



Indian Law Newsletter



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A Word from Our Chair Ann Tweedy

Welcome to the Indian Law Section. We know that this is a very trying time for most everyone, and we hope that being part of the Section will continue to serve you well by helping you maintain connections—and make new ones—with other members of the Indian law community. Through the newsletter and other offerings, we hope to help you keep abreast of legal developments, especially those affecting Washington state. Despite the serious challenges posed by the ongoing pandemic, we continue to be excited to connect with our diverse group of members in as many different ways as possible. We welcome your submissions to the newsletter on

AS ALWAYS, WE WELCOME YOUR THOUGHTS AND RECOMMENDATIONS AND ENCOURAGE YOU TO BECOME INVOLVED IN THE SECTION.

cases, legislation, and transactions that are important to the field, and we would love to hear your professional development news as well. We are exploring whether it will be feasible to offer our annual day-long CLE in an alternative format. We hope that it will be possible this year to host our holiday party, which is traditionally co-hosted with the Native American Bar Association, in early December.

While the restrictions on in-person gatherings remain in place, we will explore opportunities to come together virtually. As always, we welcome your thoughts and recommendations and encourage you to become involved in the Section. ■

Three Tribes Stand with the Children of Washington for a Healthier Future

By Wyatt Golding and Weston LeMay, on behalf of the Swinomish Indian Tribal Community; Karen Allston, on behalf of the Quinault Indian Nation; Maryanne Mohan, on behalf of the Suquamish Tribe

Three treaty tribes in Western Washington, the Swinomish Indian Tribal Community, the Quinault Indian Nation, and the Suquamish Tribe, recently filed a joint amicus brief in the Division I Court of Appeals supporting the youth plaintiffs in the climate change case captioned *Aji P. v. State*, Civ. No. 80007-8. The case is on appeal after

judgment on the pleadings in favor of the state in King County Superior Court.

Background

The current and future impacts of climate change in Washington are well-documented by independent researchers, tribal governments, federal and state agencies, the

University of Washington’s Climate Impacts Group, and the experiences of individual tribal members. Changes include altered shellfish beds and lost uplands due to rising sea levels; damage to property from increased storm surge; increased

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wildfire with associated lost forestry revenue, wildlife habitat, and hunting opportunities; and loss of aquatic resources from ocean acidification and increased fresh and saltwater temperatures.

The Swinomish Indian Tribal Community, Quinault Indian Nation, and Suquamish Tribe (collectively, “Tribes”), like other tribes in Washington, are particularly harmed by these impacts. Each of the Tribes has dedicated significant resources to the study of climate change and the concomitant impacts to their Reservations and treaty resources. As a result, the Tribes have a clear and sophisticated understanding of the existential threat facing their governments, Reservations, and members, as documented in scientific reports and Tribal climate change mitigation plans.

Each of the Tribes’ Reservations abut marine waters. Within decades, rising sea levels are expected to inundate substantial portions of each Tribe’s territory. Harms to infrastructure and housing, including from increased flooding,

have already begun. Habitat degradation and changing climactic conditions are diminishing the Tribes’ harvest of fish, shellfish, and native plants. Taken holistically, these harms—the accelerating degradation of traditional lands and waters that have sustained the Tribes’ ancestors since time

shift in response to a changing climate. Parents fear their children will no longer be able to live in their ancestral homeland, while children face an uncertain future in which their individual choice to pursue the traditional way of life is increasingly imperiled by climate change. These existential harms suffered by the

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immemorial—threaten tribal sovereignty and the cultural and spiritual wellbeing of the Tribes’ people.

The Tribes are also particularly vulnerable to climate change because they possess treaty rights and other legal rights tethered to specific locations, which raises challenges as habitat and species

Tribes are manifestly unjust in that the Tribes, relative to the state of Washington or the United States, have very little responsibility for emissions that cause climate change and generally lack the ability to regulate those off-Reservation emissions.

Each of the Tribes has exerted its sovereign authority to prepare for and mitigate the effects of climate change. The Swinomish Tribe has developed a new Forest Management Plan that increases resiliency and carbon sequestration, instituted “beach nourishment” practices to replace eroded beaches, and sited a new location to cultivate clams and other shellfish to replace inundated tidelands. The Suquamish Tribe has worked with partners to implement aggressive habitat restoration, including eelgrass restoration near Bainbridge Island and restoration of Chico Creek and its estuary. These efforts will help to mitigate some local impacts of climate change. Suquamish is also investing in community education by preparing youth for climate change through its Suquamish Youth Climate Change Club and development of an ocean acidification curriculum. The

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Section logo designed by Scott Sufficool



Three Tribes Stand with the Children of Washington for a Healthier Future

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Quinault Indian Nation, in response to recurring floods, must take the radical—and expensive—step of moving the entire Lower Taholah Village. In 2017, Quinault finalized a Taholah Village Master Relocation Plan to relocate the village to higher ground a half mile from the existing site. The first building in the new Upper Village—Wenasgwəlla?aw (Generations Building), housing elders' and children's programs—is currently under construction at a cost of nearly \$15 million. Infrastructure costs alone for the new Upper Village are projected to be over \$50 million.

It is within this context—ongoing, existential, and hugely expensive harm to the Tribes and their members, caused by emissions almost wholly attributable to non-Tribal entities—that the Tribes decided to support the youth plaintiffs in *Aji P*. The plaintiffs alleged a variety of claims against the state of Washington, including breach of public trust and violations of the Washington Constitution. The Tribes' amicus brief focuses its support on the plaintiffs' constitutional claims.

The Tribes' Amicus

In an amicus brief and supporting motion, the Tribes argued that the Washington State Constitution guarantees a fundamental right to a livable climate. As a result, the Tribes agreed that the Superior Court erred in granting judgment on the pleadings, and requested that the Court of Appeals reverse the judgment below and remand to give the plaintiffs an opportunity to prove their claims. The Tribes did not take a position on the plaintiffs' other claims and expressly did not assert treaty rights.

Although not explicitly enumerated, the right to a livable climate under the Washington State Constitution is retained by

the people of Washington and enforceable as the necessary prerequisite to the free exercise of specific, enumerated rights. While climate change litigation presents a relatively new legal frontier, the Tribes have long understood that a livable climate is a prerequisite to the exercise of fundamental liberty and property interests.

The amicus brief allowed the Tribes to explain the deep cultural, religious, and economic connection Tribal members share with the natural world and a livable climate. The brief explained that, from the Tribes' perspective, the right to a livable climate is equivalent to other "unenumerated" (i.e., not specifically codified) constitutional rights, such as the right to travel, the right to marry, and the right to raise a family. Now widely recognized, these unenumerated rights gained recognition in the courts as it became clear that they were fundamental to the preservation of deeply embedded societal values and the exercise of core enumerated constitutional rights.

For example, in *Kent v. Dulles*, 357 U.S. 116, 126 (1958), the Supreme Court determined that the right to travel is protected in part because it "may be necessary for a livelihood," and that "[f]reedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage." *Kent v. Dulles*, 357 U.S. at 126. Likewise, as the Tribes argue in *Aji P*, the preservation of a livable climate—and the accompanying preservation of life on Reservations, as well as fishing, hunting, and gathering according to treaty rights—is necessary for the livelihood of Tribal members and part of their heritage. Like freedom to travel, a livable climate is essential to the exercise of recognized life, liberty, and property rights, as well as participation in commerce among

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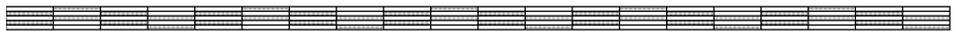
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the states and with tribes. Similarly, the constitutional right to liberty “is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation.” *Williams v. Fears*, 179 U.S. 270 (1900). The rights of enjoyment, living where one desires, and earning a livelihood, and the associated liberty right, cannot be exercised by Tribal members without a livable

climate. A livable climate, in other words, is a necessary pre-requisite to the exercise of these rights. Indeed, “it is difficult to conceive of a more absolute and enduring concern than the preservation and, increasingly, the restoration of a decent and livable environment. Human life, itself a fundamental right, will vanish if we continue our heedless exploitation of this planet’s natural resources.” *Stop H-3 Ass’n v. Dole*, 870 F.2d 1419, 1430 (9th Cir. 1989).

The Tribes hope that judicial acceptance of an unenumerated

right under the Washington Constitution to a livable climate will help protect not only the Tribes’ interests, but the broader public’s interest in protection of our state’s current natural resources—the remaining forests, salmon, and clean, cold water. As is the case with other fundamental rights, the courts are well-suited to craft appropriate relief to protect Washingtonians and spur the legislative and executive branches of the state government into necessary action. ■



WYATT GOLDING is an attorney at Ziontz Chestnut in Seattle. He represents Indian tribes, non-profit conservation groups, and individuals, with a focus on treaty rights, renewable energy development, and environmental and land use law.



WESTON LEMAY is a staff attorney for the Swinomish Indian Tribal Community, a federally recognized Indian tribe located in Skagit County, Washington. His practice emphasizes natural and treaty resources, tribal taxation, and environmental protection. Weston is an honors graduate of the University of Washington School of Law and a former judicial clerk at the Washington Court of Appeals and Washington Supreme Court. He is a member of the State Bar of Washington and is admitted to practice in state, federal, and Swinomish Tribal Court. Before beginning his legal career, Weston spent five years deployed as a humanitarian professional working with the United Nations, the International Federation of the Red Cross, and World Vision International. He obtained an undergraduate degree in international relations at Claremont McKenna College in California and a Master of Laws degree in human rights and criminal justice at the Queen’s University of Belfast in Northern Ireland. After graduation from the University of Washington, Weston served as a judicial law clerk to Washington Supreme Court Chief Justice Debra Stephens.

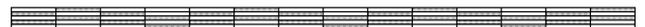
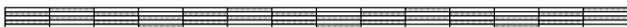


KAREN ALLSTON, *Attorney General, Quinault Indian Nation*

Karen received her Juris Doctor degree from Seattle University, cum laude, and a B.A. in communications from the University of Washington. Karen has served as in-house counsel to the Quinault Indian Nation for the last 14 years, focusing on Indian Law and natural resources issues. Prior to her tenure at the Quinault Nation, she served as the Executive Director of the Center for Environmental Law and Policy, a water watchdog and river advocacy organization in Washington.



MARYANNE MOHAN is a Tribal attorney with the Suquamish Tribe’s Office of Tribal Attorney and represents the Tribe on environmental, fisheries, hunting, forestry, and realty issues. Prior to joining Suquamish, she was a Tribal attorney for the Nisqually Tribe and represented Nisqually in all fisheries and natural resources issues including as lead counsel in *United States v. Washington, Nisqually v. Squaxin Island*, Subproceeding 14-02, and in the culverts litigation. She is a 2013 graduate of the University of Oklahoma College of Law and received her bachelor’s degree in anthropology from The George Washington University, Washington, D.C., in 2009.



Yakama Nation v. Klickitat County: Reservation Boundaries and Public Law 83-280 Jurisdiction

By Ethan Jones and Shona Voelckers*

AS THE UNITED STATES SUPREME COURT CONSIDERS RESERVATION DIMINISHMENT CASES IN *SHARP V. MURPHY*, NO. 17-1107, AND *MCGIRT V. OKLAHOMA*, NO. 18-9526, THE CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION (“YAKAMA NATION”) CONTINUES TO FACE CHALLENGES TO ITS OWN RESERVATION BOUNDARY.

In a pending case before the United States Court of Appeals for the Ninth Circuit, Klickitat County is disputing the location of the Yakama Reservation’s southwestern boundary. *Confederated Tribes and Bands of the Yakama Nation v. Klickitat Cty. et al.*, No. 19-35807 (9th Cir. filed Sept. 23, 2019). The county argues that more than 120,000 acres, including the eastern half of Pahto (Mt. Adams), are not within the Yakama Reservation, and therefore are not considered Indian Country for jurisdictional purposes.

The dispute arose in the small town of Glenwood, located within an area known as “Tract D” of the Yakama Reservation. In 2017, Klickitat County arrested and prosecuted a Yakama Member for juvenile delinquent acts that occurred near Glenwood. The Yakama Nation filed suit to prevent the county from exercising jurisdiction within the Yakama Reservation in violation of the Treaty with the Yakamas of June 9, 1855, 12 Stat. 951 (hereinafter “Treaty of 1855” or “Treaty”). The suit sought injunctive relief and a declaration that Klickitat County does not have jurisdiction over crimes involving Indians within the Yakama Reservation. Klickitat County responded with two defenses: 1) Tract D is subject to general state jurisdiction because it is not within the Yakama Reservation; and 2) even if Tract D is Indian Country, the

state of Washington has criminal jurisdiction under Public Law 83-280.

Following two years of litigation, the United States District Court for the Eastern District of Washington affirmed Tract D’s Reservation status. The district court also held that while some of the state’s Public Law 83-280 derived jurisdiction had been retroceded back to the United States, the state retained jurisdiction in the case of crimes between Indians and non-Indians; a decision that the Yakama Nation has appealed to the United States Court of Appeals for the Ninth Circuit. Klickitat County cross appealed, maintaining its challenge to the Yakama Reservation’s boundaries.

TRACT D

The Yakama Nation’s ancestors signed the Treaty of 1855 and reserved the Yakama Reservation for their exclusive use and benefit. There are ambiguities in the Reservation boundary description because the Treaty calls for the southwestern boundary to follow a spur off the Cascade Mountains that does not exist. When the Yakama Nation and United States were negotiating the Treaty, a map (“Treaty Map”) was created to depict the lands ceded and reserved by the Yakama Nation in the Treaty. The Treaty Map was sent back to Washington, D.C. with the Treaty for ratification, but was

promptly lost. For the next 75 years the United States repeatedly and erroneously surveyed the Yakama Reservation over the Yakama Nation’s objections. Congress passed a surplus lands act for the Yakama Reservation using one of those erroneous surveys. Federal errors continued to compound until the United States found the Treaty Map and accurately surveyed the Yakama Reservation’s southwestern boundary to include Tract D. The United States has since recognized Tract D’s Reservation-status, as shown through an Indian Claims Commission settlement, an executive order, congressional appropriations, and executive agency actions.

Both parties engaged expert witness historians to grapple with this history and address two broad issues regarding the boundary dispute. First, did the Treaty of 1855 include Tract D within the Yakama Reservation? If so, did Congress subsequently diminish the Yakama Reservation in a surplus lands act—the Act of December 21, 1904—to exclude Tract D? Both experts conducted archival research, issued expert reports, sat for depositions, and were the principal witnesses at trial.

On the first issue, the Yakama Nation’s expert, Dr. Andrew Fisher, applied an ethnohistorical approach to discern the Yakama Nation’s understanding of their Reservation boundaries at the time the Treaty was signed. This analysis was consistent with the well-established canons of treaty interpretation that the Treaty of 1855 should be interpreted as the Yakama Nation’s ancestors would have naturally understood it. *Washington State Dept. of Licensing v. Cougar Den*, 139 S. Ct. 1000, 1005 (2019). Because the key pieces of evidence relevant to the boundary—the Treaty, Treaty Council minutes, and Treaty Map—were all drafted by representatives

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of the United States, Dr. Fisher also looked to other sources and drew upon his understanding of Yakama Nation customs and oral traditions to inform his analysis of how the Yakama Nation's representatives would have understood those key documents. Dr. Fisher concluded that the Yakama Nation would have understood their Reservation to include Tract D. Klickitat County's expert, Mr. Michael Reis, disagreed and focused instead on how the United States would have understood the Treaty. His analysis was based on evidence of surveys in the years preceding the Treaty Council and statements made by United States representatives after the Treaty Council.

On the second issue, Dr. Fisher considered whether the historical record showed that Congress intended to diminish Tract D from the Yakama Reservation in the 1904 Act. Supreme Court precedent mandates that only Congress can change a reservation's boundaries, and that congressional intent to diminish must be clear. *Nebraska v. Parker*, 136 S. Ct. 1072, 1078-79 (2016). Courts consider three factors from *Solem v. Bartlett*, 465 U.S. 463 (1984), to discern congressional intent to diminish: (1) the text of the surplus lands act, (2) the legislative context for the surplus lands act, and (3) subsequent treatment of the land in question, which carries the least evidentiary weight. Dr. Fisher was unable to find support in the historical record for congressional intent to diminish. Mr. Reis concluded that Congress did intend to diminish the Yakama Reservation based on statements in the 1904 Act's legislative history and subsequent statements by certain Yakama Members.

The district court requested *amicus curiae* participation from the United States and Washington state prior to trial. The United States filed a brief in support of Tract D's inclusion within the Yakama

Reservation and provided the court with further evidence of the United States' historical treatment of Tract D following the Treaty Map's re-discovery. The state of Washington filed an *amicus* brief that provided further context regarding the state's ownership of land within Tract D, but the state chose not to take a position on Tract D's reservation status.

Following a three-day trial, the district court entered a declaratory judgment in the Yakama Nation's favor, stating that "Tract D ... is located within the exterior boundaries of the Yakama Reservation established by the Treaty of 1855." *Confederated Tribes and Bands of the Yakama Nation v. Klickitat Cty. et al.*, No. 1:17-cv-03192, ECF 112 at 44 (E.D. Wash. Aug. 28, 2019). The district court relied heavily upon the historical analysis of Dr. Fisher who "looked at the entire historical record and came to reasoned and fair opinions; he is credible." *Id.* at 8. The court found Mr. Reis' analysis to be "flawed" because it "ignores important historical events and critical pieces of evidence to come to a skewed conclusion . . ." *Id.* at 22. In applying the canons of treaty construction that require analyzing the Yakama Nation's understanding of the Treaty of 1855, the court held that the Yakama Nation would have understood Tract D to have been part of the land they were reserving. *Id.* at 13. Because the *Solem* factors require evidence of congressional actions and intent supporting diminishment which are absent here, the Court held that the 1904 Act did not diminish the Yakama Reservation. *Id.* at 17.

RETROCESSION

Washington state generally does not have criminal jurisdiction over crimes in Indian Country unless authorized by Congress. Under Public Law 83-280, Congress authorized Washington state to unilaterally assume from the United

States limited civil and criminal jurisdiction over Indians throughout Yakama Indian Country. Pub. L. No. 83-280, 67 Stat. 588. This jurisdictional shift occurred without the Yakama Nation's free, prior, and informed consent, prompting the Yakama Nation to unsuccessfully challenge the constitutionality of Public Law 83-280 before the United States Supreme Court. *Washington v. Confederated Bands & Tribes of the Yakama Indian Nation*, 439 U.S. 463 (1979).

In 2012, the state of Washington enacted legislation allowing the governor to retrocede Public Law 83-280 jurisdiction back to the United States. Wash. Rev. Code. § 37.12.160. The Yakama Nation immediately requested a retrocession, which Gov. Jay Inslee partially granted by Governor's Proclamation 14-01. Proclamation By The Governor 14-01 (Jan. 17, 2014). The United States accepted the state's retrocession offer in 2015 and implemented it in 2016. Acceptance of Retrocession of Jurisdiction For The Yakama Nation, 80 Fed. Reg. 63583 (Oct. 20, 2015).

Almost immediately, there were issues. Inslee repeatedly asked the United States to revise Proclamation 14-01 to claw back state jurisdiction over crimes between Indian and non-Indian adults. The Obama administration's Department of the Interior rejected his requests. The federal government issued guidance confirming that Washington state no longer has concurrent jurisdiction over crimes involving Indians within the Yakama Reservation. See Memorandum from Principal Deputy Assistant Secretary Lawrence Roberts to Bureau of Indian Affairs Office of Justice Services Director Darren Cruzan (Nov. 30, 2016). The Washington State Attorney General's Office then appointed a special prosecutor, who argued and obtained a decision from the Washington State Court of Appeals for Division III rejecting the

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Obama administration's position. *State v. Zack*, 2 Wn. App. 2d 667 (2018). Consistent with this decision, the Trump administration's Department of Justice issued a memorandum opinion purporting to change the scope of retrocession. *The Scope of State Criminal Jurisdiction Over Offenses Occurring On The Yakama Indian Reservation*, 2018 OLC LEXIS 8 (July 27, 2018), available at www.justice.gov/olc/opinions.htm. The Trump administration's Department of the Interior then attempted to revoke all Obama administration guidance on retrocession. See Letter from Assistant Secretary of Indian Affairs Tara Sweeney to Governor Jay Inslee (Feb. 12, 2019).

In deciding whether the state maintained criminal jurisdiction over certain crimes involving Indians within the Yakama Reservation, the district court focused on the state's intent in offering retrocession, rather than the federal government's intent

in reassuming Public Law 83-280 jurisdiction. *Klickitat Cty.*, No. 1:17-cv-03192 at 41. Using this state-focused analysis, the district court found that the state only intended to retrocede criminal jurisdiction over crimes between Indians (i.e. Indian v. Indian). *Id.* at 45-46. The state retained jurisdiction over crimes where either the defendant or victim is non-Indian. *Id.*

On appeal, the Yakama Nation asserts that the district court erred by rejecting the United States' interpretation of retrocession at the time it was decided. The Yakama Nation argues that federal law vests the Secretary of the Department of the Interior with the responsibility of accepting retrocession offers, and does not allow the scope of that retrocession to be changed years later. Under this federal-focused analysis, the state retroceded all jurisdiction over crimes involving Indians within the Yakama Reservation. The Ninth Circuit is

considering the same issue in a related case, *Confederated Tribes and Bands of the Yakama Nation v. City of Toppenish et al.*, Case No. 19-35199 (9th Cir. filed March 12, 2019). Both the United States and state of Washington have filed *amicus curiae* briefs opposing the Yakama Nation's retrocession position in *City of Toppenish*.

NEXT STEPS

The retrocession issue was argued before the Ninth Circuit in March 2020, and a decision is pending. Briefing on Tract D's Reservation status will be completed this summer, with oral arguments expected in the fall. Meanwhile, the Yakama Nation and United States continue normal operations within Tract D as part of the Yakama Reservation reserved by the Yakama Nation's ancestors in the Treaty of 1855. ■



ETHAN JONES is lead attorney for the Yakama Nation Office of Legal Counsel. He manages six staff attorneys who collectively represent the Yakama Nation Government and its various agencies, programs, and enterprises in civil matters impacting the Confederated Tribes and Bands of the Yakama Nation. His practice is focused on federal issues arising under the inherent sovereign rights reserved to the Yakama Nation in the Treaty with the Yakamas of June 9, 1855. Ethan is a graduate of the University of Washington School of Law. He can be reached at ethan@yakamanation-olc.org.



SHONA VOELCKERS is a Yakama Nation staff attorney. Her practice focuses on protection of Yakama Nation's Treaty-reserved cultural and natural resources through both litigation and collaborative land use planning with local jurisdictions and state and federal agencies. Shona can be reached at shona@yakamanation-olc.org.

*The authors are counsel for the Yakama Nation in this case, together with Mr. Joe Sexton of Galanda Broadman PLLC. Any opinions herein belong solely to the authors.

Preemption's Silver Lining: The NLRA Offers California Tribes a Shield Against State Labor Protections

By Steve Biddle and Jeremy Wood — Littler Mendelson

For over twenty years, the State of California has used tribal gaming compacts to accomplish what federal law and tribal sovereignty would otherwise forbid: forcing tribes to follow state labor law in their casinos. Recently however, the Ninth Circuit decided that Congress, not California, has the paramount authority to regulate labor relations in Indian Country, and that the National Labor Relations Act (NLRA) applies to tribal casinos. With federal authority confirmed, tribes can challenge state interference in their labor relations as a violation of federal law.

The Indian Gaming Regulatory Act

The power of tribes to run gaming facilities rests on two pillars: their own inherent economic sovereignty, and the Indian Gaming Regulatory Act (IGRA). Congress passed IGRA as a federalist compromise, allowing states limited control over the highest-stakes tribal gaming (*i.e.*, slot machines, casino games, etc.) within their borders. IGRA permits tribes to conduct these operations, labeled class III gaming under IGRA, if authorized by a compact signed between the operating tribe and its surrounding state. Upon tribal request, that state must negotiate in good faith to reach such a compact.

A state breaches this duty, and negotiates in bad faith, when it insists that a compact include a subject beyond what IGRA allows. A compact under IGRA can only include subjects “directly related to the operation of gaming activities.” By this limitation, Congress strove to limit states from forcing tribes to broadly adopt state law on their land as a precondition to gaming.

California's Tribal Labor Relations Ordinance

In 1998, the governor of California negotiated several gaming compacts with local tribes. At the time, the National Labor Relations Board (NLRB) disclaimed

under the state's direction.

The TLRO applies to any tribe with 250 or more casino employees that conducts class III gaming. It protects “eligible employees” at casinos and related facilities like hotels or restaurants, and

THE POWER OF TRIBES TO RUN GAMING FACILITIES RESTS ON TWO PILLARS: THEIR OWN INHERENT ECONOMIC SOVEREIGNTY, AND THE INDIAN GAMING REGULATORY ACT (IGRA).

jurisdiction over tribes as employers and held the NLRA did not reach their labor relations. Unsatisfied, and to protect the organizational and representation rights of tribal gaming employees, California refused to sign any tribal gaming compact unless the signatory tribe agreed to certain labor protections.

California's strong-handed negotiations resulted in a model compact that required, at Section 10.7, each signatory tribe to adopt:

an agreement or other procedure acceptable to the State for addressing organizational and representational rights of Class III Gaming Employees and other employees associated with the Tribe's Class III gaming enterprise, such as food and beverage, housekeeping, cleaning, bell and door services, and laundry employees at the Gaming Facility or any related facility, the only significant purpose of which is to facilitate patronage at the Gaming Facility.

The agreement or other procedure that California deemed acceptable became the model Tribal Labor Relations Ordinance (TLRO), drafted between tribes and unions

excludes supervisors, tribal gaming commission staff, security, cash counters, and dealers.

The TLRO largely tracks the NLRA. It protects the right of eligible employees to unionize, negotiate collective bargaining agreements, strike, or refrain from these activities. But its protections exceed the NLRA in other respects. Significantly, the TLRO allows employees to engage in secondary boycotts after a bargaining impasse, which the NLRA prohibits. As later amended, it even prohibits covered tribes from explaining to their employees why unionization might not serve their interests. Admittedly, the TLRO may benefit tribes in other respects. It maintains the right of tribes to promote and hire their own members over union supporters. And it bars unions from interfering with tribal elections.

Still, many have criticized the TLRO for the burdens it imposes on tribal sovereignty. First, it leaves tribes little option but to adopt state regulation in areas of labor relations the state could not regulate outside Indian Country. Second, it exposes tribes to the heavy power of national unions. UNITE HERE, for example, has sought

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to unionize several tribal casinos, supported by the dues of 300,000 members internationally. Many of the gaming tribes in California are smaller, and it can be difficult for them to resist unionization campaigns. Even for those who might support tribal labor protections, the TLRO deprives tribes of the opportunity to design their own legal regimes, suited to their particular circumstances, and nontribal jurisdictions to learn from that legislative ingenuity.

One tribe took action. In 1999, the Coyote Valley Band of Pomo Indians asked the state to meet and discuss its concerns with the TLRO. The state refused its invitation. It then asked to change the TLRO to reconcile with the IGRA, and even offered to enact its own Coyote Valley labor ordinance. The state responded that it would only agree to a labor ordinance identical to the TLRO. The Coyote Valley Band sued. But the federal district court, and ultimately the Ninth Circuit, disagreed, holding that IGRA allowed the state to insist on the TLRO as it related to gaming and the workforce necessary for its operation.

National Labor Relations Act's Application to Indian Casinos

Throughout the 2010s, the NLRB reversed its earlier position to recognize its own jurisdiction in tribal businesses and specifically the NLRA applicable to tribal casinos. A handful of federal appellate circuits upheld that new position and, finally, the Ninth Circuit, covering California, joined those sister circuits in 2018.

The Ninth Circuit case, *Pauma v. National Labor Relations Board*, arose when security for a casino operated by the Pauma Band of Mission Indians limited where employees could distribute union flyers without risking discipline. Holding the NLRA to apply, the NLRB concluded that tribal security's actions constituted an unfair labor practice.

The Ninth Circuit upheld the NLRB's decision, explaining that no basis existed to exempt tribes from the NLRA's coverage. The statutory text included no exemption, even as it exempted state employers. Self-determination did not bar the NLRA's application, because the casino was a commercial, not a governing entity. A treaty may have,

But even while the NLRA, with the NLRB's concomitant intrusion into tribal labor relations, threaten to burden tribal sovereignty and economic development, it offers tribes a powerful federal tool to block state labor protections like California's TLRO.

The National Labor Relations Act May Preempt the Tribal Labor Relations Ordinance

The NLRA not only limits how employers, employees, and unions can act in labor relations, it also limits how states can or cannot regulate that conduct, through two doctrines of preemption, each named for the United States Supreme Court case where the doctrine was first expressed.

The first, *Garmon* preemption, precludes states from regulating conduct the NLRA protects, prohibits, or arguably protects or prohibits. The second, *Machinists* preemption, forbids the NLRB and the states from regulating conduct that Congress intended to leave exposed to market forces. A state law or rule preempted under either doctrine is invalid.

A state cannot skirt federal preemption by pursuing its goals indirectly through compact negotiations rather than through direct regulation. In a 2008 decision, the United States Supreme Court held that California could not prohibit employers receiving state funds by contract from using the funds to promote or deter union organizing. This prohibition contradicted the NLRA's express protection for the free speech of employer, employee, and union. The target of California's regulation, regardless of its method, triggered preemption. There as here, California cannot skirt preemption by imposing its regulations through contract requirements.

The NLRA likely preempts the TLRO, as the *Pauma* court itself

THE NLRA NOT ONLY LIMITS HOW EMPLOYERS, EMPLOYEES, AND UNIONS CAN ACT IN LABOR RELATIONS, IT ALSO LIMITS HOW STATES CAN OR CANNOT REGULATE THAT CONDUCT,

Many tribes have concluded they have no choice. On Sept. 10, 1999, 58 tribal governments signed gaming compacts with California, each including Section 10.7 and the TLRO. Thus in California, the TLRO has remained a mandatory term in gaming compacts for nearly two decades.

but the Pauma Band had none.

This emerging trend in the NLRB and certain circuit courts has driven many tribes to lobby for a Tribal Labor Sovereignty Act in Congress that would exempt tribal employers from the NLRA's coverage. But so long as Congress remains divided, such legislation may remain elusive. The NLRA is, for better or worse, the law of the land for tribal employers.

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Preemption's Silver Lining...

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suggested. First, even if harmless, most of the TLRO's provisions overlap the NLRA and are thus preempted. More significantly, preemption would invalidate those provisions of the TLRO that surpass federal law. For example, the TLRO permits and protects secondary boycotts, while section 8(b)(4) expressly prohibits them. The TLRO, as later amended, requires that tribal employers stay neutral in a unionizing campaign. The United States Supreme Court has held that the NLRA preempts just such a requirement, when attempted before by California. Thus the NLRA would likely preempt California from imposing the TLRO outside Indian Country, and should have no different an effect within.

Ultimately, tribes alone can determine whether to accept the TLRO or challenge its validity. The circumstances that may inform such a determination are complex and particular to the labor conditions facing each tribal employer. For many, the narrower restrictions of the NLRA will be preferable. For those tribes, preemption offers a new tool to challenge California's ongoing effort to dictate labor relations for tribal employers. ■



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