

Case Law Update

Forest County Potawatomi Tribal Court

Law Day - May 1, 2018

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Tribal Court Advisor

- ▶ *Nguyen v. Gustafson*, 2018 WL 1413463
- ▶ BACKGROUND:
- ▶ W filed for divorce in Shakopee Tribal Court. H filed for divorce in MN state court and then in federal court seeking injunction to stop the tribal court case.

- ▶ Usual application of preliminary injunction test:
 - ▶ Likelihood of success on merits
 - ▶ Irreparable harm
 - ▶ Balancing of harms
 - ▶ Public interest
- ▶ Likelihood of success includes *National Farmers Union* analysis

- ▶ Discussion of whether Husband had exhausted tribal court remedies.
- ▶ H had filed interlocutory appeal in tribal court after trial court had denied his motion to dismiss.
- ▶ Leave to file interlocutory appeal was denied.
- ▶ Federal court reasoned that therefore exhaustion not accomplished.

- ▶ The Court also rejected Husband's argument that tribal court jurisdiction was "patently invalid."
- ▶ Tribal trial court analyzed jurisdiction over divorce under *Montana* and ruled that jurisdiction in tribal court was at least colorable.

- ▶ *Bishop Paiute Tribe v. Inyo County*
- ▶ 18 WL 347797
- ▶ Tribal police officer charged by county DA after responding to call and tasing suspect.
- ▶ Tribal officer charged with 3 felonies and 1 misdemeanor.
 - ▶ False imprisonment
 - ▶ Impersonating a public officer
 - ▶ Assault with a stun-gun
 - ▶ Misdemeanor batter

- ▶ Tribe filed suit seeking injunctive relief against the Sheriff and DA.
- ▶ County moved to dismiss.
- ▶ Court denied motion to dismiss.
- ▶ Tribe did state a claim
- ▶ Respondeat Superior not relevant
- ▶ Prosecutorial discretion - not a bar
- ▶ 11th amendment immunity - no help

Sovereign Immunity

- ▶ *Lewis v. Clarke*, U.S. Supreme Court, April 25, 2017; 137 S.Ct. 1285 (2017)
- ▶ Clarke was a shuttle driver for Mohegan Casino
- ▶ Rear ended the Lewis' car and caused injuries.
- ▶ Lewis' sued Clarke in CT state court

Lewis v. Clarke (cont'd)

- ▶ Clarke sued in his individual capacity (as opposed to official capacity)
- ▶ Neither Tribe nor Gaming Authority named.
- ▶ Issues is whether sovereign immunity extends to an employee sued for damages in his individual capacity.

Lewis v. Clarke (cont'd)

- ▶ Court ruled 8-0 that sovereign immunity does not extend to Clarke.
 - ▶ Indemnification by Tribe does not extend sovereign immunity to Clarke.
 - ▶ Tribe would not have to indemnify if it finds that Clarke's behavior was "wanton, reckless or malicious."

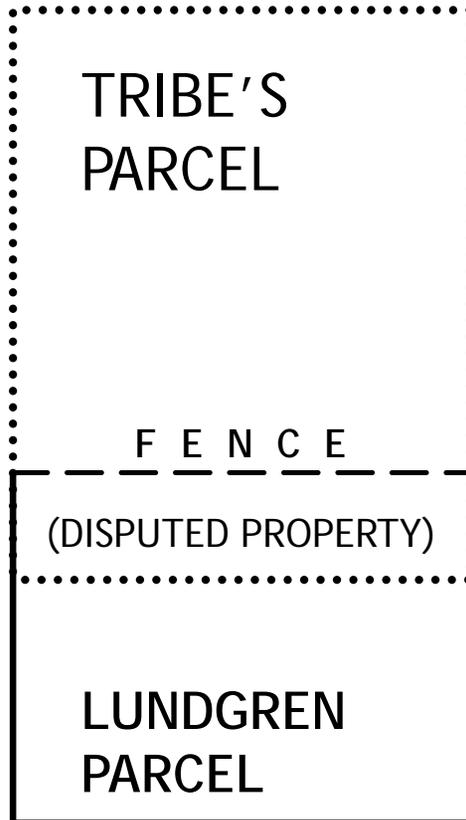
Lewis v. Clarke (cont'd)

▶ Observations:

- ▶ Thomas and Ginsburg both concurred showing their positions of strongly limiting immunity.
- ▶ Implications for casino employment.
- ▶ Sup. Ct. trending away from supporting immunity.

Sovereign Immunity

- ▶ *Upper Skagit Indian Tribe v. Lundgren*
- ▶ U.S. Supreme Court has granted review
- ▶ Washington Supreme Court ruled that sovereign immunity was not a bar to ruling on land boundary dispute between Tribe and private owners.
- ▶ 187 Wash.2d 857 (2017)
- ▶ Supreme Court review granted 12-8-17



Tribe bought
parcel in
2013.

Fence in Lundgren's
extended family
since 1947 and fence
in place since at
least 1947.

- ▶ Washington Supreme Court said:
- ▶ In rem jurisdiction means court can go forward without tribe because trial court has jurisdiction over the land; tribe not necessary.

- ▶ If Tribe's theory prevails, how would dispute get settled?

On the other hand

- ▶ If Lundgren's theory prevails, seems to diminish sovereign immunity and seems fundamentally unfair to settle issue about land without the putative owner as a party (although tribe could waive immunity).

Sovereign immunity

- ▶ *Wis. DNR v. Timber and Wood Products, et al.*, 17AP181, Dec. 19, 2017 (2017 WL 6502934).
- ▶ LCO tribe owned tribal fee land in Forest Crop status; status expired on 12-31-12 and tribe did not renew triggering around \$75,000 withdrawal or termination tax.



- ▶ Tribe did not pay; DNR sued the Tribe and sought to repossess the timber through an “in rem” claim.
- ▶ Trial court dismissed based on sovereign immunity.
 - ▶ Tribe immune from suit; AND
 - ▶ In rem action not allowed; sovereign immunity extends to the timber/real estate.

Sovereign immunity

- ▶ DNR appealed.
- ▶ Court of Appeals affirmed.
- ▶ Tribe immune from suit.
 - ▶ Though there were some close calls with the Forest Crop enrollment forms.

Sovereign immunity

- ▶ Discussion points
- ▶ Tribe still owes tax; negotiation?
- ▶ *Upper Skagit* case pending
- ▶ Similarities / differences between *Upper Skagit* and *LCO* case.
- ▶ Fall out for other Tribes
 - ▶ Continued enrollment in Forest Crop / Managed Forest?
 - ▶ Existing parcels?

Tribal Jurisdiction

- ▶ *Window Rock Unified School District v. Nez*, 9th Circuit Ct. App (August 3, 2017). 2017 WL 2784165.
- ▶ *Held*: Navajo Nation Labor Commission has colorable jurisdiction over two Arizona Public School Districts located tribal lands leased to the school districts.

Tribal Jurisdiction

- ▶ Employees of the districts filed complaint with Navajo Nation Labor Commission. (A mixture of tribal and state law claims.)
- ▶ School districts sought to enjoin in federal court. NNLC resists, arguing for exhaustion.
- ▶ Issue: can a tribe obtain jurisdiction over non-members through its right to exclude or only through *Montana* exceptions?

Tribal Jurisdiction

- ▶ Ninth Circuit said the “right-to-exclude” framework survived *Hicks* and is still a valid basis for tribal jurisdiction over non-members on tribal lands.
- ▶ Therefore, school districts must exhaust tribal remedies.
- ▶ Cert. denied 1-8-18.

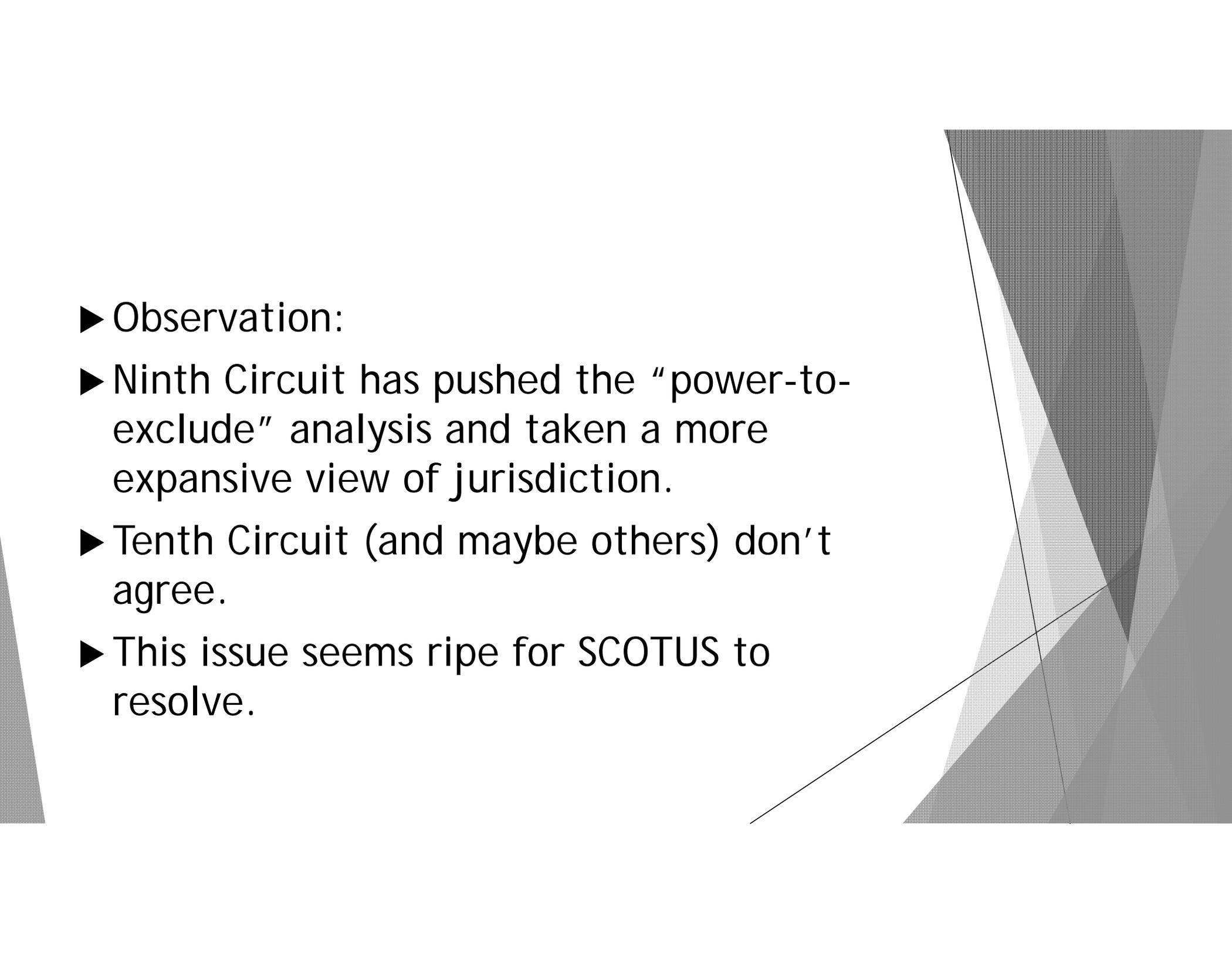
Tribal Jurisdiction

- ▶ *Norton et al. v. Ute Tribe et al.*, 862 F.3d 1236 (10th Cir., July 11, 2017)
- ▶ Arises out of chase by Utah State Police onto Ute Tribe reservation.
- ▶ Todd Murray killed at end of chase which started just off reservation and ended on reservation.
- ▶ Lots of litigation in state, federal and tribal court. Wrongful death claims, false imprisonment, assault and battery, against police officers, etc.

Tribal Jurisdiction

▶ Key points:

- ▶ Only the Plaintiffs' trespassing claims survived under *Montana* & exhaustion analysis. Generalized tort claims against officers did not implicate "core sovereign interest in excluding non-Indians from tribal lands, or any of the other tribal interests at stake in Montana's second exception."
- ▶ Acting Chief Judge was subject to suit under *Ex Parte Young* doctrine. (The Tribe, Business Committee or the Tribal Court itself were protected from suit).
- ▶ Cert. denied 2-20-18.

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- ▶ Observation:
 - ▶ Ninth Circuit has pushed the “power-to-exclude” analysis and taken a more expansive view of jurisdiction.
 - ▶ Tenth Circuit (and maybe others) don’t agree.
 - ▶ This issue seems ripe for SCOTUS to resolve.

Full faith and credit / comity

- ▶ *Coeur d'Alene Tribe v. Johnson*, Supreme Court of Idaho, 11-3-17, 2017 Opinion No. 109
- ▶ Tribe sought to enforce laws relating to pier and pilings owned by Johnsons that extended into the river on the Reservation.
- ▶ Either remove or get permit.
- ▶ Johnsons did neither; defaulted in Tribal Court
- ▶ \$17,400 fine and order to remove pier and pilings

Coeur d'Alene Tribe v. Johnson (cont'd)

- ▶ Tribe went to state court to enforce judgment and sought FFC.
- ▶ Idaho Court recognized tribal court via comity, not FFC.
- ▶ “Penal law rule” prevented imposing fine
- ▶ But order for removal of pier and filling can be recognized and enforce.

Use of tradition and custom

- ▶ Grand Traverse Band of Ottawa and Chippewa Indians Tribal Appellate Court
- ▶ GTB Anishinaabek Family Services, Appellants
- ▶ In the Matter of: [Redacted] (Case No. 2017-24-AP)

- ▶ Two issues: 1) Was law applied correctly in disposition order?
- ▶ 2) Can children testify?

Other cases of note

- ▶ *Pablo v. Ak-Chin Indian Community*, same-sex marriage - special master - CV2015-00024.
 - ▶ All defendants dismissed and stipulation reached to abide by Special Master ruling; no monetary damages.
 - ▶ Special Master appointed
 - ▶ Same-sex marriage is a fundamental right of liberty under the laws of the Ak-Chin Indian Community.

Other cases

- ▶ *McKesson v. Hembree*, 2018 WL 340042
- ▶ Cherokee Nation in Oklahoma had sued CVS, Walgreens and Walmart pharmacies and three pharmaceutical companies in Cherokee Nation Tribal Court.
- ▶ Did not survive defendants' federal court suit challenging tribal court jurisdiction.

ICWA - Wisconsin case

- ▶ *In re Termination of Parental Rights to M.J.*
- ▶ 17 AP 1697 - Dec. 28, 2017
- ▶ Indian child MJ born in 2010; father incarcerated; not adjudicated until 2014.
- ▶ While incarcerated father sent some gifts and cards.
- ▶ After release, never physically met child.

ICWA

- ▶ Court found that County was not required to show that “continued custody” would be harmful nor that “active efforts” had occurred as father had never had physical custody of the child.
- ▶ Relies on *Adoptive Couple v. Baby Girl* case. Navigates around language in Wis. Stat. sec. 48.028 that tries to disallow of Existing Indian Family Doctrine.

ICWA

- ▶ *S.S. v. Stephanie H.*, 241 Ariz. 419, (1/12/17) 2017 WL 117177.
- ▶ ICWA applies to private TPR action where Indian father sought to terminate parental rights of non-Indian mother.
- ▶ ICWA's plain language does not limit its scope to proceedings brought by state-licensed or public agencies.

- ▶ *In re the Adoption of B.B.*, 2017 UT 59, 2017 WL 3821741
- ▶ After *Adoptive Couple*, still an open question as to when an unwed father has “acknowledged or established” paternity for purposes of 25 USC § 1903(9).
- ▶ Utah Supreme Court:
 - ▶ Should not be state law
 - ▶ Reasonability standard

Thank you for listening!

This PowerPoint will be available on
my web site:

www.paulstenzel.com