INTRODUCTION

The Seventh Edition of this casebook was released in time for 2017. This teacher’s memorandum includes additional Nation Building and Lawyering Notes, some of which are much lengthier than Notes included in the book (Carcieri and labor relations), another involving issues not resolved until the conclusion of the book (Bears Ears), and a pending issue (Dakota Access Pipeline). The memorandum also includes materials on Lewis v. Clarke, a 2017 Supreme Court decision on tribal immunity.

Comments on the memorandum and on the 7th edition are most welcome and appreciated, and can be directed to Matthew L.M. Fletcher, Michigan State University College of Law, East Lansing, Michigan at matthew.fletcher@law.msu.edu. Permission is hereby granted to reproduce any or all of this memorandum for teacher or student use in any course that is based upon GETCHES, WILKINSON, WILLIAMS, FLETCHER, AND CARPENTER CASES AND MATERIALS ON FEDERAL INDIAN LAW (7th ed. 2017).

Matthew Fletcher
East Lansing, Mich.
July 2017
CHAPTER 5

THE FEDERAL-TRIBAL RELATIONSHIP

SECTION A.

TRIBAL PROPERTY INTERESTS

Add to end of notes on page 321:

INDIAN LAWYERING NOTE:

THE CARCIERI PROBLEM∗


The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

Section 7 authorized the Interior Secretary to declare new reservations on acquired trust lands. 25 U.S.C. § 5101 (formerly § 467) (“The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations: Provided, That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations.”).

Section 5 authorizes the Interior Secretary to acquire land in trust for “Indians,” a term of art defined a later section of the IRA as “all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction. . . .” 25 U.S.C. § 5129 (formerly § 479).

In Carcieri v. Salazar, 555 U.S. 379 (2009), the Supreme Court held that the Interior Secretary may not acquire land in trust for the benefit of the Narragansett Indian Tribe. Id. at 382-83, 395-96. The State of Rhode Island challenged the Secretary’s decision to take land into trust on the ground that the tribe, which the federal government recognized as an Indian tribe in 1983, was not under federal jurisdiction in 1934, the date of the enactment of the IRA. The federal government and the tribe argued that “now” meant at the time of the Interior Secretary’s decision to acquire land in trust. The Court agreed with the state.

∗ Materials in this Note are derived from Matthew L.M. Fletcher, Federal Indian Law § 7.3 (2016).
The Court undertook statutory construction under which it concluded that the definition of “Indian” was unambiguous. The Court looked to the “ordinary meaning of the word ‘now,’” and located contemporaneous dictionary definitions of the word that suggested the word “ordinarily” refers to a “present” time or moment. *Carcieri, supra*, at 388. The Court pointed to a statement made by John Collier, architect of the IRA and the Commissioner of Indian Affairs, in 1936, two years after the IRA’s enactment: “Section 19 of the Indian Reorganization Act . . . provides, in effect, that the term ‘Indian’ as used therein shall include—(1) all persons of Indian descent who are members of any recognized tribe that was under Federal jurisdiction at the date of the Act . . .” Id. at 390 (quoting Letter from John Collier, Commissioner, to Superintendents (Mar. 7, 1936)) (emphasis in original). The Court concluded by noting that no party ever claimed the Narragansett Indian Tribe was under federal jurisdiction in 1934, and shut the door to further proceedings by declaring that it would hear no evidence to the contrary.

Justice Breyer’s concurrence argued that “now” in § 479 might be more inclusive of tribes than it appears from the *Carcieri* facts. Id. at 397. While the Interior Department compiled a list of 258 tribes it recognized in 1934, Breyer suggested that in fact there might have been many, many more that “the Department did not know [about] at the time.” Id. at 398.

Professor Bill Rice argued that the decision throws a monkey wrench in modern Indian affairs:

This decision will create a cloud upon the trust title of every tribe first recognized by Congress or the executive branch after 1934, every tribe terminated in the termination era that has since been restored, and every tribe that adopted the IRA or [Oklahoma Indian Welfare Act] and changed its name or organizational structure since 1934. It will also result in incessant litigation to determine which of the over 500 tribes fall within its terms and prohibit future trust acquisitions for such tribes as are finally found to be within its net.


On March 12, 2014, the Interior Solicitor issued an opinion on the definition of “under federal jurisdiction” for IRA purposes. Dept. of Interior, Office of the Solicitor, *The Meaning of “Under Federal Jurisdiction” for Purposes of the Indian Reorganization Act*, M–37029 (March 12, 2014). The Solicitor opined that there is no plain meaning of “under federal jurisdiction.” The Solicitor then concluded that whether an Indian tribe was “under federal jurisdiction” in 1934 is a two-part inquiry:

Thus, having closely considered the text of the IRA, its remedial purposes, legislative history, and the Department’s early practices, as well as the Indian canons of construction, I construe the phrase “under federal jurisdiction” as entailing a two-part
inquiry. The first question is to examine whether there is a sufficient showing in the tribe’s history, at or before 1934, that it was under federal jurisdiction, i.e., whether the United States had, in 1934 or at some point in the tribe’s history prior to 1934, taken an action or series of actions—through a course of dealings or other relevant acts for or on behalf of the tribe or in some instance tribal members—that are sufficient to establish, or that generally reflect federal obligations, duties, responsibility for or authority over the tribe by the Federal Government. Some federal actions may in and of themselves demonstrate that a tribe was, at some identifiable point or period in its history, under federal jurisdiction. In other cases, a variety of actions when viewed in concert may demonstrate that a tribe was under federal jurisdiction.

* * *

Once having identified that the tribe was under federal jurisdiction prior to 1934, the second question is to ascertain whether the tribe’s jurisdictional status remained intact in 1934. For some tribes, the circumstances or evidence will demonstrate that the jurisdiction was retained in 1934. In some instances, it will be necessary to explore the universe of actions or evidence that might be relevant to such a determination or to ascertain generally whether certain acts are, alone or in conjunction with others, sufficient indicia of the tribe having retained its jurisdictional status in 1934.

Id. at 19.

Litigation challenging the Secretary of the Interior’s authority to acquire land in trust for tribes more recently federally recognized since 1934 has exploded. E.g., Confederated Tribes of Grand Ronde Community of Oregon v. Jewell, 830 F.3d 552 (D.C. Cir. 2016), cert. petition filed sub nom., Citizens Against Reservation Shopping v. Zinke (July 29, 2016) (No. 16-572); Upstate Citizens for Equality, Inc. v. United States, 841 F.3d 556 (2d Cir. 2016); Poarch Band of Creek Indians v. Hildreth, 656 Fed.Appx. 934 (11th Cir. 2016); Big Lagoon Rancheria v. State of California, 789 F.3d 947 (9th Cir. 2015); KG Urban Enterprises, Inc. v. Patrick, 693 F.3d 1 (1st Cir. 2012); No Casino in Plymouth v. Jewell, 136 F.Supp.3d 1166 (E.D. Cal. 2015).

The litigation involving the trust land acquisition for the Grand Traverse Band of Ottawa and Chippewa Indians is instructive. The Grand Traverse Band is a signatory to treaties with the United States in 1836 and 1855, but suffered through “administrative termination,” whereby the Department of the Interior refused to acknowledge the tribe from the 1870s until 1980 based on a misreading of the treaty language. The Interior Board of Indian Appeals held that the tribe remained “under federal jurisdiction” in 1934 even though the tribe did not enjoy federal recognition, largely because of its retained treaty rights:

We agree with the Regional Director that the historical record supports his finding that the Tribe was under Federal jurisdiction in 1934. The Tribe is the successor to the Grand Traverse Ottawas and Chippewas, who signed treaties with the United States reserving commercial and subsistence fishing rights. Grand
Traverse Band of Chippewa and Ottawa Indians v. Director, Michigan DNR, 971 F. Supp. 282, 285, 288 (W.D. Mich. 1995) (Tribe’s rights under 1836 and 1855 treaties), aff’d, 141 F.3d 635 (6th Cir. 1998). The treaty-reserved fishing rights included a servitude, or easement of access over land surrounding the Indians’ traditional fishing grounds, that remained in effect even after the land became privately owned. 141 F.3d at 639. When the United States took action in the 1970s to protect the tribal treaty-reserved rights, it did so on its own behalf and on behalf of, i.e., as trustee for, the tribes whose rights were subject to Federal protection. See United States v. Michigan, 471 F. Supp. 192, 203 (W.D. Mich. 1979). The Board has previously recognized that when the United States continues to hold land in trust for a tribe or its members, it cannot reasonably be disputed that the tribe is under Federal jurisdiction. See Village of Hobart, 57 IBIA at 20 n.23. In the present case, in 1934, the Tribe undoubtedly held a reservation of Federally protected fishing rights and other associated property rights, and those legal rights could be neither diminished nor terminated by the Secretary’s improper de facto “termination” of the Federal government’s relationship with the Tribe, based on his erroneous interpretation of the 1855 treaty. See Grand Traverse Band, 369 F.3d at 968. In our view, the existence of hunting and fishing rights, reserved in and protected by Congressionally ratified treaties, and for which the United States continued to have an obligation, is as compelling and dispositive evidence to demonstrate that the Tribe was under Federal jurisdiction in 1934 as would be the case if the United States had held land in trust for the Tribe.

Grand Traverse County Board of Commissioners v. Midwest Regional Director, Bureau of Indian Affairs, 61 IBIA 273, 281-82 (2015). It seems that extant treaty rights provide considerable evidence that an Indian tribe was “under federal jurisdiction” in 1934, but what about tribes that are not signatories to treaties with the United States?

For detailed commentary on the issues arising from Carceri, see William Wood, Indians, Tribes, and (Federal) Jurisdiction, 65 U. Kan. L. Rev. 415 (2016).
SECTION B.
THE FEDERAL-TRIBAL RELATIONSHIP AS A SOURCE OF FEDERAL POWER

PART 2.  TREATY ABROGATION

Add to the end of the note on Indian Treaty Abrogation and Congressional Intent on page 361:

NATION BUILDING NOTE:

TRIBAL LABOR RELATIONS

Indian tribal gaming operations employ about 450,000 non-Indians. Most gaming operations are relatively modest affairs, with a few on either extreme of the bell curve generating an enormous windfall for tribes or losing money. The bigger, more successful casinos tend to employ few tribal members, in large part, because there are simply not enough tribal members to staff a sizeable casino. Most casinos can be staffed by a significant plurality, or even a majority, of tribal members. Non-Indian gaming operations are often unionized, and it was only a matter of time before labor unions began organizing Indian casino employees.

The key federal labor relations law is the National Labor Relations Act of 1935 (NLRA), 29 U.S.C. § 151 et seq., administered and enforced by the National Labor Relations Board (NLRB). Labor can file grievances against management through processes established by the NLRB. State and federal government employers are protected from certain labor organizing techniques, most notably strikes. Tribal governments are not mentioned in either the statute or the legislative history. Notably, the NLRA was enacted a year after the Indian Reorganization Act of 1934, 25 U.S.C. § 5301 et seq. (formerly 25 U.S.C. § 461 et seq.).

The Sixth Circuit recently decided two cases involving the NLRB’s assertion of jurisdiction over two Michigan Indian tribes. In the first, NLRB v. Little River Band of Ottawa Indians Tribal Government, 788 F.3d 537 (6th Cir. 2015), cert. denied, 136 S.Ct. 2508 (2016), a split panel held that the National Labor Relations Act could be asserted against the tribal casino operation. The court first concluded that federal statutes of general applicability should apply to Indian nations – as in the Coeur d’Alene framework, see page 359 – because tribal authority over nonmembers is limited:

Comprehensive federal regulatory schemes that are silent as to Indian tribes can divest aspects of inherent tribal sovereignty to govern the activities of non-members. We do not doubt that “Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.” Wheeler, 435 U.S. at 323, 98 S.Ct. 1079. Yet,
such residual sovereignty is “unique and limited.” Id. As explained above, the Supreme Court has held several aspects of tribal sovereignty to regulate the activities of non-members to be implicitly divested, even in the absence of congressional action, and it is axiomatic that tribal sovereignty is “subject to complete defeasance” by Congress. It would be anomalous if certain aspects of tribal sovereignty—namely, specific powers to regulate some non-member activities—are implicitly divested in the absence of congressional action, see generally Cohen’s Handbook § 4.02(3), at 226–42, but those same aspects of sovereignty could not be implicitly divested by generally applicable congressional statutes.

Id. at 549. The court therefore applied the Coeur d’Alene framework:

We find that the Coeur d’Alene framework accommodates principles of federal and tribal sovereignty. . . . [T]here is a stark divide between tribal power to govern the identity and conduct of its membership, on the one hand, and to regulate the activities of non-members, on the other. The Coeur d’Alene framework begins with a presumption that generally applicable federal statutes also apply to Indian tribes, reflecting Congress’s power to modify or even extinguish tribal power to regulate the activities of members and non-members alike. See 751 F.2d at 1115; cf. Montana, 450 U.S. at 557, 101 S.Ct. 1245. The exceptions enumerated by Coeur d’Alene then supply Indian tribes with the opportunity to show that a generally applicable federal statute should not apply to them. The first exception incorporates the teachings of Iowa Mutual and Santa Clara Pueblo that if a federal statute were to undermine a central aspect of tribal self-government, then a clear statement would be required. By this mechanism, the Coeur d’Alene framework preserves “the unique trust relationship between the United States and the Indians.” Grand Traverse Band, 369 F.3d at 971 (quoting Blackfeet Tribe, 471 U.S. at 766, 105 S.Ct. 2399). We therefore adopt the Coeur d’Alene framework to resolve this case.

Id. at 551. The court’s application of that framework placed the onus on the tribe to get out from under the federal statute:

Under the Coeur d’Alene framework, since there is no treaty right at issue in this case, the NLRA applies to the Band’s operation of the casino unless the Band can show either that the Board’s exercise of jurisdiction “touches exclusive rights of self-governance in purely intramural matters” or that “there is proof by legislative history or some other means that Congress intended [the NLRA] not to apply to Indians on their reservations.”
Though the tribe argued that the Act and the Board’s assertion of jurisdiction effectively abrogated the tribe’s internal self-governance authority:

The Band forwards two arguments for its contention that application of the NLRA undermines its right of self-governance: first, the regulations targeted by the Board’s order protect the net revenues of the casino, which, pursuant to the IGRA, fund its tribal government. Second, the Band stresses that application of the NLRA would invalidate a regulation enacted and implemented by its Tribal Council.

Id. at 552. The court systematically rejected all those claims. Id. at 552-55.

In dissent, Judge McKeague slammed the majority’s reasoning, referring to the Couer d’Alene framework based on the Supreme Court’s Tuscarora decision as a “house of cards”:

So what changed to justify the NLRB’s new approach? Congress has not amended the NLRA or in any other way signaled its intent to subject Indian tribes to NLRB regulation. Nor has the Supreme Court recognized any such implicit intent. The NLRB “adopted a new approach” and “established a new standard” based on its recognition that some courts had begun to apply other generally applicable federal laws to Indian tribes notwithstanding Congress’s silence. San Manuel, 341 NLRB at 1055, 1057, 1059. These courts, the NLRB observed, found support for this new approach in a single statement in a 1960 Supreme Court opinion, Federal Power Comm’n v. Tuscarora Indian Nation, 362 U.S. 99, 116, 80 S.Ct. 543, 4 L.Ed.2d 584 (1960): “[I]t is now well-settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests.” The statement buttressed the Court’s holding, but was not essential to it. While the Tuscarora statement has blossomed into a “doctrine” in some courts in relation to some federal laws, closer inspection of the Tuscarora opinion reveals that the statement is in the nature of dictum and entitled to little precedential weight. In reality, the Tuscarora “doctrine,” here deemed to grant the NLRB “discretionary jurisdiction,” is used to fashion a house of cards built on a fanciful foundation with a cornerstone no more fixed and sure than a wild card.

Id. 557-58.

A few weeks later, a different panel of the Sixth Circuit – also split 2-1 – applied the Little River holding in Soaring Eagle Casino and Resort v. NLRB, 791 F.3d 648 (6th Cir. 2015), cert. denied, 136 S.Ct. 2509 (2016), to reach the same result in a matter involving the Saginaw Chippewa Indian Tribe. Unlike Little River, the tribe directly tied its authority over nonmembers to its treaty right to exclude persons from its reservation.
The court first rejected the tribe’s claim that its general, treaty-reserved power to exclude persons from its reservation precluded application of the National Labor Relations Act:

Although, given the protective language employed by the Supreme Court when assessing tribal treaty rights, the question is a close one, ultimately we conclude that a general right of exclusion, with no additional specificity, is insufficient to bar application of federal regulatory statutes of general applicability. Unless there is a direct conflict between a specific right of exclusion and the entry necessary for effectuating the statutory scheme, we decline to prohibit application of generally applicable federal regulatory authority to tribes on the existence of such a treaty right alone. . . . The 1864 Treaty states that the Isabella reservation land would be “set apart for the exclusive use, ownership, and occupancy [by the Tribe].” 14 Stat. 657. . . . [T]he 1864 Treaty language establishes a general right of exclusion for the Tribe. The treaty language does not, however, give the Tribe the specific power to condition authorization and entry of government agents . . . . Nor does it detail with any level of specificity the types of activities the Tribe may control or in which it may engage. . . . Although, as explained below, the existence of the Treaties remains relevant to our analysis of the Tribe’s right of inherent sovereignty, we do not find that the general right to exclude described in the 1855 and 1864 Treaties, standing alone, bars application of the NLRA to the Casino.

Id. at 661.

The court then rejected the Little River panel’s reasoning in adopting the Coeur d’Alene framework, proposing one of its own that would have mandated a contradictory outcome:

The Little River majority concluded that the NLRA applies to on-reservation casinos operated on trust land. Little River, 2015 WL 3556005, at *13–17. Given the legal framework adopted in Little River and the breadth of the majority’s holding, we must conclude in this case that the Casino operated by the Tribe on trust land falls within the scope of the NLRA, and that the NLRB has jurisdiction over the Casino. We do not agree, however, with the Little River majority’s adoption of the Coeur d’Alene framework, or its analysis of Indian inherent sovereignty rights. We thus set out below the approach that we believe is most consistent with Supreme Court precedent and Congress’s supervisory role over the scope of Indian sovereignty, and why we respectfully disagree with the holding in Little River.

Id. at 662. The Soaring Eagle panel focused its analysis on the Montana-Hicks line of cases, see pages 602-605 (Montana), 631-638 (Hicks), in which the Supreme Court held that tribal civil jurisdiction over nonmembers is limited, even on tribally owned lands. Id. at 662-67. The court
then adopted a presumption that statutes of general applicability apply to Indian tribes absent a clear statement from Congress that they do not apply. Id. at 666-67. Even so, the court would have concluded that the Act does not apply under the *Montana-Hicks* framework:

We believe that the weight of these factors supports our conclusion that the NLRA should not apply to the Casino. We consider relevant: (1) the fact that the Casino is on trust land and is considered a unit of the Tribe’s government; (2) the importance of the Casino to tribal governance and its ability to provide member services; and (3) that Lewis (and other nonmembers) voluntarily entered into an employment relationship with the Tribe. We recognize that our determination would have inhibited the Board’s desire to apply the NLRA to all employers not expressly excluded from its reach. But Congress retains the ability to amend the NLRA to apply explicitly to the Casino, if it so chooses. See Bay Mills, 134 S.Ct. at 2037 (“[I]t is fundamentally Congress’s job, not ours, to determine whether or how to limit tribal immunity.”) We note, however, that to the extent Congress already has acted with respect to Indian sovereignty and Indian gaming, it has shown a preference for protecting such sovereignty and placing authority over Indian gaming squarely in the hands of tribes. In the same year Congress enacted the NLRA, it also passed the Indian Reorganization Act of 1934 (“IRA”), 25 U.S.C. § [5301] et seq., to strongly promote Indian sovereignty and economic self-sufficiency, and to move federal policy away from a goal of assimilation. . . . Thus, although Congress was silent regarding tribes in the NLRA, it was anything but silent regarding its contemporaneously-stated desire to expand tribal self-governance. And, more recently, Congress enacted the IGRA “to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments,” and “to ensure that the Indian tribe is the primary beneficiary of the gaming operation.” 25 U.S.C. § 2702; see also id. § 2710(b)(2)(B)(i) (requiring that “net revenues from any tribal gaming” are only be used, inter alia, “to fund tribal government operations or programs,” “to provide for the general welfare of the Indian tribe and its members,” and “to promote tribal economic development”); id. §§ 2710(b)(2)(F),(d)(1)(A)(ii) (describing required contents of tribal ordinances or tribal-state compacts regarding employment practices of gaming employers); Bay Mills, 134 S.Ct. at 2043 (Sotomayor, J., concurring) (“And tribal business operations are critical to the goals of tribal self-sufficiency because such enterprises in some cases may be the only means by which a tribe can raise revenues.” (internal quotation marks omitted)).

Id. at 668-69. But since the *Little River* panel decision was first, the *Soaring Eagle* court’s analysis could not control. En banc petitions were denied, despite the fact that four of the five active Sixth Circuit judges to have heard these cases disagreed with the controlling framework
adopted by the Little River panel and the NLRB acquiesced to the cases being reheard. The Supreme Court, short a justice, denied petitions for ceriorari in 2016.

In a third case, the National Labor Relations Board refused jurisdiction over the casino owned by the Chickasaw Nation of Oklahoma based on the treaty rights argument made by the tribe, Chickasaw Nation d/b/a Winstar World Casino, 362 NLRB No. 109 (June 4, 2015). The relevant treaty provision guaranteed the tribe’s right to be free of federal legislation and control without its consent:

The Government and people of the United States are hereby obliged to secure to the said Choctaw Nation . . . the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the [Nation]; . . . the U.S. shall forever secure said [Nation] from, and against, all laws except such as from time to time may be enacted in their own National Councils, not inconsistent with the Constitution, Treaties, and Laws of the United States; and except such as may, and which have been enacted by Congress, to the extent that Congress under the Constitution are required to exercise a legislation over Indian Affairs.


This specific treaty language certainly bars a federal statute that is silent as to its application to Indian tribes and is not otherwise an “Indian Affairs” statute: “These obligations include securing the Nation from and against all laws except (as relevant here) those passed by Congress under its authority over Indian affairs.” Chickasaw Nation d/b/a Winstar World Casino, supra, at 4.

Currently pending in the Ninth Circuit is a tribal challenge to another tribe over which the NLRB asserted jurisdiction. Casino Pauma, 362 NLRB No. 52 (March 31, 2015), appeal filed, Casino Pauma v. NLRB, Nos.16-70397 & 16-70756 (9th Cir.), https://turtletalk.wordpress.com/2016/11/08/ninth-circuit-briefs-in-casino-pauma-v-nlrb/.

Many tribes have or will adopt the regressive strategy of adopting “right-to-work” laws, which are laws that are intended to undermine labor union recruiting and organizing strategies. Wenona T. Singel, Labor Relations and Tribal Self-Governance, 80 N.D. L. Rev. 691, 725 (2004). Other tribes are more interested in welcoming labor activity, so long as the activity is conducting in accordance with tribal laws that treat casino employees as governmental employees. But, as with the case of the Little River Band, one labor union can undo this regime by persuading the NLRB that the mere existence of a tribal ordinance is a violation of the NLRA. What should tribes do?
For an argument that tribal labor laws create a form of healthy disruption to existing labor relations archetypes by potentially discarding the adversarial relationship assumed to be predominant by federal law, see Matthew L.M. Fletcher, Kathryn E. Fort, and Wenona T. Singel, Tribal Disruption and Tribal Relations, available at https://ssrn.com/abstract=2401711.

SECTION C.

THE FEDERAL-TRIBAL RELATIONSHIP AS A SOURCE OF INDIAN RIGHTS

PART 2. EXECUTIVE AGENCY CONFLICTS IN THE ADMINISTRATION OF FEDERAL TRUST RESPONSIBILITY TO INDIANS

Add to the end of notes on page 402:

INDIAN LAWYERING NOTE:

THE DAKOTA ACCESS PIPELINE*

Starting April 2016, American Indian people led by members of the One Mind Youth Movement began to gather on the shores of Lake Oahe on the Standing Rock Indian Reservation in North Dakota in an effort to stop the completion of the Dakota Access Pipeline (DAPL). See Saul Elbein, The Youth Group That Launched a Movement at Standing Rock, N.Y. Times, Jan. 31, 2017. By the end of the year, thousands of American Indians and others had gathered there, establishing permanent camps on federal and tribal lands, and for the most part successful in temporarily stopping the construction of the pipeline by putting enormous political pressure on the Obama Administration.

* Portions of this Note derive from commentaries published in Law360.com by Matthew L.M. Fletcher.
DAPL is a 1,172 mile pipeline running from the Bakken oil shale fields of western North Dakota to oil terminals in Illinois. The pipeline originally was to run near the City of Bismarck, North Dakota, but the pipeline owners chose to route the pipeline under Lake Oahe. Lake Oahe was formed in the 1960s when the United States Army Corps of Engineers and the Bureau of Reclamation established several dams on the Missouri River under the Pick-Sloan dam project. The United States condemned over 200,000 acres of reservation lands owned by the Standing Rock Sioux Tribe and the Cheyenne River Sioux Tribe for the project, lands that are now flooded. See generally South Dakota v. Bourland, 508 U.S. 679 (1993).

Because the DAPL would run underneath a portion of the Lake Oahe federal public lands (the confiscated reservation lands), and the Missouri River, the Army Corps had an obligation to review and decide whether to authorize the construction of the pipeline through the issuance of an easement. The tribes retain hunting and fishing rights, and perhaps Winters rights to groundwater and a homeland at Lake Oahe. Additionally, as many as 18 million Americans depend on the groundwater in the Oglalla Aquifer.

In Standing Rock Sioux Tribe v. United States Army Corps of Engineers, the Standing Rock Sioux Tribe lost an initial federal court challenge to DAPL in September 2016, only to learn minutes later that the Obama Administration would dramatically reverse its position and delay the issuance of the final easement required to complete the pipeline. In a few short months, three federal agencies (Interior, Army, and Justice) issued a report, Improving Tribal Consultation and Tribal Involvement in Federal Infrastructure Decisions, available at https://bia.gov/cs/groups/public/documents/document/idc2-060030.pdf, intended to address the lack of adequate consultation between the Army Corps and tribal stakeholders.

However, the Trump Administration effectively ordered the Army Corps to issue the easement in the early weeks of the new administration, which the Corps did. Litigation restarted. Montana law professor Monte Mills helpfully described the key legal arguments:

Religious Freedom and Restoration Act

According to the Cheyenne River Sioux Tribe, oil running through the pipeline would represent the fulfillment of a generations-old prophesy, passed down through the oral traditions of tribal members, that warned of a Black Snake coming to defile the sacred waters necessary to maintain the tribes’ ceremonies. Beyond the environmental concerns often at the center of the pipeline protests, the tribe’s motion for an injunction squarely defines final authorization of the pipeline by the Corps as an existential threat: destruction of the tribes’ religion and way of life.

The Constitution’s First Amendment guarantees the exercise of religion free from governmental interference. But the Supreme Court, in Lyng v. Northwest Indian Cemetery Protection Association, in 1988 upheld the Forest
Service’s approval of a road across an area on federal land sacred to local tribes even while recognizing the road could have devastating effects on their religion.

Then in 1993, Congress enacted the Religious Freedom and Restoration Act (RFRA), which requires that the government demonstrate a compelling interest and use the least restrictive means to achieve that interest if its actions will substantially burden religious practice.

In other words, even if approving the Dakota Access Pipeline served a compelling governmental interest, RFRA may require the U.S. Army Corps of Engineers to show that the pipeline easement under Lake Oahe would have the least impact on tribal religion. That approach would be consistent with the Supreme Court’s broad application of RFRA in a 2014 case not involving tribal interests or federal lands and may pose a significant challenge to the corps, which considered but rejected a different route that did not pose the same threat to the tribes.

Both the Corps and company behind the Dakota Access Pipeline argue that the risk of spill from the pipeline is minimal and that the tribes failed to raise these religious concerns in a timely manner. In addition, the Corps contends that, consistent with the Lyng case, governmental action on federal land should not be restricted because of religious concerns raised by local tribes.

Thus, resolution of the case will turn upon whether the court recognizes the legitimacy of the tribal religious concerns and broadly applies RFRA or, instead, chooses to prioritize federal authority over federal land to the detriment of those concerns. ***

Arbitrary or capricious decisions?

In addition to their religious concerns, the Sioux Tribes challenge the Corps’ decisions based on the rights they reserved in treaties made with the federal government in 1851 and 1868.

The Constitution recognizes treaties as the “supreme law of the land” and, according to a 2016 analysis done by the Solicitor of the U.S. Department of the Interior, both the Standing Rock and Cheyenne River Sioux retain treaty-reserved water, hunting, and fishing rights in Lake Oahe.

Before reversing course in February, the Corps refused to issue the easement last year in order to further understand and analyze those treaty rights.

Importantly, federal law generally allows courts to set aside arbitrary or capricious agency decisions. In a February 14th filing, the Standing Rock Sioux
Tribe asks the court to review the Corps’ about-face under that standard and argues that the federal trust responsibility, recognized by the Supreme Court since the early 1800’s, demands more than just a cursory review of tribal treaty rights.


Recent decisions from the Ninth Circuit may bolster the tribal claims. In the United States v. Washington culverts subproceeding, 853 F.3d 946 (9th Cir. 2017) (see page 923), the court held that off-reservation hunting and fishing rights impliedly included the right to a healthy fisheries habitat. And in Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District, 849 F.3d 1262 (9th Cir. 2017), the court held that Winters rights (see page 819) include the right to groundwater. These precedents may be helpful to the Lakota tribes fighting against DAPL.


Oil began to flow in June 2017.
Add to the end note 2 on pages 471 and 472:

2. In *Lewis v. Clarke*, 137 S. Ct. 1285 (2017), the Supreme Court held that state law claims brought against tribal employees in their individual or personal capacities are not barred by tribal sovereign immunity. The case involved an accident allegedly caused by a limousine driver employed by the Mohegan Tribe. The driver was on the clock for the tribe at the time. The accident occurred on non-Indian lands. The plaintiffs brought suit in state court for state law tort more than one year after the accident. The Mohegan Tribe had waived its immunity for such claims in tribal court, with a one year statute of limitations and a damages cap more limited than that under Connecticut law.

The first critical holding in the decision was that individual capacity suits against tribal employees do not implicate tribal sovereignty:

This is a negligence action arising from a tort committed by Clarke on an interstate highway within the State of Connecticut. The suit is brought against a tribal employee operating a vehicle within the scope of his employment but on state lands, and the judgment will not operate against the Tribe. 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.” *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 687, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949). We are cognizant of the Supreme Court of Connecticut’s concern that plaintiffs not circumvent tribal
sovereign immunity. But here, that immunity is simply not in play. Clarke, not the Gaming Authority, is the real party in interest.

Id. at 1292.

The tribe fervently argued that tribal sovereignty actually is implicated when tribal employees are sued for money damages for actions they take on company time. The Mohegan Tribe had adopted a law that it would indemnify any tribal employee for damages awarded against the employee for actions taken during that employment. The Court rejected that claim, holding that the tribe’s laws did not affect the underlying individual capacity doctrine:

Here, the Connecticut courts exercise no jurisdiction over the Tribe or the Gaming Authority, and their judgments will not bind the Tribe or its instrumentalities in any way. The Tribe’s indemnification provision does not somehow convert the suit against Clarke into a suit against the sovereign; when Clarke is sued in his individual capacity, he is held responsible only for his individual wrongdoing. Moreover, indemnification is not a certainty here. Clarke will not be indemnified by the Gaming Authority should it determine that he engaged in “wanton, reckless, or malicious” activity. Mohegan Tribe Code § 4–52. That determination is not necessary to the disposition of the Lewises’ suit against Clarke in the Connecticut state courts, which is a separate legal matter.

Id. at 1294. The Court did state that tribal employees may still be cloaked in sovereign immunity when they act in an official capacity, the same as federal and state employees. Id. at 1295 (“In sum, although tribal sovereign immunity is implicated when the suit is brought against individual officers in their official capacities, it is simply not present when the claim is made against those employees in their individual capacities.”).

Whether a tribal employee is acting within the scope of official authority rather than in an individual capacity apparently will now be left to federal and state courts.* The precursor to Lewis was the Ninth Circuit’s decision in Maxwell v. County of San Diego (page 471). There, the court held that individual capacity suits against tribally employed emergency responders could proceed, even where the responders arrived on the scene in accordance with an intergovernmental public safety agreement. The affected tribe vigorously argued that their employees’ exposure to liability could undermine recently established Indian country governance relationships, but to no avail.

The initial area in which tribal exposure to liability may be expanded under Lewis is in state courts. Indian tribes that had been able to limit damages and time frames, and govern the venue, for even off-reservation torts and other possible damages claims through tort claims

ordinances may face state courts suits. State tort law is, unlike most other areas of the common
law, fairly local. Some states have restrictive liability exposure and others more expansive.
Tribes, who have no say in state tort laws whatsoever, may be forced into state tort regimes
against their will when they choose to indemnify their employees. Lewis could also give
plaintiffs two cracks at deep pockets, meaning that a plaintiff might suit both the tribe under a
tort claims ordinance and the tribal employee in state court. Tribes may reconsider their tort
claims ordinances, a potentially very regressive move under established nation-building theory.
Tribes that have purchased liability insurance with the parameters set by their tort claims
ordinances may be forced to renegotiate with their insurer.

Lewis involved an off-reservation incident, but the court’s reasoning does not limit
individual liability suits to off-reservation actions. For reservations in Public Law 280-type
states, which constitute about 70 percent of all reservations, that might not be significant
expansion, as every tort claim against a tribal employee could be brought in state court. But for
the remaining tribes, precedents like Williams v. Lee (see page 418) generally bar state court
jurisdiction over civil suits brought against Indians or tribes arising in Indian country. Or do
they, post-Lewis? Indian tribes may soon be defending a rise in individual capacity suits against
nonmember tribal employees.

The next area of potential new exposure is in the area of official capacity actions. State
and federal officials are governed by official immunity and qualified official immunity doctrines.
Whether tribal officials have the same protections remains open after the Lewis decision.
Imagine a heated tribal council meeting where one elected official makes a statement that
potential defames another elected official. An analogous case is currently pending in the
California Court of Appeals based on Maxwell. Before Lewis, the tribal elected official who
made the statement could assert the general federal Indian law principle that state and federal
courts have no jurisdiction over the internal affairs of the tribal government. A federal or state
official making the same statement likely would be governed by official immunity. But,
potentially, the federal Indian law bar might dissipate in an individual capacity suit because the
tribe’s interests are not the same as an individual’s interest.
NATION BUILDING NOTE:

BEARS EARS NATIONAL MONUMENT


In 2015, a coalition of five Indian tribes formally petitioned President Obama to invoke the Antiquities Act to create the Bears Ears National Monument. The highlights of the coalition’s proposal identified cultural and environmental justifications for the proposal:

The proposed Bears Ears National Monument is a place rich in history and culture. It is a place to connect, a place to heal, and a place where Native American Traditional Knowledge can be explored and nurtured so that it continues to inform and illuminate modern life. The Bears Ears Inter-Tribal Coalition, a consortium of five sovereign Indian nations—the Hopi, Navajo, Uintah & Ouray Ute, Ute Mountain Ute, and Zuni—has formally petitioned President Barack Obama to proclaim the Bears Ears National Monument in order to protect this extraordinary area for our Tribes, all Native people, and the nation.

The proposed 1.9 million acre monument is a landscape of deep, carved canyons, long mesas, inspiring arches, and arresting red rock formations. The monument’s namesake, the Bears Ears, are twin buttes in the heart of the landscape that rise high above the piñon-juniper forests and canyons that adorn the renowned and majestic Cedar Mesa. It lies in Southern Utah, north of the
Navajo Nation and the San Juan River, east of the Colorado River, and west of the Ute Mountain Ute Reservation. Bears Ears is adjacent to Canyonlands National Park and is every bit the equal of Canyonlands and the other great parks and monuments of the Colorado Plateau.

Ever since time immemorial, the Bears Ears area has been important to Native American people as a homeland. In the mid-1800s, Native Americans were forced fully and violently removed from the area and marched to reservations. But the Native bond to Bears Ears is strong and today is a place that embodies that history. Modern Native American people continue to use the Bears Ears area as a place for healing, ceremonies, and the gathering of firewood, plants, and medicinal herbs.

When they return to Bears Ears today, Native American people feel the presence of their ancestors everywhere. This landscape records their ancestors’ migration routes, ancient roads, great houses, villages, granaries, hogans, wickups, sweat lodges, corrals, petroglyphs and pictographs, tipi rings, shade houses, and burial grounds. Our people are surrounded by the spirits of the ancestors, and embraced by the ongoing evolution of their culture and traditions. For Native American people, Bears Ears is a place for healing. It is also a place for teaching children—Native American children and the world’s children—about meaningful and lasting connections with sacred and storied lands.

All of this is threatened—by destructive land uses, such as mining and irresponsible off-road vehicle use and by the rampant looting and destruction of the villages, structures, rock markings, and gravesites within the Bears Ears landscape. The Bears Ears National Monument proposal is a bold and inspired plan to stem the tide of this erosion—and protect Bears Ears for the benefit of all.


On December 28, 2016, President Obama invoked the Antiquities Act, established the Bears Ears National Monument, and issued the following statement:

Today, I am designating two new national monuments in the desert landscapes of southeastern Utah and southern Nevada to protect some of our country’s most important cultural treasures, including abundant rock art, archeological sites, and lands considered sacred by Native American tribes. Today’s actions will help protect this cultural legacy and will ensure that future generations are able to enjoy and appreciate these scenic and historic landscapes.
Importantly, today I have also established a Bears Ears Commission to ensure that tribal expertise and traditional knowledge help inform the management of the Bears Ears National Monument and help us to best care for its remarkable national treasures.

Following years of public input and various proposals to protect both of these areas, including legislation and a proposal from tribal governments in and around Utah, these monuments will protect places that a wide range of stakeholders all agree are worthy of protection. We also have worked to ensure that tribes and local communities can continue to access and benefit from these lands for generations to come.


The Trump Administration vowed to review the Bears Ears designation, and others as well. Legal scholars argue the President has no authority to undo the designation, that only Congress has that power. Mark Squillace, Eric Biber, Nicholas S. Bryner, & Sean B. Hecht, Presidents Lack the Authority to Abolish or Diminish National Monuments, 103 Va. L. Rev. Online, 55 (2017), http://www.virginialawreview.org/volumes/content/presidents-lack-authority-abolish-or-diminish-national-monuments; Sean B. Hecht, Politicians and Commentators Who Criticize Recent National Monuments Are Making Up Their Own Version of History, Legal Planet, May 8, 2017, http://legal-planet.org/2017/05/08/politicians-and-commentators-who-criticize-recent-national-monuments-are-making-up-their-own-version-of-history/.