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August 2011 - August 2012 Case Law on American Indians

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Erratum

Due to error, volume 1, issue 2 was originally published as volume 2, issue 1 and some articles were misnumbered or not published at all. This document reflects the correct version of volume 1, issue 2.

**AUGUST 2011 – AUGUST 2012
CASE LAW ON AMERICAN INDIANS**

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UNITED STATES SUPREME COURT

1. ***Match–E–Be–Nash–She–Wish Band Of Pottawatomi Indians v. Patchak; Salazar v. Patchak***, Nos. 11–246, 11–247, 132 S. Ct. 2199 (2012). Owner of property near site of proposed Indian casino brought action challenging decision by Secretary of the Interior to take parcel of land into trust on behalf of Indian tribe. Tribe intervened. The district court, 646 F. Supp. 2d 72, dismissed complaint on ground that resident lacked prudential standing. Resident appealed. The appellate court, 632 F.3d 702, reversed. Certiorari was granted. The Supreme Court held that: (1) United States waived its sovereign immunity, abrogating *Neighbors for Rational Development, Inc. v. Norton*, 379 F.3d 956, *Metropolitan Water Dist. of Southern Cal. v. United States*, 830 F.2d 139, *Florida Dept. of Bus. Regulation v. Department of Interior*, 768 F.2d 1248. The owner’s suit is not one to quiet title under the Quiet Title Act because, even though he seeks to divest the United States of its title to land held for the benefit of a Native American tribe, he does not seek to establish his rightful title to the real property in question, and the suit therefore falls under the United States’ general waiver of sovereign immunity in Section 702 of the Administrative Procedure Act. (2) Resident had prudential standing. Affirmed and remanded.

2. ***Salazar v. Ramah Navajo Chapter***, No. 11–551, 132 S. Ct. 2181 (2012). Several Indian tribes and tribal organizations brought suit against Secretary of the Interior, seeking to collect contract support costs for activities that had to be carried on by a tribal organization as contractor to ensure compliance with terms of self-determination contracts under Indian Self-Determination and Education Assistance Act (ISDA). The district court granted summary judgment in favor of the government and plaintiffs appealed. The appellate court, 644 F.3d 1054, reversed. Certiorari was granted. The Supreme Court held that self-determination contracts between the Secretary of the Interior and Indian tribes, pursuant to which tribes undertook to provide education, law enforcement and other services normally provided by government, in exchange for commitment by the Secretary to pay costs incurred by tribes in performing their contracts “[s]ubject to the availability of appropriations,” obligated government to pay full amount of contract support costs incurred by tribes once Congress made lump-sum appropriation sufficient to pay any individual contractor’s contract support costs; abrogating *Arctic Slope Native Assn., Ltd. v. Sebelius*, 629 F.3d 1296. Affirmed.

OTHER COURTS

A. Administrative Law

3. ***Cahto Tribe of the Laytonville Rancheria v. Dutschke***, No. 2:10–CV–01306, 2011 WL 4404149 (E.D. Cal. 2011). The Cahto Tribe of the Laytonville Rancheria (Tribe) sought an order under the Administrative Procedures Act (APA) vacating and reversing the Bureau of Indian Affairs' administrative decision that ordered the Tribe to re-enroll twenty-two members of the Sloan/Hecker family who were disenrolled by the Tribe in 1995. On September 19, 1995, the Tribe's General Council voted to remove from the Tribe's membership 22 individuals, members of a family with the surname Sloan, sometimes described as the Sloans/Heckers, finding that the Sloans "have been affiliated with other tribes by being included on formal membership rolls and/or . . . have been a distributee of a reservation distribution plan, namely the Hoopa/Yurok settlement and thus were ineligible for membership under Article III.A.3 of the Tribe's Articles of Association." From 1995 to 1999, BIA officials declined requests by the Sloans and others to intervene and maintained that the Tribe's disenrollment action was an internal matter. The BIA did not act on Gene Sloan's appeals until 2009. The Superintendent wrote to the Tribe and asked that the Tribe reconsider its disenrollment decision. As a result, the Tribe agreed to attempt to resolve the matter internally. The court denied Plaintiff's motion for summary judgment, granted Defendants' motion for summary judgment, and affirmed the BIA's 2009 Decision.

4. ***Wilton Miwok Rancheria v. Salazar***, Nos. C–07–02681, C–07–05706, 2011 WL 4407425 (N.D. Cal. 2011). On February 28, 2007, the Me–Wuk Indian Community of the Wilton Rancheria filed suit against various federal officials in District Court, alleging violations of the California Rancheria Act ("Rancheria Act" or "the Act"), Pub. L. 85-671, 72 Stat. 619, amended by Pub. L. 88–419, 78 Stat. 390. The Me–Wuk Plaintiffs sought federal recognition of the Wilton Rancheria and requested that certain land be taken into trust by the federal government on the tribe's behalf. On June 4, 2009, the Existing Parties filed a Stipulation for Entry of Judgment ("Stipulated Judgment"). The Court approved the stipulation on June 5, 2009, and final judgment was entered on July 16, 2009, nunc pro tunc to June 8, 2009. *MeWuk Indian Community of the Wilton Rancheria v. Salazar, et al.*, Dkt. Nos. 33, 34; *Wilton Miwok Rancheria et al. v. Salazar, et al.*, Dkt. Nos. 61, 62. In the Stipulated

Judgment, the United States admits that it failed to comply with the Rancheria Act in terminating the Wilton Rancheria and distributing its assets. It agrees, among other things, to restore federal recognition of the Wilton Rancheria and to accept in trust certain lands formerly belonging to the tribe. Plaintiffs agree, among other things, to release the federal government from liability arising out of violations of the Rancheria Act, to discharge the United States Department of Health and Human Services from any claims arising after the implementation of the Rancheria Act and before the restoration of recognition, and to dismiss their claims with prejudice. The Stipulated Judgment also provides that this Court will retain jurisdiction, upon motion by any party, to determine whether a party has “materially violated” the terms of the judgment. The Stipulated Judgment contains a number of specific provisions concerning the process for determining membership in the Wilton Rancheria. Of particular significance to the Proposed Intervenors is paragraph 6, which states: “The Interim Tribal Council shall develop the Tribal Constitution that shall provide for membership criteria based on the Tribe’s historical documentation, which may include the Census documents of 1933/1935 and 1941.” The Existing Parties and the County and City entered into negotiations for the purpose of modifying the Stipulated Judgment. On June 10, 2011, as the negotiations neared their successful completion, the Proposed Intervenors filed the instant motion. Proposed Intervenors represent individuals formerly associated with the Plaintiffs who claim that they were “systematically excluded from the organization process” following approval of the Stipulated Judgment. Motion for Intervention. They seek to protect their interest in “potential membership” in the Wilton Rancheria. According to their moving papers, the census documents referenced in paragraph 6 of the Stipulated Judgment “form the primary basis from which the rights to membership of the Historic Families would be derived.” They alleged that the Interim Tribal Council, which has governed the Wilton Rancheria since its restoration, elected not to base membership determinations on the Census documents, the effect of which was to exclude the Proposed Intervenors from membership in the tribe. They argued that their exclusion violates the Stipulated Judgment, because “the interpretation of the word ‘may’ as permissive . . . is contrary to the purpose of that language.” The court denied the Motion for Intervention without Prejudice.

5. ***Muwekma Ohlone Tribe v. Salazar***, No. 03–1231, 813 F. Supp. 2d 170 (2011). Native American group brought action against Department of the Interior and agency officials, challenging decision

declining to grant federal recognition to group as Native American tribe. Parties cross-moved for summary judgment. The District Court held that: (1) claim alleging unlawful termination of federal recognition was time-barred; (2) determination that group did not fulfill criteria for federal recognition was not arbitrary and capricious; (3) group lacked trust relationship with government sufficient to create fiduciary duty; (4) group lacked protected property interest in its prior acknowledgement; (5) agency was not required to provide hearing to group; and (6) group failed to show that it was “similarly situated” for equal protection purposes. Defendants’ motion granted.

6. *Wyandotte Nation v. Salazar*, No. 11-1361, 2011 WL 5841611, 825 F. Supp.2d 261 (2011). Federally recognized Indian tribe sought writ of mandamus to compel the Secretary of Department of Interior to accept trust title to land, pursuant to Land Claim Settlement Act. Defendant moved to transfer venue. The district court held that: (1) public interest factors favored transfer to Kansas, and (2) private interest factors favored transfer to Kansas. Motion granted.

7. *South Dakota v. United States Department of Interior*, No. 11-1745, 665 F.3d 986 (8th Cir. 2012). State brought action challenging Secretary of Interior’s decision to accept transfer of land into trust for benefit of Indian tribe. The district court, 775 F. Supp. 2d 1129, granted summary judgment in favor of the Secretary, and State appealed. The appellate court held that: (1) State had Article III standing, but (2) State lacked standing to bring a constitutional due process claim. Appeal dismissed.

8. *Chalepah v. Salazar*, No. CIV–11–99, 2012 WL 728280 (W.D. Okla. 2012). This matter is an action pursuant to the Administrative Procedures Act (APA), 5 U.S.C. § 706, seeking judicial review of a final determination of the United States Department of Interior (DOI) recognizing certain tribal officials after a tribal leadership election. The Apache Tribe of Oklahoma (Tribe) is governed by a Tribal Council that consists of all tribal members who are 18 years of age or older. The power to transact business and speak for the Tribe is delegated to an elected business committee, commonly known as the Apache Business Committee (ABC). On June 19, 2010, during the Tribe’s Annual Tribal Council meeting, the Tribe voted to endorse its March 20, 2010 election. On June 25, 2010, an Interlocutory Order was issued by the Assistant Secretary instructing the Regional Director to determine the validity of the Tribal Council meeting. The Assistant Secretary’s Interlocutory Order also

delegated to the Regional Director the authority to declare recognition of the winners of the March 20, 2010 election as the new Tribal Council and declare the Election Board's appeal moot. On June 29, 2010, the Superintendent submitted proposed Findings of Facts with exhibits to the Regional Director recommending recognition of the Tribal Council meeting and its vote to recognize the March 20, 2010 election results. On July 1, 2010 the Acting Regional Director found valid both the Tribal Council meeting and the 87 to 5 vote by the Council to certify those persons elected during the March 20, 2010 election. The Acting Regional Director also rendered the Election Board's appeal moot. Plaintiffs now seek review of the Department of the Interior's decision certifying the March 20, 2010 election. The court affirmed the Department's decision and denied Plaintiffs' Motion for Summary Judgment.

9. ***California Valley Miwok Tribe v. Salazar***, No. 11–160, 2012 WL 987994 281 F.R.D. 43 (2012). (From the Opinion) “This matter is a dispute over the U.S. Department of the Interior's determination of the legitimate government and membership of the California Valley Miwok Tribe (Tribe), a federally recognized Indian tribe. Defendants are Secretary of the Interior Ken Salazar, Assistant Secretary for Indian Affairs Larry Echo Hawk, and Director of the Bureau of Indian Affairs Michael Black. Plaintiffs bring suit individually and on behalf of the Tribe and its Tribal Council, arguing that the defendants' decision to recognize a General Council led by Sylvia Burley as the legitimate government of the Tribe, and to discontinue efforts to adjudicate the status of other putative tribal members, constituted arbitrary and capricious agency action, in violation of the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A), and also violated due process and the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1301, *et seq.* Another group representing the Tribe, as organized in the form of the General Council, moves to intervene as a defendant in this action for the limited purpose of filing a motion to dismiss, arguing that intervention is necessary to protect its fundamental interests in defending its sovereignty and defining its citizenship. Because the proposed intervenor satisfies the requirements for intervention as of right under Federal Rule of Civil Procedure 24(a)(2), the motion to intervene will be granted.”

10. ***Fletcher v. United States***, No. 02–CV–427, 2012 WL 1109090 (N.D. Okla. 2012). This matter was before the court on the Motion to Dismiss plaintiffs' Third Amended Complaint, filed by defendants the United States of America, the Department of the Interior, Kenneth Salazar in his official capacity as Secretary of the Interior, the Bureau of

Indian Affairs, and Larry EchoHawk in his official capacity as Assistant Secretary of the Interior– Indian Affairs (Federal Defendants). The complaint asserted four causes of action: (1) a claim that the Federal Defendants violated their right to political association and participation in the Osage government; (2) a claim that the Federal Defendants breached their trust responsibilities by (a) eliminating the plaintiffs’ right to participate or vote in Osage tribal elections, and (b) allowing mineral royalties to be alienated to persons and entities not of Osage blood; (3) a Fifth Amendment takings claim; and (4) a claim that the federal regulations regarding the Osage Tribe violated their right to participate in their government and the defendants’ trust responsibilities. The court granted Defendants’ Motion to Dismiss.

11. *County of Charles Mix v. United States Department of the Interior*, No. 11-2217, 2012 WL 1138269, 647 F. 3d 898 (8th Cir. 2012). County filed suit, under Administrative Procedure Act (APA), against Department of the Interior (DOI) to obtain declaratory and injunctive relief from decision of Bureau of Indian Affairs (BIA), affirmed by Interior Board of Indian Appeals, to grant Indian tribe’s request to acquire 39 acres of on-reservation land in trust for tribe, pursuant to Indian Reorganization Act. The district court, 799 F. Supp. 2d 1027, granted DOI summary judgment. County appealed. The appellate court held that: (1) DOI’s acquisition of land in trust did not violate Republican Guarantee Clause; (2) county’s challenge to DOI’s jurisdiction to consider tribe’s request was not reviewable; and (3) DOI’s acquisition of land in trust was supported by rational basis. Affirmed.

12. *Cloverdale Rancheria of Pomo Indians of California v. Salazar*, No. 5:10–1605, 2012 WL 1669018 (N.D. Cal. 2012). This action arises out of an internal political dispute within the Cloverdale Rancheria of Pomo Indians of California (“the Cloverdale Rancheria” or “the Tribe”). Plaintiffs claim that they are members of the Tribe’s rightful governing body, that Defendants improperly have refused to deal with them, and that instead Defendants have dealt with a competing governing body that lacks authority to act on behalf of the Tribe. Plaintiffs allege claims under the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.*, and the Indian Self–Determination and Education Assistance Act (ISDA), 25 U.S.C. § 450 *et seq.* Defendants move to dismiss the operative Second Amended Complaint (SAC) for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P 12(b)(1) and for lack of standing pursuant to Fed. R. Civ. P 12(b)(6). In a separate motion, the “Cloverdale Rancheria of Pomo Indians of California” (“Proposed Intervenor”), as represented by

the governing body that has been recognized by Defendants, seeks leave to intervene in the action. The motion to intervene was terminated as moot, and the action was dismissed with prejudice.

13. *Allen v. United States*, No. C 11–05069, 2012 WL 1710869, 871 F.Supp.2d 982 (2012). This action was filed challenging the BIA’s failure to call a Secretarial election for the Ukiah Valley Pomo Indian Tribe under the Indian Reorganization Act (IRA). The complaint alleges that defendants violated the Fifth Amendment, the IRA and the Administrative Procedure Act, and sought declaratory and injunctive relief. The complaint claimed defendants violated the Fifth Amendment and the APA by unreasonably delaying the calling and conducting of an election under the provisions of the IRA. Plaintiffs also claimed that defendants acted in direct violation of the IRA by requiring petitioners to be a federally recognized tribe in order to be eligible for an election under the IRA, and by denying services and benefits to petitioners by preventing them from organizing a tribal government. Plaintiffs sought a declaration that the IRA does not require that Indian tribes be federally recognized in order for tribes to be eligible for an IRA election, as well as a declaration that the Ukiah Valley Pomo Indian Tribe is in fact a “tribe” under the definition set forth in the IRA. Plaintiffs’ asserted the following bases for jurisdiction: (i) 28 U.S.C. 1331; (ii) 28 U.S.C. 1361; (iii) 28 U.S.C. 1337; (iv) Article VI, cl. 2 of the Constitution; and (v) the Fifth Amendment. A preliminary question was whether the government has waived its sovereign immunity. Plaintiffs asserted that the government has waived sovereign immunity pursuant to the APA. The government argued that there has been no final agency action, and that without such final action, its sovereign immunity remains intact. After the administrative record was lodged, the government filed a motion to dismiss for lack of subject-matter jurisdiction and for failure to state a claim for relief. Plaintiffs filed a motion for summary judgment. This action presents a complex problem involving the intersection of judicial authority over the right to tribal organization under the IRA and administrative authority granted to the Department of the Interior’s Bureau of Indian Affairs to determine whether a given group is entitled to organize under the IRA. Under the facts of this dispute, plaintiffs cannot satisfy the IRA’s definition of “tribe” and cannot therefore invoke its provisions as the basis for waiving the government’s sovereign immunity. Plaintiffs also have failed to exhaust administrative remedies because they have not appealed the BIA’s decision to the Interior Board of Indian Appeals (IBIA), nor have they followed the BIA’s regulations to appeal agency inaction. Absent such exhaustion, the Court is without jurisdiction to hear their

claims. The government's motion to dismiss was granted and plaintiffs' motion for summary judgment was denied as moot.

14. **Alto v. Salazar**, No. 11-2276, 2012 WL 215054 (S.D. Cal. 2012). Plaintiffs, collectively known as the "Marcus Alto Sr. Descendants," sought declaratory and injunctive relief from a January 28, 2011 order issued by Defendant Assistant Secretary Echo Hawk finding that the Marcus Alto Sr. Descendants should be excluded from the San Pasqual Band of Mission Indians (Tribe) membership roll. Before the Court was the Tribe's motion to dismiss under Fed. R. Civ. P 12(b)(7) for failure to join the Tribe as a required and indispensable party within the meaning of Fed. R. Civ. P 19 or alternatively to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P 12(b)(1). Plaintiff's original complaint alleged four causes of action: (1) declaratory relief based on the doctrine of *res judicata*; (2) declaratory relief on the basis that Defendant Echo Hawk violated the enrolled Plaintiffs' right to procedural due process; (3) declaratory relief and reversal of the agency's January 28, 2011 order based upon arbitrary and capricious action; and (4) injunctive relief based on the agency's alleged failure to act. While the Motion for Preliminary Injunction was pending, the Tribe filed a request with the Court to appear specially and an accompanying motion to dismiss the action under Federal Rule of Civil Procedure 19. The Court denied the Tribe's request to appear specially, but allowed the Tribe's motion to be docketed as an amicus curiae brief. The Court declined to dismiss the action under Fed. R. Civ. P 19, finding that complete relief could be accorded in the Tribe's absence, that the Tribe's interest may be adequately represented by the federal government, and that the federal government is unlikely to suffer inconsistent obligations in the Tribe's absence. The Court granted Plaintiffs' Motion for Preliminary Injunction, and enjoined the Defendants from removing Plaintiffs from the Tribe's membership roll or taking any further action to implement the Assistant Secretary's January 28, 2011 order. On January 12, 2012, Assistant Secretary Echo Hawk issued a memorandum order to the BIA Regional Director and BIA Superintendent. The Assistant Secretary directed that because the Alto descendants are deemed to be members of the Band, they remain entitled to all rights and benefits enjoyed by such members, including participation on tribal elections, provision of health care services, and per capita distribution of income under the Band's Revenue Allocation Plan. The Court granted Plaintiffs leave to file a First Amended Complaint (FAC). The FAC added a Fifth Cause of Action for declaratory and injunctive relief, seeking pay-out of Indian Gaming Regulatory Act and

Revenue Allocation Plan funds withheld between January 29, 2011 and January 12, 2012. The Tribe thereafter filed a Motion to Intervene pursuant to Fed. R. Civ. P 24(a). Because of the Court's preliminary injunction order, the Assistant Secretary's January 23, 2012 Memorandum Order, and Plaintiff's newly added Fifth Cause of Action raised additional issues regarding the scope of the Court's jurisdiction to adjudicate the issues in the case, the Court granted the Tribe leave to intervene for purposes of filing the current motions. For the reasons set forth herein, the Court denied in part and deferred ruling in part on the Tribe's motion to dismiss. The Court denied the Tribe's motion to dissolve the preliminary injunction.

15. *Jech v. Department Of Interior*, No. 11–5064, 2012 WL 2308715, 483 Fed.Appx. 555 (10th Cir. 2012). Not selected for publication in the Federal Reporter. Plaintiffs appealed the district court's order dismissing their complaint for failure to exhaust administrative remedies. They sued the United States of America, the Department of the Interior (DOI) and its Secretary, and the Bureau of Indian Affairs (BIA) and its Secretary. They sought injunctive and declaratory relief that would require the DOI to conduct the elections for Principal Chief, Assistant Principal Chief, and Tribal Council of the Mineral Estate (collectively, Mineral Estate Officials) of the Osage Tribe of Indians (Osage Tribe). Plaintiffs are owners of interests in the Osage Mineral Estate. These interests, called "headrights," entitle the owner to receive mineral revenue distributions from production of the Mineral Estate. The Osage Allotment Act of 1906, as amended ("1906 Act"), created the Mineral Estate, identified the original shareholders, and provided that headrights would pass to their heirs, devisees, and assigns. See Act of June 28, 1906, Pub. L. No. 59–820, 34 Stat. 539 (1906). The 1906 Act also prescribed the form of the Osage Tribal government, including the election of Chiefs and a Tribal Council. Under the 1906 Act, only shareholders were allowed to vote and the tribal officials also had to be shareholders. In 2004, Congress enacted the Reaffirmation of Certain Rights of the Osage Tribe, Pub. L. No. 108–431, 118 Stat. 2609 (2004) ("Reaffirmation Act"). Congress recognized that many people were considered Osage, but under the 1906 Act only shareholders were "members" of the Osage Tribe. The Reaffirmation Act clarified that "legal membership" in the Osage Tribe meant headright owners, *id.* § 1(a)(2) & (3), and reaffirmed "the inherent sovereign right of the Osage Tribe to determine its own form of government," *id.* § 1(b)(2). Following enactment of the Reaffirmation Act, the Osage Tribe adopted a new Constitution of the Osage Nation.

The new Constitution changed the election rules to allow all adult members of the Osage Tribe to vote in tribal elections, even if they were not headright owners. Concerned that their headrights would be governed by Mineral Estate Officials who were neither shareholders nor elected solely by shareholders, various shareholders wrote to the BIA and demanded that it conduct the 2006 election for the governing body of the Mineral Estate pursuant to the 1906 Act, i.e., allow only shareholders to vote. See 25 C.F.R. Part 90 (governing DOI's conduct of Osage elections). The BIA responded by issuing several letters, all refusing the demands by plaintiff Tillman and others to conduct the election, stating that the new Osage Constitution was consistent with the Reaffirmation Act. Plaintiffs did not appeal the BIA's decision to the Interior Board of Indian Appeals (IBIA), but instead filed the underlying lawsuit. A magistrate judge recommended granting defendants' motion to dismiss due to plaintiffs' failure to exhaust administrative remedies. The magistrate judge reasoned that plaintiffs were required to file an appeal with the IBIA and that because they failed to do so, "the BIA's decision [was] not eligible for judicial review."

The district court conducted a de novo review and adopted the magistrate judge's recommendation to grant defendants' motion to dismiss. The appellate court affirmed the judgment of the district court.

B. Child Welfare Law and ICWA

16. *In re M.H.*, Nos. 1-11-0196, 1-11-0259, 1-11-0375, 2011 WL 3587348, 353 Ill.Dec. 648 (2011). State sought permanent termination of mother and father's parental rights to Indian child and appointment of a guardian with the right to consent to child's adoption. Tribe petitioned to transfer the proceedings to the tribal court. The Circuit Court denied tribe's petition to transfer, terminated mother and father's parental rights on findings of unfitness, and determined that it was in child's best interest to be adopted by her foster mother. Mother, father, and tribe all appealed. The appellate court held that: (1) transferring proceeding for termination of parental rights to tribal court constituted an undue hardship and, thus, good cause not to transfer; (2) proceeding for termination of parental rights was at an advanced stage when tribe petitioned to transfer proceeding to tribal court, and thus good cause existed to not transfer case; (3) child's foster home placement was in compliance with the Indian Child Welfare Act of 1978; (4) State met its burden of establishing by a preponderance of the evidence active efforts to provide remedial services and rehabilitative programs; and (5) trial court did not err in considering

the risk of emotional or physical harm reunification would present to child and basing its decision to terminate parental rights in part on that factor. Affirmed.

17. ***Yancey v. Thomas***, No. 10–6239, 441 Fed. Appx. 552 (10th Cir. 2011). Biological father filed action against adoptive parents of father's Indian child, challenging validity of Oklahoma court's order terminating his parental rights under Indian Child Welfare Act (ICWA). The district court granted parents' motion to dismiss, and father appealed. The appellate court held that: (1) *Younger* abstention doctrine did not apply to biological father's challenge to final order of Oklahoma court terminating his parental rights, and (2) doctrine of res judicata barred federal district court's consideration of biological father's challenge to order terminating his parental rights under ICWA. Affirmed.

18. ***Welfare of R.S.***, No. A10-1390, 2011 WL 5061532, 805 N.W.2d 44 (2011). After parental rights to an Indian child living in Fillmore County were involuntarily terminated, the White Earth Band of Ojibwe (Band) petitioned for transfer of the ensuing pre-adoptive placement proceedings to its tribal court. The district court granted the Band's motion and the court of appeals affirmed. Because it concludes that transfer of pre-adoptive proceedings to tribal court is not authorized by federal or state law, the Supreme Court reversed.

19. ***In re J.W.C.***, No. DA 11 0227, 2011 WL 6176075, 363 Mont. 8, 265 P.3d 1265 (2011). Mother appealed from order of the District Court terminating her parental rights to children, who were members of Indian tribe. The Supreme Court held that district court should have transferred jurisdiction over case to the Tribal Court, or determined after a hearing that there was good cause not to do so. Reversed and remanded.

20. ***Merrill v. Altman***, No. 25950, 2011 WL 6849067, 807 N.W.2d 821 (2011). Maternal grandparents of Indian child, who had been awarded permanent guardianship of child by Tribal Court, filed motion seeking to have their guardianship recognized in Circuit Court, which had previously issued child custody order for child. The Circuit Court denied motion. Grandparents appealed. The Supreme Court held that Tribal Court lacked exclusive jurisdiction over guardianship petition of child's maternal grandparents under exclusive jurisdiction provision of the Indian Child Welfare Act. Affirmed.

21. *In re T.S.W.*, No. 104,424, 2012 WL 1563903, 294 Kan. 423, 276 P.3d 133 (2012). State adoption agency filed petition to terminate Native American father's parental rights to child born to non-Native American mother. Tribe petitioned to intervene and filed answer and counterclaim. Agency filed petition to deviate from Indian Child Welfare Act's (ICWA) placement preference. The District Court terminated father's parental rights, and then, in subsequent order, granted agency's petition to deviate from ICWA's placement preference requirements. Tribe appealed from order granting deviation. The Supreme Court held that: (1) tribe's petition for placement preference under ICWA was not de facto adoption proceeding, for purposes of tribe's right to appeal from order granting deviation from preference; (2) The Supreme Court lacked statutory authority over appeal from non-final order granting agency's petition for deviation of placement preference under ICWA; (3) order was collaterally appealable; (4) ICWA's parental placement preference for child applied to adoption of child born to non-Indian mother who stated preference for child's placement with non-Native American family; (5) agency was prohibited from grafting requirement onto ICWA's parental placement preference tribe members interested in adoption to show proof of ability to pay agency's \$27,500 fee and mother's preference for placement of child; and (6) mother's wish that child not be placed with any member of father's family, together with her wish that child be placed with non-Native American family, by itself, was not good cause to deviate from ICWA's placement preference statute. Reversed.

C. Contracting

22. *Southern Ute Indian Tribe v. Sebelius*, Nos. 09–2281, 09–2291, 657 F.3d 1071 (10th Cir. 2011). Indian tribe brought suit, under Indian Self-Determination and Education Assistance Act (ISDA), challenging declination of Department of Health and Human Services (HHS) to enter into self-determination contract with tribe for reservation health services, asserting claim under Administrative Procedure Act (APA), and seeking damages and injunctive relief. The district court, 497 F. Supp. 2d 1245, granted tribe partial summary judgment as to self-determination contract and directed parties to draft form of injunctive relief, and subsequently issued second order in favor of HHS's approach as to contract start date and as to payment of contract support costs. Tribe appealed second order. The appellate court, 564 F.3d 1198, dismissed for lack of jurisdiction. On remand, the district court issued a final order, directing the parties to enter a self-determination contract including HHS's proposed language regarding the contract start date and contract support

costs, and denying Tribe's request for damages. Cross-appeals were taken. The appellate court held that: (1) HHS was not permitted to decline self-determination contract with tribe on basis that available appropriations were insufficient; and (2) start date for self-determination contract was date that tribe assumed operation of clinic. Affirmed in part and reversed in part.

23. *Engage Learning, Inc. v. Salazar*, No. 2011-1007, 660 F.3d 1346 (2011). Service provider submitted claim under Contract Disputes Act (CDA) for unpaid educational training and support services provided to schools run by Bureau of Indian Affairs. Bureau denied claim. Provider appealed to the Civilian Board of Contract Appeals, 2010 WL 2484235, which granted government's motion to dismiss for lack of subject matter jurisdiction. Provider appealed. The appellate court held that: (1) in a matter of first impression, service provider's allegations were sufficient to establish that denial of claim was "relative to" express contract with an executive agency, and thus Civilian Board of Contract Appeals had subject matter jurisdiction over provider's appeal of denial of claim; (2) Civilian Board of Contract Appeals was not permitted to resolve genuine issues of fact as to whether service provider had contract with Bureau on motion to dismiss for lack of subject matter jurisdiction; but (3) service provider failed to state claim for unpaid services on ground that services were rendered pursuant to contract authorized under No Child Left Behind Act. Affirmed in part, vacated in part, and remanded.

24. *Western Sky Financial L.L.C. v. Maryland Commissioner of Regulation*, No. 11-1256, 2011 WL 4929485 (D. Md. 2011). (From the Opinion) "Western Sky Financial, LLC, Great Sky Finance, LLC, PayDay Financial, LLC, and Martin A. Webb (plaintiffs), sued the Maryland Commissioner of Financial Regulation (CFR), for declaratory relief. Martin Webb, a member of the Cheyenne River Sioux Tribe who resides on the Cheyenne River Reservation, owns Western Sky Financial, LLC, Great Sky Finance, LLC, and PayDay Financial, LLC, internet-based loan companies. All the plaintiffs reside on the Reservation. The three companies state in their loan agreements that: (1) the agreement is subject to the exclusive laws of the Cheyenne River Sioux Tribe, (2) the debtor consents to the exclusive jurisdiction of the Cheyenne River Sioux Tribal Court, (3) the agreement is governed by the Indian Commerce Clause of the U.S. Constitution and Cheyenne River Sioux Tribe laws, and (4) the company is subject to the laws of no state." The court granted the CFR's motion to dismiss.

25. *Los Coyotes Band of Cahuilla & Cupeno Indians v. Salazar*, No. 10cv1448, 2011 WL 5118733 (S.D. Cal. 2011). This case arose from the Defendant Bureau of Indian Affairs (BIA), Office of Justice Services' (OJS) denial of Plaintiff's request for a law enforcement funding contract under the Indian Self-Determination and Educational Assistance Act ("ISDEAA"), 25 U.S.C. § 450 *et seq.*, commonly known as "638 contracts." Before the court was Plaintiff's Motion for Summary Judgment and Defendants' Cross Motion for Summary Judgment. The court granted Plaintiff's Motion for Summary Judgment in part and denied in part, and granted Defendants' Cross Motion for Summary Judgment in part and denied in part.

26. *Jefferson State Bank v. White Mountain Apache Tribe*, No. CV 11–8100, 2011 WL 5833831 (D. Ariz. 2011). Before the Court was Defendant White Mountain Apache Tribe's motion to dismiss the complaint for lack of subject matter jurisdiction. From 2005 to 2007, Defendant entered into a series of municipal finance lease agreements with Lehigh Capital Access for the acquisition of vehicles and equipment. Lehigh then assigned a number of the lease agreements to Jefferson. Each lease agreement included an addendum containing identical terms governing dispute resolution whereby either party would submit a claim against the other "for binding arbitration to a court of competent jurisdiction." The arbitration procedures in the addendum outlined a process for convening an arbitration hearing and issuing an award. There were no terms in the addendum, or in the lease agreement or other documents governing the transaction, by which the parties agreed to an outside arbitration service or to be bound by any designated arbitration rules. Similarly, there were no terms by which the parties agreed to the jurisdiction of a designated court or agreed to any specific court enforcement powers. On December 31, 2010, prior to filing its Complaint, Jefferson sent a Notice of Acceleration to Defendant claiming default under the Contract Documents. Although the parties began discussions to address the alleged default, on February 9, 2011, Jefferson submitted a demand that the dispute be submitted for arbitration. On May 4, 2011, Jefferson filed a petition for arbitration with the American Arbitration Association ("AAA"). Because the parties had not agreed to use its services, AAA asked Defendant to consent to a proceeding. On June 14, 2011, AAA gave notice to the parties that it closed the arbitration file because Defendant had not given its consent. Jefferson filed a complaint on June 28, 2011, and an amended complaint on July 8, 2011, seeking injunctive relief and declaratory judgment. Specifically, Jefferson seeks an

order compelling the Defendant to “comply with its contractual duties and obligations under the terms of the Municipal Leases . . . to arbitrate the issues between the parties before a three member arbitration panel, which arbitrators have been selected in accordance with the express written terms of the Municipal Leases.” The court found that Jefferson had not shown that its claims against Defendant are subject to federal question or diversity jurisdiction and that the case must be dismissed for lack of subject matter jurisdiction. The court dismissed Jefferson’s complaint with prejudice.

27. *Yakama Nation Housing Authority v. United States*, No. 08–839C, 102 Fed. Cl. 478 (2011). Indian nation’s housing authority brought action against United States, alleging that Department of Housing and Urban Development (HUD) improperly reduced Indian Housing Block Grants that authority received under Native American Housing and Self–Determination Act (NAHASDA) over course of several years and seeking to account for and recover purportedly withheld grant funds. Government moved to dismiss for lack of subject matter jurisdiction and for failure to state claim. The court held that: (1) authority’s other district court filings did not divest court of jurisdiction; (2) some of authority’s claims were time–barred; (3) NAHASDA was money–mandating statute for purposes of court’s jurisdiction; (4) Anti-Deficiency Act did not bar relief on authority’s claims; (5) Congress did not bar court’s jurisdiction under NAHASDA; and (6) enforceable trust relationship existed between authority and HUD. Motion granted in part and denied in part.

28. *United States v. Pecore*, Nos. 10 2676, 10 3599, 2011 WL 6880632, 664 F.3d 1125 (7th Cir. 2011). United States filed civil action against tribal forest manager and fire management officer alleging violation of False Claims Act (FCA). Defendants prevailed after jury trial. Defendants moved for award of attorney’s fees under Equal Access to Justice Act (EAJA), or alternatively, sanctions. The district court, 2010 WL 2465505, denied motion. Defendants appealed. The appellate court held that: (1) alleged violation of internal agency policy guidelines served only as probative evidence that government did not file suit in good faith; (2) case involving contract performance does not necessarily foreclose FCA liability; (3) district court did not abuse its discretion in finding that government’s motive theory was substantially justified; (4) district court did not abuse its discretion in finding that government had reasonable grounds for believing that defendants had knowingly submitted false invoices; (5) government did not abdicate its duty to diligently investigate FCA claims by giving greater deference to its own expert; and (6) district

court did not abuse its discretion in rejecting request for sanctions for government's refusal to admit genuineness of tribal invoices, completion maps, and accomplishment memoranda. Affirmed.

29. *State of Colorado v. Western Sky Financial, L.L.C.*, No. 11-00887, 2011 WL 6778797, 845 F.Supp.2d 1178 (2011). Plaintiff moved to remand this case to state court for lack of federal question jurisdiction. Plaintiffs filed the case in the Denver District Court, alleging that Western Sky Financial, LLC, a South Dakota limited liability company, had offered, through the Internet, to make loans to Colorado consumers in amounts ranging from \$400 to \$2,600 with annual percentage interest rates of approximately 140 to 300%. Martin A. Webb is alleged to be Western Sky's sole manager. When individuals apply for loans with Western Sky, they sign a document called "Western Sky Consumer Loan Agreement." This agreement states that it is "governed by the Indian Commerce Clause of the Constitution of the United States of America and the laws of the Cheyenne River Sioux Tribe." Western Sky's website states that all loans "will be subject solely to the exclusive laws and jurisdiction of the Cheyenne River Sioux Tribe, Cheyenne River Indian Reservation," and that borrowers "must consent to be bound to the jurisdiction of the Cheyenne River Sioux Tribal Court, and further agree that no other state or federal law or regulation shall apply to this Loan Agreement, its enforcement or interpretation." They add that Mr. Webb is an enrolled member of the Cheyenne River Sioux Tribe (although his company is neither owned nor operated by the Tribe). They argue from those facts that "Colorado's purported state-law claims in this case are completely preempted by federal law." In support of that position they cite a number of cases for the proposition that "Colorado may not regulate commercial activity on Indian lands in South Dakota" and other cases for the proposition that the complaint "necessarily raises a dispositive, substantial, and disputed question of federal law." The court granted Plaintiff's motion to remand. The case was remanded to the District Court for the City and County of Denver. Plaintiffs were awarded costs including attorney's fees.

30. *Quantum Entertainment, LTD. v. United States Department Of Interior, Bureau of Indian Affairs*, No. 11-47, 2012 WL 989594, 848 F.Supp.2d 30 (2012). This case was before the court on the parties' cross-motions for summary judgment. Santo Domingo Pueblo (Pueblo) is a Native American pueblo, or tribal community, located in New Mexico. Kewa Gas Limited (Kewa) is a Registered Indian Tribal Distributor (RITD) that operates the Pueblo's retail gas station, its gas

distribution business and related businesses. In August 1996, the plaintiff, QEL, entered into a management agreement (“Agreement”) with the Pueblo and Kewa. The agreement authorized the plaintiff to manage Kewa’s gas distribution business and to be compensated at a rate of 49% of income, plus bonuses. The agreement was to last for ten years, but the plaintiff had the option at the end of the first decade to renew it. In March 2003, however, the Governor of the Pueblo requested that the BIA review the agreement, believing that it was “far too lucrative for” QEL, and adversely “impacted the tribe . . . financially.” In October 2003, the BIA determined that the agreement was subject to review under Old Section 81 because the parties entered into the agreement before New Section 81 was enacted. The BIA further reasoned that because the agreement had never been approved by the Secretary of the DOI, Old Section 81 dictated that the agreement had “never been legally valid and any monies received by [the plaintiff] pursuant to [the agreement] were [therefore] unauthorized.” The plaintiff appealed the BIA’s decision to the Board, which upheld the BIA’s findings in March 2007. In December 2010, the Board issued a more developed opinion that reaffirmed its previous decision. In its 2010 opinion, the Board determined that Old Section 81 should apply to the agreement because applying New Section 81 would have an impermissible retroactive effect. Specifically, the Board concluded, applying New Section 81 would create contractual rights and duties for the parties that had not existed before. The Board also held that under Old Section 81, the agreement required DOI approval because it was related to Native American lands. The defendant filed a motion for summary judgment, arguing that the Board’s revised opinion satisfied the APA. In response, the plaintiff filed a cross-motion for summary judgment, contending that the Board erred in making its determinations. The court granted the defendant’s motion for summary judgment and denied the plaintiff’s cross-motion for summary judgment.

31. *Absentee Shawnee Housing v. United States Department of Housing and Urban Development*, No. 08–1298, 2012 WL 3245953 (W.D. Okla. 2012). Plaintiffs, The Absentee Shawnee Housing Authority (ASHA) and the Housing Authority of the Seminole Nation of Oklahoma (HASNOK), filed this action under the Administrative Procedure Act, 5 U.S.C. §§ 701–706 (APA), against the United States Department of Housing and Urban Development (HUD), claiming the agency wrongfully withheld and recaptured grant funds paid to plaintiffs pursuant to the Native American Housing and Self–Determination Act of 1996, 25 U.S.C. §§ 4101–4243 (NAHASDA or Act). Plaintiffs challenge a

regulation HUD promulgated in 1998 as part of the funding allocation formula the agency used to distribute housing funds from 1998 through 2008. As the result of a nation-wide audit conducted by HUD's Office of Inspector General in 2002, HUD discovered that numerous housing entities, including plaintiffs, had owned or operated fewer dwelling units than they had reported on their Formula Response Forms and were receiving or had received funds for dwelling units they no longer owned or operated. HUD demanded a refund of the overpayments and proposed a means of repayment. The ASHA partially repaid HUD and then filed this lawsuit with HASNOK. Plaintiffs claim that HUD, by relying on 24 C.F.R. § 1000.318(a), breached its trust responsibility to plaintiffs and improperly eliminated certain housing units from the calculation of their current units through the end of fiscal year 2008. Even if the regulation was valid, plaintiffs assert that HUD erred in its enforcement in certain instances by depriving them of funding for units that they continued to own or operate, having delayed or forgone conveyance "legitimately and in the exercise of its self-determination." Plaintiffs also contend they were not afforded due process prior to the reductions and recapture. Finally, plaintiffs assert that, even if they were overfunded by HUD for any of the fiscal years in question, HUD lacks the authority to set-off future IHBG in the amount of the overfunding, the statute then in effect prohibited the recapture of IHBG funds once they were expended on low-income housing activities and any remedial actions by HUD were subject to a three year limitations period. Having rejected plaintiffs' argument that HUD acted arbitrarily and capriciously in promulgating and implementing 24 C.F.R. § 1000.318(a), and their other claims, plaintiffs request for relief is denied.

D. Employment

32. *Larimer v. Konocti Vista Casino Resort, Marina & RV Park*, No. C 11-01061, 2011 WL 4526023, 814 F.Supp.2d 952 (2011). Discharged casino employee brought action against employer, a federally-recognized Indian tribe, and employer's chief executive officer (CEO), alleging defendants failed to pay overtime wages in violation of the Fair Labor Standards Act (FLSA) and breached parties' employment contract. Defendants moved to dismiss. The court held that: (1) employer was entitled to tribal sovereign immunity; (2) as a matter of first impression, FLSA did not abrogate tribal sovereign immunity; and (3) CEO was entitled to tribal sovereign immunity. Motion granted.

33. *DolgenCorp Inc. v. Mississippi Band of Choctaw Indians*, No. 4:08CV22, 2011 WL 7110624, 814 F.Supp.2d 952 (2011), *remanded* to 12-60183 (5th Cir. 2011). Plaintiff Dolgen operates a Dollar General store on trust land on the Choctaw Indian Reservation in Choctaw, Mississippi. Dolgen occupies the premises pursuant to a lease agreement with the Mississippi Band of Choctaw Indians (the Tribe) and a business license issued by the Tribe. At all relevant times, Dale Townsend was employed as a store manager. According to defendants, in 2003, defendant John Doe, a minor tribe member, was molested by Townsend during a time when Doe was assigned to work at the Dollar General store as part of the Tribe's Youth Opportunity Program (TYOP), a work experience program run by the Tribe pursuant to which tribal youth were placed with local businesses to gain work experience. Doe and his parents filed suit in Choctaw Tribal court against Townsend, and against Dolgen, seeking actual and punitive damages. In that action, they sought to hold Dolgen vicariously liable for Townsend's actions and directly liable for its own alleged negligence in the hiring, training and supervision of Townsend. The court concluded that Dollar General's motion should be denied and the cross-motions of defendants granted.

34. *Salt River Project Agr. Imp. and Power Dist. v. Lee*, No. 10-17895, 2012 WL 858877, 672 F.3d 1176 (9th Cir. 2012). Non-Indian employers brought action seeking declaratory judgment that tribal officials lacked authority to regulate employment relations at their plant and injunction staying former employees' claims under tribal law. The district court, 2009 WL 89570, dismissed complaint, and employers appealed. The appellate court, 371 Fed. Appx. 779, reversed and remanded. On remand, the district court, 2010 WL 4977621, dismissed complaint, and employers appealed. The appellate court held that tribe was not necessary party. Reversed and remanded.

E. Environmental Regulations

35. *Madera Oversight Coalition, Inc. v. County Of Madera*, No. F059153, 199 Cal. App. 4th 48, 131 Cal. Rptr. 3d 626 (2011). Objectors petitioned for writ of mandamus challenging county's approval of mixed-use development project under California Environmental Quality Act (CEQA), the Planning and Zoning Law, and the California Water Code. The superior court granted petition in part and denied it in part. Objectors, county, and developers appealed. The appellate court held that: (1) EIR's proposed mitigation measure of "verification" that four prehistoric sites were historical resources improperly contradicted EIR's

conclusion that the sites were historical resources; (2) on issue of first impression, preservation of archaeological historical resources in place is not always mandatory when feasible; (3) a lead agency may not adopt projected future events as the baseline for EIR analysis; and (4) EIR unreasonably omitted circumstances affecting likelihood of availability of water. Affirmed in part and reversed in part.

36. *Pakootas v. State of Washington*, No. CV–04–256, 2011 WL 5975266, 832 F.Supp.2d 1268 (2011). Operator of smelting plant sought contribution for response costs under Comprehensive Environmental Response Compensation and Liability Act (CERCLA) from State of Washington for costs associated with clean up of slag which had contaminated river. Operator moved for summary judgment. The district court held that State was not an “arranger” for disposal or treatment of hazardous substance. Motion denied and judgment entered for State of Washington. Clarified on Denial of Reconsideration by *Pakootas v. Teck Cominco Metals, Ltd.* E.D. Wash., February 3, 2012.

37. *State of Alaska, Department of Natural Resources v. Nondalton Tribal Council*, No. S–13681, 268 P.3d 293 (2012). Indian tribes brought action against Department of Natural Resources (DNR) seeking declaratory judgment that the Bristol Bay Area land use plan was unlawful. The superior court denied DNR’s motion to dismiss. DNR petitioned for interlocutory review. Upon grant of review, the Supreme Court held that: (1) 30-day period for appeals from final agency actions did not apply to Indian tribes’ action, and (2) plan was not a “regulation” pursuant to the Administrative Procedure Act (APA). Reversed and remanded.

38. *Save the Peaks Coalition v. U.S. Forest Service*, No. 10–17896, 669 F.3d 1025 (9th Cir. 2012). Environmental group and individuals brought action under National Environmental Policy Act (NEPA) and Administrative Procedure Act (APA) challenging United States Forest Service’s (USFS) decision to approve snowmaking project at existing ski area in national forest. Ski resort operator intervened. The district court, 2010 WL 4961417, entered summary judgment in favor of USFS and intervenor, and plaintiffs appealed. The appellate court held that: (1) action was not barred by laches; (2) final environmental impact statement (FEIS) adequately considered risks posed by human ingestion of snow made from reclaimed water; and (3) USFS did not violate its duty to ensure scientific integrity of discussion and analysis in FEIS.

39. *Karuk Tribe of California v. United States Forest Service*, No. 05–16801, 681 F.3d 1006 (9th Cir. 2012). The Karuk Tribe sued the United States Forest Service, seeking declaratory and injunctive relief from alleged violation of Endangered Species Act (ESA) by approval of four notices of intent (NOIs) to conduct mining activities in threatened Coho salmon critical habitat within national forest without consultation. The district court, 379 F. Supp. 2d 1071, entered judgment for the government. The Tribe appealed. The appellate court, 640 F.3d 979, affirmed. Subsequently, en banc rehearing was granted. The appellate court held that Forest Service’s approval of NOIs required prior consultation with federal wildlife agencies. Reversed and remanded.

40. *Native Village Of Kivalina IRA Council v. U.S. Protection Agency*, No. 11-70776, 2012 WL 3217444, 687 F.3d 1216 (9th Cir. 2012). Alaska Native villages petitioned for review of an order of the United States Environmental Protection Agency Environmental Appeals Board, which denied their challenges to the re-issuance of a permit authorizing a mine operator to discharge wastewater caused by mine operation. The appellate court held that villages were not entitled to Board review of villages’ challenge to EPA’s re-issuance of permit. Petition denied.

F. Fisheries, Water, FERC, BOR

41. *United States v. Washington*, No. C70–9213, Subproceeding No. 89–3–07, 2011 WL 4945211 (W.D. Wash. 2011). The State of Washington filed a request for dispute resolution under section 9 of the Shellfish Implementation Plan (SIP) to resolve a dispute between the State and the Squaxin Island Tribe regarding proposed leases of state land for private aquaculture activity. The State requested dispute resolution, pursuant to § 8.2.4 of the SIP. This section directs the Magistrate Judge to determine whether or not the leased activity authorizes the taking of shellfish subject to Treaty harvest. If the lease does not, then the lease may be issued. If the land to be leased contains shellfish subject to the Treaty harvest, then the Magistrate Judge shall determine the tribal harvest of a Treaty share of such shellfish consistent with the sharing principles within paragraph 6.1.3, or allow the State and Tribe to reconsider the agreement regarding the tribal harvest. The sharing principles of § 6.1.3 of the SIP reflect the case law, which was developed in the *State v. Washington* cases. In particular, this section of the SIP authorizes tribal harvest “from each enhanced natural bed” of “fifty percent of the sustainable shellfish production (yield) from such beds that would exist absent the Grower’s and prior Grower’s current and historic

enhancement/cultivation activities.” The Court concluded that the Treaty right to fish governs this dispute and not the State property law interpretation urged by the Squaxin Island Tribe. This means that the Tribe has no right to fish an artificial bed, and that the Tribe has a right to a “fair share” of an enhanced natural bed.

42. *State v. Jim*, No. 84716–9, 2012 WL 402051, 173 Wn. 2d 672, 273 P.3d 434 (2012). An enrolled member of the Yakima Indian Nation moved to dismiss a citation for unlawfully retaining an undersized sturgeon. The district court granted the motion. State appealed. The superior court reversed. The appellate court, 156 Wn. App. 39, 230 P.3d 1080, reversed the superior court and reinstated district court’s order of dismissal. The Supreme Court accepted discretionary review. The Supreme Court held that in-lieu fishing sites, as set aside by Congress exclusively for members of four Indian tribes including the Yakima Nation to exercise their treaty fishing rights, was an established “reservation” held in trust by United States, such that state did not have criminal jurisdiction over fishing sites with respect to enrolled members’ alleged violations of state provisions. The judgment of the Court of Appeals is affirmed.

43. *Native Village Of Eyak v. Blank*, No. 09–35881, 688 F.3d 619 (9th Cir. 2012) (9th Cir. 2012). Several Alaskan Native villages brought action against the Secretary of Commerce, seeking to enforce claimed nonexclusive aboriginal hunting and fishing rights in certain parts of the Outer Continental Shelf (OCS) of Gulf of Alaska. Following remand, 375 F.3d 1218, with instructions to determine what aboriginal rights, if any, were held by the villages, the district court conducted a bench trial and found that the villages had no non–exclusive right to hunt and fish in the OCS. Villages appealed. The appellate court held that: (1) Villages satisfied continuous use and occupancy requirement for establishing aboriginal rights; and (2) Villages did not have exclusive use of claimed portions of the OCS. Affirmed.

G. Gaming

44. *Hardy v. IGT, Inc.*, No. 2:10-CV-901-WKW, 2011 WL 3583745 (M.D. Ala. 2011). During the six months preceding the filing of the complaint in this case, Plaintiff Ozetta Hardy and a purported class collectively bet and lost over \$5,000,000 playing electronic bingo at three casinos owned by the Poarch Band of Creek Indians (the “Tribe”). The Tribe was not a defendant in this suit; rather, Hardy brought suit against the Defendant manufacturers (collectively “the Manufacturers”) that

allegedly constructed, owned, and operated the electronic bingo machines at the Tribe's casinos. Ms. Hardy alleged that electronic bingo, as played within the Tribe's casinos, constitutes illegal gambling under Alabama and federal law, and the Manufacturers have no right to retain the class' illegal gambling losses under Alabama Code § 8-1-150(a). The court found that Hardy's claim should be dismissed because the Tribe is both a necessary and indispensable party; additionally, because of the Tribe's sovereign immunity and the nature of its interests in this case; the court further found that even had Hardy requested leave to amend her complaint, amendment would likely be futile. Therefore, the court did not need to address the Manufacturers' arguments that Ms. Hardy's state law contract claim is preempted by the Indian Gaming Regulatory Act (IGRA) and operation of federal law. The court granted the Rule 12(b)(7) motions to dismiss filed by Defendants.

45. *Wells Fargo Bank, National Association v. Lake of the Torches*, No. 10-2069, 658 F.3d 684 (7th Cir. 2011). Wells Fargo Bank brought an action against a tribal casino development corporation, alleging breach of a trust indenture. The district court, 677 F. Supp. 2d 1056, entered an order dismissing the action, and the bank appealed. The appellate court held that: (1) as a matter of first impression, the tribal casino development corporation was a citizen of a state for purposes of diversity statute; and (2) trust indenture was void under the Indian Gaming Regulatory Act (IGRA) because it was a management contract that lacked National Indian Gaming Commission (NIGC) approval. Affirmed in part, reversed in part, and remanded.

46. *City of Duluth v. Fond Du Lac Band of Lake Superior Chippewa*, No. 09-2668, 2011 WL 5854639, 708 F.Supp.2d 890 (2010). The city of Duluth (the "City") sued Fond du Lac Band of Lake Superior Chippewa (the "Band"), alleging breach of contractual obligations created when the City and the Band agreed to establish a casino in downtown Duluth. The City also seeks declaration that the contracts are valid and enforceable, damages, and an injunction ordering the Band to comply with its contractual obligations. Alternatively, the City seeks accelerated damages for the estimated amounts owed to the City for the remainder of the contractual relationship. The Band asserted counterclaims, alleging that the contracts were unenforceable. After the entry of summary judgment, which barred the Band from challenging the agreement's validity, 708 F. Supp. 2d 890, and entry of an order compelling the Band to arbitrate the amount of rent to be paid to the City for extension term, 2011 WL 1832786, the Band moved for relief from judgment. The district court

held that: (1) the parties' agreement was subject to National Indian Gaming Commission's (NIGC) authority; (2) NIGC's notice of violation was a change in law warranting relief from consent decree; (3) the arbitration provision in the joint venture agreement was no longer enforceable; and (4) NIGC's notice of violation did not apply retroactively. Motion granted in part and denied in part.

47. *Alturas Indian Rancheria v. California Gambling Control Communities*, No. 11-2070, 2011 WL 6130912 (E.D. Cal. 2011). The Plaintiff in this case is the Del Rosa Faction of the Alturas Valley Indian Tribe. The Del Rosas filed this action seeking to enjoin the California Gambling and Control Commission (CGCC) from releasing funds held in trust for the Alturas Valley Indian Tribe to the IRS pursuant to two tax levies. Pending before the court were two motions to dismiss. According to the plaintiff, "at the beginning of 2010, the CGCC determined that a leadership dispute within the Tribe required the Commission to withhold Revenue Trust Sharing (RSTF) distributions pending resolution of the dispute." Plaintiff became aware that the IRS had contacted the CGCC seeking levies against the Tribe's RSTF funds. At a meeting held on July 28, 2011, the CGCC voted to recognize the levies and to allow the IRS to execute the levies. Plaintiff claimed that the Tribe has no knowledge of what the levies correspond to, and requested time from the CGCC for the Tribe to investigate the matter directly with the IRS. The Plaintiff alleged that the CGCC's conduct constitutes breach of a tribal-state compact, and breach of the covenant of good faith and fair dealing. After a hearing on whether to issue a preliminary injunction, this court granted a motion by CGCC to interplead the funds subject to the IRS levies, and dismissed the preliminary injunction motion as moot. The court dismissed the case and directed the clerk of court to disburse the funds interpleaded to the court.

48. *Neighbors of Casino San Pablo v. Salazar*, No. 11-5136, 442 F. Appx. 579, 773 F. Supp. 2d 141 (2011) *aff'd*, 442 F. Appx. 579 (2011). (From the Order) ORDERED and ADJUDGED that the decision of the district court be affirmed. Counts One and Two, which challenges the National Indian Gaming Commission's (NIGC's) approval of the 2003 and 2008 ordinances, fail for lack of standing because, even if those approvals are invalid, gaming may continue under the 1999 ordinance, which plaintiffs do not challenge. To the extent it presents a constitutional challenge to section 819 of the Omnibus Indian Advancement Act of 2000, Pub. L. No. 106-568, § 819, 114 Stat. 2868, 2919, the claim is time-barred. The claim first accrued on December 27, 2000, when Congress passed section 819, but plaintiffs failed to file their suit until December 18,

2009, almost nine years later. See 28 U.S.C. § 2401(a) (barring actions against the United States filed more than “six years after the right of action first accrues”).

49. *Saginaw Chippewa Indian Tribe of Michigan v. The National Labor Relations Board*, No. 11–14652, 2011 WL 675410, 838 F.Supp.2d 598 (2011). The Saginaw Chippewa Indian Tribe of Michigan filed suit to enjoin the National Labor Relations Board (NLRB) from applying the National Labor Relations Act to the Tribe’s casino operations. The Tribe moved for preliminary injunction and the NLRB moved to dismiss the complaint. The district court held that tribe was required to exhaust all administrative remedies prior to bringing a challenge in federal courts. The Tribe’s motion was denied and the NLRB’s motion was granted.

50. *Redding Rancheria v. Salazar*, No. 11–1493 SC, 2012 WL 525484, 811 F.Supp.2d 1104 (2012). (From the Opinion) This case is about an Indian tribe’s efforts to build a new casino. Plaintiff Redding Rancheria (the “Tribe”) currently operates the Win–River Casino on its eight-and-a-half acre reservation in Shasta County. The Tribe seeks to expand its gaming operations by building a second casino on 230 acres of undeveloped riverfront lands (the “Parcels”). In 2010, the Tribe asked the Department of the Interior (DOI) to determine whether the Parcels would be eligible for gaming if the DOI were to take them into trust. The DOI, acting through its Assistant Secretary for Indian Affairs, Defendant Larry Echo Hawk, informed the Tribe that they were not. To make this decision, the DOI relied on regulations promulgated by the Secretary of the Interior, Defendant Kenneth Salazar. In this lawsuit, the Tribe challenges both the decision itself and the regulations on which they were based. The Tribe has moved for summary judgment and the DOI has filed a cross-motion. The court found that the DOI’s determination that the Parcels do not qualify for the Restored Lands Exception and therefore are ineligible for gaming remains undisturbed. The Court granted the cross-motion for summary judgment brought by the Defendants, the DOI.

51. *State of New York v. Shinnecock Indian Nation*, Docket Nos. 08–1194, 08–1195, 2012 WL 2369192, 686 F.3d 133 (2nd Cir. 2012). New York State, state agencies, and the municipality brought action against an Indian nation and its tribal officials in state court seeking to enjoin them from constructing a casino and conducting certain gaming on a parcel of non-reservation property. The Tribe removed the case to federal court on the basis that the State’s complaint had pleaded issues of

federal law. The District Court, 274 F.Supp.2d 268, denied the State's motion to remand, entered preliminary injunction barring construction, 280 F. Supp. 2d 1, and denied parties' cross-motions for summary judgment, 400 F.Supp.2d 486. After reassignment, 523 F.Supp.2d 185, the court entered judgment for the plaintiffs and issued an injunction following a bench trial, and then a limited injunction to construction and operation of a casino or gaming on the property, 560 F.Supp.2d 186. The Tribe appealed. The appellate court held that: (1) the complaint did not raise an issue of federal law by referencing federal law in anticipation of tribe's defenses; and (2) a substantial federal question exception to a well-pleaded complaint rule did not apply. Vacated and remanded.

52. *State of Oklahoma v. Tiger Hobia, as Town King and Member Kialegee Tribal Town Business Committee*, No. 12-052, 2012 WL 3096634 (N.D. Okla. 2012). Defendants asked the court to reconsider its Order concerning Kialegee Tribal Town jurisdiction over the site. The State of Oklahoma opposed the motion. The State of Oklahoma ("State") filed suit seeking declaratory, preliminary, and permanent injunctive relief to prevent Tiger Hobia, Town King of the Kialegee Tribe (as well as other tribal officers), Florence Development Partners, LLC ("Florence") and the Kialegee Tribal Town, a federally chartered corporation (the "Town Corporation") from proceeding with the construction and operation of the proposed "Red Clay Casino" in Broken Arrow, Oklahoma. The State alleged defendants' actions violated both the April 12, 2011, Gaming Compact between the Kialegee Tribal Town and the State ("State Gaming Compact") and the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701–2721 ("IGRA"). The court issued a ruling granting plaintiff's Motion for Preliminary Injunction. The court concluded that defendants' actions violated IGRA and the State Gaming Compact because the Broken Arrow Property was not the Kialegee Tribal Town's "Indian lands" as defined by IGRA, and that the Tribal Town did not exercise government power over the property within the meaning of IGRA. The court concluded that defendants' "efforts to construct and operate a gaming facility on the Broken Arrow Property violated [the Indian Gaming Regulatory Act] and—as to Class III gaming—the Kialegee–State Gaming Compact." In their Motion to Reconsider, the defendants advised the court that on May 23, 2012, the owners of the restricted allotment, Marcella Giles and Wynema Capps, applied for enrollment as members of the Kialegee Tribal Town and on May 26, 2012, the Business Committee of the Kialegee Tribal Town voted unanimously to enroll Giles and Capps as members. Defendants asserted, once again, that they share jurisdiction of the

Broken Arrow Property with the Muscogee (Creek) Nation. They also contended the recent enrollment of Giles and Capps as members of the Kialegee Tribal Town—viewed in light of the history of the Muscogee Creek Nation and the Kialegee Tribal Town—“provides the Kialegee Tribal town with a direct interest in the [Broken Arrow Property] and constitutes a change in circumstances that warrants reconsideration.” The court denied defendants’ Motion to Reconsider the Preliminary Injunction in light of subsequent changed circumstances.

53. *State of Michigan and Little Traverse Bay Bands of Odawa Indians v. Bay Mills Indian Community*, No. 11–1413, 2012 WL 3326596, 695 F.3d 406 (6th Cir. 2012). The State of Michigan and the Little Traverse Bay Bands of Odawa Indians (“Little Traverse”) filed action to prevent the Bay Mills Indian Community (“Bay Mills”) from operating a small casino on its property in Vanderbilt, Michigan. The district court entered preliminary injunction ordering Bay Mills to stop gaming at the Vanderbilt casino. The defendant appealed. The appellate court held that: (1) the proximity of the two properties, along with the likelihood that at least some gaming revenue from the defendant’s casino otherwise would have gone to Little Traverse through its casino, was enough to show injury in fact; (2) federal courts lacked jurisdiction to adjudicate the claim under the Indian Gaming Regulatory Act (IGRA), alleging that defendant Indian tribe’s casino violated the Tribal-State compact, to the extent that the claim had been based on an allegation that the defendant’s casino was not on Indian lands; (3) federal courts lacked jurisdiction to adjudicate the claim under the IGRA, alleging that defendant Indian tribe’s casino violated Tribal-State compact, to the extent that claim was based on an allegation that the defendant’s property had not been acquired by the Secretary of Interior in trust for the benefit of the defendant; (4) common law claims brought by the State of Michigan against Bay Mills to prevent it from operating a small casino, which depended on whether the casino was located on Indian lands, arose under federal law, as required for federal question subject matter jurisdiction; (5) the defendant was immune from a suit on common law claims brought by the State of Michigan to prevent Bay Mills from operating a small casino, which depended on whether the casino was located on Indian lands, unless Congress had authorized the suit or the tribe waived its immunity; (6) a provision of the IGRA that supplied federal jurisdiction and abrogated tribal immunity, did not abrogate Bay Mill’s sovereign immunity over claims that did not satisfy all textual prerequisites of the Act; (7) inferential logic that the federal statute governing gambling in Indian Country abrogated sovereign

immunity of Indian tribes with regard to gaming not conducted under the approved Tribal-State gaming compact was not sufficient to abrogate Bay Mill's sovereign immunity with regard to such gaming; and (8) the tribal gaming ordinance waiving immunity only for the tribal commission did not result in waiver of Bay Mill's immunity. Vacated and remanded.

H. Land Claims

54. *In re Michael Keith Schugg v. Gila River Indian Community*, No. CV 05-2045,, BK Nos. 2-04-13226, 2-04-19091, Adv. No. 2-05-00384, 2012 WL 1906527 (D. Ariz. 2012). Before the Court were the Gila River Indian Community's (GRIC) Motion for Entry of Final Judgment and the Trustee's¹ Motion to Set Rule 16 Hearing and Postpone Entry of Judgment. On or about September 2003, Michael Schugg and Debra Schugg (the "Schuggs") acquired title to Section 16. Section 16 is located wholly within the Reservation and is physically accessible by Smith-Enke Road and Murphy Road. In 2004, the Schuggs declared bankruptcy and listed Section 16 as their largest asset. During the bankruptcy proceedings, the GRIC filed a proof of claim asserting that it had an exclusive right to use and occupy Section 16, it had authority to impose zoning and water use restrictions on Section 16, and a right to injunctive and other relief for trespass on reservation land and lands to which it held aboriginal title. The Trustee then initiated an adversary proceeding seeking a declaratory judgment that the Schuggs' estate had legal title and access to Section 16. At the conclusion of the trial, the Court determined that Plaintiffs, the Schuggs, were entitled to legal access to Section 16 due to an implied easement over Smith-Enke Road and a right of access over Murphy Road, either because of an implied easement or because the relevant portion of the road was an Indian Reservation Road that must remain open for public use, that Defendant is not entitled to exercise zoning authority over Section 16, and that no trespass occurred. The Court of Appeals affirmed in part, but remanded for further consideration of whether Murphy Road was a public road in light of ongoing proceedings before the Bureau of Indian Affairs (BIA) regarding the issue of whether Murphy Road was an Indian Reservation Road open to the public. After remand, the Trustee withdrew his appeal to the BIA regarding the status of Murphy Road as a public road. The Court then directed the Parties to jointly submit a proposed form of judgment that "will close this case." When the Parties represented to the Court that they were

¹ G. Grant Lyon filed this case, acting in his capacity as Chapter 11 Trustee of the bankruptcy estate of Michael Keith Schugg and Debra Schugg (the "Trustee").

unable to agree on a proposed form of judgment, the Court ordered that each party should separately file a proposed form of judgment or “motions as to why judgment should not be entered at this time.” It was ordered that the Gila River Indian Community’s Motion for Entry of Final Judgment and Memorandum in Support (Doc. 321) was denied. It was further ordered that the Trustee’s Motion to Set Rule 16 Hearing and Postpone Entry of Judgment was granted.

55. *Yowell v. Abbey*, No. 3:11–cv–518, 2012 WL 3205864 (2012). Before the Court was Plaintiff’s Motion for Personal Injunctive Relief and Federal Defendants’ Motion for Reconsideration of Order Denying Federal Defendants’ Motion to Dismiss Complaint. On July 20, 2011, pro se Plaintiff Raymond D. Yowell filed a civil rights complaint pursuant to 42 U.S.C. § 1983, 25 U.S.C. § 478, and *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L. Ed .2d 619 (1971), in Nevada District Court. In the complaint, the Plaintiff sued Robert Abbey, Helen Hankins, Department of the Treasury Financial Management Services (“Treasury-FMS”), Allied Interstate Inc., Pioneer Credit Recovery, Inc., The CBE Group, Inc., Cook Utah of Duchesne, Jim Pitts, Jim Connelley, Dennis Journigan, and Mark Torvinen (collectively the “Defendants”). The complaint alleged the following: Plaintiff was a Shoshone Indian, ward of the United States, and a member of the Te-Moak Tribe of the Western Shoshone Indians of Nevada He was a cattle rancher. Throughout his life, Plaintiff let his livestock graze on the “historic grazing lands associated with the South Fork Indian Reservation.” During the 1980s, the Bureau of Land Management (BLM) attempted to get an Indian grazing association to sign a permit to graze livestock, but never approached the Plaintiff directly. The Plaintiff never obtained a permit to graze his livestock because the proclamation that established the South Fork Indian Reservation, pursuant to the Indian Reorganization Act, stated that the reservation came “together with all range, and ranges, and range watering rights of every name, nature, kind and description used in connection” with the described boundaries of the reservation. On May 24, 2002, the Defendants assembled where the Plaintiff’s livestock were grazing, gathered the Plaintiff’s livestock, and seized the livestock without a warrant or court order for the seizure. The Defendants never gave Plaintiff notice or an opportunity to dispute the underlying basis of the allegations against him. The Defendants sold Plaintiff’s livestock on May 31, 2002. The complaint alleged five causes of action: (1) an unwarranted seizure of property in violation of the Fourth Amendment; (2) a due process violation under the

Fifth and Fourteenth Amendments; (3) a violation of Article VI of the U.S. Constitution which provides that treaties made under the authority of the United States are the supreme law of land; (4) violation of his civil rights by breaching the trust of the Indian Reorganization Act of 1934; and (5) violation of his Fifth and Fourteenth Amendment due process rights by seizing his livestock without a warrant or court order, selling his livestock below market prices, and then attempting to collect a deficiency based on the alleged debt. In June 2012, the Court issued an order denying all of the pending motions to dismiss and motions for summary judgment. With respect to the Federal Defendants, the Court found that the statute of limitations was tolled with respect to all five causes of action. The court granted in part and denied in part Plaintiff's Motion for Personal Injunctive Relief.

56. *David Laughing Horse Robinson v. Salazar*, No. 09–cv–01977, 2012 WL 3245504, 855 F.Supp.2d 1002 (2012). Three motions to dismiss pursuant to Fed. R. Civ. Proc. 12(b)(1) and 12(b)(6) were pending before the Eastern District Court of California: (1) motion by Tejon Mountain Village, LLC and Tejon Ranchcorp; (2) motion by County of Kern; and (3) motion by defendant Ken Salazar, in his capacity as the Secretary, U.S. Department of the Interior. The Plaintiffs sought title to occupy and use land they contend the United States guaranteed them pursuant to the 1849 Treaty with the State of Utah and by the establishment of the Tejon Indian Reservation in 1853. Plaintiff, the Kawaiisu Tribe of the Tejon (the "Tribe"), is an Indian tribe which "resided in the State of California since time immemorial." The Tribe acknowledged that it is not on the list of federally recognized tribes by the Bureau of Indian Affairs, but alleged that it is "a federally recognized tribe by virtue of, inter alia, descending from signatories of the 1849 Treaty with the Utahs and the Utah Tribes of Indians." Plaintiffs allege the following claims for relief: (1) Unlawful possession under common law, violation of Non-Intercourse Act, trespass and accounting, against Tejon Defendants; (2) Equitable Enforcement of Treaty against the County of Kern ("Kern"); (3) Violation of the Native American Graves Protection and Repatriation Act, against Tejon Defendants; (4) Deprivation of Property in violation of the Fifth Amendment against Salazar; (5) Breach of Fiduciary Duty against Salazar; (6) Denial of Equal Protection in violation of the Fifth Amendment against Salazar; and (7) Non-Statutory Review against Salazar. The Court ruled as follows: (1) the motions by Defendants Tejon Mountain Village, LLC and Tejon Ranchcorp, County of Kern and Ken Salazar to dismiss the third amended complaint for lack of subject matter jurisdiction

are granted without leave to amend and with prejudice; and (2) the motions by Defendants Tejon Mountain Village, LLC and Tejon Ranchcorp, County of Kern and Ken Salazar to dismiss the third amended complaint for failure to state a claim are granted without leave to amend and with prejudice.

I. Religious Freedom

57. *State v. Taylor*, No. SCWC 28904, 2011 WL 6376646, 126 Haw. 205 P.3d 740 (2011). Defendant pled guilty in the district court to conspiracy to traffic in Native American cultural items, as prohibited by the Native American Graves Protection and Repatriation Act. Defendant was subsequently indicted by a Hawai'i grand jury for theft in the first degree in connection with same items. The Circuit Court denied the defendant's motion to dismiss, and the defendant appealed. The Intermediate Appellate Court (ICA), 2011 WL 661793, affirmed. The Supreme Court granted certiorari. The Supreme Court held that: (1) evidence on "property of another" element was sufficient to maintain grand jury indictment; and (2) prior federal conviction for conspiracy to traffic in Native American cultural items did not bar, under statutory double-jeopardy provision, a subsequent state prosecution for theft in the first degree involving the same artifacts. The Judgment of ICA is affirmed.

58. *Oklevueha Native American Church of Hawaii, Inc. v. Holder*, (No. 10–17687, 2012 WL 1150259, 676 F.3d 829 (9th Cir.2012)). The Native American Oklevueha church and its spiritual leader, Michael Rex, brought action against government officials, alleging that their right to use marijuana during their religious ceremonies was being infringed on by federal drug laws, and asserted claims under state law for theft and conversion. The district court, 719 F. Supp. 2d 1217 and 2010 WL 4386737, dismissed the action. Plaintiffs appealed. The appellate court held that: (1) the plaintiffs sufficiently alleged a concrete plan; (2) a definite and concrete dispute regarding the lawfulness of marijuana seizure came into existence; (3) the tribal members did not have to demonstrate a threat of future prosecution; (4) the preenforcement claim was ripe for review; (5) the allegations about use, possession, cultivation, and distribution of marijuana were not required; (6) the Religious Freedom Restoration Act (RFRA) did not contain an exhaustion requirement; (7) the Oklevueha Church had associational standing; and (8) the RFRA did not waive sovereign immunity for monetary damages. Affirmed in part, reversed in part, and remanded.

59. ***State v. White***, No. 36765, 2011 WL 6183613, 152 Idaho 361, 271 P.3d 1217 (2011), *review denied* (2012). The Defendant who was charged with possession of marijuana and paraphernalia moved to dismiss the charges. The Magistrate denied the motion. The Defendant appealed. The District Court affirmed. The Defendant appealed. The appellate court held that substantial evidence supported the Magistrate's determination that the Defendant's use of marijuana was not substantially motivated by a religious belief. Affirmed.

J. Sovereign Immunity and Federal Jurisdiction

60. ***In re Platinum Oil Properties, L.L.C.***, No. 11–09–10832, 465 B.R. 621 (2011). Chapter 11 debtor, Platinum Oil Properties, LLC (the "Debtor"), which claimed ownership of operating rights and working interests in and under two oil and gas leases on Jicarilla Apache Nation (the "Nation") land, moved for orders authorizing its assumption of leases and authorizing secured and super-priority financing. The Nation, which objected to Debtor's motions, moved to dismiss the case and, along with others, objected to a disclosure statement filed with the proposed plan by the Debtor. Parties cross-moved for summary judgment on the issue of ownership of operating rights and working interests. The Bankruptcy Court held that: (1) the Department of the Interior (DOI) and the Nation were bound by terms of confirmed Chapter 11 plan in prior bankruptcy case of Debtor's purported predecessor-in-interest; (2) Bankruptcy Code abrogates tribal sovereign immunity; (3) the sale agreement did not operate to divest the Debtor and its purported transferor of their interests in operating rights and working interests; (4) parol evidence was not admissible to establish the parties' intent that operating rights and working interests were to be transferred to the Debtor under the plan, settlement agreement, and confirmation order in the purported predecessor's case; (5) the record was insufficient to determine what approvals were required for transfer of operating rights to Debtor; and (6) DOI did not approve the transfer of operating rights and working interests to Debtor. Motions denied. Reconsideration denied, 2011 WL 6293132.

61. ***Stillaguamish Tribe of Indians v. Pilchuck Group II L.L.C.***, No. C10-995, 2011 WL 4001088 (W.D. Wash. 2011). (From the Opinion) "This matter comes before the court on a motion for summary judgment from Plaintiff, the Stillaguamish Tribe of Indians (the "Tribe") and a barely distinguishable motion from Defendant Pilchuck Group II, L.L.C. ("Pilchuck"). Pilchuck also filed a motion to seal documents . . . for the reasons stated below, the court grants the Tribe's motion because, as a

matter of law, the Tribe did not waive its sovereign immunity from suits arising out of the contract at the core of this case. The court accordingly enjoins Pilchuck from pursuing its arbitration demand against the Tribe.

62. *Young v. Duenas*, No. 66969-9, 2011 WL 4732085, 164 Wn. App. 343, 262 P.3d 527 (2011) *review denied*, 173 Wn.2d 1020, 272 P.3d 851 (2012). Decedent's brother ("Brother") brought an action against individual officers on an Indian tribe's police force, alleging tort and § 1983 claims arising from decedent's death while being arrested by officers. The superior court granted defendants' motion to dismiss for lack of subject matter jurisdiction. The Brother appealed. The appellate court held that: (1) tribal sovereign immunity barred tort claims; and (2) officers were not state actors, as required to state a § 1983 claim. Affirmed.

63. *Vann v. Salazar*, No. 03-1711, 883 F. Supp. 2d 44 (2011) *rev'd and remanded sub nom., Vann v. U.S. Dept. of Interior*, 70 F.3d 927 (2012). Plaintiffs are direct descendants of former slaves of the Cherokees, or free Blacks who intermarried with Cherokees, who were made citizens of the Cherokee Nation in the nineteenth century and are known as Cherokee Freedmen ("Freedmen"). The Freedmen contend that the Principal Chief of the Cherokee Nation, with the approval of the Secretary, has disenfranchised the Freedmen in violation of the Thirteenth Amendment of the United States Constitution and the Treaty of 1866, and that the Federal Defendants have also violated those laws and others by failing to protect the Freedmen's citizenship and voting rights. Before the Court were the motions to dismiss the Federal Defendants' and Principal Chief Crittenden's motions. The Court concluded that the suit cannot proceed without the Cherokee Nation and that the Cherokee Nation did not waive its sovereign immunity such that it can be joined as a party to the suit. The Court granted Crittenden's motion to dismiss, denied the Freedmen's motion for leave to file a fifth amended complaint, and denied as moot the Federal Defendant's motion to dismiss and the Freedmen's motion to consolidate with *Cherokee Nation v. Nash*.

64. *Lewis v. Tulalip Housing Ltd. Partnership No. 3*, No. C11-1596, 2011 WL 6140881 (W.D. Wash. 2011). This matter was before the Snohomish Superior Court on the Plaintiff's Motion to Remand to State Court and for an Award of Fees and Costs. The Plaintiff brought this action in Snohomish County Superior Court naming defendants Mike Alva, Patti Gobin, Chuck James, and Jane Doe James ("Individual Defendants"), Raymond James Native American Housing Opportunities Fund II, L.L.C. (the "Fund"), and Tulalip Housing Limited Partnership # 3

(“Partnership”). The Plaintiff is a citizen of the state of Washington. The Individual Defendants are enrolled members of the Tulalip Tribes, who live on the Tulalip Reservation, and are also Washington residents. The Partnership is a Washington limited partnership with its principal place of business in Washington. The Fund is a Delaware limited liability corporation with its principal place of business in Florida. On August 31, 2011, the state court granted a motion to dismiss for lack of subject matter jurisdiction filed on behalf of the Individual Defendants and the Partnership. The non-diverse defendants claimed that the tribal court had exclusive jurisdiction over Plaintiff’s claims. Second, the non-diverse defendants argued that Individual Defendants had sovereign immunity as Plaintiff’s claims arose out of the performance of their official duties and, in any event, the state had not assumed jurisdiction over claims against tribal members occurring on tribal lands. Finally, the defendants contended that the Tulalip Tribes were an indispensable party that could not be joined because of sovereign immunity. The state court granted the motion without indicating the grounds upon which the dismissal was based. The Fund removed the action to the Federal District Court. The court granted Plaintiff’s Motion to Remand, dismissed the case, and remanded to state court.

65. *McCrary v. Ivanof Bay Village*, No. S-13972, 2011 WL 6116492, 265 P.3d 337 (Alaska 2011) *cert. denied*, 132 S. Ct. 1977 (2012). Developer brought action against the Indian tribe alleging breaches of the implied covenant of good faith and fair dealing arising out of development contracts. The Superior Court dismissed the suit based on sovereign immunity. Developer appealed. The Supreme Court held that tribe was a federally recognized tribe entitled to sovereign immunity. Affirmed.

66. *Conley v. Comstock Oil & Gas, LP*, No. 09 10 00522 CV, 2011 WL 6225253, 356 S.W.3d 755 (2011). The purported owners of mineral interests, Margaret Brush Conley and the other plaintiffs (collectively “Conley”) brought a trespass claim to try title action against a well operator and the landlords who granted leases to the well operator, including the Indian Tribe, to determine possession of the mineral rights. The district court denied the Indian Tribe’s plea to the jurisdiction, and granted the well operator’s motion for summary judgment. Conley and the Indian Tribe appealed. The appellate court held that: (1) Indian Tribe was immune from purported owners’ trespass to try title action; (2) doctrine of stare decisis did not establish as a matter of law location of land that was surveyed in an ancient survey; (3) the doctrine of res judicata did not bar

the purported owners' trespass to title claims; but (4) landowners and the well operator established their title to mineral interests by a presumed grant under the doctrine of presumed lost deed; and (5) the well operator and its predecessor had established peaceable possession of mineral interests for purposes of ten-year adverse possession statute of limitations. Affirmed in part, and reversed and rendered in part.

67. *Everglades Ecolodge at Big Cypress, LLC v. Seminole Tribe of Florida*, No. 11-60839, 2011 WL 6754024, 836 F. Supp. 2d 1296 (2011). Developer brought an action against the Seminole Tribe (the "Tribe") in state court, alleging breach of lease for the development of a resort and for specific performance. The Tribe removed action to federal court and moved to dismiss. The Developer moved to remand. The district court held that: (1) the Developer's claims arose under federal law; (2) the state court's jurisdiction was preempted; and (3) the waiver of sovereign immunity in the lease was invalid. The Tribe's Motion to Dismiss was granted; Plaintiffs' motion denied.

68. *Miccosukee Tribe of Indians of Florida v. Department of Environmental*, No. 2D11-2797, 2011 WL 6934533, 78 So. 3d 31 (2011). The Miccosukee Tribe of Indians (the "Tribe") moved for summary judgment in an eminent domain proceeding brought by the Department of Environmental Protection. The Circuit Court denied the motion. The Tribe petitioned for a writ of certiorari. The appellate court held that: (1) the Indian tribe's sovereign immunity was not implicated in an eminent domain action; and (2) the Nonintercourse Act did not preclude the eminent domain proceeding. Petition denied.

69. *Three Stars Production Co., LLC v. BP America Production Co.*, No. 1101162, 2012 WL 32916 (2012). Before the Court was the motion of Defendant BP America Production Company ("BP") pursuant to Fed. R. Civ. P. 12(b)(7) and Fed. R. Civ. P. 19. This case involves a dispute over proceeds derived from an oil and gas well, designated as the Southern Ute 53-1 Well ("Well"), located within the exterior boundaries of the Southern Ute Indian Tribe Reservation in La Plata County, Colorado. The land is owned by the United States in trust for the Southern Ute Indian Tribe (the "Tribe"). Plaintiff Three Stars alleged that the Well lies within an established 320-acre drilling and spacing unit, yet Defendant BP has wrongfully distributed the proceeds from the Well on a 240-acre basis. Three Stars has recently acquired the leasehold interest in the 80 acres allegedly within the drilling unit but not included in Defendant's 240-acre distribution area. BP argued that the Department of

the Interior (DOI), the Tribe, and the other owners of interest in the Well are indispensable parties in this action, and therefore must be joined or the action dismissed pursuant to Fed. R. Civ. P. 19. Further, BP contended that the Southern Ute Indian Tribal Court (“Tribal Court”) has already determined that the DOI is an indispensable party in this dispute, and thus the doctrine of issue preclusion, also known as collateral estoppel or *res judicata*, prohibits the Plaintiff from re-litigating the issue in this case. The court found that that the Tribe and the DOI are indispensable parties pursuant to Rule 19 and granted the Motion of Defendant BP America Production Company pursuant to Fed. R. Civ. P. 12(b)(7) and Fed. R. Civ. P. 19. Plaintiff, Three Stars Production Company, LLC must join the DOI and the Tribe as parties to this action through the filing of an amended complaint, or if they cannot be joined, dismiss the action.

70. *J.L. Ward Associates, Inc. v. Great Plains Tribal Chairmen’s Health Board*, No. 11-4008, 2012 WL 113866, 842 F.Supp.2d 1163, (2012). A consultant, J.L. Ward Associates (“J.L.”), that prepared an application for an Access to Recovery (ATR) grant on behalf of Great Plains Tribal Chairmen’s Health Board (“Great Plains”), a non-profit corporation created by sixteen Indian tribes,² brought an action alleging breach of contract, promissory estoppel, negligent misrepresentation, fraudulent misrepresentation, unjust enrichment, and infringement on its copyrights. J.L. moved to dismiss the complaint. The district court held that: (1) the Great Plains was a tribal entity entitled to sovereign immunity; (2) the dispute resolution clause in parties’ contract did not waive entity’s sovereign immunity to allow federal court to address the merits of the claims; and (3) the Great Plains was a citizen of South Dakota, for diversity purposes. Motion granted in part.

71. *United States v. Juvenile Male*, No. 11–30065, 2012 WL 164105, 666 F.3d 1212 (9th Cir. 2012). A juvenile male appealed the district court’s determination that he is an “Indian” under 18 U.S.C. § 1153, which provides federal criminal jurisdiction for certain crimes committed by Indians in Indian Country. The juvenile claims that he does not identify as an Indian, and is not socially recognized as an Indian by other tribal

² The Great Plains was incorporated in 1992 as a non-profit corporation. Sixteen federally recognized Indian tribes from South Dakota, North Dakota, Nebraska, and Iowa formed the Great Plains in order to provide the Indian people of the Great Plains area with a single entity to communicate and participate with the Indian Health Service and other federal agencies on health matters.

members. Nonetheless, he is an enrolled tribal member, has received tribal assistance, and has used his membership to obtain tribal benefits. The court held that because the juvenile is Indian by blood and easily meets three of the most important factors used to evaluate tribal recognition laid out in *United States v. Bruce*, 394 F.3d 1215 (9th Cir.2005), he is an “Indian” under § 1153, therefore his conviction is upheld.

72. *United States v. Juvenile Male*, Nos. 09-30330, 09-30273, 2012 WL 206263, 670 F.3d 999 (9th Cir. 2012) *cert. denied*, 133 S. Ct. 234 (2012). Three juvenile defendants, each of whom was a member of an Indian tribe and who pleaded true to a charge of aggravated sexual abuse with children in the district court appealed their conditions of probation or supervision requiring registration under the Sex Offender Registration and Notification Act (SORNA). The appellate court held that: (1) the SORNA registration requirement as applied to certain juvenile delinquents in cases of aggravated sexual abuse superseded conflicting confidentiality provisions of Federal Juvenile Delinquency Act (FJDA); and (2) the SORNA registration requirement did not violate juveniles’ constitutional rights. Affirmed.

73. *Koscielak v. Stockbridge-Munsee Community*, No. 2011AP364, 2012 WL 447275, 340 Wis. 2d 409, 811 N.W.2d 451 *review granted*, 342 Wis. 2d 155, 816 N.W.2d 321 (2012). Robert and Mary Koscielak appealed a judgment dismissing their tort claims against the Stockbridge-Munsee Community (“the Tribe”), doing business as Pine Hills Golf Course and Supper Club (“Pine Hills”), and its insurer, First Americans Insurance Group, Inc. Robert Koscielak slipped and fell on ice in the Pine Hills parking lot, and sustained serious injuries requiring hospitalization. He and his wife filed suit against the Tribe under its business name, Pine Hills alleging a variety of tort claims. Pine Hills filed a motion to dismiss that contained exhibits outside the pleadings. Accordingly, the motion was converted to one for summary judgment, which the circuit court granted. The court concluded Pine Hills was a subordinate economic entity of the Tribe such that Pine Hills was entitled to the sovereign immunity conferred upon the Tribe by federal law. Because the Koscielaks’ claims against the Tribe were barred, the court determined their claims against First Americans were barred, too. Accordingly, the court dismissed all claims against the Tribe and First Americans. The circuit court concluded tribal immunity barred the Koscielaks’ claims and the appellate court agreed and affirmed.

74. *Wiseman v. Osage Indian Agency*, 11cv1385, 2012 WL 515876 (E.D. Va. 2012). Before the court was Garnishee Osage Indian Agency's Motion to Quash Garnishment Summons and Motion to Dismiss. The Osage Indian Agency (the "Agency") removed a garnishment summons to the district court. Plaintiff-judgment creditor Lynda Wiseman obtained the summons in Fairfax County Circuit Court. Ms. Wiseman served the summons upon the Agency in an attempt to collect a judgment she obtained against Defendant-judgment debtor William Berne in the Fairfax County Circuit Court. The judgment was in the amount of \$63,565.55 and resulted from Mr. Berne's mishandling of an estate over which Mr. Berne was the executor. The Osage Nation is a federally recognized Native American tribe, primarily located in Oklahoma. The Osage Agency is a component of the United States Department of the Interior's Bureau of Indian Affairs, and is responsible for providing services to the Osage Nation. Mr. Berne is not a member of the Osage Nation, but he does own an "Osage mineral non-Indian headright," which entitles him to land royalties from the United States. Ms. Wiseman sought to garnish the amounts Mr. Berne is due from his headright. The Agency moved to quash the garnishment summons and dismiss the case, asserting that the district court lacks subject matter jurisdiction to enforce the summons because it is against the United States, which is entitled to immunity. Plaintiff failed to file a response. The Court granted the Osage Indian Agency's Motion to Quash Garnishment Summons and Motion to Dismiss.

75. *Hollywood Mobile Estates Limited v. Cypress*, No. 11–13482, 2012 WL 975072, 464 F. Appx. 837 (11th Cir. 2012). Various officials of the Seminole Tribe of Florida appealed the district court's grant of a preliminary injunction to Hollywood Mobile Estates, Ltd., contending that the underlying cause of action is only for breach of a lease agreement and thus does not fit within the limited exception to tribal sovereign immunity created by *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441 (1908). Hollywood Mobile Estates operated a mobile home park on land it leased from the Seminole Tribe. In 2008, the Seminole Tribe ejected Hollywood Mobile Estates from the leased property and began collecting rent from sublessees. Hollywood Mobile Estates filed suit seeking restitution of the lost rent and an injunction compelling the Seminole Tribe to return possession of the land to it. The district court dismissed the suit for lack of jurisdiction, concluding the claims were barred by the Seminole Tribe's sovereign immunity. The appellate court affirmed the dismissal as to the restitution claim. *Hollywood Mobile Estates, Ltd. v. Cypress*, 415 F. App'x 207, 209 (11th Cir. 2011) (unpublished). The district court reversed and

remanded as to the request for injunctive relief, holding that the relief was not barred by the Seminole Tribe's sovereign immunity because it was prospective and did not implicate special sovereignty interests. On remand, Hollywood Mobile Estates moved for a preliminary injunction ordering the Seminole Tribe to restore to it the leased property. The district court granted that motion and issued the requested injunction. The Seminole Tribe appealed from that order. The appellate court found that the Seminole Tribe's attack on the district court's order is merely an effort to relitigate the sovereign immunity question it decided one year ago. It argued that the injunction does not fit within the *Ex parte Young* exception to tribal sovereign immunity because it is issued to remedy an alleged breach of a lease and not a violation of the Constitution or federal law. Affirmed.

76. *Missouri v. Webb*, No. 4:11CV1237, 2012 WL 1033414 (E.D. Mo. 2012). (From the Opinion) The State of Missouri filed this action in the Circuit Court of St. Louis County, Missouri, alleging claims for piercing of the corporate veil and violation of the Missouri Merchandising Practices Act (MMPA), Mo. Rev. Stat. § 407.010 *et. seq.* against Defendants Martin A. Webb ("Webb"), 24-7 Cash Direct LLC, Financial Solutions LLC, Great Sky Finance LLC, High Country Ventures LLC, Management Systems LLC, Payday Financial LLC, Red River Ventures LLC, Red Stone Financial LLC, Western Capital LLC, Western Sky Financial LLC (collectively "Lending Companies"), certain limited liability companies organized and registered under the laws of South Dakota, engaged in the business of internet-based lending, and owned, controlled, or managed by Webb. Defendants timely removed this action pursuant to 28 U.S.C. §§ 1331 and 1441(a), asserting in their notice of removal that Plaintiff's claims give rise to substantial, disputed questions of federal law, and that they are entitled to tribal immunity as a Native-American owned businesses operating on tribal lands. Before the Court are Plaintiff's motion to remand pursuant to 28 U.S.C. § 1447(c), and Defendants' motion to dismiss. The court granted the Plaintiff's motion to remand and, therefore, did not address the arguments set forth in Defendants' motion to dismiss.

77. *Alltel Communications, L.L.C. v. DeJordy*, No. 11-1520, 2012 WL 1108822, 675 F.3d 1100 (8th Cir. 2012). The Oglala Sioux Tribe (the "Tribe") and the tribal administrator filed motions to quash third-

party subpoenas *duces tecum*³ served by the Alltell Communications (“Alltell”) that filed suit in another district against former senior vice president for allegedly breaching a separation agreement by assisting the Tribe in tribal court lawsuit to enjoin Alltell from the proposed sale of assets that provided telecommunications services on the Pine Ridge Indian Reservation. The district court denied motions. The Tribe and the tribal administrator appealed. The appellate court held that tribal immunity barred enforcement of subpoenas. Reversed.

78. *United States v. Diaz*, No. 10–2252, 2012 WL 1592967, 679 F.3d 1183 (10th Cir. 2012). Linda Diaz was convicted of knowingly leaving the scene of a car accident where she hit and killed a pedestrian. The accident occurred on the Pojoajue Pueblo Indian reservation. She was charged with committing a crime in Indian Country under 18 U.S.C. § 1152. On appeal, among other issues, Diaz contended the federal court lacked jurisdiction over the crime because the government failed to prove that the victim was not an Indian, a jurisdictional requirement under § 1152. The appellate court concluded the government met its burden of proof. The testimony of the victim’s father provided enough evidence for a jury to conclude the victim was not an Indian for purposes of the statute. The court also concluded the district court did not err in its rulings on various other evidentiary and trial issues. Having jurisdiction pursuant to 18 U.S.C. § 1291, the court affirmed.

79. *Chavez v. Navajo Nation Tribal Courts*, No. 11–2203, 465 F. Appx. 813 (10th Cir. 2012). Not selected for publication in the Federal Reporter. (From the opinion.) Russell W. Chavez is a member of the Navajo Nation, a federally recognized Indian Tribe. He filed in federal district court a pro se 42 U.S.C. § 1983 civil rights complaint against the Navajo Nation and various Tribal officials (collectively the “Defendants”). The Defendants moved to dismiss the case for failure to state a claim under Fed. R. Civ. P 12(b)(6). The district court dismissed the case for lack of jurisdiction. The court held that Mr. Chavez’s lawsuit against the Defendants could not be maintained in federal court under § 1983 because all of his challenges to the Defendants’ actions relied on Tribal law. *See Burrell v. Armijo*, 456 F.3d 1159, 1174 (10th Cir. 2006) (“A § 1983 action is unavailable for persons alleging deprivation of constitutional rights under color of tribal law, as opposed to state law.” (internal quotation marks omitted)); *see also Polk Cnty. v. Dodson*, 454

³ A Subpoena *duces tecum* is a court summons ordering the recipient to appear before the court and produce documents or other tangible evidence for use at a hearing or trial.

U.S. 312, 315, 102 S. Ct. 445, 70 L. Ed. 2d 509 (1981) (observing that acting under color of state law is “a jurisdictional requisite for a § 1983 action”). Turning to the Defendants, the court held that Congress had not authorized suit “against tribal entities pursuant to 42 U.S.C. § 1983.” See *Nanomantube v. Kickapoo Tribe in Kan.*, 631 F.3d 1150, 1152 (10th Cir. 2011) (“[A]n Indian tribe is not subject to suit in a federal or state court unless the tribe’s sovereign immunity has been either abrogated by Congress or waived by the tribe.”); *E.F.W. v. St. Stephen’s Indian High Sch.*, 264 F.3d 1297, 1302–03 (10th Cir. 2001) (observing that tribal sovereign immunity “is a matter of subject matter jurisdiction”). Mr. Chavez appeals. The court affirmed the judgment of the district court for substantially the same reasons stated by the magistrate judge.

80. *Shield v. Sinclair*, No. 10-35650, 2012 WL 1893563, 473 F. Appx. 726 (9th Cir. 2012). Not selected for publication in the Federal Reporter. (From the opinion.) The Plaintiffs, who are five members of the Little Shell Tribe of Chippewa Indians, a non-federally recognized Indian tribe, appeal from the district court’s judgment dismissing their action alleging that the defendants, violated their rights under 42 U.S.C. § 1985(3) and 25 U.S.C. § 1302. The Court of Appeals for the Ninth Circuit affirmed. The Court of Appeals held the district court properly dismissed the claims plaintiffs brought under section 1985(3) because the first amended complaint failed to allege facts sufficient to show that they are a protected class. See *Schultz v. Sundberg*, 759 F.2d 714, 718 (9th Cir. 1985) (per curiam) (to bring a claim under section 1985(3), plaintiffs must show that “the courts have designated the class in question a suspect or quasi-suspect classification requiring more exacting scrutiny or that Congress has indicated through legislation that the class required special protection”). The district court properly dismissed the claims plaintiffs brought under the Indian Civil Rights Act because “the only remedy available from the federal courts under [the Act] is a writ of habeas corpus under 25 U.S.C. § 1303.” *Hein v. Capitan Grande Band of Diegueno Mission Indians*, 201 F.3d 1256, 1259-60 (9th Cir. 2000). Affirmed.

81. *Wallulatum v. The Confederated Tribes of the Warm Spings Reservation Of Oregon Public Safety Branch*, 6:08-CV-747-AA, 2012 WL 1952000 (D. Or. 2012). Plaintiff filed this action under 42 U.S.C. § 1983 alleging that the Confederated Tribes of the Warm Springs Reservation of Oregon Public Safety Branch (the “Tribe”) violated his rights under the Fourth Amendment of the United States Constitution by using excessive force against him when he was arrested on the Warm

Springs Indian Reservation. The Plaintiff is an enrolled tribal member of the Confederated Tribes of the Warm Springs Reservation of Oregon. The incident giving rise to the plaintiff's claims occurred on the Warm Springs Indian Reservation. It is undisputed that at the time of the incident, that the defendant Patterson's actions were taken as a tribal officer. The law is clear that no action can be brought in federal court for alleged deprivations of constitutional rights under the color of tribal law. *R.J. Williams Co. v. Fort Belnap Housing Authority*, 719 F.2d 979, 982 (9th Cir. 1983); *Desautel v. Dupris*, 2011 WL 5025270 (E.D. Wash. 2011). Thus the actionable conduct, if any, was under the color of tribal law and 42 U.S.C. § 1983 does not provide a proper jurisdictional basis for this court to entertain plaintiff's claim. For these reasons, the District Court of Oregon is without jurisdiction and the Tribe is entitled to dismissal of plaintiff's claims against him.

82. *Marceau v. Blackfeet Housing Authority*, (No. 11–35444, 2012 WL 1999856, 473 F. Appx. 764 (9th Cir. 2012) *cert. denied*, 133 S. Ct. 931 (2013)). In this putative class action, plaintiffs—American Indian individuals whose homes were built in the late 1970s with the financial assistance of the United States Department of Housing and Urban Development (“HUD”)—appeal the district court's grant of summary judgment in favor of HUD. The Court of Appeals affirmed. The district court correctly rejected plaintiffs' Administrative Procedure Act (APA) claim that HUD, in violation of its statutory and regulatory authority, required the use of wooden foundations in the construction of the plaintiffs' houses. According to statute, civil actions against federal agencies must be “filed within six years after the right of action first accrues,” 28 U.S.C. § 2401(a); a substantive challenge to an agency decision as beyond its authority accrues when the disputed decision is first “appli[ed] ... to the challenger,” *Wind River Mining Corp. v. United States*, 946 F.2d 710, 715-16 (9th Cir. 1991). Plaintiffs' claim against HUD accrued in the late 1970s, when the agency purportedly decided to require wooden foundations. At that time, plaintiffs knew about the decision and knew that it affected them. *Cf. id.* at 715 (agency action not immune from review simply because it occurred “long before anyone discovered the true state of affairs”); *N. Cnty. Cmty. Alliance, Inc. v. Salazar*, 573 F.3d 738, 743 (9th Cir. 2009) (allowing challenge to 14-year-old agency action to proceed where plaintiffs could not have known it would affect them until shortly before filing suit). The fact that the plaintiffs may not have immediately grasped the full impact HUD's decision might eventually have on them does not mean they knew too little in 1980 to bring an APA challenge. The district

court also correctly rejected plaintiffs' claim that HUD wrongly denied, or failed to respond to, various requests made by individual homeowners and by their Indian housing authority for HUD's assistance in repairing and maintaining the houses. Plaintiffs identified several instances in which HUD officials were alerted to the problems plaintiffs faced as a result of the wooden foundations used in the construction of their homes, but there were no instances in which HUD failed to comply with a specific obligation imposed by law. Affirmed.

83. *Harris v. Muscogee (Creek) Nation*, 11-CV-654-GKF-FHM, 2012 WL 2279340 (N.D. Okla. 2012). Before the court were the Motion to Dismiss of defendant Muscogee (Creek) Nation ("Creek Nation") and the Motion to Dismiss of defendant Hudson Insurance Company ("Hudson"). Plaintiff, a customer of River Spirit Casino, was injured in a slip and fall accident at the casino. She filed suit in Tulsa County District Court against Creek Nation, the owner of the casino, asserting a claim for negligence, and against Hudson, the casino's liability insurer. Plaintiff asserted she is a third party beneficiary of the insurance policy and Hudson breached the policy by denying her tort claim. Creek Nation removed the case to federal court pursuant to 28 U.S.C. §§ 1331, 1441 and 1446, alleging federal question jurisdiction. Specifically, Creek Nation asserted the federal question raised by plaintiff's action is whether the state court has jurisdiction over a tort action arising in Indian Country against the Creek Nation. Citing *Williams v. Lee*, 358 U.S. 217, 217-18 (1959), the Creek Nation argued federal law determines whether a state may exercise jurisdiction over civil actions against Indians in Indian Country. Subsequently, the Creek Nation filed a Rule 12(b)(1) Motion to Dismiss, asserting plaintiff's claim against it was barred by tribal sovereign immunity, which deprives the court of subject matter jurisdiction. Hudson also moved to dismiss the breach of contract claim pursuant to Rule 12(b)(6), on the basis that Oklahoma does not recognize a claim by an injured plaintiff against an insurer based on a third party beneficiary theory. The court granted defendant Creek Nation's Motion to Dismiss.

84. *Furry v. Miccosukee Tribe Of Indians Of Florida*, No. 11-13673, 2012 WL 2478232, 685 F.3d 1224 (11th Cir. 2012) *cert. denied*, 133 S. Ct. 663 (2012). John Furry, as personal representative of the estate of his daughter, brought a wrongful death action against the Miccosukee Tribe (the "Tribe") that owned and operated a gambling and resort facility, asserting that the Tribe violated federal law and Florida's dram shop law by knowingly serving excessive amounts of alcohol to his

daughter, who later was involved in a fatal motor vehicle collision. The Tribe moved to dismiss on the ground that it was immune from suit under the doctrine of tribal sovereign immunity. The district court, 2011 WL 2747666, granted the motion, and plaintiff appealed. The appellate court held that: (1) in enacting the federal statute governing the application of Indian liquor laws, which authorizes state regulation and licensing of tribal liquor transactions, Congress did not abrogate tribal immunity from private tort suits based on state dram shop acts or other tort laws; and (2) the Tribe did not waive its immunity from private tort actions by applying for a state liquor license. Affirmed.

85. *Harvest Institute Freedman Federation, L.L.C. v. United States*, No. 11-3113, 2012 WL 2580775, , 478 F. Appx. 332 (6th Cir. 2012) *cert. denied*, 133 S. Ct. 673 (2012). Not selected for publication in the Federal Reporter. Plaintiffs-Appellants Harvest Institute Freedman Federation (“Harvest”) and Leatrice Tanner-Brown want the federal courts to hold that the Claims Resolution Act, No. 111–291, 124 Stat. 3064 (2010) (the “Act”), is unconstitutional because it perpetuates racial discrimination against former slaves-known as the Freedmen-of certain Native American tribes (“Freedman”). Congress enacted the Act to implement the settlement between the parties in *Cobell v. Salazar*, No. 1:96CV01285–JR (D.D.C.), which was a class-action lawsuit brought by a number of individual Native Americans against the Secretaries of the Departments of the Interior and of the Treasury. The class in *Cobell* claimed that the United States had breached its fiduciary duty to properly administer the Individual Indian Money (IIM) Accounts held on the behalf of certain Native Americans. The Harvest plaintiffs claim that the Freedmen were wrongfully excluded from ownership of the IIM Accounts due to racism, and that it perpetuates racial discrimination for Congress to not address their claims at the same time that it addresses the claims of the *Cobell* class. The district court dismissed the case, holding that the Harvest plaintiffs did not have standing because any injury to them is not fairly traceable to the United States and because the injury will not be redressed by a favorable decision. The Harvest plaintiffs timely appealed. The appellate court concluded that the district court did not err in dismissing the case and affirmed the judgment of the district court.

86. *In re Greektown Holdings, L.L.C.*, 475 B.R. 563 (2012) *reconsideration denied*, 12-CV-12340, 2012 WL 4484933 (E.D. Mich. 2012). An unsecured creditors committee brought an adversary proceeding against alleged transferees of avoidable fraudulent transfers,

including Sault Ste. Marie Tribe of the Chippewa Indians (the “Tribe”) and the Kewadin Gaming Authority (the “Authority”). After replacing the committee as plaintiff, the trustee for both the litigation trust and unsecured creditors distribution trust sought approval of settlement with the Tribe and the Authority. The nonsettling defendants objected. The district court, held that: (1) the Tribe and the Authority were not judicially estopped from seeking claims bar order in settlement, without carve-out for nonsettling defendants; (2) the nonsettling defendants did not have a potential viable claim for indemnification against the Tribe and the Authority; (3) nonsettling defendants were not joint tortfeasors with the Tribe and the Authority, as required for nonsettling defendants to have viable contribution claims; (4) nonsettling defendants did not have a potential viable claim for fraud; (5) nonsettling defendants did not have a potential viable claim for deepening insolvency; (6) the Tribe and the Authority did not waive sovereign immunity from suit with respect to any claims that nonsettling defendants might later assert against them; and (7) the proposed settlement was fair and reasonable, warranting its approval. Motion granted and settlement approved.

87. *In re Linda Rose Whitaker, Debtor, Paul W. Bucher, Trustee v. Dakota Finance Corporation*, Nos. 12–6004, 12–6005, 12–6006, 12–6007, 2012 WL 2924252, 474 B.R. 687 (8th Cir. 2012). Chapter 7 bankruptcy trustees (the “Trustees”) brought four adversary proceedings against The Lower Sioux Indian Community (the “Tribe”) and its “subsidiary,” Dakota Finance Corporation. In three of the proceedings, the Trustees are pursuing the Tribe and debtors for turnover of ongoing tribal revenue payments owed to the debtors under the Tribe’s ordinances and the Indian Gaming Regulatory Act. In one of the proceedings, the Trustee is seeking to avoid a lien asserted by Dakota Finance Corporation or compel turnover. The Bankruptcy Court granted defendants’ motion to dismiss on sovereign immunity grounds, on the theory that Congress had not abrogated the immunity that they possessed as an Indian tribe and tribal finance company. The Trustees appealed. The Bankruptcy Appellate Panel held that: (1) Congress did not unequivocally express its intent to abrogate sovereign immunity of Indian tribes in suits under the Bankruptcy Code; and (2) the tribal finance company was sufficiently close to the Tribe to assert its sovereign immunity, and could not be subject of avoidance actions brought by the Chapter 7 Trustees. Affirmed.

88. *Somerlott v. Cherokee Nation Distributors, Inc.*, No. 10–6157, 2012 WL 3055566, 686 F.3d 1144 (10th Cir. 2012). An employee brought a federal employment discrimination claim against CND, LLC, a

limited liability corporation wholly owned and regulated by the Cherokee Nation. The employee alleged violations of Title VII and the Age Discrimination in Employment Act. The district court, 2010 WL 1541574, dismissed the complaint for lack of subject matter jurisdiction. The employee appealed. The appellate court held that: (1) the tribal corporation was not immune from the employee's federal employment discrimination claims under tribal sovereign immunity; and (2) the employee failed to preserve an argument regarding sovereign immunity. Affirmed.

89. *Cook Inlet Region, Inc. v. Rude*, No. 11-35252, 2012 WL 3553477, 690 F.3d 1127 (9th Cir. 2012). An Alaska Native regional corporation (the "Corporation"), formed under the Alaska Native Claims Settlement Act (ANCSA), brought an action against shareholders and former directors, alleging defendants violated ANCSA and Alaska law by soliciting shareholder signatures for petitions for a vote to lift alienability restrictions on corporation's stock and for a special shareholder meeting to consider certain advisory resolutions. The Corporation moved for summary judgment. The district court, 2010 WL 5146520, granted the motion. The district court subsequently denied defendants' motion for relief from judgment insofar as it sought relief on the ground that the district court lacked federal-question subject matter jurisdiction. The Defendants appealed. The appellate court held that district court had federal-question jurisdiction over ANCSA claims. The fact that the provision of ANCSA governing shareholder petitions incorporated a provision of state law that prohibited false and materially misleading statements in a solicitation of proxies did not change the fact that the case arises under federal law. Affirmed.

K. Sovereignty, Tribal Inherent

90. *State v. Eriksen*, No. 80653-5, 172 Wash.2d 506, 259 P.3d 1079 (2011). The Defendant, a non-native American, was convicted in the Superior Court of driving under the influence (DUI) in connection with an incident where she was detained by a tribal police officer who pursued her beyond the borders of an Indian reservation after the tribal police officer observed her committing alleged traffic infractions. Defendant moved for discretionary review. On reconsideration, the Supreme Court held that the tribal police officer lacked the inherent authority to stop and detain the Defendant on state land outside Indian reservation. Reversed and remanded.

91. ***DesAutel v. Dupris***, No. CV-11-0301-EFS, 2011 WL 5025270 (E.D. Wash. 2011). The Plaintiffs, Shawn DesAutel, Tamara Davis, and Tonia DesAutel, filed a pro se lawsuit. The essence of Plaintiffs' ninety-two page Complaint is that the Colville Tribal Court and Business Council and individuals connected with those entities (collectively "Defendants") violated the Plaintiffs' U.S. constitutional rights: (1) by granting them adopted tribal membership rather than enrolled tribal membership; (2) by the process used to deny enrolled tribal membership; and (3) by requiring Mr. DesAutel to pay the Colville Business Council's attorney fees and costs incurred as a result of his tribal court lawsuits. Although the Plaintiffs are treated as adopted tribal members, the Plaintiffs sought enrolled tribal membership which would allow the Plaintiffs to receive additional tribal per capita payments. The Plaintiffs asked the Court to set aside the Colville Business Council and Colville Tribal Court's decisions and orders and find that the Plaintiffs are entitled to enrolled tribal membership and receipt of the accompanying per capita payments. The Court denied the Plaintiffs' motions and entered judgment in the Defendants' favor.

92. ***State v. Smith***, No. 07FE0142; A142178, 2011 WL 5866211, 268 P.3d 644, 246 Or. App. 614 (2011). The Defendant was convicted in the Circuit Court of attempting to elude a police officer, failing to perform duties of a driver, driving under the influence of intoxicants, and reckless driving. Defendant appealed the conviction. The Appellate Court held that: (1) the "hot pursuit" provision of the tribal code applied both to tribal police acting outside of their jurisdictional authority and non-tribal police acting outside of their jurisdictional authority; (2) the arresting officer was not required to follow warrant requirements of tribal code in arresting the Defendant; (3) as matter of first impression, a non-tribal police officer may arrest a person for a traffic offense on the Warm Springs reservation under the "hot pursuit" provision of the tribal code; and (4) a city police officer is authorized to stop and arrest a driver on the reservation. Affirmed.

93. ***Carden v. Owle Construction L.L.C.***, No. COA11-298, 2012 WL 120069, 720 S.E.2d 825 (2012). The Plaintiff brought an action against a tribal casino and construction company after he was struck by a passing vehicle while standing at a crosswalk at an intersection where the construction company was carrying out improvements. The Casino and company filed a motion to dismiss, alleging the tribal casino gaming entity was a necessary party, and casino moved in the alternative to "remove" to the tribal court. The Superior Court entered a consent order, stayed the

action, and removed the matter to the Tribal Court. After a jury trial, which resulted in a mistrial and settlement of Plaintiff's claims against the casino and gaming entity, the Plaintiff filed a notice of dismissal in the Tribal Court and thereafter filed a motion to lift the stay. The Superior Court denied the motion, and the Plaintiff appealed. The Appellate Court held that the action was removed, and thus the Superior Court could not lift the stay. Affirmed.

94. ***Bradley v. Bear***, No. 104,080, 2012 WL 167337, 46 Kan.App.2d 1008, 272 P.3d 611 (2012). Nancy Sue Bear claimed the Brown County District Court did not have jurisdiction to dissolve her family partnership and then partition and order the sale of real estate that she and her family, all enrolled members of the Kickapoo Nation Tribe, farmed on the Kickapoo Reservation. The Appellate Court relied on the rule that Indian tribes are domestic dependent nations that exercise inherent sovereign authority over their members and territories. Because all of the parties to their action are enrolled members of the Kickapoo Nation Tribe and all of the land is located within the Kickapoo Reservation, the Appellate Court held that the Tribal Court is the proper forum for resolving this dispute, reversed the judgments of the District Court, and remanded the matter with directions to dismiss the case.

95. ***Grand Canyon Skywalk Development, L.L.C. v. 'SA' NYU WA Inc.***, No. CV12-8030, 2012 WL 1207149 (D. Ariz. 2012). AMENDED ORDER. The Plaintiff asked the Court to declare that the Hualapai Indian Tribe has no authority to condemn the Plaintiff's private contract rights in the Skywalk Agreement and that the Hualapai Indian Tribe's condemnation ordinance is invalid. The Plaintiff argues that it is not required to exhaust its remedies in Hualapai Tribal Court because several exceptions to exhaustion apply. The Court's order of February 28, 2012, found that the Plaintiff had failed to show two of the exceptions applied—it is "plain" that the Tribal Court lacks jurisdiction or exhausting the issue of jurisdiction in the Tribal Court will be futile. The Court found, however, the Plaintiff made a colorable claim that the bad faith exception to the exhaustion requirement applied. The Court ordered the parties to provide additional briefing, and the parties filed supplemental briefs. For the reasons stated below, the Court concluded the bad faith exception to exhaustion did not apply. Therefore, the Court denied the Plaintiff's motion for a TRO, required the Plaintiff to exhaust its jurisdictional arguments in the Tribal Court, and stayed this action. IT IS ORDERED: (1) The Plaintiff Grand Canyon Skywalk Development Company's complaint is stayed in the interest of requiring the Plaintiff to exhaust its

Tribal Court remedies. (2) The Plaintiff's motion for an emergency TRO is denied. (3) The Defendant's motion to strike is denied as moot.

96. *Fox Drywall & Plastering, Inc. v. Sioux Falls Construction Company*, No. 12-CIV-4026, 2012 WL 1457183 (D.S.D. 2012). The Defendant, Sioux Falls Construction Company, entered into a contract with the Flandreau Santee Sioux Tribe (the "Tribe") to serve as the general contractor for the construction of an addition to the Royal River Casino and Motel near Flandreau, South Dakota. Sioux Falls Construction entered into individual subcontractor agreements with each of the Plaintiffs, Fox Drywall & Plastering, Inc., S and S Builders, Inc., G & D Viking Glass, Inc., and H & R Roofing of South Dakota, Inc. (collectively "Plaintiffs" or "subcontractors"). After the project was completed, the Tribe brought suit against Sioux Falls Construction in the Flandreau Santee Sioux Tribal Court ("Tribal Court"). Sioux Falls Construction filed a third-party indemnity and contribution action ("third-party complaint") against the Plaintiffs in the Tribal Court. The Plaintiffs filed a motion to dismiss based on the Tribal Court's lack of subject matter jurisdiction. The Tribal Court initially denied the motion to dismiss, and the Plaintiffs appealed. The Flandreau Santee Sioux Tribal Appellate Court (Tribal Appellate Court) remanded the case to the Tribal Court to conduct an evidentiary hearing. After conducting an evidentiary hearing, the Tribal Court denied the motion to dismiss. The Tribal Appellate Court upheld the Tribal Court's determination that it had jurisdiction over the third-party complaint. Plaintiffs filed an action in Federal Court seeking a preliminary injunction to enjoin the Tribal Court's assertion of jurisdiction over Sioux Falls Construction's third-party complaint. Sioux Falls Construction resists. On April 24, 2012, the federal court held a hearing on the preliminary injunction. The Federal Court denied the motion for a preliminary injunction.

97. *United States v. Gatewood*, No. CR-11-08074, 2012 WL 2389960 (D. Ariz. 2012). Before the Court was the Defendant Jefferson Gatewood's motion to dismiss counts I and II of the superseding indictment ("Motion"). The Defendant was charged in counts I and II with sexually abusing a minor. The Defendant was previously tried in Tribal Court for sexually abusing this same minor. The Defendant argued the re-prosecution violates his Constitutional rights because the Dual Sovereignty Doctrine, which allows two prosecutions for the same offense by independent sovereigns, violates the Double Jeopardy Clause of the Fifth Amendment. In addition, the Defendant argued that the *Bartkus 2* exception to the Dual Sovereignty Doctrine applies here because there

was law enforcement and institutional collusion between the federal government and the White Mountain Apache Tribe. The Court held that the *Bartkus* exception does not bar the re-prosecution by the federal government, denied the Defendant's motion to dismiss counts I and II, and denied the Defendant's request for an evidentiary hearing.

98. *DeCoteau v. District Court*, No. 4:12-030, 2012 WL 2370113 (D.N.D. 2012). Before the Court was the Respondent, the District Court, 85th Judicial District, Brazos County, State of Texas's motion to dismiss. Tyrell DeCoteau asserts that he and the Respondent, Francyne DeCoteau, were married in Bottineau, North Dakota. They have two minor children. They are members of the Turtle Mountain Band of Chippewa Indians. Tyrell DeCoteau is a member of the United States Army and is currently stationed in El Paso, Texas. Francyne DeCoteau resides with the children in College Station, Texas. On an unknown date, Tyrell DeCoteau filed for divorce in the Turtle Mountain Tribal Court. Francyne DeCoteau filed for divorce in the Texas State District Court in Bell County, Texas. The Texas State District Court issued a temporary restraining order; the Texas State District Court issued an employer's order to withhold income; and the Texas State District Court issued a supplemental temporary order. On May 1, 2006, the Turtle Mountain Tribal Court (Tribal Court) issued an order finding that it had exclusive jurisdiction over the divorce and child custody matter and further found that the Texas orders were null and void. The Tribal Court ordered that the parties share joint custody of the children. Thereafter, the Tribal Court issued an order granting a dissolution of the DeCoteaus' marriage. Later, the Tribal Court issued an order granting Tyrell DeCoteau custody of the children for one year effective June 15, 2011. On January 6, 2012, the Tribal Court issued an arrest warrant for Francyne DeCoteau for noncompliance with the court's orders. On March 19, 2012, Tyrell DeCoteau filed a motion in Federal District Court seeking the following relief: (1) the Petitioner have judgment against Respondents whereby this Court issue a Temporary Restraining Order preventing Respondent District Court, 85th Judicial District, Brazos County, State of Texas from taking jurisdiction of the custody action in Texas until the parties have exhausted Tribal Court remedies; (2) the Court issue a declaratory judgment declaring the Tribal Court has exclusive jurisdiction under Texas laws and Tribal laws, the Tribal Court Orders are enforceable under the rule of comity and that the warrant for Respondent Francyne DeCoteau's arrest is valid and enforceable, and the Bureau of Indian Affairs must make arrangements to extradite the Respondent Francyne DeCoteau

back to the Turtle Mountain Tribal jurisdiction; and (3) the Court issue a permanent injunction against the Respondent Francyne DeCoteau ordering her to cease and desist in pursuing this matter in the Texas courts and ordering Respondent District Court, 85th Judicial District, Brazos County, State of Texas from taking jurisdiction of the custody action in Texas. On April 30, 2012, the District Court, 85th Judicial District, Brazos County, State of Texas (“Texas State District Court”) filed a motion to dismiss under Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure. The Texas State District Court argued the Court does not have jurisdiction and DeCoteau’s claim is barred. DeCoteau did not file a response to the motion. DeCoteau has failed to respond to the Texas State District Court’s motion, and the Court takes that failure as an admission that the motion is well taken. In addition, the Court also finds as a matter of law that it does not have subject-matter or personal jurisdiction. The Texas District Court’s motion to dismiss was granted.

99. *Rincon Mushroom Corporation v. Mazzetti*, No. 10–56521, 2012 WL 2928605 (9th Cir. 2012). Not selected for publication in the Federal Reporter. (From the order.) The petition for panel rehearing is granted. The memorandum filed on April 20, 2012 is withdrawn and replaced by the memorandum filed contemporaneously with this order. Plaintiff, Rincon Mushroom Corporation of America, the owner of a five-acre parcel within the Rincon Band of Luiseno Mission Indians tribal reservation, appealed the District Court’s dismissal of its action to enjoin Rincon tribal officials from enforcing tribal environmental and land-use regulations on its property on the ground that Rincon Mushroom has not exhausted its tribal remedies. ... The Court is not now deciding whether the tribe actually has jurisdiction under the second *Montana* exception. Where, as here, the tribe’s assertion of jurisdiction is “colorable” or “plausible,” the Tribal Courts get the first chance to decide whether tribal jurisdiction is actually permitted. If the Tribal Courts sustain tribal jurisdiction and Rincon Mushroom is unhappy with that determination, it may then repair to Federal Court. ... However, the District Court abused its discretion in dismissing the case rather than staying it. When “dismissal might mean that [the plaintiff] would later be ‘barred permanently from asserting his claims in the federal forum by the running of the applicable statute of limitations’ ... the District Court should ... stay[], not dismiss[], the federal action pending the exhaustion of tribal remedies.” *Sharber v. Spirit Mountain Gaming Inc.*, 343 F.3d 974, 976 (9th Cir. 2003) (citation omitted). Here, at least some of Rincon Mushroom’s claims would be time-barred if it had to re-file after exhausting its tribal remedies. For example,

the complaint asserts a claim under 42 U.S.C. § 1985(3)—which is subject to a one-year statute of limitations—challenging conduct that occurred in 2006. See *McDougal v. Cnty. of Imperial*, 942 F.2d 668, 673–74 (9th Cir. 1991). That claim would be time-barred if filed anew tomorrow. Thus, the District Court’s dismissal is reversed and the case remanded with instructions to stay the case pending Rincon Mushroom’s exhaustion of tribal remedies. Reversed and remanded.

L. Tax

100. *Red Earth L.L.C v. United States*, Docket Nos. 10–3165, 10–3191, 10–3213, 2011 WL 4359919, 657 F.3d 138 (2011). (From the Opinion) “Appeal from an order of the Western District of New York granting a preliminary injunction to stay enforcement of provisions of the Prevent All Cigarette Trafficking Act (PACT Act) that require mail-order cigarette sellers to pay state excise taxes. The government argues that the District Court erred in concluding that the Plaintiffs were likely to succeed on their claim that the PACT Act’s provision requiring out-of-state tobacco sellers to pay state excise taxes regardless of their contact with that state violates due process. We affirm the District Court’s order granting the preliminary injunction. AFFIRMED.”

101. *Confederated Tribes and Bands of the Yakama Indian Nation v. Gregoire*, No. 10–35776, 2011 WL 4430858, 658 F.3d 1078 (9th Cir. 2011). Yakama Indian Tribes brought action against various Washington state officials, challenging the state’s cigarette excise tax as violating Indian tax immunity because it purportedly makes retailers on Indian lands liable for payment of tax for sales to non-Indians. The District Court, 680 F. Supp. 2d 1258, granted in part and denied in part the Defendants’ summary judgment motion. Yakama Indian Tribes appealed the decision. The Appellate Court held that the legal incidence of tax did not fall upon Indian retailers, but instead fell on non-Indian purchasers. Affirmed.

102. *United States v. Native Wholesale Supply Co.*, No. 08-CV-850, 2011 WL 4704221, 822 F.Supp.2d 326 (2011). The United States brought an action against a Native American-owned tobacco importer for failing to pay its quarterly assessments as required by the Fair and Equitable Tobacco Reform Act (FETRA). The United States moved for summary judgment. Following transfer, the parties cross-moved for summary judgment. The Court held that: (1) the Commodity Credit Corporation’s (CCC) interpretation of FETRA was reasonable, and

therefore entitled to Chevron deference; (2) the FETRA did not violate the Takings Clause or the Due Process Clause of the Fifth Amendment; and (3) the Native American importers were not exempt from FETRA. Government's motion granted; defendant's motion denied.

103. *Oneida Indian Nation of New York v. Madison County*, Docket Nos. 05-6408, 06-5168, 06-5515, 665 F.3d 408 (2nd Cir. 2011). Indian tribe brought actions against counties to enjoin them from assessing property tax on tribe-owned property acquired on the open market and from enforcing those taxes through a tax sale or foreclosure. In the first case, the District Court, 145 F. Supp. 2d 226, 145 F. Supp. 2d 268, determined that the property was not taxable and the County appealed. The Appellate Court, 337 F.3d 139, vacated the judgment, and certiorari was granted. The Supreme Court, 544 U.S. 197, 125 S. Ct. 1478, 161 L. Ed. 2d 386, reversed and remanded. On remand parties cross-moved for summary judgment. The District Court entered summary judgment in favor of the Tribe, 401 F. Supp. 2d 219, and denied County's motion for relief from judgment, 235 F.R.D. 559. County appealed. In the second case, the District Court, 432 F. Supp. 2d 285, entered summary judgment in favor of the Tribe. County appealed, and cases were consolidated on appeal. The Appellate Court, 605 F.3d 149, affirmed, and certiorari was granted. Tribe declared that it waived its tribal sovereign immunity from suit. The Supreme Court, 131 S. Ct. 704, 178 L. Ed. 2d 587, vacated and remanded. On remand, the Appellate Court held that: (1) the Tribe irrevocably waived its claim to tribal sovereign immunity from enforcement of real property taxation through foreclosure by state, county, and local governments; (2) the Tribe abandoned its claim on appeal that Nonintercourse Act's statutory restrictions on alienation of Indian land prohibited counties' tax foreclosures; (3) vacatur of District Court's grant of summary judgment to Indian tribe was proper, to the extent that judgment rested upon doctrine of tribal sovereign immunity and Nonintercourse Act; (4) counties' notices of tax enforcement proceedings provided tribe with sufficient notice of its due-process-protected right to redeem its properties from foreclosure and enable it to take appropriate steps to protect property before redemption period expired; (5) the District Court was required to decline supplemental jurisdiction over tribe's claim that property that tribe acquired on open market was "Indian reservation" property under New York law and thus was exempt from taxation; and (6) counties forfeited their arguments on appeal in opposition to tribe's claim that it was entitled on grounds of equity to declaratory judgment that it did not owe interest or penalties on taxes that accrued prior to the Supreme Court's holding that

overturned prior decisional law under which property purchased on open market was not subject to taxation on ground that tribe possessed sovereign authority over property. Affirmed in part, reversed in part, vacated in part, and remanded with instructions.

104. *Tonasket, dba Stogie Shop; and David T. Miller v. Sargent*, No. CV–11–073, 2011 WL 5508992, 830 F.Supp.2d 1078 (2011). Tribally-licensed cigarette retailer and individual brought action against federally-recognized Indian tribe, individual tribal officials, and others, challenging requirement that retailer acquire its cigarettes from certain wholesalers. The Defendants moved to dismiss. The District Court held that: (1) tribe and tribal officials were entitled to tribal sovereign immunity, and (2) the State of Washington was a “necessary party” for the purposes of mandatory joinder. Motion granted.

105. *Seneca Nation of Indians v. State of New York*, No. CA 11-01193, 2011 WL 5609815, 89 A.D.3d 1536, 933 N.Y.S.2d 500 (2011). The Plaintiff commenced this action seeking, inter alia, individual declarations that 20 NYCRR 74.6 (hereafter, the rule), concerning taxes imposed on cigarettes on qualified Indian reservations, is null, void and unenforceable based on the failure of the Defendant, New York State Department of Taxation and Finance (“Department”), to comply with §§ 201-a, 202-a, and 202-b of the State Administrative Procedure Act. The Department promulgated the rule in accordance with the statutory mandate governing the sale of tax-exempt cigarettes on qualified reservations to members of an Indian nation or tribe, as well as the collection of the excise tax on cigarette sales to non-members of the nation or tribe. The Court ruled that 20 NYCRR 74.6 is valid and enforceable, and that the Defendant, New York State Department of Taxation and Finance, substantially complied with the State Administrative Procedure Act §§ 201-a, 202-a and 202-b in promulgating that rule and as modified the judgment is affirmed without costs.

106. *State v. Comenout*, No. 85067-4, 2011 WL 6091351, 173 Wash.2d 235, 267 P.3d 355 (2011). State charged Defendants, who were members of Indian tribe, with engaging in the business of purchasing, selling, consigning, or distributing cigarettes without a license, unlawful possession or transportation of unstamped cigarettes, and first degree theft. The Defendants filed motion to dismiss the charges. The Superior Court denied the motion. The Defendants sought discretionary review. The Appellate Court certified case to the Supreme Court. The Supreme Court held that: (1) the State had nonconsensual criminal jurisdiction over

the Defendants, and (2) the unlicensed store from which the Defendants were allegedly selling unstamped cigarettes was not exempt from state cigarette tax. Affirmed.

107. *Muscogee (Creek) Nation v. Pruitt*, No. 11–7005, 2012 WL 627967, 669 F.3d 1159 (10th Cir. 2012). Indian tribe brought action alleging that Oklahoma’s tobacco tax-stamp scheme violated federal law and tribal sovereignty. The District Court for the Eastern District of Oklahoma dismissed the complaint, and tribe appealed. The Court of Appeals, Matheson, Circuit Judge, held that: (1) the District Court had subject matter jurisdiction over the matter; (2) the requirement that retailers on Indian reservations obtain state tax exemption certificates was not preempted by federal statute; (3) the requirement that tribally-licensed retailers purchase tobacco products from state-licensed wholesalers did not impermissibly infringe on tribal self-governance; (4) the use of probable-demand formula to limit number of tax-free stamps did not impose impermissible burden on tribal self-governance; (5) the State’s practice seizing cigarettes outside Indian Country that did not have tax or tax-free stamp did not impermissibly infringe on tribe’s sovereignty; (6) the statutes did not unduly interfere with tribal members’ ability to buy cigarette brands of their choosing; and (7) the Indian trader statute did not preempt statutes requiring tobacco manufacturers that did not join master settlement agreement (MSA) to pay into escrow fund. Affirmed.

108. *Mashantucket Pequot Tribe v. Town of Ledyard*, No. 3:06cv1212, 2012 WL 1069342 (D. Conn. 2012). (From the Opinion) “This case concerns the authority of the Defendants, the State of Connecticut (the “State”) and the Town of Ledyard (the “Town”), to tax slot machines owned by non-Indian entities leased by plaintiff Mashantucket Pequot Tribe (Tribe). In counts one and two, the Tribe complains that the Town’s property tax is preempted by federal law; in count three, the Tribe claims that the tax interferes with its ability to exercise its sovereign functions. The parties have filed cross-motions for summary judgment. . . . [t]he Plaintiff’s motion for summary judgment will be granted. The Defendants’ motion in limine and motions for summary judgment will be denied.”

109. *United States v. Wilbur*, Nos. 10–30185, 10–30186, 10–30187, 10–30188, 2012 WL 1139078, 674 F.3d 1160 (9th Cir. 2012). Pursuant to their guilty pleas, the Defendants were convicted in the District Court, 2010 WL 519735, of a conspiracy to violate the Contraband Cigarette Trafficking Act (CCTA), and they appealed. The Appellate Court

held that: (1) the Defendants' actions in selling unstamped cigarettes violated CCTA during periods that the Indian tribe's cigarette tax contract (CTC) with state was not in effect; (2) the rules applicable to constructive amendment of indictments or variances which prejudice a defendant's substantial rights did not apply where indictment charged a single continuous conspiracy to violate the CCTA, while the facts showed two separate conspiracies with a gap between them; and (3) neither Treaty at Point Elliott nor Washington law deprived Washington of the power to enforce its cigarette tax laws against reservation Indians' trade of tobacco. Affirmed in part, reversed in part, and remanded.

110. *Matheson dba Jess's Wholesale v. Smith*, No. 3:11–05946, 2012 WL 1802278 (D. Wash. 2012). Before the Court were the Defendants' (together, the "State") Motion to Dismiss the Plaintiff's complaint for lack of subject matter jurisdiction and the Plaintiff's motion for a preliminary injunction. The Plaintiff Jessica Mae Matheson is a member of the Puyallup Indian Tribe. The Plaintiff does business in Washington State as a sole proprietorship called "Jess's Wholesale," a licensed Washington cigarette wholesaler. The case arises from a \$9.2 million Washington State Department of Revenue tax assessment against the Plaintiff, in connection with her cigarette wholesale business. The Plaintiff unsuccessfully opposed the assessment before the Washington Board of Tax Appeals, and in the Thurston County Superior Court. The case is currently pending in the Washington State Court of Appeals. The Plaintiff alleged primarily that the State (and its agents and employees) did not have the authority to tax her business and that the State knew it. She claims to be the only female registered Indian ever granted a Washington State wholesale license and claims that the taxing authority has discriminated against her both because she is female and because she is an Indian. The Plaintiff asserted six broad claims for relief including a declaratory judgment that she is not subject to the tax and enjoining the State from attempting to collect the assessment at issue in state court. The State sought dismissal of all of the Plaintiff's claims under Fed. R. Civ. P 12(b)(1) and (6), arguing that the Tax Injunction Act (28 U.S.C. § 1341) deprives the federal court of subject matter jurisdiction to hear the Plaintiff's injunction, declaratory judgment, and damage claims, because she has a plain, speedy, and adequate remedy for those claims in state court. The Court found that the Tax Injunction Act deprives the court of

subject matter jurisdiction over the Plaintiff's injunctive, declaratory and damages claims. The Court granted the State's motion to dismiss, dismissed the Plaintiff's claims, and denied her motion for preliminary injunction.

111. *Miccosukee Tribe Of Indians Of Florida v. United States*, No. 11–23107, 2012 WL 2872166, 877 F.Supp.2d 1331 (2012). Before the Court was the Respondent's, the United States of America, motion to deny petitions to quash. On August 29, 2011, the Tribe filed a petition to quash summons to Morgan Stanley Smith Barney in Case No. 11–23107, seeking to quash a summons issued to Morgan Stanley Smith Barney ("Morgan Stanley") on August 9, 2011 for select documents encompassing calendar year 2010. The Court rejected the Tribe's argument that sovereign immunity barred the Internal Revenue Service's ("IRS") issuance of a summons to Morgan Stanley seeking production of records for the tax years 2006 through 2009 for accounts belonging to the Tribe's former chairman. The Court concluded the Government has met all four Powell (*United States v. Powell*, 379 U.S. 48) factors in demonstrating its summonses may be enforced. The Tribe has failed to meet its heavy burden of refuting the Government's showing or otherwise demonstrating that enforcement would be an abuse of the Court's process.

112. *United States v. Morrison*, Nos. 10–1926, 10–1951, 2012 WL 2877648, 686 F.3d 94 (2nd Cir. 2012). The Defendant was charged by indictment with a Racketeer Influenced and Corrupt Organizations Act (RICO) conspiracy and multiple other crimes. Following denial of the Defendant's motion to dismiss the indictment, 521 F. Supp. 2d 246, and a jury verdict finding the Defendant guilty of a RICO conspiracy and being a felon in possession of a firearm, the Defendant moved to dismiss the RICO charge or for a new trial. The District Court, 596 F. Supp. 2d 661, denied the motion, and the Defendant moved for reconsideration. The District Court, 706 F. Supp. 2d 304, granted reconsideration in part, vacating the RICO conviction. The parties cross-appealed. Morrison claimed that the CCTA was inapplicable to him given New York's "forbearance policy," under which the State refrained from collecting taxes on cigarette sales transacted on Native American reservations. According to Morrison, this forbearance policy barred his conviction under the CCTA because that statute provides that, in order for a federal prosecution to lie, the state in which the allegedly contraband cigarettes are found must "require" tax stamps to be placed on cigarettes. The Appellate Court held that: (1) prior certification to the New York Court of Appeals of questions regarding the New York Tax Law section delineating the parameters of a

Contraband Cigarette Trafficking Act (CCTA) violation did not support a determination that the section was unconstitutionally vague and (2) the Defendant could be validly convicted under the CCTA, even though, at the time, the State was refraining from enforcing taxes on on-reservation sales. Reversed and remanded.

M. Trust Breach and Claims

113. *Jicarilla Apache Nation v. United States*, No. 02-25L, 2011 WL 3796273, 100 Fed.Cl. 726 (2011). In tribal trust case, Jicarilla Apache Nation filed suit against the United States seeking an accounting and to recover for monetary loss and damages relating to the government's breach of fiduciary duties by failing to pool Nation's trust funds with those of other tribes for investment purposes and by immediately removing funds from trust fund to cover disbursement check, thereby creating lag between removal of funds and check negotiation during which time no income was earned on funds. The government moved for partial summary judgment on pooling and disbursement lag claims, and Nation cross-moved for partial summary judgment on disbursement lag claim. The Court held that: (1) the claims that the government violated its duty to maximize trust income by prudent investment are within Indian Tucker Act jurisdiction; (2) the pooling claim fell within Indian Tucker Act jurisdiction; (3) the fact issues precluded summary judgment as to pooling claim; but (4) the disbursement lag claim was not within Indian Tucker Act jurisdiction. The Plaintiff's motion denied; the Defendant's motions denied for one claim and granted for other claim.

114. *Samish Indian Nation v. United States*, No. 2010-5067, 657 F.3d 1330 (2011), Rehearing and *rehearing en banc* denied (2012). Indian tribe brought action against the United States under Tucker Act and Indian Tucker Act to recover compensation for benefits it would have received under Tribal Priority Allocation (TPA) system and Indian Health Service (IHS) funding process but for Department of Interior's (DOI) improper omission of the Tribe from list of federally recognized tribes. The Court of Federal Claims, 82 Fed. Cl. 54 and 90 Fed. Cl. 122, dismissed the complaint, and the Tribe appealed. The Appellate Court held that: (1) the statutes relating to TPA system were not money-mandating; (2) the State and Local Fiscal Assistance Act of 1972 was money-mandating; and (3) the Antideficiency Act did not limit the Tribe's recovery for funds under State and Local Fiscal Assistance Act of 1972. Affirmed in part, reversed in part, and remanded.

115. *Nez Perce Tribe v. United States*, No. 06–910, 2011 WL 4498762, 101 Fed.Cl. 139 (2011). The Nez Perce Tribe alleged that the United States has breached its duties as trustee of certain assets of the Tribe, resulting in financial losses. See *Nez Perce Tribe v. United States*, 83 Fed. Cl. 186, 187 (2008). Almost immediately after commencing this action, the Tribe filed an action in the U.S. District Court for the District of Columbia (the “District Court”), *Nez Perce Tribe v. Kempthorne*, No. 1:06–cv–02239, alleging the same operative facts but seeking different relief. Because the filing progression was initially in doubt, the Court issued an order to show cause directing the Tribe to demonstrate why its case should not be dismissed under 28 U.S.C. § 1500, which denies jurisdiction to this court over “any claim for or in respect to which the plaintiff . . . has pending in any other court any suit or process against the United States.” The Court established that the case brought in this Court was filed before the action was commenced in the District Court and ruled that § 1500 consequently was no bar because “Nez Perce’s complaint in the District Court was not ‘pending’ when the Tribe filed its complaint in this Court.” *Nez Perce*, 83 Fed. Cl. at 195. The government requested that the Court reexamine its subject matter jurisdiction under § 1500 and dismiss the complaint in light of a recently issued Supreme Court decision interpreting and applying that statute, *United States v. Tohono O’odham Nation*, ___ U.S. ___, 131 S. Ct. 1723 (2011). The parties do not dispute that this case and the action filed in the District Court rest on the same operative facts. Neither do they contest that the instant suit was filed before that action was commenced in the District Court, albeit only by a few hours. The setting for application vel non of § 1500 is thus complete for purposes of the government’s motion to revisit the jurisdictional issue. In essence, the government contends that a later-filed action in another court divests this Court of jurisdiction over an earlier-filed action, so long as both suits are based on the same operative facts. The government’s motion to dismiss for lack of subject matter jurisdiction was denied.

116. *Cobell v. Salazar*, No. 96-01285, 2011 WL 4590776, 816 F.Supp.2d 10 (2011). Following final judgment approving a \$3.412 billion settlement in class action involving allegations that the United States breached its trust obligations by mismanaging the money, land and resource assets of more than 450,000 Indians, the Plaintiffs filed motions for appeal bonds to be imposed against appellants. The Court held that attorney fees that could be assessed on appeal were not taxable as costs covered by appeal bonds. Motions denied.

117. *Wolfchild v. United States*, Nos. 03-2684L, 01-568L, 2011 WL 5075078, 101 Fed.Cl. 92 (2011). The government moved for reconsideration of a partial final judgment of the Court of Federal Claims, 101 Fed. Cl. 54, granting awards, pursuant to the Indian Tribal Judgment Funds Use or Distribution Act, to approximately 20,750 persons of Indian descent on their claims for revenue derived from use of lands reserved for eligible Indians. The Court of Federal Claims held that upon Reports Elimination Act's repeal of Secretary of the Interior's duty under Indian Tribal Judgment Funds Use or Distribution Act to submit to Congress a plan for the use and distribution of the funds to pay a judgment of the Court of Federal Claims to any Indian tribe, the Court of Federal Claims regained its general powers of effectuation of its judgments, including by issuing "a remit, remand, and direction to the Secretary of the Interior to provide a report to the court within the time specified in Indian Tribal Judgment Funds Use or Distribution Act." Motion denied.

118. *Robinson v. United States*, No. 2:11-01227, 2011 WL 5838472 (E.D. Cal. 2011). This matter was before the Court on the motion of the United States, to dismiss the Plaintiffs, Dennis, Spencer, Rickie, Cynthia and Vickie Robinson's (collectively, "Robinsons" or "Plaintiffs") lawsuit. This lawsuit involves land held in trust by the United States for the benefit of the Indians of the Mooretown Rancheria, also known as the Maidu Indians of California ("Tribe"). The complaint alleged that the Tribe's construction of a casino and other facilities on the land has encroached upon and interfered with the Plaintiffs' rights to a sixty foot, non-exclusive road and utility easement the Plaintiffs allege they own. Specifically, the Plaintiffs allege that, "[b]ased on the United States' awareness and knowledge of the [Tribe's] planned construction activities, it knew or should have known that these activities would adversely affect the easement . . . and that, as a result, these activities would violate the Robinsons' legal rights." The gravamen of the Plaintiffs' complaint is that the United States "took no steps to warn or give notice to the [Tribe] that the planned activities would" interfere with the Plaintiffs' use of the easement, refused to take steps to rectify the alleged damage, and violated its duty to maintain the subject easement. The Court granted the United States' motion to dismiss without leave to amend, holding that the United States' sovereign immunity precluded the Court from exercising subject matter jurisdiction over the Robinsons' claims.

119. *The Shoshone Indian Tribe of the Wind River Reservation, Wyoming v. United States*, No. 2010-5150, 2012 WL 34382, 672 F.3d 1021 (2012). Indian tribes brought actions against the

United States for breach of fiduciary duty in management and payment of royalties on oil and gas production on Indian lands. The actions were consolidated. The Court of Federal Claims, 93 Fed. Cl. 449, granted summary judgment for United States. Tribes appealed. The Appellate Court held that: (1) the Tribes had not been prevented from knowing all material facts that established government's liability; (2) the government's misstatements and omissions did not toll accrual of statute of limitations for their claim; (3) the Tribes should have known that oil and gas leases had not been competitively bid; (4) the Interior Appropriations Act did not reach claims related to trust assets involving losses resulting from terms of contract being suboptimal; (5) the failure to strictly comply with requirements of Non-intercourse Act rendered any resulting conveyance void; (6) the government's unauthorized lease of Indian land to third parties for oil and gas production did not create implied right for lessees to extract oil and gas from that land; and (7) remand was required. Vacated and remanded.

120. *Richard v. United States*, No. 2011–5083, 2012 WL 1233012, 677 F.3d 1141 (2012). Representatives of the estates of two members of a Sioux Tribe who were killed by an intoxicated driver brought suit claiming that the United States was obligated to reimburse the injured parties for losses sustained. The Court of Federal Claims, 98 Fed. Cl. 278, dismissed for lack of jurisdiction, and the representatives appealed. The Appellate Court held that the “bad men” provision of the Laramie Treaty of 1868 is not limited to governmental actors. Vacated and remanded.

121. *Timbisha Shoshone Tribe v. Salazar*, No. 11–5049, 2012 WL 1673654, 678 F.3d 935 (2012). A faction of Indian tribe, purporting to be its tribal council, brought action against the Departments of the Interior (DOI) and the Treasury (DOT), seeking declaratory and injunctive relief from provision of the Western Shoshone Claims Distribution Act which directed that funds appropriated for the Tribe pursuant to a determination of the Indian Claims Commission (ICC) be distributed directly to individual tribe members rather than to any tribal entity, which the Plaintiffs alleged constituted an unconstitutional taking of tribal property and a denial of equal protection. The government moved to dismiss. The District Court, 766 F. Supp. 2d 175, dismissed for failure to state a claim. The Plaintiffs appealed. The Appellate Court held that the Plaintiffs lacked standing. Vacated and remanded with instructions to dismiss for lack of jurisdiction.

122. *Siemion, dba/White Buffalo Ranch v. Stewert, et al.*, No. 11–120, 2012 WL 1925743 (D. Mont. 2012). The United States Attorney

for Montana, under 28 U.S.C. § 2679(d)(1) and 28 C.F.R. § 15.4(a), has certified that Scott, Hugs, Stewart, and Ten Bear were acting within the scope of their employment with the BIA at the time of the incidents alleged in Siemion's Amended Complaint. Doc. 43. The certification is "prima facie evidence that a federal employee was acting in the scope of her employment at the time of the incident[.]" *Pauly v. U.S. Dept. of Agri.*, 348 F.3d 1143, 1151 (9th Cir.2003) (quoting *Billings v. United States*, 57 F.3d 797, 800 (9th Cir.1995)). Siemion, as the plaintiff, bears the burden of disproving the certification by a preponderance of the evidence. *Pauly*, 348 F.3d at 1151. To disprove the certification, a court may allow a plaintiff to conduct some discovery provided the plaintiff has alleged "sufficient facts that, taken as true, would establish that the defendants' actions exceeded the scope of their employment." *Ikmatian v. U.S.*, 2010 WL 3893610, at *2 (D. Mont. Sept. 28, 2010) (quoting *Stokes v. Cross*, 327 F.3d 1210, 1214 (D.C. Cir. 2003)). Permitting such discovery, however, "must be balanced against the congressional intent 'to protect federal employees from the uncertain and intimidating task of defending suits that challenge conduct within the scope of their employ.'" *Id.*, at *3 (quoting *Brown v. Armstrong*, 949 F.2d 1007, 1011 (8th Cir. 1991)). Siemion has not met her burden. All of the allegations stem from the named Federal Defendants' conduct taken pursuant to their employment. Siemion has not alleged nor has she presented any evidence to demonstrate that any act by any of these Federal Defendants was done in furtherance of their own personal interest or beyond what is ordinarily incidental to duties performed on behalf of their employer. Thus, the Federal Defendants' motion to the extent it seeks to substitute the United States for Scott, Hugs, Stewart, and Ten Bear is granted. The Court has carefully considered the parties' arguments and relevant authority and concludes that the Tribal Defendants' motion to dismiss should be granted. Siemion's claims against Black Eagle and Cabrera are to be dismissed because they are immune from suit in their capacities as Tribal officials. Siemion's claim against Tribal Defendants Tobacco, Snell, Wilhelm, Bends, V. Hill, and T. Hill are to be dismissed for lack of subject matter jurisdiction. To the extent that Siemion alleges that these named Tribal Defendants acted beyond their valid authority, Tribal sovereign immunity may not extend to them. In this event, Siemion's claim against them is appropriately dismissed for lack of subject matter jurisdiction for a different reason. Civil jurisdiction over activities on reservation lands "presumptively lies in the tribal courts unless limited by federal statute or a specific treaty provision. Considerations of comity require the exhaustion of tribal remedies before the claim may be addressed by the district court." Here,

the record does not reflect that Siemion has sought relief in Tribal Court for the claim she asserts here against these named Tribal Defendants, her Tribal Court case involved only the leasing dispute. Accordingly, her claims against the Tribal Defendants must be dismissed.

123. *Otoe–Missouria Tribe of Indians v. United States*, No. 06–937, 2012 WL 1959437, 105 Fed.Cl. 136 (2012). This case is one of many cases before the Court whereby the Defendant alleges that the case must be dismissed pursuant to RCFC 12(b)(1), relying on 28 U.S.C. § 1500 as interpreted by *United States v. Tohono O’odham Nation*, ___ U.S. ___, 131 S. Ct. 1723, 179 L. Ed. 2d 723 (2011) (“*Tohono O’odham*”). In this case, it is undisputed that the Plaintiff filed its complaint in this Court, and then, several hours later and on the same day, filed a complaint in the United States District Court for the Western District of Oklahoma. The Defendant argued that this fact, the order of filing, is irrelevant for purposes of § 1500 and is not pertinent in light of *Tohono O’odham* and, therefore, the case must be dismissed. At 9:01 a.m. Eastern Standard Time on December 26, 2006, Otoe–Missouria filed a complaint with the Court of Federal Claims (“CFC”) alleging the Government’s mismanagement of tribal assets in trusts. On that same day, a second complaint was filed at 2:04 p .m. Central Standard Time in the United States District Court for the Western District of Oklahoma (“District Court”). In this complaint, Otoe–Missouria alleged that the Government had not provided an accurate accounting of its Trust Fund to the Tribe and requested a declaratory judgment that the government has not provided a complete and accurate accounting of the Trust Fund. The Court denied the Defendant’s motion to dismiss.

124. *Klamath Tribe Claims Committee v. United States*, No. 09–75L, 2012 WL 2878551, 106 Fed.Cl. 87 (2012). The Klamath Tribe Claims Committee (Klamath Claims Committee or plaintiff) sought damages for alleged takings and breaches of fiduciary duty committed by the Department of the Interior (“Interior”). It asserted that Interior failed to disburse funds owed to tribal members and to safeguard treaty-based water rights associated with a dam. On February 11, 2011, the Court granted in part a motion filed by Defendant and dismissed two of Plaintiff’s counts for lack of jurisdiction. As to the remaining counts, the Court concluded, under RCFC 19, that a necessary party, the Klamath Tribes (the “Tribes”) must be joined. Subsequently, the Tribes declined to participate in this lawsuit. The Court concluded that the Tribes is an indispensable party and that the inability to join it in this lawsuit requires that the complaint be dismissed.

125. *Blackfeet Housing v. United States*, No. 12–04, 2012 WL 3126771, 106 Fed.Cl. 142 (2012). Before the Court was the Defendant’s motion to dismiss pursuant to RCFC 12(b)(1) for lack of subject matter jurisdiction and 12(b)(6) for failure to state a claim. The issue for decision on the Defendant’s jurisdictional motion is whether Blackfeet Housing Authority (“Plaintiff”) timely filed its complaint for breach of a trust responsibility owed to the tribal authority by the United States, which implicates the merits issue. The Defendant’s substantive motion questions whether the breach pleaded rests on a specific statutory trust responsibility. In the final and dispositive Ninth Circuit opinion, the Court held: (1) neither the United States Housing Act of 1937, 42 U.S.C. §§ 1437–1437j (1976), the Indian Housing Act of 1988, 42 U.S.C. §§ 1437aa–1437ee, nor the Native American Housing Assistance and Self-Determination Act of 1996, 25 U.S.C. §§ 4101–4243 (the “NAHASDA”), created a trust relationship that imposed fiduciary duties on HUD, *see Marceau v. Blackfeet Housing Auth.*, 540 F.3d 916, 921–28 (9th Cir. 2008); (2) the tribal members had alleged sufficient facts to proceed against HUD under the Administrative Procedure Act, 5 U.S.C. §§ 702–706 (2006), *Marceau*, 540 F.3d at 928–29; and (3) it was inappropriate to consider the merits of the tribal members’ claims against the Plaintiff because they had yet to exhaust their tribal-court remedies. On remand the District Court ruled that the tribal members’ APA claims stemming from HUD’s alleged decision requiring the use of wooden foundations were barred by the six-year statute of limitations set forth in 28 U.S.C. § 2401(a) (2006), because the decision to use wooden foundations in the homes was made no later than November 15, 1977. *See Marceau v. Blackfeet Housing Auth.*, No. CV–02–73–GF–SEH, slip op. at 10–11 (D. Mont. 2011). On June 5, 2012, in an unpublished decision, the Ninth Circuit affirmed the dismissal, ruling:

[The tribal members’] claim against HUD accrued in the late 1970s, when the agency purportedly decided to require wooden foundations. At that time, [the tribal members] knew about the decision [to construct the homes with wooden foundations] and knew that it affected them.... That [the tribal members] may not have immediately grasped the full impact that HUD’s decision might eventually have on them does not mean they knew too little in 1980 to bring an APA challenge.

Marceau v. Blackfeet Housing Auth., No. 11–35444, slip op. at 2–3 (9th Cir. 2012).

The Plaintiff filed its complaint on January 3, 2012, seeking \$30 million in damages resulting from HUD's alleged breach of "its trust responsibility to plaintiff." On April 5, 2012, the Defendant moved to dismiss under both RCFC 12(b)(1) and 12(b)(6). The Court found that the Plaintiff had not met its burden to establish subject matter jurisdiction. Even if that ruling were not dispositive, the complaint fails to state a claim upon which this court could grant relief. Accordingly, based on the foregoing, the Clerk of the Court shall dismiss the complaint for lack of subject matter jurisdiction.

N. Miscellaneous

126. *Winnemucca Indian Colony, v. United States Department of the Interior*, No. 3:11-cv-00622, 2011 WL 4377932, 837 F.Supp.2d 1184 (2011). The Native American colony brought action seeking declarations as to the identity of legitimate colonial officials and injunctive relief preventing the BIA from interfering with contractors hired by purported Colonial Council Chairman to perform work within the colony against the United States, the Department of the Interior, and the Bureau of Indian Affairs (BIA) and its regional agency. After the Court granted a Temporary Restraining Order (TRO) in relation to the injunction claim, 2011 WL 3893905, the Colony moved for preliminary injunction and the BIA moved to vacate the TRO. The District Court held that the Colony was entitled to a preliminary injunction enjoining the BIA from interfering with activities on colonial land by the purported Chairman or his agents. Injunction motion granted in part and denied in part, and Motion to Vacate denied.

127. *Large v. Fremont County, Wyoming*, No. 10-8071, 670 F.3d 1133 (10th Cir. 2012). Members of the Eastern Shoshone and Northern Arapaho Tribes filed suit alleging that the county's at-large system for electing commissioners to the county Board of Commissioners violated the Voting Rights Act. Following a bench trial, the District Court declared that the county's scheme violated the Voting Rights Act and rejected the County's proposed hybrid remedial plan and fashioned remedial plan solely consisting of single-member districts. The County appealed. The Appellate Court held that: (1) the County's proposed "hybrid" scheme was not a legislative plan entitled to deference, and (2) the District Court did not abuse its discretion in fashioning a remedial plan solely consisting of single-member districts. Affirmed.