

# **INTRODUCTION TO AMERICAN INDIAN LAW DESKBOOK 2024 EDITION**

The Conference of Western Attorneys General (CWAG), has proudly sponsored the publication of the American Indian Law Deskbook. In recognition of the dynamic, ever-changing nature of the law, recent editions have been updated annually. CWAG expects that the Deskbook will continue to serve as a comprehensive and practical overview of Indian law useful to practitioners, the judiciary, students, and scholars. This last year, there were again noteworthy case law developments, and the following summarizes some of the significant new cases discussed in the 2024 Edition. Indian law issues have also received substantial scholarly commentary since the 2023 Edition's publication, and a sample of recent law review articles is provided that reflects the commentary's diverse and thoughtful nature.

## **NOTABLE CASES**

### **Chapter 1**

*Northern Arapaho Tribe v. Becerra*, 61 F.4th 810 (10th Cir. 2023). The Tenth Circuit took up an issue that is the subject of a number of recent decisions: tribal entitlement to reimbursement of contract support costs under the Indian Self-Determination and Education Assistance Act (ISDEAA) for administrative expenditures associated with collecting and then recirculating revenues generated by billing third-party healthcare insurers. The Northern Arapaho Tribe and the Indian Health Service (IHS) entered into a contract under the ISDEAA for the Tribe to operate a federal healthcare program. Under the ISDEAA, tribes receive federal funding for the programs they operate in the amount that the IHS would have spent had it administered the program. Tribes also receive "contract support funds," to cover expenses incurred by the tribe in complying with the contract terms that would not be incurred had IHS provided the services directly, and "any additional administrative or

other expense” incurred by the tribe “in connection with the operation of the Federal program, function, service, or activity pursuant to the contract.” Tribes may also bill their members’ insurance carriers, whether Medicare, Medicaid, workers’ compensation, or private insurers, for services provided. The Tribe asserted it was entitled to contract support funds for overhead costs incurred in collecting and recirculating funds received from third-party insurers because it incurred the costs as part of its “operation of the Federal program.” The Secretary disagreed, asserting that contract support costs are limited by another section of the ISDEEA to “reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which ... normally are not carried on by the respective Secretary in his direct operation of the program.”

The issue resulted in three opinions, with one judge concluding that there were at “least two ways” to interpret the relation between the relevant statutory provisions. This judge then applied the canon of construction interpreting ambiguous statutes in favor of tribes, concluding that, under the canon, the Tribe’s “reasonable reading of the relevant and ambiguous statutory provisions is all that is required for the Tribe’s interpretation to succeed.” Another judge concurred in the result, finding it unnecessary to apply the canon of construction favoring tribes because the statutory definition of “contract support costs” unambiguously covered any overhead expenses incurred in connection with operation of the federal program, including costs incurred in billing third parties. A dissenting judge would have held that the statutory provision requiring a “tight nexus between the costs at issue and the Tribe’s contract with IHS” in order to be reimbursable trumped those provisions of the statute that, if read in isolation, would have unambiguously supported the Tribe’s claim. The Ninth Circuit earlier had reached a similar decision in *San Carlos Apache Tribe v. Becerra*, 53 F.4th 1236, 1242 (9th Cir. 2022), which relied heavily on the Indian canon of construction in concluding that a tribe was entitled to contract support costs for administrative costs incurred in providing health care services funded by third-party payors such as Medicare, Medicaid, or private insurers.

These decisions, however, directly conflicted with *Swinomish Indian Tribal Community v. Becerra*, 993 F.3d 917

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(D.C. Cir. 2021), which held that the Tribe was not entitled to reimbursement for direct and indirect expenses incurred in providing services funded by third-party payments. Given the split between circuits and the large amount of funds at issue, the Secretary petitioned for certiorari in both *Northern Arapaho Tribe* and *San Carlos Apache Tribe*, and both petitions were granted and consolidated on November 20, 2023. *Becerra v. Northern Arapaho Tribe*, 144 S. Ct. 419 (2023); *Becerra v. San Carlos Apache Tribe*, 144 S. Ct. 418 (2023).

## Chapters 1 and 8

*Arizona v. Navajo Nation*, 599 U.S. 555, 143 S. Ct. 1804, 216 L. Ed. 2d 540 (2023). The Navajo Nation brought an action against the United States, seeking “injunctive and declaratory relief to compel the Federal Defendants to determine the water required to meet the needs of the Nation’s lands in Arizona and devise a plan to meet those needs to fulfill the promise of the United States to make the Nation’s Reservation lands a permanent homeland for the Navajo people.” The Nation’s concerns can be traced back to Arizona’s 1952 original action in the Supreme Court against California, seeking a declaration of water rights in the Lower Basin of the Colorado River. There, the Special Master Report omitted any mention of the Navajo Nation, the United States did not respond to the Nation’s request to object to such exclusion, and the Nation’s later motion to intervene was opposed by the United States. The eventual decree in *Arizona v. California*, 373 U.S. 546, 83 S. Ct. 1468, 10 L. Ed. 2d 542 (1963), allocated the Lower Basin Colorado River mainstream among various parties—including five other tribes—but did not address the water rights of the Navajo Nation.

The five-member majority characterized the Nation’s suit as seeking to require the United States to take affirmative steps to secure water for the Nation—“potentially building pipelines, pumps, wells or other water infrastructure”—and concluded that the Treaty with the Navajos did not require such affirmative steps. Applying prior decisions addressing whether the federal government could be held liable in damages under the Indian Tucker Act, 28 U.S.C.A. § 1505, for alleged mismanagement of reservation resources, the majority concluded that the government owes judicially enforceable duties to tribes only to the extent that specific rights-creating or duty-imposing language is found in a treaty, statute, or

regulation. Examining the treaty with the Navajos, the Court found specific, affirmative duties to construct schools and other buildings and to provide clothing, seeds, and other agricultural implements for specified periods, but did not find any “affirmative duty for the United States to secure water.” Because “nothing in the 1868 treaty establishes a conventional trust relationship with respect to water,” the majority declined to “apply common-law trust principles” to infer such a duty, citing *U.S. v. Jicarilla Apache Nation*, 564 U.S. 162, 131 S. Ct. 2313, 180 L. Ed. 2d 187 (2011), for the principle that the “trust relationship” between the United States and the Nation is “limited or bare compared to a trust relationship between private parties at common law.”

In a concurring opinion, Justice Thomas wrote to emphasize that the “trust relationship” doctrine has improperly shaped Indian-law jurisprudence, particularly when used to support interpretative rules favoring tribes, and argued that “the idea of a generic trust relationship with all tribes—to say nothing of legally enforceable fiduciary duties—seems to lack a historical or constitutional basis” and that “[i]n future cases, we should clarify the exact status of this amorphous and seemingly ungrounded ‘trust relationship.’”

Justice Gorsuch, joined by three other justices, dissented, characterizing as flawed the majority’s conclusion that only a “bare trust” existed. His dissent quoted *United States v. Mitchell*, 463 U.S. 206, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983), for the proposition that “where the Federal Government takes on or has control” of property belonging to a tribe, the necessary “fiduciary relationship normally exists ... even though nothing is said expressly” about “a trust or fiduciary connection.” Justice Gorsuch concluded that the United States’ “fiduciary relationship” with the Nation, when coupled with its “complete managerial control over the property” of the Nation, gave “rise to a duty to account.” In short, “[b]ecause *Winters* rights belong to the Navajo themselves, the United States cannot lawfully divert them elsewhere—just as a lawyer cannot dispose of a client’s property entrusted to him without permission.”

## Chapters 1 and 13

*Haaland v. Brakeen*, 599 U.S. 255, 143 S. Ct. 1609, 216 L. Ed. 2d 254 (2023). A seven-member majority opinion, authored by Justice Barrett, held that the provisions of the Indian Child Welfare Act (ICWA), including ICWA’s place-

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ment preferences, recordkeeping requirements, and mandate that active efforts be made to prevent the breakup of Indian families, did not violate the anticommandeering provisions of the Tenth Amendment. Because the petitioners lacked standing, the Court did not address the merits of the petitioners' equal protection challenge to ICWA's placement preferences and a nondelegation challenge to the provision allowing tribes to alter the order of placement preferences.

The majority rejected the petitioners' assertion that ICWA exceeds Congress' authority, concluding that Congress has plenary, but not unbounded, authority over Indian affairs, grounded in the Indian Commerce Clause (Art. I, § 8, cl. 3), the Treaty Clause (Art. II, § 2, cl. 2), "principles inherent in the Constitution's structure," and the "trust relationship between the United States and the Indian people" which "informs the exercise of legislative power." Petitioners' argument that "ICWA takes the 'commerce' out of the Indian Commerce Clause" was rejected because "our precedent states that Congress's power under the Indian Commerce Clause encompasses not only trade but also 'Indian affairs.'" Notably, the majority's holding left room for future challenges: While "[w]e have often sustained Indian legislation without specifying the source of Congress's power," the petitioners failed "to offer a theory for rationalizing this body of law," leading to the conclusion that "[i]f there are arguments that ICWA exceeds Congress's authority as our precedent stands today, petitioners do not make them. We therefore decline to disturb the Fifth Circuit's conclusion that ICWA is consistent with Article I."

The Court then turned to the petitioners' Tenth Amendment arguments, first addressing the assertion that ICWA's requirement that an initiating party must "satisfy the court that active efforts have been made ... to prevent the breakup of the Indian family" violates the anticommandeering provisions of the Tenth Amendment. The majority characterized such argument as being fundamentally flawed, because "the provision applies to 'any party' who initiates an involuntary proceeding, thus sweeping in private individuals and agencies as well as government entities." "Legislation that applies 'evenhandedly' to state and private actors does not typically implicate the Tenth Amendment." Likewise, the Court concluded that ICWA's notice requirement, expert witness requirement, evidentiary standards, and recordkeeping requirements do not, for various reasons, violate the Tenth Amendment's anti-commandeering doctrine.

As for ICWA's requirement that adoption orders must give preference to (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families, and in the case of foster placements, to members of the child's extended family or to foster homes licensed, approved, or specified by the Indian child's tribe, the Court concluded that such placement preferences do not violate the Tenth Amendment because they do not command state agencies to search for alternative placements but instead place the burden of producing a higher-ranked placement on the tribe or other objecting party. Additionally, the requirement that state courts apply the placement preference in making custody determinations is consistent with the Supremacy Clause requirement that "the Judges in every State shall be bound" by the "laws of the United States." Justice Kavanaugh concurred in the entire opinion but wrote "separately to emphasize that the Court today does not address or decide the equal protection issue that can arise when the Indian Child Welfare Act is applied in individual foster care or adoption proceedings"—an issue that he deemed "serious."

Justice Gorsuch, joined in part by Justices Sotomayor and Jackson, filed a lengthy concurring opinion. The three justices agreed that "at its core, ICWA restricts how non-Indians (States and private individuals) may engage with Indians" and thereby implement a power that "falls in the heartland of Congress's constitutional authority." Justice Gorsuch's concurrence also included an extended discussion (not joined by Justices Sotomayor and Jackson) laying out his vision for the "corrective steps" necessary to rein in the plenary power doctrine that had "injected incoherence into our Indian-law jurisprudence" and to "recover fully the original meaning of the Indian Commerce Clause," which the concurrence characterized as "confirm[ing], rather than abridg[ing], principles of tribal sovereignty."

Justice Thomas, dissenting, stated that "in the normal course, we would say that the Federal Government has no authority to enact any of this," and criticized any reliance on the plenary power doctrine "which appears to have been born of loose language and judicial *ipse dixit*," and rejected any assertion that the "Founders thought the term 'commerce' in the Commerce Clause meant different things for Indian tribes that it did for commerce between States." Justice Alito likewise criticized the plenary power doctrine,

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recognized the fact that “the field of domestic relations ‘has long been regarded as a *virtually exclusive* province of the States,’” (quoting *Sosna v. Iowa*, 419 U.S. 393, 95 S. Ct. 553, 42 L. Ed. 2d 532 (1975)) and would have held that “[t]he ICWA provisions challenged here do not simply run up against this traditional state authority, they run roughshod over it.”

## Chapters 2 and 12

*Littlefield v. United States Department of the Interior*, 85 F.4th 635 (1st Cir. 2023), cert. denied, 2024 WL 1348872 (2024). Plaintiff Littlefield and 22 others brought an action challenging a decision by the Secretary of the Interior to take two parcels of land into trust for the Mashpee Wampanoag Indian Tribe, which was granted formal recognition in 2007. Under the Indian Reorganization Act (“IRA”), the Secretary may “acquire land and hold it in trust ‘for the purpose of providing land for Indians,’” and the term “Indian” is defined to mean: “[1] all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and [2] all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation.” 25 U.S.C.A. § 5129. In *Carcieri v. Salazar*, 555 U.S. 379, 129 S. Ct. 1058, 172 L. Ed. 2d 791 (2009), the Supreme Court, interpreting the word “now” in the first definitional phrase, held that it “unambiguously refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934.”

In 2021, after an earlier Record of Decision (“ROD”) finding that the Tribe was not under federal jurisdiction in 1934 was vacated by a federal district court, the BIA issued a new ROD concluding that the Tribe met the “under Federal jurisdiction” requirement. The Secretary also found that the Tribe could conduct gaming activities on the land taken into trust because the land qualified as the Tribe’s “initial reservation” under the Indian Gaming Regulatory Act (“IGRA”). The district court granted summary judgment in favor of Interior and the Tribe, finding that the 2021 ROD was not arbitrary or capricious.

On appeal, the plaintiffs argued that the Mashpees were not a “tribe” in 1934, relying, in part, on the assertion that the Supreme Court had, in *Montoya v. United States*, 180 U.S. 261, 21 S. Ct. 358, 45 L. Ed. 521 (1901), established

that the term “tribe” applies only to “a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory.” The court held that Congress, in enacting the IRA, did not “unambiguously incorporate” *Montoya’s* definition of “tribe” and that the term “tribe” was not a term of art that Congress intended to adopt.

The court went on to hold the Secretary had properly considered a 1822 report discussing the conditions of the Mashpee and affirmatively deciding not to apply the federal removal policy to the Tribe, as well as evidence related to the attendance of Mashpee children at the federal Carlisle Indian School “every year between 1905 and 1918,” because the Government’s actions toward individual “tribal members” may “in some instances” constitute probative evidence that the tribe was “under Federal jurisdiction.” The Secretary properly discounted the probative value of a letter indicating that federal officials in the 1930s “generally disclaimed federal jurisdiction over the Tribe,” upholding the Secretary’s conclusion that such letters were “best characterized as reflections of evolving federal policy, practical constraints on implementing the IRA, and factual mistakes, rather than termination of the Tribe’s jurisdictional relationship with the Federal Government.”

### **Chapters 3 and 6**

*WPX Energy Williston LLC v. Jones*, 72 F.4th 834 (8th Cir. 2023). WPX Energy Williston, LLC, an oil and gas company, acquired a right-of-way across four allotments owned by enrolled members of the Mandan, Hidatsa, and Arikara Nation. In a side letter agreement with the four allotment owners, WPX agreed to prohibit its employees from smoking on those portions of the right-of-way running over the allotments, with a \$5,000 fine per incident. Federal regulations provide that in obtaining consent from allotment owners, the parties may enter into side letter agreements with “restrictions or conditions.” After discovering employees smoking, the allotment owners brought an action in the Three Affiliated Tribes District Court, alleging a breach of the side letter agreement. In response to WPX’s jurisdictional challenge, the tribal court concluded it had jurisdiction under exceptions described in *Montana v. United States*, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981), recognizing tribal jurisdiction over the activities of nonmembers when

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they enter into consensual commercial relationships with a tribe or its members, or when a nonmember's conduct threatens a tribe's health or welfare. WPX brought an action in federal district court, which concluded that WPX had exhausted its tribal remedies, that the Tribe lacked jurisdiction, and that WPX was entitled to a preliminary injunction preventing the tribal court from proceeding.

The tribal court and its members filed a notice of appeal with the Eighth Circuit, which concluded that WPX had not exhausted its tribal court remedies because the Mandan, Hidatsa, and Arikara Nation Supreme Court had not yet ruled on the jurisdictional question, and rejected WPX's argument that exhaustion was not necessary because the tribal court "plainly" lacked jurisdiction. It distinguished prior decisions holding that tribal courts lacked jurisdiction over oil and gas leases negotiated between energy companies and the federal government because the current dispute "requires an application of *Montana* in a new context" that takes into consideration the fact that the controversy arose "from the alleged violation of a condition that was independently negotiated" with the allotment owners.

### Chapters 3 and 9

*Pueblo of Jemez v. United States*, 63 F.4th 881 (10th Cir. 2023). In a Quiet Title Act action, the Jemez Pueblo claimed aboriginal title to lands within the Valles Caldera National Preserve ("Caldera"), which the United States purchased from private landowners in 2000. In an earlier appeal, *Pueblo of Jemez v. United States*, 790 F.3d 1143, 1170-73 (10th Cir. 2015), the Tenth Circuit had ruled that an 1860 federal grant of title to private landowners in settlement of a Mexican land-grant dispute would not extinguish the Jemez Pueblo's claimed aboriginal title and remanded the case to the district court for trial. After the district court ruled that the Pueblo had failed to establish aboriginal title to the entirety of the Caldera, and the dismissal of claims to three parcels for lack of notice, the district court ruled that the Pueblo had established aboriginal title to the remaining parcel by exclusively occupying it between the 1400s and 1650 but had lost that title sometime after 1650 by not continuously maintaining its use to the exclusion of other Indian groups.

Reversing, the Tenth Circuit reasoned that aboriginal title endures until extinguished by the federal government or voluntarily abandoned by the Pueblo and was not lost due

to the Pueblo's cessation of efforts to exclude use by other Indian groups sometime after 1650—the loss of exclusivity did not equate to abandonment. Rather, abandonment would occur only if the Pueblo had not actually used its right to occupy the lands continuously from 1860 through its filing of its Quiet Title Act claim in 2000, a factual question that the district court would have to address on remand. One judge dissented from this portion of the majority opinion and would have held that the Pueblo's aboriginal title to the parcel was extinguished by the fact that other Indian tribes had used the parcel for more than 350 years. The dissent expressed concern that the majority's "snapshot-in-time" approach to aboriginal title would result in "untold new claims related to federal lands once occupied by Indian tribes."

## Chapter 6

*Medina v. Estate of Cody*, 538 P.3d 737 (Ariz. Ct. App. 2023). A tribal member drove across the center line of an undivided state highway running through the Navajo Reservation, and collided with a vehicle carrying four non-members, who were all killed. A surviving family member brought an action in state court against the estate of the deceased tribal member. The action was ultimately dismissed for lack of subject matter jurisdiction, and the plaintiff appealed.

The court of appeals affirmed the dismissal, relying principally on *Enriquez v. Superior Court*, 115 Ariz. 342, 565 P.2d 522 (Ct. App. 1977), which held that under the Supreme Court's holding in *Williams v. Lee*, 358 U.S. 217, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959), state courts generally lack jurisdiction over civil actions brought by non-tribal members against members arising out of on-reservation conduct because the exercise of state court jurisdiction would "infringe[ ] on the right of reservation Indians to make their own laws and be ruled by them." The plaintiff argued that since the decision in *Enriquez* the Supreme Court had, in the line of cases beginning with *Montana v. United States*, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981), applied much stricter limits on the reach of tribal jurisdiction. The court responded that the *Montana* line of cases, including the holding in *Strate v. A-1 Contractors*, 520 U.S. 438, 117 S. Ct. 1404, 137 L. Ed. 2d 661 (1997), that a right-of-way for a state highway on tribal land is "equivalent, for nonmember governance purposes, to alienated, non-Indian land," such

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that tribes need “[n]either regulatory nor adjudicatory authority over [ ] state highway accident[s] ... to preserve” their right “to make their own laws and be ruled by them,” was inapplicable, because the question before it was the “scope of state court jurisdiction, not ... the extent of tribal court jurisdiction.” Thus, the court concluded, the “case falls squarely under *Williams*’ framework.” The court did note, however, that the Supreme Court, since *Montana*, has curtailed the scope of tribal authority and may yet hold that state rights-of-way within tribal territorial boundaries are the equivalent of non-Indian fee land for jurisdictional purposes in all cases, thus overriding the *Williams* framework.

*Jensen v. EXC, Inc.*, 82 F.4th 835 (9th Cir. 2023). A collision between a sedan and a tour bus on a U.S. highway within the boundaries of the Navajo Nation reservation killed the father of a family and his unborn child, and injured several others. The highway was maintained by the State of Arizona. After a lawsuit brought in the tribal court of the Navajo Nation was successfully challenged in federal court for lack of jurisdiction, the plaintiffs brought a diversity action in federal court, asserting that Navajo law applied. Plaintiff sought to apply Navajo law because it permitted additional persons to sue for damages arising from the father’s death, allowed suit for wrongful death by the estate of the unborn child, and allowed plaintiffs to proceed directly against the insurer of the tour bus.

Applying choice-of-law principles borrowed from Arizona law, the district court held that Arizona state law, not tribal law, applied. The Ninth Circuit affirmed, noting that in a prior ruling in the same matter it had held that the Navajo Nation lacked adjudicative jurisdiction over the plaintiffs’ claims, and, as a general matter, a tribe’s legislative and adjudicative jurisdiction are coextensive. Therefore, “these federal law principles do not grant the Navajo Nation jurisdiction to prescribe the substantive legal rules governing this traffic accident.”

*Nygaard v. Taylor*, 78 F.4th 995 (8th Cir. 2023). A non-Indian father obtained an order from the North Dakota state court granting him equal decision-making and residential responsibility for his daughter, who, like her mother, was an enrolled member of the Cheyenne River Sioux Tribe. The mother violated the order by removing the daughter from North Dakota to the Cheyenne River Sioux Reservation in

South Dakota. The mother was eventually arrested for parental kidnapping, pled guilty, and was sentenced to federal prison in North Dakota. The mother then filed a petition with the Cheyenne River Sioux Tribal Court to place the daughter in the temporary custody of her maternal aunt. The father argued that the Tribal Court was required to give full faith and credit to the custody order of the North Dakota state court under the terms of the Parental Kidnapping Prevention Act (“PKPA”), which requires any “State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States” to give full faith and credit to custody determinations issued by the child’s home state in order to prevent parents from kidnapping a child and absconding to a new jurisdiction to avoid an unfavorable custody determination. After the Tribal Court of Appeals held that the PKPA does not apply to tribes and ordered the custody case to be resolved in tribal court, the father filed a petition for habeas corpus in federal district court, which agreed with the tribal court that the PKPA does not apply to tribes and dismissed the habeas corpus petition. The father then appealed to the Eighth Circuit.

On appeal, the court rejected the argument that tribes, being located within the geographic boundaries of the United States, are a “territory ... of the United States,” finding that the term “territory” is most naturally understood to refer to political entities that are not distinct from the United States, but act as agents of the federal government, rendering them distinguishable from Indian tribes that, under Supreme Court precedents, retain rights of sovereignty predating the Constitution. Tribes remain a “separate people” and are not arms of the federal government. Additionally, the court found that when Congress intends for tribes to be subject to full faith and credit requirements, it does so expressly, citing as examples the Indian Child Welfare Act, the Full Faith and Credit for Child Support Orders Act of 1994, and the Violence Against Women Act of 1994. While the court recognized that exclusion of tribes from coverage of the PKPA could frustrate the statutory objective of preventing parents from kidnapping children to avoid an unfavorable custody determination, it noted that such concerns must be addressed to, and resolved by, Congress.

## Chapter 7

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*Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. 382, 143 S. Ct. 1689, 216 L. Ed. 2d 342 (2023). A seven-member majority of the Court concluded that two provisions in the Bankruptcy Code, when read together, formed a clear statement abrogating tribal sovereign immunity, thereby allowing a person who declared bankruptcy after borrowing money from a tribal lender to obtain a stay of the lender’s collection efforts. The first provision cited by the Court, 11 U.S.C.A. § 106(a), abrogates the sovereign immunity of “governmental unit[s].” The second provision, 11 U.S.C.A. § 101(27), defines “governmental unit” to mean the “United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States ... a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government.” Concentrating on the term “other foreign or domestic government,” the majority concluded that the pairing of “foreign” and “domestic” was an expression of two extremes, intended to include any and all governments, whether foreign, domestic, or governments that “have both foreign and domestic attributes.” While the majority acknowledged that the Court had not previously recognized an abrogation of tribal sovereign immunity “where the statute did not reference Indian tribes explicitly,” it concluded that such statistics “do not move the needle in this case [because] none of the petitioner’s cited examples involved a statutory provision that was worded analogously to, and structured like, the ones at issue here.”

Justice Thomas, concurring in the judgment, asserted that the Court “should simply abandon its judicially created tribal sovereign immunity doctrine,” particularly with regard to off-reservation commercial activities. Justice Gorsuch, writing in dissent, emphasized that the Court should not read a statute to abrogate immunity if any other possible construction remains. The dissent deemed as plausible that the disjunctive “or,” as used in § 101(27), was used to require that one of the two conditions, i.e., “foreign” or “domestic,” must be satisfied to find an abrogation of sovereign immunity. In its view, the fact that tribes are “*sui generis* entities falling outside the foreign/domestic dichotomy [was] fatal under the clear statement rule.”

## Chapter 8

*In re: Klamath Irrigation District*, 69 F.4th 934 (9th Cir. 2023), cert. denied, 144 S. Ct. 552 (2024). The State of Oregon is conducting a general stream adjudication, with both administrative and judicial phases, to determine water rights, including, under the terms of the McCarran Amendment, 43 U.S.C.A. § 666, federal and Indian reserved rights in the Upper Klamath Lake and portions of the Klamath River within Oregon. After completing the administrative phase, the Oregon Water Resources Department entered an Amended and Corrected Findings of Fact and Final Order of Determination (“ACFFOD”), which provisionally determined all filed claims, and filed it in the state district court for confirmation.

Water from Upper Klamath Lake eventually drains into the Klamath River, which then proceeds southwest into California and eventually flows past the Yurok and Hoopa Valley Reservations. In *Baley v. United States*, 942 F.3d 1312, 1339 (Fed. Cir. 2019), the court held that on those portions of the Klamath River flowing through their reservations, the Yurok and Hoopa Valley Tribes have an implied water right to instream flows. The Tribes’ implied water rights have not been quantified but have been held to be “at least equal, but not limited to, the amount necessary to fulfill Reclamation’s [Endangered Species Act (“ESA”)] responsibilities.”

In 2021, the Klamath Irrigation District (“KID”) filed a motion for a preliminary injunction in state court seeking to stop the Bureau of Reclamation from releasing water from Upper Klamath Lake in accordance with its ESA responsibilities and the implied water rights of the two California Tribes. After the case was removed to federal district court, KID filed a motion to remand. The primary issue before the district court, and later on petition for writ of mandamus to the Ninth Circuit, was whether the state court had prior exclusive jurisdiction over the questions raised by the KID. The Ninth Circuit confirmed the district court’s retention of the case, ruling in part that the state court did not have prior exclusive jurisdiction, given that the Oregon adjudication did not adjudicate the water rights of the California Tribes or adjudicate Reclamation’s obligations to avoid interfering with those rights. The court found similarly unpersuasive KID’s argument that the state court had exclusive jurisdiction because KID was seeking to enforce rights determined in the general stream adjudication, citing its prior decision in *Klamath Irrigation District v. United*

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*States Bureau of Reclamation*, 48 F.4th 934 (9th Cir. 2022), which had “rejected KID’s characterization of its suit as an administration of ACFFOD-determined rights and concluded that it was instead an Administrative Procedure Act challenge to Reclamation’s authority to release water in compliance with the ESA and federal reserved water rights.”

Judge Baker, writing in dissent, would have found that the failure to remand to the state court was error, because that court had exclusive jurisdiction over the res at issue, which Judge Baker characterized as “the right to the stored waters of Upper Klamath Lake.” Because water rights are a zero-sum game, Judge Baker argued that “the district court cannot adjudicate KID’s and Reclamation’s ‘personal claims to [the] property without disturbing the first court’s jurisdiction over the res.’” Judge Baker would also have concluded that KID’s motion to enforce the decree was, at least colorably, seeking the “administration” of water rights and therefore was properly within the jurisdiction of the state court as recognized in the McCarran Amendment.

## Chapter 9

*Northwestern Band of the Shoshone Nation v. Wooten*, 83 F.4th 1205 (9th Cir. 2023). In 2019, the State of Idaho cited two members of the Northwestern Band of the Shoshone Nation (NWB) for hunting without a state-issued license. The NWB asserted that it retained hunting rights pursuant to Article IV of the 1868 Treaty of Fort Bridger Treaty, which provides:

The Indians herein named agree, when the agency house and other buildings shall be constructed on their reservations named, they will make said reservations their permanent home, and they will make no permanent settlement elsewhere; but they shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts.

The treaty named two reservations, the Wind River Reservation, and a reservation to be established at a future date, which was accomplished when the President established the Fort Hall Reservation by executive order on July 30, 1869. The NWB does not reside on either reservation. Idaho argued that the second clause in Article IV, introduced with the conjunctive “but,” made exercise of the hunting

right therein conditional upon compliance with the first clause, requiring the Indians to make the two reservations their permanent homes. The court rejected the argument, reasoning that Article IV contains two express conditions introduced by the phrase “so long as”; the Indians may hunt only so long as game is found, and only so long as peace subsists among the whites and Indians on the borders of the hunting districts—the court concluded that if the parties had intended to make residency on one of the two reservations a condition, “they could have easily done so ... by using the same clear language that they used to impose the other conditions on the hunting right.”

Additionally, while the Fort Bridger Treaty established the Wind River Reservation, it left the establishment of a second reservation for an unspecified future date, leaving it “uncertain that a second reservation for the Bannock would be created.” Given that uncertainty, the court “conclude[d] that the Indians would not have understood Article IV to mean that the Bannock (or any Shoshone band) would forfeit its reserved hunting right if it did not reside on a reservation.”

The court remanded the case to the district court for consideration of the Idaho officials’ alternative argument that the hunting rights could only be exercised by Indians that had maintained political cohesion with the two tribal entities contemplated by the Treaty, and its argument that the complaint should be dismissed for failure to join a necessary and indispensable party that cannot be joined due to sovereign immunity, the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation, which, in an amicus filing, opposed expansion of the Fort Bridger Treaty off-reservation hunting right to the Northwestern Band.

## Chapter 12

*West Flagler Associates, Ltd. v. Haaland*, 71 F.4th 1059 (D.C. Cir. 2023). The Seminole Tribe of Florida (“Tribe”) and the State of Florida entered into a gaming compact (“Compact”) under the Indian Gaming Regulatory Act (“IGRA”) which provided that the Tribe could offer online sports betting throughout the state by providing that such bets would be “deemed to take place” at servers located on tribal lands. Subsequent state legislation adopted the same “deeming” language used in the Compact. The Secretary of the Interior, by failing to approve or disapprove the Compact within 45 days, allowed the Compact to go into effect pursuant to 25

## INTRODUCTION

### U.S.C.A. § 2710(d).

Several brick-and-mortar casinos sought judicial review of the Secretary’s action, alleging that the Compact’s “deeming” language sought to evade a Florida constitutional provision which excluded only “casino gambling on tribal lands” from a requirement that new casino gambling be subjected to a vote of all Florida citizens. The court of appeals agreed that gaming compacts cannot *authorize* gaming off Indian lands. But, the compact did not purport to authorize online sports betting but only “discussed” it—any authorization of sports betting off of tribal lands was a matter of state law and therefore outside the scope of the Secretary’s review. The court declined to express any “opinion as to whether the Florida statute ratifying the Compact is constitutional” under Florida law.

The court next held that while IGRA only regulates gaming on Indian lands, the discussion of off-reservation gaming was authorized by IGRA § 2710(d)(3)(C), which the court characterized as authorizing compacts to “‘include provisions relating to’ a litany of topics [including] ‘any other subjects that are directly related to the operation of gaming activities.’” The court distinguished the recent holding in *Chicken Ranch Rancheria of Me-Wuk Indians v. California*, 42 F.4th 1024, 1036 (9th Cir. 2022), which imposed limits on the “catch-all” provision, by noting that the purpose of such limits is “generally to ensure that states do not use gaming compacts as a backdoor to exercise regulatory power over tribes that they otherwise would not have,” a concern not present in this case.

The court went on to hold that the Compact could not be facially challenged under the provisions of the Federal Wire Act prohibiting the use of “a wire communication facility for the transmission ... of bets or wagers ... on any sporting event,” because the Compact did not independently “authorize” wagers, and expressly required compliance with the Wire Act. Likewise, the court held that the Secretary’s decision not to act was not a facial violation of the Unlawful Internet Gambling Enforcement Act (UIGEA), which prohibits “knowingly accept[ing]” certain forms of payment in connection with “unlawful Internet gambling” such as credit card transactions, checks, and electronic fund transfers, but cautioned that “[h]ow the Tribe and Florida ultimately implement the Compact in practice, and whether that implementation is consistent with UIGEA, may be the subject of a future

lawsuit.”

Notably, in addressing the Wire Act, UIGEA, and equal protection challenges to the Compact, the court observed that because those challenges lacked merit, it need not resolve the “thorny question” of whether the non-IGRA challenges to the Compact were judicially reviewable given that 25 U.S.C.A. § 2710(d)(8)(C) “lists inconsistency with IGRA as the only ground for nullifying a compact considered approved following secretarial inaction.”

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