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Tribal Workers May Face More Suits after Indemnity Ruling – **See Attachment 1** (Law360, Apr. 25, 2017)

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Trump Ordering Review Of Nat'l Monument Designations

Share us on: By **Keith Goldberg**

Law360, New York (April 25, 2017, 9:02 PM EDT) -- President Donald Trump will sign an executive order Wednesday directing the U.S. Department of the Interior to review designations of land and marine national monuments stretching back over 20 years, including former President Barack Obama's controversial designation of the Bears Ears National Monument in Utah in December.

The order will direct Interior Secretary Ryan Zinke to review designations of monuments of at least 100,000 acres since Jan. 1, 1996, and to provide recommendations to Trump as to whether such designations should be modified, resized or rescinded. That covers 24 monuments, from the 1996 designation of the Grand Staircase-Escalante National Monument in Utah to the **1.35-million-acre Bears Ears National Monument** by Obama near the end of his term, Zinke told reporters Tuesday evening.

The order also directs Zinke to recommend legislative changes to the Antiquities Act of 1906, which gives the president sole authority to designate public lands as national monuments.

"I think the concern I have, and the president has, is when you designate a monument, the local community that's affected should have a voice," Zinke said Tuesday, acknowledging accusations from Utah lawmakers that the Obama administration didn't adequately consult with local communities and other stakeholders before designating Bears Ears a national monument. "I'm not going to predispose what the outcome is going to be. I'm going to talk to congressional delegations, talk to governors and the stakeholders involved and formulate recommendations that are appropriate."

Zinke emphasized that the order doesn't strip any monument designations or loosen any conservation measures. He said the Interior Department might also review older monument designations that were significantly modified after 1996.

The order directs Zinke to give his recommendations to Trump within 120 days and an interim report within 45 days — which Zinke acknowledged was to provide a

recommendation on Bears Ears. The designation was backed by the Navajo Nation, and Democratic lawmakers in the West have urged Trump not to rescind it.

"My obligation is to wrap up my recommendations within 120 days," Zinke said. "My recommendation could be for further review."

Conservation groups blasted the move as opening the door to allowing extraction industries to tap environmentally and culturally sensitive areas.

"This review is a first step towards monument rollbacks, which we will fight all the way," Natural Resources Defense Council President Rhea Suh said in a statement Tuesday. "The president does not have the authority to reverse monument designations, and the public supports protection of public lands."

Center for Biological Diversity Executive Director Kieran Suckling said in a statement Monday that Trump is "declaring war on public lands" with the order.

"Trump's tapping into the right-wing, anti-public-lands zealotry that will take us down a very dangerous path — a place where Americans no longer have control over public lands and corporations are left to mine, frack, clear-cut and bulldoze them into oblivion," Suckling said. "It starts with Bears Ears and Grand Staircase and only gets worse from there."

Any attempt to rescind or significantly modify a monument designation is sure to be challenged in court, but that didn't seem to bother Zinke.

"Prudent public policy should be the right policy," Zinke said. "I'm not afraid of being sued. I get sued all the time. I'm not going to make any judgment based on getting sued or not sued."

Zinke said any recommendations will be firmly grounded within the Antiquities Act, signed into law by former President Teddy Roosevelt, an ardent conservationist.

"At the end of it, we're going to follow the law as Teddy Roosevelt laid it out," Zinke said.

--Additional reporting by Andrew Westney and Kat Sieniuc. Editing by Jill Coffey.

Update: This story was updated to clarify the number of designated monuments subject to review and that the order calls for recommendations for legislative changes to monument designations under the Antiquities Act as well as to include additional comment from conservation groups.

Split 9th Circ. Panel Won't Rehear Tribal Banishment Suit

Share us on: By **Kat Sieniuc**

Law360, New York (April 25, 2017, 4:25 PM EDT) -- The Ninth Circuit will not reconsider its decision upholding a move by the United Auburn Indian Community to temporarily ban certain members from tribal land, after a split panel on Monday declined to rehear the case and the full court took a pass.

The same panel that issued the **March decision** upholding a district court's dismissal of the challenge voted 2-1 not to rehear the case, with the same judge, U.S. Circuit Judge Kim McLane Wardlaw, siding with the banished tribe members in both decisions. The full court likewise declined a request for rehearing en banc.

In the March decision, a panel majority held that the tribe's temporary exclusion of members Jessica Tavares, Dolly and Barbara Suehead, and Donna Caesar from tribal land, but not an entire reservation, did not constitute a “detention” under the Indian Civil Rights Act, which allows Native Americans to challenge tribal detentions in federal court.

The district court was therefore right to find it lacked jurisdiction to review the members’ temporary exclusion claims, the panel held.

The appeal arose out of actions taken by the tribal council of the United Auburn Indian Community — which owns the Thunder Valley Casino Resort in California — after the four petitioners disagreed with how the council was governing internal tribal affairs.

In November 2011, the petitioners submitted a recall petition, raising allegations against members of the council that included financial mismanagement, electoral irregularity and restrictions on access to tribe members’ mailing addresses, the panel said.

The petitioners were eventually banished from tribal properties and facilities, but not privately owned parcels of land, including their homes and other tribe members' properties. Tavares was given a 10-year banishment, while the other three got two-year banishments that have since passed.

Andrew Stroud, an attorney for the plaintiffs, expressed disappointment when the appeal court issued its initial decision, saying at the time this was exactly the type of case the ICRA was designed to address.

“Our disappointment is even greater because the majority completely reinterpreted ICRA in order to reach the result that they desired,” he said in a statement in March. “It is an example of a court making law rather than following it. And they made really bad law to boot.”

A United Auburn Indian Community spokesman said in a statement at the time that the court’s opinion was measured and thoughtful, adding that the tribe believed the result was correct under the law and that the opinion “supports the political independence of tribes in general as well as the traditions that govern the tribe’s internal processes.”

“A win for the plaintiffs would have opened the door for federal judges to second-guess a wide range of tribal decisions and exert significant control over tribal governments in general,” spokesman Doug Elmetts said. “Thankfully, the majority opinion recognized this risk and decided the case in a way that respects the right of tribes to govern their own affairs.”

Counsel for the parties could not be immediately reached for comment Tuesday.

U.S. Circuit Judges M. Margaret McKeown, Kim McLane Wardlaw and Richard C. Tallman sat on the panel for the Ninth Circuit.

The plaintiffs are represented by Andrew W. Stroud and Landon D. Bailey of Hanson Bridgett LLP and Fred J. Hiestand.

The defendants are represented by Elliot R. Peters, Steven A. Hirsch and Jo W. Golub of Kecker & Van Nest LLP.

The case is Jessica Tavares et al. v. Gene Whitehouse et al., case number 14-15814, in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Adam Lidgett and Christine Powell. Editing by Mark Lebetkin.

9th Circ. Affirms Nix Of Calif. Tribe's Land Claims

Share us on: By **Christine Powell**

Law360, New York (April 25, 2017, 3:29 PM EDT) -- The Ninth Circuit on Monday upheld the dismissal of the Mishewal Wappo Tribe of Alexander Valley Rancheria's claim that the federal government illegally terminated its land holdings more than 50 years ago, finding that the tribe waited too long to bring its claim.

In a nonprecedential ruling, a unanimous three-judge panel affirmed a California district court's **grant of summary judgment** to the U.S. Department of the Interior in the Mishewal Wappo Tribe's suit claiming that the agency illegally terminated the Alexander Valley Rancheria, one of the parcels of land that had been designated for the state's Native Americans.

The panel agreed with the lower court's conclusion that all of the tribe's claim depended on its allegations that the Interior Department wrongly terminated the rancheria in violation of the California Rancheria Act — a claim that it held accrued too long ago — and declined to consider the tribe's "new argument" that the termination of the rancheria did not terminate its status as a federally recognized tribe, pointing to the fact that the tribe never raised that issue in the lower court.

"The federal defendants published notice of the termination of the rancheria in the Federal Register in 1961, along with a list of those who would receive land," the panel said. "This publication was 'legally sufficient notice ...[,] regardless of actual knowledge or hardship resulting from ignorance,' to put the tribe on notice of the federal defendants' alleged breach of their fiduciary duty and to trigger the statute of limitations. Absent tolling, the statute of limitations expired in 1967, decades before the tribe filed the instant suit."

And equitable tolling of the statute of limitations is inappropriate in this situation because the tribe "did not diligently pursue its rights or show that extraordinary circumstances prevented it from doing so," the panel continued.

While the tribe had argued that the Interior Department tricked it into not filing a lawsuit or proceeding with the administrative recognition process "by representing in various ways"

that it would “restore the tribe’s status as a federally recognized tribe,” the panel said that the earliest piece of evidence to support that claim is a 1987 letter.

“Even assuming this letter induced the tribe to refrain from pursuing other avenues of recognition or litigation to rectify the purportedly unlawful termination of the rancheria, it was issued about 26 years after the rancheria was terminated,” the panel said. “The 1987 letter could not warrant tolling of the statute of limitations for the 20 years beforehand.”

According to court documents, in the early 20th century, the federal government passed a law that allowed the head of the Interior Department to purchase parcels of lands, known as rancherias, throughout the state of California for use by its Native Americans.

About 50 years later, Congress passed another law, called the California Rancheria Act, which allowed the head of the Interior Department to dissolve those same rancherias.

By filing suit over the Sonoma County-based Alexander Valley Rancheria in 2009, the Mishewal Wappo Tribe claimed that the process used by the head of the agency to terminate it between 1959 and 1961 was inconsistent with the California Rancheria Act, according to court documents.

The federal government responded to the lawsuit by saying that the tribe’s claims were barred by a six-year statute of limitations, an argument with which U.S. District Judge Edward J. Davila agreed when ruling on competing motions for summary judgment in March 2015.

The tribe appealed, prompting the Ninth Circuit’s ruling Monday.

Representatives for the tribe did not respond immediately to requests for comment on Tuesday. The federal government does not comment on pending litigation.

Circuit Judges Kim McLane Wardlaw and Ronald M. Gould and District Judge Marilyn L. Huff, sitting by designation, sat on the panel for the Ninth Circuit.

The tribe is represented by Kelly F. Ryan of the Ryan Law Firm and Joseph L. Kitto.

The DOI is represented by Rachel Heron of the U.S. Department of Justice.

The case is The Mishewal Wappo Tribe of Alexander Valley v. Sally Jewell, in her capacity as Secretary of the Interior, et al., case number 15-15993, in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Andrew Westney, Jack Newsham and Vidya Kauri. Editing by Sara Ziegler.

Analysis

Tribal Workers May Face More Suits After Indemnity Ruling

Share us on: By **Andrew Westney**

Law360, New York (April 25, 2017, 8:39 PM EDT) -- The U.S. Supreme Court's decision Tuesday that a Mohegan Tribe limousine driver doesn't share the tribe's sovereign immunity and must face claims over an off-reservation car accident rejected the idea that a tribe can shield its employees from litigation by indemnifying them, opening the door for creative suits that circumvent tribal immunity.

The high court **unanimously reversed** a Connecticut Supreme Court decision that Mohegan Tribal Gaming Authority employee William Clarke was immune to claims over injuries a Connecticut couple sustained after his limo pushed their car into a concrete highway median, saying a Mohegan tribal code provision indemnifying tribal gaming employees against negligence suits didn't confer the tribe's immunity onto Clarke.

That holding broadens the potential liability for tribal employees and could heap costs on tribes that have agreements to foot the bills for their workers, attorneys say.

"The court may be saying that this isn't a workaround [of tribal immunity], but some creative plaintiffs may be able to find a workaround through this ruling to bring suits against tribal employees and perhaps tap the pockets of the tribes themselves," Littler Mendelson PC shareholder Holly M. Robbins said.

While the Mohegan case dealt with a car accident on an interstate highway in Connecticut, plaintiffs could try to pursue claims for incidents like slip-and-falls at on-reservation casinos or other tribal businesses, which would put employees at risk of facing more such suits since the tribes themselves would remain immune, but not employees, attorneys say.

With the attention on the Mohegan case, tribes' costs of doing business may well rise in the short term if they face an upswing in litigation and have to pay more on behalf of their employees, according to Holland & Knight LLP partner James T. Meggesto.

The Connecticut court had ruled the protections of sovereign immunity would be gutted if

government workers like Clarke could just be sued as individuals, a position it said state and federal precedents supported.

In the Supreme Court's opinion, however, Justice Sonia Sotomayor said that Clarke, rather than the tribe, was the true target of the negligence suit by Brian and Michelle Lewis, and that the tribe's indemnification of the driver didn't extend tribal immunity to him.

While a suit against an employee acting in her official capacity is really against the sovereign itself, the "real party in interest" in an individual capacity suit like that against Clarke is the employee, regardless of "who will ultimately pick up the tab," according to the opinion.

And in reversing the Connecticut court, Sotomayor said Clarke's contention that the Mohegan Tribe's sovereign immunity should apply to him would extend immunity for tribal employees beyond that available for federal or state employees.

The court's placing of tribal employees on an equal footing with federal and state employees actually helps make the ruling "the best possible result in this case for tribal interests," according to Greenberg Traurig LLP shareholder Jennifer Weddle.

The opinion means the novel question of whether the tribe's indemnification extended immunity to Clarke had "nothing to do with Indian law" but "everything to do instead with governmental employment indemnification law," Weddle said.

The ruling, however, shouldn't open the door to suits against tribal employees for on-reservation incidents or actions by an employee in his official capacity, as it focused tightly on an employee's liability for an individual capacity claim for off-reservation activity, she added.

Yet the court's analysis did little to address arguments by Clarke and **amicus tribes supporting him** that allowing tribal employees to be sued in a foreign court undermines tribal self-governance and tribal sovereignty, attorneys say.

"By not addressing the tribal sovereignty case, there were a lot of policy and historical arguments that were left unaddressed, and perhaps unconsidered" by the court, according to Littler Mendelson associate Tessa K. Mlsna.

The opinion also neglected to address the Mohegans' own tribal court process to deal with tort claims and the fact that the Lewises brought suit in state court only after a statute of limitations to bring the claims in Mohegan court had elapsed.

Tribes like the Mohegans that want to hear tort suits in their own courts could now see their employees forced to enter another forum, "a big deal" for those tribes, according to Faegre Baker Daniels associates Leah Sixkiller, Josh Peterson and Nicole Truso.

And tribes that don't have laws to allow those suits in tribal court "now will have to assess whether to implement new liability laws or to structure their insurance arrangement in a manner that contemplates the Lewis decision," the Faegre attorneys said.

But the decision's impact on tribal sovereignty may not be as negative as some tribal advocates feared, as the majority opinion stayed away from the more critical stances toward tribal sovereignty and immunity staked out by Justices Clarence Thomas and Ruth Bader Ginsburg in their brief concurring opinions.

And Clarke may be able to assert personal defenses on remand to state court that other tribal employees can take advantage of — in particular the theory of official immunity, which protects government employees from liability for using their discretion in carrying out their duties, according to Weddle, who represented several states and tribes that filed an amicus brief supporting Clarke.

The opinion didn't reach whether Clarke is shielded by official immunity because he first raised the issue on appeal, and also left open other immunity defenses, such as prosecutorial immunity and judicial immunity, that "will likely continue to insulate tribal employees from personal liability in many circumstances," according to Dorsey & Whitney LLP associate Forrest Tahdooahnippah.

But where those doctrines aren't applicable, the court's decision could lead tribes to balk at indemnifying employees, which could have "a chilling effect on tribal police officers, emergency responders, prosecutors and court officials," according to Tahdooahnippah.

The Lewises are represented by James M. Harrington of Polito & Associates LLC and Eric D. Miller, Jennifer A. MacLean and Luke M. Rona of Perkins Coie LLP.

Clarke is represented by Daniel J. Krisch of Halloran & Sage LLP, and Neal Kumar Katyal, Morgan L. Goodspeed and Mitchell P. Reich of Hogan Lovells.

The case is Brian Lewis et al. v. William Clarke, case number 15-1500, in the Supreme Court of the United States.

--Additional reporting by Christine Powell. Editing by Philip Shea and Jack Karp.