

# “Play or Pay”: Interpreting the Employer Mandate of the ACA as it Relates to Tribal Employers



RACHEL SIBILA

# Background



- “Because of the unique legal status of Indians in American jurisprudence, legal doctrines often must be viewed from a different perspective from that which would obtain in other areas of law.” *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985)

# “Trust-Responsibility” Doctrine



- Treaties are foundation of “trust-responsibility” doctrine
  - “Supreme law of the land”
- United States has charged itself with “moral obligations [toward tribes] of the highest responsibility and trust.” *United States v. Jicarilla Apache Nation*, 131 U.S. 2313, 2324 (2011)

# Congressional Power



- Constitution “grants Congress broad general powers to legislate in respect to Indian tribes.” *United States v. Lara*, 541 U.S. 193, 200 (2004)
  - Congress’s power is “plenary and exclusive”

# Balance



- Tension between the two competing doctrines
  - Federal government *should* keep its word; but
  - Congress *may* restrict tribal sovereignty if it deems it expedient to do so
- What do courts do when a generally applicable statute is silent in regards to its applicability to tribes?

# Canons of Statutory Construction



- “Ambiguities in a federal statute must be resolved in favor of Indians; and
- [A] clear expression of Congressional intent is necessary before a court may construe a federal statute as to impair tribal sovereignty.” *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1311 (D.C. Cir. 2007)

# Supreme Court Precedent



- “Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so.” *Minnesota v. Mille Lacs Band of Chippewa Indians*, 562 U.S. 172, 202 (1999); *see also U.S. v. Dion*, 476 U.S. 734, 738-39 (1986)
- “Congress’ intent to abrogate Indian treaty rights [must be] clear and plain.” *Dion*, 476 U.S. at 738

# “Clear and Plain”



- Explicit statements not required
  - May be derived from legislative history, surrounding circumstances, or face of the act
- “What is essential is clear evidence that Congress *actually considered* the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.” *Dion*, 476 U.S. at 738-40



# Tuscarora



- **Holding**

- Court applied the clear-and-plain rule, finding that the Federal Power Act applies to tribes because it “specifically defines and treats with lands occupied by Indians.” *Federal Power Comm’n v. Tuscarora Indian Nation*, 362 U.S. 99, 118 (1960)

- **Dictum**

- “[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.” *Tuscarora*, 362 U.S. at 117

- **Subsequent Cases**

# Ninth Circuit Analysis



- *Coeur d'Alene* test:
  - The court must apply a silent statute to a tribe unless:
    - ✦ 1) doing so would touch “exclusive rights of self-governance in purely intramural matters;”
    - ✦ 2) application of the statute would “abrogate rights guaranteed by Indian treaties; or
    - ✦ 3) there is evidence that Congress intended to exempt Indians from application of the statute.”
  - *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1114-15 (9<sup>th</sup> Cir. 1985)
- Circuits 9, 2, 11

# Ninth Circuit Analysis



- Exclusive rights of self-governance in purely intramural matters
  - Conditions of tribal membership, inheritance rules, domestic relations
  - *Coeur d'Alene* court held that a farm conducting business on the open market was *not* engaged in purely intramural matters
    - ✦ Farm employed Indians & non-Indians making it “neither profoundly intramural . . . nor essential to self-government.”  
*Coeur d'Alene*, 751 F.2d at 1116

# Ninth Circuit Analysis



- **Abrogation of rights guaranteed by Indian treaties**
  - Treaties are to be construed as the Indians understood them at the time they were entered into, and “as justice and reason demand.” *U.S. v. Winans*, 1998 U.S. 371, 380 (1905)
  - Ambiguities should be resolved in favor of Indians

# Ninth Circuit Analysis



- Proof of legislative intent *to exempt*
  - Opposite of standard articulated by Supreme Court

# Supreme Court Analysis



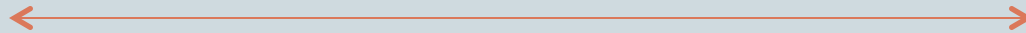
- Clear-and-plain intent required
- “The special brand of sovereignty the tribes retain—both its nature and its extent—rests in the hands of Congress.” *Michigan v. Bay Mills Indian Community*, No. 12-515, 134 U.S. 2024 (2014)
- Circuits 8, 10, and the Supreme Court of the United States

# D.C. Circuit Analysis



- Acknowledging “conflicting Supreme Court canons of interpretation,” the D.C. Circuit created its own analysis
- Sliding scale

Traditional  
customs and  
practices



Private,  
commercial  
enterprises

# Sixth Circuit Analysis



- Two cases went up to 6<sup>th</sup> Circuit on appeal
  - *NLRB v. Little River Band of Ottawa Indians*
  - *Soaring Eagle Casino & Resort v. NLRB*
- *Little River* panel adopted the *Coeur d'Alene* framework
  - Strong dissent addresses the “dictum-turned-doctrine” of the *Coeur d'Alene* analysis, referring to it as a house of cards that collapses when we notice what is inexplicably overlooked in the fifty-five years of adding card upon card
    - ✦ “Not only has the Supreme Court conspicuously refrained from approving it, but the ‘doctrine’ is exactly 180-degrees backward.” *NLRB v. Little River Band of Ottawa Indians*, Case No. 14-2239 (June 9, 2015), 38 (McKeague, J., dissenting)



# Sixth Circuit Analysis



- Three weeks later, the *Soaring Eagle* panel found the NLRA applicable to tribes
  - Panel noted that, absent binding precedent resulting from the *Little River* decision, and keeping in mind the “proper respect both for tribal sovereignty itself and for the plenary authority of Congress,” the NLRA, containing no expression of congressional intent regarding tribes, should not apply to the tribe
  - *Little River* wrongly decided

# Circuit Split



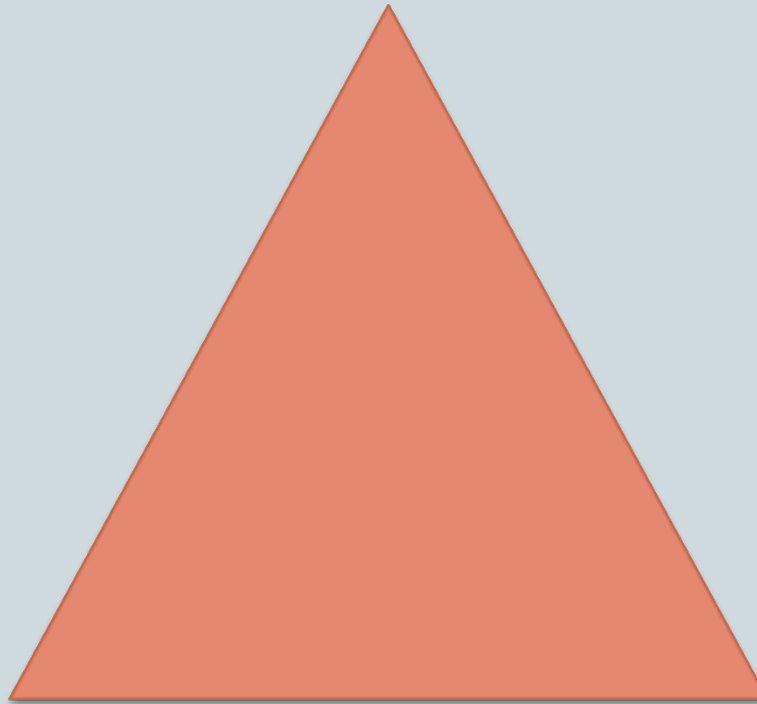
- En banc review denied in *Little River*
  - On 9/24/15, respondent filed unopposed motion to stay Court's mandate enforcing its Opinion pending timely appeal to Supreme Court
  - On 9/29/15, Court issued order granting motion
- SCOTUS review

# Circuit Split



SCOTUS,  
8, 10

9, 2, 11



D.C. Circuit

# Affordable Care Act



- **Employer Mandate**
  - IRC §4980H
- **Statute of general applicability**
  - NPRM - December, 2012
  - Final Regulations - February, 2014
- **Analysis is potentially outcome-determinative**

# Affordable Care Act



- *Coeur d'Alene*
  - Statute applies *unless*:
    - ✦ Exclusive rights of self-governance
      - Tribal businesses employing solely Native American employees
      - Tribal businesses employing Native American and non-Native American employees
    - ✦ Abrogation of rights guaranteed by Indian treaties
      - Indian Health Care Improvement Act (IHCIA)
    - ✦ Congressional intent to exempt tribes

# Affordable Care Act



- **SCOTUS precedent**
  - Congressional intent to apply to tribes
- **D.C. Circuit**
  - Sliding scale

# *Northern Arapaho Tribe v. Burwell*



- U.S. District Court – District of Wyoming
- Northern Arapaho Tribe employs more than 900 people
  - Tribe paid 80% of premiums
- Employer mandate became effective January 1, 2015
- Tribe objected on three grounds:
  - Treas. Reg. §54-4980H-1
  - Treas. Reg. §301.6056-1
  - Treas. Reg. §1.6055-1

# *Northern Arapaho Tribe v. Burwell*



- Court cited *Tuscarora*; applied *Coeur d'Alene* test
  - Employer mandate does not affect exclusive rights of self-governance;
  - Application of the employer mandate would not abrogate rights guaranteed by Indian treaties;
  - Language employed by Congress suggests it intended the large employer mandate to apply to Indian tribes (placing burden on Tribe to identify legislative history that would suggest the opposite)



# *Northern Arapaho Tribe v. Burwell*



- Congress knew how to exclude taxpayers from ACA's ambit and chose not to do so
  - Individual mandate (26 U.S.C. §5000A(d)(1)-(4))
  - “Failure to specify Indian tribes as large employers is not enough to suggest they must be excluded . . . .”
  - “Congress’s decision not to expressly exempt Indian tribes as large employers suggests Congress intended them to be subject to the large employer mandate.”

# *Northern Arapaho Tribe v. Burwell*



- Tribe next argued that ambiguities should be resolved in favor of Native Americans
  - Court found no ambiguity in §4980H; canons of statutory construction do not apply
  - Statute is “clear and unambiguous”
    - ✦ Is it?

# Request for Relief



- National Congress of American Indians; National Indian Health Board; Tribal Self-Governance Advisory Committee; Direct Services Tribal Advisory Committee
- Requested relief from employer mandate on the following grounds:
  - Inconsistent with the federal trust-responsibility doctrine
  - Denies tribal members the opportunity to take advantage of benefits and protections designed for them in the Marketplace
  - Chills Marketplace enrollment for American Indians

# Pending Legislation



- **Tribal Employment and Jobs Protection Act**
  - Introduced in House and Senate on July 15, 2015
  - Amends §4980H(c) by excluding from the definition of “applicable large employer:”
    - ✦ Any Indian tribal government
    - ✦ Any tribal organization
    - ✦ Any corporation if more than 50% of the equity interest is owned by an Indian tribal government or organization

# Pending Legislation



- **Senate 1771 – Sen. Steve Daines (R-MT)**
  - Referred to Finance Committee
- **HB 3080 - Rep. Kristi Noem (R-S.D.) and Sen. John Thune (R-S.D.)**
  - Referred to Ways and Means Committee

# Call for Clarification



- Regarding express exemption from Title VII and ADA:

“The reason why it is necessary to add these words is that Indian tribes . . . are virtually political subdivisions of the Government. To a large extent, many tribes control and operate their own affairs, even to the extent of having their own elected officials, courts and police forces. This amendment would provide to American Indian tribes in their capacity as a political entity the same privileges accorded to the U.S. Government and its political subdivisions, to conduct their own affairs, and economic activities without consideration of the provisions of the bill.” – Sen. Mundt (R – S.D.)



**QUESTIONS?**