Indian Law Litigation Update

California Indian Law Association Conference
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Overview

- Focus on:
  - Pending Supreme Court cases
  - Major Ninth Circuit decisions
  - Particularly significant federal appellate decisions outside the Ninth Circuit
  - California decisions
- This is an attempt to hit the major points, but hard to cover everything of significance in 30 minutes.

The Big Cases (Current Supreme Court term)

- To be decided this Term:
  - Dollar General Corp. v. Mississippi Band of Choctaw Indians (tribal civil jurisdiction)
  - Nebraska v. Parker (diminishment)
  - Menominee Indian Tribe of Wisconsin v. U.S. (equitable tolling of Indian Self-Determination Act claims)
- Vacated and remanded January 2015:
  - Knight v. Thompson (religious practices in prison)

Dollar General Corp. v. Mississippi Band of Choctaw Indians

- Facts:
  - Dollar General leased a parcel of tribal trust land from the tribe and sought a tribal license for the operation of its store.
  - Dollar General then agreed to participate in tribal job training program under which young tribe members worked in unpaid positions to gain skills.
  - Thirteen-year-old tribe member alleges he was molested by Dollar General store manager while participating in the program.
  - The young tribe member sued manager and Dollar General (on vicarious liability theory) in tribal court seeking compensatory and punitive damages of $2.5 million.
- Legal issues:
  - Fifth Circuit affirmed 2-1 the district court's position that the tribe had jurisdiction under the *Montana* "consensual relationships" exception (746 F.3d 167).
  - Dollar General has taken the position that exception is met only where consent is "unambiguous."
  - Choctaw have argued that exception is satisfied based on Dollar General's activities.
  - An underlying issue is whether the *Montana* framework applies on tribal trust land at all and whether the Court will address this.

Nebraska v. Parker

- Facts
  - Establishments selling alcohol in Pender, Nebraska sought declaratory and injunctive relief from enforcement of Omaha Tribe's Beverage Control Ordinance, enacted in 2006, including liquor license provisions and 10% sales tax.
  - 1882 Act ratified agreement for sale of Omaha tribal land to non-Indians.
- Legal issues
  - Question: Did 1882 Act diminish the reservation, rendering it no longer Indian country?
  - Eighth Circuit 3-0 affirmed district court's judgment that it did not (774 F.3d 1166).
  - Court considered diminishment factors:
    - No "cede" or "sum certain" language in 1882 Act; proceeds of sales were to be held in trust for the tribe's benefit.
    - Legislative history suggested that Congress's primary concern was to sell land quickly to non-Indian farmers and to compensate tribe, and that Congress envisioned that tribe members and non-Indians might own adjoining land.
    - Factors of Congress's subsequent treatment of area and current demographics of area were inconsistent and thus non-dispositive.
      - The lower courts also found these factors to be less important.
  - Petitioners argue that court should have given more weight to later treatment and demographics given ambiguity of first two factors.

Menominee Indian Tribe of Wisconsin v. U.S.

- Facts
  - Claim for breach of a self-determination contact between a tribe and a federal agency must be filed with the agency within 6 years of accrual.
  - Tribe filed suit against DHHS in 2005 for claims that accrued from 1996-1998.
- Law
  - Is tribe entitled to equitable tolling because an "extraordinary circumstance" prevented timely filing, as discussed in *Holland v. Florida* (2010)?
  - Tribe argued yes, because it mistakenly believed that it would be entitled to class-action tolling and because it believed that adverse precedent (later reversed) would have made filing futile.
  - D.C. Circuit (764 F.3d 51) found unanimously that tribe's delay was because of "inauspicious legal judgments" rather than extraordinary circumstances.
  - Tribe seeks review based on argument that D.C. Circuit's narrow construction of *Holland* is at odds with Federal Circuit's more generous approach in *Arctic Slope Native Ass'n v. Sebelius*, where court was more sympathetic to tribe's reaction to an uncertain legal climate and weighed the unique nature of federal-tribal relationship in favor of tolling.

Knight v. Thompson

- Eleventh Circuit rejected challenge by Native American prisoners to prison policy requiring male inmates to have hair "off neck and ears."
  - Despite acknowledging religious significance of long hair, the court found the policy to be supported by compelling safety interests, where there was evidence of 1) an escaped prisoner cutting hair to change his appearance; 2) prisoners from hiding weapons or contraband in their hair, and 3) a black widow spider nesting in long hair (!).
- In *Holt v. Hobbs*, decided January 20, 2015, the Court held 9-0 that a prison policy requiring closely trimmed beards infringed a Muslim inmate's religious rights.
  - Among justifications for policy that court rejected was the argument that it was needed to prevent hiding contraband.
  - The Court cautioned against "unquestioning deference" to prison officials' stated justifications for a policy.
  - Holt planned, however, to grow a beard that would be only one-half inch long.
- USSC vacated and remanded for reconsideration in light of *Holt v. Hobbs* on January 26, 2015.
- Following remand, Eleventh Circuit opinion (797 F.3d 934) issued August 5, 2015.
  - Despite *Holt*, the Eleventh Circuit panel reinstated prior opinion with minor revisions and the same result.
  - The Court found that in this case, the district court's factual findings supported the view that long hair was a security concern.

A Roundup of Circuit Court cases

(with focus on 9th Circuit and a few other significant cases)

IGRA cases:

- Big Lagoon Rancheria v. State of California, 789 F.3d 947 (9th Cir.)
  - En banc Ninth Circuit decision, reversing panel
  - Big Lagoon Rancheria sought to build casino resort on land purchased in 1994 and taken into trust by BIA.
  - California refused to negotiate, claiming that land transfer was invalid under *Carcieri* because Big Lagoon was not federally recognized until 1979.
  - Ninth Circuit rejected California's position as "end run" given that Administrative Procedure Act was proper avenue for challenge to BIA action and California had failed to make such a challenge within the APA's six-year statute of limitations.
- Idaho v. Coeur D'Alene Tribe, 2015 WL 4461055 (9th Cir.)
  - Ninth Circuit sustains injunction against tribe offering Texas Hold 'Em poker at its casino
  - Hold 'Em is not Class II because Idaho constitution prohibits games like poker and exception for contests of skill does not apply.
  - Court reads tribal-state compact to abrogate sovereign immunity in this situation.
- Oklahoma v. Hobia, 775 F.3d 1204 (7th Cir.)
  - Oklahoma seeks injunctive relief against tribal officials of Kialegee Tribal Town forbidding them to go through with plans to construct and operate a Class III gaming facility.
  - Oklahoma claims this is a violation of tribal –state gaming compact, but court finds terms of compact do not permit *Ex parte Young* suits.
  - Further, per *Bay Mills*, no claim for relief under IGRA because IGRA concerns only Class III games on tribal lands.
  - Cert denied October 5, 2015.
- Wisconsin v. Ho-Chunk Nation, 784 F.3d 1076 (7th. Cir.)
  - Cabazon Band regulatory/prohibitory distinction informs consideration of whether game is Class II or Class III.
  - Because Wisconsin had, among other things, decriminalized possession of electronic poker machines, nonbanked electronic poker is a Class II game under the tribe's compact with Wisconsin.
  - Cert denied October 5, 2015.

Circuit court roundup, cont.

Tribal civil jurisdiction:

- EXC Inc. v. Jensen, 588 Fed. Appx. 720 (9th. Cir.)
  - Cert petition filed July 13, 2015 and now pending
  - Question of Navajo jurisdiction over fatal tour bus accident on stretch of Arizona state highway within Navajo Reservation
  - Brief unpublished opinion says that highway is "equivalent of non-Indian fee land" per *Strate* and *Montana* exceptions don't apply; cert petition challenges both conclusions
- Fort Yates Public School District v. Murphy ex rel. C.M.B., 786 F.3d 662 (8th Cir.), Belcourt Public School District v. Davis, 786 F.3d 653 (8th Cir.)
  - Both cases involved defendant North Dakota school districts that had entered into agreements with tribes to administer schools in Indian country
  - Court finds that tribe members wishing to sue school districts in tribal court may not rely on *Montana*'s consensual relationships exception because, among other reasons, the exception does not apply to agreements between governments.

Circuit court roundup, cont.

- Tribal employment preferences:
  - Equal Employment Opportunity Commission v. Peabody Western Coal Co., 773 F.3d 977 (9th Cir.)
    - Court finally reaches the merits of litigation begun in 2001.
    - Ninth Circuit affirms district court finding that lease between Navajo Nation and Peabody Coal requiring employment preference for "Navajo Indians" is a political classification and not a prohibited classification based on national origin under Title VII of the Civil Rights Act.
      - Title VII allows preferential hiring of Indians vs. non-Indians living on or near reservations, but does not directly deal with the question of a preference for a specific tribe.
      - Court finds, however, that a tribal preference is consistent with both Title VII and *Mancari.*
- Suits alleging breach of trust relationship:
  - Hopi Tribe v. U.S., 782 F.3d 662 (Fed. Cir.)
    - Hopi Tribe sues in Court of Federal Claims seeking damages to cover cost of providing safe drinking water on the reservation.
    - Tribe points to an executive order establishing reservation, 1958 act ratifying this order, and various statutory provisions in support of the existence of trust duty.
    - Court finds that Congress created only a "bare trust" in 1958 Act and, while subsequently assisting the tribe in providing safe drinking water, did not assume any fiduciary duties in doing so.

Circuit court roundup, cont.

Tribal sovereign immunity:

- Pistor v. Garcia, 2015 WL 3953448 (9th Cir.)
  - "Advantage gamblers" sued under 42 U.S.C. § 1983 alleging that tribal officers had acted "in concert with" state officers to improperly restrain them in violation of 4th and 14th amendments.
  - Court found that tribal officers were not entitled to sovereign immunity when sued for personal liability in their individual rather than official capacities
- Idaho v. Coeur D'Alene Tribe, 7th Cir., previously discussed
- Oklahoma v. Hobia, 7th Cir., previously discussed

Circuit court roundup, cont.

Criminal jurisdiction:

- United States v. Zepeda, 9th Cir. 2015 WL 4080164
  - En banc Ninth Circuit case
  - Federal conviction under Major Crimes Act for various offenses occurring on Ak-Chin Indian Reservations
  - Overruling *United States v. Maggi*, the court holds that the quantum of tribal ancestry needed to satisfy the first prong of Indian status test under MCA need not derive from a tribe that is currently federally recognized
  - The court further holds that under the second prong (affiliation with a federally recognized tribe), the federal recognition status of a tribe is a question of law to be determined by the judge rather than the jury.

Circuit court roundup, cont.

Applicability of federal labor law to tribes:

- Soaring Eagle Casino and Resort, 6th Cir. 791 F.3d 648 (en banc rehearing denied)
  - Employee of Soaring Eagle Casino operated by Saginaw Chippewa tribe discharges employee for violating casino's no-solicitation policy.
  - NLRB finds discharge violated National Labor Relations Act and orders casino to reinstate employee and cease and desist from maintaining a no-solicitation rule.
  - Court finds (following 9th Circuit approach) that no treaty right would be abrogated by the NLRA's application.
    - According to the court, treaties preserving the tribe's general right to exclude non-Indians from its territory "do not … standing alone … bar[] application of the NLRA to the Casino" where there was no "direct conflict between a specific right of exclusion and the entry necessary for effectuating the statutory scheme."
  - Court then, departing from *Tuscarora*/*Coeur d'Alene* analysis employed in prior 6th Circuit cases, proposes a new framework rooted in *Montana*:
    - Has Congress demonstrated a clear intent that a statute of general applicability will apply to tribes? (If so, court will effectuate Congress's intent.)
    - If not, does it impinge on the tribe's control over its own members and activities? (If so, don't apply.)
    - If not, assume that the tribe's powers don't reach nonmember activity unless one of the *Montana* exceptions applies, with location on or off trust land being a factor in the analysis.
    - Under this analysis, *Montana*'s consensual relationship exception would mean that the NLRA does not apply here.
  - However, "notwithstanding our preferred analytical framework," the court is bound by prior 6th Circuit precedent (*NLRB v. Little River Band*, decided just 3 weeks earlier) holding that the NLRA is applicable to tribal activities.
  - A partial concurrence/partial dissent would have found the NLRA inapplicable on the basis that it interferes with the tribe's specific treaty rights.
- NLRB v. Little River Band of Ottawa Indians, 6th Cir. 788 F.3d 537 (en banc rehearing denied)
  - Similar case involving NLRB order directing tribe to cease and desist from enforcing tribal ordinance provisions that conflict with NLRA.
  - Court takes as its starting point the idea that tribes have been substantially divested of their jurisdiction over nonmembers.
  - Court then construes *Tuscarora* as creating a presumption of applicability limited by *Coeur d'Alene* exceptions, which court finds are not met here.
  - Strong dissent invokes *Bay Mills* as the Court's "reaffirmation of the traditional [Indian law] principles."

Circuit court roundup, cont.

Land title:

- Pueblo of Jemez v. U.S., 10th Cir., 790 F.3d 1143
  - Quiet title action against the U.S. involving Pueblo of Jemez's claimed aboriginal title to land now part of the Valles Caldera National Preserve.
  - U.S. contended that claim accrued in 1860, when U.S. granted lands to a third party as settlement of Mexican land grant dispute, and was thus barred under the ICCA's statute of limitations for claims accruing before 1946.
  - Jemez Pueblo argued that land at time of grant was subject to Pueblo's continuing occupation and aboriginal title and that its claim accrued in 2000 when U.S. purchased the property and began to interfere with the Jemez Pueblo's use.
  - Court holds that claim may proceed under federal common law and the Quiet Title Act with its 12-year statute of limitations, though Jemez Pueblo must still establish that it used the land from 1860 onward in a manner consistent with continuing, unextinguished aboriginal title.

Selected California cases

ICWA:

- In re Abbigail A., 173 Cal.Rptr.3d 191
  - For children under a juvenile court's jurisdiction who are eligible for tribe membership but not yet members, California Rule of Court 5.482 requires the court to direct the relevant agency to make "active efforts" to enroll the children and to treat them provisionally as "Indian children" under ICWA.
  - California's Third District invalidated this rule on the grounds that it impermissibly expands the definition of "Indian child" based on California's adoption of ICWA's provisions as state law.
  - California Supreme Court granted review on September 10, 2014 and case is currently pending before it.
- In re L.S., J.R., et al. 2014 WL 5395786
  - Where juvenile court failed to clarify the facts about parents' possible Indian heritage or make ruling about whether ICWA applied, order terminating parental rights was reversed and remanded for clarification of ICWA applicability and (if ICWA was found to apply) compliance, with order to be reinstated if court finds ICWA does not apply.
- In re I.B. v. W.H. 2015 WL 4736545
  - Court finds that, even after initial notice to tribe, a juvenile court that acquires additional information regarding children's ancestry must send updated information to tribes.
- In re H.G. 2015 WL 765139
  - Where juvenile court erroneously did not believe that ICWA applied, but evidence first submitted on appeal established that children were Indian children under ICWA, court reversed and remanded order terminating parental rights with instructions to juvenile court to conduct a new hearing in accordance with ICWA.

Selected California cases, cont.

Tribal sovereign immunity:

- People v. Miami National Enterprises, 223 Cal. App. 21
  - Relying on "arm of the tribe" doctrine, analogous to "arm of the state" in state sovereign immunity context, court found that payday loan corporations were arms of the tribe where they were formed under tribal law, their boards consisted of tribe members, the tribe intended them to be covered by sovereign immunity, and their profits were used to fund tribal activities.
  - "Neither third-party management of day-to-day operations nor retention of only a minimal percentage of the profits from the enterprise (however that may be defined) justifies judicial negation of that inherent element of tribal sovereignty."
  - California Supreme Court granted review on May 21, 2014 and case is still pending.

Tribal jurisdiction and gaming:

- Stop the Casino 101 Coalition v. Brown, 2014 WL 4947088
  - Group contended that compact authorizing casino operation was invalid because state failed to expressly cede jurisdiction over property to the Graton Tribe later taken into trust under the procedures of the federal Graton Rancheria Restoration Act.
  - Court rejects this challenge on numerous grounds: gaming ordinance approved by National Indian Gaming Commission, Congress has accepted land in trust, state has implicitly consented to transfer of jurisdiction to the Graton Tribe.
  - U.S. Supreme Court denied cert on May 26, 2015.