



INDIAN NATIONS LAW UPDATE

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Indian Nations Law Update

Written by Brian L. Pierson – 5/10/17

SUPREME COURT REJECTS TRIBAL EMPLOYEE'S SOVEREIGN IMMUNITY DEFENSE

In *Lewis v. Clarke*, 2017 WL 1447161 (U.S. 2017), the Mohegan Tribal Gaming Authority (Tribe) employed Clarke as a limousine driver. While driving on Interstate 95, Clarke allegedly caused a motor vehicle accident that injured the Lewises, who sued Clarke individually for damages. Under tribal law, Clarke was entitled to indemnification from the tribe for any damages assessed against him arising out of the performance of his duties. The trial court denied Clarke's motion to dismiss on sovereign immunity grounds but the Connecticut Supreme Court reversed, holding that Clarke shared the Tribe's sovereign immunity for acts within the scope of his duties and that the plaintiffs could not circumvent tribal sovereign immunity by suing Clarke individually.

In a unanimous decision handed down April 25th, the U.S. Supreme Court reversed the Connecticut Supreme Court, holding that Clarke was not protected by the Tribe's sovereign immunity: "[I]n a suit brought against a tribal employee in his individual capacity, the employee, not the tribe, is the real party in interest and the tribe's sovereign immunity is not implicated. That an employee was acting within the scope of his employment at the time the tort was committed is not, on its own, sufficient to bar a suit against that employee on the basis of tribal sovereign immunity. We hold further that an

indemnification provision does not extend a tribe's sovereign immunity where it otherwise would not reach. ... The critical inquiry is who may be legally bound by the court's adverse judgment, not who will ultimately pick up the tab."

SUPREME COURT GRANTS CERTIORARI IN PATCHAK V. ZINKE

In *Patchak v. Jewell*, 828 F.3d 995 (D.C. Cir. 2016), Patchak had challenged the decision of the then-Secretary of the Interior to take land into trust for gaming purposes for the Match-E-Be-Nash-She-Wish Band of Pottawatomis Indians (Tribe). Patchak argued that the Tribe was not "under federal jurisdiction" in 1934 and, therefore, ineligible to acquire land in trust under the Indian Reorganization Act (IRA) per the Supreme Court's 2009 ruling in *Carcieri v. Salazar*, 555 U.S. 379 (2009). The district court had initially held that Patchak's suit was barred by the Quiet Title Act but the court of appeals reversed and the Supreme Court affirmed and remanded. In the meantime, in 2014 the Secretary issued an Amended Notice of Decision concerning the Tribe's fee-to-trust application for two other parcels of land it sought to acquire, expressly confirming its authority under the IRA to take land into trust on behalf of the Tribe. Also in 2014, Congress enacted the Gun Lake Trust Land Reaffirmation Act (Reaffirmation Act), which "reaffirmed" the Secretary's acquisition of the land subject to Patchak's suit and provided that "an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the land described in subsection (a) shall not be filed or maintained in a Federal court and shall be promptly dismissed." Citing these two developments, the district court granted the government's motion for summary judgment, rejecting Patchak's constitutional challenges to

the Reaffirmation Act. The D.C. Circuit affirmed, holding that (1) “[p]articulized legislative action is not unconstitutional on that basis alone, (2) the Gun Lake Act did not unduly infringe Patchak’s First Amendment right to petition government or his Due Process rights under the Fifth Amendment because “there is no deprivation of property without due process when legislation changes a previously existing and still-pending cause of action” and (3) the Act was not an impermissible bill of attainder: “While it may be true that Mr. Patchak was adversely affected as a result of the legislation, the record does not show that Congress acted with any punitive or retaliatory intent.” Patchak petitioned for review of the appellate decision, re-captioned to reflect the new Interior Secretary, in the U.S. Supreme Court on two questions.

1. Does a statute directing the federal courts to “promptly dismiss” a pending lawsuit following substantive determinations by the courts (including this Court’s determination that the “suit may proceed”)—without amending underlying substantive or procedural laws—violate the Constitution’s separation of powers principles?
2. Does a statute which does not amend any generally applicable substantive or procedural laws, but deprives Petitioner of the right to pursue his pending lawsuit, violate the Due Process Clause of the Fifth Amendment?

On May 1, 2017, the Supreme Court granted the petition for review on the first, but not the second, of the questions presented. If the Court reverses the D.C. Circuit, the case could be remanded for a trial on the issue whether the Gun Lake Tribe was entitled to have land taken into trust. The D.C. Circuit has already held, in *Confederated Tribes of the*

Grand Ronde Community v. Jewell, 2016 830 F.3d 552 (D.C. Cir. 2016), that the Department of Interior's (DOI) liberal interpretation of "under federal jurisdiction," adopted in the wake of *Carcieri*, was reasonable. Revival of Patchak's claims could, however, provide a path back to the Supreme Court and a review of the DOI interpretation.

GODFREY & KAHN TO PRESENT ON RENEWABLE ENERGY FOR TRIBAL HOUSING AT NAIHC

Godfrey & Kahn Indian Nations team leader Brian Pierson and Energy Strategies team leader John Clancy presented, on June 29, at the annual convention of the National American Indian Housing Council in Nashville on financing solar energy to cut tribal energy costs. Helping tribes identify sources of funding to transition from energy from coal-fired plant to clean, renewable, cheap solar energy has been a major focus of Godfrey & Kahn's Indian country practice. Our presentation will focus on strategies to leverage federal grants with investment tax credit and power purchase agreements to fund the costs of conversion to clean energy.

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