuit on behalf of the Tribe. As the Court described in its prior order, there was sufficient evidence in the record for the Court to determine that DOI's recognition decision was reasonable. Nothing has changed since the Court made its ruling that would warrant a different outcome. Therefore, the Court does not find that its holding represented manifest error.").

In *Rabang v. Kelly*, the 306 tribal members that the holdover Tribal Council attempted to disenroll brought suit against the members of the council and the tribal judge that had overseen the disenrollment proceedings.<sup>343</sup> The district court dismissed the tribal judge in charge of the disenrollment procedures on the basis of judicial immunity because “when a judge knows that he lacks jurisdiction, or acts in the face of clearly valid statutes or case law expressly depriving him of jurisdiction, judicial immunity is lost.”<sup>344</sup> The evidence presented by the parties in this case did not definitively show that the judge knew that Interior had refused to recognize all actions of the Tribal Council after March 24, 2016.<sup>345</sup> On May 3, 2017, the plaintiffs filed an amended complaint alleging additional facts against the tribal judge.<sup>346</sup> The judge filed for summary judgment, and the plaintiffs asked for time to complete discovery related to when the judge had subjective knowledge that he lacked authority to act.<sup>347</sup> The court granted the plaintiffs additional time to complete discovery.<sup>348</sup>

By October 2017, the federal district court held out hope for a settlement of the issues that remained between the parties. In *Rabang v. Kelly*, the federal district court took notice of an August 28, 2017 agreement between Interior and Kelly, which recognized Kelly as Chairman of the Nooksack Tribal Council, and the Council as the governing body of the Nooksack Indian Tribe contingent upon Kelly organizing an election within 120 days in which all the purportedly disenrolled members were eligible to vote, run for tribal office, and receive benefits from the tribe on an equal basis with all other members.<sup>349</sup> In light of that agreement, the federal court stayed the proceedings, suggesting that Interior’s decision to recognize the Tribal Council could be an event of “jurisdictional significance.”<sup>350</sup> In December 2017, the remnant Council won an election that was marred with allegations of fraud.<sup>351</sup> Chairman

---

343. *Rabang v. Kelly*, No. C17-0088-JCC, 2017 U.S. Dist. LEXIS 66798 (W.D. Wash. May 2, 2017).

344. *Id.* at \*2.

345. *Id.* at \*3.

346. *Rabang v. Kelly*, No. C17-0088-JCC, 2017 U.S. Dist. LEXIS 101182 (W.D. Wash. June 29, 2017).

347. *Id.* at \*2.

348. *Id.* at \*3.

349. *Rabang v. Kelly*, No. C17-0088-JCC, 2017 U.S. Dist. LEXIS 177176, at \*4-5 (W.D. Wash. Oct. 25, 2017).

350. *Id.* at \*12-13 (“The DOI’s action will likely have substantial relevance to—or even control—the Court’s subsequent rulings on this litigation. Given that the pending tribal election could affect the Court’s continued jurisdiction over this case, a stay of proceedings could conserve both the Court’s and parties’ resources.”).

351. Nina Shapiro, *Nooksack Chairmen Vows to Continue Disenrollments in Wake of Contested Election*, SEATTLE TIMES (Dec. 5, 2017), <https://www.seattletimes.com/seattle-news/politics/nooksack-chairman-vows-to-continue-disenrollments-in-wake-of-contested-election/>.

Kelly vowed to reinstate the disenrollment procedures,<sup>352</sup> which almost certainly means this litigation will continue into 2018.

### G. Gaming

The Supreme Court decided in 1987 that California could not impose its state civil regulations on a bingo operation run by the Cabazon Band of Mission Indians.<sup>353</sup> The following year Congress enacted the Indian Gaming Regulatory Act (IGRA) to create federal requirements to oversee tribal gaming activity.<sup>354</sup> Since then Indian gaming has become a \$30 billion operation, providing economic development for many tribes.<sup>355</sup>

With the potential profitability of Indian casinos, the stakes have increased litigation on all sides. States, local communities, and non-Indian property owners object to the construction of casinos; even other tribes, sensing competition, have attempted to use the law and the courts to limit casino development. There are too many cases involving gaming to summarize them all. I have tried to provide an overview of the important decisions taken by state and federal courts in 2017.

#### 1. IGRA

Among the most notable cases of 2017 was a decision permitting a degree of state regulation into Indian gaming as long as those regulations were directed at off-reservation activity. In *Pueblo of Pojoaque v. New Mexico*, the Pueblo of Pojoaque sued New Mexico for failing to conduct gaming compact negotiations in good faith as required under IGRA.<sup>356</sup> The Pueblo also alleged that New Mexico deprived it and its members from their right to be free from state jurisdiction over activities that occur on its lands when the state gaming board denied vendor licenses for businesses doing work with the Pueblo.<sup>357</sup> The district court dismissed the Pueblo's claims, holding that IGRA does not preempt state regulatory authority over non-Indian state licensee vendors.<sup>358</sup>

The Tenth Circuit affirmed.<sup>359</sup> It concluded that traditional preemption analysis is appropriate for conduct that occurs outside Indian country (and is thus indirect) even if it has a substantial effect on the

---

352. *Id.*

353. *See* *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

354. The Indian Gaming Regulatory Act, 25 U.S.C. § 2701 (2012).

355. Grant Christensen et al., *Tribal Court Litigation*, in RECENT DEVELOPMENTS IN BUSINESS AND CORPORATE LITIGATION 436 (2017). In 2015, tribal gaming had grown to a \$29.9 billion industry and had posted 5% annual growth.

356. *Pueblo of Pojoaque v. New Mexico*, 863 F.3d 1226 (10th Cir. 2017).

357. *Id.* at 1229–30.

358. *See id.* at 1229.

359. *Id.* at 1228.

tribe.<sup>360</sup> It then held that IGRA does not explicitly preempt state regulatory action occurring outside Indian country, only activity on Indian lands.<sup>361</sup> The Tenth Circuit concluded that under traditional preemption analysis, there must be a comprehensive federal regulatory scheme in order to preempt regulation, but the IGRA has no such scheme that governs the state regulation of vendors doing business with Indian gaming enterprises; it is in fact “silent” as to the regulation of licensing gaming vendors.<sup>362</sup>

Accordingly, the Tenth Circuit reasoned, IGRA does not implicitly preempt state authority based on field preemption because it explicitly allows state regulation of licensing, regulation, and prohibition of vendors with conduct based outside of Indian country in the area of gaming.<sup>363</sup> Conflict preemption also does not apply because it is possible to comply with IGRA and state rules on vendor licensing.<sup>364</sup>

Judge Bacharach issued a dissenting opinion. He argued that *Bracker*’s interest balancing approach should be applied instead of traditional preemption because the underlying dispute involved an Indian tribe.<sup>365</sup> The dissent cited *Ramah Navajo School Board*, 458 U.S. 832 (1982), to conclude that *Bracker* is appropriate even when the effect on the tribe is indirect and the activity to be regulated is outside of Indian country.<sup>366</sup> The dissent would have found that IGRA preempts state regulation regardless of whether the effect on the Pueblo was direct or indirect.<sup>367</sup>

In a related challenge, the Tenth Circuit also held that IGRA’s grant of power to the Secretary to issue gaming regulations when a state refused to negotiate a compact was an unlawful exercise of the Secretary’s powers.<sup>368</sup> In *New Mexico v. United State Department of Interior*, the state

---

360. *Id.* at 1232–35.

361. *Id.* at 1235 (“[T]he pertinent question is not from where the State is regulating, but whether the State is regulating Indian gaming on tribal lands. If New Mexico is regulating gaming on tribal land, then the *Bracker* balancing test applies. If not, then the traditional preemption analysis applies.”).

362. *Id.* (“Indeed, [e]verything—literally everything—in IGRA affords tools (for either state or federal officials) to regulate gaming on Indian lands, and nowhere else.”) (quoting *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2034 (2014)).

363. *Id.* at 1236.

364. *Id.* (“But here it is not impossible to comply with both federal and state law, because there are no conflicting obligations for state licensees. Moreover, the licensees can continue doing business with the Pueblo (as no license is required), and the absence of a compact demonstrates that the State is without authority to take enforcement action to prohibit or penalize such transactions.”).

365. *Id.* at 1237 (“In determining whether to apply *Bracker*, neither the Supreme Court nor our court has ever drawn a rigid distinction based on the directness of the effect on a tribe. To the contrary, the Supreme Court’s opinions on Indian taxation establish that *Bracker* may be triggered even when the burden on the tribe is indirect.”).

366. *Id.*

367. *Id.* at 1239–40.

368. *New Mexico v. U.S. Dep’t of Interior*, 854 F.3d 1207 (10th Cir. 2017).

challenged the authority of Interior to issue regulations (25 C.F.R. § 291 *et. seq.*) allowing the Secretary to approve gaming operations when the state itself did not enter into a gaming compact with the tribe.<sup>369</sup> The state argued that Interior lacks this authority where a tribe's IGRA suit against the state for failing to negotiate a compact in good faith is dismissed due to the state's sovereign immunity.<sup>370</sup> In this case, the Pueblo of Pojoaque sued New Mexico for failure to negotiate a compact in good faith as permitted under IGRA, but New Mexico had that case dismissed on the basis of sovereign immunity.<sup>371</sup> The Pueblo then asked Interior to promulgate gaming regulations as permitted by 25 C.F.R. § 291 when a state does not negotiate in good faith.<sup>372</sup> Before Interior could do so, New Mexico challenged its authority.<sup>373</sup> The Tenth Circuit upheld the district court's holding that the case was justiciable and affirmed the state's summary judgment motion blocking the Secretary from approving tribal gaming under Section 291 because the creation of the regulation was an invalid exercise of the Secretary's power.<sup>374</sup>

The court concluded that New Mexico had standing.<sup>375</sup> The Tenth Circuit then applied *Chevron* deference to the powers granted to the Secretary.<sup>376</sup> The Tenth Circuit held that Congress spoke directly to the question of when the Secretary could issue regulations to permit gaming without a compact, and the text of IGRA requires a finding by a federal court that the state has acted in bad faith.<sup>377</sup> The Tenth Circuit reasoned that Section 291 was therefore an attempt by the Secretary to rewrite IGRA.<sup>378</sup> It rejected Interior's argument that when Congress wrote IGRA it "drew a map in which all roads lead to some kind of gaming procedures."<sup>379</sup> The Tenth Circuit instead concluded that Congress

---

369. *Id.* at 1211.

370. *See id.*

371. *Id.*

372. *Id.*

373. *Id.*

374. *Id.* at 1214.

375. *Id.* at 1215–18. New Mexico has suffered both a procedural and an injury in fact: "[T]he Part 291 regulations injure New Mexico by forcing it to choose between participating in a process it considers unlawful and forgoing any benefit from that allegedly unlawful process . . ." *Id.* at 1218.

376. *Id.* at 1221 ("If Congress has spoken *directly* to the issue, that is the end of the matter; the court, as well as the agency, must give effect to Congress's unambiguously expressed intent." However, if the statute is silent or ambiguous as to the precise question at issue, a court must determine whether to afford the agency's interpretation *Chevron* deference. Such deference is appropriate if "Congress delegated authority to the agency generally to make rules carrying the force of law" and the agency's interpretation of the statute was issued pursuant to that authority.") (internal citations omitted).

377. *Id.* at 1217–18.

378. *Id.* at 1225 ("At bottom, the Secretary is attempting to rewrite IGRA.")

379. *Id.* at 1227.

intended to create a system that balances the equal sovereign interests of states and tribes.<sup>380</sup>

Interior argued that the decision in *Seminole Tribe*, 517 U.S. 44 (1996), altered what might have been an unambiguous statute into an ambiguous one by declaring Congress's chosen enforcement mechanism (a lawsuit by the tribe against the state) violated the Eleventh Amendment.<sup>381</sup> However, the Tenth Circuit rejoined: "The Supreme Court has never held that, in crafting a partially unconstitutional regulatory regime, Congress has necessarily delegated to the relevant administrative agency the power to fundamentally revise that regime in order to work around an area that had been declared unconstitutional."<sup>382</sup> Instead, it cited now Justice Gorsuch (then a member of the Tenth Circuit): "[W]hen the political branches disagree with a judicial interpretation of existing law, the Constitution prescribes the appropriate remedial process. It's called legislation."<sup>383</sup>

In *Massachusetts v. Wampanoag Tribe of Gay Head (Aquinnah)*, the tribe moved to establish gaming pursuant to IGRA on lands gained subject to a 1987 settlement that made the land subject to the laws of the commonwealth.<sup>384</sup> The settlement specifically contemplated bingo or any other game of chance and took effect six months after *Cabazon* but before the enactment of IGRA.<sup>385</sup> The district court concluded that the tribe failed to exercise sufficient "government power" over the lands and that even if it had such power, IGRA did not impliedly repeal the settlement agreement's grant of commonwealth authority over gaming on the tribal lands.<sup>386</sup>

The First Circuit reversed.<sup>387</sup> It recognized that IGRA requires the tribe to have jurisdiction over the land in order for IGRA to apply but concluded the settlement agreement recognized that jurisdiction.<sup>388</sup> The court explained that those government powers utilized by the tribe include: a housing program that coordinates with the HUD, an intergovernmental

---

380. *Id.* at 1227–28 ("Equal bargaining cannot be had, however, where the parties know that, absent an agreement, one side will nevertheless obtain its fundamental goals; yet, this is precisely the situation that the Part 291 regulations prescribe, where ultimately the tribe will secure gaming procedures.").

381. *Id.* at 1212–13.

382. *Id.* at 1230.

383. *Id.* (citing *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1151 (10th Cir. 2016) (Gorsuch, J., concurring)).

384. *Massachusetts v. Wampanoag Tribe of Gay Head (Aquinnah)*, 853 F.3d 618 (1st Cir. 2017).

385. *Id.* at 622.

386. *Id.* at 623.

387. *Id.* at 621.

388. *Id.* at 624–25 ("Although the Federal Act does contain some language limiting the Tribe's jurisdiction that language only confirms that the Tribe retains the jurisdiction it has not surrendered in the Federal Act.").

agreement with EPA, a health clinic with assistance from IHS, an education and scholarship program financed by the BIA, a child welfare program, a tribal court, etc.<sup>389</sup> The First Circuit made clear that IGRA does not require that the tribe exercise complete governmental power in order to engage in gaming.<sup>390</sup> The First Circuit then went on to hold that IGRA effected a partial repeal of the Settlement Act.<sup>391</sup> It reasoned that the Settlement Agreement had no language that contemplated that it could not be modified by future federal laws and that IGRA's enactment in 1988 removed the control of the commonwealth over class II games like bingo, pull-tabs, and non-banking card games like poker.<sup>392</sup> The case was remanded so a judgment could be entered in the tribe's favor.<sup>393</sup> In a related case, the Eastern District of California held that when land is held in trust, the tribe has sufficient "jurisdiction" over it to operate casino gaming for the purposes of IGRA.<sup>394</sup>

In other IGRA related cases, the federal courts: (1) permitted a claim against California to proceed on the basis that the state violated the terms of its gaming compact by misusing funds paid to the Special Distribution Fund;<sup>395</sup> (2) held that a legal opinion by the Acting General Counsel of the National Indian Gaming Commission (NIGC) is not a final "agency action" subject to judicial review;<sup>396</sup> and (3) held that IGRA requires that management contracts between a tribe and a private company to operate a casino be approved by the NIGC Commissioner and that failure to receive approval makes the contract unenforceable.<sup>397</sup>

## 2. Other Gaming Opinions

Not all gaming litigation was necessarily focused on the requirements of IGRA. In *Outsource Services Management v. Nooksack*

---

389. *Id.* at 625–26.

390. *Id.* at 626 ("Pursuant to IGRA, 'the operation of gaming by Indian tribes [is] a means of promoting tribal economic development, self-sufficiency, and strong tribal governments.' The Town now seeks to put this logic on its head by requiring the Tribe's government to be fully developed before it can have the benefit of gaming revenue. This is not what IGRA requires, nor is it our case law.") (internal citations omitted).

391. *Id.* at 629.

392. *Id.* at 627–29.

393. *Id.* at 629.

394. *Club One Casino v. U.S. Dep't of Interior*, No. 1:16-cv-01908-AWI-EPG, 2017 U.S. Dist. LEXIS 196312 (E.D. Cal. Nov. 29, 2017).

395. *Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation v. California*, No. 16-cv-01713-BAS-JMA, 2017 U.S. Dist. LEXIS 47122 (S.D. Cal. Mar. 29, 2017).

396. *Kansas ex rel. Schmidt v. Zinke*, 861 F.3d 1024 (10th Cir. 2017).

397. *Sharp Image Gaming, Inc. v. Shingle Springs Band of Miwok Indians*, 223 Cal. Rptr. 3d 362 (Cal. Ct. App. 2017). A similar claim brought in federal court was dismissed for lack of subject matter jurisdiction. *See Osceola Blackwood Ivory Gaming Grp. v. Picayune Rancheria of Chukchansi Indians*, No. 1:17-cv-00394-DAD-BAM, 2017 U.S. Dist. LEXIS 118065 (E.D. Cal. July 27, 2017).

*Business Corporation*, NBC, a tribal business owned by the Nooksack Indian Tribe, defaulted on a \$15 million loan that was secured to build a casino on trust land.<sup>398</sup> The casino closed before the loan could be fully repaid.<sup>399</sup> Outsource Services Management sought compensation from the profits generated from the use of the facility itself, despite the casino closure, because the loan gave Outsource a claim to revenues generated from the casino complex's facilities—not merely its profits from gaming.<sup>400</sup> The tribe argued that claiming revenue from non-casino activity that occurred on the land was equivalent to a claim on the land itself, which, because the land is held in trust, is prohibited under the law.<sup>401</sup> The trial court disagreed.<sup>402</sup> The appellate court affirmed, reasoning that the pledged security is not the land itself but income generated from activities on the land.<sup>403</sup>

Other gaming opinions in 2017 saw the Ninth Circuit hold that the “doctrine of prevention” makes it a violation of the implied covenant of good faith and fair dealing for a party to a contract to interfere with a condition precedent to the agreement, and that the lobbying of the BIA and a governor by city officials to deny gaming after the city signed a contract with a tribe for potential casino development violated that doctrine.<sup>404</sup> Federal courts also: (1) determined that they could not interpret the Muscogee Creek Nation’s tribal law prohibiting gaming on an allotment held by a member of the Kialegee Tribal Town but located on the Muscogee Reservation;<sup>405</sup> (2) upheld a contract between tribes for the provision of casino management services;<sup>406</sup> (3) refused to seal the entire

---

398. *Outsource Servs. Mgmt., LLC v. Nooksack Bus. Corp.*, No. 74764-9-I, 2017 Wash. App. LEXIS 790 (Wash. Ct. App. Apr. 3, 2017).

399. *Id.* at \*4–5.

400. *Id.* at \*2–4.

401. *Id.* at \*6. Any contract that encumbers the land must be approved by the Secretary of Interior under 25 U.S.C. § 81.

402. *Id.* at \*4–5 (“NBC and the Tribe may choose to use the Facilities in a manner that generates no income; the agreements give them that opinion. If the Facilities are used in a manner that generates income, however, that income is a Pledged Revenue subject to collection.”).

403. *Id.* at \*10 (“The pledged security is not a legal interest in the land itself. Nor does OSM’s right interfere with the tribe’s exclusive proprietary control over the land. . . . OSM has limited recourse financing and retains a right to income from the facilities, but not the right to the land or to control operation of the facilities. Because the tribe retains complete control over the casino building and property and can use the facilities for any purpose, there is no encumbrance for purposes of Section 81, and thus the agreements did not require preapproval.”).

404. *See Guidiville Rancheria of Cal. v. United States*, 704 F. App’x 655 (9th Cir. Aug. 4, 2017).

405. *Kialegee Tribal Town v. Dellinger*, No. 17-CV-0478-CVE-FHM, 2017 U.S. Dist. LEXIS 138417 (N.D. Okla. Aug. 29, 2017).

406. *Yavapai-Apache Nation v. La Posta Band of Diegueno Mission Indians*, No. D069556, 2017 Cal. App. Unpub. LEXIS 4430 (Cal. Ct. App. June 28, 2017).

record of litigation involving a failed gaming compact<sup>407</sup> but permitted a limited redaction;<sup>408</sup> (4) refused to amend the appellate record to include documents not considered by the agency on a challenge to a decision to disapprove amendments to a gaming compact;<sup>409</sup> and (5) determined a claim by one tribe alleging that another tribe's gaming facility was in violation of its gaming compact was subject to a six-year statute of limitations.<sup>410</sup>

### 3. Non-Indian v. Indian Gaming

Finally, there was one notable case out of the Second Circuit where non-Indian gaming interests claimed that state rules discriminated against them by preferring Indian gaming. In *MGM Resorts International Global Gaming Development LLC. v. Malloy*, plaintiff MGM filed suit against Connecticut, alleging that Special Act 15-7 places it at a competitive disadvantage in the state's gaming industry.<sup>411</sup> Special Act 15-7 permits Connecticut's two federally recognized tribes (the Mashantucket Pequot and the Mohegans) to jointly form a Tribal Business Entity in order to negotiate with state municipalities about the prospect of building commercial casinos on non-Indian-owned land.<sup>412</sup> MGM attempted to register as a Tribal Business Entity but was rejected because it was not affiliated with either, let alone both, of the tribes as required by the Special Act.<sup>413</sup> The Special Act does not mention non-Indian entities, the significance of which was disputed by the parties.<sup>414</sup> The district court dismissed MGM's complaint because it lacked Article III standing.<sup>415</sup> The court held that MGM presented no plans to open or compete for a commercial casino on non-Indian land in Connecticut and so it lacked standing to bring the claim.<sup>416</sup>

---

407. *Williams & Cochrane LLP v. Quechan Tribe of the Fort Yuma Indian Reservation*, No. 3:17-cv-1436-GPC-MDD, 2017 U.S. Dist. LEXIS 132731 (S.D. Cal. Aug. 17, 2017).

408. *Williams & Cochrane LLP v. Quechan Tribe of the Fort Yuma Indian Reservation*, No. 3:17-cv-1436-GPC-MDD, 2017 U.S. Dist. LEXIS 184512 (S.D. Cal. Nov. 7, 2017).

409. *Forest Cty. Potawatomi Cmty. v. United States*, No. 15-105 (CKK), 2017 U.S. Dist. LEXIS 147778 (D.D.C. Sept. 12, 2017).

410. *Stockbridge-Munsee Cmty. v. Wisconsin*, No. 17-cv-249-jdp, 2017 U.S. Dist. LEXIS 176596 (W.D. Wis. Oct. 25, 2017).

411. *MGM Resorts Int'l Global Gaming Dev., LLC. v. Malloy*, 861 F.3d 40 (2d Cir. 2017).

412. *Id.* at 43.

413. *Id.* at 43–44.

414. *Id.* at 43 (“MGM interprets the statutory language to mean that only the Tribes are authorized to establish commercial casinos in Connecticut at all. . . . The state argues that nothing in the Act prevents other developers from soliciting municipalities for contracts, and that it imposes a unique burden on the Tribes by requiring them to partner with each other. . . .”).

415. *Id.* at 44.

416. *Id.*

The Second Circuit agreed.<sup>417</sup> It held that “Connecticut has provided municipalities with a general authority to enter into contracts under a separate statute” and so MGM can negotiate for commercial casinos under that provision.<sup>418</sup> MGM replied that even if it negotiated an agreement with a municipality, Connecticut would hold such a contract void for illegality as gambling is generally prohibited.<sup>419</sup> The Second Circuit recognized that concern but determined that MGM was free to enter into these contracts with municipalities, which is all Special Act 15-7 permits tribes to do; the Special Act still makes all casino operations subject to the agreement of the Connecticut General Assembly.<sup>420</sup>

Alternatively, MGM argued that Special Act 15-7 discriminates against it by giving the Tribal Business Entity the exclusive right to publish its casino proposal on the Department of Consumer Protection’s website.<sup>421</sup> The Second Circuit agreed that this contention alleges an injury in fact.<sup>422</sup> However the Second Circuit held that because such an injury is not “imminent” or “certainly impending,” MGM still lacks standing to challenge the Connecticut law.<sup>423</sup>

#### H. Housing

There were two important cases from federal circuit courts in 2017 regarding the Native American Housing Assistance and Self-Determination Act (NAHASDA). In *Modoc Lassen Indian Housing Authority v. United States Department of Housing & Urban Development*, a group of tribes brought suit against the Department of Housing and Urban Development (HUD).<sup>424</sup> HUD distributes funds under NAHASDA based on tribes reporting their public housing units.<sup>425</sup> The program is

---

417. *Id.* at 43.

418. *Id.* at 46.

419. *Id.*

420. *Id.*

421. *Id.*

422. *Id.* (“MGM’s complaint plausibly alleges that the RFP requirement reallocates state resources—specifically, space on the website of a state agency—in a discriminatory manner, and that the Act generally encourages municipalities to favor the Tribes’ projects over others. If MGM’s assertions are correct, this places it at a disadvantage in attracting negotiating partners for future development sufficient to trigger protection under the Equal Protection Clause and the dormant Commerce Clause.”).

423. *Id.* at 47 (“Here, MGM has pleaded only that it is ‘interested’ in exploring development opportunities in Connecticut, and that it has made initial studies of the viability of a casino in the state. It has not alleged any concrete plans to enter into a development agreement with a Connecticut municipality, or demonstrated any serious attempts at negotiation.”).

424. *Modoc Lassen Indian Hous. Auth. v. U.S. Hous. & Urban Dev.*, 864 F.3d 1212 (10th Cir. 2017).

425. *Id.* at 1216–17 (“Critically, HUD relies on each tribe to provide an accurate yearly count of its eligible housing units.”).

zero-sum, so if a tribe overstates its units, it necessarily reduces the amount available to other tribes.<sup>426</sup> HUD identified a group of tribes who had misstated their public housing units and therefore had been overpaid under the funding model.<sup>427</sup> It subsequently reduced future payments to them under NAHASDA in order to essentially claw back the difference.<sup>428</sup> The tribes sued, arguing the money should not have been withheld without a hearing.<sup>429</sup> The district court held that hearings were required and HUD appealed.<sup>430</sup>

On appeal, the Tenth Circuit reversed.<sup>431</sup> It first held that hearings were not required because HUD did not recapture the funds that were overpaid pursuant to a review or audit covered by 25 U.S.C. § 4165, and so no hearing was required to recover the overpayments from the tribes.<sup>432</sup> In doing so, the Tenth Circuit created a circuit split with the Ninth Circuit and the Federal Court of Claims, which have both come to the opposite conclusion.<sup>433</sup>

Having identified that hearings were not required, the three judge panel of the Tenth Circuit fractured on the remaining issue. Judge Moritz and Judge Matheson<sup>434</sup> concluded that HUD's reclaiming of overpaid funds was unlawful.<sup>435</sup> However, Judge Bacharach<sup>436</sup> joined Judge Moritz,

---

426. *Id.*

427. *Id.*

428. *Id.* (“These consolidated appeals arise from a government agency’s decision to recapture, via administrative offset, funds that the agency allegedly overpaid to multiple grant recipients.”).

429. *Id.* at 1217.

430. *Id.*

431. *Id.* at 1216.

432. *Id.* at 1218–20 (“[W]e agree with HUD that the applicable statutes unambiguously establish that the terms ‘eligible activities’ and ‘certifications’ don’t encompass a tribe’s report on its eligible housing units.”).

433. *Id.* (“Accordingly, we part ways with both the Ninth Circuit and the Court of Federal Claims to the extent those courts have held that when HUD reviews a tribe’s report of its eligible housing stock, that review falls within the scope of HUD’s authority to review or audit a tribe’s activities and certifications.”).

434. Judge Matheson, concurring in part and dissenting in part, would have granted the tribes the requested relief. He concluded that the tribes are seeking a statutory right—the return of monies wrongfully taken—to which the federal government’s sovereign immunity defense does not apply. *Id.* at 1231 (“The Tribes do not allege the government destroyed or damaged their housing units or that other harms arose from the government’s recapture of grant funds or failure to pay in a timely fashion. The Tribes seek only the grant funds themselves—the very thing to which they are entitled. . . . the Tribes have sued as statutory beneficiaries to enforce a mandate for the payment of money by the federal government. This is not a suit for damages, § 702’s waiver applies, and sovereign immunity poses no bar.”).

435. *Id.* at 1224–25 (“[B]ecause HUD hasn’t advanced on appeal any alternative basis for its authority to recapture the funds via administrative offset, we therefore affirm the district court’s ruling that HUD acted illegally by recapturing the alleged overpayments.”).

436. Judge Bacharach, concurring in part and dissenting in part, would have concluded that HUD has the right to recoup the funds from the tribes. But with two votes holding that HUD does not have that right, he joined with Judge Moritz to conclude that HUD can claim sovereign immunity to claims

dismissing the claims by the tribe for a return of those funds on the basis of HUD's sovereign immunity—no repayment of funds was required.<sup>437</sup>

A second case decided by the Federal Circuit raised a similar issue. In *Lummi Tribe of the Lummi Reservation v. United States*, the United States sought review of a decision of the Court of Federal Claims that held that violations of NAHASDA were money-mandating.<sup>438</sup> HUD admitted that it had miscalculated payments under NAHASDA to plaintiff tribes (including Lummi, Fort Berthold, and Hopi) and recouped the overpayment by withholding future funds from the tribes.<sup>439</sup> The tribes sued under the Tucker Act and the Indian Tucker Act, arguing that recoupment was unlawful because it denied them funds to which they were currently entitled.<sup>440</sup> The United States moved to dismiss, but the Court of Federal Claims denied the motion, holding that NAHASDA was money-mandating and that the Secretary was bound to pay to a qualifying tribe the amount to which it was statutorily entitled under the formula each year.<sup>441</sup> The United States sought interlocutory review.<sup>442</sup>

The Federal Circuit reversed and ordered that the tribe's claim be dismissed.<sup>443</sup> It reasoned that to come under the waiver of sovereign immunity provided by the Tucker Act requires a party asserting a claim against the United States to identify a separate source of substantive law that creates a right to money damages.<sup>444</sup> The Federal Circuit reversed the decision of the Court of Federal Claims that NAHASDA is money-mandating.<sup>445</sup> The court reasoned that the money won under a successful

---

for a return of the funds by the tribes. *Id.* at 1238–39 (“Congress implicitly delegated this common-law authority to HUD, authorizing it to recoup overpayments through offset. Indeed, in the absence of such a delegation, Congress would have left a gaping hole in NAHASDA by requiring HUD to allocate funds from a finite sum without any power to correct errors, leaving some tribes with too much and other tribes with too little.”).

437. *Id.* at 1225–29 (“But this victory for the Tribes is largely a hollow one. That’s because HUD enjoys sovereign immunity from claims for money damages.”).

438. *Lummi Tribe of the Lummi Reservation v. United States*, 870 F.3d 1313 (Fed. Cir. 2017).

439. *Id.* at 1315–16.

440. *Id.* at 1316.

441. *Id.* at 1316–17.

442. *Id.* at 1317.

443. *Id.* at 1315.

444. *Id.* at 1317 (“The Tucker Act itself does not create a substantive cause of action; in order to come within the jurisdictional reach and the waiver of sovereign immunity in the Tucker Act, a plaintiff must identify a separate source of substantive law that creates the right to money damages.”).

445. *Id.* at 1318 (“Under NAHASDA, the Tribes are not entitled to an actual payment of money damages, in the strictest terms; their only alleged harm is having been allocated too little in grant funding. Thus, at best, the Tribes seek a nominally greater strings-attached disbursement. But any monies so disbursed could still be later reduced or clawed back. And any property acquired with said monies would be ‘held in trust’ by the Tribes, ‘as trustee for the beneficiaries’ of NAHASDA. . . . To label the disbursement of funds so thoroughly scrutinized and cabined as a remedy for ‘damages’ would strain the meaning of the term to its breaking point.”).

NAHASDA claim was not so much “damages” as it was a larger share of future appropriated monies, which was essentially equitable relief.<sup>446</sup> The Federal Circuit ordered the Claims Court to dismiss the tribe’s claim for lack of subject matter jurisdiction.<sup>447</sup>

### *I. Hunting & Fishing*

Many of the cases involving hunting and fishing rights are related to treaty rights, with a majority of these cases decided in 2017 originating in the Pacific Northwest.<sup>448</sup> There was one particularly interesting case involving the interpretation of the right to fish that warrants further discussion. In *Makah Indian Tribe v. Quileute Indian Tribe*, the Quileute and Quinault tribes argued that the 1855 Treaty of Olympia’s “right of taking fish” applies to the taking of whales and seals, which the Makah Tribe claimed are demonstrably mammals and not fish.<sup>449</sup> After a twenty-three-day trial, the court held that in 1855, the Quileute and Quinault understood the “right of taking fish” to include the right to whale and seal.<sup>450</sup> The Makah Tribe and the State of Washington appealed.<sup>451</sup> The Ninth Circuit affirmed.<sup>452</sup>

The Ninth Circuit applied the Indian canons of construction: “As a general rule, treaties ‘are to be construed, so far as possible, in the sense in which the Indians understood them,’ and ‘ambiguous provisions [should be] interpreted to their benefit.’”<sup>453</sup> The court looked at the meaning of the word “fish” from the 1800s when the treaties were negotiated and concluded that there was ambiguity.<sup>454</sup> The Ninth Circuit recognized that

---

446. *Id.* at 1319 (“It is for larger strings-attached NAHASDA grants—including subsequent supervision and adjustment—and, hence, for equitable relief.”).

447. *Id.* at 1320.

448. Many of these cases deal with the interpretation of usual and accustomed rights under a series of treaties signed with tribes in Washington State. Most of these opinions are generally unremarkable and require no detailed discussion in this annual review. *See generally* *United States v. Lummi Nation*, 876 F.3d 1004 (9th Cir. 2017); *Upper Skagit Indian Tribe v. Suquamish Indian Tribe*, 871 F.3d 844 (9th Cir. 2017); *United States v. Washington*, No. C70-9213, 2017 U.S. Dist. LEXIS 140882 (W.D. Wash. Aug. 30, 2017); *Skokomish v. Forsman*, No. C16-5639 RBL, 2017 U.S. Dist. LEXIS 42730 (W.D. Wash. Mar. 23, 2017); *State v. Snyder*, No. 73893-3-I, 2017 Wash. App. LEXIS 779 (Wash. Ct. App. Apr. 3, 2017).

449. *Makah Indian Tribe v. Quileute Indian Tribe*, 873 F.3d 1157, 1159 (9th Cir. 2017).

450. *Id.*

451. *See id.*

452. *Id.* (“The court’s extensive factual findings supported its ultimate conclusion that ‘fish’ as used in the Treaty of Olympia encompasses sea mammals and that evidence of customary harvest of whales and seals at and before treaty time may be the basis for the determination of a tribe’s [usual and accustomed fishing grounds].”).

453. *Id.* at 1163.

454. *Id.* at 1162 (“At the time of signing, ‘fish’ had multiple connotations of varying breadth. For example, Webster’s Dictionary simultaneously defined ‘fish’ broadly as ‘[a]n animal that lives in water’ (which would include whales and probably seals) and narrowly as a ‘name for a class of animals

whales and seals were harvested by the tribes in their usual and accustomed fishing grounds encompassed by the treaty, and so the Indians may have understood the term “fish” to include whales and seals.<sup>455</sup> However, the appellate court concluded that the boundary rights assigned by the district court to hunt whales and seals were too large and remanded with instructions for the district court to fashion alternative boundaries that are more closely related to the tribes’ historical fishing range.<sup>456</sup>

### J. Indian Civil Rights Act

The Constitution does not restrict the activities of tribal courts and tribal governments as, unlike states, tribes have never agreed to be bound by the document.<sup>457</sup> In order to ensure that tribal governments protect the rights of individuals Congress has enacted the Indian Civil Rights Act which applies many of the rights conferred by the Constitution to individuals in Indian country.<sup>458</sup> However, the only remedy Congress provided for individuals who have had their rights violated is a habeas corpus petition.<sup>459</sup> The year 2017 saw more than a dozen cases involving ICRA, but one in particular deserves discussion because it arguably creates a circuit split between the Ninth and Second Circuits.<sup>460</sup>

---

subsisting in water’ that ‘breathe by means of gills, swim by the aid of fins, and are oviparous’ (which would exclude whales and seals). Webster’s American Dictionary of the English Language (1828).”)

455. *Id.* at 1165 (“As Professor Hoard explained, the Quileute would likely have used ‘?aàlita?’, which translates as ‘fish, food, salmon.’ Similarly, the Quinault’s term ‘Kémken’ is defined alternatively as ‘salmon,’ ‘fish,’ and ‘food.’ Because the Quileute and Quinault traditionally harvested whales and seals for food at and before treaty time, these pieces of linguistic evidence strongly support the district court’s finding that the tribes ‘would have understood that the treaty reserved to them the right to take aquatic animals, including . . . sea mammals, as they had customarily done.’”).

456. *Id.* at 1167–70. The court includes some maps in its opinion to make the boundary issue very clear.

457. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) (“As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority. Thus, in *Talton v. Mayes*, this Court held that the Fifth Amendment did not ‘[operate] upon’ ‘the powers of local self-government enjoyed’ by the tribes.”) (alteration in original) (citation omitted) (quoting *Talton v. Mayes*, 163 U.S. 376, 384 (1896)).

458. The Indian Civil Rights Act, 25 U.S.C. §§ 1301–1341 (2012). For a discussion of the rights conferred by the ICRA, see Matthew L.M. Fletcher, *Indian Courts and Fundamental Fairness: Indian Courts and the Future Revisited*, 84 U. COLO. L. REV. 59, 94 (2013) (“ICRA, merely a federal statute, does not carry the same weight as the United States Constitution and, therefore, provides insufficient protection for nonmembers in tribal court.”).

459. 25 U.S.C. § 1303. For a Supreme Court ruling clarifying that the ICRA may provide rights that individuals may not be able exercise through suit in federal courts, see *Santa Clara Pueblo*, 436 U.S. 49 (holding that Ms. Martinez cannot challenge her tribe’s denial of the enrollment of her children in the tribe because the only remedy provided by ICRA is habeas).

460. See *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 905 (2d Cir. 1996). The Second Circuit has previously held that permanent banishment from the reservation was sufficient confinement so as to constitute detention for purposes of the ICRA.

In *Tavares v. Whitehouse*, the United Auburn Indian Community disciplined a group of its members who it claimed had “slandered and defamed” the tribe by withholding their per capita distributions and member privileges, and by temporarily banning them from tribal lands.<sup>461</sup> The members filed a petition for habeas corpus under the Indian Civil Rights Act, arguing that their banishment from the reservation for up to ten years was a form of detention.<sup>462</sup> The district court held that the petitioners’ punishment was not a “detention” and so it lacked jurisdiction.<sup>463</sup> A divided panel of the Ninth Circuit affirmed.<sup>464</sup>

The majority held that the loss of financial benefits did not constitute a detention.<sup>465</sup> It further held that temporary banishment was not a “detention” as that term is used in the Act.<sup>466</sup> The majority recognized that “petitioners raise free speech and due process claims that implicate the substantive protections Congress saw fit to grant Indians with respect to their tribes through the ICRA”<sup>467</sup> but concluded that a temporary exclusion is not a “detention,” and so the petitioner’s only redress was an appeal to the tribe itself.<sup>468</sup>

The dissent would not have distinguished as clearly between the terms “detention” and “custody” and would have held that being banished from the tribal lands for ten years was significant enough to constitute a sufficiently severe restraint on petitioners’ liberty to exercise habeas jurisdiction.<sup>469</sup>

Other 2017 ICRA cases held that: (1) the imposition of a \$2,355 fine is not a form of physical confinement that triggers habeas;<sup>470</sup> (2) a conviction obtained without informing the defendant of his right to

---

461. *Tavares v. Whitehouse*, 851 F.3d 863, 867–68 (9th Cir. 2017).

462. *Id.* at 869.

463. *Id.*

464. *Id.* at 878.

465. *Id.* at 870 (“[T]he loss of quarterly distributions paid to all tribal members is ‘insufficient to bring plaintiffs within ICRA’s habeas provision. . . .’”).

466. *Id.* at 871 (“[W]e think Congress’s use of ‘detention’ instead of ‘custody’ when it created habeas jurisdiction over tribal actions is significant. . . . At the time Congress enacted the ICRA . . . ‘detention’ was commonly defined to require physical confinement.”).

467. *Id.* at 878.

468. *Id.* at 877–78 (“A temporary exclusion is not tantamount to a detention. And recognizing the temporary exclusion orders at issue here as beyond the scope of ‘detention’ under the ICRA bolsters tribes’ sovereign authority to determine the makeup of their communities and best preserves the rule that federal courts should not entangle themselves in such disputes.”).

469. *Id.* at 880–89 (“Banishment is a uniquely severe punishment. It does ‘more than merely restrict one’s freedom to go or remain where others have the right to be: it often works a destruction of one’s social, cultural, and political existence.’ Tavares’s ten-year banishment is not ‘a modest fine or a short suspension of a privilege . . . but [rather] the coerced and peremptory deprivation of [her] membership in the tribe and [her] social and cultural affiliation.”) (internal citations omitted).

470. *Scudero v. Moran*, 230 F. Supp. 3d 980 (D. Alaska 2017).

counsel at his own expense or a jury trial violates ICRA,<sup>471</sup> (3) the proper venue to bring an ICRA challenge is where the petitioner is currently incarcerated and not where he was convicted;<sup>472</sup> (4) ICRA requires the exhaustion of tribal remedies<sup>473</sup> but does not require an appeal to the tribal governor;<sup>474</sup> (5) ICRA requires suit against both the warden who can physically release the petitioner but also some member of tribal government to ensure that the petitioner does not get prosecuted again upon return to the reservation;<sup>475</sup> (6) ICRA applies to convictions from tribal court but does not apply when the defendant is incarcerated under orders of the federal government;<sup>476</sup> (7) ICRA no longer applies after the petitioner has been released from tribal custody;<sup>477</sup> and (8) being fined for trespass on tribal land is not the kind of confinement to which ICRA's habeas relief is designed to apply.<sup>478</sup>

#### K. *Indian Child Welfare Act (ICWA)*

Cases involving ICWA were by far the largest number of Indian law cases decided in 2017, constituting more than a third of the total at 252 out of 646.<sup>479</sup> It is important to note that while ICWA is a federal law, many states have adopted their own state versions which may have even stronger protections or procedures for cases involving Indian children. California, Michigan, and Minnesota stand out particularly in this regard.<sup>480</sup> It is also important to note that there are thousands of decisions by trial courts

---

471. *Fragua v. Casamento*, No. CV 16-1404 RB/WPL, 2017 U.S. Dist. LEXIS 69534 (D.N.M. May 8, 2017).

472. *Cheykaychi v. Geisen*, No. 17-CV-00514-KG-GBW, 2017 U.S. Dist. LEXIS 70426 (D.N.M. May 9, 2017).

473. *Darnell v. Merchant*, No. 17-03063-EFM-TJJ, 2017 U.S. Dist. LEXIS 195793 (D. Kan. Nov. 29, 2017).

474. *Toya v. Toledo*, CIV 17-0258 JCH/KBM, 2017 U.S. Dist. LEXIS 160173 (D.N.M. Sept. 9, 2017).

475. See *Talk v. S. UTE Det. Ctr.*, No. 1:17-cv-00669 WJ/KK, 2017 U.S. Dist. LEXIS 129915 (D.N.M. Aug. 15, 2017); *Garcia v. Elwell*, No. CV 17-00333 WJ/GJF, 2017 U.S. Dist. LEXIS 80303 (D.N.M. May 25, 2017); *Toya v. Casamento*, No. CV 17-00258 JCH/KBM, 2017 U.S. Dist. LEXIS 80091 (D.N.M. May 25, 2017).

476. *Adams v. Elwell*, No. CV 17-00285 RB/SCY, 2017 U.S. Dist. LEXIS 99806 (D.N.M. June 27, 2017).

477. *United States v. Smith*, Nos. CV 16-08160-PCT-GMS (ESW), CR 13-08043-PCT-GMS, 2017 U.S. Dist. LEXIS 131560 (D. Ariz. Aug. 15, 2017).

478. *Napoles v. Rodger*, No. 1:16-cv-01933-DAD-JLT, 2017 U.S. Dist. LEXIS 106382 (E.D. Cal. July 7, 2017).

479. See *infra* Part I.

480. For a discussion of state acts that implement the federal Indian Child Welfare Act and may provide even greater protections to Indian children, see Caroline M. Turner, *Implementing and Defending the Indian Child Welfare Act Through Revised State Requirements*, 49 COLUM. J.L. & SOC. PROBS. 501 (2016).

involving Indian children that never result in a written opinion and are not captured through a Lexis search.

This Section could not possibly attempt to cite to every ICWA case from 2017. Moreover, a majority of the published ICWA cases raise just one of two issues: (1) violations of a duty to inquire into a child's status as an Indian or (2) failure to provide notice to one or more Indian tribes. Anyone wishing for a complete list of the 2017 ICWA cases is welcome to contact the author, but for the sake of brevity, only a handful of cases that raise relatively unique issues under ICWA will be discussed here.

### 1. Constitutionality of ICWA

There were a couple challenges to the constitutionality of ICWA in 2017. In *A.D. v. Washburn*, the plaintiffs, a group of parents who intentionally left Indian country to try to avail themselves of state law, challenged the constitutionality of ICWA.<sup>481</sup> They alleged that because ICWA applies only to Indian children it discriminates on the basis of race in violation of the Equal Protection and Due Process Clauses, and that Congress lacks the power to regulate state court proceedings relating to parental rights and the custody of children in accordance with the Commerce Clause and Tenth Amendment.<sup>482</sup> The court dismissed the claims for lack of standing because none of the plaintiffs could show that the application of ICWA would have resulted in a different outcome or delayed their personal adoption proceedings.<sup>483</sup>

In *Doe v. Piper*, parents, members of different federally recognized tribes, wanted to complete a voluntary adoption by selecting a non-Indian couple as the adoptive parents for their Indian child.<sup>484</sup> The parents challenged the constitutionality of ICWA and the Minnesota Indian Family Preservation Act (MIFPA).<sup>485</sup> Importantly, MIFPA applies to both voluntary and involuntary adoptions, requires notice be given to the tribe, and gives the tribe the right to intervene.<sup>486</sup> In this instance the tribes agreed not to intervene, and the voluntary adoption was completed. The federal district judge then dismissed the case as moot.<sup>487</sup>

---

481. *A.D. v. Washburn*, No. CV-15-01259-PHX-NVW, 2017 U.S. Dist. LEXIS 38060 (D. Ariz. Mar. 16, 2017).

482. *Id.* at \*10–11.

483. *Id.* at \*32.

484. *Doe v. Piper*, No. 15-2639 (JRT/DTS), 2017 U.S. Dist. LEXIS 124308 (D. Minn. Aug. 4, 2017).

485. *Id.* at \*2–4.

486. *Id.* at \*3.

487. *Id.* at \*13–14 (“This case presents significant constitutional questions, including whether MIFPA’s extension of the tribal notice requirement and intervention right to voluntary adoption proceedings implicates the biological parents’ fundamental right to care, custody, and control of their children; whether those portions of MIFPA are entitled to rational-basis review because they are

## 2. Jurisdiction § 1911

Section 1911(a) of ICWA requires that if a child is domiciled on the reservation, then the tribal court has exclusive jurisdiction over the child.<sup>488</sup> Section 1911(b) allows a tribe to request that a state proceeding involving one of its members be transferred to the tribal court and that a transfer should be allowed absent “good cause” or objection by the child’s parents.<sup>489</sup> Section 1911(c) allows a tribe to participate in state court proceedings involving one of their members or children eligible for enrollment.<sup>490</sup> Each of these provisions was contested in 2017.

Section 1911(a): In *In re X.C.*, the court held that when the mother moved to the reservation after her children were born, and the children remained in California, the children were not domiciled on the reservation.<sup>491</sup> In *State v. State*, the Utah appellate court determined that the children were domiciled in Utah when proceedings began and that the mother was a member of the Timpanogos Tribe, which is not federally recognized.<sup>492</sup> The fact that the children were later moved to a federally recognized tribe’s reservation did not give tribal courts exclusive jurisdiction over the children.<sup>493</sup>

Section 1911(b): In *V.S.O. v. C.G. (In re People)*, the South Dakota Supreme Court held that just because the state proceedings had lasted for more than one year, the length of the proceeding was an insufficient reason to deny transfer to the tribal court.<sup>494</sup> Instead, the lower court needed to consider all the facts and make a determination on a case-by-case basis before determining whether there was good cause not to transfer the case after a request for transfer was properly made.<sup>495</sup> In *In re Dependency of*

---

authorized by federal law or further a federal policy benefitting Indians; and whether the statute could survive strict scrutiny, if applicable, under either theory. Presented in the proper context, these questions merit careful consideration. But the Court cannot reach them due to jurisdictional constraints. Accordingly, the Court will grant Defendants’ motion and dismiss the Does’ action as moot.”) (internal citations omitted).

488. Indian Child Welfare Act, 25 U.S.C. § 1911(a) (2012).

489. *Id.* § 1911(b).

490. *Id.* § 1911(c).

491. *In re X.C.*, No. B272461, 2017 Cal. App. Unpub. LEXIS 8881, at \*21–23 (Cal. Ct. App. Dec. 29, 2017) (“As respondents point out, none of the cases Mother cites holds that a child’s domicile is with a parent who was recently granted primary physical custody but with whom the child is not yet cohabitating, as opposed to the parent with whom the child has lived his entire life.”).

492. *State v. State*, 2017 UT App. 237, ¶ 6 (Utah Ct. App. Dec. 29, 2017).

493. *Id.* ¶¶ 18–21.

494. *V.S.O. v. C.G. (In re People)*, 2017 SD 30, 896 N.W.2d 652 (Dakota 2017).

495. *Id.* at 655 (“[I]n determining whether the motions to transfer were timely, the court was required to consider all the particular circumstances of this case, not simply the amount of time that had passed since the proceedings first began. . . . Without knowing the Tribe’s and Mother’s reasons for waiting to seek transfer, the circuit court necessarily did not consider all the circumstances of this case.”).

*B.M.A.*, a mother abandoned her four children at the local Indian Child Welfare office but then subsequently objected when the father requested the case be transferred to tribal court.<sup>496</sup> The father appealed the court's refusal to transfer, but the Washington appellate court held that under ICWA state courts cannot transfer to tribal courts over the objection of a parent and that the mother remained a parent even if she had left her children.<sup>497</sup> In *Gila River Indian Community v. Department of Child Safety*, the Arizona Supreme Court held that since pre-adoptive and adoptive placements after parental rights have been terminated are not included under § 1911(b), a transfer to tribal court is not required.<sup>498</sup> In *San Bernardino County Children & Family Services v. M.S. (In re G.S.)*, the father appealed the decision of the California court to transfer the proceedings to Picuris Pueblo in New Mexico (the mother's tribe) without giving notice to the Osage Nation (the father's tribe).<sup>499</sup> The California appellate court agreed the transfer was in error but held that the court could not order relief because the transfer had already happened and, therefore, California courts had lost jurisdiction.<sup>500</sup>

Section 1911(c): In *In the Interest of J.T.T.*, the Texas juvenile court recognized that the child was a member of the Navajo Nation but denied the tribe's motion to intervene in the proceedings because it was untimely.<sup>501</sup> The Texas appellate court reversed, holding that the plain language of § 1911(c) allows the tribe to participate even if the tribe moves to intervene at the final hearing.<sup>502</sup> The appellate court also concluded that while Texas law requires a written request to intervene, ICWA does not require the request be in writing and ICWA preempts Texas state law.<sup>503</sup>

---

496. *In re Dependency of B.M.A.*, No. 75404-1-1, 2017 Wash. App. LEXIS 1379, at \*1-4 (Wash. Ct. App. June 12, 2017).

497. *Id.* at \*28-31.

498. *Gila River Indian Cmty. v. Dep't of Child Safety*, 395 P.3d 286, 290 (Ariz. 2017) ("Congress's differentiation throughout ICWA indicates its desire to place certain federal mandates on states for foster care placement and termination-of-parental-rights actions but not preadoptive and adoptive placements. The latter are not presumptively subject to transfer to tribal court under § 1911(b).").

499. *San Bernardino Cty. Children & Family Servs. v. M.S. (In re G.S.)*, No. E068000, 2017 Cal. App. Unpub. LEXIS 8409 (Cal Ct. App. Dec. 11, 2017).

500. *Id.* at \*10 ("[T]he dependency case was dismissed by the court. Therefore, neither this court nor the juvenile court has any further jurisdiction. Even though we agree that the juvenile court erred in failing to notice any of the Indian tribes and in transferring the case to the Picuris Pueblo tribal court over father's objection, if we order a reversal of the transfer order, no effective relief could be gained at the juvenile court level.")

501. *In the Interest of J.T.T.*, No. 08-17-00162-CV, 2017 Tex. App. LEXIS 11801 (Tex. App. Dec. 20, 2017).

502. *Id.* at \*7-8 ("Courts should not infer a waiver of the right to intervene simply because the Indian's child tribe does not intervene at the first opportunity.")

503. *Id.* at \*9-10 ("Intervention by the tribe insures that the child will not be removed from the Indian community and consequently lose touch with Indian traditions and heritage. A state procedural

## 3. Notice § 1912(a)

Section 1912(a) requires that in an involuntary proceeding involving a foster care placement or the termination of parental rights, if the court knows or has reason to know an Indian child is involved, notice must be given to the child's tribe.<sup>504</sup> The following are a sampling of the more than one hundred cases that raised the issue of notice in 2017.

In *In re Breanna S.*, the court held that although notice was sent to the Yaqui tribe, and the tribe replied verifying that the child was not an Indian child under Yaqui law, because the notice did not include all the required information about Yaqui ancestors, the notice was incomplete.<sup>505</sup> The Department objected, arguing that even if the great-grandmother was a full-blooded Yaqui, the child would not be eligible for membership, being no more than one-eighth Yaqui by blood and therefore below the one-fourth threshold written into the tribal law,<sup>506</sup> however, the court held that under ICWA it is up to the tribe to decide for itself the application of its laws related to membership eligibility.<sup>507</sup>

Many states had cases decided on the question of notice. Arizona held that when the mother told the court that she was not enrolled but that she was eligible for enrollment in either the Oglala Sioux (through her mother) or Spirit Lake (through her father), notice must be sent to those tribes.<sup>508</sup> California held that when a parent raises "Blackfoot" as their Indian ancestry, the court has an obligation to determine whether the parent meant "Blackfeet," which is a federally recognized tribe and requires notice under ICWA, or "Blackfoot," which is not.<sup>509</sup> Colorado held that even though the mother did not claim membership in any federally recognized tribe, her repeated assertions of Apache heritage required notice be sent to the Apache tribes.<sup>510</sup> Kansas held that courts

---

rule which would deny the right to intervene in a child custody proceeding because the tribe did not file a written pleading prior to the hearing directly conflicts with this purpose. Accordingly, we conclude that Section 1911(c) preempts Rule 60's requirement of a written pleading because it stands as an obstacle to the accomplishment of congressional objectives.") (internal citations omitted).

504. Indian Child Welfare Act, 25 U.S.C. § 1912(a) (2012).

505. *In re Breanna S.*, 8 Cal. App. 5th 636 (Cal. Ct. App. 2017).

506. *Id.* at 654.

507. *Id.* at 654–55 (“[M]embership . . . is a tribe’s determination based on tribal law’ . . . . [A]lthough the Department accurately quotes language from the Pascua Yaqui Constitution, we are unwilling to determine in the first instance the tribe’s membership eligibility requirements, particularly since we are without benefit of testimony regarding how that language has been applied by the tribe and whether exceptions have been created by tribal custom and practice.”).

508. *Michelle M. v. Dep’t of Child Safety*, 401 P.3d 1013 (Ariz. Ct. App. 2017).

509. *Tehama Cty. Dep’t of Soc. Servs. v. B.M. (In re Z.B.)*, No. C084117, 2017 Cal. App. Unpub. LEXIS 8303, at \*5–9 (Cal. Ct. App. Dec. 6, 2017). “When Blackfoot heritage is claimed, part of the [Department’s] duty of inquiry is to clarify whether the parent is actually claiming Blackfoot or Blackfeet heritage so that it can discharge its additional duty to notice the relevant tribes.” *Id.* at \*7.

510. *People v. L.L.*, 2017 COA 38, 395 P.3d 1209 (Colo. App. 2017).

must continue treating children as Indian children when a prospective tribe had requested more information about their ancestry and had not yet made a determination of their eligibility for membership.<sup>511</sup>

Massachusetts held that the new ICWA guidelines require courts to verify that proper notice was sent to each potential tribe by reviewing return receipts or other proofs of service.<sup>512</sup> Michigan held that while juvenile courts have an obligation to inquire into the Indian status of all children within their jurisdiction, the failure to do so was harmless because the mother never alleged the child was an Indian child.<sup>513</sup> However, a Texas court held that a father's allegation that he "had 'Indian blood'" and that his family was "part of a reservation" was enough to trigger the notification requirement of ICWA.<sup>514</sup>

#### 4. Active Efforts § 1912(d)

Section 1912(d) requires that before a foster care placement or a termination of parental rights can be entered by the court, the court must conclude that "active efforts" have been made to prevent the breakup of the Indian family.<sup>515</sup> Numerous cases were decided on this provision in 2017; however, most of them turned heavily on the specific factual situation.<sup>516</sup> I will highlight just two cases here, one a published opinion out of California and the other a divided opinion by the Alaska Supreme Court.

In *In re T.W.-I*, the father argued that active efforts had not been made to prevent the breakup of the Indian family—specifically, that the initial case plan failed to identify any service providers placing the burden on the father to locate services.<sup>517</sup> Subsequent case plans included a service provider but no contact information or information on enrollment.<sup>518</sup> Some case plans failed to include any substance abuse counseling or any assessment related to substance abuse, and the father was never tested despite district court direction that the plan include

---

511. *In the Interest of D.H.*, 401 P.3d 163, 172–74 (Kan. Ct. App. 2017).

512. *Adoption of Uday*, 91 Mass. App. Ct. 51, 52–53 (Mass. App. Ct. 2017).

513. *In re York*, No. 333672, 2017 Mich. App. LEXIS 498 (Mich. Ct. App. Mar. 23, 2017).

514. *In the Interest of C.C.*, No. 12-17-00114-CV, 2017 Tex. App. LEXIS 6036, at \*7–8 (Tex. App. June 30, 2017).

515. Indian Child Welfare Act, 25 U.S.C. §1912(d) (2012).

516. See e.g., *Bob S. v. Dep't of Health & Soc. Servs.*, 400 P.3d 99 (Alaska 2017); *Jude M. v. State*, 394 P.3d 543 (Alaska 2017); *Carlos R. v. Dep't of Child Safety*, No. 1 CA-JV 16-0372, 2017 Ariz. App. Unpub. LEXIS 290 (Ariz. Ct. App. Mar. 16, 2017); *Ritter v. Ark. Dep't of Human Servs.*, 511 S.W.3d 343 (Ark. Ct. App. 2017); *In re J.L.*, 217 Cal. Rptr. 3d 201 (Cal. Ct. App. 2017); *Dep't of Human Servs. v. M.L.M. (In re L.M.G.M.)*, 388 P.3d 353 (Or. Ct. App. 2017).

517. *In re T.W.-I*, 9 Cal. App. 5th 339, 341–46 (Cal. Ct. App. 2017).

518. *Id.* at 346.

“testing protocols.”<sup>519</sup> Additionally, the record was unclear whether there were any services specifically related to parenting skills or avoiding criminal activity, which would be instrumental in preventing the breakup of the family.<sup>520</sup> Finally, the father was provided with only one telephone visit despite his request for more interaction and the fact that visitation is a critical component of a reunification plan.<sup>521</sup> Accordingly, the California appellate court concluded that active efforts were not made to prevent the breakup of the Indian family, and it reversed the lower court’s termination of parental rights.<sup>522</sup>

In *Margot B. v. State*, a divided vote of the Supreme Court of Alaska (3–2) affirmed the termination of parental rights by concluding that active efforts had been made to prevent the breakup of the Indian family.<sup>523</sup> The majority suggested that it was proper to look at the entire period in which social services was involved in order to decide whether active efforts had been made.<sup>524</sup> The majority recognized that there was a seven-month period between when the mother graduated from Mental Health Court and the actual termination proceedings, where limited efforts occurred.<sup>525</sup> However, the majority ultimately relied on the trial court’s finding that the Office of Child Services (OCS) had developed case plans throughout the case, which had included visitation, urine analysis tests, numerous referrals to parenting classes, individual and couple’s counseling, and substance abuse assessments.<sup>526</sup> Accordingly, it affirmed the lower court order that active efforts had been made.<sup>527</sup>

The dissent would have held that the facts indicated that active efforts had not been made.<sup>528</sup> It noted that both the mother’s counselor and the couple’s counselor felt that six months of additional services might better prepare the parents to resume custody of their children.<sup>529</sup> Further, it would have held that OCS did not make the required active efforts.<sup>530</sup> The dissent

---

519. *Id.* at 346–47.

520. *Id.* at 347.

521. *Id.*

522. *Id.* at 349.

523. *Margot B. v. State*, Nos. S-16318, S-16331, S-16332, 2017 Alas. LEXIS 38 (Alaska Mar. 22, 2017).

524. *Id.* at \*11.

525. *Id.* at \*11–12.

526. *Id.* at \*13.

527. *Id.* at \*20.

528. *Id.*

529. *Id.* at \*20–21.

530. *Id.* at \*24–25 (“The caseworker’s trial testimony reveals that she did not update Margot’s case plan between December 2014 and March 2016; that she did not meet with Margot at any time after her graduation from Mental Health Court in July 2015; and that she never conveyed her expectation that Margot would continue to engage in the counseling that had been part of her treatment program in Mental Health Court.”).

placed particular weight on the mother's testimony that she did not know what else OCS expected of her in order to be compliant with her case plan.<sup>531</sup> Accordingly, the dissent would have reversed the lower court and allowed six additional months of services to try to prevent the breakup of the Indian family.<sup>532</sup>

5. Procedure for a Foster Care Placement (§ 1912(e)) or Termination of Parental Rights (§ 1912(f))

ICWA requires that before an Indian child can be placed in foster care (§ 1912(e)) and/or before a parent's parental rights to an Indian child are terminated (§ 1912(f)), the court must determine, on the record, that the continued custody of the child by its parents would likely result in serious emotional or physical harm to the child.<sup>533</sup> The determination must be based at least in part on testimony from a qualified expert.<sup>534</sup> In 2017, many courts were faced with appeals from parents arguing that the lower court erred in determining that continued custody would harm the child or that the court's decision was not based upon the testimony of a qualified expert.

Continued Custody Likely to Result in Serious Harm: In 2017, courts held that the same information that justified an emergency removal could not also be used to justify the § 1912(e) requirement that continued custody would likely result in serious harm to the child,<sup>535</sup> that the evidence that demonstrates that serious harm would result from continued custody does not have to be solely provided by a qualified expert,<sup>536</sup> that a finding of serious harm must be formally made on the record,<sup>537</sup> and that marijuana use alone does not qualify as evidence that continued custody would result in serious harm to the child.<sup>538</sup>

Qualified Expert: In 2017, courts held that the qualified expert did not have to be a social worker but could be someone with knowledge of prevailing social and cultural standards or child-rearing practices within

---

531. *Id.* at \*25.

532. *Id.* at \*25–26.

533. Indian Child Welfare Act, 25 U.S.C. §1912(e)–(f) (2012).

534. *Id.*

535. *In the Interest of D.E.J.*, Nos. 116,103, 116,104, 116,106, 2017 Kan. App. Unpub. LEXIS 293, at \*23–24 (Kan. Ct. App. Apr. 21, 2017).

536. *Jude M. v. State*, 394 P.3d 543, 558–59 (Alaska 2017) (“We have interpreted ICWA to require that “[t]he expert testimony constitute[] some of the evidence upon which the judge bases this finding. But it does not need to be the sole basis for that finding; it simply must support it.”).

537. *In re Welfare of Child S.R.K. & O.A.K.*, No. A16-2067, 2017 Minn. App. Unpub. LEXIS 457, at \*12–14 (Minn. Ct. App. May 15, 2017).

538. *Los Angeles Cty. Dep’t of Children & Family Servs. v. William B. (In re W.B.)*, No. B279288, 2017 Cal. App. Unpub. LEXIS 7105, at \*16 (Cal. Ct. App. Oct. 17, 2017).

the tribe,<sup>539</sup> that a member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and child-rearing practices is a qualified expert,<sup>540</sup> that even when a person is reluctant to consider themselves an "expert" or an "elder," they may still possess the qualifications of an expert for the purposes of ICWA,<sup>541</sup> that even if the evidence was otherwise clear that continued custody would cause serious harm to the children, the court must have some testimony from a qualified expert,<sup>542</sup> and that when the tribe designates the expert, the parents cannot contest that the expert is not qualified.<sup>543</sup>

## 6. Other ICWA Issues

There are three related issues that were discussed by the courts this year but that do not fit neatly into the categories described above that correspond directly to ICWA's statutory provisions: (1) the severance of a non-Indian parent's rights under ICWA, (2) whether the state has an obligation to assist parents in enrolling their children with their respective tribes, and (3) who is a "parent" under ICWA.

Non-Indian Parental Rights: In *S.S. v. Stephanie H.*, the Arizona appellate court determined that ICWA applied to a proceeding in which an Indian parent sought the termination of the non-Indian parent's parental rights.<sup>544</sup> The court reasoned that ICWA applies to any "child custody proceeding" involving an "Indian child."<sup>545</sup> Since the children at issue were Indian children and the severance of parental rights was a child custody proceeding, the requirements of ICWA governed the proceeding: "[T]he plain language of the act reveals its focus is not on custody

---

539. Caitlyn E. v. State, 399 P.3d 646, 652 (Alaska 2017). The Court concluded that the expert here met those qualifications; she had

Yupik upbringing as a member of the Native Village of Tununak and her six years of work in social services for the Tribe in Bethel. Charlie worked with children on cultural and subsistence awareness as a youth coordinator for five years; the Tribe then promoted her to Social Services Director, and she supervised the departments for ICWA, rural child welfare, and youth services for a year and a half. The Tribe also approved Charlie's participation as an expert witness in this case.

*Id.*

540. *In the Interest of L.M.B.*, 398 P.3d 207, 217–19 (Kan. Ct. App. 2017).

541. *In re Dependency of KS*, No. 75169-7-I, 2017 Wash. App. LEXIS 1464, at \*18–24 (Wash. Ct. App. June 19, 2017).

542. *See Gaddie v. K.S.D. (In re K.S.D.)*, 2017 ND 289, ¶¶ 27–29, 904 N.W.2d 479 (N.D. 2017). The Chief Justice dissented on this point, arguing that the likelihood the decision of the lower court would be challenged was so small that he would have upheld the termination without sending the case back to the lower court to gather testimony from the expert witness. *Id.* ¶¶ 32–35.

543. *In re Children of S.R.K.*, No. A17-1194, 2017 Minn. App. Unpub. LEXIS 1007, at \*3–4 (Minn. Ct. App. Dec. 11, 2017).

544. *S.S. v. Stephanie H.*, 388 P.3d 569 (Ariz. Ct. App. 2017).

545. *Id.* at 573.

proceedings that affect Indian *parents*, but instead is on custody proceedings that affect Indian *children*.<sup>546</sup>

Duty to Enroll: In *Solano County Health & Social Services v. R.E.* (In re *A.E.*), the Department sent notice to the Cherokee tribes and received a reply that the children did not meet ICWA's definition of an "Indian Child" but that they were eligible for enrollment through their paternal great-grandmother, who was a member.<sup>547</sup> The Department sent the Cherokee Nation the information it needed to determine whether it would intervene in the lawsuit but did not take steps to enroll the children.<sup>548</sup> The father argued that the Department had a duty to enroll the children.<sup>549</sup> The court disagreed. It recognized that California law does require the Department to assist Indian children with tribal enrollment, but only if they are already Indian children.<sup>550</sup> Because the children in this instance were eligible for enrollment but were not yet Indian children, the Department had no duty to assist them with their enrollment.<sup>551</sup>

In *San Bernardino County Children & Family Services v. J.P.* (In re *A.W.*), the father claimed that he had been born on the reservation and was enrolled as a child but that he was adopted off the Cheyenne River Sioux Reservation at a young age and did not have the proper records to show enrollment.<sup>552</sup> The tribe represented to the court that a fire fifteen to twenty years ago had destroyed the enrollment records and that the father was in the process of reenrolling.<sup>553</sup> The father asked for several continuances to give him time to get enrolled so that ICWA would apply to the proceedings.<sup>554</sup> The lower court ultimately denied a further continuance, held that because the father was not enrolled at that time that the child was not an Indian child, and proceeded to terminate the father's parental

---

546. *Id.* at 574.

547. *Solano Cty. Health & Soc. Servs. v. R.E. (In re A.E.)*, No. A149302, 2017 Cal. App. Unpub. LEXIS 4077, at \*26 (Cal. Ct. App. June 12, 2017).

548. *Id.* at \*27.

549. *Id.* at \*28.

550. *Id.* at \*28–31 (“We likewise reject Father’s argument that the Department violated its duties under rule 5.484(c)(2), which provides that efforts to provide services to an Indian child ‘must include pursuit of any steps necessary to secure tribal membership for a child if the child is eligible for membership in a given tribe, as well as attempts to use the available resources of extended family members, the tribe, tribal and other Indian social service agencies, and individual Indian caregivers.’ Our high court has made clear that this mandate applies to those who meet the definition of Indian children, not to those who, like Minors, are eligible for tribal membership but do not meet that definition.”).

551. *Id.* at \*29.

552. *San Bernardino Cty. Children & Family Servs. v. J.P. (In re A.W.)*, No. E067059, 2017 Cal. App. Unpub. LEXIS 5540, at \*2 (Cal. Ct. App. Aug. 11, 2017).

553. *Id.* at \*6–7.

554. *Id.* at \*6–9.

rights.<sup>555</sup> The father argued that CFS had a duty to help him enroll.<sup>556</sup> The court disagreed.<sup>557</sup> It held that the lower court does not have a duty to assist a parent in enrolling or to wait indefinitely for a parent to enroll.<sup>558</sup> While the court recognized that it may be appropriate for a court to extend a proceeding “‘a few days or weeks while a parent or child pursues an application for tribal membership,’ if such a delay would be in the child’s best interest[,]” the court concluded that the continuances here had already lasted 4.5 months.<sup>559</sup> The appellate court ultimately concluded that because the child was not an Indian child at the time the court refused a continuation and terminated parental rights, ICWA did not apply.<sup>560</sup>

Who Is a Parent: In *E.T. v. R.B.K. (In re B.B.)*, a sharply divided Utah Supreme Court concluded that the biological father was a “parent” under ICWA and remanded for proceedings in which the father could participate.<sup>561</sup> The facts read like a movie plot. The biological father and mother are both enrolled members of the Cheyenne River Reservation.<sup>562</sup> The mother got pregnant, and the father supported her for six months until the mother decided to move to Utah.<sup>563</sup> In Utah, the mother met an ex-boyfriend and then cut off contact with the biological father.<sup>564</sup> Only twenty-four hours and six minutes after giving birth to their son, she relinquished parental rights and consented to an adoption.<sup>565</sup> The mother lied to the hospital and listed her brother-in-law as the biological father. The brother-in-law also executed a termination of rights in relation to the

---

555. *Id.* at \*9–10.

556. *Id.* at \*18 (“Father argues that even after the Northern Cheyenne Tribe had intervened and was processing Father’s application to enroll, ICWA required CFS to delve into ‘the particulars’ of Father’s status with the Tribe rather than wait for the Tribe to determine for itself whether it wished to declare Father an enrolled tribal member and move to transfer the case to the Tribal court.”).

557. *Id.* at \*18–19. The father cited to a California statute and Section 1912(a) for the proposition that the Department had a duty to assist his enrollment and to report proactively about his enrollment status. The court held that “[n]either code requires CFS to investigate Father’s Native American ancestry on behalf of the Tribe, nor to provide the court with detailed reports on Father’s status.” *Id.* at \*19.

558. *Id.* at \*10–11 (“In *Abigail A.*, our Supreme Court clarified that a court can apply ICWA to dependency proceedings only when the child is an Indian Child at the time the court makes the ICWA determination, not when it is possible that the child could be determined to be an Indian Child at some future date.”).

559. *Id.* at \*13.

560. *See id.* at \*20.

561. *E.T. v. R.B.K. (In re B.B.)*, 2017 UT 59 (Utah 2017).

562. *Id.* ¶ 2.

563. *Id.* ¶ 4.

564. *Id.* ¶ 2.

565. *Id.* ¶ 6.

adoption.<sup>566</sup> The mother denied having any Indian ancestry, and no notice was sent to the Cheyenne River Sioux Tribe or to the biological father.<sup>567</sup>

After executing the adoption, the mother returned to South Dakota and told the biological father what she had done.<sup>568</sup> The biological father then moved to intervene in the adoption proceedings, seeking custody.<sup>569</sup> At the same time, the mother attempted to withdraw her consent to the adoption.<sup>570</sup> The Utah Supreme Court was asked to determine whether the father was a “parent” for the purposes of ICWA and, therefore, entitled to intervene in the adoption proceedings.<sup>571</sup> A 3–2 majority of the court determined that the biological father was a parent under ICWA, and so the case was remanded for further proceedings in which the father could participate.<sup>572</sup>

The majority held that the appropriate definition of a parent under ICWA should be determined by reference to a federal standard for paternity and not the state standard.<sup>573</sup> The majority applied a reasonability standard to paternity, which the biological father could meet in this case.<sup>574</sup> The majority then reasoned that ICWA, under § 1912(a), gives a “parent” the right to notice and the right to intervene in the proceedings.<sup>575</sup> After mother filed an affidavit informing the court she had misrepresented the birth father, the proceedings were no longer voluntary because at least one of the parents was objecting, and so the real biological father was entitled to notice and a right to intervene under ICWA.<sup>576</sup>

---

566. *Id.*

567. *Id.* ¶¶ 6–7.

568. *Id.* ¶ 8.

569. *Id.* ¶ 9.

570. *Id.*

571. *Id.* ¶ 2.

572. *Id.* ¶ 3.

573. *Id.* ¶ 59 (“‘Parent’ is a critical term under ICWA. Whether an individual qualifies as a ‘parent’ determines whether he or she may benefit from the heightened protections for parental rights available under ICWA. There is ‘no reason to believe that Congress intended to rely on state law for the definition of [this] critical term.’”).

574. *Id.* ¶ 71. (“We acknowledge that ICWA does not explicitly define the procedures and timing required, but in light of the congressional findings and the purpose of ICWA as discussed above, as well as its protectiveness of parental rights pertaining to Indian children, we conclude that the requirements must be less exacting than those for establishing paternity under Utah law. Instead, we conclude that a reasonability standard applies to the time and manner in which an unwed father may acknowledge or establish his paternity.”).

575. *Id.* at ¶ 86.

576. *Id.* ¶ 88 (“[I]n light of ICWA’s policy ‘to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families,’ 25 U.S.C. § 1902, it would be inconsistent to deny a parent the right to receive notice and to intervene in proceedings for the termination of his or her parental rights just because the termination of the other parent’s rights was voluntary. Thus, we conclude that the proceedings in this case are involuntary as they pertain to Birth Father. Birth Father therefore was entitled to notice of the proceedings and the opportunity to intervene.”).

The dissent would have held that the biological father was not a parent within the meaning of ICWA because the parents were unwed and paternity had not been established.<sup>577</sup> The dissent would have applied Utah's state law on paternity to determine that the biological father never acknowledged his paternity and therefore is not a parent subject to intervene in the proceedings.<sup>578</sup>

## 7. Scope

There were many challenges to the scope of the Indian Child Welfare Act and its related state counterparts during 2017. While I do not have space to include a summary of all of the cases, this section summarizes some of the opinions dealing with the scope of the act divided by state.

An Alaska court held that the ICWA applies whenever the children are being removed from their parents and not returned, even if the person removing them is an extended family member.<sup>579</sup> An Arizona court required compliance with ICWA's placement preferences even when the mother completed enrollment with her tribe after her parental rights had been terminated.<sup>580</sup> An Arkansas court held that the ICWA does not apply because there was no evidence a child was an Indian when the child's father applied for tribal membership nine days before a hearing and the father never informed the court whether the application was successful.<sup>581</sup>

A California court held that the ICWA is not triggered when a child is placed with a legal parent, even if that party is not the biological parent.<sup>582</sup> When a new tribe was federally recognized in the middle of custody proceedings, the ICWA did not require that the parties go back and restart the process or revisit past decisions on the termination of parental rights.<sup>583</sup> The court further held that ICWA requires a child's biological parents to be Indian and does not apply when only the adoptive

---

577. *Id.* ¶ 162 (ICWA "states that a 'parent' is 'any biological parent or parents of an Indian child,' not including 'the unwed father where paternity has not been acknowledged or established.' *Id.* § 1903(9).").

578. *Id.* ¶ 192.

579. *Rice v. McDonald*, 390 P.3d 1133, 1136–37 (Alaska 2017).

580. *Alexandra K. v. Dep't of Child Safety*, No. 1 CA-JV 16-0340, 2017 Ariz. App. Unpub. LEXIS 278 (Ariz. Ct. App. Mar. 14, 2017).

581. *Davis v. Ark. Dep't of Human Servs.*, 2017 Ark. App. 275 (Ark. App. 2017).

582. *In re M.R.*, 212 Cal. Rptr. 3d 807 (Cal. Ct. App. 2017).

583. *Contra Costa Cty. Children & Family Servs. Bureau v. T.G. (In re Z.J.)*, A147446, 2017 Cal. App. Unpub. LEXIS 1470, at \*19–25 (Cal. Ct. App. Feb. 27, 2017).

parents are Indian,<sup>584</sup> and that courts are not required to prove paternity through genetic testing whenever the father claims Indian heritage.<sup>585</sup>

A Colorado court held that a judge must make an ICWA inquiry both when the child is removed to foster care and again when the parent's rights are terminated.<sup>586</sup> A federal court in Georgia held that ICWA does not apply when the alleged tribe is not federally recognized.<sup>587</sup> A Michigan court held that its state act applies when one parent involuntarily gives up custody even if it is to the other parent because the child has been "removed," but does not apply when custody is given up by one parent to the other voluntarily.<sup>588</sup> A Missouri court held that a tribe may appeal a decision issued by a state court on behalf of its members even if the parent does not appeal.<sup>589</sup> A Montana court held that when the mother appealed only the placement of her child, but not the termination of her rights, that she lacked standing to proceed because she no longer possessed parental rights.<sup>590</sup> A New Jersey court held that "vague and casual references" to possible ancestry were insufficient to trigger ICWA as the court still does not have reason to know the child is an Indian child.<sup>591</sup> A North Carolina court held that the burden of proving ICWA applies is on the party asking for ICWA's application.<sup>592</sup> A Wisconsin court held that when a father never had custody of the children he could not raise an ICWA objection.<sup>593</sup>

#### *L. Indian Country*

Indian country describes the land over which tribes exercise their authority and demarcates much of the line between state and tribal

---

584. San Diego Cty. HHS Agency v. Christopher M. (In re *C.M.*), D071165, 2017 Cal. App. Unpub. LEXIS 1843, at \*3–4 (Cal. Ct. App. Mar. 14, 2017).

585. See *In re G.A.*, B282730, 2017 Cal. App. Unpub. LEXIS 8285, at \*11–12 (Cal. Ct. App., Dec. 5, 2017).

586. *People ex. rel. C.A.*, 2017 COA 135, 2017 Colo. App. LEXIS 1333, at \*9–11 (Colo. Ct. App. Oct. 19, 2017).

587. *Thomas v. Disanto*, NO.: 5:17-cv-7, 2017 U.S. Dist. LEXIS 97296, \*12-15 (S.D. Ga. June 23, 2017).

588. *In re Detmer/Beaudry*, No. 336348, 2017 Mich. App. LEXIS 1350 (Mich. Ct. App. Aug. 22, 2017).

589. *In re S.E. & B.E.*, 527 S.W.3d 894, 899–901 (Mo. App. Sept. 12, 2017).

590. *In re C.B.D.*, 387 Mont. 347, 349–50 (Mont. 2017).

591. *New Jersey Div. of Child Prot. & Permanency v. J.N.*, NO. A-4390-15T1, 2017 N.J. Super. Unpub. LEXIS 855, \*15 (Sup. Ct. N.J. Apr. 6, 2017).

592. *In re L.W.S.*, 804 S.E.2d 816, 818–19 (N.C. Ct. App. Sept. 5, 2017).

593. *Kewaunee Cty. Dep't of Human Servs. v. R.I.* (In re *Termination of Parental Rights to M.J.*), No. 2017AP1697, 2017 Wisc. App. LEXIS 1094, at \*7 (Wisc. Ct. App. Dec. 28, 2017) ("In *Adoptive Couple*, the Supreme Court held § 1912(f) does not apply where a parent never had physical or legal custody of the Indian child prior to any child custody proceedings. *Adoptive Couple*, 133 S. Ct. at 2562. On this point, the Court interpreted the phrase 'continued custody' in § 1912(f) as referring to 'custody that a parent already has (or at least had at some point in the past).'"

jurisdiction.<sup>594</sup> When an event occurs in Indian country different jurisdictional rules may apply.<sup>595</sup> Given the importance of jurisdiction to the practice of Indian Law the issue of whether or not an event has occurred in “Indian country” has been decided repeatedly by the Supreme Court.<sup>596</sup>

### 1. In the Context of Criminal Jurisdiction

Several cases decided in 2017 required their respective courts to determine whether a crime was committed in Indian country. Arguably the most important of these criminal cases, as it involved the death penalty, was *Murphy v. Royal*.<sup>597</sup> In *Murphy*, a member of the Muscogee Creek Nation was convicted of murder in an Oklahoma state court and sentenced to death.<sup>598</sup> The defendant appealed, arguing that he was an Indian and his crime occurred in Indian country; therefore, the federal government and not the state had the sole authority to prosecute him.<sup>599</sup> The Tenth Circuit agreed.<sup>600</sup> It reasoned that once land is set aside as a reservation it does not matter if the state later takes an interest in the land; the land remains Indian country until Congress determines otherwise.<sup>601</sup> It expressly rejected the State’s argument that the Creek Nation’s reservation had been diminished, which would have given the state authority over the crime.<sup>602</sup>

To determine whether Congress intended the reservation to be diminished the Tenth Circuit applied the three part test from *Solem*.<sup>603</sup> First, it concluded that there was no explicit statutory language suggesting

---

594. 18 U.S.C. § 1151 (2012).

595. For example, a number of federal criminal laws only apply if the crime occurred in Indian Country. See Major Crimes Act, 18 U.S.C. § 1152 (2012); Indian Country Crimes Act, 18 U.S.C. § 1153 (2012).

596. For a discussion of four Supreme Court cases in the last three decades that have had to determine whether a reservation was diminished, see *Nebraska v. Parker*, 136 S. Ct. 1072, 1076 (2016); *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 333 (1998); *Hagen v. Utah*, 510 U.S. 399, 409 (1994); *Solem v. Bartlett*, 465 U.S. 463, 467 (1984).

597. *Murphy v. Royal*, 866 F.3d 1164 (10th Cir. 2017).

598. *Id.* at 1171.

599. *Id.* (“[W]hen an Indian is charged with committing a murder in Indian country, he or she must be tried in federal court. Mr. Murphy is a member of the Muscogee (Creek) Nation. Because the homicide charged against him was committed in Indian country, the Oklahoma state courts lacked jurisdiction to try him.”).

600. *Id.* at 1172.

601. *Id.* at 1183 (“[R]eservation status depends on the boundaries Congress draws, not on who owns the land inside the reservation’s boundaries: ‘[W]hen Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress.’ . . . ‘Once a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise.’”) (internal citations omitted).

602. *Id.* at 1190.

603. *Id.* at 1187–90.

the reservation had been diminished.<sup>604</sup> The court cited to *Parker* for the proposition that even if the statutory language is unclear, it is still possible for a court to determine that a reservation has been diminished.<sup>605</sup> However, the Tenth Circuit concluded that there was insufficient evidence to support a finding of diminishment because the events surrounding passage were ambiguous.<sup>606</sup> The court also determined that a change in the Indian character alone is not enough to find congressional intent.<sup>607</sup> Because the crime was committed by an Indian in Indian country the state had no jurisdiction over the crime and the Tenth Circuit overturned the tribal member's conviction.<sup>608</sup> The state petitioned for a rehearing *en banc* which was subsequently denied by the Tenth Circuit.<sup>609</sup>

A couple other opinions decided this year discussed whether a crime was committed in Indian Country. In *United States v. Jackson*, the Eighth Circuit affirmed federal jurisdiction over felony charges occurring on the Red Lake Reservation because it had never been diminished.<sup>610</sup> The Court applied the Supreme Court's test for diminishment and noted that in 1934 the Secretary of Interior observed that "Red Lake has remained a 'closed' reservation, meaning almost all lands are held communally, 'apparently one of only two reservations in the nation to enjoy this status.'"<sup>611</sup> The lack of clear congressional intent to diminish the reservation was indicated by the large portions of land held communally. Because the Red Lake

---

604. *Id.* at 1215–18 ("Congress never expressly terminated the Creek Reservation in any of the statutes, nor did it use the kind of language recognized by the Supreme Court as evidencing disestablishment. It has long been clear 'the Congresses that passed the surplus land acts' were hostile to the reservation system; indeed they 'anticipated [its] imminent demise' and 'passed the acts partially to facilitate the process,' but *Solem* prevents courts from "extrapolat[ing]" this general congressional expectation into 'a specific congressional purpose' with respect to a given reservation.").

605. *Id.* at 1220–21 ("When the statutory text at step one does not reveal that Congress has disestablished or diminished a reservation, such a finding requires 'unambiguous evidence' that 'unequivocally reveals' congressional intent.").

606. *Id.* at 1226 ("None of the step-two evidence, whether viewed in isolation or in concert, shows unmistakable congressional intent to disestablish the Creek Reservation. The State's historical evidence supports the notion that Congress intended to institute a new government in the Indian Territory and to shift Indian land ownership from communal holdings to individual allotments. But this does not show, unequivocally or otherwise, that Congress had erased or even reduced the Creek Reservation's boundaries.").

607. *Id.* at 1232. Finally, even though the Creek reservation is now 73% White and only 16% American Indian the Court concluded that the demographic history was insufficient without some language from the statute and/or events surrounding passage to justify diminishment. ("The demographic evidence does not overcome the absence of statutory text disestablishing the Creek Reservation.").

608. *Id.* at 1233 ("Because Mr. Murphy is an Indian and because the crime occurred in Indian country, the federal court has exclusive jurisdiction. Oklahoma lacked jurisdiction.").

609. *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017).

610. *United States v. Jackson*, 853 F.3d 436 (8th Cir. 2017).

611. *Id.* at 440.

reservation had not been diminished, the crime had occurred in “Indian country” and the federal government had jurisdiction.<sup>612</sup>

In *Hackford v. Utah*, the Tenth Circuit reaffirmed that the Uintah and Ouray Reservation had been disestablished because of the clear language of “cession” coupled with the payment of a “sum certain” that created a presumption of diminishment that the petitioner could not overcome.<sup>613</sup> Finally, in *United States v. Antonio* the federal district court for New Mexico applied the Pueblo Land Act Amendments of 2005 to conclude that the United States had jurisdiction over the defendant’s conduct on a highway running through a Pueblo regardless of whether that land was actually part of the Sandia Pueblo because it had been within *any* land grant from a prior sovereign.<sup>614</sup>

## 2. In the Context of Civil Jurisdiction

Two important Indian country cases arose from circuit courts in the civil context, each attracting a divided opinion and a spirited dissent. In *Penobscot Nation v. Mills*, the Penobscot Nation filed suit against the state of Maine after the Maine Attorney General issued an opinion that allowed the Nation to regulate hunting on islands within the river channel but could not regulate fishing or restrict access to the river itself.<sup>615</sup> The district court agreed with the Attorney General and held that the tribe’s control extended to the islands in the river but not the waters or the land under the waters.<sup>616</sup> The tribe appealed and the First Circuit affirmed in a divided opinion.<sup>617</sup> The majority reasoned that the language of the Maine Implementing Act

---

612. *See id.* at 446–47.

613. *Hackford v. Utah*, 845 F.3d 1325 (10th Cir. 2017). The area had originally been part of the Uintah and Ouray reservation, but in 1910 Congress directed the Secretary of Interior to pay the tribe \$1.25 per acre for the land so it could be used as a future reservoir. The Act concluded that after this payment “[a]ll right, title, and interest of the Indians in the said lands are hereby extinguished.” *Id.* at 1328 (citing Act of April 4, 1910, ch. 140, 36 Stat. 285.)

614. *United States v. Antonio*, No. CR 16-1106 JB, 2017 U.S. Dist. LEXIS 85436, at \*69–71 (D.N.M. June 5, 2017) (“The jurisdictional inquiry is not whether the collision site is located within the Sandia Pueblo’s present-day boundaries; rather, the jurisdictional inquiry is whether the collision site is located ‘anywhere within the exterior boundaries of any grant from a prior sovereign, as confirmed by Congress or the Court of Private Land Claims to a Pueblo Indian tribe of New Mexico.’ . . . The Court concludes that it has jurisdiction, because the collision site is located within the exterior boundaries of the May 16, 1748, grant to the Sandia Pueblo, as confirmed by the Act of December 22, 1858, 11 Stat. at 374.”)

615. *Penobscot Nation v. Mills*, 861 F.3d 324, 328 (1st Cir. 2017) (“[T]he . . . Nation may lawfully regulate hunting on, and restrict access to, the islands within the River from Medway to Old Town that comprise its Reservation, but may not regulate activities occurring on, nor restrict public access to, the River itself . . .”).

616. *Id.* at 327.

617. *Id.*

(MIA) was clear on its face that the Tribe's reservation included only the islands and not the water.<sup>618</sup>

Judge Torruella dissented: "Everything in US history is about the land—[including] who . . . fished its waters."<sup>619</sup> He would have held that Reservation includes the main stem of the Penobscot River because "the Supreme Court has held that a grant of 'lands' and 'islands' to Indians includes 'submerged lands' and 'surrounding waters.'"<sup>620</sup> Judge Torruella also would have held that "the Settlement Acts provide for the Penobscot Nation to have the right to fish *within* its Reservation, yet if the majority view prevails, the Nation's 'fishing' will only take place in the uplands of their islands, on dry land where there are no fish and no places to fish."<sup>621</sup> Accordingly, Judge Torruella concluded that the language of the Maine Implementing Act was ambiguous and both controlling Supreme Court precedent in *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918), and the Indian canons of construction, require that ambiguities in the statutes be interpreted to the Indians' benefit.<sup>622</sup>

In *Wyoming v. EPA*, the Eastern Shoshone and Northern Arapaho applied to regulate some clean air programs on the Wind River reservation under the Tribe as State provision of the Clean Air Act.<sup>623</sup> The State of Wyoming contested the application arguing that the tribe lacked jurisdiction over parts of the reservation since it had been diminished in 1905.<sup>624</sup> The EPA, relying on analysis from Interior, concluded the reservation was not diminished and Wyoming appealed.<sup>625</sup> A divided panel of the Tenth Circuit concluded the reservation was diminished utilizing the three part test adopted first in *Solem v. Bartlett*.<sup>626</sup>

The majority began with the language of the 1905 Act: "*cede, grant, and relinquish to the United States, all right, title, and interest . . .*" which the majority determined "aligns with the type of language the Supreme Court has called 'precisely suited' to diminishment. . . . We believe Congress's use of the word 'cede' can only mean one thing—a diminished

---

618. *Id.* at 331–35 ("[T]he statute is clear that the role of the treaties is simply to define which 'islands' are included in the Reservation, not to alter the plain meaning of the term Reservation itself").

619. *Id.* at 338.

620. *Id.* at 338–39.

621. *Id.* at 339.

622. *Id.* at 339–40.

623. *Wyoming v. EPA*, 849 F.3d 861 (10th Cir. 2017).

624. *Id.* at 865.

625. *Id.* at 868 ("In their comments, Wyoming and the Farm Bureau argued the Reservation was diminished by the 1905 Act, which, they contended, established the current boundaries of the Reservation. Based on these objections, the EPA asked the Department of the Interior for an analysis of the competing claims. In 2011, the solicitor issued a legal opinion concluding the 1905 Act had not changed the boundaries established by the 1868 treaty. Relying on this analysis, the EPA issued its final decision granting the Tribes' application.").

626. *Id.* at 869–89.

reservation.”<sup>627</sup> The Tribe argued that the lack of a lump sum or sum certain payment proved that Congress did not intend to diminish the reservation but the majority described a hybrid method of compensation where funds were directed for specific activities and programs, and further cited *Hagen v. Utah* for the proposition that while “the provision for definite payment can certainly provide additional evidence of diminishment, the lack of such a provision does not lead to the contrary conclusion.”<sup>628</sup>

Judge Lucero, in dissent, would have found the reservation was not diminished.<sup>629</sup> His opinion placed great weight on the lack of a sum certain payment to buttress the cession language described by the majority, and would have held a reservation diminished only with the cession language coupled with an unconditional commitment to pay for the land or language returning the land to the public domain.<sup>630</sup> The tribe’s petition for a rehearing *en banc* was denied.<sup>631</sup>

Other 2017 opinions involving Indian country included a decision (1) that a section of land originally reserved for schools in California was not part of the Chemehuevi reservation,<sup>632</sup> (2) that a village located entirely within the original boundaries of the Oneida Nation was entitled to conduct discovery on the question of whether the reservation was diminished<sup>633</sup> but that it ultimately had the burden to prove diminishment,<sup>634</sup> (3) that New York could not assert its *ad valorem* tax over land parcels on the Cayuga Nation,<sup>635</sup> (4) that a decision on a land parcel’s status as Indian country in state court is preclusive in federal court,<sup>636</sup> and (5) that a dispute between non-Indian landowners on a diminished reservation belongs in state court.<sup>637</sup>

---

627. *Id.* at 870–72.

628. *Id.* at 872–73.

629. *Id.* at 882.

630. *Id.* 872–74 (“By deriving an intent to diminish absent sum-certain payment or statutory language restoring lands to the public domain, the majority opinion creates a new low-water mark in diminishment jurisprudence.”).

631. *Wyoming v. EPA*, 875 F.3d 505 (10th Cir. 2017).

632. *Chemehuevi Indian Tribe v. McMahon*, No.: ED CV 15-1538-DMG (FFMx), 2017 U.S. Dist. LEXIS 143446 (C.D. Cal. Sept. 5, 2017).

633. *Oneida Nation v. Village of Hobart*, No. 16-C-1217, 2017 U.S. Dist. LEXIS 114712 (E.D. Wisc. April 19, 2017).

634. *Oneida Nation v. Village of Hobart*, No. 16-C-1217, 2017 U.S. Dist. LEXIS 174662 (E.D. Wisc. Oct. 23, 2017).

635. *Cayuga Indian Nation v. Seneca County*, 260 F. Supp. 3d 290 (W.D.N.Y. Apr. 30, 2017).

636. *Navajo Nation v. Rael*, No. 1:16-cv-00888 WJ/LF, 2017 U.S. Dist. LEXIS 55797 (D.N.M. Apr. 11, 2017), *Navajo Nation v. Rael*, No. 1:16-cv-00888 WJ/LF, 2017 U.S. Dist. LEXIS 107136 (D.N.M. July 11, 2017).

637. *Austin v. Dietz*, No. 2:16-cv-459-DB, 2017 U.S. Dist. LEXIS 36057 (D. Utah Mar. 13, 2017).

*M. Land Into Trust*

The last section discussed when land could be termed “Indian country” for purposes of federal law.<sup>638</sup> The Indian Reorganization Act established a process by which the United States could take new land into trust for Indian tribes.<sup>639</sup> These decisions are contentious as any land taken into trust is removed from the tax base of the state/county in which it sits and becomes subject to the tribe’s jurisdictional authority. This section will summarize an important Ninth Circuit opinion and then briefly summarize two other district court opinions that were decided on land into trust issues in 2017.

In *County of Amador v. United States Department of Interior*, the County challenged a decision of the Department of the Interior to take land into trust for the Ione Band of Miwok Indians and permit the Band to operate a casino on the property.<sup>640</sup> The County argued that Ione Band was not eligible to have land taken into trust under the IRA because the law requires that the Band be recognized back in 1934 (it was formally recognized in 1995), or alternatively, that the lands do not qualify for the “restored lands of a restored tribe” exception to IGRA.<sup>641</sup> The district court disagreed and gave summary judgment to the Band.<sup>642</sup> The Ninth Circuit unanimously affirmed.<sup>643</sup>

The Ninth Circuit explained that the IRA statute permits Interior to take land into trust for the purpose of providing land to Indians and defines “Indian” as “all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction.”<sup>644</sup> The Ninth Circuit recognized that the Supreme Court in *Carciere* defined ‘now under Federal jurisdiction’ to mean those tribes who were under the jurisdiction of the United States in 1934, but that the Supreme Court left open when federal recognition had to occur.<sup>645</sup> The Ninth Circuit held “Given the IRA’s text, structure, purpose, historical context, and drafting history—

---

638. Contrary to the commonsense perspective that all land within a reservation is owned by the federal government for the benefit of tribes (held in trust), much of this land was parceled out and sold to non-Indians under the Dawes Act. This Act resulted in non-Indians owning land in fee on the reservation, further complicating the jurisdictional questions presented to tribal courts. For discussions of the Dawes Act, see Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995).

639. Indian Reorganization Act, 25 U.S.C. § 461 *et. seq.* (2011).

640. *County of Amador v. U.S. Dep’t of Interior*, 872 F.3d 1012 (9th Cir. 2017).

641. *Id.* at 1018–19.

642. *Id.* at 1019–20.

643. *Id.* at 1015.

644. *Id.* at 1020.

645. *Id.* at 1020 n.8 (“There is a third question left open by *Carciere*: Are the ‘now under Federal jurisdiction’ and ‘recognized’ requirements even distinct, or do they comprise a single requirement? The Court in *Carciere* did not explicitly hold that the two requirements are distinct but, as Justice Souter noted in his opinion, ‘[n]othing in the majority opinion forecloses the possibility that the two concepts, recognition and jurisdiction, may be given separate content.’”).

and Interior's administration of the statute over the years—the better reading of § 5129 is that recognition can occur at any time.”<sup>646</sup> Accordingly, the court held that a tribe qualifies to have land taken into trust for its benefit under § 5108 if it (1) was “under Federal jurisdiction” as of June 18, 1934, and (2) is “recognized” at the time the decision is made to take land into trust.<sup>647</sup>

The Ninth Circuit went on to adopt Interior's interpretation of the phrase “under federal jurisdiction” which broadly asks “whether the United States had . . . taken an action or series of actions . . . sufficient to establish or that generally reflect[ed] Federal obligations, duties, responsibility for or authority over the tribe by the Federal Government . . .”<sup>648</sup>

The court reasoned that such a flexible interpretation of the phrase is consistent with the Supreme Court's language in *United States v. John*.<sup>649</sup> The Ninth Circuit applied this standard to the Band and determined that there were sufficient dealings with the United States both before and during 1934 to conclude that the Band was under federal jurisdiction for the purposes of the IRA.<sup>650</sup>

Finally, the Ninth Circuit determined that the acquisition of land for the Band by Interior falls within the IGRA's restored land to restored tribes provision.<sup>651</sup> The County argued that because the Band was administratively recognized by Interior outside of the section 83 process the Band did not qualify for the IGRA exception.<sup>652</sup> The Ninth Circuit disagreed, holding instead that Congress' intent was to permit a qualifying tribe to be “restored” at any time.<sup>653</sup> The Ninth Circuit thus affirmed the decision of the district court granting summary judgment to the Band and the United States and permitting the land to be taken into trust for the purpose of gaming.<sup>654</sup>

---

646. *Id.* at 1024.

647. *Id.*

648. *Id.* at 1026.

649. *Id.* at 1027 (“[T]he fact that federal supervision over [a tribe] has not been continuous’ does not ‘destroy[] the federal power to deal with’ that tribe.”).

650. *Id.* at 1027–28. (“A 1941 letter from an Interior official in California to the Commissioner of Indian Affairs states that efforts to purchase land for the Ione Band resumed in 1935, but that the efforts once again failed, this time because of ‘mineral rights and values.’ Given that efforts were made by the federal government on the Band's behalf a few years before and just one year after 1934, it was reasonable for Interior to conclude that the Band's ‘jurisdictional status remained intact in 1934.’”).

651. *Id.* at 1028–31.

652. *Id.* at 1030.

653. *Id.* at 1030–31 (“Because Congress did not clearly intend for the ‘restored lands’ exception to be unavailable to those tribes administratively re-recognized outside the Part 83 process, grandfathering in those tribes would not frustrate congressional intent. Accordingly . . . Interior's decision to grandfather in the Ione Band under 25 C.F.R. § 292.26(b) was permissible.”).

654. *Id.* at 1031.

District courts also grappled with challenges to a decision to take land into trust. Two notable decisions were decided in 2017 in which one tribe challenged the Secretary's decision to take land into trust for another tribe. In *Cachil Dehe Band of Wintun Indians v. United States Department of Interior*, the Colusa tribe asked the Court to reconsider the denial of its summary judgement motion contesting the decision by the Secretary to take land into trust for the benefit of the Estom Yumeka Maidu Tribe of the Enterprise Rancheria.<sup>655</sup> The Court denied the request to reconsider, holding that it could not say as a matter of law that the decision by the Secretary to take land into trust was arbitrary *and* capricious, and that under IGRA the Secretary was not required to consider the adverse effects of the decision on the Colusa Band because it was located more than 25-miles away from the subject of the land into trust decision.<sup>656</sup>

In *Cherokee Nation v. Jewell*, the Cherokee Nation challenged the 2011 decision of the Department of the Interior to take a seventy-six acre parcel of land into trust for the United Keetoowah Band of Cherokee that was located on the reservation of the Cherokee Nation.<sup>657</sup> The Cherokee Nation argued that the decision was arbitrary and capricious, would violate treaties with the Cherokee, and would require the Cherokee's consent.<sup>658</sup> The Eastern District of Oklahoma agreed and sent the decision back to the BIA Region for consideration.<sup>659</sup> The court relied on 25 C.F.R. § 151.8<sup>660</sup> to conclude that the Cherokee Nation must consent to the transfer because the land, although belonging to a member of another tribe, was located within the outer boundaries of its reservation and that the decision to take the land into trust violated the 1866 Treaty with the Cherokee.<sup>661</sup>

---

655. *Cachil Dehe Band of Wintun Indians v. U.S. Dept of Interior*, 2017 U.S. Dist. LEXIS 9107 (E.D. Cal. Jan. 23, 2017).

656. *Id.* at \*15–17.

657. *Cherokee Nation v. Jewell*, No. CIV-14-428-RAW, 2017 U.S. Dist. LEXIS 82896 (E.D. Okla. May 31, 2017).

658. *Id.* at \*2.

659. *Id.* at \*26.

660. *Id.* at \*20–21 (“[T]hat an individual Indian or tribe ‘may acquire land in trust status on a reservation other than its own only when the governing body of the tribe having jurisdiction over such reservation *consents in writing* to the acquisition.’”).

661. *Id.* at \*22–23 (“The court agrees with the Cherokee Nation’s arguments that taking land into trust within the Cherokee Nation’s former reservation without its consent violates its treaties, is contrary to precedent, and ignores the jurisdictional conflicts. The 1866 Treaty with the Cherokee Nation provides: ‘The United States guarantee to the people of the Cherokee Nation the quiet and peaceable possession of their country and protection against domestic feuds and insurrections, and against hostilities of other tribes.’ The members of the UKB are also Cherokee; thus, this could be considered a ‘domestic feud or insurrection.’ The UKB is also an independent tribe; thus, this could be considered ‘hostility of another tribe,’ as the UKB has announced its intention to assert exclusive jurisdiction over the Subject Tract. In either event, the 1866 Treaty guaranteed the Cherokee Nation protection against it.”) (internal citations omitted).

*N. Payday Lending*

The payday lending cases all derive from questions of tribal sovereignty. Tribes are generally not subject to state law, and tribes have used this exception to expand their economic development in a number of different sectors. Some tribes have opted to operate or help facilitate payday lending because tribal entities are otherwise exempt from state usury laws.<sup>662</sup> While there were no groundbreaking cases involving payday lending in 2017, this section will highlight a couple circuit court cases and will briefly summarize some of the more notable cases from other courts.

In *Dillon v. BMO Harris Bank, N.A.*, the plaintiff, an individual from North Carolina, entered into a loan agreement with Great Plains, a lender wholly owned by the Otoe-Missouria Tribe of Indians.<sup>663</sup> North Carolina law prohibits loans with an interest rate over 16% as usurious, but plaintiff's loan had an effective interest rate of 440.18%.<sup>664</sup> The plaintiff electronically signed the loan agreement which included a clause that the loan was subject only to the laws and jurisdiction of the Otoe-Missouria Tribe and "no other state or federal law or regulation shall apply to this Agreement, its enforcement, or its interpretation."<sup>665</sup> The Fourth Circuit found this case indistinguishable from a 2016 case holding identical language was unenforceable as a matter of law.<sup>666</sup> In addition to finding the choice of law provision unenforceable because it attempted to waive rights granted by federal statutes, the Fourth Circuit also held that the contract violated public policy.<sup>667</sup>

In *Finn v. Great Plains Lending LLC*, the plaintiff took out a payday loan from the same defendant.<sup>668</sup> After the defendant made repeated automated calls to the plaintiff's phone in an attempt to collect, the

---

662. Victor D. Lopez, *When Lenders can Legally Provide Loans with Effective Annual Interest Rates Above 1,000 Percent, Is it Time for Congress to Consider a Federal Interest Cap on Consumer Loans?*, 42 J. LEGIS. 36, 58 (2016) ("In recent years, lenders aligned with Indian tribes across the country have successfully used tribal immunity in many states to defeat usury laws. Despite criticism from consumer advocates and industry groups, as well as the mostly unsuccessful efforts of state attorneys general to enforce regulations, tribal-affiliated lenders operate with relative impunity.").

663. *Dillon v. BMO Harris Bank, N.A.*, 856 F.3d 330 (4th Cir. 2017).

664. *Id.* at 331.

665. *Id.*

666. *Id.* at 335 ("[W]e interpret these terms in the arbitration agreement as an unambiguous attempt to apply tribal law to the exclusion of federal and state law. . . . [W]e conclude that the arbitration agreement functions as a prospective waiver of federal statutory rights and, therefore, is unenforceable as a matter of law.").

667. *Id.* at 336 ("[W]hen a party uses its superior bargaining power to extract a promise that offends public policy, courts generally opt not to redraft an agreement to enforce another promise in that contract. . . . Accordingly, we hold that the entire arbitration agreement is unenforceable.").

668. *Finn v. Great Plains Lending LLC*, 689 Fed. Appx. 608 (10th Cir. 2017).

plaintiff sued under the Telephone Consumer Protection Act.<sup>669</sup> The defendant claimed that it was a corporation run by the Otoe–Missouria Tribe of Indians and therefore asked the court to dismiss on the basis of sovereign immunity.<sup>670</sup> The plaintiff argued the defendant was actually run for the benefit of a non-tribal entity and asked for limited discovery on the question of tribal immunity.<sup>671</sup> The district court denied the plaintiff’s request and dismissed on the basis of sovereign immunity.<sup>672</sup> The Tenth Circuit reversed.<sup>673</sup> It reasoned that the plaintiff’s allegations were specific and plausible and that the court needed more information before determining that the defendant was entitled to assert its immunity defense.<sup>674</sup> The Tenth Circuit remanded the case with instructions to permit limited discovery.<sup>675</sup>

State and federal district courts also decided payday pending cases in 2017. A federal court upheld indictments against a non-Indian who had allegedly engaged the tribe’s immunity through a series of ‘sham business relationships’ to operate a payday lending network.<sup>676</sup> The court rejected the defendant’s attempt to hide behind the tribe holding, “a tribe has no legitimate interest in selling an opportunity to evade state law.”<sup>677</sup> In the same lawsuit, the court ordered the production of attorney documents related to the defendant’s businesses, the plaintiff having successfully argued that the crime-fraud exception justified their production.<sup>678</sup>

In another federal case, the District Court of New Jersey refused to recognize tribal jurisdiction over non-member Indians subject to a payday loan agreement despite the presence of a choice of law clause specifying tribal law.<sup>679</sup> The court reasoned that the choice of law clause violated the

---

669. *Id.* at 609.

670. *Id.* at 609–10.

671. *Id.*

672. *Id.* at 610.

673. *Id.* at 611.

674. *Id.* (“[D]iscovery should be ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination,” and a discovery order should be ‘narrowly tailored . . . to the precise jurisdictional fact question presented.’”).

675. *Id.* at 611–12.

676. *United States v. Tucker*, 16-cr-91 (PKC), 2017 U.S. Dist. LEXIS 134265 (S.D.N.Y. Mar. 1, 2017).

677. *Id.* at \*9.

678. *United States v. Tucker*, 254 F. Supp. 3d 620 (S.D.N.Y. June 6, 2017).

679. *Macdonald v. CashCall Inc.*, No. 16-2781, 2017 U.S. Dist. LEXIS 64761 (D.N.J. Apr. 28, 2017) (The loan agreement purported to apply only the law of the Cheyenne River Sioux Tribe and specifically disclaimed the applicability of any state or federal law. The initial \$5,000 loan carried a 116.73% interest rate. Taken out in December 2012, by April 2016 “Defendants had collected a total of \$15,493.00 from Plaintiff on his \$5,000 loan. This included \$38.50 in principal, \$15,256.65 in interest, and \$197.85 in fees. At the time of the filing of the Complaint, Plaintiff still owed more than \$7,833.91.” *Id.* at \*2–3. (internal citations omitted)).

state's public policy and was therefore unenforceable.<sup>680</sup> California state appellate courts remanded several cases to the lower courts after the California Supreme Court clarified that it is the burden of the tribal entity alleging sovereign immunity to prove that it qualifies as an 'arm of the tribe,' making it harder for payday lenders in that state from raising the sovereign immunity defense when sued by unhappy borrowers.<sup>681</sup>

### O. Recognition of Indian Tribal Status

The United States maintains a formal recognition process for Indian tribes.<sup>682</sup> Only tribes that have been federally recognized are eligible for most federal benefits and programs designed for Indian tribes and Indian persons.<sup>683</sup> There are currently 573 federally recognized tribes,<sup>684</sup> a complete list of which is required by the Federally Recognized Tribes List Act (List Act) to be published annually in the Federal Register.<sup>685</sup> Some tribes have not been federally recognized but are recognized by the state in which their traditional lands are located.<sup>686</sup> These tribes are given whatever rights their states afford them and may qualify for a small number of federal programs by virtue of their state recognition.<sup>687</sup> In 2017 there were a handful of cases deciding issues related to the recognition of various Indian tribes.

---

680. *Id.* at \*18–28.

681. *See* Baille v. Processing Sols. LLC, A144105, 2017 Cal. App. Unpub. LEXIS 6771 at \*21 (Cal. Ct. App. Sept. 28, 2017); Baille v. Tucker, A142101, 2017 Cal. App. Unpub. LEXIS 6757 at \*10–11 (Cal. Ct. App. Sept. 28, 2017); Rosas v. AMG Servs., A139147, 2017 Cal. App. Unpub. LEXIS 6756 at \*6–7 (Cal. Ct. App. Sept. 28, 2017).

682. 25 C.F.R. § 83 (2018).

683. *See* Mark D. Myers, *The State of Native America and its Unfolding Self-Governance: Federal Recognition of Indian Tribes in the United States*, 12 STAN. L. & POL'Y REV. 271, 271–72 (2001).

684. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 83 Fed. Reg. 20, Pg. 4235 (Jan. 30, 2018), <https://www.gpo.gov/fdsys/pkg/FR-2018-01-30/pdf/2018-01907.pdf> [<https://perma.cc/AXZ6-XV7F>]. (The Federal Registrar recognized 567 federally recognized tribes, but on January 29, 2018 the President signed H.R. 984, the Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2017 which added six new federally recognized tribes bringing the total to 573. *See* Press Release, The White House, President Donald J. Trump Signs H.R. 984 and H.R. 4641 into Law, (Jan. 29, 2018) <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-signs-h-r-984-h-r-4641-law/> [<https://perma.cc/T2AG-LD33>].

685. Federally Recognized Indian Tribes List Act of 1994, Pub. L. 103–454, 108 Stat. 4791 (1994).

686. For a discussion of state recognition see Alexa Koenig & Jonathan Stein, *Federalism and the State Recognition of Native American Tribes: A Survey of State-Recognized Tribes and State Recognition Processes Across the United States*, 48 SANTA CLARA L. REV. 79 (2008) (The survey finds that as of 2008 there were 62 tribes that were recognized by states but not by the federal government spread across 16 states. *Id.* at 84.).

687. *See id.*

## 1. Federal Recognition

In *Wyandot Nation v. United States*, the Wyandot Nation of Kansas claimed to be a federally recognized tribe as the successor in interest to the Historic Wyandot Nation.<sup>688</sup> The Wyandot Nation of Kansas brought two claims against the United States for breach of trust related to two treaties signed with the Historic Wyandot Nation.<sup>689</sup> The first claim was for monetary damages, and the second claim was for recognition that the Wyandot Nation of Kansas has an ownership interest in the Huron Cemetery, a Wyandot burial ground.<sup>690</sup> The Court of Federal Claims dismissed the claims for lack of standing and jurisdiction, and the Wyandot Nation appealed.<sup>691</sup>

On appeal, the Federal Circuit held that the List Act “exclusively governs federal recognition of Indian tribes”<sup>692</sup> and therefore the Wyandot Nation of Kansas is not a federally recognized tribe and cannot to seek an accounting of trust monies.<sup>693</sup> Since the tribe had previously petitioned Interior for recognition and was denied, the Federal Circuit held it was appropriate to dismiss the petitioner’s claim.<sup>694</sup> For the same reason the Wyandot Nation of Kansas has no claim to the cemetery lands.<sup>695</sup>

In *Allen v. United States*, plaintiffs were a group of eighteen persons who lived on or near the Pinoleville Rancheria, most of whom were previously members of the federally recognized Pinoleville Pomo Nation.<sup>696</sup> Plaintiffs gave up their tribal membership and petitioned the BIA to recognize them as a new tribe and permit them to organize under the IRA.<sup>697</sup> The BIA denied the request and plaintiffs filed suit under the Administrative Procedure Act, arguing the decision to deny their recognition was arbitrary and capricious, and was not supported by substantial evidence.<sup>698</sup>

---

688. *Wyandot Nation v. United States*, 858 F.3d 1392 (Fed. Cir. 2017).

689. *Id.* at 1394.

690. *Id.* at 1396.

691. *Id.* at 1394.

692. *Id.* at 1398.

693. *Id.* at 1402–04 (“We hold that tribal recognition is within the primary jurisdiction of Interior and that we thus cannot independently make a determination of the effects of the various treaties or resolve the various conflicting legal and factual contentions about whether, apart from the Interior determination, Wyandot Nation is a federally recognized Indian tribe.”).

694. *Id.* at 1403 (“For the reasons discussed above, we conclude that the threshold issue of whether the appellant is in fact a federally recognized successor tribe to the Historic Wyandot Nation is within the primary jurisdiction of Interior, and that the Claims Court properly dismissed without prejudice.”).

695. *Id.*

696. *Allen v. United States*, No. C 16-04403 WHA, 2017 U.S. Dist. LEXIS 194497, \*2–4 (N.D. Cal. Nov. 27, 2017).

697. See *id.* at \*6.

698. *Id.* at \*6–7.

The federal district court granted the defendant's motion for summary judgment.<sup>699</sup> The court reasoned that the Regional Director concluded that the plaintiffs were a subset of an existing federally recognized tribe,<sup>700</sup> which was further supported by the record.<sup>701</sup> The court held that neither the IRA nor federal regulations permit recognition of a subset of an existing tribe.<sup>702</sup> Finally the court rejected the plaintiffs contention that the Regional Director's decision to deny recognition on the basis that they are a subset of an existing tribe announced a new 'one-tribe-only' rule—or essentially that each reservation must consist of a single tribe.<sup>703</sup>

Other cases decided in 2017 relating to recognition include (1) a determination that a tribe seeking federal recognition in federal court must first exhaust its administrative remedies,<sup>704</sup> (2) a clarification that Congress is the body to whom a band of Indians claiming to be recognized by a prior treaty should direct their appeal,<sup>705</sup> (3) a decision that challenges to a tribe's recognition need to be brought in the federal district where the tribe claims to be located,<sup>706</sup> (4) a refusal to block a tribal election because a group of tribal members believe they should be separately recognized as a tribe,<sup>707</sup> (5) an affirmation of an agency decision that the California Valley Miwok tribe contains more than five recognized members,<sup>708</sup> (6) a decision that a non-federally recognized tribe is ineligible for Indian

---

699. *Id.* at \*22.

700. *Id.* at \*14 (The Regional Director "found that plaintiffs fell outside of the definition of tribe set forth in the IRA by dint of being 'only a subset of the Indians for whom the Pinoleville Rancheria was set aside.' This finding was based upon a rational interpretation of the relevant statutes as applied to the record, and was not arbitrary, capricious, or an abuse of discretion.") (internal citations omitted).

701. *Id.* at \*17–9 ("Indeed, plaintiffs are descendants of several of the Indians for whom the rancheria was established in 1911 (a fact each of them notes in their declarations submitted to the BIA), which is ultimately what gave them the right to settle on the reservation. This, of course, supports the Regional Director's conclusion that plaintiffs are only a subset of the descendants of the Indians for whom the reservation was set aside.") (internal citations omitted).

702. *Id.* at \*11–15.

703. *Id.* at \*20–21 ("Plaintiffs point to the Wind River Reservation, where two recognized tribes reside, as proof that the one-tribe-per-reservation rule is contrary to the IRA. Those tribes, however, both fall within the IRA's first definition of tribe, which includes historically recognized tribes. The Regional Director's decision in no way defies such an arrangement and does not rest on a newly created one-tribe-per-reservation rule, as plaintiffs contend.") (internal citations omitted).

704. *See* *Mdewakanton Sioux Indians v. Zinke*, 264 F. Supp. 3d 116 (D.D.C. Sept. 1, 2017).

705. *Bruette v. Sec'y of Interior*, No. 17-C-286, 2017 U.S. Dist. LEXIS 152917, \*19–20 (E.D. Wisc. Sept. 20, 2017).

706. *See* *Tsi Akim Maidu of Taylorsville Rancheria v. U.S. Dep't of Interior*, No. 16-cv-07189-LB, 2017 U.S. Dist. LEXIS 80732 (N.D. Cal. May 25, 2017).

707. *See* *Mdewakanton Sioux Indians v. Zinke*, 255 F. Supp. 3d 48 (D.D.C. June 9, 2017).

708. *See* *Cal. Valley Miwok Tribe v. Zinke*, NO. 2:16-01345 WBS CKD, 2017 U.S. Dist. LEXIS 84282, at \*11-16 (E.D. Cal. May 31, 2017).

gaming under the IGRA,<sup>709</sup> and (7) a resolution of a tribal leadership dispute which clarified that the appropriate person to claim funds a tribe was entitled to as proceeds from a class action suit was the factional leader recognized by Interior.<sup>710</sup>

## 2. State Recognition

2017 also saw several challenges by state recognized tribes. In *Nanticoke Lenne-Lenape Tribal Nation v. Hoffman*, the Tribe brought an action against the State alleging a violation of its rights under the New Jersey Constitution and common law when the State denied and repudiated the State's prior recognition of the Tribe as an American Indian tribe.<sup>711</sup> The New Jersey Superior Court reversed the trial court's dismissal of the claim, holding that the Tribe had alleged a sufficient injury to overcome a motion to dismiss.<sup>712</sup>

Like some of the cases involving federal recognition, there are also disputes among factions of state recognized tribes, each faction seeking legitimacy for its claim to speak for the tribe. In *Schaghticoke Tribal Nation v. State*, the plaintiff, Schaghticoke Tribal Nation, brought suit against the State of Connecticut for breaching various duties conferred by statute, constitution, and common law.<sup>713</sup> Connecticut defended itself by arguing that the Schaghticoke Tribal Nation did not have the ability to appear in court as a representative of the Schaghticoke tribe the State had recognized.<sup>714</sup> The State pointed out there is a second faction, the Schaghticoke Indian Tribe, and that the Tribal Nation alone cannot assert claims on behalf of the state recognized tribe.<sup>715</sup> The court disagreed, holding that the Tribal Nation has associational standing to sue, however

---

709. *Frank's Landing Indian Cmty. v. Nat'l Indian Gaming Comm'n*, 242 F. Supp. 3d 1156 (W.D. Wash. 2017).

710. See *Ramah Navajo Chapter v. Jewell*, No. 90 CV 957 JAP/KBM, 2017 U.S. Dist. LEXIS 108514 (D.N.M. July 11, 2017).

711. *Nanticoke Lenne-Lenape Tribal Nation v. Hoffman*, 2017 N.J. Super. Unpub. LEXIS 1691 (N.J. Super. Ct. July 10, 2017).

712. See *id.* at \*10 (The benefits of state recognition include "plaintiff has suffered and will continue to suffer the loss of: the ability to market and sell products as 'Indian-made' under the Indian Arts and Crafts Act, 25 U.S.C.A. §§ 305 to 310; grants from the U.S. Department of Health and Human Services Administration (HHS) for Native Americans; the ability to do business as a certified tribal company; educational opportunities and funding; loss of funding from HHS's block grant program; membership and standing in professional organizations, including the National Congress of American Indians; approval for lines of credit; and eligibility for government contracts.").

713. *Schaghticoke Tribal Nation v. State*, X07HHDCV166072009S, 2017 Conn. Super. LEXIS 4452 (Sup. Ct. Conn. Sept. 19, 2017).

714. *Id.* at \*1.

715. *Id.* at \*1-2.

the court was careful to limit the effect of its decision to the unique parties and facts before it.<sup>716</sup>

### P. Religion

Every year, courts decide a handful of cases related to the religious rights of American Indians. Many of these cases are appeals from prisoners. With so many different American Indian religious traditions, it can be hard for prisons to accommodate the variety of requests for religious accommodation. This section includes a short discussion of four cases in which incarcerated Indians prevailed in some way on a freedom of religion claim. The section proceeds to review several cases where the government has been accused of infringing on American Indian religious traditions.

#### 1. Prisoners

The courts decided a number of cases where American Indian prisoners alleged violations of the Religious Land Use and Institutionalized Persons Act (RLUIPA).<sup>717</sup> In *Hidalgo v. Pennsylvania Department of Corrections*, petitioner, a Mohawk Indian, complained that the only American Indian religious service offered at the prison was led by a Lakota and that the Mohawk do not smudge or engage in other traditions led by the Lakota leader.<sup>718</sup> After petitioner complained, he was denied the right to participate in any Native American religious services.<sup>719</sup> The district court denied the defendant's motion to dismiss and permitted the case to proceed.<sup>720</sup>

---

716. *Id.* at \*7–8 (“[T]he Schaghticoke Tribal Nation is a group composed of Schaghticoke Indians who could have brought this lawsuit on their own but chose to do it as a group. Nothing here prevents the state from saying the other group purporting to represent the Schaghticoke tribe (which in fact has moved to intervene) or even the tribe members themselves are necessary parties to fairly resolving this litigation. Nothing here sheds any light whatsoever on the many other weighty questions of the case, including whether the state ever wronged the Schaghticoke and whether it is too late to do anything about any wrongs the state might have committed. It also doesn't decide the state's claim that it may not be sued without its permission and hasn't given it—its claim of sovereign immunity.”).

717. Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et. seq.*, 114 Stat. 803 (Sept. 20, 2000).

718. *Hidalgo v. Pa. Dep't of Corr.*, 3:14-CV-03012-RAL, 2017 U.S. Dist. LEXIS 3243, \*3–4 (W.D. Pa. Jan. 10, 2017) (“Native American religious practices dictate that when many nations come together, ‘it is up to the individual to decide whether . . . he or she chooses to smudge with the herbs being used.’ For smudging, ‘the herbs used are different for all [n]ations.’ The Native Americans at [the prison] are ‘told to follow a Lakota teaching’ even though members of many other tribes are there.”) (internal citations omitted).

719. *Id.* at \*5 (“The result of these events is that Hidalgo was ‘banned from participating in Native American [s]ervices and removed from the [p]rison [c]all out sheet.’”).

720. *Id.* at \*12–3 (The Court clarified that the Plaintiff's claims which would proceed to discovery include (1) the right to freely exercise his religion under the First Amendment, (2) the prohibition of the religious practice violates the Religious Land Use and Institutionalized Persons Act

The court also allowed the petitioner's claim to proceed under RLUIPA in *Dorsey v. Shearin*.<sup>721</sup> The petitioner had made multiple requests for Native American religious services, but the warden denied the requests because the services included the use of ceremonial tobacco.<sup>722</sup> The court denied the defendant's motion to dismiss and ordered briefing on the merits within thirty days<sup>723</sup> stating, "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution."<sup>724</sup>

In *White v. Davis*, the petitioner sued the prison director and the warden because he was in ill health and under the mandate of his tribal religious practice he needed to die with long hair; however the prison denied his request, telling him to grow a beard instead.<sup>725</sup> The plaintiff argued that the prison's grooming policy, which prevented men from having long hair, was not the least restrictive means to achieve its compelling government interest and therefore violated his constitutional rights.<sup>726</sup> The court recognized that 38 states and the federal prison system have an accommodation for hair length, and that the Supreme Court had recently disfavored a ban on beard length.<sup>727</sup> In *Holt v. Hobbs*, the Supreme Court held that a prison ban on hair length was not the least restrictive means because less restrictive means were available to protect the compelling government interest in prison safety.<sup>728</sup> In *White v. Davis*, the magistrate judge concluded that a genuine issue of material fact existed regarding whether the ban on hair length was the least restrictive means to accomplish prison safety and so recommended that the summary judgment

---

(RLUIPA) wherein the failure to provide religious accommodation substantially burdens his First Amendment rights, and (3) that corrections officers illegal retaliated against him for asserting his First Amendment rights.).

721. *Dorsey v. Shearin*, No. GLR-15-3645, 2017 U.S. Dist. LEXIS 38483 (D. Md. Mar. 17, 2017).

722. *Id.* at \*1.

723. *Id.* at \*14.

724. *Id.* at \*9 (citation omitted).

725. *White v. Davis*, A-16-CA-059-LY, 2017 U.S. Dist. LEXIS 120453 \*2-3 (W.D. Tex. August 1, 2017) ("Plaintiff maintains it is his deeply held religious belief that he must have long hair upon his death in order to be recognized and taken into eternity by his ancestors, none of whom grew beards. Plaintiff asserts, prior to entering prison, he had never cut his hair.").

726. *Id.* at \*10-11 (On the RLUIPA claim the court focused on the least restrictive means analysis "Defendants do not dispute that Plaintiff sincerely believes growing long hair is mandated by his faith and do not argue whether TDCJ's grooming policy substantially burdens his ability to grow long hair. Therefore, the Court focuses on whether TDCJ's short-hair grooming policy is the least restrictive means to advance its compelling interests in maintaining security and safety and controlling costs in light of the security risk presented by Plaintiff.").

727. *Id.* at \*15.

728. *Holt v. Hobbs*, 135 S. Ct. 853, 864 (2015) ("[I]ts contraband argument would still fail because the Department cannot show that forbidding very short beards is the least restrictive means of preventing the concealment of contraband.").

motions filed by both parties be denied and that the case timely proceed to trial.<sup>729</sup>

In *Schlemm v. Litscher*, the plaintiff, an American Indian prison inmate, had previously won a verdict that the Wisconsin Department of Corrections had violated the plaintiff's RLUIPA rights by failing to accommodate his religious request for a multi-colored headband, game meat, and fry bread at the annual Ghost Feast.<sup>730</sup> Here, the same plaintiff requested some modifications to that order including that he be permitted to acquire 'fresh' food brought in by a volunteer, local tribes, or a caterer, and that the court find the defendants in contempt for their refusal to comply with previous court orders.<sup>731</sup> The court denied all of the plaintiff's requests.<sup>732</sup> It concluded that there was no evidence that dried game meat, if prepared without nitrates or chemicals, would place a substantial burden on the plaintiff's religious practice nor was there evidence in the record that professional preparation of food was required.<sup>733</sup>

## 2. Other Religion Cases

In *Morris v. Huebsch*, the plaintiff, a member of the Red Cliff Band of Lake Superior Chippewa, brought suit against Wisconsin police officers for violating his First Amendment rights when they issued him a citation for playing his spiritual Chippewa drum in violation of a rule against playing any instrument in the capitol building without a permit.<sup>734</sup> The citation was later dismissed.<sup>735</sup> The court recognized that "[t]o the Chippewa people, drumming is a sacred form of musical expression that communicates feelings and spiritual energy, which cannot be expressed with the voice alone."<sup>736</sup>

The question left for the court was whether the officer had official immunity when he violated the First Amendment rights of the plaintiff.<sup>737</sup> The court determined that the rule against musical instruments in the

---

729. *White*, 2017 U.S. Dist. LEXIS at \*19.

730. *Schlemm v. Litscher*, 11-cv-272-wmc, 2017 U.S. Dist. LEXIS 156975, at \*1 (W.D. Wisc. Sept. 26, 2017).

731. *Id.* at \*1-2.

732. *Id.* at \*2.

733. *Id.* at \*9-10 ("Plaintiff provided no further testimony during the trial on his own belief that certain preparations of food are required for a meaningful Ghost Feast or that preserved foods would be inadequate. Nor did he explain the basis for these beliefs.").

734. *Morris v. Huebsch*, 12-cv-319-wmc, 2017 U.S. Dist. LEXIS 30770, \*1-2 (W.D. Wisc. Mar. 3, 2017).

735. *Id.* at \*8.

736. *Id.* at \*4-5.

737. *Id.* at \*1.

capitol was content-neutral and thus applied intermediate scrutiny.<sup>738</sup> The court concluded that the government has a substantial interest in protecting its citizens from unwanted noise.<sup>739</sup> It further concluded that a ban on instruments without a permit was narrowly tailored enough because instruments can be much louder than voices and a permit permits officers to plan for loud noises which might otherwise limit their ability to be heard in an emergency.<sup>740</sup> Finally it held there were other alternatives, the use of the voice, application for a permit, or playing the drum outside.<sup>741</sup>

In *Wingra Red-Mex Inc. v. Burial Sites Preservation Board*, the court concluded that the plaintiff had not presented evidence to overcome the Burial Sites Preservation Board's conclusion that "in the absence of contravening evidence, prehistoric Indian mounds—including effigy mounds [as in this case]—are properly considered to be human burial sites."<sup>742</sup> The circuit court later granted a motion to reconsider and reversed itself, removing protections for the Ward Mound.<sup>743</sup> The appellate court reversed the circuit court and ordered that the Ward Mound remain protected.<sup>744</sup> Of particular interest in the opinion was the religious significance of the Ward Mound to the Ho-Chunk people.<sup>745</sup> The court relied upon this testimony to conclude that the original agency review that

---

738. *Id.* at \*15 ("[T]o survive intermediate scrutiny, a regulation must be 'narrowly tailored to serve a significant governmental interest' . . . and they must 'leave open ample alternative channels for communication of the information.'").

739. *Id.* ("[T]here is no real dispute that the government has 'a substantial interest in protecting its citizens from unwelcome noise . . . .'").

740. *Id.* at \*16–17 ("The rule requiring a permit to play an instrument does not clearly violate these principles. As a general matter, musical instruments can reach volumes far exceeding the limits of the human voice; in fact, drumming in the Capital has, in the past, proven to be so loud that officers were concerned they would not be heard if they needed to order an evacuation. By requiring a permit for instruments, and banning them otherwise, the Capitol police ensure that they are aware of, and can plan for, the use of instruments." (internal citations omitted)).

741. *Id.* at \*18.

742. *Wingra Redi-Mex Inc. v. Burial Sites Pres. Bd.*, No. 2014AP2498, 2017 Wisc. App. LEXIS 563, at \*9–10 (Wisc. Ct. App. July 31, 2017).

743. *Wingra Redi-Mix Inc. v. State Historical Soc'y*, Nos. 2015AP1632, 2015AP1844, 2017 Wisc. App. LEXIS 564, at \*1 (Wisc. Ct. App. July 31, 2017).

744. *Id.* at \*2.

745. *See id.* at \*10–11 ("Both witnesses testified about Ho-Chunk religious and spiritual beliefs concerning burial of the dead and that, according to Clan Leader Funmaker, the Ho-Chunk believe that one of the purposes of effigy mounds is to provide spiritual 'protection' to the dead interred within them. Clan Leader Funmaker testified that Ho-Chunk people believe that when the remains of a dead person are disturbed, 'the spirit . . . goes wandering and it gets lost. They're never at rest, they're never at peace.' Based on this belief, disturbing the dead after they have been buried is spiritually forbidden. Clan Leader Funmaker testified that, for the above reasons, the Ho-Chunk people consider the proposed disturbance of the Ward Mounds by Wingra Stone a desecration of those burial sites.").

denied Plaintiff's request to remove the Ward Mound from the catalog of protected sites was based on substantial evidence.<sup>746</sup>

### *Q. Sovereign Immunity*

Tribal sovereignty is at the core of Indian law.<sup>747</sup> It is also the basis of more than fifty opinions decided by federal and state courts in 2017.<sup>748</sup> There was a wide range of topics covered in relation to tribal sovereign immunity this year, including: whether federal statutes of general applicability apply to tribes,<sup>749</sup> whether tribes are obligated to pay

---

746. *Id.* at \*12 (“We are satisfied that DHA’s decision is based on substantial evidence. There was testimony that the Ho-Chunk people consider as sacred all of the effigy mounds throughout the Four Lakes region, which include the Ward Mounds, and believe that desecration of burial sites in general, and the Ward Mounds specifically, is spiritually forbidden for the reason that the remains of Native American people who have died will wander, get lost, and not rest in peace if the burial sites are disturbed.”).

747. Wenona Singel, *Labor and Employment Laws in Indian Country: The Institutional Economics of Tribal Labor Relations*, 2008 MICH. ST. L. REV. 487, 489 (2008) (“[M]uch of Indian law scholarship focuses on arguments based on the core attributes of tribal sovereignty”).

748. *See, e.g.*, *Comenout v. Whitener*, No. 15-35261, No. 15-35268, 2017 U.S. App. LEXIS 10640 (9th Cir. June 9, 2017); *Consumer Fin. Prot. Bureau v. Great Plains Lending LLC*, 846 F.3d 1049 (9th Cir. 2017); *Montella v. Chugachmiut*, 3:16-CV-00251 JWS, 2017 U.S. Dist. LEXIS 156013 (D. Alaska, Sept. 25, 2017); *Dine Citizens Against Ruining Our Environment v. U.S. Dep’t of Interior*, No. CV-16-08077-PCT-SPL, 2017 U.S. Dist. LEXIS 147432 (D. Ariz. Sept. 11, 2017); *Dine Dev. Corp. v. Fletcher*, No. CIV 17-0015 JB/KBM, 2017 U.S. Dist. LEXIS 34590 (D. N.M. March 10, 2017); *Forsythe v. Reno Sparks Indian Colony*, No.: 2:16-cv-01867-GMN-VCF, 2017 U.S. Dist. LEXIS 140453 (D. Nev. Aug. 30, 2017); *Union Pac. R.R. Co. v. Runyon*, No. 3:17-cv-00038-AA, 97 Fed. R. Serv. 3d 445, 2017 U.S. Dist. LEXIS 33006 (D. Ore. March 8, 2017); *Oglala Lakota Coll. v. Hudson Ins. Grp.*, CIV. 16-5093-JLV, 2017 U.S. Dist. LEXIS 152932 (D.S.D. Sept. 20, 2017); *Douglas Indian Ass’n v. Cent. Council of Tlingit*, No. S-16235, No. 7198, 2017 Alas. LEXIS 112 (Alaska, Sept. 8, 2017); *Churchill Fin. Mgmt. Corp. v. ClearNexus Inc.*, 802 S.E.2d 85 (Ga. App. 2017); *Scott v. Dir. of Dep’t of Licensing*, No. 75664-8-I, 2017 Wash. App. LEXIS 1486 (Wash. Ct. App. June 26, 2017).

749. *See* *Consumer Fin. Prot. Bureau v. Great Plains Lending LLC*, 846 F.3d 1049 (9th Cir. 2017). The Ninth Circuit reiterated the proposition that “laws of general applicability govern tribal entities unless Congress has explicitly provided otherwise.” *Id.* at 1053. Because Congress did not write in an exception for Indian tribes, the Court reasoned that the Consumer Finance Protection Act applies to tribal businesses. *Id.* In contrast, *see Pancheco v. Salt River Pima-Maricopa Indian Cmty.*, No. CV-16-01947-PHX-GMS 2017 U.S. Dist. LEXIS 23352, at \*4–5 (D. Ariz. Feb. 15, 2017) (holding the Family Medical Leave Act does not apply to tribes “[w]ithout any explicit reference to ‘court enforcement, suing or being sued, or any other phrase clearly contemplating suits against’ the tribe, the tribe’s adoption of FMLA policies do ‘not amount to an unequivocal waiver’ of sovereign immunity”); *see also Bruguier v. Lac du Flambeau Band*, 237 F. Supp. 3d 867, 870 (W.D. Wis. 2017) (holding that the Tribe is not an ‘employer’ for purposes of Section VII of the Civil Rights Act and therefore may raise sovereign immunity as a defense to claims of discrimination); *Montella v. Chugachmiut*, No. 3:16-CV-00251 JWS, 2017 U.S. Dist. LEXIS 156013 (D. Alaska Sept. 25, 2017) (a second case concluding that a tribe may raise immunity to a Title VII action).

attorney's fees under the Lanham Act,<sup>750</sup> and whether tribal entities other than the tribe itself are eligible to assert immunity.<sup>751</sup>

The rest of this section will focus on four larger subsets of immunity cases. The first deals with cases involving whether the tribe waived immunity, the second discusses whether tribal immunity extends to cases *in rem* and not just *in personam*, the third raises the relatively new issue of tribes licensing their immunity to drug companies, and the final section reviews a development in Alabama where that state's supreme court has questioned the very existence of tribal sovereign immunity.

### 1. Waiver of Immunity

Generally a waiver of immunity cannot be implied but must be clearly and unequivocally expressed. In *Casino Caribbean LLC v. Money Centers of America*, QCA, a tribal casino run by the Quapaw Tribe, filed a claim against the bankruptcy trustee to recover funds it claimed are owed to it separately and not part of the bankruptcy estate.<sup>752</sup> The trustee counterclaimed to recoup money transferred in the last 90 days as allowed under the bankruptcy code.<sup>753</sup> The trustee also brought a claim to recoup funds against Thunderbird, another tribal casino (owned by the Absentee Shawnee of Oklahoma).<sup>754</sup> Both casinos moved to dismiss on the basis of sovereign immunity.<sup>755</sup>

---

750. See *Elem Indian Colony of Pomo Indians v. Ceiba Legal, LLP*, 230 F. Supp. 3d 1146, 1150-52 (N.D. Cal. 2017).

751. See *Diné Citizens Against Ruining Our Environment v. BIA*, No. CV-16-08077-PCT-SPL, 2017 U.S. Dist. LEXIS 147432, at \*11-12 (D. Ariz. Sept. 11, 2017) (Navajo Transitional Energy Company is a necessary party to an action to close a coal plant on the reservation and could not be joined because it enjoys the tribe's sovereign immunity); *Ireson v. Avi Casino Enters.*, No. 2:17-CV-987 JCM (VCF), 2017 U.S. Dist. LEXIS 106651, at \*4 (D. Nev. July 10, 2017) (tribe's casino enterprise was entitled to assert the tribe's immunity); *Churchill Fin. Mgmt. Corp. v. ClearNexus Inc.*, 802 S.E.2d 85, 90 (Ga. Ct. App. 2017) (holding that Churchill is entitled to claim immunity as an arm of the tribe and therefore dismissing the action. "This result may seem unfair, but that is the reality of [tribal] sovereign immunity[.]" *Id.*); *United States ex. rel. Cain v. Salish Kootenai College, Inc.*, 862 F.3d 939, 940 (9th Cir. 2017) (remanding to the district court to determine whether a Tribal College is an 'arm of the tribe' and, therefore, not a person for purposes of the False Claims Act); *Howard v. Plain Green, LLC*, No. 2:17cv302, 2017 U.S. Dist. LEXIS 137229, at \*19 (E.D. Va. Aug. 7, 2017) (corporation owned by the tribe's holding company closely enough related to be considered an 'arm of the tribe' for purposes of raising a sovereign immunity defense).

752. *Casino Caribbean, LLC v. Money Ctrs. of Am. (In re Money Ctr. of Am., Inc.)*, 565 B.R. 87, 92 (D. Del. 2017).

753. *Id.* at 93.

754. *Id.* at 94.

755. *Id.* at 97-98 (holding that the casinos are capable of asserting the tribe's immunity; "Tribal sovereign immunity may extend to subdivisions of a tribe, including those engaged in economic activities, provided that the relationship between the tribe and the entity is sufficiently close to properly permit the entity to share in the tribe's immunity").

The trustee argued that the bankruptcy code abrogated tribal immunity because tribal governments are “governmental units” under 106(a) and 101(27).<sup>756</sup> The federal district court recognized there is a circuit split between the Ninth Circuit ruling that tribes are governmental units<sup>757</sup> and the Eighth Circuit and Eastern District of Michigan ruling that states that tribes are immune under the Bankruptcy Code.<sup>758</sup> The Delaware court was ultimately more persuaded by the Eighth Circuit.<sup>759</sup> It relied upon the prior holdings which noted that Congress need not use ‘magic words’ but needs to clearly express its intent to abrogate immunity before an abrogation of immunity can be presumed.<sup>760</sup> In a similar 2017 case, the Eastern District of California came to the opposite conclusion.<sup>761</sup> Following Ninth Circuit precedent, it held that the tribe could not claim immunity in the bankruptcy proceeding.<sup>762</sup>

In *Miccosukee Tribe of Indians of Florida v. Lewis Tein*, former attorneys for the Miccosukee Tribe filed civil tort claims against the tribe for malicious prosecution related to the tribe’s activity in four previous proceedings which had been resolved in the former attorneys’ favor.<sup>763</sup> The tribe moved to dismiss for lack of subject matter jurisdiction based upon the defense of sovereign immunity.<sup>764</sup> The trial court denied the motion claiming the tribe waived its immunity in a previous action where it had advanced money to members in order to pay lawyers bills and that filing continuous frivolous lawsuits constituted a waiver of immunity with regard to the matter.<sup>765</sup>

The Florida appellate court reversed.<sup>766</sup> It held that absent an express, clear, explicit, and unmistakable waiver of immunity or congressional abrogation of immunity tribes are immune to the civil jurisdiction of

---

756. See *id.* at 101–02 (“This Court concludes that Congress has not unequivocally abrogated the sovereign immunity of Indian tribes under sections 106(a) and 101(27) of the Bankruptcy Code.”). *Id.* at 103.

757. *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1057–58 (9th Cir. 2004).

758. *In re Whitaker*, 474 B.R. 687, 697 (8th Cir. 2012); *In re Greektown Holdings LLC*, 532 B.R. 680, 700–01 (E.D. Mich. 2015).

759. See *Casino Caribbean, LLC*, 565 B.R. at 103 (“The Court finds that, as neither the terms ‘Indians’ nor ‘Indian tribes’ were included in the language of section 101(27) of the Bankruptcy Code, Congress did not unequivocally express an intent to abrogate the sovereign immunity of Indian tribes in section 106(a) of the Bankruptcy Code.”).

760. *Id.*

761. See *Jamestown S’Klallam Tribe v. McFarland*, No. CIV. NO. 2:17-00293-WBS, 2017 U.S. Dist. LEXIS 152372 (E.D. Cal. Sept. 19, 2017).

762. *Id.* at \*6 (“because the Tribe has failed to demonstrate that § 106(a)’s reference to § 544 should be limited to § 544(a), the court finds the bankruptcy court was correct in concluding that the Tribe’s sovereign immunity has been abrogated.”).

763. *Miccosukee Tribe of Indians v. Lewis Tein*, P.L., 227 So. 3d 656 (Fla. Dist. Ct. App. 2017).

764. *Id.* at 660.

765. *Id.* at 668–69.

766. *Id.* at 669.

courts.<sup>767</sup> Tribal immunity survived because no waiver was present in this case.<sup>768</sup> The court reasoned that a waiver of immunity exists only for the particular matter in which immunity was waived.<sup>769</sup> In this instance the tribe waived immunity related to its attorney's release of copies of checks that were loaned by tribal members to pay legal bills related to a wrongful death lawsuit.<sup>770</sup> The tribe's immunity was waived only for the disclosure of checks and no further.<sup>771</sup> Furthermore the appellate court held that even evidence of vexatious and bad faith litigation did not amount to a waiver of immunity;<sup>772</sup> this is true "even where the results are deeply troubling, unjust, unfair, and inequitable."<sup>773</sup> Additionally, the court held that a tribe that waives immunity by participating in one piece of litigation has not waived immunity for a second, related piece of litigation, and "[i]f the unfairness and inequity of a tribal employee negligently killing or battering someone is not enough to waive immunity, it follows that allegations of vexatious and bad faith litigation are also not enough to waive or abrogate it."<sup>774</sup>

Holdings by other courts in 2017 affirm this notion that there is a high—but not insurmountable—bar for a finding that sovereign immunity has been waived or abrogated. For example, courts held that (1) producing documents to the United States waives a tribes ability to claim immunity to prevent it from producing the same documents to opposing parties in litigation,<sup>775</sup> (2) a tribe is not a 'person' under the False Claims Act and so can claim immunity,<sup>776</sup> (3) a choice of forum clause selecting Suffolk County as the place to resolve conflicts in a contract was not an unequivocal waiver of immunity,<sup>777</sup> (4) they will assume tribes and their

---

767. *Id.* at 658 ("Whatever its wisdom, tribal immunity endures, and Indian tribes are not subject to the civil jurisdiction of our courts absent a clear, explicit, and unmistakable waiver of tribal sovereign immunity or a congressional abrogation of that immunity. Because neither exception to tribal immunity has been established in this case, we reverse the trial court's denial of the Miccosukee Tribe's motion to dismiss.").

768. *Id.*

769. *See id.* at 661–64 ("If the Tribe dips its toe in the litigation waters, the reasoning goes, it can be asked about its toe but not the whole body.").

770. *Id.* ("The Tribe was immune from the *Bermudez* lawsuit but waived its immunity to a limited extent to allow Roman's deposition about the disclosure of the sixty-one checks and check stubs.").

771. *Id.* at 664.

772. *Id.* at 666.

773. *Id.* at 667.

774. *Id.*

775. *United States v. Encore Servs. LLC*, No. GF-16-19-GF-BMM-JTJ 2017 U.S. Dist. LEXIS 23973, at \*2–3 (D. Mont. Feb. 21, 2017).

776. *Dahlstrom v. Sauk-Suiattle Indian Tribe*, NO. C16-0052JLR, 2017 U.S. Dist. LEXIS 40654, at \*7 (W.D. Wash. Mar. 21, 2017).

777. *Aron Sec. Inc. v. Unkechaug Indian Nation*, 54 N.Y.S. 3d 668, 671 (Sup. Ct. N.Y. 2017) ("Although this choice of forum clause requires 'any claim or controversy' regarding the contract to

officials are immune from suit, tribal officials need not appear themselves to assert sovereign immunity,<sup>778</sup> (5) even if a contract contains a valid waiver of immunity, if the contract is not valid the tribe may still raise the immunity defense to have the case dismissed,<sup>779</sup> (6) “a tribe does not waive its sovereign immunity from actions that could not otherwise be brought against it merely because those actions were pleaded in a counterclaim to an action filed by the tribe,”<sup>780</sup> (7) merely accepting federal money, without more, does not constitute a waiver of immunity,<sup>781</sup> (8) one tribe may raise sovereign immunity to a claim brought by another tribe,<sup>782</sup> and (9) tribal sovereign immunity applies to individual employees acting in their official capacity.<sup>783</sup>

## 2. *In Rem* Jurisdiction

As noted in Section III, the U.S. Supreme Court has granted certiorari on a Washington State Supreme Court case regarding a tribe’s sovereign immunity defense in an *in rem* proceeding.<sup>784</sup> In a 5–4 opinion, the Washington State Supreme Court held that a tribe’s sovereign immunity defense does not prevent litigation from going forward in an *in rem* proceeding because the state court has control over the property.<sup>785</sup> After *Lundgren* was decided, the Wisconsin state courts came to the contrary conclusion in a case involving the imposition and collection of state taxes on tribally owned timber.<sup>786</sup>

In *Wisconsin Department of Natural Resources v. Timber & Wood Products*, the Wisconsin’s Department of Natural Resources brought suit against Lac Oreilles Band of Lake Superior Chippewa Indians of Wisconsin to recover taxes owed under Wisconsin’s Forest Cropland

---

be resolved in Suffolk County, it does not require that such claim or controversy be resolved by a state court. Rather, under the clause, a party could bring a claim before a mediator, an arbitrator, a tribal court, a state court, or a federal court, as long as the selected forum was located in Suffolk County. Thus, unlike the cases involving arbitration clauses, this clause does not unequivocally express the defendant’s agreement to be sued in a state court.”)

778. Harper v. White Earth Human Res., No. 16-1797 (JRT/LIB), 2017 U.S. Dist. LEXIS 25608, at \*4 (D. Minn. Feb. 22, 2017).

779. Stillaguamish Tribe of Indians v. Washington, NO. 3:16-cv-05566-RJB, 2017 U.S. Dist. LEXIS 126381, at \*21–22 (W.D. Wash. Aug. 9, 2017).

780. Quinault Indian Nation v. Pearson, 868 F.3d 1093, 1097 (9th Cir. 2017).

781. Forsythe v. Reno Sparks Indian Colony, No.: 2:16-cv-01867-GMN-VCF, 2017 U.S. Dist. LEXIS 140453, at \*8–9 (D. Nev. Aug. 30, 2017).

782. Douglas Indian Ass’n v. Cent. Council of Tlingit, No. S-16235, No. 7198, 403 P.3d 1172, 1179 (Alaska Sept. 8, 2017).

783. WD at the Canyon, LLC v. Honga, No. 1 CA-CV 16-0468, 2017 Ariz. App. Unpub. LEXIS 1715 (Ariz. Ct. App. Nov. 14, 2017).

784. Lundgren v. Upper Skagit Indian Tribe, 389 P.3d 569 (Wash. 2017).

785. See *supra* Section III.B.2

786. Wis. Dep’t of Natural Res. v. Timber & Wood Prods., No. 2017AP181, 2017 Wisc. App. LEXIS 1053 (Wisc. Ct. App. Dec. 19, 2017) (recommended for publication in official reporters).

Law.<sup>787</sup> The Department also sued the property itself *in rem*.<sup>788</sup> The lower court granted the tribe's motion to dismiss on the basis of sovereign immunity.<sup>789</sup>

The Wisconsin appellate court affirmed the dismissal of the Department's action.<sup>790</sup> First, the court concluded the tribe did not waive its immunity by agreeing to comply with Wisconsin's Forest Crop law.<sup>791</sup> The court reasoned that the tribe's agreement to comply with state law may have created ambiguity regarding the availability of the sovereign immunity defense but that any waiver of immunity must be clear and unambiguous.<sup>792</sup>

The Wisconsin appellate court also rejected the Department's attempt to proceed to collect the tax through asserting *in rem* jurisdiction over the timber itself. The court began by articulating a difference between a tribe's 'sovereign authority' and its 'sovereign immunity' from suit, and it used the difference to help explain the various cases cited to it by both the tribe and the Department.<sup>793</sup> After articulating that difference the court focused on the defense of sovereign immunity.<sup>794</sup> It concluded that while the state may impose its tax against the tribe, it cannot sue the tribe to collect if the tribe does not pay;<sup>795</sup> "In other words, while the Tribe's property is not synonymous with Tribe for purposes of the imposition of the tax, the property at issue is synonymous with the Tribe for purposes of collection."<sup>796</sup> Accordingly it extended the tribe's sovereign immunity from suit to the wood products and denied the Department's attempt to proceed against them *in rem*.<sup>797</sup>

---

787. *Id.* at \*8.

788. *Id.* at \*1.

789. *Id.* at \*9.

790. *Id.* at \*1.

791. *Id.* at \*11 ("The law is clear, however, that '[t]here is a difference between the right to demand compliance with state laws and the means available to enforce them.' Consistent with that principle, courts throughout the country have repeatedly held that a tribe's mere agreement to comply with a particular law does not amount to an unequivocal waiver of the tribe's sovereign immunity.").

792. *Id.* at \*11–12.

793. *Id.* at \*23 ("Tribal sovereign authority and tribal sovereign immunity are distinct doctrines with different origins and purposes.' A tribe's sovereign authority 'concerns the extent to which a tribe may exercise jurisdictional authority over lands the tribe owns to the exclusion of state jurisdiction.' It is 'inherently distinct from the notion of tribal sovereign immunity—the plenary right to be free from having to answer a suit.'") (internal citations omitted).

794. *Id.* at \*23–24.

795. *Id.*

796. *Id.* at \*24.

797. *Id.* at \*29.

### 3. Drug Patents

In *Allergan Inc. v. Teva Pharmaceuticals USA, Inc.*, Allergan filed a letter with the court notifying it that it had assigned its rights to the pharmaceutical patents contested in the litigation to the Saint Regis Mohawk Tribe and that the tribe had granted Allergan an exclusive license to the patents at issue.<sup>798</sup> Allergan is paying \$13.5 million up front and then \$15 million a year to obtain the exclusive license.<sup>799</sup> Defendants argued that the purpose of the assignment was to utilize the tribe's sovereign immunity to cut off pending challenges to the validity of the patents with the Patent Office.<sup>800</sup> The court recognized the defendant's concerns noting that the tribe has already sought to enter a special appearance in litigation pending before the Patent and Trademark Office.<sup>801</sup> The issue in this opinion was whether the tribe should be added as a plaintiff under rule 25(c) of the Federal Rules of Civil Procedure, which relates to transfer of interest.<sup>802</sup>

The court strongly rebuked the attempted legal strategy.<sup>803</sup> The court even suggested that it might refuse to enforce the agreement between Allergan and the tribe on the basis of public policy.<sup>804</sup>

---

798. *Allergan Inc. v. Teva Pharms. USA Inc.*, No. 2:15-cv-1455-WCB, 2017 U.S. Dist. LEXIS 170825, at \*6 (E.D. Tex. Oct. 16, 2017).

799. *Id.*

800. *Id.* (“Allergan ‘has admitted in other forums that the intent is to employ Native American sovereign immunity and attempt to cut-off pending validity challenges with the Patent Office.’ Mylan argued that ‘Allergan is attempting to misuse Native American sovereignty to shield invalid patents from cancellation.’”).

801. *Id.* at \*7.

802. *See id.* at \*8.

803. *See id.* at \*10–11 (“The Court has serious concerns about the legitimacy of the tactic that Allergan and the Tribe have employed. The essence of the matter is this: Allergan purports to have sold the patents to the Tribe, but in reality it has paid the Tribe to allow Allergan to purchase—or perhaps more precisely, to rent—the Tribe’s sovereign immunity in order to defeat the pending IPR proceedings in the PTO. This is not a situation in which the patentee was entitled to sovereign immunity in the first instance. Rather, Allergan, which does not enjoy sovereign immunity, has invoked the benefits of the patent system and has obtained valuable patent protection for its product, Restasis. But when faced with the possibility that the PTO would determine that those patents should not have been issued, Allergan has sought to prevent the PTO from reconsidering its original issuance decision. What Allergan seeks is the right to continue to enjoy the considerable benefits of the U.S. patent system without accepting the limits that Congress has placed on those benefits through the administrative mechanism for canceling invalid patents.”).

804. *Id.* at \*12 (“Although sovereign immunity has been tempered over the years by statute and court decisions, it survives because there are sound reasons that sovereigns should be protected from at least some kinds of lawsuits. But sovereign immunity should not be treated as a monetizable commodity that can be purchased by private entities as part of a scheme to evade their legal responsibilities. It is not an inexhaustible asset that can be sold to any party that might find it convenient to purchase immunity from suit. Because that is in essence is what the agreement between Allergan and the Tribe does, the Court has serious reservations about whether the contract between Allergan and the Tribe should be recognized as valid, rather than being held void as being contrary to public policy.”).

Ultimately, the court allowed the tribe to be added as a co-plaintiff.<sup>805</sup> The court explained that the defendants did not show they would be prejudiced by the joinder of a co-plaintiff and given the current procedural posture of the case the tribe's joinder will not cause a delay in the proceedings.<sup>806</sup> The court was clear that it was not allowing the addition because the assignment of the patent rights in Restasis was valid.<sup>807</sup> Rather, the court was allowing it as a precaution against future challenges in which the assignment might be upheld and, thus, any future decisions rendered by the court be voided for failure to join a necessary party.<sup>808</sup>

#### 4. Scope of Immunity (Alabama Cases)

In 2017, the Alabama Supreme Court decided three notable cases in which it seemed to suggest that it was time to officially reexamine whether Indian tribes may assert sovereign immunity from suit, at least in the context of tort actions.<sup>809</sup> In *Harrison v. PCI Gaming Authority*, plaintiffs brought suit against entities owned and controlled by the Poarch Band of Creek Indians for dram shop liability stemming from a drunk driver who caused an accident where plaintiff's son was killed.<sup>810</sup> The lower court had dismissed on the basis of tribal sovereign immunity.<sup>811</sup> The Alabama Supreme Court reversed in a per curiam opinion, holding that the doctrine of tribal sovereign immunity should be revisited and reversed.<sup>812</sup> The court remanded for consideration of subject matter jurisdiction after recognizing the parties disagreed about the application of subject matter jurisdiction.<sup>813</sup> The tribe claims the wrongful act was the serving of alcohol which occurred on tribal lands, but the plaintiff claims that the injury occurred

---

805. *Id.* at \*20.

806. *Id.* at \*19–20 (“[I]n light of the fact that the trial and the post-trial briefing in the case has been completed, the presence of the Tribe as a co-plaintiff will not interfere with the prompt entry of the Court’s findings of fact and conclusions of law, and the Court’s the final judgment in this case. Allergan has represented that ‘the joinder will not otherwise impact the substantive issues in the litigation.’ And, as the successor-in-interest to Allergan, the Tribe would be bound by any judgment.”) (internal citations omitted).

807. *Id.* at \*19.

808. *Id.* at \*20 (“[T]he Court does not hold that the assignment of the patent rights to the Tribe is valid, but instead proceeds on the ground that the assignment may at some point be held valid, and that joining the Tribe as a party in this action is necessary to ensure that the judgment in this case is not rendered invalid because of the absence of a necessary party.”).

809. See *Harrison v. PCI Gaming Auth.*, 1130168, 2017 Ala. LEXIS 98 (Ala. Sept. 29, 2017); *Wilkes v. PCI Gaming Authority*, 1151312e, 2017 Ala. LEXIS 105 (Ala. Sept. 29, 2017); *Rape v. Poarch Band of Creek Indians*, 1111250, 2017 Ala. LEXIS 103 (Ala. Sept. 29, 2017).

810. *Harrison*, 2017 Ala. LEXIS at \*1–2.

811. *Id.* at \*3.

812. *Id.* at \*21 (“[T]his Court today in the case of *Wilkes*, supra, declines to extend the doctrine of tribal immunity to actions in tort, in which the plaintiff has no opportunity to bargain for a waiver and no other avenue for relief.”).

813. *Id.* at \*21–22.

on the highway or was where the petitioner's son died which were both in Alabama and not on the reservation.<sup>814</sup>

In *Wilkes v. PCI Gaming Authority*, plaintiffs were injured in an automobile accident when their vehicle was hit by another vehicle driven by an intoxicated employee of the defendant, a gaming enterprise owned and operated by the Poarch Band of Indians.<sup>815</sup> The trial court had dismissed on the basis of sovereign immunity,<sup>816</sup> and the Alabama Supreme Court reversed.<sup>817</sup> It refused to extend tribal sovereign immunity into the realm of tort cases.<sup>818</sup> Citing Justice Stevens' dissent in *Kiowa*, the Alabama Supreme Court concluded that sovereign immunity is improper in tort cases where the plaintiff lacked an opportunity to negotiate with the tribal defendant for a waiver of immunity.<sup>819</sup>

In *Rape v. Poarch Band of Creek Indians*, a non-member alleged that he won a triple multiplier on a jackpot win of \$459,000 resulting in a \$1,377,015.30 prize during a 'spin bet' at a casino run by the Poarch Band of Creek Indians.<sup>820</sup> When the defendant failed to pay, claiming instead that the machine had malfunctioned, the casino patron filed a claim in state court.<sup>821</sup> The lower court dismissed on the basis of sovereign immunity.<sup>822</sup> The Alabama Supreme Court affirmed the dismissal<sup>823</sup> but refused to issue an opinion on the basis of immunity.<sup>824</sup> Instead the court held that the plaintiff was in a "Catch-22."<sup>825</sup> The court reasoned that it is possible that under *Carcieri* the Poarch Band was not 'under federal recognition' in 1934 and so its lands should not have been taken into trust, and therefore the gaming took place on state land.<sup>826</sup> But if that is true—the gaming was unlawful as the county in which it took place does not permit bingo, and the Alabama Supreme Court will not assist a plaintiff to recover the

---

814. *Id.*

815. *Wilkes*, 2017 Ala. LEXIS 105 at \*1.

816. *Id.* at \*4.

817. *Id.* at \*10–11 (“In light of the fact that the Supreme Court of the United States has expressly acknowledged that it has never applied tribal sovereign immunity in a situation such as this, we decline to extend the doctrine beyond the circumstances to which that Court itself has applied it; accordingly, we hold that the doctrine of tribal sovereign immunity affords the tribal defendants no protection from the claims asserted by Wilkes and Russell. As Justice Stevens aptly explained in his dissent in *Kiowa*, a contrary holding would be contrary to the interests of justice, especially inasmuch as the tort victims in this case had no opportunity to negotiate with the tribal defendants for a waiver of immunity.”).

818. *Id.* at \*12.

819. *Id.* at \*10–11.

820. *Rape*, 2017 Ala. LEXIS 103 at \*2.

821. *Id.* at \*4.

822. *Id.*

823. *Id.* at \*38.

824. *Id.* at \*26.

825. *Id.* at \*27.

826. *Id.* at \*27–28.

proceeds of illegal activity.<sup>827</sup> On the other hand, it is possible that the land the Poarch Band's casino operates on was properly taken into trust.<sup>828</sup> In that case the proper forum to resolve the dispute is tribal court, and the state courts lack subject matter jurisdiction.<sup>829</sup> Without deciding which of those possibilities exists, the Alabama Supreme Court affirmed the dismissal.<sup>830</sup>

### *R. Taxation*

In 2017, there were about twenty cases decided by federal courts involving taxation. By far the most common procedural posture was the state attempting to tax conduct on the reservation.<sup>831</sup> The Supreme Court has generally held that a state may not tax persons or activity on the reservation if the imposition of the tax would infringe upon the tribe's right to govern itself or if it is preempted.<sup>832</sup> Indian preemption is a little

---

827. *Id.* (“The activity out of which Rape’s claim arose, however, was gambling. If it occurred on land within the regulatory and adjudicative jurisdiction of the State of Alabama, that activity was illegal. . . . It is well established that this Court will not aid a plaintiff seeking to recover under an illegal contract but, instead, will simply leave the parties where it finds them.”).

828. *Id.* at \*22–23.

829. *See id.* at \*37 (The Alabama Court reasoned “[o]n the one hand, if the dispute here arises from activity determined to be ‘permitted by Federal law’ and thus to be the subject of a congressional delegation of ‘regulatory authority’ to the Tribe, then disputes arising out of the same would, as noted, likewise be a legitimate adjudicative matter for the Tribe, and the circuit court’s dismissal of Rape’s claims would have been proper on that basis. But conversely, even if it were to be determined that the gaming at issue were illegal under the provisions of IGRA and therefore not the subject of an ‘express congressional delegation’ of regulatory authority to the Tribe, it would be that very illegality that would also prevent our state courts from providing relief to Rape under the principles discussed previously.”).

830. *Id.* at \*38.

831. *See* Tulalip Tribes v. Washington, No. 2:15-cv-00940-BJR, 2017 U.S. Dist. LEXIS 1646 (W.D. Wash. Jan. 5, 2017); Seneca Nation of Indians v. Paterson, No. 1:10-CV-00687 (MAT), 2017 U.S. Dist. LEXIS 9060 (W.D. NY January 23, 2017); Lake Cty. v. State, No. DV 16-206, 2017 Mont. Dist. LEXIS 14 (Mont. Dist. Jan. 27, 2017); Desert Water Agency v. United States DOI, 849 F.3d 1250 (9th Cir. 2017); Cougar Den, Inc. v. Dep’t of Licensing, 392 P.3d 1014 (Wash. 2017); Smith v. Dep’t of Revenue, TC-MD 160383R, 2017 Ore. Tax LEXIS 39 (Ore. Tax Ct. Mar. 16, 2017); New York v. UPS, 253 F. Supp. 3d 583 (S.D.N.Y. May 25, 2017); New York v. UPS, 15-cv-1136 (KBF), 2017 U.S. Dist. LEXIS 80907 (S.D.N.Y. May 25, 2017); Mescalero Apache Tribe v. Comm’r of Internal Revenue, Docket No. 28120-14, 148 T.C. No. 11 (U.S. Tax Ct. Apr. 5, 2017); Agua Caliente Band of Cahuilla Indians v. Riverside Cty, No.: ED CV 14-0007-DMG (DTBx), 2017 U.S. Dist. LEXIS 92592 (C.D. Cal. June 15, 2017); Keweenaw Bay Indian Cmty. v. Khouri, No: 2:16-cv-121, 2017 U.S. Dist. LEXIS 101890 (W.D. Mich. June 30, 2017); Flandreau Santee Sioux Tribe v. Gerlach, CIV 14-4171, 2017 U.S. Dist. LEXIS 150037 (D.S.D. Sept. 15, 2017); People ex rel Becerra v. Rose, 16 Cal. App. 5th 317 (Cal. App. 2017); Seminole Tribe of Florida v. Biegalski, No. 16-62775-Civ-Scola, 2017 U.S. Dist. LEXIS 169009 (S.D. Fla. Oct. 12, 2017); Mitchell v. Tulalip Tribes of Washington, NO. C17-1279-JCC, 2017 U.S. Dist. LEXIS 182243 (W.D. Wash., Nov. 2, 2017); Comenout v. Pittman, NO. 3:16-cv-05464-RJB, 2017 U.S. Dist. LEXIS 205941 (W.D. Wash., Dec. 14, 2017).

832. *See* McClanahan v. Arizona Tax Comm’n, 411 U.S. 164 (1973); Oklahoma Tax Comm’n v. Sac and Fox Nation, 508 U.S. 114 (1993); Mescalero Apache v. Jones, 411 U.S. 145 (1973); Warren

different than traditional constitutional preemption and looks more like interest balancing. When the interests of the state to levy its tax are weaker than the interests of the tribe and the United States to allow the tribe to be free from the tax, then the state's authority to tax is preempted.<sup>833</sup> This section cannot possibly highlight the detailed analysis of every tribal tax case and so presents a couple of the most detailed decisions and a brief summary of some of the others.

In *Agua Caliente Band of Cahuilla Indians v. Riverside County*, the tribe contested the authority of the county to impose a Possessory Interest Tax (PIT) on non-Indian lessees who occupied land on the Agua Caliente Band's reservation.<sup>834</sup> Both the tribe and the county sought summary judgment on three issues: (1) whether the Indian Reorganization Act (IRA) preempts the state tax, (2) whether *Bracker* should result in preemption, and (3) whether the PIT infringes on the Tribe's sovereignty.<sup>835</sup> The court held that the county may assess the PIT.<sup>836</sup>

The court recognized that the IRA does have a provision which prohibits state taxes from being levied on land taken into trust under the IRA, but the court concluded that the Band's land was held for them since before the IRA was enacted, not through the IRA's land into trust mechanism.<sup>837</sup> Accordingly, the IRA's prohibition of taxation does not apply to the Band's land because it was not taken into trust pursuant to the statute.<sup>838</sup>

The United States, as amicus, took the position that *Bracker* should preempt the state taxation of reservation lands leased to non-Indians.<sup>839</sup> The district court concluded that the federal interests were sufficient to preempt state taxation absent sufficient state interests,<sup>840</sup> however, the

---

Trading Post v. Ariz. Tax Comm'n, 380 U.S. 685 (1965); *White Mountain Apache v. Bracker*, 448 U.S. 136 (1980).

833. *White Mountain Apache v. Bracker*, 448 U.S. 136, 144–145 (1980).

834. *Agua Caliente Band of Cahuilla Indians v. Riverside Cty.*, No.: ED CV 14-0007-DMG (DTBx), 2017 U.S. Dist. LEXIS 92592, at \*3 (C.D. Cal. June 15, 2017).

835. *Id.* at \*18.

836. *Id.* at \*53.

837. *Id.* at \*19–28 (“[T]wo executive orders that long predate the IRA and the 1955 Act established and expanded the Reservation, taking this case outside of section 465’s purview.”).

838. *Id.* at \*28–29.

839. *Id.* at \*32–33 (“The United States, as *amicus curiae* in this case, contends that the comprehensiveness of the federal and regulatory scheme governing the leasing of Indian land, coupled with the federal interest in tribal sovereignty, ‘weigh heavily against state and local taxation.’”).

840. *Id.* at \*34–35 (“Given the Ninth Circuit’s pronouncements on the federal statutory and regulatory scheme of Indian leasing, the Secretary’s thorough and persuasive interpretation of the statutes and regulations it administers, and the federal policy of promoting Indian welfare and economic independence, the Court concludes that the federal interests here, like those at stake in *Bracker* and *Ramah*, are pervasive enough to preclude the burdens of a tax, absent sufficient state interests.”).

court concluded the state had asserted sufficient interests, ranging from “public road maintenance and animal and pest control services, to larger undertakings such as public safety, law enforcement, and education.”<sup>841</sup> Although, the court concluded that the PIT taxes give the state more than a mere interest in raising revenue; the PIT taxes were directly related to the services that the state provides to non-Indian lessees and therefore were sufficient to defeat the presumption of preemption based on the alleged federal interests.<sup>842</sup> Therefore, the court held that the county’s tax was not preempted by *Bracker*’s interest balancing.<sup>843</sup>

Finally, the court concluded that the County’s tax did not infringe on the right of the tribe to make its own laws and be governed by them.<sup>844</sup> It pointed out that the tribe could assert its own taxes in addition to those imposed by the County.<sup>845</sup>

In *Flandreau Santee Sioux Tribe v. Gerlach*, the tribe sought a court order to prevent South Dakota from levying its taxes on purchases made by non-members on the reservation.<sup>846</sup> South Dakota attempted to collect its use tax on the sale of goods and services to non-members at the tribe’s Royal River Casino & Hotel and First American Mart (the tribal store).<sup>847</sup> South Dakota also argued that it could condition the reissuance of a liquor license on the collection and remittance by the tribe of the state use tax.<sup>848</sup> The tribe sought summary judgment, arguing that the imposition of the state use tax was preempted by the IGRA and/or preempted in general because it infringes on tribal sovereignty and thus contradicts established tribal and federal interests.<sup>849</sup>

After some lengthy discussion the court concluded that state taxation of all activity that is related to gaming was preempted by the IGRA.<sup>850</sup> It

---

841. *Id.* at \*40.

842. *Id.* at \*41–43 (“[T]he PIT and the allocation of its revenues appear to be based, at least in part, on the share of services and benefits that the lessees enjoy. . . . the state interest in raising revenues here is at its strongest because, by and large, ‘the taxpayer is the recipient of state services.’”).

843. *See id.* at \*43.

844. *Id.* at \*52–53.

845. *Id.* at \*51 (“*Agua Caliente* has not provided this Court with evidence of the PIT’s actual obstruction of tribal governance. As explained above, the Tribe may impose its own tax concurrently with that of the County. Thus, this is not a case where the state has ‘tak[en] revenue that would otherwise go towards supporting the Tribe and its programs.’”).

846. *Flandreau Santee Sioux Tribe v. Gerlach*, CIV 14-4171, 2017 U.S. Dist. LEXIS 150037, at \*2 (D.S.D. Sept. 15, 2017).

847. *Id.* at \*2–3.

848. *Id.* at \*5.

849. *Id.* at \*6.

850. *Id.* at \*34–35 (“[T]he Court holds that the slots, table games, food and beverage services, hotel, RV park, live entertainment events, and gift shop are directly related to class III gaming . . . regulation and taxation is, therefore, compactable between a tribe and a state. As the State and the Tribe did not include a provision providing for such taxation in the gaming compact, the application of the use tax to such amenities is preempted by IGRA and the Tribe’s motion for summary judgment

reasoned that the state could have asked to negotiate for the inclusion of the tax as part of the compacting process, but that the compact was silent on the collection of the use tax and so was preempted.<sup>851</sup> However, the court concluded that state taxation of sales at the tribal store were not preempted by the IGRA as sales at the store were not sufficiently related to the gaming enterprise to fall within the preemptive scope of IGRA.<sup>852</sup>

The court then proceeded to ask whether those sales not preempted by the IGRA may yet still be preempted by strong tribal and federal interests under *Bracker*.<sup>853</sup> The court concluded that the value generated by the store was not value typically generated on the reservation and so had a weaker claim to preemption.<sup>854</sup> Additionally, the court reasoned that the state has an interest in the uniform application of its tax code and in the provision of services to South Dakotans.<sup>855</sup> Accordingly, the court concluded that the imposition of the use tax on the sale of goods by the tribal store to non-members was not preempted by tribal and federal interests.<sup>856</sup>

Finally, the Tribe argued that the imposition of the state tax is discriminatory because South Dakota gives a tax credit to state residents who have paid sales or use taxes to other states when those states offer a reciprocal credit to its residents, but South Dakota provides no reciprocal credit for taxes paid to the tribe even though it offers a credit for taxes paid to South Dakota.<sup>857</sup> The court disagreed, reasoning that tribes and states are differently situated and so it is not discriminatory to treat them differently.<sup>858</sup>

---

is granted to that extent. Even had the State negotiated for such a provision, though, the State would have to earmark those funds for services that are also directly related to the operation of gaming activities as well as offer meaningful concessions in return . . . . The remittance of those taxes into a general fund with unlimited potential uses, such as the State's general fund here, would not satisfy *Rincon* and would be preempted by IGRA as an impermissible negotiation topic.”)

851. *Id.* at \*33–35.

852. *Id.* at \*35.

853. *Id.* (“[I]t is still necessary to determine if the use tax, where not preempted by plain implication of IGRA—in other words, the sale of goods and services at the Store—is not otherwise preempted under the *Bracker* balancing test.”).

854. *Id.* at \*39.

855. *Id.* at \*41.

856. *Id.* at \*40–41 (“[T]he State does not interfere with the Tribes’ power to regulate tribal enterprises when it simply imposes its tax on [use by] nonmembers.’ ‘Nor would the imposition of [the] tax on these purchasers contravene the principle of tribal self-government, for the simple reason that nonmembers are not constituents of the governing tribe.”) (internal citations omitted).

857. *Id.* at \*41–42.

858. *Id.* at \*46–47 (“Although the proceeds of the use tax enter the State’s general fund, which is not earmarked for any expenditures in particular, the Tribe does indeed benefit from off-reservation road maintenance and public safety services leading to the Store, the licensure of some food vendors, as well as other services. Further, nonmember consumer residents of South Dakota benefit from a wide range of general services offered by the State when off the reservation. Therefore, the State tax is not

In *Cougar Den Inc. v. Department of Licensing*, the plaintiff, a Yakima Nation corporation, asserted that the “right to travel” clause in Article III of the Treaty with the Yakima includes the right to import fuel without an importer’s license and without paying a state tax on the fuel.<sup>859</sup> The majority of the Washington Supreme Court (7–2) held that the treaty’s right to travel preempted the state’s ability to tax.<sup>860</sup> It began by emphasizing that Indian treaties should be interpreted as the Indians themselves understood them.<sup>861</sup> The majority highlighted the importance of travel to the Yakima to support the conclusion that the right to travel would include the right to move goods.<sup>862</sup> The opinion drew on Ninth Circuit precedent in relation to the Yakima that refused to draw a distinction between trade and travel.<sup>863</sup> The court accordingly held that the imposition of a state tax on fuel imported unto the reservation was preempted by the treaty’s guarantee of a right to travel.<sup>864</sup>

The dissent would have implied a difference between the right to travel and the right to trade: “The Yakima Nation’s treaty right to travel applies to trade *only* when it cannot be meaningfully separated from travel, not when travel is merely necessary for trade.”<sup>865</sup> Because the imposition of a tax on imported fuel is a restriction of trade, and not travel, it would have upheld the power of the state to tax.<sup>866</sup>

In 2017, courts decided many other issues related to Indian tribes and taxation. For example, courts held (1) that when the Bureau of Indian Affairs determines that land has been taken into trust that land should be

---

discriminatory, as the Tribe is not similarly situated to other states which have been granted a tax credit.”).

859. *Cougar Den Inc. v. Dep’t of Licensing*, 392 P.3d 1014 (Wash. 2017) (The treaty provides “the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highway”).

860. *Id.* at 58.

861. *Id.* at 60–61 (“It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council, and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.”).

862. *Id.* at 62 (“Travel was woven into the fabric of Yakama life in that it was necessary for hunting, gathering, fishing, grazing, recreational, political, and kinship purposes . . . . At the time the treaty was drafted, agents of the United States knew of the Yakamas’ reliance on travel. During negotiations, the Yakamas’ right to travel off reservation had been repeatedly broached, and assurances were made that entering into the treaty would not infringe on or hinder their tribal practices.”).

863. *Id.* at 67 (“We hold that the right to travel provision in the treaty protects the Tribe’s historical practice of using the roads to engage in trade and commerce.”).

864. *Id.*

865. *Id.* at 74.

866. *Id.* at 70 (Citing *Wagnon and Mescalero Apache Tribes* it would have held that “[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law. This includes state fuel excise taxes.”) (internal citations omitted).

removed from county tax rolls,<sup>867</sup> (2) that Indian treaties may contain tax-exemptions and should be read broadly,<sup>868</sup> (3) that alternative dispute resolution with the United States on tax matters is not required when settlement with the United States is unlikely,<sup>869</sup> (4) that a state agency could not challenge an Interior regulation that may remove its authority to levy taxes on water users on the reservation until one of those users refuses to pay the tax,<sup>870</sup> (5) that income earned by a tribal member on the reservation is not subject to state income tax,<sup>871</sup> (6) that UPS can be liable for knowingly shipping untaxed cigarettes from the reservation to other non-member purchasers,<sup>872</sup> (7) that when goods are imported from outside the reservation and sold to non-members the state has legitimate interest in raising revenue to support off-reservation services which make on-reservation commerce possible,<sup>873</sup> and (8) that tribes selling cigarettes to non-members have an obligation to collect and remit cigarette taxes to the State of California.<sup>874</sup>

### S. Treaty Rights

There are many cases discussed in this update that deal in some way with treaties and the rights conferred upon tribes. However, there is one dispute originating from Washington State that deserves special mention because the denial of a rehearing *en banc* in the Ninth Circuit drew a strong dissent. In *United States v. Washington*,<sup>875</sup> a group of twenty-one

---

867. *Lake Cty. v. State*, No. DV 16-206, 2017 Mont. Dist. LEXIS 14 at \*6 (Mont. Dist. Jan. 27, 2017).

868. *Perkins v. United States*, No. 16-CV-495(LJV), 2017 U.S. Dist. LEXIS 123543 at \*5 (W.D.N.Y. Aug. 4, 2017).

869. *Perkins v. United States*, 16-CV-495V, 2017 U.S. Dist. LEXIS 186169, at \*16 (W.D.N.Y. Nov. 9, 2017) (“[T]he applicability of the Canandaigua Treaty and the 1842 Treaty is a binary proposition—those treaties either do exempt plaintiffs’ income, or do not. A settlement of the case for an amount less than what plaintiffs paid is theoretically possible but unlikely, since any such amount would not reflect where the parties would stand after a full resolution of the treaty issue. For these reasons, the Court will release the parties from the automatic referral to ADR . . .”).

870. *Desert Water Agency v. U.S. Dept’ of Interior*, 849 F.3d 1250, 1258 (9th Cir. 2017).

871. *Smith v. Dep’t of Revenue*, TC-MD 160383R, 2017 Ore. Tax LEXIS 39 (Ore. Tax Ct. Mar. 16, 2017).

872. *New York v. UPS*, 253 F. Supp. 3d 583 (S.D.N.Y. May 25, 2017). In a subsequent proceeding to determine damages the court imposed large fines. *New York v. UPS*, 15-cv-1136 (KBF), 2017 U.S. Dist. LEXIS 80907, at \*28 (S.D.N.Y. May 25, 2017) (The court ordered large damages to specifically send a message to UPS and others who would facilitate the transfer and sale of untaxed cigarettes to non-members living off the reservation. The court awarded New York State \$165,817,479 and New York City was awarded \$81,158,135.).

873. *Tulalip Tribes v. Washington*, No. 2:15-cv-00940-BJR, 2017 U.S. Dist. LEXIS 1646, at \*25 (W.D. Wash. Jan. 5, 2017).

874. *People ex rel Becerra v. Rose*, 16 Cal. App. 5th 317, 328 (Cal. Ct. App. 2017).

875. Since time of writing the article, the U.S. Supreme Court has granted certiorari, see *Washington v. United States*, 199 L. Ed. 2d 602 (2018).

Washington tribes brought a claim under the Stevens treaties claiming that Washington had violated their off-reservation treaty rights to fish at their usual and accustomed places by building barrier culverts.<sup>876</sup> The district court ordered Washington to remove its barrier culverts over a period of seventeen years in order to comply with the treaty.<sup>877</sup> The Ninth Circuit agreed.<sup>878</sup>

Washington argued that under the treaties it was permitted to block all of the streams because a treaty right to take fish does not guarantee that there will continue to be fish to harvest.<sup>879</sup> The Ninth Circuit disagreed.<sup>880</sup> It held that Indian treaties are to be interpreted as the Indians would have understood them at the time the treaty was signed and the Indians would not have understood the treaties as preventing the flow of salmon up and down the rivers and streams.<sup>881</sup> In describing the treaty negotiations the court reasoned; “[e]ven if Governor Stevens had not explicitly promised that ‘this paper secures your fish,’ and that there would be food ‘forever,’ we would infer such a promise.”<sup>882</sup> The Ninth Circuit thus affirmed the decision of the district court.<sup>883</sup>

The State of Washington appealed, asking the Ninth Circuit to hear the case *en banc*. In *United States v. Washington*, the Ninth Circuit issued a written opinion in which it refused to hear the case *en banc*.<sup>884</sup> The rehearing was denied over the objection of nine judges on the Ninth Circuit.<sup>885</sup>

---

876. *United States v. Washington*, 853 F.3d 946, 954 (9th Cir. 2017). When Washington builds roads or structures over streams it builds culverts to accommodate the passage of water underneath. When those structures prevent the flow of salmon fry down river or adult salmon back up the river they become barrier culverts.

877. *Id.* at 954.

878. *Id.*

879. *Id.* at 962 (“Washington concedes that the clause guarantees to the Tribes the right to take up to fifty percent of the fish available for harvest, but it contends that the clause imposes no obligation on the State to ensure that any fish will, in fact, be available.”).

880. *Id.*

881. *Id.* at 963–64 (“The Indians did not understand the Treaties to promise that they would have access to their usual and accustomed fishing places, but with a qualification that would allow the government to diminish or destroy the fish runs. Governor Stevens did not make, and the Indians did not understand him to make, such a cynical and disingenuous promise.”).

882. *Id.* at 964–65.

883. *Id.* at 980 (“The district court did not abuse its discretion in enjoining Washington to correct most of its high-priority barrier culverts within seventeen years, and to correct the remainder at the end of their natural life or in the course of a road construction project undertaken for independent reasons.”).

884. *United States v. Washington*, 864 F.3d 1017, 1018 (9th Cir. 2017).

885. *Id.* at 1023. Ninth Circuit Judges O’Scannlain, Kozinski, Tallman, Callahan, Bea, Ikuta, N.R. Smith, Bybee, and M. Smith all dissented from the decision not to order a rehearing *en banc*.

Judge O’Scannlain wrote for those dissenting from rehearing.<sup>886</sup> He argued that while the litigation over salmon has been going on for fifty years, the parties only now found an obligation that the State of Washington expend as much as \$1.88 billion to create additional salmon habitat by removing culverts under state maintained roads that impede salmon.<sup>887</sup> The dissent alleged four errors. First, it reasoned that the treaties have been misread to require not just sharing of the salmon in common with the people of Washington but that the state has an affirmative duty to ensure there are enough salmon for the tribe to make a “moderate living.”<sup>888</sup>

Second, the dissent reasoned the remedy of removing all of the culverts is too extreme.<sup>889</sup> The dissenting opinion reasoned that many factors beyond the culverts could impact fish populations, and it cited shared concerns raised by Idaho and Montana that the ruling could be used to block development in other areas where natural resources are threatened.<sup>890</sup>

Third, the dissent argued that the tribe’s claims are barred by laches.<sup>891</sup> It would have held that the United States approved of many of the highway designs that include the barrier culverts that it is now demanding that Washington pay to remove, and that since the culverts were approved by the federal government, that same federal government could not now demand their removal.<sup>892</sup> The dissent focuses on *Sherrill* where the Supreme Court suggested that laches is a defense which can be raised against the United States.<sup>893</sup>

Finally, the dissent argued that the Ninth Circuit’s affirmation was overbroad.<sup>894</sup> The dissent highlighted that many private barrier culverts

---

886. *Id.* Judges Bybee and M. Smith joined all of Judge O’Scannlain’s opinion except for the part about laches and the application of *Sherrill*.

887. *Id.* at 1023–24 (See specific discussion of actual cost to replace all culverts at footnote 1).

888. *Id.* at 1026 (“[T]he Supreme Court in *Fishing Vessel* did not hold that the Tribes were entitled to any particular minimum allocation of fish. Instead, *Fishing Vessel* mandates an allocation of 50 percent of the fish to the Indians, subject to downward revision if moderate living needs can be met with less.”).

889. *Id.* at 1028 (“There seems little doubt that future litigants will argue that the population of various birds, deer, elk, bears, and similar animals, which were traditionally hunted by the Tribes, have been impacted by Western development.”).

890. *Id.*

891. *Id.* at 1030–31.

892. *Id.* at 1029 (“[I]t was the federal government, now bringing suit in its capacity as trustee for the Tribes, which ‘specified the design for virtually all of the culverts at issue.’”).

893. *Id.* at 1030–31 (“Presumably, the State’s alleged violation of the Treaties was complete when it constructed the culverts (and relevant highways) in the 1960s. The United States first brought suit to enforce the Tribes’ fishing rights in 1970. Yet, the United States found no problem with the culverts until 2001.”) (internal citations omitted).

894. *Id.* at 1031–33 (“Being forced to replace even a single barrier that will have *no tangible impact* on the salmon population is an unjustified burden.”).

exist that are not addressed by the order so the state will be required to remove culverts which will not increase salmon runs.<sup>895</sup>

Judges Fletcher and Gould wrote a concurrence to support their original panel opinion.<sup>896</sup> They argued that “there is nothing in the Court’s opinion that authorizes the State to diminish or eliminate the supply of salmon available for harvest.”<sup>897</sup> The panel reasoned that it has not opened the floodgates to future suits because future claims against states by private parties or tribes seeking to block development would be blocked by the Eleventh Amendment.<sup>898</sup> The concurrence distinguished *Sherrill* because the tribes in this instance were not attempting to reassert sovereignty over land, and no party was resting on its rights because the parties had been in conflict over the issue for a century.<sup>899</sup> Finally, the concurrence concluded that the order was not overbroad because it did not require remediation of every culvert but instead required remediation of some, but not all, of the culverts within seventeen years.<sup>900</sup>

#### *T. Voting*

The year 2017 saw several court cases involving American Indians and voting rights, mostly concentrated around alleged disenfranchisement of Indian voters. This manifested either through access to the polls or through judicial districts that unconstitutionally pack American Indian voters into districts in order to diminish their potential representational strength.

In *Navajo Nation v. San Juan County*, the Navajo Nation and several tribal members brought suit against Utah’s San Juan County alleging that both the county commission and school board districts violated the equal protection clause of the Fourteenth Amendment, the Fifteenth Amendment, and Section 2 of the Voting Rights Act.<sup>901</sup> San Juan County is roughly evenly divided between White persons and American Indian persons.<sup>902</sup> The court had previously found the districts unconstitutional because the county had packed American Indians into as few districts as possible in order to diminish the voting strength of tribal members and the

---

895. *Id.* at 1032–33.

896. *Id.* at 1018–23.

897. *Id.* at 1020.

898. *Id.* (“Because of the Eleventh Amendment, a further suit against Washington State seeking enforcement of the Treaties cannot be brought by the Tribes.”).

899. *Id.* at 1021.

900. *Id.* at 1022–23.

901. *Navajo Nation v. San Juan Cty.*, 266 F. Supp. 3d 1341, 1344 (D. Utah 2017).

902. *Id.* at 1360 (The County is roughly evenly divided between American Indian and non-Hispanic Whites, with American Indians having a slight majority of both the overall population (52.17%) and the voting age populations (50.33%)).

districts did not contain roughly equal numbers of residents, thus violating the principle of one-person/one-vote.<sup>903</sup> The county presented the court with new proposed districts which it submitted had cured the potential defects.<sup>904</sup> The district court disagreed.<sup>905</sup> It held that race was a predominate factor used by the county in developing the revised commission and school board maps and therefore the proposed districts remained unconstitutional.<sup>906</sup>

In reviewing the proposed plan Judge Shelby began by recognizing that the submitted plans had ameliorated the previous problem of one-person/one-vote with districts that are within acceptable population differentials.<sup>907</sup> To comply with the Voting Rights Act the county attempted to achieve proportional representation where each racial group could have the opportunity to elect members in proportion to the county's demographics.<sup>908</sup> However, the court concluded that in doing so the county had drawn maps using race as the predominant factor.<sup>909</sup> Because the Navajo Nation was able to prove that race was the primary criteria for creating some of the districts, the burden shifted to the county to prove that it narrowly tailored its decision to achieve a compelling government interest.<sup>910</sup> The county was unable to identify any governmental interest

---

903. *Id.* at 1346.

904. *Id.* at 1345.

905. *Id.* (“For the reasons below, San Juan County’s remedial plans fail to pass constitutional muster. Specifically, the court concludes race was the predominant factor in the development of District 3 of the School Board plan and Districts 1 and 2 of the County Commission plan. The County’s consideration of race requires strict scrutiny analysis of these districts. The court concludes the County has failed to satisfy strict scrutiny and, therefore, these districts are unconstitutional.”).

906. *Id.* at 1366 (“The record establishes that San Juan County predominated racial considerations over other traditional districting criteria when drawing its County Commission Districts 1 and 2 and School Board District 3, and it did so without providing any reason to think it would violate the Voting Rights Act if it simply drew districts based on race-neutral factors. To the contrary, it did so even while maintaining there was no Section 2 issue that required it to take race into account in redistricting. This runs afoul of Supreme Court pronouncements against racial classifications in drawing voting districts.”).

907. *Id.* at 1353.

908. *Id.* at 1348–49 (“Proportional representation presented a challenge in San Juan County, which is roughly half Native American and half White but with an odd number of voting districts—five for the School Board and three for the County Commission. [The County’s] goal, therefore, was to create two safe Native American School Board districts, two safe White School Board districts, and a district where the racial mix reflected the County’s overall demographics—approximately 52% Native American and 48% White. Similarly, his goal was to create one safe White County Commission district, one safe Native American County Commission district, and a third district that reflected the racial composition of the County generally.”).

909. *Id.* at 1361 (“Because the County’s attempt at compliance with Section 2 of the Voting Rights Act entailed nothing more than proportionality (meaning the establishment of racial targets for the resulting districts); and because compliance with the Voting Rights Act was the County’s highest priority, save one-person, one-vote; the court concludes San Juan County adopted a countywide policy of prioritizing racial targets above all other traditional redistricting criteria.”).

910. *Id.* at 1364.

that would justify the primary use of race and so the court held the new maps submitted by the county were unconstitutional.<sup>911</sup>

The court had previously indicated that if the county's newly revised districts failed to pass constitutional muster it would approve districts submitted by the Navajo Nation.<sup>912</sup> However, the court refused to comply with its previous order; "[i]n view of this reality, the court believes adopting Navajo Nation's proposed redistricting plans—the product of an adversarial, litigation-driven process—could jeopardize, and possibly undermine confidence in, the legitimacy of the County's new legislative districts."<sup>913</sup> Instead the court decided to appoint a special master to assist in the formulation of lawful remedial districts with input from all parties.<sup>914</sup>

Later in 2017, the special master had completed the work of drawing newly proposed boundaries which complied with the mandates imposed by the constitution.<sup>915</sup> In *Navajo Nation v. San Juan County*, the county objected to the new boundaries proposed by the special master.<sup>916</sup> The federal district court approved the districts over the objections of the county because they now complied with all constitutional principles including one-person one-vote and did not use race as a predominant factor.<sup>917</sup> It ordered the new maps be used during the 2018 election.<sup>918</sup> The new maps are included in the opinion.<sup>919</sup>

Courts also decided a pair of cases focused on the potential disenfranchisement of American Indian voters. In *Navajo Nation Human Rights Commission v. San Juan County*, the Navajo Nation Human Rights Commission brought suit against San Juan County alleging voting discrimination.<sup>920</sup> Before 2014 the county operated nine in-person polling

---

911. *See id.* ("The County did not explicitly identify any governmental interest it contends it was trying to achieve, nor did it argue that its race-based considerations were narrowly tailored to achieve any specific interest. Because law places the burden to make this showing on the County, its failure to address the issue necessarily means the County's redistricting fails strict scrutiny review.")

912. *Id.* at 1366–67 ("The court previously stated it would evaluate Navajo Nation's proposed redistricting plans if the County's plans failed. The court indicated that if it reached the Navajo Nation's plans, and if they were legally sound, the court likely would enter its plans as a final order. Having considered the issue more carefully in the time that has passed since its earlier Order, the court no longer believes such an approach would lead to a satisfactory result.")

913. *Id.* at 1367.

914. *Id.*

915. *See Navajo Nation v. San Juan Cty.*, No. 2:12-cv-00039, 2017 U.S. Dist. LEXIS 211230 at \*1 (D. Utah, Dec. 21, 2017).

916. *Id.*

917. *Id.* at \*2–23.

918. *Id.* at \*51.

919. *Id.*

920. *Navajo Nation Human Rights Comm'n v. San Juan Cty*, No. 2:16-cv-00154-JNP-BCW, 2017 U.S. Dist. LEXIS 145159, at \*5 (D. Utah Sept. 7, 2017).

places with Navajo language assistance.<sup>921</sup> For the 2014 election and subsequent elections the county moved to a mail-in voting system with a single in-person polling place located in the northern, white-majority part of the county.<sup>922</sup> The plaintiffs filed suit alleging violations of the Voting Rights Act and the Equal Protection Clause.<sup>923</sup> In 2016, the county opened three additional in-person voting places all located on the Navajo reservation, provided Navajo language assistance at all four polling stations, and expressed its intention not to return to the 2014 procedures.<sup>924</sup> However in-person early voting was still located solely in the predominately white northern portion of the County.<sup>925</sup> The court concluded that the plaintiff's original complaint regarding the 2014 voting procedures was now moot and dismissed those claims.<sup>926</sup>

The court then permitted the Commission to amend its complaint to allege that the 2016 procedures still violate section 2 of the Voting Rights Act.<sup>927</sup> The Commission alleged that the early voting location solely in the white northern portion of the county gives those voters benefits denied to the Navajo-majority portion of the county.<sup>928</sup> The plaintiffs also alleged a violation of section 203 of the Voting Rights Act.<sup>929</sup> They claimed that the county has no formal training for Navajo interpreters, that there is inadequate publicity to voters, that the publicity that did exist was confusing, and that some voters that needed assistance did not receive it.<sup>930</sup> The county replied that its actions substantially complied with the Voting

---

921. *Id.* at \*4.

922. *Id.*

923. *Id.* at \*5.

924. *Id.* at \*6.

925. *Id.* at \*54.

926. *Id.* at \*9–10 (“Here, the court concludes that the County’s abandonment of the 2014 procedures has mooted Plaintiffs’ claims for declaratory relief regarding those procedures. The County has not used the 2014 procedures for an entire election cycle, choosing instead to implement entirely different procedures for both the primary and general elections in 2016. Moreover, neither the current County Clerk nor the County government has openly expressed any intention to reinstitute the 2014 procedures.”).

927. *Id.* at \*22–26.

928. *Id.* at \*55 (“First, they assert that the provision of early in-person voting only in Monticello means that the average white voter, who lives closer to Monticello, has proportionately more days in which to vote than the average Navajo voter, who is more likely to live further from Monticello. Second, Plaintiffs assert that the provision of early in-person voting only in Monticello provides the average white voter with ‘additional benefits, including the ability to request a [new] ballot (if, for instance, the ballot was lost in the mail) or receive troubleshooting help if a [voting] problem arises.’ Plaintiffs also argue that the option of mail-in voting does not alleviate this inequity, because, among other barriers, the average Navajo lives more distant from post office locations than the average white voter and certain majority-Navajo precincts lack sufficient post office boxes to accommodate demand.”) (internal citations omitted).

929. *Id.* at \*22.

930. *Id.* at \*64.

Rights Act's requirements.<sup>931</sup> After reviewing the evidence the court denied both parties summary judgment motions concluding that there remains a genuine issue of material fact about whether the 2016 voting procedures violate the VRA.<sup>932</sup> Litigation on San Juan County's alleged disenfranchisement of Native voters continues.

The second case involving voter disenfranchisement arose in South Dakota. In *Poor Bear v. County of Jackson* the petitioners originally sued the state of South Dakota seeking to establish a satellite office on the reservation for purposes of voter registration and in-person absentee voting.<sup>933</sup> The South Dakota Secretary of State's Office and Jackson County arranged to support a satellite office during all federal elections through 2023, and the case was then dismissed for ripeness in 2016.<sup>934</sup> Petitioners then filed an action seeking reimbursement of attorney's fees under the Voting Rights Act.<sup>935</sup>

The federal district court dismissed the petition because Poor Bear and others were not prevailing parties in the original action.<sup>936</sup> There are two requirements to be considered a prevailing party when a claim is dismissed for ripeness: (1) a material alteration of the legal relationship between the parties, and (2) the relief is judicially sanctioned.<sup>937</sup> The court reasoned that there was not a material alteration of the legal relationship between the parties because the county voluntarily changed its position to open the satellite office.<sup>938</sup> Moreover, the court reasoned that the result was not judicially sanctioned.<sup>939</sup> Because neither requirement was met, the court denied the motion for attorney's fees.<sup>940</sup>

Finally, Michigan appellate courts addressed an interesting quirk in the state constitution's limits on the eligibility for elected office. In *Paquin v. City of St. Ignace*, the petitioning tribal member brought suit against the city after it found him ineligible to run for city council because he was a convicted felon.<sup>941</sup> While serving as chief of police and as an elected member on the Board of Directors of the Sault Tribe of Chippewa Indians,

---

931. *Id.* at \*64–65.

932. *Id.* at \*72.

933. *Bear v. Cty. of Jackson*, 5:14-CV-05059-KES, 2017 U.S. Dist. LEXIS 590, \*2–3 (D. S.D. Jan. 4, 2017).

934. *Id.* at \*3.

935. *Id.* at \*2.

936. *Id.* at \*14.

937. *Id.* at \*4.

938. *Id.* at \*8–9.

939. *Id.* at \*12–13 (“A court mediated agreement is not the same as a judgment on the merits, a consent decree, or a preliminary injunction—all of which involve a measure of court action and potential continued court oversight.”).

940. *Id.* at \*14.

941. *Paquin v. City of St. Ignace*, No. 334350, 2017 Mich. App. LEXIS 1696, \*2–4 (Mich. App., Oct. 19, 2017).

the petitioner was convicted (plead guilty) of conspiracy to defraud the United States related to the misuse of federal funds granted to tribal police departments and was sentenced to serve one year and one day in prison (a felony).<sup>942</sup> The Michigan Constitution makes a person ineligible for elected or appointed office if, in the last twenty years, they have been convicted of a felony involving dishonesty while holding elected office or a position of employment in local, state, or federal government.<sup>943</sup> The district court ruled that under this provision the plaintiff was ineligible.<sup>944</sup>

The plaintiff appealed the decision of the district court; “The issue . . . is whether plaintiff’s employment with a federally recognized sovereign Indian tribe constituted employment in ‘local, state, or federal government,’ for purposes of Const 1963, art 11, § 8. This is an issue of first impression involving the interpretation of a constitutional provision.”<sup>945</sup> The Michigan appellate court upheld the lower court’s determination of ineligibility.<sup>946</sup> It reasoned that the Tribe is a ‘local government’ under the plain meaning of the phrase at the time of the Constitutional provision.<sup>947</sup>

#### U. Water

In 1908, the Supreme Court decided *Winters v. United States* and held that Indians were entitled to reasonable use of water in order to irrigate their lands.<sup>948</sup> The *Winters* doctrine has sparked costly and ongoing litigation between competing water uses for decades and has spurred large settlements between tribes and the United States in recent years.<sup>949</sup> Indian water rights continue to be litigated regularly in both state and federal courts.

The Ninth Circuit held for the first time that *Winters* rights extend to groundwater in *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District*.<sup>950</sup> The court reasoned that the United States reserved for the tribe rights to groundwater when it created the

---

942. *Id.* at \*1–2.

943. *Id.* at \*2–3.

944. *Id.* at \*5.

945. *Id.*

946. *Id.* at \*12–13.

947. *Id.* at \*8–9 (“*Merriam-Webster’s Collegiate Dictionary* (2007), p 730, defines ‘local government’ as: ‘1. the government of a specific local area constituting a major political unit (as a nation or a state).’”).

948. *Winters v. United States*, 207 U.S. 564 (1908).

949. For discussion of just one of these settlements see Erin B. Agee, *In the Federal Government We Trust? Federal Funding for Tribal Water Rights Settlements and the Taos Pueblo Indian Water Rights Settlement Act*, 21 CORNELL J.L. & PUB. POL’Y 201 (2011).

950. *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262, 1270 (9th Cir. 2017).

reservation.<sup>951</sup> The *Winters* doctrine only reserves water to the extent necessary to accomplish the purposes of creating the reservation, but once *Winters* rights are established they vest “on the date of the reservation and [are] superior to the rights of future appropriators.”<sup>952</sup> The court then determined that the primary purpose of the creation of the Agua Caliente reservation envisioned continual water use<sup>953</sup> and that groundwater was appurtenant to the reservation.<sup>954</sup> Finally, the court held that it does not matter that the tribe has not historically tapped groundwater because state water rights are preempted by federal reserved rights, the lack of historical use does not prevent usage of groundwater now, and the right to water does not depend on the tribes need for the water but rather on whether the right to the water was intended to be reserved by Congress.<sup>955</sup>

Unlike the application of *Winters* rights to groundwater, claims to the waters that feed Pyramid Lake have been in the federal courts for several decades. In 2017, the Ninth Circuit issued another opinion in this long running contest of water rights. In *United States v. Board of Directors of the Truckee-Carson Irrigation District*, the court revisited a set of claims by the United States and the Pyramid Lake Paiute Tribe against the irrigation district to recover for water that was willfully diverted in violation of federal law.<sup>956</sup> In this iteration of the proceedings, the lower court denied any recoupment by the tribe for water illegally diverted during 1985–1986.<sup>957</sup> The Ninth Circuit reversed.<sup>958</sup> It reasoned that the lower court misread judicial orders from 1985 and 1986, and that those orders did not prevent the Irrigation District from complying with federal rules and procedures and so the District could not be excused from non-

---

951. *Id.* at 1268 (“The creation of these rights stems from the belief that the United States, when establishing reservations, ‘intended to deal fairly with the Indians by reserving for them the waters without which their lands would have been useless.’”).

952. *Id.*

953. *Id.* at 1270 (“Water is inherently tied to the Tribe’s ability to live permanently on the reservation. Without water, the underlying purpose—to establish a home and support an agrarian society—would be entirely defeated. Put differently, the primary purpose underlying the establishment of the reservation was to create a home for the Tribe, and water was necessarily implicated in that purpose.”).

954. *Id.* at 1271 (“Appurtenance, however, simply limits the reserved right to those waters which are attached to the reservation. It does not limit the right to surface water only. . . . The *Winters* doctrine was developed in part to provide sustainable land for Indian tribes whose reservations were established in the arid parts of the country. And in many cases, those reservations lacked access to, or were unable to effectively capture, a regular supply of surface water. Given these realities. . . . [W]e hold that the *Winters* doctrine encompasses both surface water and groundwater appurtenant to reserved land.”).

955. *Id.* at 1272.

956. *United States v. Bd. of Dirs. of the Truckee-Carson Irrigation Dist.*, No. 16-15507, 2017 U.S. App. LEXIS 17876, at \*3 (9th Cir. Sept. 13, 2017).

957. *Id.* at \*3.

958. *Id.*

compliance by judicial orders.<sup>959</sup> The lower court had also refused to consider the calculations of recoupment submitted by the Tribe and the United States on the basis that they were calculated on a monthly instead of an annualized basis which had been the methodology at trial.<sup>960</sup> The Ninth Circuit reasoned that while that decision would ordinarily be within the broad discretion of the district court, in this case such a decision would prevent an equitable result and therefore ordered those calculations admitted.<sup>961</sup> The Ninth Circuit proceeded to fashion its own equitable remedy. It awarded the United States and the Tribe 8,300 acre feet of water and remanded for an entry of that order with all costs assessed to the Irrigation District.<sup>962</sup>

However not all Indian reservations come with *Winters* rights. In *United States v. Abousleman*, the federal district court entered the recommendation of a magistrate that Pueblos lack *Winters* rights to their lands.<sup>963</sup> The court recognized that the Pueblos actually and exclusively used the water before the arrival of the Spanish, and that to extinguish aboriginal water rights the act of the sovereign must be ‘clear and unambiguous,’ but held that Spanish actions toward the Pueblos met that standard.<sup>964</sup>

Other water rights cases involved the (1) Havasupai Tribe<sup>965</sup> and (2) the Ak-Chin Community<sup>966</sup> having claims dismissed for failure to join the United States as an indispensable party, (3) a challenge by the Crow Creek Sioux was dismissed because even though the United States built a pair of

---

959. *Id.* at \*5.

960. *Id.* at \*6.

961. *Id.* at \*7–8 (“Permitting TCID to escape liability for its repeated violations of federal law because the case is now in a posture that requires the United States and the Tribe to base any request for recoupment on historical—and apparently uncontroverted—data that was admitted for a different purpose at trial plainly contravenes the spirit of *Bell II*.”).

962. *Id.* at \*9.

963. *United States v. Abousleman*, 83cv01041 MV/WPL, 2017 U.S. Dist. LEXIS 164733 at \*4 (D.N.M. Sept. 30, 2017).

964. *Id.* at \*11–12 (“Prior to the arrival of the Spanish, the Pueblos were able to increase their use of public waters without restriction. After its arrival, the Spanish crown insisted on its exclusive right and power to determine the rights to public shared waters. Spanish law plainly provided that the waters were to be common to both the Spaniards and the Pueblos, and that the Pueblos did not have the right to expand their use of water if it were to the detriment of others. Although Spain allowed the Pueblos to continue their use of water, and did not take any affirmative act to decrease the amount of water the Pueblos were using, the circumstances cited by the expert for the United States and Pueblos plainly and unambiguously indicate Spain’s intent to extinguish the Pueblos’ right to increase their use of public waters without restriction and that Spain exercised complete dominion over the determination of the right to use public waters adverse to the Pueblos’ pre-Spanish aboriginal right to use water.”).

965. *Havasupai Tribe v. Anasazi Water Co.*, 321 F.R.D. 351 (D. Ariz. Apr. 18, 2017).

966. *Ak-Chin Indian Cmty. v. Cent. Ariz. Water Conservation Dist.*, No. CV-17-00918-PHX-DGC, 2017 U.S. Dist. LEXIS 117846 (D. Ariz. July 27, 2017).

dams on the Missouri River the tribe was still able to draw all the water it needed,<sup>967</sup> and (4) a court rejected Freeport Minerals Corporation's attempt to change where it was drawing its water from the Gila River.<sup>968</sup> Also in 2017, (5) Nevada tribes lost an appeal seeking to overturn the Bureau of Land Management's approval of the first phase of a plan to divert water from northern part of the state down toward Clark County,<sup>969</sup> (6) the Montana Supreme Court held that non-Indian land owners who bought an allotment that used to be in trust had until 2019 to seek a declaration of water rights to run with that property,<sup>970</sup> and (7) the Ninth Circuit rejected a challenge from the Navajo Nation to the Department of the Interior's guidelines on rights to water from the Colorado River during surplus and shortage years but permitted the tribe's breach of trust claim to move forward.<sup>971</sup>

#### V. *Other Developments*

There were a number of one-off Indian law decisions that did not lend themselves into the development of larger themes covered by section IV but which an annual survey would be remiss if it ignored entirely. This section is intended to capture those one-off themes and provide brief discussion—but thorough and complete citation—for readers who are interested in reading more.

**638 Contracting:** The District of Montana decided a pair of opinions on the eligibility of the Northern Arapaho Tribe to qualify for 638 contracting for its tribal court.<sup>972</sup> The court emphasized the situation is

---

967. *Crow Creek Sioux Tribe v. United States*, 132 Fed. Cl. 408 (Ct. Fed. Claims June 1, 2017).

968. *United States v. Gila Valley Irrigation District*, 859 F.3d 789 (9th Cir. 2017).

969. *Ctr. for Biological Diversity v. U.S. Bureau of Land Management*, No. 2:14-cv-00226-APG-VCF, 2017 U.S. Dist. LEXIS 137089, at \*53–56 (D. Nev. Aug. 23, 2017) (The Goshute tribe argued that BLM had failed to comply with this consultation process in relation to the water diversion. The district court disagreed; it held that the record showed that BLM's field manager, Nevada State Director, BLM's project manager, ethnographer, and associate field manager all had meetings with the tribe over a period of five years. This included at least six meetings on the reservation and resulted in a 137-page cultural resources inventory and a 147-page ethnographic assessment which altogether is a much more detailed consultation process than courts have approved on other projects for compliance with NHPA and shows BLM's good faith effort to include the tribe in its decision making process. The court did not block the first phase of the water diversion project.).

970. *Scott Ranch LLC.*, 402 P.2d 1207, 1211–12 (Mont. 2017).

971. *Navajo Nation v. U.S. Dep't of Interior*, 876 F.3d 1144 (9th Cir. 2017).

972. *Northern Arapaho Tribe v. LaCounte*, CV-16-11-BLGS-BMM; CV-16-60-BLGS-BMM (Consolidated), 2017 U.S. Dist. LEXIS 32350 (D. Mont. Mar. 7, 2017) (While negotiations are still ongoing the issues raised by the Northern Arapaho were not ripe for review); *Northern Arapaho Tribe v. LaCounte*, CV-16-11-BLG-BMM; CV-16-60-BLG-BMM, 2017 U.S. Dist. LEXIS 97525 (D. Mont. June 22, 2017) (The Northern Arapaho argued that a 638 court operated only by the NAT could still serve Eastern Shoshone by asserting criminal jurisdiction over them and opening its court's jurisdiction to civil actions filed by Eastern Shoshone members. The federal court remanded to Interior

particularly complicated because while the Wind River Reservation is treated as one reservation, there are two different tribes that maintain separate tribal governments and services (Eastern Shoshone & Northern Arapaho).<sup>973</sup> The Eastern Shoshone ended their support for a unified court and asked Interior to reinstate a CFR court while the Northern Arapaho sought to continue to operate its tribal court under a 638 contract.<sup>974</sup>

§ 1983 Claims: In *Morales-Alfonso v. Francisco Enterprises*, the District of Arizona clarified that the scope of 42 U.S.C. § 1983 does not extend to parties acting under the color of tribal law.<sup>975</sup> The plaintiff brought several claims against Tohono O’odham officials alleging he was treated poorly and forced to leave while attempting to trade at a swap meet.<sup>976</sup> His complaint alleged that his poor treatment was because of “racial/ethnic troubles with the staff” and that he was told “in Indian territory you have no rights.”<sup>977</sup> The Court dismissed his 1983 claims because the statute does not apply to a defendant acting under color of tribal law.<sup>978</sup>

Attorney Qualifications: In *Rose v. Office of Professional Conduct* the Utah Supreme Court upheld the disbarment of plaintiff Susan Rose for violations of Utah’s Rules of Professional Conduct which occurred in federal and tribal (Navajo) courts.<sup>979</sup> Plaintiff objected, arguing that the state should not be able to sanction her for activity that occurred outside of state courts.<sup>980</sup> The Utah Supreme Court held that it has jurisdiction over all lawyers licensed by the state regardless of where they practice; “[t]he question of whether we have jurisdiction over Rose’s discipline case is different from whether we would have had jurisdiction to hear the underlying case. We do not have jurisdiction to hear an Alaskan divorce case; we do, however, have jurisdiction over a Utah attorney who commits a breach of the rules of professional conduct while practicing in

---

to consider these arguments when determining NAT’s eligibility for a 638 contract for judicial services).

973. Northern Arapaho Tribe v. LaCounte, 2017 U.S. Dist. LEXIS 32350, at \*3–4; Northern Arapaho Tribe v. LaCounte, 2017 U.S. Dist. LEXIS 97525m at \*3–4.

974. *Id.* at \*4–5. Both decisions discuss the problems that emerge when two different federally recognized tribes, that maintain two separate tribal governments, share a single reservation.

975. *Morales-Alfonso v. Francisco Enters.*, CV 15-0200-TUC-JAS (LAB), 2017 U.S. Dist. LEXIS 69058 (D. Ariz. May 4, 2017).

976. *Id.* at \*2.

977. *Id.*

978. *Id.* at \*5.

979. *Rose v. Office of Prof’l Conduct*, 2017 UT 50 (Utah 2017).

980. *Id.* ¶ 68 (“Rose seems to believe that because she practiced in federal and Navajo courts, the State of Utah has no business basing sanctions upon violations of the Utah Rules of Professional Conduct that are alleged to have occurred there. She calls our jurisdiction in this case an invasion of ‘US and [Navajo Nation] sovereignty.’”).

Alaska.”<sup>981</sup> The Court accordingly affirmed petitioner’s disbarment for violating its rules of professional conduct while practicing in federal and Navajo courts.<sup>982</sup>

Bad Men Among the Whites: The Treaty of Fort Laramie has an interesting provision in it which makes the United States liable for actions committed by ‘bad men among the whites.’<sup>983</sup> This provision has been cited in more than forty cases over the years and had a substantial impact in one important case decided by the Federal Circuit in 2017. In *Jones v. United States* Utah state police attempted to stop a car near but not on the reservation.<sup>984</sup> The car turned onto the reservation and stopped about 25 miles inside the reservation borders.<sup>985</sup> The driver and passenger split up and the driver was apprehended without incident.<sup>986</sup> State police officers testified that after being cornered, and after shots had been exchanged, the passenger turned his gun on himself and fired.<sup>987</sup> State officers handcuffed the passenger but provided no medical assistance.<sup>988</sup> The passenger was still alive thirty minutes later when an ambulance arrived, but was pronounced dead upon arriving at a medical center.<sup>989</sup> The medical examiner found a bullet had entered from the back of the head and found no soot on the passenger’s hands, but declared it a suicide; although the medical examiner later testified that he could not rule out an execution style shot.<sup>990</sup> No autopsy was performed and an illegal gun found near the body was destroyed by the FBI.<sup>991</sup> Plaintiffs filed suit alleging the United States was responsible for the actions of federal and local officials in the murder and subsequent cover up of the Indian passenger under the Treaty of 1868.<sup>992</sup>

The Federal Circuit vacated the Court of Federal Claims order dismissing the claims, concluding that the plaintiff’s complaint alleged a

---

981. *Id.* ¶ 70.

982. *Id.* ¶ 104.

983. *Jones v. United States*, 846 F.3d 1343, 1348 (Fed. Cir. 2017) (In the 1868 Treaty the United States agreed that no persons but those authorized by the government “shall ever be permitted to pass over, settle upon, or reside in the Territory described in this article” and that “[i]f bad men among the whites or among other people, subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will . . . proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.”).

984. *Id.* at 1346.

985. *Id.*

986. *Id.*

987. *Id.*

988. *Id.*

989. *Id.*

990. *Id.* at 1347.

991. *Id.*

992. *Id.* at 1350.

plausible case for recovery.<sup>993</sup> It held that the treaty's provision applies only to criminal wrongs because the United States was to "arrest" the alleged wrongdoers.<sup>994</sup> The Court remanded to the Court of Federal Claims to determine whether the wrongs alleged by the plaintiff would subject the accused members of law enforcement to arrest under "the law of the United States."<sup>995</sup> It clarified that those "wrongs" need not necessarily be affirmative acts, but that omissions could constitute wrongs if failing to act could have necessitated violent retaliation and asked the lower court to conduct a more thorough review.<sup>996</sup> Finally, the Court went on to discuss the geographic scope of the treaty provision and concluded that wrongs begun on the reservation but continuing elsewhere (like at the medical center) fall within the scope of the treaty provision.<sup>997</sup>

Cultural Property: There were several cases decided involving tribal cultural property in 2017. In *Round Valley Indian Tribes of California v. United States Department of Transportation* tribal plaintiffs sued the Department for failure to consult under NHPA and NEPA before commencing a highway project which could destroy ancestral, cultural, and archeological resources.<sup>998</sup> The district court allowed litigation to continue holding that the plaintiffs had stated a demand for relief sufficient to survive a motion to dismiss.<sup>999</sup> In *Roskelly v. Washington State Parks & Recreation Commission* a divided state appellate court allowed 279 acres of Mount Spokane State Park to be opened for recreational skiing despite its central importance to the religion of local tribes.<sup>1000</sup> The dissent would have found the Commission's decision arbitrary and capricious because the Department of Archeology and Historic Preservation had classified Mount Spokane as traditional cultural property.<sup>1001</sup> Finally, in *Caddo*

---

993. *Id.* at 1359.

994. *Id.* at 1355–56.

995. *Id.* at 1357.

996. *Id.* at 1357–59.

997. *Id.* at 1359–61 (“[Plaintiff] does not argue that the bad men provision is unlimited in geographic scope, but argues that a wrong committed on reservation land and continuing off-reservation land is cognizable. We agree with this general principle.”).

998. *Round Valley Indian Tribes of Cal. v. United States DOT*, No. 15-cv-04987-JSW, 2017 U.S. Dist. LEXIS 34923, at \*3–4 (N.D. Cal. Mar. 10, 2017).

999. *Id.* at \*21–22.

1000. *Roskelly v. Wash. State Parks & Rec. Comm’n*, No. 48423-4-II, 2017 Wash. App. LEXIS 747, at \*1–2 (Wash. App. Mar. 28, 2017).

1001. *Id.* at \*38–43 (“As a singular peak, Mount Spokane is a significant landscape feature for Native American tribes. Mount Spokane was and is used by tribal elders and others for gathering traditional plants, including bear grass, huckleberries and serviceberries. Tribal elders report that some berries taste sweeter on the higher elevations of the mountain. Western red-cedar, which grows within the PASEA, is sacred to the tribes; its bark and bows are used for ceremonies and in medicine. The Spokane Tribe has been intimately connected to Mount Spokane for as long as oral history recounts. For the Spokane Tribe, the significance of Mount Spokane includes: the location of a creation myth;

*Nation of Oklahoma v. Wichita & Affiliated Tribes* the Caddo Nation challenged the construction of a tribal history center on the basis that it may disrupt the remains of Caddo children who had attended a nearby Indian school.<sup>1002</sup> The Tenth Circuit ultimately dismissed the challenge as moot because the tribal history center had completed its construction and so there was no further danger of disruption of tribal burial grounds.<sup>1003</sup>

**Divorce:** In *Horning v. Horning*, the Alaska Supreme Court reversed a decision of the superior court that did not value or assign health care benefits between the parties in a divorce.<sup>1004</sup> Instead the superior court equated the wife's eligibility for healthcare from the Indian Health Service to the husbands earned benefits through the military's TRICARE program.<sup>1005</sup> The wife appealed, arguing that her IHS benefit is separate property but her husband's military benefits are marital property subject to equitable distribution.<sup>1006</sup> The Supreme Court of Alaska agreed.<sup>1007</sup> It held that healthcare benefits, including TRICARE, are marital property to the extent the benefits are earned during marriage but that the wife's "eligibility to receive IHS healthcare was [ ] acquired before marriage and is separate property."<sup>1008</sup> The court remanded for proper distribution of marital property.<sup>1009</sup>

**Equal Protection:** In *Cole v. Oravec*, a Crow tribal member was shot and killed by a non-Indian on the reservation.<sup>1010</sup> The FBI investigated and declared it a non-crime, which foreclosed some statutory benefits for the victim's family.<sup>1011</sup> The family of the deceased brought suit against the government alleging a violation of their equal protection rights.<sup>1012</sup> The district court dismissed the claim for lack of standing.<sup>1013</sup> The Ninth Circuit reversed; "[W]hen the government imposes a discriminatory barrier making it more difficult for members of a group to obtain a

---

a vision quest and prayer site; an important hunting and gathering location for first foods and medicinal plants; and a territorial marker.").

1002. *Caddo Nation v. Wichita & Affiliated Tribes*, 877 F.3d 1171, 1775 (10th Cir. 2017).

1003. *Id.* at 1177 ("We thus constrain our analysis to the relief Caddo Nation sought below: a temporary restraining order on construction of the History Center.").

1004. *Horning v. Horning*, 389 P.3d 61 (Alaska 2017).

1005. *Id.* at 63.

1006. *Id.*

1007. *Id.* at 64.

1008. *Id.*

1009. *Id.* at 65.

1010. *Cole v. Oravec*, No. 14-35664, 700 Fed. Appx. 602, 603–04 (9th Cir. 2017).

1011. *Id.* at 604.

1012. *Id.* ("[t]he Bearcrane Family Members alleged that Defendants' conduct has caused them to suffer several distinct injuries. They claimed that they receive fewer and less-adequate law enforcement services and are therefore less secure than other citizens, which has severely impacted them, both emotionally and economically.").

1013. *Id.*

benefit . . . , the injury of unequal opportunity to compete confers standing.”<sup>1014</sup> The court went on to determine that the complaint alleged a plausible violation of equal protection rights because it showed a higher rate of crime committed against Native Americans than non-Native Americans, alleged that the FBI has abdicated its responsibility to investigate crimes involving Indian victims, found that the FBI regularly destroys relevant evidence involving reservation crime, and concluded that the Montana field office regularly closes cases involving Indian victims without investigating.<sup>1015</sup> It remanded the case for further proceedings.<sup>1016</sup>

Federal Courts are not Tribal Appellate Courts: There were a series of cases in 2017 in which petitioners in federal actions tried to use federal courts to review the merits of tribal court decisions interpreting tribal law. None of these attempts were successful as federal courts are not tribal appellate courts. In *Eagleman v. Rocky Boy Chippewa-Cree Tribal Business Committee or Council* three tribal members originally filed common law claims in tribal court against the tribal housing authority.<sup>1017</sup> The tribal court dismissed the claims on the basis of sovereign immunity.<sup>1018</sup> The plaintiffs then filed suit in federal court seeking a declaratory judgment that the tribal court erred in dismissing their claims.<sup>1019</sup> The Ninth Circuit affirmed the dismissal of plaintiff’s petition.<sup>1020</sup> The Ninth Circuit went on to discuss the relationship between tribal and federal courts.

The Eaglemans essentially ask the district court to sit as a general appellate body to review the decision of the tribal court. This misconprehends the relationship between the federal government and Indian tribes. Tribal courts are not vertically aligned under the federal judicial hierarchy. They are institutions within coordinate sovereign entities vested with the power to regulate internal tribal affairs. Asserting jurisdiction here would effectively expand this court’s authority to superintend matters of tribal self-governance.

---

1014. *Id.* at 604–05.

1015. *Id.* at 605–06.

1016. *Id.* at 606.

1017. *Eagleman v. Rocky Boy Chippewa-Cree Tribal Bus. Comm. or Council*, 699 Fed. Appx. 599 (9th Cir. 2017).

1018. *Id.* at 600.

1019. *Id.*

1020. *Id.* at 601 (The Court used the well-pled complaint rule to dismiss the plaintiff’s claim. “Under the well-pleaded complaint rule, a claim must actually arise under federal law to trigger jurisdiction under § 1331. A litigant may not plead his way into federal court by asserting an opposing party’s federal defense. Here, tribal sovereign immunity arose as a defense in tribal court, and the allegation that the tribal court erred in applying the defense is not a question ‘arising under’ federal law for purposes of § 1331.”) (internal citations omitted).

And because we lack general appellate power over the tribal court, we would be unable to afford effective relief to the Eaglemans even if we determined that the tribal court erred.<sup>1021</sup>

The Ninth Circuit's summary is a concise description of the interaction between federal and tribal courts. Two other federal district courts also had to dismiss appeals from tribal courts, clarifying that the same principle articulated in *Eagleman* that federal courts cannot reinterpret tribal law.<sup>1022</sup>

Indian Health Service: While 2017 brought with it many claims that involved the Indian Health Service (IHS), one case stood out for its importance in discussing the interaction between the Affordable Care Act and the provision of health care in Indian Country. In *Redding Rancheria v. Hargan* plaintiff Redding Rancheria, a federally recognized Indian tribe, brought a claim against the Department of Health and Human Services (HHS) seeking reimbursement for health services provided under a compact with HHS under the Indian Self-Determination and Education Assistance Act (ISDEAA).<sup>1023</sup> The defendants have consistently refused reimbursement because they dispute the legitimacy of the tribe's coordination of a tribal insurance scheme with IHS benefits and the federal agency is prohibited from making the reimbursements under the Indian Health Care Improvement Act as amended by the Affordable Care Act.<sup>1024</sup> The federal district court concluded that HHS's interpretation of the IHCA was inconsistent with the plain meaning of the statute and remanded back to IHS administrative courts for further proceedings consistent with the opinion.<sup>1025</sup>

Labor & Employment: Indian employment law cases often involve whether the tribe is bound by state or federal labor rules. In *County of Riverside v. Workers' Compensation Appeals Board* the county appealed

---

1021. *Id.* (internal citations omitted).

1022. *Lesperance v. Sault Ste. Marie Tribe of Chippewa Indians*, 259 F. Supp. 3d 713, 719 (W.D. Mich., 2017) ("When a tribe enacts a waiver of sovereign immunity, does the federal court have jurisdiction to interpret it, either in an original action, or on review from a tribal court decision? The Court believes the answer is 'no,' at least in this case. There is no diversity of citizenship. Neither is there a general federal question presented by the scope and application of a tribal sovereign immunity ordinance . . . . Finally, even if some basis for original subject matter jurisdiction existed, there would still be no basis for this Court to exercise what would amount to appellate review of a tribal court decision."); *Wilson v. Umpqua Indian Dev. Corp.*, No. 6:17-cv-00123-AA, 2017 U.S. Dist. LEXIS 101808, at \*8 (D. Or. June 29, 2017) ("But 'jurisdiction' is not a magic word that automatically creates a federal question in the Indian law context. Rather, whether a dispute about the extent of a tribal court's jurisdiction raises a federal question depends on the source of the limitation on jurisdiction. Here, the Tribal Court dismissed based on a jurisdictional limitation imposed by *tribal law*.").

1023. *Redding Rancheria v. Hargan*, No. 14-2035 (RMC), 2017 U.S. Dist. LEXIS 184061 at \*2 (D.D.C., Nov. 7, 2017).

1024. *Id.* at \*2-3.

1025. *Id.* at \*36-37.

from a determination that it was liable for a former employee's injury.<sup>1026</sup> The state appellate court affirmed, reasoning that the county was liable because the employee's last employer was the Pauma Band of Luiseno Indians.<sup>1027</sup> Therefore, under state law, the last employer with workers' compensation coverage becomes liable and since the tribe was not obligated to carry coverage, the county was left with the obligation.<sup>1028</sup>

In *Unite Here International Union v. Shingle Springs Band of Miwok Indians*, the Union brought suit to compel arbitration with the tribe over a claim that the tribe interfered with labor organization activity at the casino.<sup>1029</sup> The court determined that it was appropriate for the parties to arbitrate about whether their dispute was subject to arbitration.<sup>1030</sup> At the same time the federal court declined to proceed with a separate claim brought by the Tribe under the Declaratory Judgment Act, deferring instead to arbitration.<sup>1031</sup>

Lay Advocates: Many tribes permit persons without a law degree, but trained as lay advocates, to appear before them to represent clients. This can cause confusion in the state and federal court systems. The issue of tribal lay-advocates was at the center of *United States v. Sanchez*.<sup>1032</sup> In *Sanchez*, the defendant was charged with a first degree murder that occurred on the Crow reservation.<sup>1033</sup> After being arrested, the defendant asked for an attorney and then specifically asked by name for a tribal advocate.<sup>1034</sup> The BIA Agents clarified that the advocate was not an attorney and confirmed that the advocate was who the defendant wanted to represent him.<sup>1035</sup> The defendant subsequently moved to suppress the

---

1026. *County of Riverside v. Workers' Comp. Appeals Bd.*, 10 Cal. App. 5th 119, 122 (Cal. App. 2017).

1027. *Id.* at 128 (“[T]he fact that the Pauma Police Department is not subject to the WCAB’s jurisdiction means the department was not ‘insured for workers’ compensation coverage or an approved alternative thereof.’”).

1028. *Id.*

1029. *Unite Here Int’l Union v. Shingle Springs Band of Miwok Indians*, No. 2:16-cv-00384-TLN-EFB, 2017 U.S. Dist. LEXIS 108179 at \*1 (E.D. Cal. July 12, 2017).

1030. *Id.* at \*5–6 (“At bottom, ‘a broad arbitration clause—even one that does not specifically mention *who* decides arbitrability—is sufficient to grant the arbitrator authority to decide his or her own jurisdiction.’ . . . Thus, the parties have reserved for the arbitrator the question of arbitrability. The Court is ‘divested of [its] authority and [the] arbitrator will decide in the first instance whether [this] dispute is arbitrable.’”).

1031. *Shingle Springs Band of Miwok Indians v. Unite Here Int’l Union*, No. 2:16-cv-01057-TLN-EFB, 2017 U.S. Dist. LEXIS 108152 at \*3–4 (E.D. Cal. July 12, 2017).

1032. *United States v. Sanchez*, CR 16-82-BLG-SPW-1, 2017 U.S. Dist. LEXIS 1553 (D. Mont. Jan. 5, 2017).

1033. *Id.* at \*1.

1034. *Id.* at \*2–5.

1035. *Id.* at \*3.

statements he made to law enforcement as a violation of his Fifth and Sixth Amendment rights.<sup>1036</sup>

The court concluded that the statements were admissible.<sup>1037</sup> Specifically the court held that the defendant's request for the advocate was not "an unambiguous request for an attorney because [the defendant] maintained he wanted to speak with [the tribal advocate] after the agents clarified that [the tribal advocate was] not an attorney."<sup>1038</sup> Accordingly, the court reasoned, a reasonable agent would not have understood the defendant's request to be for a lawyer because the defendant clarified that he wanted the advocate after being informed that the advocate was not an attorney.<sup>1039</sup>

Navajo-Hopi Settlement Act: In 2017, federal courts decided four challenges to the denial of relocation benefits by the Office of Navajo & Hopi Indian Relocation. In *Laughter v. Office of Navajo & Hopi Indian Relocation* and *Bahe v. Office of Navajo & Hopi Indian Relocation*, the court affirmed the denial because there was documented evidence which contradicted family testimony about the dates and times of settlement.<sup>1040</sup> In *Burnside v. Office of Navajo & Hopi Indian Relocation*, the court affirmed the denial of benefits to three separate claimants who had waited between five and ten years to appeal even after the Office had issued Policy Memorandum 9 permitting appeals from previous denials.<sup>1041</sup> In *Begay v. Office of Navajo & Hopi Indian Relocation*, the court reversed the denial of benefits and remanded.<sup>1042</sup> It reasoned that the evidence suggested that the claimant may have been a resident on the partitioned lands on December 22, 1974, as required by law<sup>1043</sup> and may have earned enough money to qualify as head of household.<sup>1044</sup> It remanded with instructions to verify the claimant's income in 1984 and ensure it was at least \$1,300 in order to qualify under the law.<sup>1045</sup>

Rights-of-Way: Courts decided many cases dealing with access to and across tribal lands in 2017, from oil and gas companies to utilities. The

---

1036. *Id.* at \*1.

1037. *Id.* at \*6–10.

1038. *Id.* at \*6.

1039. *Id.* at \*7–8.

1040. *Laughter v. Office of Navajo & Hopi Indian Relocation*, No. CV-16-08196-PCT-DLR, 2017 U.S. Dist. LEXIS 101116 (D. Ariz. June 29, 2017); *Bahe v. Office of Navajo & Hopi Indian Relocation*, No. CV-17-08016-PCT-DLR, 2017 U.S. Dist. LEXIS 212562 (D. Ariz. Dec. 28, 2017).

1041. *Burnside v. Office of Navajo & Hopi Indian Relocation*, No. CV-15-08233-PCT-PGR, 2017 U.S. Dist. LEXIS 158804 (D. Ariz. Sept. 27, 2017).

1042. *Begay v. Office of Navajo & Hopi Indian Relocation*, No. CV-16-08221-PCT-DGC, 2017 U.S. Dist. LEXIS 159648 (D. Ariz. Sept. 28, 2017).

1043. *Id.* at \*11–12.

1044. *Id.* at \*7–9.

1045. *See id.* at \*11.

most notable case came from the Tenth Circuit. In *Public Service Co. of New Mexico v. Barboan*, the public utility sought to condemn a right-of-way for electrical lines against five parcels owned by the Navajo Nation and its members after they withheld consent.<sup>1046</sup> The district court held that on two of the parcels the Navajo Nation itself now holds an interest and that 25 U.S.C. § 357 does not permit condemnation of an interest held by the tribal sovereign.<sup>1047</sup> The Tenth Circuit affirmed.<sup>1048</sup> The Tenth Circuit pointed to the difference between 25 U.S.C. § 357 which allows for condemnation against Indian allotments and 25 U.S.C. § 319 which allows the Secretary to grant rights-of-way across reservations for the limited purpose of telephone and telegraph lines.<sup>1049</sup> The utility argued that once land was allotted it remained always allotted even if the tribe were to obtain the entirety of the interest.<sup>1050</sup> The Tenth Circuit disagreed: “Congress has neither enacted nor amended § 357 to establish that ever-allotted status would permanently trump any later tribal acquisitions.”<sup>1051</sup> The Court reasoned that the amount of interest owned by the tribe does not matter, any tribal interest is enough to prevent condemnation proceedings.<sup>1052</sup>

Tobacco: In *Ho-Chunk Inc. v. Sessions*, the plaintiff, a corporation organized by the Winnebago Tribe of Nebraska, challenged the application of the recordkeeping requirements of the Contraband Cigarette Trafficking Act (CCTA) to tribal businesses.<sup>1053</sup> It filed a claim in federal court seeking a declaratory judgment that the recordkeeping requirements of CCTA do not apply in ‘Indian country’ and alternatively that tribal businesses, as instrumentalities of tribal government, are not ‘persons’ covered by the Act.<sup>1054</sup> The court rejected both arguments.<sup>1055</sup> It concluded that 2006 amendments to CCTA that specifically exclude imposing new *reporting* requirements on tribes were not retroactive and that the original

---

1046. *Public Serv. Co. of N.M. v. Barboan*, 857 F.3d 1101, 1104 (10th Cir. 2017).

1047. *Id.* at 1107.

1048. *Id.* at 1104.

1049. *Id.* at 1105–07 (The Tenth Circuit made clear “‘a plain and clear distinction’ exists ‘between the granting of rights-of-way over and across reservations or tribal lands and those allotted in severalty to restricted Indians.’”).

1050. *Id.* at 1109.

1051. *Id.*

1052. *Id.* at 1110–11 (“When all or part of a parcel of allotted land owned by one or more individuals is transferred to the United States in trust for a tribe; that land becomes ‘tribal land’ not subject to condemnation under § 357.”).

1053. *Ho-Chunk Inc. v. Sessions*, 253 F. Supp. 3d 303, 304 (D.D.C., 2017).

1054. *Id.* at 306–07.

1055. *Id.* at 307–10.

*recordkeeping* requirements under CCTA do still apply in Indian country.<sup>1056</sup>

Treaty Abrogation: In *Swinomish Indian Tribe Cmty. v. BNSF Railway. Co.*, the Court was asked to determine whether the Swinomish Tribe's right to exclusive use of its reservation guaranteed in the Treaty of Point Elliott of 1855 (and thus the right to exclude a railroad from operating a rail line crossing the reservation without its consent) had been abrogated by the Interstate Commerce Commission Termination Act of 1995 (ICCTA).<sup>1057</sup> The federal court reiterated the Supreme Court's requirement for preemption that abrogation can only be found if there is clear evidence of Congress' intent to abrogate.<sup>1058</sup> The court concluded that "[t]here is no such evidence in this case."<sup>1059</sup> The court reasoned that Congress had acted to specifically protect Indian authority over railroads in the Indian Right of Way Act (IRWA) and that ICCTA and IRWA act in different spheres and are not mutually exclusive.<sup>1060</sup> The Court recognized that it is unclear whether Congress considered the conflict between the statutes, but that even if it did "[i]t most certainly did not make clear an intention to resolve potential conflicts by abrogating the treaty right of 'exclusive use' or repealing the IRWA."<sup>1061</sup> The Court reaffirmed this conclusion in relation to the Treaty of Point Elliott explicitly in a subsequent order from June 2017.<sup>1062</sup>

---

1056. *Id.* at 308–09 (The CCTA amendments "clarif[y] that '[n]othing in this chapter shall be deemed to abrogate or constitute a waiver of any sovereign immunity of a State or local government, or an Indian tribe against any unconsented lawsuit under this chapter.' Plaintiffs argue that reading 'State' to include Indian country under the recordkeeping regulations somehow violates this latter provision, because it encroaches on 'tribal sovereignty.' But 'sovereign immunity' is a term of art, and in this context it is clearly a reference to tribes' general immunity from suit, not a broader policy statement regarding the autonomy of Indian government and lands.") (internal citations omitted).

1057. *Swinomish Indian Tribe Cmty. v. BNSF Ry. Co.*, 228 F. Supp.3d 1171 (W.D. Wash. Jan. 13, 2017). Additional discussion of this case is available under the "Trespass" section of this annual update.

1058. *Id.* at 1181 ("What is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.") (internal citations omitted).

1059. *Id.*

1060. *Id.* at 1181–82.

1061. *Id.* at 1181.

1062. *Swinomish Indian Tribe Cmty. v. BNSF Ry. Co.*, No. C15-0543RSL, 2017 U.S. Dist. LEXIS 88449 (W.D. Wash. June 8, 2017) ("The Treaty of Point Elliott is not mentioned in the ICCTA, nor is any treaty or agreement with Indian nations. The fact that rail lines cross tribal lands throughout the United States was known at the time the ICCTA was passed, as were the tribe's treaty rights to exclusive use of those lands. Yet Congress expressly addressed the intersection of railroad rights of way and tribal lands only through the IRWA, a statute which pre-dated the ICCTA by almost half a century. Under the IRWA, if an individual or entity uses tribal lands without obtaining the necessary permissions, the unauthorized use is a trespass and the Tribe 'may pursue any available remedies under applicable law. . . .' 25 C.F.R. § 169.413. Thus, the congressional pronouncement that specifically

Trespass: In *Davilla v. Enable Midstream Partners*, plaintiffs were 38 individual Indians and the Kiowa Tribe of Oklahoma who own undivided interests in an allotment under which the defendant has a gas pipeline.<sup>1063</sup> The easement agreement expired in 2000 and the defendant has been unable to obtain consent for a renewal but has continued to use the pipeline.<sup>1064</sup> Plaintiffs brought an action for trespass, seeking damages and an injunction preventing its future use. The court, relying in part on 25 U.S.C. § 324 held that although the defendant was able to obtain consent from five of the individual Indian landowners, their collective interest was less than 10% of the whole and so there was no consent to the trespass.<sup>1065</sup> The court granted the tribe's motion for partial summary judgment as to liability for the trespass, issued an injunction immediately enjoining the defendant from using the pipeline, and ordered its removal within six months.<sup>1066</sup>

#### CONCLUSION

The year 2017 was an interesting one for Indian law. As the year ends, we have three cases pending this term in front of the Supreme Court and several others awaiting a decision on certiorari.<sup>1067</sup> The Court delivered its newest pronouncement on sovereign immunity, encouraging the development of a canon of Indian law which will now look more closely to determine the real party in interest in a lot of litigation involving tribal officials.<sup>1068</sup> Justice Thomas issued a lone dissent on the scope of the Indian Commerce Clause.<sup>1069</sup>

It is my hope that the reader takes something away from this summary of the year in Indian law. Whether you have stumbled across this article in 2018 or 2028 there is certainly something important about trying to collect and synthesize the year's developments. I note that while this piece contains a discussion of, and citation to, many of the cases decided this year – many others have been omitted at the author's discretion and for the sake of space. I welcome any comments on how this project could be improved or be made more useful for future iterations.

---

addresses tribal rights vis-a-vis a railroad right of way leaves intact the Tribe's right to pursue a treaty-based trespass action under federal law.").

1063. *Davilla v. Enable Midstream Partners*, 247 F. Supp. 3d 1233, 1235 (W.D. Okla., 2017).

1064. *Id.*

1065. *Davilla*, 247 F. Supp. 3d at 1237–38.

1066. *Id.* at 1238–39.

1067. See *supra* Section III.

1068. See *Lewis v. Clarke*, 137 S. Ct. 1285 (2017).

1069. See *Upstate Citizens for Equality v. United States*, 199 L. Ed. 2d 372 (2017).