10th Annual Tribal Leadership Conference:
Transitions
October 1-2, 2019
Santa Ana Star Casino Hotel
Santa Ana Pueblo, New Mexico

Case Law Update – All text comes directly from the respective court's opinion or order. All footnotes were omitted.

Indian Child Welfare Act

***Brackeen v. Bernhardt,* No. 18-11479, 2019 WL 3857613 (5th Cir. 2019). Note that the opinion was filed on August 9, 2019, but was modified on August 16, 2019.**
August 9, 2019 Opinion:
https://turtletalk.files.wordpress.com/2019/08/brackeendecisionfifth.pdf
August 16, 2019 Opinion:
http://www.ca5.uscourts.gov/opinions/pub/18/18-11479-CV0.pdf

"This case presents facial constitutional challenges to the Indian Child Welfare Act of 1978 (ICWA) and statutory and constitutional challenges to the 2016 administrative rule (the Final Rule) that was promulgated by the Department of the Interior to clarify provisions of ICWA. Plaintiffs are the states of Texas, Indiana, and Louisiana, and seven individuals seeking to adopt Indian children. Defendants are the United States of America, several federal agencies and officials in their official capacities, and five intervening Indian tribes. Defendants moved to dismiss the complaint for lack of subject matter jurisdiction, but the district court denied the motion, concluding, as relevant to this appeal, that Plaintiffs had Article III standing. The district court then granted summary judgment in favor of Plaintiffs, ruling that provisions of ICWA and the Final Rule violated equal protection, the Tenth Amendment, the nondelegation doctrine, and the Administrative Procedure Act. Defendants appealed. Although we AFFIRM the district court's ruling that Plaintiffs had standing, we REVERSE the district court's grant of summary judgment to Plaintiffs and RENDER judgment in favor of Defendants."

***In Re Navajo Nation, Relator*, No. 07-19-00202-CV, 2019 WL 4282909 (Court of Appeals of Texas, Amarillo)**
https://casetext.com/case/in-re-navajo-nation

"By this original proceeding, Relator, the Navajo Nation, seeks a writ of mandamus to compel Respondent, the Honorable William C. Sowder, to grant its motion to transfer jurisdiction over the underlying parent/child termination proceeding to the Navajo Nation's Tribal Court in Arizona, pursuant to the provisions of the Indian Child Welfare Act of 1978 ("ICWA"). Specifically, the Navajo Nation challenges the trial court's determination that "good cause" existed, within the meaning of the ICWA, not to transfer the proceeding to the Navajo Nation's Tribal Court. *See* 25 U.S.C.S. § 1911(b) (2019). Because the Navajo Nation is not entitled to the relief requested, we deny its petition."

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Voting Districts

***Navajo Nation v. San Juan County*, No. 18-4005, 2019 WL 3121838 (10th Cir. 2019).**
https://turtletalk.files.wordpress.com/2019/07/20190716-opinion.pdf

"In 2012, the Navajo Nation and several of its individual members (collectively, the Navajo Nation) sued San Juan County, alleging that the election districts for both the school board and the county commission violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and the Voting Rights Act (VRA) of 1965, 52 U.S.C. §§ 10301–14 (transferred from 42 U.S.C. §§ 1973–1973o). The district court denied the county's motion to dismiss, found that the election districts violated the Equal Protection Clause, and awarded summary judgment to the Navajo Nation. It later rejected the county's proposed remedial redistricting plan because it concluded the redrawn districts again violated the Equal Protection Clause. The district court then appointed a special master to develop a proposed remedial redistricting plan, directed the county to adopt that remedial plan, and ordered the county to hold special elections based on that plan in November 2018. On appeal, the county challenges each of the district court's decisions. For the reasons explained below, we affirm."

Trust Relationship

***Navajo Nation v. U.S. Dept. of the Interior*, CV-03-00507-PCT-GMS, 2019 WL 3997370 (U.S. Dist. Ct, D. Ariz. 2019).**
https://www.narf.org/nill/bulletins/federal/documents/navajo_v_doi_2019.html

"Since none of these substantive sources of law create the trust duties the Nation seeks to enforce, and the Nation "cannot allege a common law cause of action for breach of trust that is wholly separate from any statutorily granted right," Gros Ventre Tribe, 469 F.3d at 810, its breach of trust claim must fail, and amendment would be futile. Koster, 847 F.3d at 656. "Although the [Nation] may disagree with the current state of Ninth Circuit caselaw, as it now stands, unless there is a specific duty that has been placed on the government with respect to Indians, the government's general trust obligation is discharged by the government's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes." Id. The general trust relationship between the Nation and the United States is insufficient to support the Nation's breach of trust claim. See Navajo I, 537 U.S. at 506.

IT IS THEREFORE ORDERED that Plaintiff Navajo Nation's Renewed Motion for Leave to File Third Amended Complaint, (Doc. 360), is DENIED."

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Sovereign Immunity

***Oertwich v. Traditional Village of Togiak*, 3:19-cv-00082 JWS, 2019 WL 4345975 (U.S. Dist. Ct, D. Alaska 2019).**
https://www.narf.org/nill/bulletins/federal/documents/oertwich_v_togiak.html

"Plaintiff filed a complaint seeking declaratory and injunctive relief plus compensatory and punitive damages naming the Tribe, the individual defendants, the State of Alaska Department of Public Safety and the City of Togiak as defendants.1 Plaintiff's nine claims for relief are rooted in the fact that the Tribe banished him from Togiak on the grounds that he brought alcohol into the village and Plaintiff nevertheless returned to the village. The court granted the City of Togiak's motion to dismiss Plaintiff's claim for punitive damages against it.2 The court also granted the motion by the State of Alaska Department of Public Safety to dismiss Plaintiff's claims against it.3

The Tribe and the individual defendants contend that this court lacks jurisdiction to entertain Plaintiff's claims against them because they are entitled to sovereign immunity, and because there are other insurmountable impediments to Plaintiff's claims against them.

. . .

For the reasons set forth above, Plaintiff's claims against the Tribe and the individual defendants are dismissed without prejudice to Plaintiff's pursuit of claims in tribal court. This order does not address Plaintiff's claim against defendant Teodoro Pauk in his capacity as Mayor of the City of Togiak. That claim remains before this court."

Tribal Jurisdiction/Sovereignty

Murphy v. Royal, Nos. 07-7068 and 15-7041 (10th Cir. 2017). Up for review by the United States Supreme Court - Docket No. 17-1107 as Sharp v. Murphy.
http://www.scotusblog.com/case-files/cases/royal-v-murphy/

"The parties hotly dispute the inferences to be drawn from the history of the Creek Nation. I am not without sympathy for Oklahoma's argument that Congress's series of actions here effectively constitute disestablishment, but the panel properly rejected that argument: Solem is clear that "[o]nce 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." 465 U.S. at 470 (emphasis added); see also Murphy, 866 F.3d at 1219 (explaining that allotment alone cannot terminate a reservation under Supreme Court precedent).

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…

This case may present the high-water mark of de facto disestablishment: the boundaries of the Creek Reservation outlined by the panel opinion encompass a substantial non-Indian population, including much of the city of Tulsa; and Oklahoma claims the decision will have dramatic consequences for taxation, regulation, and law enforcement. The panel faithfully applied Supreme Court precedent holding that such "demographic evidence [cannot] overcome the absence of statutory text disestablishing the Creek Reservation." Murphy, 866 F.3d at 1232. But this may be the rare case where the Supreme Court wishes to enhance Steps Two and Three of Solem if it can be persuaded that the square peg of Solem is ill suited for the round hole of Oklahoma statehood. As Justice Cardozo wrote, "[e]xtraordinary situations may not wisely or fairly be subjected to tests or regulations that are fitting for the commonplace or normal." Pokora v. Wabash Ry. Co., 292 U.S. 98, 105–06 (1934).

In sum, this challenging and interesting case makes a good candidate for Supreme Court review."

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