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Update on California Indian Law Litigation

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This outline sketches the holdings and reasoning of decisions of the U.S. Supreme Court, as well as major decisions of the Ninth Circuit, federal district courts in California, and California state courts. It also addresses some major decisions of interest outside the Ninth Circuit. It covers the time period from January 1, 2016 to October 1, 2016. The update focuses on major cases, but does not discuss every California Indian Law litigation during that period.

U.S. Supreme Court

1. Cases Decided in October 2015 Term

   a. *Contracting*

      Menominee Indian Tribe of Wisconsin v. United States, 136 S. Ct. 750 (2016): holding that Indian Nation could not invoke equitable tolling to preserve contract claims against federal government; explaining that "equitable tolling test is met only where the circumstances that caused a litigant's delay are both extraordinary and beyond its control"

   b. *Tribal Jurisdiction*

      Dollar Gen. Corp. v. Mississippi Band of Choctaw Indians, 136 S. Ct. 2159 (2016): affirming, by equally divided Court, court of appeals judgment recognizing that Indian Nation's courts had jurisdiction over tort action against non-Indian corporation

   c. *Diminishment*

      Nebraska v. Parker, 136 S. Ct. 1072 (2016): holding that Congress had not diminished boundaries of Indian Nation's reservation, while also opining that "[p]etitioners' concerns about upsetting the 'justifiable expectations' of the almost exclusively non-Indian settlers who live on the land are compelling"

   d. *Use of Tribal Court Convictions in Federal Prosecution*

      United States v. Bryant, 136 S. Ct. 1954 (2016): holding that U.S. prosecutors may use uncounseled Tribal-court convictions to establish prior-crimes predicate for felony habitual offender statute; explaining that because Tribal-court "convictions did not

violate the Sixth Amendment when obtained," use of these convictions in federal prosecution "generates no Sixth Amendment defect where none previously existed"

2. Certiorari Grants in October 2016 Term

   a. *Tribal Sovereign Immunity*

      Lewis v. Clarke, No. 15-1500 (U.S. 2016): Court has granted certiorari to answer the following question: "Whether the sovereign immunity of an Indian tribe bars individual-capacity damages actions against tribal employees for torts committed within the scope of their employment"

Ninth Circuit

1. Tribal Court Convictions

   a. *Alvarez v. Lopez*, 2016 WL 4527558 (9th Cir. 2016): holding that Indian Tribal court violated criminal defendant's right to jury trial under ICRA, finding that government "made no effort to ensure that Alvarez knew he would receive a jury trial only if he requested one"

   b. *United States v. Alvirez*, 2016 WL 4073312 (9th Cir. 2016): holding that district court abused its discretion by admitting an "unauthenticated Certificate of Indian Blood as evidence" to support conviction for assault resulting in serious bodily injury on an Indian reservation in violation of 18 U.S.C. §§ 1153 and 113(a)(6); reasoning that "[b]ecause Indian tribes are not listed among the entities that may produce self-authenticating documents, the district court abused its discretion in admitting the Certificate pursuant to Federal Rule of Evidence 902(1) as a self-authenticating document"

2. IGRA

   a. *Jamul Action Committee v. Chaudhuri*, 2016 WL 4414683 (9th Cir. 2016): holding that NIGC did not have to prepare an EIS under NEPA prior to approving Tribal gaming ordinance "because there is an irreconcilable statutory conflict" between NEPA and IGRA and "'where a clear and unavoidable conflict in statutory exists, NEPA must give way" (internal quotation marks omitted)

   b. *Arizona v. Tohono O'odham Nation*, 818 F.3d 549 (9th Cir. 2016): rejecting challenge to proposed Class III gaming enterprise and holding, inter alia, that land taken into trust pursuant to a land replacement act qualified as land "taken into trust as part of . . . a settlement of a land claim" under § 2719(b)(1)(B)(i) of IGRA and that Tribal sovereign immunity barred claims based upon promissory estoppel, fraud in the inducement, and material misrepresentation

3. Tribal Sovereign Immunity

   a. *Bodi v. Shingle Springs Band of Miwok Indians*, 2016 WL 4183518 (9th Cir. 2016): holding, as matter of first impression, that Indian Nation may remove a case from

state to federal court without waiving Tribal sovereign immunity; reasoning that "absence" of clear and unequivocal waiver is "dispositive of the tribal waiver-by-removal question"

4. Tribal Citizenship

    a. *Aguayo v. Jewell*, 827 F.3d 1213 (9th Cir. 2016): holding that BIA did not act arbitrarily and capriciously when it concluded it had no authority to intervene in dispute over Tribal citizenship, and rejecting argument that "BIA has an independent trust duty" and general authority to protect against "unjust disenrollment"

5. Treaty Interpretation and Enforcement

    a. *United States v. Washington*, 827 F.3d 836 (9th Cir. 2016): holding that state had violated fishing rights protected by treaties by building culverts that caused reduction in size of salmon runs, and reaffirming Indian canon under which "[w]e have long construed treaties between the United States and Indian tribes in favor of the Indians"

6. NAGPRA

    a. *Navajo Nation v. U.S. Dep't of Interior*, 819 F.3d 1084 (9th Cir. 2016): holding that federal agency's decision to inventory human remains and funerary objects was final agency action reviewable under APA because, "[b]y deciding to undertake NAGRPA's inventory process, the [agency] conclusively decided that it, and not the Navajo Nation, has present right to 'possession and control' of the remains and objects"

7. Native Hawaiian Elections

    a. *Keli'i Akina, et al. v. Hawaii*, 2016 WL 4501686 (9th Cir. 2016): dismissing as moot appeal of preliminary injunction in litigation challenging delegate election in connection with effort to establish federally recognized Native Hawaiian government

Other Federal Circuit Courts

1. *Confederated Tribes of Grand Ronde Community of Oregon v. Jewell*, 2016 WL 4056092 (D.C. Cir. 2016): holding that BIA reasonably concluded that Indian Nation was "under federal jurisdiction" in 1934 based upon two-part test that looks first to "whether the United States had in 1934 or at some point in the tribe's history prior to 1934, taken an action or series of actions . . . that are sufficient to establish, or that generally reflect federal obligations, duties, responsibility for or authority over the tribe by the Federal Government" and second to "whether the Federal-jurisdiction status remained intact in 1934"

2. *Mackinac Tribe v. Jewell*, 829 F.3d 754 (D.C. Cir. 2016): holding that Indian Nation first must exhaust administrative remedies through Part 83 process before seeking to compel Secretary of Interior to recognize it as a federally recognized Indian Tribe

3. *Patchak v. Jewell*, 828 F.3d 995 (D.C. Cir. 2016): holding that congressional statute, which reaffirmed Interior's decision to take land into trust for Gun Lake Indian Tribe and removed federal jurisdiction to consider Patchak's challenge to that designation, did not violate Article III, the First Amendment, due process, or the constitutional prohibitions upon bills of attainder

Federal District Courts

1. California

   a. *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 2016 WL 2621301 (C.D. Cal. 2016): holding, in water rights action brought by Indian Nation, that defendants could not invoke laches defense or defense of unclean hands because U.S. holds Tribe's lands in trust, and that equitable defense based upon balancing of equities was unavailable

   b. *Estom Yumeka Maidu Tribe of the Enterprise Rancheria of California v. California*, 163 F. Supp. 3d 769 (E.D. Cal. 2016): holding that California breached IGRA's mandate to negotiate in good faith when legislature did not ratify gaming compact for nearly two years after governor signed compact, and concluding, inter alia, that state had waived its sovereignty immunity and that IGRA's negotiation mandate as applied would not violate Tenth Amendment

   c. *James Raymond Acres v. Blue Lake Rancheria Tribal Court*, 2016 WL 4208328 (N.D. Cal. 2016): holding that plaintiff challenging Tribal court jurisdiction over contractual dispute must first exhaust remedies in Tribal court, and explaining that Tribal jurisdiction is at least colorable based upon contract between plaintiff and Tribal casino enterprise notwithstanding plaintiff's argument that agreement was executed "off the reservation"

   d. *Jamul Action Committee v. Jonodev Chaudhuri*, 2016 WL 4192407 (E.D. Cal. 2016): dismissing claims challenging Tribal status, sovereignty, and property and contract rights where Tribe was necessary party but could not be joined in light of Tribal sovereign immunity

2. Other Federal District Courts

   a. *Standing Rock Sioux Tribe v. U.S. Army Corps. of Engineers*, 2016 WL 4734356 (D.C. Dist. 2016): denying Indian Tribe's motion for preliminary injunction to block construction of Dakota Access Pipeline and finding Tribe had not shown likelihood of success on merits of its claims that Army Corps had not conducted adequate consultation under National Historic Preservation Act

   b. *Stand Up for California! v. U.S. Dep't of Interior*, 2016 WL 4621065 (D.C. Dist. 2016): rejecting challenges under APA, IRA, IGRA, NEPA, and the Clean Air Act to three Interior actions related to Tribal casino project

California Courts

1. Sovereign Immunity

    a. *Findelton v. Coyote Valley Band of Pomo Indians* (2016) 1 Cal. App. 5th 1194, 205 Cal. Rptr. 3d 699: holding that Tribal council had, pursuant to delegation of authority from general council resolution, waived Tribe's sovereign immunity for purposes of enforcement of arbitration agreement in contract, and reasoning that "[n]one of the cases cited by the tribe — and none we are aware of — stands for the proposition that a tribe's *litigation position* regarding the meaning of tribal law must necessarily be respected regardless of whether it is reasonable or consistent with prior official interpretations by the tribe"

2. Indian Child Welfare Act

    a. *In re Abbigail A.* (2016) 1 Cal. 5th 83, 204 Cal. Rptr. 3d 760: holding (i) that state court rule requiring juvenile court to treat a child eligible for Tribal membership as an Indian child under ICWA is invalid, but, (ii) that state court rule requiring juvenile court to pursue Tribal membership for child who is an Indian child is valid; reasoning that first rule was inconsistent with state Legislature's intent to leave "cases not involving Indian children subject to the statutes generally applicable in dependency proceedings" but that second rule is valid because state court may "properly direct that steps be taken to pursue tribal membership for a child who, while not a member of a tribe, is already an Indian child to whom ICWA applies because he or she is both eligible for membership and also the biological child of a member"

    b. *In re Isaiah W.* (2016) 1 Cal. 5th 1, 203 Cal. Rptr. 3d 633: holding that parent may challenge finding that ICWA is inapplicable on appeal from order terminating parental rights though she did not timely appeal earlier court order finding statute inapplicable; explaining that "ICWA imposes on the juvenile court a continuing duty to inquire whether the child is an Indian child" and emphasizing "that social services departments and juvenile courts should inquire about a child's Indian status early in the proceedings and should provide notice at the soonest possible opportunity"

    c. *In re Alexandria P.* (2016), 1 Cal. App. 5th 331, 204 Cal. Rptr. 3d 617: holding that there was not good cause to depart from ICWA's placement preferences and that lower court had correctly ordered that an Indian child be placed with her extended family; explaining that "[a] holding that the facts before us constituted good cause as a matter of law would circumvent the policies favoring relatives and siblings, and it would incentivize families who knowingly accept temporary foster placements to delay an Indian child's ultimate adoptive placement"