LEGAL UPDATE

CALIFORNIA INDIAN LAW ASSOCIATION 17TH ANNUAL INDIAN LAW CONFERENCE

Anna Kimber, Esq., Law Office of Anna Kimber
Michelle Carr, Esq., Attorney General, Sycuan Band of Kumeyaay Nation
10/13/2017

POST-CARCIERI LAND-INTO-TRUST
LAND-INTO-TRUST FOR GAMING

County of Amador v. Zinke
2017 WL 4448127 (9th Cir. 10/6/2017)

Amador County challenged the Department of the Interior's decision to take lands into trust for the Ione Band pursuant to the Indian Reorganization Act ("IRA") because the Tribe was not recognized and under Federal jurisdiction as of 1934; and the land was not eligible for gaming under the "restored lands of a restored tribe" exception under the Indian Gaming Regulatory Act ("IGRA").

Land into Trust Pursuant to the IRA
"Timing-of-recognition" issue: After a review of the history of the IRA, the court concluded: "It seems more likely that Congress intended the statute to benefit all tribes, whenever recognized, provided that those tribes were 'under Federal jurisdiction as of the date when the IRA was enacted. "

"Under Federal Jurisdiction" issue: DOI's two-part inquiry;
1. In 1934 (or prior to), did the U.S. take an action or a series of acts, sufficient to establish or generally reflect the federal government had obligations, duties responsibility for, or authority over, the Tribe.
2. Did the Tribe's jurisdictional status remain intact in 1934? The longer the period of time prior to 1934 and the smaller the gap between the date of last evidence of being under federal jurisdiction, the greater the likelihood the tribe retained its jurisdictional status in 1934.

The court concluded DOI's determination the Band was "under Federal jurisdiction" as of 1934 was not arbitrary or capricious, and "Interior did not err in concluding that the Band is eligible to have land taken into trust on its behalf."

Land into Trust Eligible for Gaming Pursuant to the "Restored Lands/Tribe" Exception of IGRA
"Congress did not clearly intend for the 'restored lands' exception to be unavailable to those tribes administratively re-recognized outside the Part 83 process. Rather, Congress left a statutory ambiguity for Interior to resolve, and Interior reasonably could have determined that a tribe could be 'restored' to Federal recognition outside the Part 83 process, at least in certain circumstances."

SECRETARIAL TWO-PART DETERMINATION GOVERNOR'S AUTHORITY

United Auburn Indian Community v. Brown
4 Cal.App.5th (2016)

The United Auburn Indian Community filed a petition for writ of mandate and complaint for declaratory relief, challenging Governor Brown's concurrence in the Secretary of Interior's decision to take land acquired after 1988 by the Enterprise Rancheria of Maidu Indians into trust for gaming purposes, arguing *inter alia* that the concurrence represented an illegal exercise of legislative power and that the ability to concur was not ancillary and incidental to the Governor's power to enter into gaming compacts with tribes. In sustaining the Governor's demurer to the action, the Superior Court of Sacramento County found that the Governor's concurrence did not violate the separation of powers doctrine and that the power to concur was ancillary and incidental to the power granted by California law to negotiate and execute tribal-state gaming compacts.

In reviewing the lower court, the Third District Court of Appeal ("Court") noted that the standard for evaluating the separation of powers clause is if the action of one branch defeats or materially impairs the core zone of constitutional authority of another branch. The Court noted that in order for the Governor's concurrence to violate the separation of powers clause, it would have to impede the core function of the legislative branch, which is to pass statutes. Upholding the lower court's determination, the Court held that the concurrence represented the implementation of existing gaming policy found in the Constitution and statute and did not defeat or materially impair the legislature's core function. Because the Court determined that the Governor's concurrence was not a legislative act, it found no need to determine whether the power is ancillary and incidental to the Governor's authority to enter into gaming compacts with tribes.

The California Supreme Court granted review of the decision.

SECRETARIAL TWO-PART DETERMINATION GOVERNOR'S AUTHORITY

Stand Up For California! v. State
6 Cal.App.5th 686 (2016)

Interest group, Stand Up For California!, filed a complaint, challenging Governor Brown's concurrence in the Secretary of the Interior's decision to take land acquired after 1988 by the North Fork Rancheria of Mono Indians ("North Fork") into trust for gaming purposes, arguing that the concurrence violated the California Constitution In sustaining demurrers filed by the state defendants and North Fork as intervener, the Superior Court of Madera County found that the Governor's power to concur is implied from authority granted to him by California law to negotiate and enter into tribal-state gaming compacts.

Upon review, the Fifth District Court of Appeal ("Court") indicated that, in order for the Governor's concurrence to be valid, state law must authorize this action, but no such express authority exists. Instead, the Court looked to the California Constitution and statutory law, determining that the authority to concur in the Secretary's determination is found by implication in those laws providing authority for the Governor to negotiate and enter into gaming compacts. However, the Court noted, the North Fork compact was the subject of a referendum, nullifying the implementing statute and no other compact has been consummated, but rather North Fork obtained Secretarial procedures under which it could conduct Class III gaming. In this particular instance, where the proposed gaming establishment will be operated under something other than a tribal-state gaming compact, the Court determined that, because the laws through which the Governor's authority to concur is implied are inapplicable, the concurrence was given without authority. Consequently, the Court reversed the lower court's decision and remanded the matter for further proceedings consistent with the order.

The California Supreme Court granted review of the decision, but further action is deferred pending resolution of *United Auburn Indian Community v. Brown*, 4 Cal.App.5th (2016).

GASOLINE TAX/TREATY RIGHTS

Washington State Department of Licensing v. Cougar Den
188 Wash. 2d 55, 392 P. 3d 1014 (3/16/2017)

Cougar Den, a corporation owned by a member of the Yakama Nation and organized under the laws of the Yakama Nation, contracts with a trucking company to transport fuel from Oregon to the Yakama Indian Reservation.

The State of Washington assessed Cougar Den $3.6 million for hauling fuel across state lines. Administrative and judicial appeals ensued. On March 16, 2017, the Washington Supreme Court, on direct review, sitting en banc, held that, pursuant to Article III of the Yakama Nation Treaty of 1855, tribes were entitled to import fuel without holding an importer's license and without paying state fuel taxes.

> Where trade does not involve travel on public highways, the right to travel provision in the treaty is not implicated. Here, travel on public highways is directly at issue because the tax was an importation tax. The fact that the tax is imposed at the border and is assessed regardless of whether Cougar Den uses the highway is immaterial because, in this case, it was impossible for Cougar Den to import fuel without using the highway. In addition, the tax does not, as the State argues, fall under the regulatory exception.

Cougar Den, Inc. v. Washington State Dep't of Licensing, 188 Wash. 2d 55, 67, 392 P.3d 1014, 1019 (2017)

Cert Petition 16-1498 filed 6/14/2017 (Supreme Court invited the Solicitor General to file a brief in the case expressing the views of the United States)

Question Presented:

Whether the Yakama Treaty of 1855 creates a right for tribal members to avoid state taxes on off-reservation commercial activities that make use of public highways.

WATER RIGHTS
WINTERS & GROUNDWATER

Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District 849 F.3d 1262 (9th Cir. 2017)

In an action against local water agencies, the Agua Caliente Band of Cahuilla Indians ("Tribe") sought a declaration and quantification of its federally reserved water rights to groundwater underlying the Agua Caliente Indian Reservation ("Reservation"). The United States District Court for the Central District of California held that, upon establishment of the Reservation, the Tribe also received an implied reserved water right, which included groundwater.

On appeal, the Ninth Circuit ("Court") upheld the lower court decision, noting that, pursuant to *Winters v. United States*, 207 U.S. 564 (1908), the withdrawal of lands from the public domain for federal purposes includes by implication a reservation of unappropriated water appurtenant to those reserved lands to the extent needed to accomplish the purpose of the reservation of land. Recognizing that *Winters* had not previously been applied to groundwater rights, the Court determined that water appurtenant to a reservation is not limited to surface water. In the arid Coachella Valley, the Court reasoned, the very purpose for the establishment of the Reservation as a homeland for the Tribe would be defeated unless groundwater were a part of the reserved water rights. As such, the Court held that upon the creation of the Agua Caliente Indian Reservation, the Tribe received a reserved right to groundwater appurtenant to the Reservation, along with an implied use right to water underneath the Reservation.

A writ of certiorari, requesting review of the question whether the *Winters* doctrine preempts California state law regulating groundwater, is pending before the United States Supreme Court.

PAYDAY LENDERS

Great Plains Lending, LLC, et al., v. Consumer Financial Protection Bureau 846 F3d 1049 (9th Cir. 1/20/2017)

Great Plains Lending, LLC and other for-profit Tribal Lending Entities ("TLEs"), owned and operated by federally recognized Tribal governments, were being investigated by the CFPB.

Pursuant to the directive of those tribal governments the TLEs, refused to respond to the Bureau's Civil Investigative Demands ("CIDs") issued to investigate whether the TLE were in violation of several federal laws, including Section 1036 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, the Truth in Lending Act, the Electronic Funds Transfer Act, the Gramm-Lease-Bliley Act "or any other Federal consumer financial law."

Rather than submit to the jurisdiction of the Bureau, the Tribe's offer to cooperate with the Bureau "as co-regulators." The Tribe's offer was rejected, and the Bureau sought enforcement of the CIDs in federal court.

In affirming the District Court, the Ninth Circuit held the Consumer Financial Protection Act was a law of general applicability, and applied to tribal business like the TLEs being investigated. The Court further held that Congress did not expressly exclude Tribes from the Bureau's enforcement authority. The Court held that none of the three exceptions outlined in *Donovan v. Coeur d'Alene Tribal Farms*, 751 F.2d 1113 1115 (9th Cir. 1985), to prohibit the enforcement of generally applicable laws against Indian tribes applied.

"At this stage of the proceedings, we conclude that the district court properly held that the Bureau does not plainly lack jurisdiction to issue investigative demands to the tribal corporate entities under the Act."

Cert. Petition 17-184, filed 8/3/2017 (Response due 10/5/2017).

Question presented:

Whether a generally applicable federal statute, which is silent as to its applicability to Indian Tribes, should nevertheless be presumed to apply to Tribes.

SPORTS BETTING

Christie et al. v. NCAA
New Jersey Thoroughbred Horsemen's Association, Inc. v. NCAA
832 F.3d 389 (3rd Cir. 2016)

For years, the State of New Jersey has attempted to permit sports betting in its failing casinos, without success, due to the federal prohibition embodied in the Professional and Amateur Sports Protection Act ("PAPSA"), a law that prohibits most states other than Nevada from having sports betting.

The petitioners and amici have framed the issue as one over federalism and states' rights. New Jersey **argues that** PASPA commandeers the state's authority to pass or repeal its own laws in violation of the Tenth Amendment because it directs states to maintain their state law prohibitions on sports betting to carry out Congress' objective.

Amici American Gaming Association further argues that PASPA not only unconstitutionally compels states to maintain laws banning sports betting, it "undermines core federalism principles" meant to allow states to experiment and innovate with policy.

Cert Petition 16-476 and 16-277 Granted 6/27/2017. Oral Argument 12/04/2017

Question Presented:

Does a federal statute that prohibits modification or repeal of state-law prohibitions on private conduct impermissibly commandeer the regulatory power of State in contravention of *New York v. United States*, 505 U.S. 144 (1992)

California Assembly Constitutional Amendment 18 (ACA18) (Gray)
Introduced July 20, 2017

"This measure would authorize the Legislature to permit sports watering only if a change in federal law occurs to authorize sports wagering in this state."

PATENTS

Mylan Pharmaceuticals Inc., et al. v. Allergan, Inc.
(U.S. Patent Trial and Appeal Board)
Case Nos. IPR2016-01127, 01128, 01129, 01130, 01131, and 01132

On September 22, 2017, the St. Regis Mohawk Tribe, specially appeared and filed a motion for summary judgment with the U.S. Patent Trial and Appeal Board, to dismiss the Petitions filed in 2016 by Petitioners Mylan Pharmaceuticals (and other pharmaceutical corporations), seeking an Inter Partes Review of six patents ("Patents at Issue") owned by Allergan Inc. concerning the eye medicine Restasis. These Patents at Issue were also the subject of a patent infringement suit filed by Allergan, Inc., in the Eastern District of Texas in 2015 against the same pharmaceutical companies.

On September 8, 2017, Allergan assigned the six Patents at Issue to the Tribe, and the Tribe then granted back to Allergan an "exclusive limited field of use license." According to the Tribe in its motion for summary judgment, the result of this assignment was the Patents at Issue (now assigned to the Tribe) could not be subject to the administrative review proceedings, as neither Congress nor the Tribe had waived its sovereign immunity, and the Tribe had not consented to the jurisdiction of the Patent Trial and Appeal Board. Because the Tribe was a necessary and indispensible party to the proceedings, the Tribe argued the Petitions should be dismissed.

S. 1948 (McCaskill) Introduced 10/5/17

"Notwithstanding any other provision of law, an Indian tribe may not assert sovereign immunity as a defense in a review that is conducted under chapter 31 of title 35, United States Code."

SOVEREIGN IMMUNITY
TRIBAL ENTERPRISES

Owen v. Miami Nation Enterprises
2 Cal.5th 222 (2016)

The Superior Court of Los Angeles County granted the motion and dismissed the claim for lack of subject matter jurisdiction. The Second District Court of Appeal, finding the payday lending business were sufficiently related to federally recognized Indian tribes to enjoy immunity from suit, affirmed the lower court decision.

On appeal the California Supreme Court ("Court"), distinguishing between tribes and related entities, held that an entity of a tribe invoking sovereign immunity as a defense to suit must show by a preponderance of the evidence that it is an "arm of the tribe" and thus immune from suit. Relying on previous caselaw, including the six factor test articulated by the Tenth Circuit Court of Appeals in *Breakthrough Management Group Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1172 (10th Cir. 2010), the Court crafted its own five factor test to determine whether an entity is an arm of a tribe.

The factors considered under the Court's new test are 1) whether the entity was created pursuant to tribal or state law; 2) if the tribe intended the entity to share its immunity from suit; 3) whether the entity's purpose, both stated and actual, is the promotion of tribal self-governance; 4) actual versus nominal tribal control over the entity; and 5) the financial relationship between the tribe and the entity - the degree to which entity liability could impact tribal revenue.

Emphasizing that not one of the five factors is dispositive, but that each must be considered as part of a fact-specific inquiry, the Court looked to both the documentation associated with the creation and operation of the payday lending companies and actual business operations. Examining the record in light of the five factors, the Court found only a nominally close relationship between each entity and tribe or sufficient evidence of actual tribal control and oversight of the companies or of significant financial benefit to the tribes. Superseding the lower court, the Court held that both tribally affiliated payday lending entities failed to establish by a preponderance of the evidence that they constituted arms of a tribe, immune from suit, remanding the matter to the trial court.