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SELECTED COURT DECISIONS

In *United States v. Denezpi*, 979 F.3d 777 (10th Cir. 2020), Denezpi, a Navajo tribal member, was arrested by Ute Mountain Ute tribal authorities and charged with violating the Tribe's assault and battery laws, as well as two provisions of the Code of Federal Regulations (CFR) on terroristic threats and false imprisonment. He entered an Alford plea to the assault and battery charge and was released from custody for time served. Six months later, federal prosecutors indicted Denezpi for aggravated sexual assault in violation of 18 U.S.C. §§ 2241(A)(1)-(2) & 1153(a). The court denied Mr. Denezpi's motion to dismiss the indictment on **double jeopardy** grounds. The Tenth Circuit Court of Appeals affirmed, citing the doctrine that prosecution for the same crime by two different sovereigns is not double jeopardy and rejected Denezpi's argument that his tribal court convictions under the Code of Federal Regulations occurred under federal, not tribal authority: "Mr. Denezpi asserts that the CFR's power is derived from a dual wellspring of both federal and tribal power. He claims the Court of Indian Appeals decisions 'acknowledge tribal sovereignty, but also recognize that the CFR courts operate under the authority of the federal government, not just the tribes.' …. But Mr. Denezpi misses the point. Because it has never been withdrawn, the ultimate source of the power undergirding the CFR prosecution of Mr. Denezpi is the Ute Mountain Ute Tribe's inherent sovereignty. … Therefore, the subsequent prosecution of Mr. Denezpi in the federal district court did not violate the Fifth Amendment's prohibition against Double Jeopardy." (Internal citations and emendations omitted.)

In *Oneida Indian Nation v. Phillips*, 2020 WL 6878441 (2d. Cir. 2020), the Second Circuit Court of Appeals, in the course of affirming a decision dismissing a meritless claim by an individual Oneida member claiming to own Oneida land independently of the Tribe on behalf of the long-defunct Orchard Party, distinguished the defense of **tribal sovereign immunity** from a defense based on lack of subject matter jurisdiction: "The Supreme Court has held that sovereign immunity is jurisdictional in nature. We think that tribal sovereign immunity, however, is not synonymous with subject matter jurisdiction for several reasons. Tribal sovereign immunity may be waived in certain circumstances and is subject to the plenary power of Congress. Lack of subject matter jurisdiction, on the other hand, may not be waived or forfeited. Second, tribal sovereign immunity operates essentially as a party's possible defense to a cause of action. In contrast, subject matter jurisdiction is fundamentally preliminary and an absolute stricture on the court. Finally, a waiver of sovereign

immunity cannot, on its own, extend a court's subject matter jurisdiction. We observe that there appears to be a divergence of opinion as to the precise nature of tribal sovereign immunity, but that there is no need to address, much less resolve, it here." (Internal citations, quotation and emendations omitted.)

In *Genskow v. Prevost*, 2020 WL 5259710, 825 Fed.Appx. 388 (7th Cir. 2020), Genskow, a member of the Oneida Nation of Wisconsin, was ejected from a meeting of the Nation's General Council at the order of the Nation's chair. Genskow sued the four tribal police officers who forcibly removed her from the meeting, alleging violations for constitutional rights under 42 U.S.C. § 1983. The district court dismissed and the Seventh Circuit Court of Appeals affirmed, rejecting the plaintiff's argument that, under the rule of *Lewis v. Clarke*, **sovereign immunity** did not protect the officers from a suit brought against them individually: "[W]ith regard to the Tribal Chairman's directive to remove Genskow from the meeting—the tribe is the real party in interest because the officers' actions 'in essence' were the tribe's own. Id. In carrying out the Chairman's directive, the officers were acting merely as 'an arm or instrumentality' of the tribe. Any claim based on the decision to remove Genskow from the meeting is essentially a claim against the tribe and therefore barred by its sovereign immunity. … It is a closer question, however, whether tribal sovereign immunity also bars Genskow's claims against the individual officers for using excessive force while removing her from the meeting. … *Lewis* differs from this case in material ways. In *Lewis*, the action for damages was brought by a non-Indian for personal injuries sustained in a car accident on a state highway; this action, the Court emphasized, would not require involvement 'by the sovereign or disturb the sovereign's property.' [Cite omitted.] Here, by contrast, a tribal member seeks to hold individual tribal officers liable for using excessive force while removing her from a meeting of the Nation's governing body on tribal land at the Tribal Chairman's direction. These facts reflect that the tribe must be the real party in interest. Allowing this suit to proceed would be 'at odds with ... tribal self-government' and 'undermine the authority of tribal forums,' which 'have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personnel and property interests of both Indians and non-Indians.'"

In *Navajo Nation v. United States Department of Interior*, 2020 WL 6869449 (D. Ariz. 2020), the Navajo Nation (Nation) gaming enterprise (Enterprise) in 2010 had acquired an easement, to be governed by Arizona law, from the Dryes, who owned land between Interstate 40 and the Nation's gaming facility south of Flagstaff. In 2012, the Hopi Tribe (Tribe) purchased the Dryes' land underlying the Enterprise's easement pursuant to deed (Hopi Fee Deed) that, by its terms, was subject to "matters of record in the Official Records of the Coconino County Recorder's Office" and that also explicitly acknowledges the Enterprise's easement. In 2012, the Hopi Tribe submitted a fee-to-trust application to the Western Regional Director of the Bureau of Indian Affairs (BIA), requesting that the BIA take the newly purchased **land into trust** pursuant to the Navajo Hopi Land Dispute Settlement Act of 1996. The application acknowledged the Enterprise's interest in the easement. The Regional Director issued a Letter Decision approving the application and stating that any notified parties would have thirty days from "receipt" of the Letter Decision to appeal. Notice of the Letter Decision was published in the Arizona Daily Sun. In January 2014, the Hopi property was taken into trust pursuant to a special warranty deed (Hopi Trust Deed), which made no explicit mention of the Nation's easement. In 2015, the Tribe asserted jurisdiction over the easement. The Nation, through a Freedom of Information Act request, obtained a copy of the Letter Decision in July 2016 and filed an appeal with the Interior Board of Indian Appeals (IBIA) within thirty days. When the IBIA in 2019 dismissed the appeal as untimely, the Nation sued Department of Interior (DOI) officials, alleging violation of the Administrative Procedure Act, including misapplication of 25 CFR § 151.12(d)(2)(ii)(A), which requires BIA officials to provide written notice of approval decisions to interested parties who made themselves known in writing. The Nation argued that the Regional

Director had actual knowledge of the Enterprise's recorded property interest in the easement but failed to provide actual written notice of the Letter Decision to the Enterprise at the time he issued the Letter Decision or within a reasonable time thereafter. The Court dismissed on the ground that the Nation lacked standing: "[L]ack of explicit reference to the easement alone is not sufficient to demonstrate that the Hopi Trust Deed extinguished any rights Plaintiffs had in the easement. Plaintiffs entered into an agreement with the Dryes that stated that the easement 'shall run with the land' and be 'governed' by Arizona law. … Plaintiffs have not established that their property interest in the easement was somehow extinguished or otherwise adversely affected, and the Hopi Tribe's mere 'assertion' of jurisdiction does not rise to the level of a recognizable legal harm. … Because Plaintiffs have not demonstrated that the regulatory provisions at issue were designed to protect a concrete interest instead of a merely procedural one or that the alleged violations produced harm, or a material risk of harm, to their concrete interests, Plaintiffs have not produced sufficient allegations to establish injury in fact. Instead, Plaintiffs' allegations are what they cannot be for Article III purposes: allegations of a 'bare procedural violation, divorced from any concrete harm.'" (Citations and internal emendations omitted.)

In *Kansas v. United States Department of Interior*, 2020 WL 6868776 (D. Kans. 2020), the Wyandotte Nation in 1992 had purchased approximately 10 acres of land near Park City in Sedgwick County, Kansas (Park City Parcel). Shortly after purchasing the Park City Parcel, the Wyandotte Nation sought trust status for it but later withdrew that application and instead focused on converting a larger parcel in Kansas City, known as the Shriner Tract, into trust land for gaming purposes under the **Indian Gaming Regulatory Act's** (IGRA) exception for lands acquired in settlement of land claims to the general rule against gaming on lands acquired after IGRA's enactment. The State of Kansas sued to challenge the Secretary's decision to accept the Park City Parcel in trust, arguing that Public Law 602 (PL 602), the 1984 congressional act settling the Wyandotte land claim provided just $100,000 explicitly to be used to purchase real property that the Secretary was required to take into trust (mandatory trust provision) and that, having previously prevailed in litigation asserting that settlement funds had been used to acquire the Shriner Tract, the Tribe could not argue that the same funds had been used to acquire the Park City Parcel. The State argued further that the National Indian Gaming Commission (NIGC) had improperly determined that the parcel fell within IGRA's land claim exception. The District Court denied the State's motion for a preliminary injunction: "Plaintiffs argue that the Secretary's reliance on Wyandotte Nation was 'clearly wrong' because there are material factual differences between the purchase of the Shriner Tract and the purchase of the Park City Parcel, and those differences were material to the decision in Wyandotte Nation, making that decision inapplicable. … Plaintiffs contend that the holding in Wyandotte Nation turned on the fact that the Shriner Tract was purchased with 'all' the PL 602 funds, and that had the Shriner Tract been purchased with funds over which the Wyandotte Nation exercised discretion, the court would not have concluded the 'settlement of a land claim' exception applied. Plaintiffs assert that the funds used to purchase the Park City Parcel were funds over which the Wyandotte Nation had such discretion. … This argument does not demonstrate a substantial likelihood of success on the challenge to the gaming decision. First, it assumes that there were insufficient PL 602 funds to purchase both the Park City Parcel and the Shriner Tract. The May 20 Decision found precisely the opposite. Plaintiffs may disagree, but that goes to the trust decision, not the gaming decision. Plaintiffs have made it clear they are not attacking the trust decision in the preliminary-injunction motion, and they are therefore not entitled to a presumption that it was in error at this stage."

In *Hardwick v. United States*, 2020 WL 6700466 (N.D. Cal 2020), residents of seventeen California rancherias, including the Buena Vista Rancheria (Tribe), terminated by the United States through the California Rancheria Act of 1958 sued in 1979 to have their status as Indians restored. Under a settlement agreement reached in 1983, the government restored the plaintiffs' status and recognized

their communities as Indian entities. The judgment required the government to acquire in trust lands fee land still held by rancheria members or their successors in interest. When the Tribe applied to have certain lands acquired from rancheria residents taken into trust for gaming purposes, the Department of Interior refused, concluding that the Tribe would need to apply for a discretionary acquisition under federal fee-to-trust regulations. The District Court for the Northern District of California, which had retained jurisdiction of the Hardwicke case for purposes of enforcement of the 1983 Judgment, on the Tribe's motion, ordered the government to take the parcels into trust, concluding that, for purposes of the mandatory **fee to trust** acquisition provisions of the 1983 Judgment, the Tribe was a successor in interest to the original plaintiffs.

In *President of the Church of Jesus Christ of Latter-Day Saints v. FD*, 2020 WL 6424117 (D. Utah 2020), FD had sued President of the Church of Jesus Christ of Latter-Day Saints (LDS) in the Navajo District Court. On Aug. 2, 2018, FD's attorney sent the defendant an email stating that FD had agreed to settle her claim for $60,000. The next day, a different attorney informed the first attorney that he was now representing FD and that FD did not wish to settle. When LDS sued in state court to enforce the settlement agreement, the state court entered judgement for LDS, which then sued in federal court and moved to enjoin further proceedings in the Navajo court. The federal district dismissed for failure to exhaust tribal remedies. LDS then sued again in state court for an order enjoining the Navajo court proceedings. FD moved to federal court, which held that only the Navajo court, not the state court, had jurisdiction to determine the enforceability of the settlement of FD's claims filed in that court: "[T]his court holds, as a matter of federal law, that the Navajo District Court possesses the exclusive authority to resolve the disputed settlement agreement between FD and Plaintiffs. The Fourth District Court therefore lacks subject matter **jurisdiction** to enforce the disputed settlement agreement. Because Plaintiffs' Complaint in this case—2:20-cv-507—depends on relief that the state court does not have the authority to grant, this case is dismissed without prejudice as to the Plaintiffs' ability to pursue their claims and defenses in the Navajo District Court. F.D.'s Motion to Dismiss, (ECF No. 10), is GRANTED."

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