Federal Indian Law Update

Elizabeth Kronk Warner

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University of Kansas School of Law

Recent Legal Developments: Indian Law

Elizabeth Ann Kronk Warner[1]

I. Introduction to Federal Indian Law

Given the complexity of federal Indian law, it is helpful to start with a brief introduction to federal Indian law. Much of the information appearing in this first section of the annual update is repetitive of material included in previous updates. A review of these foundational principles may prove helpful.

There are three potential sovereigns that may be able to assert jurisdiction in matters arising within Indian country: tribal government, state government, or the federal government. Which sovereign is legally capable of asserting jurisdiction often turns on two questions: (1) the political identity of the parties involved; and (2) the location of the action giving rise to the matter.

A. Political Identity

In matters related to Indian country, the determination of which court has jurisdiction turns in part on the political identity of the parties involved. There are three possible political identities: (1) member Indian (i.e. a person who is a citizen of the tribal nation involved in the matter), (2) non-member Indian (i.e. a person who is a citizen of a tribal nation not involved in the matter), and (3) non-Indian.

B. Location – What is Indian Country?

Indian country is more than reservation land. Indian country is defined at 18 U.S.C. § 1151. Although this is part of the criminal section of the Code, the Supreme Court has applied the definition in the civil context. 18 U.S.C. § 1151 provides that Indian country includes: (1) all land within a reservation, notwithstanding issuance of a patent and including rights of way; (2) dependent Indian communities; and (3) all allotments.

In addition to 18 U.S.C. § 1151, the U.S. Supreme Court announced a test to help determine whether an area of land is Indian country. Under this test, the Court will ask whether the area has been validly set apart for the use of the Indians as such under the superintendence of the Government. *Alaska v. Native Village of Venetie*, 522 U.S. 520 (1998).

Indian country may be diminished, but, if it is disestablished, it is no longer Indian country. As a result, courts will often evaluate to determine whether tribes have been diminished or disestablished. In *Solem v. Bartlett*, 465 U.S. 463 (1984), the Court considered whether a crime that was committed on a portion of the Tribe's land that had been opened for allotment occurred

[1] I would like to acknowledge and thank my research assistant, Megan Carroll who is a second year law student at the University of Kansas School of Law, for her substantial assistance in researching this information. Also, the majority of this information is including in my chapter on Indian law for the Kansas Bar Association Annual Survey.

in Indian country. The Court indicated that in determining whether there was diminishment or disestablishment the necessary factors to consider were: (1) whether there is language of cessation; (2) whether the legislative history suggests there was agreement about cessation; and (3) what occurred after the land was opened. In *Solem*, the Court found no conclusive evidence that the land had been disestablished.

C. Tribal Sovereign Immunity

Tribal sovereign immunity prevents suits against tribes under certain circumstances. Yet, sovereign immunity does not protect tribes from suits brought by the United States against a tribe. However, tribal sovereign immunity, where applicable, is a right possessed by tribal governments that must be recognized by both the federal and state governments. Additionally, tribal sovereign immunity extends to agencies of the tribes. *See Weeks Construction, Inc. v. Ogala Sioux Housing Authority*, 797 F.2d 668, 670-671 (8th Cir. 1986). Tribal sovereign immunity also applies to tribal officials acting within the scope of their official duties. *Id.* Tribal sovereign immunity extends to claims for declaratory and injunctive relief, not merely damages, and it is not defeated by a claim that the tribe acted beyond its power. *Kiowa Tribe v. Mfg. Technologies, Inc.*, 523 U.S. 751, 754 (1998); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

Notably, tribal sovereign immunity can apply to both governmental and commercial enterprises. *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998). Tribes may create separate business entities that are not immune from suit. Tribes may create business enterprises under tribal law, federal law (section 17 of the Indian Reorganization Act) or state law.[2] Even though tribal sovereignty may not extend to some tribal business entities, claims against such tribal commercial entities are limited to the assets held by the entity in question. There are numerous factors that courts will consider in determining whether tribal sovereign immunity applies to a tribal commercial enterprise, including: 1) how the entity was created; 2) the entity's purpose; 3) the structure, ownership, and management of the entity; 4) whether the tribe in question intended to share its sovereign immunity with the commercial enterprise; and 5) the financial relationship between the tribe and commercial enterprise. *Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173 (10th Cir. 2010). Recently, as discussed below, the U.S. Supreme Court held that tribal sovereign immunity applied to tribal commercial enterprises off of the reservation in *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024 (2014).

D. Marshall Trilogy

To understand tribal court jurisdiction, it is important to understand the three foundational cases of federal Indian law, also known as the Marshall Trilogy.[3] These three decisions are: *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); and, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). In *Cherokee Nation*, the Court addressed whether its original jurisdiction extended to Indian nations. In holding that it

[2] Several courts have indicated that a tribe's decision to incorporate a tribal commercial enterprise under state law is a factor strongly indicating that tribal sovereign immunity should not apply to such state-chartered tribal commercial enterprises.

[3] This is a reference to Chief Justice Marshall, who authored opinions in all three cases.

did not, the Court reasoned that Indian nations were not foreign nations, but, rather, "domestic dependent nations". In *Worcester*, the Court considered whether the laws of the state of Georgia applied within the territory of the Cherokee Nation. The Court concluded that the laws of the state of Georgia had no force or effect within Indian country.

Both *Cherokee Nation* and *Worcester* are important to understanding the extent of tribal court jurisdiction. *Cherokee Nation* recognized the separate sovereignty of tribal nations, which is a basis for tribal court jurisdiction. *Worcester* held that the laws of states generally do not apply in Indian country. Although subsequent congressional acts and court decisions have modified *Worcester*, the presumption against the applicability of state law in Indian country to issues involving wholly internal matters (such as domestic relations, property, etc.) remains, and, therefore, tribal courts may assert their authority without interference from state courts in numerous areas. Moreover, both cases are helpful starting points in understanding the pervasive federal role in Indian country, as the Court in *Worcester* and *Cherokee Nation* explained that the federal government owed a duty to tribal nations by virtue of their status within the United States.

The Kansas courts have recognized the importance of the Marshall trilogy on the development of modern federal Indian law. As recognized by the Kansas Court of Appeals,

> Indian tribes are "domestic dependent nations" that exercise inherent sovereign authority over their members and territories. Indian reservations are separate and distinct nations inside the boundaries of the state of Kansas. Indian rights are protected by treaty with the United States. The inherent sovereignty possessed by Indian tribes allowed them to form "their own laws and be ruled by them.

Diepenbrock v. Merkel, 33 Kan.App.2d 97, 98-99, 97 P.3d 1063 (2004).

E. Subsequent Relevant Developments in Federal Indian Law

Congress passed the Major Crimes Act approximately 50 years after the Court's decision in *Worcester*. The Major Crimes Act is more fully discussed below in the section on criminal jurisdiction in Indian country. The Court determined that Congress had the authority to enact the Major Crimes Act in *United States v. Kagama*, 118 U.S. 375 (1886). *See also Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). In reaching this decision, the Court determined that the United States owes Indian tribes a "duty of protection" and, therefore, the federal government has plenary authority over Indian country. *Id.* at 385. Since this time, the federal government has exercised substantial authority in Indian country.

In considering tribal court jurisdiction, it is also important to know that tribes pre-existed the formation of the federal government, and, as a result, are extra-constitutional entities. As a result, the U.S. Constitution does not apply to Indian country. In 1968, Congress recognized this "void" and enacted the Indian Civil Rights Act (ICRA). 82 Stat. 77, 25 U.S.C.A. §§ 1301 et seq. The ICRA applies the majority of the provisions of the Bill of Rights to Indian country, with a

few notable exceptions. Some of these exceptions include: 1) the First Amendment does not apply in Indian country; 2) there is no right to an attorney; and 3) ICRA placed a limitation on tribal court enforcement authority. Currently, the limitation on tribal court enforcement authority is one year in jail and/or a $5,000 fine. 25 U.S.C.A. § 1302(7). However, tribes that comply with the requirements of the recently enacted Tribal Law and Order Act may be able to increase the sentencing authority of their tribal courts in certain circumstances. Public L. 111-211.

F. Civil Jurisdiction

Although civil jurisdiction in Indian country is a complicated area of federal Indian law with many exceptions, a few guidelines provide a starting point for understanding civil jurisdiction in Indian country. Generally, tribal courts have exclusive jurisdiction[4] where: 1) the matter occurs in Indian country and involves both Indian plaintiffs and Indian defendants; or 2) the matter occurs in Indian country, and the defendant is a member of the tribe. Furthermore, federal courts may have civil jurisdiction over matters occurring in Indian country when either federal statutes or federal common law provide a basis for the cause of action.

Tribal Court Civil Jurisdiction

As mentioned above, the civil jurisdiction of tribal courts turns on the status of the plaintiff and defendant, as well as the location of the incident.[5] One of the first U.S. Supreme Court cases to address the question of tribal civil jurisdiction was *Williams v. Lee*, 358 U.S. 217 (1959). In *Williams*, a unanimous Court held that state courts have no jurisdiction over transactions arising on the Navajo reservation and involving an Indian defendant. Because of the status of the defendant and the location of the transaction, the Court reasoned that state court jurisdiction in the matter "would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves." *Id.* at 223. The Court applied similar reasoning in *Fisher v. District Court*, 424 U.S. 382 (1976), where it determined that tribal courts have exclusive jurisdiction over matters involving Indian plaintiffs and Indian defendants when the matter occurs in Indian Country. The *Fisher* Court explained that tribal court subject matter jurisdiction over tribal members is a matter of tribal law, and, therefore, there is no federal limitation on tribal court jurisdiction over tribal members. *See id.* at 389. Following *Williams* and *Fisher*, tribal courts have civil jurisdiction over Indian defendants involved in incidents occurring within Indian country. Yet, if the actions of the Indians in Indian country implicate a state interest, the state may have the authority to assert jurisdiction over matters occurring within Indian country. *See Nevada v. Hicks*, 533 U.S. 353, 362 (2001) (holding that Nevada had the ability to execute a search warrant for evidence in an off-reservation crime in an Indian's home located on an Indian reservation).

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[4] This assumes the incidents at issue do not implicate state interests outside of Indian country. In *Nevada v. Hicks*, 533 U.S. 353, 362 (2001), the Supreme Court indicated that a state may have jurisdiction over incidents occurring within Indian country if the incidents implicate state interests beyond Indian country.

[5] This discussion of tribal court jurisdiction focuses on tribal court subject matter jurisdiction. Just as state and federal courts must have personal and subject matter jurisdiction to assert authority over a matter, so too must tribal courts have personal and subject matter to assert jurisdiction over a matter. In the case of federal Indian law, it is likely that if a tribal court has subject matter jurisdiction, it will also likely have personal jurisdiction.

Tribal jurisdiction, however, is not as clear when the respondent is a non-Indian. This is because "when nonmembers have a right to be in Indian Country by virtue of land ownership, the usual presumption favoring tribal jurisdiction is reversed." Felix Cohen, Handbook of Federal Indian Law, 600-601 (LexisNexis Matthew Bender 2005). Accordingly, tribal courts typically do not have civil jurisdiction over non-Indian defendants, even for matters occurring in Indian country. The Supreme Court, however, in *Montana v. United States*, 450 U.S. 544 (1981), articulated two exceptions to this general prohibition of tribal court jurisdiction over non-Indians.[6]

> To be sure, 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.

Id. at 565-566 (citations omitted). The Court's decision in *Montana* is commonly referred to as the *Montana* exceptions. As a result of these exceptions, tribal courts can assert civil jurisdiction over non-Indians when the non-Indians either enter into a consensual relationship with the plaintiff, or when the non-Indians' activities threaten the health, welfare, economic security or political integrity of the tribe. Furthermore, Congress has the authority to grant tribal courts jurisdiction over non-Indians. *See City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554, 558 (8th Cir. 1993) (finding that Congress delegated tribes the authority to regulate liquor traffic of non-Indians within Indian Country).

Tribal court jurisdiction is not limited to matters that occur solely within Indian country. Tribal courts may have subject-matter jurisdiction over off-reservation treaty rights. *See U.S. v. Sohappy*, 770 F.2d 816, 819 (9th Cir. 1985) (finding that the tribe had concurrent jurisdiction with the federal government over fish caught outside of the reservation). Additionally, tribal courts may assert jurisdiction over matters occurring outside of Indian country if the matter involves internal concerns of the tribe. *See John v. Baker*, 982 P.2d 738, 756 (Alaska 1999) ("And tribal courts may also have jurisdiction to 'resolve civil disputes involving nonmembers, including non-Indians' when the civil actions involve essential self-governance matters such as membership or other areas where 'the exercise of tribal authority is vital to the maintenance of tribal integrity and self-governance.'") (citations omitted). Despite circumstances that allow for tribal court jurisdiction, it is difficult for tribal courts to assert jurisdiction over non-Indian defendants. Circumstances under which tribes may assert jurisdiction outside of Indian country

[6] Notably, *Montana* only addressed the authority of a tribe to regulate non-Indian-owned land within the borders of the tribe's reservation, and does not address the question of a tribe's authority over non-Indians acting on tribal trust land or tribally-owned land within the reservation.

are further limited by the Supreme Court's determination that a defendant's identity is central to the determination of civil jurisdiction. *See Nevada v. Hicks*, 533 U.S. 353, 357-360 (2001).

Exhaustion of Tribal Remedies

Generally, a federal court will not take action in a matter arising in Indian country until a party shows that tribal remedies have been exhausted. The Supreme Court has indicated that federal courts should not address the question of whether tribal courts have jurisdiction until the appropriate tribal court has had the opportunity to address the question first. *National Farmers Union Insurance Comp. v. Crow Tribe*, 471 U.S. 845 (1985). "The current rule appears to be that federal courts must generally refuse to hear cases arising within Indian country until the tribal courts have had a chance to determine whether they have jurisdiction over the case." Felix Cohen, Handbook of Federal Indian Law, 632 (LexisNexis Matthew Bender 2005). There are, however, exceptions to the exhaustion requirement. The U.S. Supreme Court declared that "where an assertion of tribal jurisdiction 'is motivated by a desire to harass or is conducted in bad faith' … or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." *National Farmers Union Insurance Comp. v. Crow Tribe*, 471 U.S. 845, 856 n.21 (1985). Additionally, a tribe may opt to enter into a contract with a choice-of-forum clause, and, under such circumstances, the choice-of-forum clause may be directly enforced without first requiring exhaustion of tribal remedies. Finally, federal courts must generally defer to tribal court findings of facts, unless the tribal court findings of fact are clearly erroneous. *Mustang Prod. Co. v. Harrison*, 94 F.3d 1382, 1384 (10th Cir. 1996).

G. Criminal Jurisdiction

In 1817, the federal government began regulating criminal jurisdiction in Indian country with passage of the Indian Country Crimes Act. 18 U.S.C.A. § 1152. Under the Indian Country Crimes Act, the federal government asserted jurisdiction over crimes occurring within Indian country, except where the crime involved an Indian against an Indian. The tribe had exclusive jurisdiction over these crimes. In 1883, the U.S. Supreme Court decided *Ex Parte Crow Dog*, 109 U.S. 556 (1883), which involved the murder of one Indian by another Indian in Indian country. The Court held that the federal court did not have jurisdiction over the crime, because both the defendant and victim were Indian, and the crime occurred within Indian country. In reaction to this decision, Congress passed the Major Crimes Act, which granted the federal courts concurrent jurisdiction over enumerated crimes that occur within Indian country, regardless of the political affiliation of the individuals involved. 18 U.S.C.A. § 1153.

Despite these congressional acts, tribal courts still maintain considerable jurisdiction over crimes committed in Indian country by Indians. With the caveat of Public Law 280, which is discussed above, tribal courts maintain exclusive jurisdiction over non-major crimes committed by Indians against Indians in Indian country. Tribal courts have concurrent jurisdiction over non-major crimes committed by Indians against non-Indians. Many tribal courts also exercise concurrent jurisdiction with the federal government over major crimes committed by Indians. Notably, this tribal court authority extends to both member and non-member Indians, as decided by the U.S. Supreme Court in *United States v. Lara*, 541 U.S. 193 (2004). It is also notable that

the Double Jeopardy clause of the Fifth Amendment does not preclude federal prosecution of a crime following tribal prosecution, because tribes are separate sovereigns. *United States v. Wheeler,* 435 U.S. 313 (1978).

However, tribal courts lack criminal jurisdiction over non-Indians. *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978). In Oliphant, the Court determined that tribal court authority over crimes committed by non-Indians would be inconsistent with the dependent status of Indian tribes.

Criminal Jurisdiction in Kansas

With regard to criminal jurisdiction in Indian country, the state of Kansas is unique. Congress granted Kansas criminal jurisdiction "over offenses committed by or against Indians on Indian reservations." 18 U.S.C. § 3243 (2006). This provision has been interpreted to mean that "Kansas has jurisdiction over non-major state offense committed by or against Indians on Indian reservations located in the State of Kansas." *Iowa Tribe of Indians v. State of Kan.*, 787 F.2d 1434, 1440 (10th Cir. 1986).

H. Indian Gaming

Indian Gaming Regulatory Act of 1988 (IGRA), 25 U.S.C. §§ 2701, *et seq*., was designed to balance the interests of states, tribes and the federal government. IGRA divides gaming into three classes: Class 1 (traditional and social games played for no significant financial stakes and are to be regulated exclusively by the tribes); Class 2 ("the game of chance commonly known as bingo including pull-tabs, lotto, punch boards, tip jars, instant bingo and other games similar to bingo"; regulated by tribes pursuant to tribal ordinances approved by the National Indian Gaming Commission); and, Class 3 (typically your Vegas style gaming). Gaming is permitted only on Indian lands. Congress has limited how tribes may use their revenues. Net revenues from any tribal gaming may only be used: 1) To fund tribal government operations or programs, 2) To provide for the general welfare of the Indian tribe and its members, 3) To promote tribal economic development, 4) To donate to charitable organizations, and 4) To help fund operations of local government agencies.

II. Recent Judicial Developments

Because of the unique relationship between federally recognized tribes and the federal government, Indian law issues can arise in tribal, state, and federal courts. Accordingly, the following review of recent cases includes decisions from both state and federal courts (District of Kansas, Tenth Circuit, and U.S. Supreme Court). This review only includes decisions that involve questions of Indian law. Cases involving matters arising in Indian country, but not addressing questions of Indian law, are excluded.

A. Court of Appeals of Kansas

1. *In re M.G.* (Unpublished Disposition)[7]

The district court terminated C.G.'s (Father's) parental rights to his son, M.G. Father brought suit arguing that the State failed to comply with the notice requirements of Indian Child Welfare Act (ICWA). Father also brought due process and evidentiary claims, but the Court of Appeals found no reversible error on these claims. The Court of Appeals did, however, find that the record failed to show that the district court complied with the ICWA notice requirements.

An altercation between M.G.'s parents, Father (C.G.) and Mother (B.B.) landed them in the emergency room, where police were informed of the details. Mother stabbed Father in the shoulder, and Father responded by punching Mother in the eye. M.G. was 15 months old and present for the altercation. As a result, the State filed petition to adjudicate M.G. as a child in need of care (CINC). The State's petition indicated it was unknown at that time if ICWA was applicable.

At the initial hearing, the district court approved 6-month informal supervision plan. The Court ordered Mother and Father to work with KVC, a child welfare agency that works with DCF, on reintegration programs, to create and enforce structure in their household. KVC's plan required Mother and Father to maintain a clean, orderly household; maintain stable income; utilize mental health services; submit to random drug testing; and provide documentation to KVC about their compliance with the plan.

At time of this plan, Mother, Father, and M.G. lived with Be. B. (Maternal Grandmother). During the supervision period, Mother and Maternal Grandmother had an argument, which possibly involved physical violence. After the argument, the State placed M.G. in DCF temporary custody. The Court deemed KVC's reasonable efforts to assist Mother and Father as unsuccessful because the family was homeless, with no appropriate home for M.G.

The district court entered an order for adjudication and disposition in the CINC case. The journal entry indicates ICWA was not applicable. There is no transcript of that hearing, so it is unknown how the district court reached its decision on applicability. The court issued a six-month reintegration plan, but retained M.G. in DCF custody.

The State later filed a motion requested a finding of unfitness and termination of both parents' parental rights. The basis of this motion was that after a year of preservation services, Father and Mother's situation remained unchanged. At the time of this filing, both Father and Mother had failed to maintain employment or obtain financial assistance; Maternal Grandmother's home was in poor condition; Father had several recent criminal charges, including indecent liberties with a minor; and both Father and Mother had tested positive for methamphetamines and refused several other drug tests.

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[7] No. 115,007, 2016 WL 4159902 (Kan. Ct. App. 2016) (unpublished opinion).

At the termination hearing, the Father was not present. Father's counsel stated he was informed that Father planned to attend, and requested a continuance. The court denied this request. Father's counsel then informed the court he was still waiting on tribal responses to notice letters, and that the proceeding should not move forward until a response was received. The State's attorney's response suggested a belief that this was a delay tactic. The district court, without elaborating, ruled that ICWA did not apply.[8]

The termination hearing proceeded and occurred over the course of four non-consecutive days. At the second day of the hearing, Father was present and represented by counsel. The State asked the court, for clarification purposes, to again rule that ICWA did not apply. Neither Mother or Father objected, and the district court again ruled that ICWA was inapplicable.

At the conclusion of the proceedings, the district court filed its memorandum decision. It found, by clear and convincing evidence, that Father was an unfit parent and his unfitness was not likely to change in the future. For the foreseeable future, it was in M.G.'s best interests to terminate parental rights. Father timely appealed.

On appeal and in relevant part, Father claimed the State failed to comply with ICWA and asked the court to vacate the order terminating his parental rights, or in the alternative, for remand for proceedings consistent with ICWA procedures. An appellate court has unlimited review to determine whether ICWA applies, which is a question of law.[9] Father preserved the ICWA applicability issue because his attorney raised the issue before the termination hearing began.

Rather than vacating the termination order, the Court of Appeals applied the remedy from *In re JMB*.[10] The Court of Appeals let the termination order stand, with instructions to remand to the district court to determine if ICWA applies. If ICWA did not apply, the termination order would remain in place. If ICWA did apply, the district court could then vacate the termination order, and proceed according to ICWA guidelines. Further, the Court of Appeals noted that the district court judge handling this case had been reversed several times for failure to follow ICWA. The court stated its first preference is for the district court to follow ICWA, but in the absence of this action, the *In re JMB* remedy is appropriate.

B. United States District Court for the District of Kansas

1. Koslover v. Prairie Band Potawatomi District Court[11]

Plaintiff, appearing *pro se*, filed suit in the District of Kansas based on the results of a case heard in the Prairie Band Potawatomi District Court. Plaintiff was acting as conservator and guardian for her son. The tribal court sent her a notice that she was to provide an accounting of how her son's money was being spent. Plaintiff claims she was "ambushed" by the judge and other tribal officials at the hearing. Plaintiff was removed as conservator and guardian for her

[8] *Id.* at *3.
[9] *Id.* at *13.
[10] No. 112,578, 2015 WL 4460578 (Kan. Ct. App. 2015) (unpublished opinion).
[11] No. 16-4061-DDC, 2016 WL 3511532 (D. Kan. May 31, 2016).

son. Plaintiff appealed in the tribal courts, which was denied. This suit in the District of Kansas followed. This opinion is a report and recommendation from a U.S. magistrate judge to the district court judge. The magistrate judge recommended the district judge "dismiss this action because plaintiff fails to state a claim upon which relief may be granted, because plaintiff is seeking monetary relief against those immune from such relief, and because this court lacks subject-matter jurisdiction over plaintiff's claims."[12]

The District Court dismissed Plaintiff's claims for failure to state a claim on which relief under 25 U.S.C. § 1983 and the Indian Civil Rights Act (ICRA). Section 1983 allows a plaintiff recovery for constitutional rights violations by a person who was acting "under color of state law." However, Plaintiff sued a tribal court and tribal officials. Tribes have historically been regarded as pre-existing the Constitution, and are not bound by the rights contained in the Constitution.[13] Therefore, as the Tenth Circuit had already recognized, § 1983 is not available if the alleged actions depriving constitutional rights were done under color of tribal law.[14]

Plaintiff's complaint also failed to state a valid claim for relief under ICRA. ICRA imposes restrictions on tribes similar to those in the Bill of Rights and Fourteenth Amendment.[15] However, it is settled law that a federal court does not have jurisdiction to hear claims containing alleged ICRA violations.[16] Tribes possess sovereign immunity, similar to the states. This immunity can only be abrogated with express, congressional intent.[17] ICRA does not contain an explicit abrogation of tribes' sovereign immunity, and accordingly tribes are protected from suits, such as this one, by virtue of their sovereign immunity.[18]

Further, tribal immunity is also an issue of subject matter jurisdiction.[19] Tribes have sovereign immunity from suits such as this because of their common-law immunity from suits.[20] This immunity is extended to tribal officials acting in their official capacity.[21] Again, because ICRA does not contain an express abrogation of sovereign immunity, federal courts do not have subject matter jurisdiction over an action such as this one.

C. United States Court of Appeals for the Tenth Circuit

1. Wyoming v. United States Environmental Protection Agency[22]

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[12] *Id.* at *1.
[13] *Id.* at *2, citing Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56–57 (1978).
[14] *Id.*, citing Burrell v. Armijo, 456 F.3d 1159, 1174 (10th Cir. 2006).
[15] *Id.*, citing Santa Clara Pueblo, 436 U.S. at 57–58 (citing 25 U.S.C. § 1302).
[16] *Id.*, citing Santa Clara Pueblo, 436 U.S. at 58–59 (citing 25 U.S.C. § 1302).
[17] *Id.*
[18] *Id.*
[19] *Id.* at *3, citing *Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1009 (10th Cir. 2007).
[20] *Id.*, citing *Santa Clara Pueblo*, 436 U.S. at 58.
[21] *Id.*, citing *Burrell*, 456 F.3d at 1174; *see also Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1183 (10th Cir. 2010).
[22] 849 F.3d 861 (10th Cir. 2017).

The State of Wyoming and Wyoming Farm Bureau Federation (Petitioners) petitioned for review of the Environmental Protection Agency's (EPA) determination of the Wind River Indian Reservation boundaries for purposes of the Tribe's authority to administer portions of the Reservation under the Clean Air Act. Regionally application final actions of the EPA are directly appealable to the Tenth Circuit, so there is no lower court decision on review. Ultimately, the majority held that the Wind River Indian Reservation boundaries had been diminished by a 1905 legislative Act, and therefore granted Petitioners' petition.

The Tribes residing on the Wind River Reservation, Eastern Shoshone and Northern Arapaho Tribes, jointly petitioned the EPA for approval to administer non-regulatory programs under the Clean Air Act. The Clean Air Act contains provisions allowing tribes to act as states, if a tribe can meet certain criteria, such as regulatory jurisdiction. As part of their application, the Tribes had to demonstrate that they possess jurisdiction over the relevant land, and were required to clearly spell out the boundaries of the Wind River Reservation. In the application to the EPA, the Tribes asserted that they maintained jurisdiction over most of the lands that fell within the original 1868 boundaries of the Reservation. In response, Petitioners argued that the Reservation had been diminished by a 1905 act of Congress, and that some of the land included within the application no longer fell under the Tribes' jurisdiction.[23]

In reviewing the EPA's approval of the Tribes' application, which included the description of the lands over which the Tribes had jurisdiction, the court began with a historical overview related to the controversy. In relevant part, the court explain that the Tribes and United States signed the Treaty of Fort Bridger in 1868, which set aside roughly three million acres of land for the Tribes' exclusive use. "[I]n 1904 Representative Frank Mondell … introduced a bill initiating the cession of the land north of the Big Wind River …. The 1904 legislation was the framework for negotiations with the Tribes, which the Tribes ultimately agreed to as amended. Congress passed the 1904 agreement in 1905."[24] Today, approximately 75% of the land impacted by the 1905 Act is held in trust for the Tribes the federal government. In the Tribes' application to the EPA, they claimed the Reservation boundaries essentially followed those laid out in the 1868 Treaties, and Petitioners argue that the Reservation boundaries were diminished by the 1905 Act of Congress.

Accordingly, the Tenth Circuit focused its analysis on whether the Reservation was diminished by the 1905 Act of Congress. It began its analysis by explaining that congressional intent to diminish must be clearly expressed and diminishment is not to be lightly inferred.[25] Further, the court explained that the U.S. Supreme Court has articulated a three part test to determine whether diminishment has occurred in *Solem v. Bartlett*, 465 U.S. 463 (1984). Under the *Solem* test, the court first considers the legislative text, then the circumstances surrounding passage, and finally subsequent treatment to determine congressional intent.[26] Accordingly, the court started its analysis with the text of the 1905 Act. The court noted that Article I of the 1905 Act used the terms "cede, grant, and relinquish," suggesting that Congress intended to diminish

[23] *Id.* at 865.
[24] *Id.*at 867.
[25] *Id.* at 868.
[26] *Id.* at 869.

the Reservation.[27] This language is consistent with language that the U.S. Supreme Court has previously found indicated Congress' intent to diminish.[28]

The EPA and Tribes argued that the 1905 Act does not include any language regarding the "sale" of the land. But, the court determined that the addition of terms related to "sale" would not materially alter the purpose of the 1905 Act.[29] Further, the EPA and Tribes argued that there was no diminishment because nothing in the 1905 Act indicated unconditioned payment for the land. The court responded that the 1905 Act contained language suggesting a hybrid payment scheme, which was consistent with congressional beliefs at the time.[30] The EPA and Tribes then argued that the language of the 1905 Act indicated an intent for the U.S. to hold the relevant land in trust for the Tribes. The court responded by explaining that trust status can exist even after a reservation has been diminished.[31]

The court then moved to the second step of the *Solem* test and considered the historical context surrounding the passage of the 1905 Act. The court concluded that the circumstances surrounding passage of the 1905 Act confirms diminishment, as "[t]he legislative history and the negotiations leading up to the 1905 Act reveal Congress's longstanding desire to sever from the Wind River Reservation the area north of the Big Wind River."[32] Further, the prevailing policy for Congress at the time was to remove a sum certain from the Act and to replace with a hybrid payment scheme, which Congress believed with result in more money for the Tribes. To support this conclusion, the court considered terms used to open negotiations with the Tribes, and the fact that the Tribes were advised that the boundaries of the Reservation would change. Further, statements from tribal members suggested that they understood the Reservation boundaries would change. Finally, in a report back to Congress, the negotiator indicted that the Reservation was to be diminished.[33] The court therefore determined that the historical circumstances surrounding passage of the 1905 Act supported a conclusion that the Reservation was diminished.

Finally, the court turned to the third step in the *Solem* test by considering the subsequent treatment of the area. The court began its analysis of the third step by indicating that subsequent events should be given lesser weight in determining the intent of Congress. In this case, the court could not discern clear congressional intent from the subsequent treatment, so it found that such information was of little evidentiary value.[34] Ultimately, nothing in the subsequent treatment upset the court's conclusion that diminishment had occurred by virtue of enactment of the 1905 Act.

For these reasons, the court granted the Petitioners' petition for review to vacate the EPA's determination, and remanded for further proceedings.

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[27] *Id.* at 870.
[28] *Id.*at 870-871.
[29] *Id.* at 872.
[30] *Id.*
[31] *Id.* at 874.
[32] *Id.*
[33] *Id.*at 877-878.
[34] *Id.* at 879.

Judge Lucero dissented from the majority opinion. Judge Lucero indicated that diminishment cannot be lightly inferred. He argued that the majority erred in relying on sum-certain payment cases, as this matter did not involve a sum-certain for payment for the lands at issue in the 1905 Act. Further, he pointed to the fact that the 1905 Act did not restore the lands to the public domain, suggesting that the Reservation had not been diminished. This fact also suggests that the Reservation was merely opened for settlement, and not diminished. He further pointed to the fact that where there are two reasonable options, such as his reading of the 1905 Act and the majority's reading of the same, "'[s]tatutes are to be construed liberally in favor of the Indians, which ambiguous provisions interpreted to their benefit.'"[35] Further, considering the surrounding circumstances, Judge Lucero indicated that there was language suggesting that the Reservation status would be kept for the lands in question, and that there was an absence of continuity of purpose of diminish the Reservation. He concludes that, "[a]t best, the historical record is mixed regarding Congress' intent. As such, it is insufficient to overcome ambiguity in the statutory text."[36] As to the third step, subsequent treatment, Judge Lucero agrees with the majority that the subsequent treatment is muddled as to diminishment, and, as a result, there is nothing to support a conclusion of diminishment.[37] Judge Lucero concludes his dissent by explaining that the United States has a moral obligation to act in the best interests of tribes, which also weighs in the Tribes' favor in this case.[38]

2. Hackford v. Utah[39]

Plaintiff filed a motion to enjoin state officials from prosecuting him for traffic offenses because of his status as an Indian and because the traffic offenses occurred on tribal land. The District Court for the District of Utah denied the motion, finding the traffic offenses did not occur on tribal land, and that Hackford was not an Indian within the meaning of the federal statute. The Tenth Circuit affirmed that the offense did not occur in Indian country, and therefore did not discuss whether or not Hackford was an Indian as defined by the statute.

The relevance of the land status where the traffic violation occurred is significant. If the location of the traffic violation is within Indian country, only the federal government or the Tribe may prosecute Indians for criminal offenses.[40] Further, the U.S. Supreme Court has specifically held that "Congress has not granted criminal jurisdiction to the State of Utah to try crimes committed by Indians in Indian Country."[41]

Parties agree on the location of where the traffic offense occurred, which was in an area known as the Strawberry Valley Project land.[42] Parties also agree that the location was

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[35] *Id.*at 883-884.
[36] *Id.*at 887.
[37] *Id.*
[38] *Id.* at 889.
[39] 845 F.3d 1325 (10th Cir. 2017).
[40] *Id.* at 1327, citing Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah (Ute VI), 790 F.3d 1000, 1003 (10th Cir. 2015); and Cheyenne–Arapaho Tribes of Okla. v. Oklahoma, 618 F.2d 665, 668 (10th Cir. 1980).
[41] *Id.* at 1327, citing Hagen v. Utah, 510 U.S. 339, 408 (1994).
[42] *Id.* at 1326.

originally part of the Uintah and Ouray Indian Reservation.[43] Originally, the Ute Tribe received reservation lands via presidential executive orders in the late 1800s.[44] In 1905, President Roosevelt, using a presidential proclamation, took certain lands within the reservation and set the land aside for the Strawberry Valley Reservoir Project.[45] Five years later, Congress directed Secretary of Interior to pay the Ute Indians $1.25 per acre and declared that "[a]ll right, title, and interest of the Indians in the said lands are hereby extinguished."[46] Later, in 1988, almost all of the Strawberry Valley Project lands were added to the Uinta National Forest.[47]

The Tenth Circuit agreed with the district court's determination that the Strawberry Valley Project land "ceased to be part of Indian Country when it was withdrawn from the Uintah Indian Reservation and set aside for use as a reservoir, and that the status of this land did not change when it was subsequently incorporated into the Uinta National Forest."[48] Diminishing tribal lands is not lightly inferred, and requires that "Congress clearly evince[d] an intent to change boundaries."[49] The Ute Tribe has had an ongoing battle with the State of Utah over diminishment of its reservation land. In a previous litigation, the district court held that "land purchased through the 1910 Act for reservoir purposes was disestablished from the Uintah and Ouray Reservation" because "the transfer of all management and control of the lands to private parties, compounded with the express extinguishment of the Indians' interest [in the Act], is inconsistent with continuing Indian reservation status."[50] Neither party appealed the district court's decision, so the district court's holding is still valid.

Nevertheless, Plaintiff argues that although the Strawberry Valley lands were taken from the reservation in 1910 that the land regained reservation status in 1988 when the land was added to the Uinta National Forest.[51] But the Court found Mr. Hackford did not present any legal basis for this reasoning. The Court further noted that "the test for determining whether land is Indian country does not turn upon whether that land is denominated 'trust land' or 'reservation.' Rather, we ask whether the area has been 'validly set apart for the use of the Indians as such, under the superintendence of the Government.'"[52] However, Congress' stated purpose for including the Strawberry Valley land in the national forest in 1988 was to increase administrative flexibility and efficiency of the land, not to set it aside for use by the Ute Indians.[53]

Last, Mr. Hackford argued that even if the land was not part of the Ute reservation, the land in question was federal land and, therefore, the state did not have jurisdiction over him. However, the state does not lose jurisdiction over land situated in a national forest, but rather has

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[43] *Id.* at 1326.
[44] *Id.* at 1328.
[45] *Id.* at 1328.
[46] *Id.* at 1328, citing Act of April 4, 1910, ch. 140, 36 Stat. 285.
[47] *Id.* at 1328.
[48] *Id.* at 1328, citing Aplt. App., vol. B at 354–55.
[49] *Id.* at 1328 (quoting Solem v. Bartlett, 465 U.S. 463, 470(1984)).
[50] *Id.* at 1328, citing Ute Indian Tribe v. Utah (Ute I), 521 F.Supp. 1072, 1075, 1141 (D. Utah 1981).
[51] *Id.* at 1329.
[52] *Id.* at 1329–30 (quoting Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 511, (1991), quoting United States v. John, 437 U.S. 634, 648–49, (1978)).
[53] *Id.* at 1330.

concurrent jurisdiction with the federal government.[54] Accordingly, the Tenth Circuit affirmed the district court's holding, finding that the traffic offenses did not occur within Indian country.

3. Ute Indian Tribe of the Uintah and Ouray Reservation v. Myton[55]

The Ute Indian Tribe filed motion for injunctive relief against cities, counties, and state officials to stop criminal prosecution of traffic offenses allegedly committed by tribal members in Indian country. The District Court of Utah granted the city's motion to dismiss, but the Tenth Circuit reversed the district court and ordered the case reassigned to a new district court judge. The City of Myton has filed a petition for writ of cert with the U.S. Supreme Court, and the tribe's response is due March 13, 2017.[56]

This is the seventh opinion in the forty-year saga between the Ute Tribe and the cities, counties, and state of Utah. The Tenth Circuit expressed its frustration by stating "over the last forty years the questions haven't changed—and neither have our answers."[57] This opinion is scathing against the State of Utah and the district court, to say the least, and the final blow was that the Tenth Circuit ordered the case to be reassigned to a different district court judge, noting that this situation qualified as an "extreme circumstance" that warranted reassignment.[58]

The original controversy involved an argument by Utah and local governments that three portions of the Tribe's lands had been diminished, and, in 1985, the Tenth Circuit settled those diminishment claims in favor of the Tribe. In response to this decision, state officials sought a "friendlier forum" and prosecuted tribal members in state court for actions occurring within the tribal boundaries. The Tenth Circuit explained that the state officials had no authority to prosecute for conduct within the tribal boundaries. Eventually this matter made its way to the U.S. Supreme Court, and, in *Hagen v. Utah*, 510 U.S. 399 (1994), the Court held that the land in question in this case was diminished and, therefore, the state prosecutions could stand.

After *Hagen*, the Tenth Circuit issued its interpretation of *Hagen*.[59] The question in *Hagen* dealt with whether particular state officials could prosecute a particular defendant on a particular parcel of land. While the Supreme Court did decide that the particular parcel of land was not in Indian country, the Court "made plain that its holding rested on the judgment that all parcels of land transferred to nontribal members between 1905 and 1945 are not Indian country—and that Mr. Hagen's home sat on such a parcel."[60] *Hagen* did not purport to deal with lands that had *not* been transferred to nontribal members between 1905 and 1945, nor did it hold that every tract of land within City of Myton is not Indian country.

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[54] *Id.* at 1330, citing 16 U.S.C. § 480; United States v. Fields, 516 F.3d 923, 932–33 (10th Cir. 2008); and Utah Code Ann. § 63L–1–204.
[55] 835 F.3d 1255 (10th Cir. 2016). Note that there was an error at page 17 of this original opinion, so the court re-released the opinion at 832 F.3d 1220 (10th Cir. 2016).
[56] Myton v. Ute Indian Tribe of the Uintah and Ouray Reservation, U.S., January 10, 2017.
[57] *Id.* at 1258.
[58] *Id.* at 1263–64.
[59] Ute Indian Tribe of the Uintah and Ouray reservation v. Utah, 114 F.3d 1513 (10th Cir. 1997) (hereinafter Ute V).
[60] *Id.* at 1261, citing Hagen at 414.

Despite this decision, *Ute V*, local authorities persisted in asserting jurisdiction over tribal lands the Tenth Circuit had explicitly stated are within Indian country. While yet another case[61] was pending in front of the Tenth Circuit, one of the defendants, City of Myton, filed a Motion to Dismiss and the District Court granted the motion. The granting of that motion was appealed by the Tribe and resulted in this decision from the Tenth Circuit.

The City of Myton disputes facts in the Tribe's complaint and denies that the land at issue is within Indian country. However, the Tenth Circuit points out that a motion to dismiss is not the appropriate motion to file when a party disputes facts. In a motion to dismiss, the court has to construe facts in light most favorable to non-movant.[62] The Tribe wholeheartedly maintains that the land is within Indian country. The Court points out that not only should that fact be inferred for the purpose of a motion to dismiss, but that fact is one the court had previously ruled on. The City of Myton's plan and plat acknowledgement indicates the land is the Tribe's land. Further, the Department of the Interior previously refused the city's request for a permit to purchase land within the townsite's boundaries to build an airport because the land in question "had been irrevocably restored to tribal jurisdiction in 1945."[63]

The City of Myton next argues that the U.S. Supreme Court's ruling in *Hagen v. Utah* requires dismissal because the Court's opinion stated the land in question, where the defendant in that case committed the crime, is not in Indian country. However, as the Tenth Circuit already distinguished in Ute V, *Hagen* dealt with the issue of one particular tract of land, not all lands transferred to nontribal members between 1905 and 1945. Further, Utah has unsuccessfully petitioned the U.S. Supreme Court for certiorari in two subsequent cases after the Tenth Circuit's *Hagen* interpretation, which further supports the tribe's argument that the Tenth Circuit's *Hagen* interpretation in Ute V is correct. The Tenth Circuit drives the point home by stating "*Ute V*'s interpretation of *Hagen* is not only plainly controlling: it seems to us plainly correct."[64]

The City of Myton also made an equity argument, complaining that its criminal jurisdiction had become checkboarded throughout the town. The Tenth Circuit observed that jurisdictional checkerboarding "is the natural consequence of Congress's decision to open and then close reservation lands to outside settlement."[65] A ruling for the City would not rid the checkerboard effect, but only change its jurisdictional limits in direct conflict with the court's prior decisions. Other municipalities have successfully dealt with checkerboarding, and the Tenth Circuit did not believe the judiciary is the correct place to undo Congress's scheme.

Finally, the City of Myton argued the doctrine of laches, as the Tribe waited so long to assert its claims, and the city has since come to expect that its town does not contain any tribal lands. The Tenth Circuit rejects this argument because the lands that were reverted back to the tribe in 1945 were held in trust by the federal government, and laches cannot be asserted against the United States.[66] Further, the City cannot claim it never knew it had tribal lands within its

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[61] Ute Indian Tribe of the Uintah and Ouray reservation v. Utah, 790 F.3d 1000 (10th Cir. 2016) (hereinafter Ute VI).
[62] *Id.* at 1260–61.
[63] *Id.* at 1261.
[64] *Id.* at 1262.
[65] *Id.* at 1262.
[66] *Id.* at 1263, citing Guar. Trust Co. v. United States, 304 U.S. 126, 132 (1938).

limits based on the Department of Interior's explanation for denying the city's airport permit. Further, the Tribe timely brought suit thirty years ago when local officials started asserting jurisdiction over tribal members, and no laches arguments were raised at that time, and the Tribe has been consistently defending its jurisdiction since that time.

The Tribe filed a motion seeking to have this case and related matters reassigned to a different judge on remand. The court acknowledged that reassignment is an exception remedy, but that it was appropriate in this case because the district court failed to give effect to the court's mandate in *Ute V*. Accordingly, the court reassigned the matter to ensure just and timely resolution.

4. United Planners Financial Services of America, L.P. v. Sac and Fox Nation[67]

This case involves a string of on-going litigation between parties since 2011 "over an investment allegedly gone awry."[68] The Sac and Fox Nation sued United Planners for breach of contract in tribal court. The tribal court found the contract required arbitration and dismissed the suit. The arbitration panel subsequently dismissed the proceeding because of the statute of limitations. The Nation filed suit again in tribal court, claiming litigation was appropriate because arbitration was no longer available.

United Planners filed suit in federal court asking the court to intervene and enjoin the tribal suit. The district court dismissed United Planners' case because it failed to first exhaust tribal remedies before coming to federal court. United Planners appealed the district court's decision to the Tenth Circuit. The Tenth Circuit agreed with the district court that United Planners must first exhaust its remedies in the tribal system.

United Planners argued that a suit in federal court is appropriate when a tribe is unlawfully asserting jurisdiction over a non-tribal person or entity.[69] But as the Tenth Circuit pointed out, before a claim of unlawful tribal jurisdiction can be asserted, all tribal remedies must first be exhausted.[70]

United Planners also asked the district court and Tenth Circuit to consider the tribal court's prior dismissal of the case not just a dismissal in order to pursue arbitration, but as "permanently closing the tribal court to the Nation's claims."[71] Essentially, United Planners was asking the federal court to issue a judicial ruling that the Nation's suit is barred in tribal court because of issue or claim preclusion based on its original suit. However, as admitted by United Planners' counsel in oral argument, there is nothing preventing United Planners from raising this defense on its own in tribal court. The issue or claim preclusion defense is a remedy that should be exhausted in tribal court before the district court should get involved.

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[67] 654 F. App'x 376 (Mem) (10th Cir. 2016).
[68] *Id.* at 377.
[69] *Id.*, citing *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 852–53, (1985).
[70] *Id.*, citing *Nat'l Farmers*, 471 U.S. at 856–67.
[71] *Id.*

There are two exceptions for when a party does not have to exhaust tribal remedies: if doing so would lead to unnecessary delay, or if tribal jurisdiction is asserted in bad faith.[72] Neither exception is applicable for United Planners. There is no unnecessary delay because either the tribal court or the district court would need to issue a ruling on the preclusion argument, and United Planners has not given any reasons why the tribal court would take longer than the district court. Further, United Planners has not offered any indication that the Nation's second suit was brought in bad faith. The Tenth Circuit cited other instances when cases have returned to court after arbitration,[73] but also included a disclaimer that the Nation's suit may ultimately be found to have been brought in bad faith, but at this time, United Planners had not offered any evidence to indicate bad faith.

Last, United Planners requested that if it must return to tribal court, that the district court abate rather than dismiss United Planners' current suit in federal court. However, abatement is only appropriate if the requesting party shows good cause for its failure to exhaust tribal remedies. United Planners had not shown any reason for its failure to exhaust tribal remedies, so its abatement request was also denied.

D. United States Supreme Court

1. Lewis, et al. v. Clarke[74]

In *Lewis*, the U.S. Supreme Court considered whether tribal sovereign immunity applied to shield a tribal employee sued in his individual capacity in state court for an accident occurring outside of Indian country. The tribal employee argued that tribal sovereign immunity barred the suit, as he was acting within the scope of his employment at the time of the accident. Alternatively, because tribal law provided that he may be indemnified by the Gaming Authority, he argued that he should be entitled to sovereign immunity on the basis of the indemnification statute. The Court, however, rejected both arguments, finding that tribal sovereign immunity does not apply to a tribal employee acting in his personal, not official, capacity.

The Petitioners, Brian and Michelle Lewis, were struck from behind by Clarke while they were driving on a Connecticut interstate outside of the reservation. At the time, Clarke was transporting patrons of the Tribe's casino. All parties agreed that Clarke caused the accident. The Petitioners brought a claim against Clarke in his individual capacity in state court. In defense, Clarke argued that he was shielded from liability by virtue of the Tribe's sovereign immunity given he was acting within the scope of his employment at the time of the accident. The lower state court determined that tribal sovereign immunity did not apply, given the suit was brought against Clarke in his individual capacity. The Connecticut Supreme Court disagreed, finding that tribal sovereign immunity applied to shield Clarke given he was acting within the scope of his employment at the time of the accident. The Court granted certiorari to resolve whether an Indian tribe's sovereign immunity bars individual-capacity damages actions against

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[72] *Id.* at 377, citing *Burrell v. Armijo*, 456 F.3d 1159, 1168 (10th Cir. 2006).
[73] *Id.* at 378, citing *e.g., In re Salomon Inc. Shareholders' Derivative Litig*. 91 Civ. 5500 (RRP), 68 F.3d 554, 560–61 (2d Cir. 1995).
[74] 581 U.S. __ (2017).

tribal employees for torts committed within the scope of their employment and for which the employees are indemnified.

In determining that tribal sovereign immunity did not apply in such circumstances, Court explained that it has previously held that sovereign immunity only applies where the remedy is truly against the sovereignty. The Court determined that the same standard should be applicable in determining whether tribal sovereign immunity protects an employee. Further, the Court explained that the difference between individual and official immunity is relevant in this matter. 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."[75] Alternatively, "'[p]ersonal-capacity suits … seek to impose *individual* liability upon a government officer for actions taking under color of state law.'"[76] The Court concluded that this matter raised questions of personal capacity and not official capacity. "This is not a suit against Clarke in his official capacity. It is simply a suit against Clarke to recover for his personal actions, which 'will not require action by the sovereign or disturb the sovereign's property.'"[77] Notably, Clarke did not raise the issue of personal immunity until his appeal, and, therefore, the Court did not address the issue of personal liability.

In response, Clarke argued that the Tribe's Gaming Authority (an arm of the Tribe) is the real party in interest given the requirement under tribal law that the Gaming Authority indemnify him. The Court responded, however, that "an indemnification provision cannot, as a matter of law, extend sovereign immunity to individual employees who would otherwise not fall under its protective cloak."[78] In reaching this decision, the Court focuses its analysis on who is legally bound by the Court's decision, and not on who will ultimately pay for any damages. Further, the Court explained that indemnification is not guaranteed in this case, as the Gaming Authority is not required to indemnify him if it is determined that he engaged in "wanton, reckless, or malicious" activity.

Next, Clarke argued that courts have applied sovereign immunity to protect private healthcare insurance companies, which supports application of sovereign immunity in the present case. The Court disagreed, explaining that "these cases rest of the proposition that the fiscal intermediaries are essentially state instrumentalities, as the governing regulations make clear."[79] As a result, the Court declined to treat a suit against an individual in the same manner as one against a state instrumentality. The Court also adds that this decision is consistent with the practice that applies in diversity of citizenship and joinder cases. Accordingly, based on the foregoing analysis, the Court reversed the Connecticut Supreme Court.

Both Justices Ginsburg and Thomas wrote separately, concurring in the judgment. Justice Thomas wrote to reiterate his belief that tribal sovereign immunity does not apply to off-reservation commercial activity, and, as a result, would not apply to this case. Similarly, Justice Ginsburg wrote to explain her belief that "tribes, interacting with nontribal members outside of

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[75] *Id.*at *6 (citations omitted).
[76] *Id.*(emphasis in original) (citations omitted).
[77] *Id.*at *7 (citations omitted).
[78] *Id.* at 8-9.
[79] *Id.* at 10.

reservation boundaries, should be subject to non-discriminatory state laws of general application."[80]

2. U.S. v. Bryant[81]

In *Bryant*, the U.S. Supreme Court considered whether tribal court convictions can be used as predicate offenses in the application of federal law. Tribal courts are not required to comply with the Sixth Amendment as the U.S. Constitution does not apply to tribes. Accordingly, Bryant challenged a federal court using his tribal court convictions as predicate offenses for purposes of a federal statute given the tribal court convictions were obtained without his being represented by counsel. The tribal court convictions, however, applied with all applicable law. The U.S. Supreme Court concluded that uncounseled tribal court convictions can be used as predicate offenses and that there use in such a manner did not trigger due process concerns.

At issue in this case is 18 U.S.C. §117(a), which targets serial domestic violence offenders. Section 117(a) makes it a federal crime for any person to "commit a domestic assault within … Indian country" if the person has a least two prior final convictions for domestic violence rendered in federal, state, or tribal court. Bryant had multiple tribal court convictions for domestic violence. For several of his convictions, he was sentenced to imprisonment, but none for a term longer than a year. Bryant did not receive assistance of counsel in these proceedings. He therefore argues that these past convictions should not be considered for purposes of Section 117(a) given he would have been entitled to counsel if the proceedings had occurred in either state or federal court.

The Court started by explaining that the Sixth Amendment does not apply to tribes given tribes are extra-constitutional and pre-dated the existence of the Constitution. The Indian Civil Rights Act (ICRA), however, does apply to convictions in tribal court. ICRA only requires that counsel be appointed when a sentence of more than a year is imposed. Given Bryant was not sentenced to more than a year imprisonment, it is undisputed that his convictions therefore complied with ICRA when entered.[82] Further, no previous Sixth Amendment violation existed at the time the convictions were entered.

Following this introduction, the Court went on to recognize the high rates of sexual assault against Indian women in Indian country. For example, 46% of American Indian and Alaska Native women have been victims of physical violence by an intimate partner.[83] Also, the Court acknowledged that tribal court sentencing authority has been curbed, as ICRA limits tribal courts to one year imprisonment and/or a fine.[84] The Tribal Law and Order Act, enacted in 2010, does allow for tribes to have increased sentencing authority if a tribe meets certain conditions, but few tribes have taken advantage of this increased sentencing authority.[85] States

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[80] *Id.* at 1 (J. Ginsburg concurring).
[81] 136 S.Ct. 1954 (2016).
[82] *Id.*at 1958-59.
[83] *Id.* at 1959 (citation omitted).
[84] *Id.* at 1960.
[85] *Id.*

are largely not filling the gap left by this curbed sentencing authority, even states under Public Law 280 which have criminal jurisdiction in Indian Country.[86] As a result, the federal government is left to fill the gap. Congress therefore enacted Section 117(a) to create a felony offense to hopefully address the escalating abuse in Indian country.[87] The case therefore requires the Court to determine whether Section 117(a)'s inclusion of tribal court decisions is compatible with the Sixth Amendment's right to counsel. The Sixth Amendment requires the appointment of counsel for an indigent defendant whenever a sentence of imprisonment is imposed.

The Court went on to explain that tribal courts are generally free from limitations on federal and state courts. As a result, the Sixth Amendment right to counsel does not apply to tribal courts.[88] ICRA does, however, apply and guarantees due process and habeas review of tribal court convictions. The Court acknowledged that a conviction in violation of the Sixth Amendment cannot be used in subsequent federal proceedings.[89] The tribal court convictions at issue in this case, however, were valid when entered and did not violate the Sixth Amendment. The U.S. Court of Appeals for the Ninth Circuit, however, found that, because the uncounseled convictions and imprisonment would have violated the Sixth Amendment if entered in state or federal court, then they past convictions could not be used as predicate offenses for purposes of Section 117(a).[90] This created a Circuit Court split between the Ninth Circuit and the Eighth and Tenth Circuits, which is why the Court granted cert.[91]

In making its determination, the Court reiterated that the convictions were valid when entered and complied with ICRA. Bryant urged the Court to treat the tribal court convictions as if they were entered in state or federal court.[92] The Court declined to do so, because, in past decisions, the focus was on whether the past convictions were valid when entered, which they were in this case.[93] Because there was no Sixth Amendment problem at the time the convictions were entered, the Court declined to find one now. In other words, the Court declined to create a "hybrid" category for tribal court decisions.[94]

Next, Bryant argued that there were reliability problems with the tribal court convictions in the absence of counsel. The Court responded, however, that "[t]here is no reason to suppose that tribal-court proceedings are less reliable when a sentence of a year's imprisonment is imposed than when the punishment is merely a fine."[95] Finally, Bryant alleged that there were due process concerns with the tribal court convictions. But, the Court responded by explaining that due process protections attach to tribal court proceedings through ICRA, and ICRA ensures the reliability of tribal court decisions.[96] For these reasons, the Court reversed the Ninth Circuit, holding that tribal court convictions can be predicate offenses for purposes of Section 117(a).

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[86] *Id.*
[87] *Id.*at 1961.
[88] *Id.* at 1962.
[89] *Id.*
[90] *Id.* at 1964.
[91] *Id.*
[92] *Id.*at 1965.
[93] *Id.*
[94] *Id.* at 1966.
[95] *Id.*
[96] *Id.*

Justice Thomas concurred in the decision. Although he concurred in the result, he wrote separately to express his concern with the tensions inherent in Indian law – that all tribes are treated as having the same level of sovereignty, yet the federal government maintains plenary power.[97] Justice Thomas doubts that either view of tribal sovereignty is entirely correct, as he does not believe that all tribes possess the same level of sovereignty.[98] Further, he argues that no enumerated power gives Congress the power to act with plenary authority in Indian country.[99]

3. Dollar General Corp. v. Mississippi Band of Choctaw Indians[100]

In *Dollar General*, an equally divided Court affirmed the judgment of the U.S. Court of Appeals for the Fifth Circuit. No opinion was released. Below, the Fifth Circuit upheld the Mississippi Band of Choctaw Indians tribal court's jurisdiction over a non-Indian business engaged in conduct on the reservation. Specifically, the case involved a young tribal member who was sexually assaulted by a Dollar General store manager at the store during working hours. The tribal member was present at the store because he was participating in a job-training program. Before opening the store within the Tribe's reservation, Dollar General had agreed to participate in the Tribe's job training program. Following the sexual assault, the boy's parents filed for civil damages related to the tort. Dollar General filed its complaint in federal court, arguing that the tribal court did not have jurisdiction over a non-Indian business on the reservation. The Fifth Circuit disagreed, holding that Dollar General agreed to participate in the job training program, and, as a result, was subject to tribal court jurisdiction over conduct arising from that program.

E. Recent Bureau of Indian Affairs Developments – Revised ICWA Regulations and Guidelines

This past year, the Department of the Interior updated both the regulations and guidelines for the Indian Child Welfare Act (ICWA). ICWA was enacted in 1978. In 1979, the Department of the Interior issued both regulations and guidelines to assist in the proper implementation of the Act. In 2014, as reported in past chapter updates, the Department invited comments as to whether the guidelines should be updated. In response to the comments the Department received, it published updated guidelines interpreting the ICWA regulations. However, through the notice and comment period in 2014, it became clear that there was a need to update the regulations, as well as the guidelines. Accordingly, on March 20, 2015, the Department issued a proposed rule.[101]

On June 14, 2016, the Department issued its final rule regarding regulations for ICWA implementation.[102] The overall purpose of the regulation is to improve implementation of ICWA, and the regulation replaces the 1979 regulation. The final regulation promotes

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[97] *Id.* at 1967.
[98] *Id.*at 1968.
[99] *Id.*
[100] 136 S.Ct. 2159 (Mem) (2016).
[101] 80 Fed. Reg. 14480 (Mar. 20, 2015).
[102] 81 Fed. Reg. 38778.

nationwide uniformity and provides clarity on the federal minimum standards. The regulation addresses: applicability, initial inquiry, emergency proceedings, notice, transfer, qualified expert witnesses, placement preferences, voluntary proceedings, information, record keeping, and other rights.[103] The final regulation focuses on standards to be applied in state courts.

> In the final rule, the Department carefully balanced the need for more uniformity in the application of Federal law with the legitimate need for State courts to exercise discretion over how to apply the law to each case, while keeping in mind that Congress enacted ICWA in part to address a concern that State courts were exercising their discretion inappropriately, to the detriment of Indian children, parents, and Tribes.[104]

Further, the Department determined that guidelines were necessary to assist with the implementation and interpretation of the Act, given implementation has been inconsistent across states. Accordingly, in December 2016, the Department adopted guidelines for the implementation of ICWA.[105] The Department found that inconsistent implementation of the Act has led to disparate treatment of Indians across the nation, which conflicts with the federal government's unique obligation to tribes and Indian people. In notable part, the guidelines explain that:

> Native American children … are disproportionately more likely to be removed from their homes and communities than other children. In addition, some State court interpretations of ICWA have essentially voided Federal protections for groups of Indian children to whom ICWA clearly applies. And commenters provided numerous anecdotal accounts whether Indian children were unnecessarily removed from their parents and extended families; where the rights of Indian children, their parents, or their Tribes were not protected; or where significant delays occurred in Indian child-custody proceedings due to disputes or uncertainty about the interpretation of the Federal law.[106]

In light of these findings, the Department determined that guidelines were necessary to ensure that the minimum federal standards are met in all states. The guidelines therefore assist all parties, including courts, involved in child custody proceedings to understand how ICWA should be uniformly applied. The guidelines are not binding, but should be considered a valuable resource for those participating in child custody proceedings involving Indian children.

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[103] *Id.* at 38779-80.
[104] *Id.* at 38780.
[105] U.S. Department of the Interior Office of the Assistant Secretary – Indian Affairs, Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act* (Dec. 2016), available at: https://bia.gov/cs/groups/public/documents/text/idc2-056831.pdf.
[106] *Id.* at 6 (citations omitted).

Additional Resources

For additional information on federal Indian law, please see:

- Cohen's Handbook of Federal Indian Law (LexisNexis Matthew Bender 2012).
- William C. Canby, Jr., American Indian Law in a Nutshell (6th ed. 2015).