Case Law on American Indians: August 2015—August 2016

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CASE LAW ON AMERICAN INDIANS:
AUGUST 2015—AUGUST 2016¹

Thomas P. Schlosser

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permission. For purposes of this symposium, the presenter has revised the
synopses.
CASE LAW ON AMERICAN INDIANS:
AUGUST 2015—AUGUST 2016

By Thomas P. Schlosser*

I. UNITED STATES SUPREME COURT

A. 2016 Cases

1. Menominee Indian Tribe of Wisconsin v. United States


The Tribe argued that diligence and extraordinary circumstances should be considered together as factors in a unitary test, and it faults the Court of Appeals for declining to consider the Tribe’s diligence in connection with its finding that no

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extraordinary circumstances existed. But this Court has expressly characterized these two components as “elements,” not merely factors of indeterminate or commensurable weight, *Pace v. DiGuglielmo*, 544 U. S. 408, 418, and has treated them as such in practice, see *Lawrence v. Florida*, 549 U. S. 327, 336–337. The Tribe also objects to the Court of Appeals’ interpretation of the “extraordinary circumstances” prong as requiring the showing of an “external obstacle” to timely filing.

This Court reaffirmed that this prong is met only where the circumstances that caused a litigant’s delay are both extraordinary and beyond its control. None of the Tribe’s excuses satisfy the “extraordinary circumstances” prong of the test. The Tribe had unilateral authority to present its claims in a timely manner. Its claimed obstacles, namely, a mistaken reliance on a putative class action and a belief that presentment was futile, were not outside the Tribe’s control. And the significant risk and expense associated with presenting and litigating its claims are far from extraordinary. Finally, the special relationship between the United States and Indian tribes, as articulated in the ISDA, does not override clear statutory language. 764 F. 3d 51, affirmed. Alito, J., delivered the opinion for a unanimous Court.

2. **Nebraska v. Parker**

No. 14-1406, 2016 U.S. LEXIS 2132 (U.S. Mar. 22, 2016). An 1882 Act opening Indian reservation land to settlement by non-Indians did not diminish the reservation to preclude application of the Indian tribe’s liquor laws to non-tribal retailers in the opened land, since the language of the Act only opening the land for settlement did not establish a clear intent of Congress to diminish the reservation. Neither conflicting legislative history nor changed demographic history based on the tribe’s absence from the opened land for a substantial period could overcome the conclusion that Congress did not intend to diminish the reservation. Judgment affirmed. Unanimous decision.

3. **Sturgeon v. Frost**

National Interest Lands Conservation Act prohibit the National Park Service from exercising regulatory control over state, native corporation and private Alaska land physically located within the boundaries of the National Park System?

Holdings: The Ninth Circuit’s interpretation of Section 103(c) is inconsistent with both the text and context of ANILCA.

(a) The Ninth Circuit’s interpretation of Section 103(c) violates “a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme,” Roberts v. Sea-Land Services, Inc., 566 U. S. ___, (2012). ANILCA repeatedly recognized that Alaska is different, and ANILCA itself accordingly carves out numerous Alaska-specific exceptions to the Park Service’s general authority over federally managed preservation areas. Those Alaska-specific provisions reflect the simple truth that Alaska is often the exception, not the rule. Yet the reading below would prevent the Park Service from recognizing Alaska’s unique conditions. Under that reading, the Park Service could regulate “non-public” lands in Alaska only through rules applicable outside Alaska as well. The Court concluded that, whatever the reach of the Park Service’s authority under ANILCA, Section 103(c) did not adopt such a “topsy-turvy” approach. Pp. 12–14.

(b) Moreover, it is clear that Section 103(c) draws a distinction between “public” and “non-public” lands within the boundaries of conservation system units in Alaska. And yet, according to the court below, if the Park Service wanted to differentiate between that “public” and “non-public” land in an Alaska-specific way, it would have to regulate the “non-public” land pursuant to rules applicable outside Alaska, and the “public” land pursuant to Alaska-specific provisions. Assuming the Park Service has authority over “non-public” land in Alaska (an issue the Court does not decide), the Court concludes that this is an implausible reading of the statute. The Court therefore rejects the interpretation of Section 103(c) adopted by the court below. Pp. 14–15.

(c) The Court does not reach the remainder of the parties’ arguments. In particular, it does not decide whether the Nation River qualifies as “public land” for purposes of ANILCA. It also does not decide whether the Park Service has authority under Section 100751(b) to regulate Sturgeon’s activities on the Nation River, even if the river is not “public” land, or whether—as
Sturgeon argues—any such authority is limited by ANILCA. Finally, the Court does not consider whether the Park Service has authority under ANILCA over both “public” and “non-public” lands within the boundaries of conservation system units in Alaska, to the extent a regulation is written to apply specifically to both types of land. 768 F. 3d 1066, vacated and remanded.

4. United States v. Bryant

No. 15-420, 195 L. Ed. 2d 317, 2016 U.S. LEXIS 3775 (U.S. Jun. 13, 2016). Respondent Michael Bryant, Jr., has multiple tribal-court convictions for domestic assault. When convicted, Bryant was indigent and was not appointed counsel. For most of his convictions, he was sentenced to terms of imprisonment not exceeding one year’s duration. Because of his short prison terms, the prior tribal-court proceedings complied with ICRA, and his convictions were therefore valid when entered. Based on domestic assaults he committed in 2011, Bryant was indicted on two counts of domestic assault by a habitual offender, in violation of § 117(a).

Represented in federal court by appointed counsel, he contended that the Sixth Amendment precluded use of his prior, uncounseled, tribal-court misdemeanor convictions to satisfy § 117(a)’s predicate-offense element and moved to dismiss the indictment. The District Court denied the motion; Bryant pleaded guilty, reserving the right to appeal. The Ninth Circuit reversed the conviction and directed dismissal of the indictment. It comprehended that Bryant’s uncounseled tribal-court convictions were valid when entered because the Sixth Amendment right to counsel does not apply in tribal-court proceedings. It held, however, that Bryant’s tribal court convictions could not be used as predicate convictions within § 117(a)’s compass because they would have violated the Sixth Amendment had they been rendered in state or federal court.

Holdings: (1) Indian tribal court convictions for domestic assault were sufficient to convict a defendant of the federal felony offense of domestic assault in Indian country by an habitual offender, even though the defendant had no right to the assistance of counsel in the tribal court based on his limited terms of imprisonment, since the convictions were valid under tribal law and remained valid when invoked to convict and sentence the
defendant as an habitual offender in the subsequent proceeding. (2) Invoking the tribal court convictions did not constitute a denial of due process since the tribal court accorded the defendant specific procedural safeguards, and proceedings in compliance with tribal civil rights sufficiently ensured reliability of tribal court convictions. Judgment reversed.

5. **Dollar General Corporation v. Mississippi Band of Choctaw Indians**

No. 13-1496, 2016 U.S. LEXIS 4056 (U.S. Jun. 26, 2016). The judgment was affirmed by an equally divided Court on June 26, 2016. Issues: Do Indian tribal courts have jurisdiction to adjudicate civil tort claims against non-members, including as a means of regulating the conduct of non-members who enter into consensual relationships with a tribe or its members? Holding Below: *Dolgencorp, Inc. v. the Mississippi Band of Choctaw Indians*, 746 F.3d 167.

The court affirmed the district court’s judgment that the corporation’s consensual relationship with John Doe gives rise to tribal court jurisdiction over Doe’s tort claims under *Montana v. United States*, 450 U.S. 544 (1981). In *Montana*, the United States Supreme Court recognized that a tribe may regulate the activities of nonmembers who enter into consensual relationships with the tribe or its members through commercial dealing, contracts, leases or other arrangements. It is surely within the tribe’s regulatory authority to insist that a child working for a local business not be sexually assaulted by the employees of the business. The fact that the regulation takes the form of a tort duty that may be vindicated by individual tribe members in tribal court makes no difference.

II. OTHER COURTS

A. Administrative Law

1. **County of Amador v. United States Dept. of the Interior, et al.**

No. 2:12-01710, 2015 U.S. Dist. LEXIS 133482 (E.D. Cal. Sept. 29, 2015). The matter was before the Court on Cross Motions
for Summary Judgment filed by Plaintiff County of Amador ("Plaintiff"); Defendants the United States Department of the Interior (the "Department"), S.M.R. Jewell, and Kevin Washburn; and the Ione Band of Miwok Indians ("Defendant Intervenors"). This lawsuit presented a challenge to the Record of Decision ("ROD"), issued on May 24, 2012, by Donald Laverdure, Acting Assistant Secretary of Indian Affairs, Department of the Interior, concerning the acquisition of the Plymouth Parcels property in trust for the Ione Band of Miwok Indians, in anticipation of the construction of a gaming-resort complex.

Plaintiff challenged: the Department’s determination to take the Plymouth Parcels into trust; the determination that the Ione Band is a “recognized Indian tribe now under Federal jurisdiction,” 25 U.S.C. § 479; and the determination that the trust acquisition constitutes the “restoration of lands for an Indian tribe that is restored to Federal recognition,” 25 U.S.C. § 2719(b)(1)(B), such that the property is gaming-eligible. Defendants and Defendant Intervenors responded that the ROD is procedurally and substantively valid. The complaint contained four causes of action. Claims one and two sought declaratory and injunctive relief under the Indian Reorganization Act that the Department’s determination – that the Ione Band was “under federal jurisdiction” in June 1934 – constitutes an abuse of discretion and is arbitrary, capricious, and contrary to law. Claims three and four sought declaratory and injunctive relief under the Indian Gaming Regulatory Act that the Department’s “Indians Lands” determination – including that the “restored lands for a restored tribe provision” is met – constitutes an abuse of discretion and is arbitrary, capricious, and contrary to law.

The court found that the ROD demonstrates consideration was given to the applicable statutory and regulatory framework, and to the Ione Band’s relationship with the federal government throughout the 20th century, in reaching the determination that the restored lands provision is met. The Court did not find the Department’s conclusion – that the acquisition constitutes the “restoration of lands for an Indian tribe that is restored to Federal recognition,” 25 U.S.C. § 2719(b)(1)(B)(iii) – was arbitrary, capricious, unlawful, or an abuse of discretion. The court denied Plaintiff’s Motion for Summary Judgment and granted both
Defendants’ Motion for Summary Judgment and Defendant Intervenors’ Motion for Summary Judgment.


No. 11-cv-2276, 2015 U.S. Dist. LEXIS 133540 (S.D. Cal. Sept. 30, 2015). This action arose from the approval of a recommendation from the Enrollment Committee of the San Pasqual Band of Diegueño Mission Indians (“San Pasqual Band” or “Band”) to disenroll the named plaintiffs from the Band’s membership roll. Pending before the Court were the parties’ cross-motions for summary judgment. Plaintiffs filed a complaint seeking, among other things, judicial review of the Assistant Secretary’s 2011 Decision under the APA and the arbitrary-and-capricious standard.

Shortly after the action began, the Court granted Plaintiffs’ motion for a preliminary injunction, restraining and enjoining Defendants from removing Plaintiffs from the San Pasqual Band’s membership roll and from taking any further action to implement the Assistant Secretary’s 2011 Decision for the duration of this lawsuit. The Court also enjoined the Assistant Secretary from issuing certain interim orders. In the First Amended Complaint (“FAC”), Plaintiffs asserted five claims to set aside the Assistant Secretary’s 2011 Decision: (1) declaratory relief based upon 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 2011 Decision based upon the arbitrary-and-capricious standard; (4) “federal agency action unlawfully withheld and request for preliminary injunctive relief”; and (5) “declaratory and injunctive relief by all Plaintiffs against all Defendants[.]”

After the Court granted the San Pasqual Band the limited right to intervene, the Band pursued an interlocutory appeal to the Ninth Circuit. The Ninth Circuit affirmed the Court’s determination that it had jurisdiction to review the Assistant Secretary’s disenrollment decision and that the San Pasqual Band is not an indispensable party. *Alto v. Black*, 738 F.3d 1111, 1131 (9th Cir. 2013). The Ninth Circuit also remanded to “allow the district court formally to clarify the original injunction to conform with the [Ninth Circuit’s] understanding of the injunction,” which was eventually resolved
The court found that the record strongly suggests that the San Pasqual Band has engaged in a relentless battle to disenroll Marcus Alto, Sr. and his descendants from the very beginning. For the most part, that battle appeared to be one that Plaintiffs were winning all the way up to the Regional Director’s November 2008 decision. Then suddenly, in a complete about face, the Assistant Secretary reversed the Regional Director’s decision, found in favor of the Band, and followed the recommendation to disenroll Marcus Alto, Sr.’s descendants. However, the Court’s role in this situation is “not to substitute its judgment for that of the agency,” but rather to examine whether there is a “rational connection between the facts found and the choice made” by the agency. Bonneville Power, 477 F.3d at 687 (quoting State Farm, 463 U.S. at 43).

Plaintiffs expended considerable effort to identify facts in the record either unmentioned, potentially ignored, or devalued, but as the Court has repeatedly stated, it “must defer to a reasonable agency action ‘even if the administrative record contains evidence for and against its decision.’” Modesto Irrigation, 619 F.3d at 1036 (quoting Trout Unlimited, 559 F.3d at 958). The failure to address the substantial deference afforded to agency decisions, particularly for factual determinations, was a recurring flaw in Plaintiffs’ reasoning. See Arkansas, 503 U.S. at 112; Melkonian, 320 F.3d at 1065. Under the standard prescribed by 5 U.S.C. § 706(2)(A), which is highly deferential to the agency, Plaintiffs failed to meet their burden to demonstrate that the Assistant Secretary’s decision is in any way “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” See 5 U.S.C. § 706(2)(A); San Luis & Delta-Mendota, 747 F.3d at 601.

Plaintiffs also failed to demonstrate that the Assistant Secretary’s decision is not supported by “substantial evidence.” See Love Korean Church, 549 F.3d at 754; Bear Lake Watch, 324 F.3d at 1076. Upon the Court’s review of the 2011 Decision, the Court found that the Assistant Secretary articulated a rational relationship between his factual findings and conclusions. See Fence Creek Cattle, 602 F.3d at 1132.

In light of the foregoing, the Court denied Plaintiffs’ motion for summary judgment, and granted Defendants’ cross-motion for summary judgment. Accordingly, the Court affirmed the Assistant Secretary’s 2011 Decision “revers[ing] the decision made by the
Pacific Regional Director on November 26, 2008” and concluding that “the enrollment of the Marcus Alto Sr.[.] descendants was based on information subsequently determined to be inaccurate and, as a result, their names must be deleted from the Band’s roll.”

3. **No Casino in Plymouth v. Jewell**


This lawsuit presents a challenge to the Record of Decision (“ROD”), issued by Donald Laverdure, Acting Assistant Secretary of Indian Affairs, concerning the acquisition of the Plymouth Parcels property in trust for the Ione Band of Miwok Indians, in anticipation of the construction of a gaming-resort complex.

Claim 1 in the First Amended Complaint (“FAC”) alleged that the Secretary of the Interior lacks the authority to take land into trust for the Ione Band because it was not a “recognized tribe now under Federal jurisdiction” in 1934 when the IRA was enacted. 25 U.S.C. § 479. Claim 2 in the FAC alleged that the Department failed to comply with its regulations, 25 C.F.R. §§ 151.10, 151.11, and 151.13, when it reviewed and approved the ROD. Claim 4 stated that: Lands taken in trust acquired after October 17, 1988, are not gaming eligible, 25 U.S.C. § 2719, unless an enumerated exception applies. Here, the exception relied upon by the Department is § 2719(b)(1)(B)(iii): “the restoration of lands for an Indian tribe that is restored to Federal recognition.” Plaintiffs argue simply that this exception is not applicable in this case. The Court has considered this issue in its Order on the cross motions for summary judgment, Case No. 1710 — particularly the “restored tribe” part of section 2719(b)(1)(B)(iii) — and incorporates by reference its analysis from that Order. Claim 5 in the FAC alleged that the Department failed to comply with NEPA when it reviewed and approved the fee-to-trust transfer and the casino project.
Specifically, Plaintiffs alleged the Department did not adequately consider the traffic, water quality, and air quality of the proposed project. These negative impacts include: increases in traffic congestion and safety concerns on rural roads in the area, increases in air pollution, increases in water pollution, the overuse of limited water resources, and potential increase in crime. Plaintiff also alleged the Final Environmental Impact Statement (“EIS”) wrongfully assumed that non-Indian interests did not require equal consideration against the interests of the Ione Band when considering the environmental impacts of the proposed project.

The Court found: With respect to the First Amended Complaint, Claim 1, Plaintiffs’ Motion for Summary Judgment is denied; Defendants’ Motion for Summary Judgment is granted; and Defendant Intervenors’ Motion for Summary Judgment is granted. With respect to the First Amended Complaint, Claims 2 through 5, Defendants’ Motion for Summary Judgment is granted; and Defendant Intervenors’ Motion for Summary Judgment is granted.

4. Hammond v. Jewell

No. 1:15-00391, 2015 U.S. Dist. LEXIS 137141 (E.D. Cal. Oct. 7, 2015). Plaintiff alleged he was ousted from the leadership of the Picayune Rancheria of Chukchansi Indians Tribe in violation of tribal law, and brought this suit against numerous federal defendants seeking reinstatement to the Tribal Council. Before the court was defendants’ motion to dismiss for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1), and for failure to state a claim pursuant to Rule 12(b)(6).

Plaintiff was elected to the Tribal Council of the Picayune Rancheria of Chukchansi Indians Tribe in December 2008. After initially suspending plaintiff from the Tribal Council for alleged violations of the tribal Ethics Ordinance, the Tribal Council permanently removed him on June 17, 2011 after a hearing.

Following the December 3, 2011 election, three factions were embroiled in a power struggle over tribal leadership, resulting in legal disputes in the Tribal Court and even violence. Plaintiff was not a member of any of the factions and it does not appear that their leadership disputes were related to plaintiff’s removal from
the Tribal Council. Asserting conflicting claims of leadership, all three factions submitted contracts under the Indian Self-Determination and Education Assistance Act ("ISDEAA") to the Bureau of Indian Affairs ("BIA").

The BIA Superintendent returned the contract requests from all three factions and concluded it would recognize the results of the disputed December 1, 2012 election. All three factions appealed the Superintendent’s decision and the BIA Regional Director affirmed the decision to return all three contract requests, but vacated the decision to recognize the results of the disputed election because the BIA did not have “the authority to determine which of the opposing factions’ interpretation of the Tribe’s law is correct.” The Regional Director determined that “recognition of a government is essential for the purpose of contracting under the ISDEAA and that the BIA “will conduct business, on an interim basis, with the last uncontested Tribal Council elected December 2010.” The Regional Director did not identify plaintiff as a member of that Tribal Council because “[t]he record reflects that Nokomis Hernandez was appointed by the Tribal Council to replace Patrick Hammond, III.”

Two factions and plaintiff appealed that decision to the BIA Office of Hearings and Appeals and a two-judge panel concluded that exigent circumstances justified making the Regional Director’s decision to recognize the 2010 Tribal Council “for government-to-government purposes” effective immediately. Although plaintiff had appealed “the Regional Director’s acceptance of his subsequent removal from the Council and replacement,” the panel did not address the merits of that dispute in its decision.

The court found that a plaintiff cannot simply sue the federal government in an attempt to avoid tribal immunity with respect to intra-tribal affairs; and that the Tribal Council removed plaintiff from his leadership position and plaintiff’s avenue to challenge that action remains with the Tribe. Since the court lacks jurisdiction to hear plaintiff’s § 1983 and ICRA claims, and plaintiff failed to allege a cognizable claim under the APA over which the court could exercise jurisdiction, the court granted defendants’ motion to dismiss.
5.  *Tohono O’odham Nation v. City of Glendale*

No. 11-16811, No. 11-16833, 2015 U.S. App. LEXIS 19407 (9th Cir. Nov. 6, 2015). This appeal involved a dispute concerning 135 acres of unincorporated land within Maricopa County, Arizona that was purchased by Plaintiff, the Tohono O’odham Nation (the Nation). The Nation filed suit against the City of Glendale and the State of Arizona (collectively, Defendants), challenging the constitutionality of H.B. 2534, a law passed by the Arizona legislature that allows a city or town within populous counties to annex certain surrounding, unincorporated lands.

The Nation alleged that H.B. 2534 was enacted to block the federal government from taking the 135 acres it purchased into trust on behalf of the Nation—a process that would render the land part of the Nation’s reservation pursuant to the Gila Bend Indian Reservation Lands Replacement Act, Pub. L. No. 99-503, 100 Stat. 1798 (1986) (the Act). The Nation asserted that H.B. 2534 is preempted by the Act, violates the Equal Protection and Due Process Clauses of the United States and Arizona Constitutions, and violates the Arizona Constitution’s prohibition against special legislation. The parties filed cross summary judgment motions.

The district court ruled in favor of the Nation as to the federal preemption claim, and ruled in favor of Defendants as to the remaining claims. The appellate court found that the district court properly concluded that H.B. 2534, Ariz. Rev. Stat. § 9-471.04 was preempted by the Gila Bend Indian Reservation Lands Replacement Act (Act). At the very moment the Tohono O’odham Nation filed an application with the Secretary of the Interior to take any of the Replacement Lands into trust, the city was permitted, pursuant to H.B. 2534, to annex the same land by either a majority vote of the governing body or by two-thirds vote of the governing body, in which case the annexation became immediately operative. The city had the authority, at the point when the Nation filed a trust application, to preemptively annex unincorporated land and effectively block the trust application, and this barred the Nation’s effort to incorporate purchased land into tribal land. Judgment affirmed.
6. **Tuttle v. Jewell**

No. 13-365, 2016 U.S. Dist. LEXIS 31398 (D.D.C. Mar. 11, 2016). Plaintiff William Tuttle leased restricted Indian land in Riverside County, California, for a term of 50 years. The land is owned by the United States in trust for the Colorado River Indian Tribes. In 2010, the Bureau of Indian Affairs terminated the lease, finding that Mr. Tuttle had violated several of its provisions. The termination decision was affirmed by the Interior Board of Indian Appeals. The Bureau of Indian Affairs and the Interior Board of Indian Appeals are constituent agencies of the Department of Interior. Plaintiff sued the Secretary of the Interior, in her official capacity, complaining that the agency’s decision to terminate was arbitrary and capricious, in violation of both the Indian Long-Term Leasing Act and the terms of the Lease itself. The Court concluded that the agency acted reasonably on the record before it and within its authority. The Secretary’s motion for summary judgment was granted.

7. **Bruette v. Jewell**

No. 15-2897, 2016 U.S. App. LEXIS 5827 (7th Cir. Mar. 30, 2016). Felix Bruette appealed from a dismissal of his suit for lack of jurisdiction. Bruette’s complaint alleged that as a great-great-grandson of Gardner, he was entitled to his share of benefits that Congress promised to Gardner in the 1893 statute. The Department is disregarding that Act, the complaint continues, and is thereby breaching its fiduciary duties by not establishing an official list of tribe beneficiaries. At a hearing Bruette expanded these allegations. He explained that he represents descendants of those who signed the 1856 Treaty, but whom Congress excluded from its benefits under a law enacted 15 years later. Congress, Bruette continued, recognized that it had wrongly excluded many who signed the 1856 Treaty from receiving tribal benefits required by the Treaty. It therefore passed in 1893 an act to remedy that situation. But, Bruette concluded, the Department never completed the required tribal membership “roll” that would have treated Gardner’s descendants as members of the tribe contemplated by the 1856 Treaty.
Bruette sought an order requiring that the Department of the Interior follow an 1893 law involving the Stockbridge and Munsee Indians. At a hearing Bruette clarified his principal demand: He wants the Department to recognize that descendants (including him) of Stephen Gardner, a signor of an 1856 Treaty between the Stockbridge and Munsee Indians and the United States, belong to the tribe recognized in the Treaty. The district court dismissed the suit based on several incurable defects. Because Bruette had not developed an argument to disturb the district court’s decision, we dismiss his appeal.

8. Timbisha Shoshone Tribe v. United States DOI

No. 13-16182, 2016 U.S. App. LEXIS 9713 (9th Cir. May 27, 2016). An appeal of decisions made by the Department of the Interior regarding a leadership dispute among factions of the Timbisha Shoshone Tribe was mooted by the Tribe’s adoption of a new constitution. There was no possibility that the agency would change its decision that certain members were improperly excluded from the Tribe, as the disenrolled members clearly qualified for membership under the new constitution. Appeal dismissed.

9. Caddo Nation of Okla. v. Wichita & Affiliated Tribes

No. CIV-16-0559, 2016 U.S. Dist. LEXIS 70554 (W.D. Okla. May 31, 2016). Plaintiff Caddo Nation of Oklahoma (“Caddo Nation”) filed this action against defendants Wichita and Affiliated Tribes (“Wichita Tribe), Terri Parton, President of the Wichita Tribe, and other elected officials of the Wichita Tribe, seeking declaratory and injunctive relief. Plaintiff’s claims are based on its concerns that defendant is building a history center on a site that Caddo elders believe may hold the remains of Caddo ancestors and cultural artifacts. Plaintiff asserted the land on which the center is being built is held jointly in trust by the United States for the Caddo Nation, the Wichita Tribe and the Delaware Nation. It contended defendants have violated the Administrative Procedures Act, the National Environmental Policy Act (“NEPA”), and the National Historic Preservation Act (“NHPA”). A hearing on the motion was held on May 27, 2016, at which plaintiff argued that defendants failed to comply with obligations under NEPA and
NHPA. Plaintiff also asserted that defendants had begun to pour the concrete floor for the history center and claimed that, once completed, the concrete would prevent it from being able to conduct the ground-penetrating radar tests required to determine whether any human remains, funerary objects or cultural items are located at the building site.

The court concluded at the end of the hearing that, due to the unusual circumstances presented by the case, a short TRO was warranted to maintain the status quo for a brief period. The parties were directed to file a statement regarding the status of the construction site. Because the pouring of the floor has not been completed, it appears the testing plaintiff sought to perform is still possible. Based on the record before it, the court concluded that the Wichita Tribe fulfilled its consultation responsibilities under NHPA. Plaintiff did not meet its burden of showing a violation of the Act. Having concluded that plaintiff failed to demonstrate it is likely to succeed on the merits of its claim that defendants violated the APA by their noncompliance with NEPA or NHPA, the court vacated the TRO previously entered and denied plaintiff’s motion for TRO.

10. **Cayuga Nation v. Tanner**

Nos. 15-1667 and 15-1937, 2016 U.S. App. LEXIS 10007 (2d Cir. Jun. 2, 2016). Plaintiffs-Appellants, the Cayuga Nation, a federally recognized Indian tribe, and individual officers, employees, and representatives of the Cayuga Nation, filed this action in the District Court against the Village of Union Springs, the Board of Trustees of the Village, and individual Village officials, seeking declaratory and injunctive relief. Plaintiffs contend that the federal Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721, preempts the defendants’ efforts to enforce a local anti-gambling ordinance against a gaming facility located on land owned by Cayuga Nation.

The district court dismissed the complaint, holding that it lacked subject matter jurisdiction to hear the case because it could not determine, in light of an ongoing leadership dispute within Cayuga Nation, whether the lawsuit was authorized as a matter of tribal law. Following a motion for reconsideration, the district
court additionally held that the individual plaintiffs lacked Article III standing to sue in their own right.

On appeal, the plaintiffs argued that the district court had jurisdiction because the Bureau of Indian Affairs had recognized Clint Halftown, who initiated this suit, as the Cayuga Nation’s “federal representative,” thereby relieving the court of the need to resolve questions of tribal law, and because the individual plaintiffs had standing to challenge the anti-gaming ordinance. We agree and therefore vacate the district court’s order dismissing the complaint and remand for further proceedings consistent with this opinion.

11. Akiachak Native Cmty. v. United States DOI

No. 13-5360, 2016 U.S. App. LEXIS 12121 (D.C. Cir. Jul. 1, 2016). Holdings: (1) Where several Indian Tribes sued the United States Department of Interior challenging a regulation implementing certain settled land claims staked by descendants of Alaskan aboriginal Tribes, and where after a district court held that the Department’s interpretation was contrary to law, the Department, following notice and comment, revised its regulations and dismissed its appeal, the appeal of the State of Alaska, which had intervened in the district court as a party defendant but brought no independent claim for relief, was dismissed for lack of jurisdiction because the controversy between the Tribes and the Department was moot. (2) The underlying controversy was moot under U.S. Const. art. III, § 2 because the Department’s new regulation resolved the underlying claim by removing the Alaska exception from its land-into-trust regulations and there was no longer a live controversy. Decision vacated; appeal dismissed.


No. 14-56909, 2016 U.S. App. LEXIS 12587 (9th Cir. Jul. 8, 2016). The Pala Band is a federally-recognized Indian tribe located in northern San Diego County. The Secretary of the Interior created the Pala Reservation in the late nineteenth century, pursuant to the Mission Indian Relief Act of 1891.

Notwithstanding its decision to vote against the Indian Reorganization Act in 1934, the Pala Band chose to organize its
government. In 1960, it adopted Articles of Association as the Band’s governing document. The Articles created an Executive Committee, comprised of six elected officers, and a General Council, which included all adult members of the tribe. The Articles granted the General Council the power “[t]o enact ordinances . . . governing future membership, loss of membership and adoption of members into the Band.”

Shortly thereafter, the General Council enacted a membership ordinance (the 1961 Ordinance), pursuant to the authority granted to it in the Articles. Under the 1961 Ordinance, a person seeking membership in the Band would apply to the Executive Committee, which would make a report and recommendation to the Regional Director of the BIA. In other words, pursuant to the Articles of Association and the 1961 Ordinance, the Executive Committee made recommendations, but the BIA was granted ultimate authority over whether an applicant was enrolled.

Plaintiffs are descendants of Margarita Britten (Margarita), a Pala Indian who was born in 1856. Their eligibility to be enrolled as members of the Pala Band depends on whether Margarita was a full- or half-blooded Pala Indian. Margarita was originally considered to be one-half Pala Indian, and thus her great-great-grandchildren did not have the minimum 1/16 blood quantum to be eligible for membership in the Band.

The first eligibility dispute regarding Margarita’s descendants proceeded pursuant to the 1961 Ordinance. In 1984, the General Council concluded that the evidence suggesting that Margarita was actually a full-blooded Pala Indian was more accurate, and voted to change her status accordingly. The General Council’s recommendation was sent to a BIA Regional Director, Tom Dowell, who recommended against enrolling her descendants because there was insufficient evidence to establish Margarita’s blood quantum. Director Dowell’s decision was appealed to the Assistant Secretary-Indian Affairs in 1989, who reversed that finding and concluded that Margarita should be considered a full-blooded Pala Indian. Pursuant to the 1961 Ordinance, the Executive Committee was then compelled to add Margarita’s great-great-grandchildren, with the requisite 1/16 blood quantum, to the Band’s membership rolls.

In subsequent proceedings, based on new evidence, the Assistant Secretary-Indian Affairs concluded that Margarita was
one-half Pala, leading to disenrollment. But the AS-IA aptly noted that “in the exercise of sovereignty and self-governance, tribes have the right, like other governments, to make good decisions, bad decisions, and decisions with which others may disagree.” The federal government does not interfere in those decisions in the absence of specific authority to do so. The district court’s grant of summary judgment, upholding the decision of the AS-IA, is affirmed.

13.  *Patchak v. Jewell*

No. 15-5200, 2016 U.S. App. LEXIS 12984 (D.C. Cir. Jul. 15, 2016). David Patchak brought this suit under the Administrative Procedure Act, 5 U.S.C. §§ 702, 705, challenging the authority of the Department of the Interior to take title to a particular tract of land under the Indian Reorganization Act (IRA), 25 U.S.C. § 465. The land, called the Bradley Property, had been put into trust for the use of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians in Michigan, otherwise known as the Gun Lake Band or the Gun Lake Tribe.

Following the Supreme Court’s determination in 2012 that Mr. Patchak had prudential standing to bring this lawsuit, see *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2212, 183 L. Ed. 2d 211 (2012), Congress passed the Gun Lake Trust Land Reaffirmation Act (the Gun Lake Act), Pub. L. No. 113-179, 128 Stat. 1913 (2014), a stand-alone statute reaffirming the Department of the Interior’s decision to take the land in question into trust for the Gun Lake Tribe, and removing jurisdiction from the federal courts over any actions relating to that property. Taking into account this new legal landscape, the District Court determined on summary judgment that it was stripped of its jurisdiction to consider Mr. Patchak’s claim. Holding additionally that the Act was not constitutionally infirm, as Mr. Patchak contended, the District Court dismissed the case.

Mr. Patchak now appeals the dismissal of his suit. The court held that: (1) Appellant landowner’s suit contesting appellee Department of the Interior’s (Department) taking of land in trust for appellee tribe failed because the Gun Lake Trust Land
Reaffirmation Act (Act), Pub. L. No. 113-179, 128 Stat. 1913 (2014), permissibly removed federal jurisdiction, as the Act constitutionally exercised Congress’s power to legislate as to Indian tribes; (2) The Act did not violate the landowner’s right to petition because Congress could withhold federal jurisdiction; (3) The Act did not violate his due process rights because the legislation provided all process that was due; (4) The Act was not a U.S. Const. art. I, § 9, cl. 3 bill of attainder because its means were rationally designed to meet its legitimate nonpunitive goals. The Court granted the Motion to Dismiss and Motion for Judgment on the Pleadings and denied the motions for preliminary injunctive relief. Judgment affirmed.

14. **Mackinac Tribe v. Jewell**

No. 15-5118, 2016 U.S. App. LEXIS 13140 (D.D.C. Jul. 19, 2016). Plaintiff-Appellant Mackinac Tribe brought an action in federal district court to compel the Secretary of the Interior to convene an election allowing the Tribe to organize under the Indian Reorganization Act (IRA), 25 U.S.C. § 476(a). Although the Mackinac Tribe does not appear on the Secretary’s list of federally acknowledged tribes and has not been acknowledged through the Secretary’s Part 83 process, the group alleges it is federally recognized for IRA purposes because it is the historical successor to a tribe the federal government previously recognized via treaty. The district court reserved the question of whether acknowledgment through Part 83 is a necessary prerequisite for tribal organization under the IRA, finding instead that the Mackinac Tribe failed to exhaust its administrative remedies by first seeking acknowledgment through the Part 83 process. The appellate court affirmed the district court’s grant of summary judgment.

15. **Littlefield v. United States DOI**

No. 16-10184, 2016 U.S. Dist. LEXIS 98732 (D. Mass. Jul. 28, 2016). This case arises out of a decision of the Secretary of the Department of the Interior (the “Secretary”) to acquire land in trust for the benefit of the Mashpee Wampanoag Tribe (the “Mashpees”) under Section 465 of the Indian Reorganization Act
The Mashpees are a federally recognized tribe that obtained official acknowledgement from the BIA in 2007. Upon receiving federal acknowledgement, the Mashpees filed a “fee-to-trust” application with the BIA requesting that the Department acquire tracts of land for the Mashpees’ use as a tribal reservation in Mashpee and Taunton, Massachusetts. Of concern to the Plaintiffs here is the Taunton site, which Taunton had designated for economic development purposes. The Mashpees intend to construct and operate a gaming resort on the Taunton site. On September 18, 2015, the Secretary issued a written decision (the “Secretary’s Decision” or “Record of Decision”) granting the Mashpees’ fee-to-trust application. The Secretary specifically found that “the Mashpee Tribe qualifies” – i.e., is “eligible to receive land into trust under the IRA” – pursuant to the second definition of “Indian” set forth in Section 479 of the IRA. The land was subsequently taken into trust on November 10, 2015. The Plaintiffs filed suit challenging the Secretary’s Decision and later amended their complaint to include additional claims.

The Court rules that the second definition of “Indian” in Section 479 of the IRA unambiguously incorporates the entire antecedent phrase – that is, “such members” refers to “members of any recognized Indian tribe now under Federal jurisdiction.” Thus, no deference is due the Secretary’s interpretation. In light of the Supreme Court’s interpretation of “now under Federal jurisdiction” to mean under Federal jurisdiction in June 1934, the Secretary lacked the authority to acquire land in trust for the Mashpees, as they were not then under Federal jurisdiction. The matter is
remanded to the Secretary for further proceedings consistent with this opinion.


No. 14-5326 Consolidated with 15-5033, 2016 U.S. App. LEXIS 13779 (D.C. Cir. Jul. 29, 2016). Holdings: Where appellants brought challenges under Administrative Procedure Act to Interior Secretary’s decision to take certain land into trust for Cowlitz Indian Tribe, Secretary reasonably interpreted and applied Indian Reorganization Act (IRA) to conclude that Cowlitz was recognized Indian tribe now under Federal jurisdiction because tribe only had to be recognized as of time Department acquired land into trust. Secretary reasonably determined that Cowlitz met “initial-reservation” exception to Indian Gaming Regulatory Act (IGRA) because substantial evidence amply showing that Interior found Cowlitz parcel to be within broader area of historical significance to Tribe. Appellants’ remaining claims of error under the IRA and NEPA based on Secretary’s alleged failure to independently verify Tribe’s business plan and membership figures were without merit. Judgment affirmed.

**B. Child Welfare Law and ICWA**

1. *Jennifer L. v. State Department of Health and Social Services*

No. S–15646, 357 P.3d 110, 2015 WL 5062023 (Alaska Aug. 28, 2015). After Office of Children’s Services (OCS) took three minor children into emergency custody, a standing master determined that no probable cause existed and recommended that children be returned to mother’s custody. Following remand from the Supreme Court, 2014 WL 1888190, the Superior Court rejected recommendation and determined that probable cause existed. Mother appealed and Superior Court dismissed underlying case before State could file brief. The Supreme Court held that: (1) public interest exception to mootness doctrine applied, and (2) standing master’s order that children should be returned to parents was not effective until judicially reviewed.

2. *K.P. v. Michelle T.*

Throughout most of their dependency cases, K.P. and Kristopher were eligible for membership, or were enrolled, in the Pala Band of Mission Indians (Pala Band). At the children’s first § 366.26 hearing, the Pala Band did not consent to the children’s adoption and the juvenile court ordered a plan of guardianship. Several years later, when the children’s cases proceeded to a second § 366.26 hearing, the juvenile court learned that the Pala Band of Mission Indians had disenrolled K.P. and Kristopher, and others, on the ground that they lacked the blood quantum necessary for membership.

Michelle argued that in view of a pending appeal in the Ninth Circuit challenging the validity of the Pala Band’s enrollment ordinance that resulted in the disenrollment of K.P. and Kristopher and the others, the juvenile court erred when it found that K.P. and Kristopher were not Indian children within the meaning of the ICWA and declined to apply ICWA’s substantive and procedural protections at the children’s second § 366.26 hearings. Michelle also argued that enrollment in a tribe is not required to be considered an Indian child, and that the Pala Band did not provide written confirmation that enrollment is a prerequisite for Pala Band membership.

The appellate court concluded that the juvenile court correctly ruled that the Indian tribe has the sole authority to determine its own membership and that the juvenile court must defer to the membership decisions of an Indian tribe. Under federal and state law, the Indian tribe’s membership determination is conclusive. The record shows that enrollment is a prerequisite for Pala Band membership, and that the Pala Band determined that K.P. and Kristopher are not members of its tribe and that the juvenile court did not err when it determined that K.P. and Kristopher are not Indian children within the meaning of the ICWA and terminated parental rights without applying ICWA’s heightened substantive and procedural protections. The appellate court affirmed.
3. **In re K.M.**

No. G051656, 2015 WL 7352048 (Cal. Ct. App. Nov. 20, 2015). In a dependency proceeding, the Superior Court, No. DP024561, terminated parental rights to child. Mother and father appealed. While the matter was still pending on appeal, the Superior Court issued a post-judgment order finding that the county child welfare agency complied with the Indian Child Welfare Act (ICWA). The appellate court held that juvenile court lacked jurisdiction to rule on the ICWA issue following its termination of parental rights.

4. **Gila River Indian Cnty. v. Dep’t of Child Safety**


The appellate court held that good cause to deviate from the Indian Child Welfare Act placement preferences must be established by clear and convincing evidence. While the trial court cited the child’s bond with her foster family and expert opinions in ordering a deviation from the Act, remand was required because it was not apparent that the trial court applied the clear and convincing standard to its good cause determination that deviation from the Act’s placement preferences was appropriate. Vacated and remanded.

5. **In re Amy J.**

Humboldt County juvenile court pursuant to Welfare and Institutions Code section 300, appeals from that court’s order authorizing respondent Humboldt County Department of Health & Human Services (Department) to place her as requested by her Indian tribe with a Butte County family that was caring for, and in the process of adopting, her sister. Amy, one year old when the court issued its order, was bonded and thriving with Humboldt County foster parents who had cared for her since she was two days old and wanted to adopt her. Amy argues the order must be reversed for three reasons: (1) regardless of the court’s characterization of it as a foster care placement order, it was in fact an order for her adoptive placement and, as such, violated the Indian Child Welfare Act (ICWA) adoptive placement preferences; (2) even if construed as a foster care placement order, it should not have issued because there was no tribal resolution and because Amy showed good cause to deviate from the ICWA foster care placement preferences; and (3) the order violated Amy’s constitutional liberty interest in her family relationship with her Humboldt County foster parents.

We conclude the court’s order was not for adoptive placement, but instead authorized a change in Amy’s foster care placement, and that Amy does not establish the court erred in issuing it. Therefore, we affirm the order.


No. S-15-129, 292 Neb. 804, 2016 Neb. LEXIS 24 (Neb. Feb 19, 2016). Tavian B. was found to be a child who lacks proper parental care by reason of the fault or habits of his parents and to be in a situation dangerous to life or limb or injurious to his health or morals. See Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008). Approximately 16 months later, the State of Nebraska moved to terminate the parental rights of both parents. The father then filed a motion to transfer jurisdiction to the Oglala Sioux Tribal Juvenile Court (Tribal Court) pursuant to the federal Indian Child Welfare Act of 1978 (ICWA). See 25 U.S.C. § 1901 et seq. (2012).

Prior to the juvenile court’s ruling on the father’s motion to transfer, the State withdrew its motion to terminate parental rights. The court found that good cause existed to deny the request to transfer jurisdiction to the tribal court, because the proceedings
were in “an advanced stage.” The father appeals the juvenile court’s order overruling his motion to transfer.

For the reasons stated below, we reverse the judgment of the juvenile court and remand the cause with directions.

7. **State v. Central Council of Tlingit and Haida Indian Tribes of Alaska**

No. S-14935, 2016 WL 1168202 (Alaska Mar. 25, 2016). Central Council of Tlingit and Haida Indian Tribes filed action against state, seeking declaratory judgment that its tribal court system had subject matter jurisdiction over child support matters and seeking an injunction requiring the state’s child support enforcement agency to recognize tribal courts’ child support orders. The Superior Court entered judgment in favor of the tribes. State appealed. The Supreme Court held that: (1) tribal courts have inherent, non-territorial subject matter jurisdiction to adjudicate parents’ child support obligations, and (2) the power to set nonmember parents’ child support obligations is within the retained powers of membership-based inherent tribal sovereignty. Affirmed.

8. **State v. Anthony S. (In re Abbie L.)**

No. A-15-996, 2016 Neb. App. LEXIS 89 (Neb. Ct. App. Apr. 26, 2016). In a case in which a father appealed from an order of the juvenile court granting the continued temporary custody of his child to the Nebraska Department of Health and Human Services, the appellate court concluded that there was clearly reason to believe the child was Indian. Accordingly, the Nebraska Indian Child Welfare Act and the federal Indian Child Welfare Act were applicable. Even if active efforts had been made to prevent or eliminate the need for removal, there was still a deficiency under Neb. Rev. Stat. § 43-1505(5) (Reissue 2008 & Supp. 2015). Because the evidence at the protective custody hearing did not include testimony of a qualified expert as required by § 43-1505(5), the juvenile court erred in continuing the child’s out-of-home placement. Reversed and vacated.
9. In re Alexandria P.

No. B270775, 2016 Cal. App. LEXIS 555 (Cal. Ct. App. Jul. 8, 2016). For the third time this case comes before us on the issue of whether the lower court has correctly ordered an Indian child, Alexandria P., to be placed with her extended family, Ken R. and Ginger R. in Utah, after concluding that Alexandria’s foster parents, de facto parents, Russell P. and Summer P., failed to prove by clear and convincing evidence that there was good cause to depart from the adoptive placement preferences set forth in the Indian Child Welfare Act (ICWA).

We have twice remanded the matter because the lower court used an incorrect standard in assessing good cause. The dependency court has now correctly applied the law governing good cause, considering the bond Alexandria has developed over time with the P.s, as well as a number of other factors related to her best interests. Those other factors include Alexandria’s relationship with her extended family and half-siblings; the capacity of her extended family to maintain and develop her sense of self-identity, including her cultural identity and connection to the Choctaw tribal culture; and the P.s’ relative reluctance or resistance to foster Alexandria’s relationship with her extended family or encourage exploration of and exposure to her Choctaw cultural identity.

Because substantial evidence supports the court’s finding that the P.s did not prove by clear and convincing evidence that there was good cause to depart from the ICWA’s placement preferences, we affirm.

10. Renteria v. Shingle Springs Band of Miwok Indians

No. 2:16-cv-1685, 2016 U.S. Dist. LEXIS 97608 (E.D. Cal. Jul 26, 2016). Through this lawsuit, Plaintiffs Efrim and Talisha Renteria (“Plaintiffs”) seek to overturn Shingle Springs Band of Miwok Indians Tribal Court’s ruling which appoints Defendant Regina Cuellar as the legal guardian of Plaintiffs’ three nieces. Their Complaint attacks the Tribal Court’s jurisdiction over the custody proceedings in the first instance, and further alleges that the Tribal Court custody proceedings violated Plaintiffs’ right to
due process under the Fourteenth Amendment. Plaintiffs are the maternal great aunt and uncle of three young girls (“AC (older),” “AC (younger),” and “NC,” collectively, “Minors”). The Minors’ parents were killed in a car accident on December 17, 2015. Their late father was a member of the Shingle Springs Band of Miwok Indians (“Tribe”), a federally recognized Indian tribe, but the Minors resided and were domiciled with their parents in Visalia, California. They have never resided or been domiciled on tribal lands.

Plaintiffs cared for the Minors in the weeks following the accident. On January 5, 2016, members of the children’s paternal family appeared at Plaintiffs’ house in Visalia, thrust a copy of an emergency order issued by the Tribal Court of the Shingle Springs Band of Miwok Indians (“Tribal Court”) into Plaintiffs’ hands, and forcibly removed AC (younger) and NC. On January 22, 2016, the Tribal Court held a review hearing regarding guardianship, appointed Plaintiffs as temporary guardians for the Minors, and established a schedule of visitations for the paternal family.

Beginning in February 2016, the two older children repeatedly reported that their paternal step-grandfather (“Joseph”) was sexually abusing them during their visits. Plaintiffs reported the abuse to the Visalia Police Department and the Tulare County Health & Human Services Agency. The two older children continued to report instances of sexual abuse by Joseph to these social workers. After Plaintiffs made these reports, the Tribal Court modified the visitation order such that Joseph was not to have access to the minors.

On June 3, 2016, the Tribal Court appointed Defendant Regina Cuellar as the Minors’ guardian effective June 12, 2016. At the same time, the Tribal Court issued a visitation order that failed to restrict Joseph’s access to the Minors.

The failure to restrict Joseph’s access to the Minors resulted in yet another instance of alleged sexual abuse. Plaintiffs are currently proceeding with a Petition Re Good Cause under California Penal Code section 278.7 and California Family Code section 3041 to retain temporary guardianship of the three minor children in Tulare County Superior Court.

Plaintiffs’ Application for a Temporary Restraining Order is granted. Defendants are enjoined from enforcing the Tribal Court’s June 3, 2016 Order Appointing Guardian of Minors, and Plaintiffs
are appointed temporary guardians of the three minor children who are the subject of this action.

11. **Villarreal v. Villarreal**

No. 04-15-00551-CV, 2016 Tex. App. LEXIS 8272 (Tex. App. Aug. 3, 2016). Richard Matthew Villarreal appeals the trial court’s order dismissing the underlying cause. The trial court dismissed the cause after finding a final divorce decree entered by a tribal court divested the trial court of jurisdiction. We reverse the trial court’s order and remand the cause for further proceedings.

The appellate court held that the trial court erred in concluding the final divorce decree entered by the tribal court divested the trial court of jurisdiction to determine custody because the wife filed the original divorce petition in Texas, the Texas proceeding had not been terminated and was not stayed, and, as such, the tribal court could not exercise jurisdiction. The ICWA did not apply to the Texas divorce proceeding because the definition of child custody proceeding in the ICWA did not include divorce proceedings, 25 U.S.C.S. § 1903(1), and, as such, Texas was the children’s home state, and the trial court had jurisdiction to make the initial child custody determination. Tex. Fam. Code Ann. § 152.201(a). Order reversed; matter remanded.

12. **Gila River Indian Cnty. v Dep’t of Child Safety**

No. 1 CA-JV 16-0038, 2016 Ariz. App. LEXIS 187 (Ariz. Ct. App. Aug. 11, 2016). Following termination of the parental rights of the biological parents of A.D., an Indian child and eligible member of the Gila River Indian Community (“the Community”), the Community moved for an order transferring jurisdiction of the matter to its Children’s Court. The Maricopa County Juvenile Court denied the motion, and the Community appealed. The appellate court held that 25 U.S.C. § 1911(b) of the Indian Child Welfare Act (“ICWA”), which the Community argued requires transfer, does not allow jurisdiction to be transferred after parental rights have been terminated. Accordingly, we affirm the denial of the motion to transfer jurisdiction.

13. **In re Nicholas E.**

The dispositional order is affirmed, and the matter is remanded to the juvenile court with directions to order the Department to comply with the notice and inquiry provisions of ICWA. After proper notice under ICWA, if it is determined that this child is an Indian child and ICWA applies to these proceedings, mother is entitled to petition the juvenile court to invalidate orders that violated ICWA. (See 25 U.S.C. § 1914; Cal. Rules of Court, rule 5.486 (petition to invalidate orders).) Should any of the identified tribes determine that the child is an Indian child, or other information show the child to be an Indian child as defined by ICWA, the juvenile court shall conduct new jurisdiction and disposition hearings in conformity with ICWA.

14. M.C. v. Superior Court of Cal. for L.A.


At the September 2014 detention hearing, mother declared she may have Cherokee Indian ancestry and the court ordered the Department to investigate the claim and provide the court with a supplemental report.
In a November 2014 jurisdiction/disposition report, the Department stated that ICWA “does or may apply.” The Department also provided a response it received from the Cherokee Nation, stating that the information the Department provided was incomplete and requesting that the Department provide the middle names and dates of birth of both of J.S.’s parents. The letter stated that “[i]t is impossible to validate or invalidate this claim without [the requested] information.”

However, there is nothing in the record to confirm what information, if any, was provided to the Cherokee Nation. The Department concedes it failed to satisfy ICWA’s notice requirements, and agrees the matter should be remanded to the juvenile court to ensure compliance. Accordingly, we grant the petition and remand with directions to effectuate proper notice under the ICWA.

15. *In re A.B.*

No. D069257, 2016 Cal. App. LEXIS 714 (Cal. Ct. App. Aug. 24, 2015). Scott R. appeals from an order terminating his parental rights to his biological daughter, A.B., under Family Code section 7822 which authorizes the termination of rights of a parent who “has left the child in the care and custody of the other parent for a period of one year without any provision for the child’s support, or without communication . . . with the intent . . . to abandon the child.” (§ 7822, subd. (a)(3).) He contends that the one-year statutory period refers only to the year immediately preceding the filing of the petition for termination of parental rights, which precludes its application to him. Alternatively, Scott asserts that reversal is warranted in any event because (1) he rebutted the presumption that he intended to abandon A.B., (2) the termination of his rights was not in A.B.’s best interests and (3) the juvenile court erred in determining that the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 *et seq.*) did not apply absent proof that a tribe he identified actually received notice as required under that statutory scheme.
During the course of the proceeding, Scott submitted an ICWA-030 form identifying four separate tribes with which A.B. might be affiliated. Respondents mailed a copy of the form and notice of the termination hearing to each of the tribes and filed a copy of the notice, proof of service and counsel’s declaration with the court. By the time of the hearing in August 2015, three of the four tribes had responded, indicating that A.B. was not affiliated with them.

At the continued hearing, the court was informed that no response had been received from the United Keetoowah Band and, with the assent of Scott and A.B., it made a finding that ICWA did not apply. On appeal, Scott contends the court failed to comply with ICWA’s notice provisions because there is no evidence the United Keetoowah Band received actual notice of the proceeding as the result of an error in the zip code used in sending the notice. Scott is correct that the date of receipt of an ICWA notice, rather than the date of its service, is the critical time for determining whether ICWA applies in the absence of any tribal response.

However, this court has taken judicial notice of evidence that the United Keetoowah Band actually received notice of these proceedings several months prior to the termination hearing and decided not to intervene. Although this evidence was not before the juvenile court at the time of the continued hearing on the termination petition and thus the court erred in finding ICWA inapplicable, it nonetheless establishes that there is no reasonable probability that Scott would have obtained a more favorable result in the absence of error, as required to establish reversible error. The order terminating parental rights is affirmed.

C. Contracting

1. Grand Canyon Skywalk Dev., LLC v. Cieslak

Nos.2:15-01189 and 2:13-00596, 2015 U.S. Dist. LEXIS 107457 (D. Nev. Aug. 13, 2015). This matter was before the Court on Gallagher & Kennedy, P.A. and The Hualapai Indian Tribe’s (hereinafter “Gallagher & Kennedy”) Motion to Quash Plaintiff’s Subpoena to Glen Hallman. This action arose out of a long-running dispute relating to the Grand Canyon Skywalk (“Skywalk”) in Case No. 2:13-cv-00596. Plaintiffs alleged that Defendants David
John Cieslak, Nicholas Peter Scutari and Scutari & Cieslak Public Relations, Inc. (hereinafter collectively referred to as “Scutari & Cieslak”), together with individual members of the Hualapai Tribal Council, conspired to conduct a public relations/news media campaign to falsely accuse the Plaintiffs of having breached their contracts with the Hualapai Tribe. The alleged purpose of the conspiracy was to gain support for the Tribal Council’s enactment of an eminent domain ordinance and the subsequent condemnation of Plaintiffs’ contractual rights. Plaintiffs alleged that the Tribe hired Scutari & Cieslak to formulate the public relations campaign against Plaintiffs. As part of this campaign, Scutari & Cieslak, or Tribal officials following scripts prepared by Scutari & Cieslak, falsely stated that Plaintiffs breached their contract “to complete certain critical elements of the Skywalk — including water, sewer and electricity” when, in fact, it was the Tribe’s responsibility to provide these elements. Defendants also allegedly made other statements that impugned the honesty of Plaintiffs. Scutari & Cieslak alleged as an affirmative defense that they acted in good faith upon advice of counsel in making the allegedly defamatory statements.

This Court previously denied Gallagher & Kennedy’s motion to quash a subpoena duces tecum served by Defendants Scutari & Cieslak which sought documents relating to communications between Gallagher & Kennedy and Scutari & Cieslak. Gallagher & Kennedy filed an objection to that order, which is currently pending before the District Judge. The instant motion to quash involves a deposition subpoena that Plaintiffs served on Glen Hallman, an attorney who was formerly employed by Gallagher & Kennedy. Plaintiffs stated that they seek only to question Mr. Hallman about his communications with Scutari & Cieslak. They do not seek to discover privileged communications between the Tribe and Mr. Hallman. Gallagher & Kennedy stated that as part of its representation of the Tribe, it recommended that the Tribe hire Scutari & Cieslak to manage media contacts in connection with the litigation. It also stated that Mr. Hallman was “an attorney assisting the Tribe in carrying out its fundamental sovereign and legislative powers, including the exercise of eminent domain and because this role was in the nature of an official function involving matters of internal governance, the Tribe’s immunity extends to him and the Court has no jurisdiction to compel compliance with the subpoena.
Gallagher & Kennedy also argued that Mr. Hallman’s communications with Scutari & Cieslak are protected from disclosure by the Tribe’s attorney-client privilege and by the attorney work-product doctrine. The Court concluded that the doctrine of tribal sovereign immunity does not preclude the taking of the deposition of attorney Glen Hallman in regard to his communications with Scutari & Cieslak.

The Court concluded, however, that confidential communications in which Mr. Hallman provided legal advice to Scutari & Cieslak regarding the statements that the latter subsequently made about Plaintiffs are within the scope of the Tribe’s attorney-client privilege. At the time such communications occurred, Scutari & Cieslak was the functional equivalent of a tribal employee and the legal advice appears to have been provided with respect to its actions on behalf of the Tribe or its officers.

The factual record is insufficient to support a finding that the Tribe waived its attorney-client or work-product privileges by failing to assert them in a timely manner. Nor has this argument been clearly raised by Plaintiffs or Scutari & Cieslak.

There is no indication that the parties wish to take Mr. Hallman’s deposition if they cannot inquire into the legal advice he allegedly gave Scutari & Cieslak with respect to the allegedly defamatory statements. This order, however, does not preclude the taking of Mr. Hallman’s deposition with respect to his knowledge of relevant, non-privileged information. Accordingly, IT IS HEREBY ORDERED that Gallagher & Kennedy, P.A. and the Hualapai Indian Tribe’s Motion to Quash Plaintiff’s Subpoena to Glen Hallman (#1) is granted in accordance with the foregoing provisions of this order. The granting of this motion is without prejudice to the filing of a motion by Plaintiffs or Scutari & Cieslak that the Hualapai Tribe waived its privileges by not asserting them in a timely manner.

2. Douglas Indian Ass’n v. Cent. Council of Tlingit & Haida Indian Tribes

Defendant Central Council of Tlingit and Haida Indian Tribes of Alaska (“Central Council”) are federally recognized Indian tribes located in Juneau, Alaska. Defendants Richard Peterson and William Ware are, respectively, the President and Tribal Transportation Manager of Central Council. As federally recognized tribes, DIA and Central Council were eligible to receive transportation grants (Tribal Transportation Funds) through the Indian Reservation Roads (IRR) Program from the United States government under 25 U.S.C. 458aa-458hh and 25 C.F.R. parts 170 and 1000 between 2005 and 2012. Multiple tribes are permitted to form consortia in order to collectively receive and administer the Tribal Transportation Funds. 25 U.S.C. 458aa; 25 C.F.R. 1000.14.

In a letter dated July 20, 2005, Central Council solicited DIA’s membership in a consortium of tribes formed by Central Council for the purpose of receiving and administering Tribal Transportation Funds. Central Council’s letter specified expectations for the operation of the consortium, including how the Tribal Transportation Funds of the individual tribes would be handled. Central Council went on to form the Southeast Tribal Department of Transportation (SETDOT) in 2006 to administer the consortium funds and again sought DIA’s membership in the consortium in a memorandum of agreement dated May 8, 2006. This memorandum from SETDOT further detailed the consortium’s operations and management of tribal funds. DIA alleged that based on the promises and expectations in this SETDOT memorandum, they signed and joined the consortium on August 11, 2006. While SETDOT was dissolved in 2007, the consortium continued under the direct administration of Central Council. However, after joining the consortium, DIA alleged that between 2005 and 2012 no transportation projects were undertaken or benefit from the funds afforded DIA despite repeated requests to SETDOT and Central Council.

DIA withdrew from the consortium on January 12, 2012, at which time they requested Central Council to remit all Tribal Transportation Funds the consortium had received on behalf of DIA. DIA filed suit in the Superior Court for the State of Alaska, First Judicial District at Juneau on April 9, 2015, and Central Council filed a Notice of Removal to this Court on May 18, 2015,

Central Council asserted that removal to federal court is supported on two bases. First, Central Council asserted that it was acting as an agent of the United States by carrying out the IRR Program for Alaska Natives and American Indians. Second, Central Council asserted that the matter is based on a federal question arising under the Indian Self-Determination and Education Assistance Act of 1975 (“ISDEAA’’), Public Law 93-638.

The Court did not find any substantial federal issue contested in this matter. DIA’s complaint alleged claims arising under state law which do not turn on a question of federal law. The Court also finds that removal and jurisdiction based on 28 U.S.C. § 1441 is unsupported. The court granted Plaintiff’s Motion for Remand to Alaska Superior Court and denied Defendants’ Motion to Dismiss as moot.

3. United States v. Aubrey

No. 13–10510, 2015 WL 5201800 (9th Cir. Sept. 8, 2015). Defendant, a general contractor on a tribal construction project, was convicted of conversion or misapplication of property belonging to Indian tribal organization by the District Court and he appealed both his conviction and the sentence imposed. The appellate court held that: (1) as matter of first impression, tribal funds disbursed to general contractor on project to construct housing for members of tribe, even funds that were disbursed for completed construction work, continued to be “property belonging to any Indian tribal organization,” as long as tribe maintained title to, possession of, or control over these funds; (2) evidence was sufficient to support defendant’s conviction; (3) forensic auditor who was called as witness to establish foundation for charts detailing the passage of funds through contractor’s accounts did not have to be certified as expert; (4) district court did not abuse its discretion in admitting summary charts; and (5) defendant occupied “position of trust,” as defined by the abuse-of-trust Sentencing Guideline. The appellate court affirmed the conviction and sentence.
4. **Grand Canyon Skywalk Dev. v. Steele**

No.: 2:13-cv-00596, 2015 U.S. Dist. LEXIS 160906 (D. Nev. Nov. 30, 2015). Scutari & Cieslak Public Relations, Inc. is a public-relations firm hired by the Hualapai Indian Tribe of the Hualapai Indian Reservation to promote the Grand Canyon Skywalk, a tourist attraction built on tribal land in the Grand Canyon. When the relationship between the Tribe and the project’s developer began to fracture, Scutari & Cieslak launched a public-relations campaign that, the developer claims, was defamatory and designed to disparage the developer. After the developer sued Scutari & Cieslak and its principals (collectively S&C) for defamation and conspiracy, S&C filed third-party claims against the Tribe for indemnity and contribution.

The Tribe moved to dismiss S&C’s claims, arguing that the court lacks jurisdiction over the third-party claims because the Tribe has not waived its sovereign immunity from suit in federal court. The Court granted the Tribe’s motion to dismiss and denied as moot S&C’s motion to sever the third party claims and its two requests for oral argument.

5. **Walker River Paiute Tribe v. United States HUD**

No. 3:08-CV-0627, 2015 U.S. Dist. LEXIS 166979 (D. Nev. Dec. 14, 2015). Before the court were defendants the United States Department of Housing and Urban Development (HUD); Julian Castro, the Secretary of Housing and Urban Development; and Jemine A. Bryon’s, General Deputy Assistant for Public and Indian Housing, (collectively defendants) motion for partial reconsideration of the court’s December 15, 2014 order granting in-part and denying in-part plaintiff Walker River Paiute Tribe’s (WRPT) motion for summary judgment and defendants’ counter-motion for summary judgment.

WRPT filed the underlying declaratory and injunctive relief action alleging that defendants improperly offset the amount of federal block grant funding WRPT received in fiscal year 2009 in violation of the Native American Housing Assistance and Self-Determination Act (NAHASDA). In particular, WRPT challenged HUD’s allocation of annual Indian Housing Block Grants (IHBG)
pursuant to the funding allocation formula codified at 24 C.F.R. §§ 1000.304 - 1000.340.

In early 2008, HUD conducted an audit of WRPT’s Indian Housing Block Grant (IHBG) funding. In the audit, HUD determined that WRPT had been overfunded in fiscal year 2008 in the amount of $110,444 due to an inflated Formula Current Assisted Stock (FCAS) calculation. HUD then reduced WRPT’s grant for fiscal year 2009 by $110,444 in order to recapture the overpaid funds.

WRPT initiated the present action against HUD under the Administrative Procedures Act (APA), seeking a determination that HUD’s promulgation and interpretation of 24 C.F.R. § 1000.318 was arbitrary and capricious. WRPT filed an amended complaint contending that the exclusion of dwelling units from the block grant formula pursuant to § 1000.318 was in violation of the specific pre-amendment statutory language of NAHASDA. In response to WRPT’s amended complaint, both parties filed cross-motions for summary judgment.

The court found that HUD’s promulgation of 24 C.F.R. § 1000.318 was within NAHASDA’s mandate, and as such, was an appropriate exercise of HUD’s funding authority. However, the court also found that HUD’s interpretation of § 1000.318 to exclude certain housing units from a tribe’s FCAS calculation simply because the underlying leases had passed their initial 25-year term was an arbitrary and capricious interpretation of the regulation. Thereafter, defendants filed the present motion for reconsideration of the court’s order. The Court denied defendants’ motion for reconsideration.


Nos. 14–1109, 14–1114, 2016 WL 385308 (La. Ct. App. Jan. 27, 2016). Engineering firm hired by Indian tribe in connection with capital improvement project at casino facility brought action against tribe for breach of contract when newly elected tribal council suspended project sanctioned by the former administration. The District Court, No. 2006-2683, denied tribe’s exceptions of lis pendens and lack of subject matter jurisdiction. Tribe filed writ application. The appellate court, 965 So. 2d 930, granted writ and ordered a stay to allow tribal court to decide whether tribe had
waived its sovereign immunity. Granting certiorari, the Supreme Court, 992 So. 2d 446, reversed and remanded. On remand, the tribe answered and filed reconventional demand, asserting breach of contract, breach of fiduciary duties, fraud and failure to provide an accounting. The district court entered a number of judgments having the ultimate effect of awarding firm $10,998,250.00 in contractual damages, $5,585,573.00 in attorney fees, and $57,662.34 in court costs. Parties appealed.

The appellate court held that: (1) the trial court improperly granted relief not prayed for when it found that tribe violated fiduciary duties it owed to firm; (2) the firm failed to present sufficient evidence to demonstrate the absence of factual support for one or more elements essential to tribe’s fraud and misrepresentation claims; and (3) fact questions precluded summary judgment in favor of firm on breach of contract claim. Reversed and remanded.

7. **Maniilaq Ass’n v. Burwell**

No. 15-152, 2016 U.S. Dist. LEXIS 36605 (D.D.C. Mar. 22, 2016). For more than twenty years, the Secretary of Health and Human Services has allocated $30,921 a year in federal funds toward renting health clinic space in the Native American village of Kivalina, Alaska. Maniilaq Association, a regional health corporation that now owns and operates the clinic in Kivalina, believes that amount is insufficient to assure adequate healthcare in that community. In an attempt to remedy the Kivalina clinic’s chronic underfunding, Maniilaq submitted a lease proposal based on section 105(l) of the Indian Self-Determination and Education Assistance Act. That section, Maniilaq argued, requires the Secretary to rent its Kivalina clinic space and pay it compensation, based on the clinic’s operating costs, of $249,842 a year. But the Secretary declined Maniilaq’s proposal, arguing that it must pay Maniilaq no more than the $30,921 it has provided previously. Maniilaq sued. The Court granted summary judgment for Maniilaq, and directed the parties to enter into discussions regarding Maniilaq’s Kivalina lease proposal consistent with this opinion.

8. **Navajo Nation v. DOI**
No. 14-cv-1909, 2016 U.S. Dist. LEXIS 42242 (D.D.C. Mar. 30, 2016). Plaintiff Navajo Nation (the “Nation”) alleged that the Bureau of Indian Affairs (“BIA”), an agency within the United States Department of the Interior (“DOI”), violated the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 et seq. (the “ISDEAA”), by failing to disperse calendar year (“CY”) 2014 funding to the Nation according to the Nation’s proposed CY 2014 annual funding agreement (the “Proposal”). Specifically, the Nation contended that DOI Secretary Sally Jewell (the “Secretary”) failed to approve or decline the Proposal within the statutorily-mandated 90-day window for doing so and that, as a result, the Proposal must be deemed approved as a matter of law.

The parties have each moved for summary judgment. Upon consideration of the parties’ motions and supporting briefs, and for the reasons set forth below, the Nation’s motion for summary judgment is hereby denied, and DOI’s cross-motion for summary judgment is hereby granted.


No. C15-0543RSL, 2016 U.S. Dist. LEXIS 60547 (W.D. Wash. May 6, 2016). This matter came before the Court on “BNSF Railway Company’s Motion to Compel Discovery.” BNSF served discovery on the Tribe in November 2015 seeking a wide array of information, including “[a]ll documents related to BNSF running trains across the Tribe’s reservation” and “[a]ll internal communications related to the Easement.” To the extent BNSF sought documents protected by a privilege and/or documents created after this action was filed, the Tribe objected. On March 10, 2016, the Tribe filed a motion for summary judgment regarding BNSF’s contention that this lawsuit is preempted by the Interstate Commerce Commission Termination Act (“ICCTA”) because enforcement of the Easement Agreement negotiated between the parties in 1990 would impede BNSF’s ability to satisfy its common carrier obligations. The Tribe argues that a railway’s voluntary contractual commitments are enforceable, that the terms of the Easement Agreement are clear, that the ICCTA cannot preempt the Indian Right-of-Way Act (“IRWA”) that governs this case, and that BNSF is estopped from asserting a preemption defense. In
support of the first and fourth arguments, the Tribe discusses the intent of the parties and asserts that it had no reason to suspect that BNSF would later claim that the limitations contained in the agreement were unenforceable due to its status as a common carrier. The Tribe provided details regarding the course of the negotiations between the parties and the chronology of events that resulted in the Easement Agreement. In addition, it submitted the declaration of Allan Olson, its current General Manager and the Tribe’s in-house attorney at the time the Easement Agreement was executed. Mr. Olson states in relevant part: “The specific terms and conditions contained in the Easement Agreement were very important to the Tribe. Absent those conditions, the Tribe would not have given its consent for a right-of-way grant to BN. Instead, the Tribe would have continued with the litigation of its trespass claims. Had the Tribe known that BNSF would later take the position that the Easement Agreement conditions were unenforceable due to BNSF’s common carrier obligations, the Tribe never would have consented to the Right-of-Way.”

BNSF argues that the Tribe has put its otherwise privileged communications at issue and should be compelled to turn over any and all communications with counsel that analyze or discuss BNSF’s common carrier obligations and the impact they could have on enforcement of the Easement Agreement. The Court finds as follows: Privileged Documents and Communications: If the Tribe chooses to withdraw paragraph 6 of the Olson Declaration, its attorney-client privileged communications will not be at issue and there will be no need for the discovery sought by BNSF. If, however, the Tribe continues to rely on the declaration of counsel regarding what the Tribe knew regarding the impact of BNSF’s common carrier status and the importance of the negotiated limitations to the Tribe’s decision making, a waiver will have occurred, and the motion to compel will be granted.

10. **Snoqualmie Indian Tribe v. City of Snoqualmie**

No. C15-1936, 2016 U.S. Dist. LEXIS 64350 (W.D. Wash. May 16, 2016). Before the court was Defendants City of Snoqualmie (“the City”) motion to dismiss Plaintiff Snoqualmie Indian Tribe’s (“the Tribe”) amended complaint. Defendants argued that the court should dismiss the Tribe’s 42 U.S.C. § 1981
claim as not plausibly pleaded and decline to exercise supplemental jurisdiction over the Tribe’s remaining state law claims. This case arose out of a dispute regarding municipal services that the City provides to the Tribe and, more specifically, to the casino that the Tribe operates (“the Casino”). The Casino is located outside City limits but within the City’s urban growth area (“UGA”). The City provides sewer and other municipal services pursuant to the “Agreement Between the City of Snoqualmie and the Snoqualmie Tribe for the Provision of Police, Fire and Emergency Medical Services to the Snoqualmie Hills Project and Sewer Utility Service to the Tribe’s Initial Reservation” (“the Agreement”) that the Tribe and the City entered into on April 26, 2004, with an initial term of seven years after the opening of the Casino, after which the Agreement automatically renews for five additional periods of seven years unless either the Tribe or the City gives written notice of termination at least six months prior to the expiration of the initial term or any renewal term.

Under the Agreement, the City agreed to accept up to 360 equivalent residential units (“ERU”) of wastewater effluent per day. The Tribe paid the City approximately $1,270,440 for sewer capacity at the time of connection, and approximately $3,000,000 for sewer services from 2008 through 2015.

In June 2014, the City enacted Ordinance 1133, which raised sewer rates for all customers outside City limits to 150% of the rates for those inside City limits effective July 1, 2014. Prior to that, the City had not established a differential rate for in-and-out-of-City sewer users; rather, the prior City ordinance—Ordinance 994—had set one rate for in-City users and provided that out-of-City users’ rates were set by contract. The City’s decision to create a different rate for customers outside City limits caused the sewer rates for the Casino and other out-of-City users to go up by 50 percent.

The Agreement was to reach the end of its first term in November 2015, and in July 2015, the City and the Tribe met to discuss amending the Agreement before that time. At that meeting, the Tribe expressed its desire for a one-year extension to allow the parties time to negotiate a long-term solution. In an August 25, 2015, letter, the City threatened to cease providing services to the Casino upon expiration of the Agreement. On October 15, 2015, the City signed the Tribe’s proposed amendment, which renewed
the Agreement for one year. Accompanying the City’s October 15, 2015, acceptance was a letter from Mayor Larson informing the Tribe that the City Council had voted to discontinue sewer services to the Tribe by November 30, 2016. Further, the City has opposed the Tribe taking land into trust for the construction of sewer and water facilities.

The Tribe alleged that the City has likewise interfered with its efforts to obtain replacement fire and emergency medical services. The Tribe had explored obtaining those services from Eastside Fire & Rescue (“EF&R”). The City, however, had told EF&R that the Agreement does not permit an alternative arrangement and has submitted a public records request to EF&R regarding EF&R’s communications with the Tribe. The Tribe alleged that these actions may increase the cost of fire and emergency medical services as the Tribe must indemnify EF&R in the event the City sues EF&R regarding its agreement with the Tribe.

The Tribe contended that the City has undertaken these actions out of racial animus. In support of that contention, the Tribe alleged that “Defendants’ decision to refuse services to the Plaintiff denies Plaintiff a basic utility service that the City holds out and offers to non-Indians within the City of Snoqualmie and within its UGA.” The Tribe also alleged that the City “is overcharging the Tribe for sewer services,” and that “the City has not terminated or threatened termination of sewer utility service of any other paying customer within City limits and the City’s UGA.” In its amended complaint, the Tribe asserted causes of action for racial discrimination in violation of 42 U.S.C. § 1981, unreasonable refusal to provide sewer services in violation of RCW 35.67.31, and tortious interference with contractual relations and business expectancies.

Defendants moved to dismiss the Tribe’s Section 1981 claim on the basis that the Tribe has alleged insufficient facts to support that claim. Although Defendants moved for dismissal under Federal Rule of Civil Procedure 12(b)(6), they had already filed an answer to the Tribe’s amended complaint, and the Tribe had filed an answer to Defendants’ counterclaims. Accordingly, the court treated Defendants’ motion as a motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c). Defendants’ motion was before the court.
The court granted in part and denied in part Defendants’ motion. The court dismissed the Tribe’s § 1981 claim but granted the Tribe leave to amend its complaint concerning that claim within 20 days of the date of this order. The Court denied without prejudice Defendants’ request that the court decline supplemental jurisdiction over and dismiss the Tribe’s state law claims.

11. **Wells Fargo Bank v. Cabazon Band of Mission Indian**

No. E060447, 2016 Cal. App. Unpub. LEXIS 4417 (Cal. Ct. App. Jun. 15, 2016). In 2006, plaintiff Wells Fargo Bank loaned $56,570,000 to the Cabazon Band of Mission Indians (Tribe) to build a new parking garage for a casino, which was operated by East Valley Tourist Development Authority (EVTDA), an instrumentality of the Tribe. The loan agreement included a provision that payments would be made to the Bank from a custodial bank account, into which EVTDA deposited the Tribe’s net income from the casino, resort and golf course, which were operated by EVTDA. In August 2007, EVTDA was indebted under a bridge loan from Merrill Lynch and others in the amount of more than $180 million relating to the improvement and operation of the casino, resort and golf course on tribal land. The bridge loan included terms limiting amounts payable to the Tribe.

Due to the recession of 2008, revenues from the casino and resort declined, so the Tribe and EVTDA restructured their loans, with the Tribe executing a supplemental trust indenture in favor of Bank, and EVTDA executed an amended bridge loan agreement with its lenders. In April 2012, the Tribe and EVTDA informed their respective lenders that they could not continue payments and wished to restructure the loans. EVTDA’s lenders agreed to restructure its loans, but Bank notified the Tribe it was in default.

The Bank filed a lawsuit for breach of contract and for injunctive relief to compel EVTDA to deposit funds into the custodial account. Cross motions for summary adjudication were filed by the Bank and the Tribe. The lower court granted Bank’s motion for summary adjudication as to the breach of contract action, and granted the Tribe’s motion for summary adjudication as to the cause of action for injunctive relief. Both parties appealed.

On appeal, the Tribe argued that the trial court erred in granting summary adjudication on the breach of contract cause of action on
the ground it violated the Indian Gaming Act and erred in its calculation of damages. On cross-appeal, the Bank argued the court erred in denying injunctive relief and attorney’s fees. The appellate court found that the trial court did not abuse its discretion in finding that the Bank did not prevail on the breach of contract claim, notwithstanding the judgment. The judgment was affirmed. Each party was to bear its own costs.


No. 16-10317, 2016 U.S. Dist. LEXIS 101610 (E.D. Mich. Aug. 3, 2016). The Saginaw Chippewa Indian Tribe of Michigan and its Employee Welfare Plan (collectively, “Plaintiff” or “Tribe”) sued Blue Cross Blue Shield of Michigan (“BCBSM”) over the manner in which BCBSM has administered Plaintiff’s “self-insured employee benefit Plan” and the health-benefit portions of that Plan. Plaintiff brought a nine-count complaint alleging that BCBSM breached its fiduciary duty to Plaintiff under the Employee Retirement Income Security Act (“ERISA”) when it did not authorize payment of Medicare-like Rates (“MLRs”) for certain health services (Count I), that BCBSM engaged in prohibited transactions under ERISA when it charged Plaintiff hidden fees (Count II), and seven state law claims (Count III-IX).

BCBSM moved to dismiss Plaintiff’s claims that it violated its fiduciary duty to Plaintiff by not paying MLRs for certain health services procured by Plan members. It also moved to dismiss Plaintiff’s state law claims.

Plaintiff and BCBSM entered into Administrative Service Contracts which set out the terms of the parties’ relationship. On July 5, 2007, the Department of Health and Human Services implemented regulations governing the payment amounts that health-care providers may accept from Indians for medical services rendered. 42 C.F.R. § 136.30. The regulations cap the amount a hospital or health-care provider may accept at the same rate that would be paid under Medicare for the same service. From the time the regulation was enacted, BCBSM did not ensure that it processed claims for payment at the MLR for the applicable service. Thus, BCBSM often paid healthcare provider’s rates for
services that were in excess of what would otherwise have been paid under Medicaid.

Because Plaintiff cannot establish that BCBSM had a fiduciary duty under ERISA to ensure payment of MLRs for healthcare services obtained by eligible plan participants, Plaintiff’s MLR claims will be dismissed. Plaintiff’s state law claims are completely preempted by ERISA. Plaintiff’s state law claims will be dismissed. The court dismissed with prejudice Counts I & III-IX of Plaintiff’s Amended Complaint, ECF No. 7 and Count II on the extent it alleges any claims related to Defendant BCBSM’s obligation to ensure the Plan paid Medicare-like Rates for healthcare claims.

13. *Sprint Communications Co., L.P. v. Crow Creek Sioux Tribal Court*

No. 4:10-CV-04110, 2016 U.S. Dist. LEXIS 102257 (D.S.D. Aug. 4, 2016). The issue before the court was whether defendant, Native American Telecom, LLC. (NAT), is entitled to collect access service charges that it billed to plaintiff, Sprint Communications Company, L.P. Sprint provides nationwide long-distance telephone services and is known under the telecommunications regulatory framework as an interexchange carrier (IXC). Sprint delivers long-distance calls to a local exchange carrier (LEC) for termination to end-users. Under the FCC’s current regulatory framework, Sprint pays the LEC a terminating access charge based on the LEC’s interstate access tariff, which is filed with the FCC.

In October 2008, the Crow Creek Sioux Tribal authority authorized NAT to provide telecommunications services on the Crow Creek Reservation subject to the tribe’s laws. Pursuant to the 2008 approval order, NAT began to operate as a LEC. NAT also operates a free conference calling system (used for conference calling, chat-lines, and similar services) in connection with Free Conferencing Corporation. A party using NAT’s services does not pay NAT for the conference call, but rather is assessed charges by the party’s telecommunications provider. NAT then bills the telecommunications provider an access fee as defined in its interstate tariff.
NAT’s access charges that were billed to Sprint for conference calls are at issue here. After paying two of NAT’s bills for charges connected to conference calls, Sprint ceased paying NAT’s terminating access tariffs because Sprint believed that NAT was involved in a traffic-pumping scheme, otherwise known as access stimulation, to generate traffic from free conference calls and chat services. Sprint filed suit against NAT alleging a breach of the Federal Communications Act (FCA) and a state-law unjust enrichment claim.

On November 29, 2011, the FCC released its Connect America Fund final rule that addresses access stimulation and traffic pumping. See Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support, 76 Fed. Reg. 73,830 (Nov. 29, 2011). This court issued an order directing the parties to discuss what effect, if any, the FCC’s Connect America Fund final rule had on the issues presented in this case. The court concluded that NAT’s interstate tariffs numbers 1 and 2 were unenforceable, and granted summary judgment in Sprint’s favor. The court could not, however, determine summarily whether NAT’s tariff number 3 was enforceable. The NAT-Free Conferencing relationship does not resemble a normal carrier-customer relationship. Rather, it resembles a relationship between business partners attempting to operate in a manner only superficially consistent with the FCC’s rules and regulations. Consequently, because Free Conferencing was not an “end user” or “customer” as defined in NAT’s interstate tariff number 3, NAT did not properly bill Sprint for switched access services regarding calls delivered to Free Conferencing. Thus, it was ordered that judgment will be entered in favor of Sprint and against NAT in accordance with this memorandum opinion and order.

D. Employment

1. *Coppe v. Sac & Fox Casino Healthcare Plan*

Civ. P. 12(b)(2), it asserted a defense that the Court lacks jurisdiction of the subject matter of this case, because Defendant has tribal sovereign immunity and can be sued only in its own tribal court. The motion also asserted that ERISA does not waive sovereign immunity as a defense for the claims of Plaintiff.

Plaintiff argued that the Motion to Dismiss should be denied for three reasons: First, Congress has indicated that ERISA is applicable to the tribal plans at issue in this dispute. Second, Defendants waived tribal immunity contractually. Third, the Sac and Fox Nation is not the Defendant, only The Sac and Fox Casino Healthcare Plan, which does not have the defense of sovereign immunity.

The Court found that because of the unequivocal Congressional abrogation of sovereign immunity under 29 U.S.C. § 1002(32) and the Plan’s clear contractual waiver of sovereign immunity, it has jurisdiction over the subject matter of the action. The Defendant’s Motion to Dismiss was denied.

2. Sanders v. Anoatubby

No. 15-6116, 2015 U.S. App. LEXIS 20268 (10th Cir. Nov. 23, 2015). Sanders, a citizen of the Chickasaw Nation (Nation), was employed as a Housing Specialist in the Nation’s Division of Housing (Division). While so employed, her supervisors and other employees allegedly treated her unfairly, called her names, made derogatory comments about her personal life, and failed to follow tribal policies and procedures with respect to her employment. She also claimed to have been wrongfully discharged because, contrary to tribal policy, she was not provided a statement of reasons for her termination.

Sanders also filed applications for housing assistance with the Division. Her applications indicated that her daughter and grandchildren would be living with her in the home, but they were processed as if she was the lone applicant, thereby relegating her to the lowest priority. Sanders claimed the reason was retaliation for her having filed a grievance against the Executive Director and one of her supervisors.

Sanders’ complaint against the Division, Tribal Governor Bill Anoatubby, and various tribal officers was for (1) Wrongful Termination, Abuse of Authority, Non-Compliance of Several
Chickasaw Policies and Procedures, Hostile Work Environment, Homeowner’s Application Discrimination, Non-Compliance of NAHASDA (Native American Housing Assistance and Self-Determination Act of 1996). Defendants moved to dismiss under Fed. R. Civ. P. 12(b)(1) arguing, the Division and the individual defendants were entitled to tribal sovereign immunity.

The appellate court held that (1) Title VII of the Civil Rights Act of 1964 did not abrogate tribal sovereign immunity so as to allow a former employee to bring discrimination claims against tribal housing officials; 42 U.S.C.S. § 2000e(b) specifically exempted Indian tribes from the Title VII definition of “employer.” (2) Title VI of the Civil Rights Act of 1964 did not permit the employee to bring housing discrimination claims, as 25 U.S.C.S. § 4131(b)(6) exempted tribes and their housing divisions from the reach of Title VI. (3) The Ex Parte Young doctrine was inapplicable because the employee did not allege an ongoing violation of federal law and did not seek injunctive or declaratory relief. Judgment affirmed.

3. **Nawls v. Shakopee Mdewakanton Sioux Cmty.Gaming Enters.-Mystic Lake Casino**

No. 15-2769, 2016 U.S. Dist. LEXIS 17902 (D. Minn. Feb. 12, 2016). On February 11, 2016, the undersigned United States District Judge heard oral argument on Defendant Shakopee Mdewakanton Sioux Community Gaming Enterprise’s (“Gaming Enterprise”) Motion to Dismiss for Lack of Jurisdiction. Plaintiffs Annette and Adrian Nawls (the “Nawls”) oppose the Motion. The Nawls asserted claims under Title VII against the Gaming Enterprise. “It is well-settled that the plaintiff bears the burden of establishing subject matter jurisdiction.” *Nucor Corp v. Neb. Pub. Power Dist.*, 891 F.2d 1343, 1346 (8th Cir. 1989). Here, the Nawls have failed to satisfy this burden for two reasons. First, Title VII does not apply to Indian tribes, nor their gaming operations. Second, the Gaming Enterprise is immune from suit in federal court. Accordingly, the Complaint must be dismissed.

Indian tribes, such as the Shakopee Mdewakanton Sioux Community, are excluded from Title VII’s definition of the term “employer.” 42 U.S.C. § 2000e(b). In *Ferguson v. SMSC Gaming*
Enterprise, the court addressed the very question presented here—whether a Title VII claim can be brought against the Gaming Enterprise. 475 F. Supp. 2d 929, 931 (D. Minn. 2007). The court concluded that a Title VII claim could not be asserted against the Gaming Enterprise because “Title VII claims cannot be brought against Indian tribes or their agencies or businesses.” Id. at 931. Indeed, the Eighth Circuit has recognized that the Gaming Enterprise’s predecessor, Little Six Inc., is exempt from Title VII. Charland v. Little Six, Inc., 198 F.3d 249 (8th Cir. 1999). The Nawls’ Title VII claims therefore cannot be asserted against the Gaming Enterprise and no federal question is presented to this Court.

Additionally, the Gaming Enterprise is immune from suit under the doctrine of sovereign immunity. “[T]ribal sovereign immunity is a threshold jurisdictional question.” Amerind Risk Mgmt. Corp. v. Malaterre, 633 F.3d 680, 684 (8th Cir. 2011). The Shakopee Mdewakanton Sioux Community is a federally recognized Indian tribe and possesses sovereign immunity from suit. Smith v. Babbitt, 100 F.3d 556 (8th Cir. 1996). The Gaming Enterprise is “a branch of the sovereign tribal government.” Prescott v. Little Six, Inc., 387 F.3d 753, 757 (8th Cir. 2004). As such, because the Gaming Enterprise has not waived its right to immunity, it is immune from suit. See Charland, 198 F.3d 249; see also Ferguson, 475 F. Supp. 2d at 931.

Finally, the Court notes that Mr. Nawls’ Title VII claims fail for the additional reason that they were not filed within the statutory 90-day timeline. See 42 U.S.C. § 2000e-5(f)(1). Accordingly, Mr. Nawls’ claims are time barred. Williams v. Thomson Corp., 383 F.3d 789, 790 (8th Cir. 2004). For all these reasons, the Gaming Enterprise’s Motion to Dismiss is granted and the Nawls’ Complaint is dismissed.

4. Longo v. Seminole Indian Casino-Immokalee

No. 15–12460, 2016 WL 722526 (11th Cir. Feb. 24, 2016). Former employee of tribe-owned casino brought action against casino, alleging claims under Title VII and Florida Civil Rights Act. In October 2008, Defendant hired Plaintiff to serve as a security guard at its casino. Plaintiff enjoyed success in this position until January 2013, when a patron of the casino started to
sexually harass, stalk, and physically touch him on a continual basis. Because these actions created a hostile work environment, Plaintiff sought to remedy this situation by reporting the incidents to Defendant. But Defendant failed to take any corrective action. Instead, Defendant terminated Plaintiff’s employment one month later, stating that Plaintiff “was ‘discourteous to team members.’” Casino moved to dismiss. The district court, 110 F. Supp. 3d 1252, granted motion. Former employee appealed. The appellate court of Appeals held that: (1) in a matter of first impression, Seminole Tribe of Florida, which owned and operated casino, was federally recognized Indian tribe, and thus it was entitled to sovereign immunity, and (2) sanctions and double costs were not warranted against former employee for frivolous appeal. Affirmed.

5. **Anderson v. Coushatta Casino Resort**

No. 2:15-01203, 2016 U.S. Dist. LEXIS 49416 (W.D. La. Apr. 12, 2016). Before the court was a “Motion for Dismissal of Defendant, the Coushatta Tribe of Louisiana” wherein the movant sought to have the instant matter dismissed (1) for lack of subject matter jurisdiction under the doctrine of sovereign immunity, (2) as time-barred and (3) because plaintiff did not set forth any factual bases or allegations for wrongful or illegal termination under federal or state law. Plaintiff, Larry Anderson, worked in the Terrace Restaurant at the Coushatta Casino Resort in Kinder, Louisiana. In his complaint, Mr. Anderson alleges he was terminated on December 18, 2012 for insubordination and failure to comply with a supervisor’s request. Plaintiff sought compensatory damages, attorney fees and court costs. Plaintiff has not provided this court with any authority for the Tribe’s waiver of this sovereign immunity which would allow him to bring his claims in this court. The court found that it lacked subject matter jurisdiction over this suit and therefore will grant the defendant’s motion because the defendant has not waived its sovereign immunity.

6. **Paskenta Band of Nomlaki Indians v. Crosby**

Plaintiffs Paskenta Band of Nomlaki Indians and Paskenta Enterprises Corporation’s (collectively “Plaintiffs”) Second Amended Complaint (“SAC”) under Federal Rule of Civil Procedure (“Rule”) 12(b)(6). For the reasons set forth below, the dismissal motions are granted in part and denied in part.

The Paskenta Band of Nomlaki Indians (“the Tribe”) employed Ines Crosby, John Crosby, Leslie Lohse and Larry Lohse (collectively, the “Employee Defendants”) in executive positions for more than a decade. Plaintiffs contended that the Employee Defendants used their positions to embezzle millions of dollars from the Tribe and its principal business entity, the Paskenta Enterprises Corporation (“PEC”). According to Plaintiffs, the Employee Defendants stole these funds from Plaintiffs’ bank accounts at Umpqua Bank and Cornerstone Bank by withdrawing large sums for their personal use. Plaintiffs further alleged that the Employee Defendants caused the Tribe to invest in two unauthorized retirement plans for the Employee Defendants’ personal benefit: a defined benefit plan (“Tribal Pension Plan”) and a 401(k) (“Tribal 401(k)”) (collectively “Tribal Retirement Plans”). The Employee Defendants allegedly kept their activities hidden from Plaintiffs through inter alia, harassment, intimidation, and cyber-attacks on the Tribe’s computers.

Plaintiffs went on to assert that the Umpqua Defendants, Cornerstone Defendants, and APC knowingly assisted the Employee Defendants in aspects of their scheme. They contended that the Umpqua Defendants and the Cornerstone Defendants controlled banks where Plaintiffs maintained accounts, and, despite knowing the Employee Defendants were withdrawing money from these accounts for their personal benefit, permitted the Employee Defendants to continue making withdrawals and failed to notify Plaintiffs of the Employee Defendants’ actions. APC, as the third-party administrator for the Tribal Retirement Plans, assisted the Employee Defendants in setting up and administering the unauthorized Tribal Retirement Plans. Cornerstone Defendants’ Motion to Dismiss is granted with leave to amend as to Plaintiffs’ common law negligence claim; denied as to Plaintiffs’ breach of contract and aiding and abetting claim; and granted with prejudice as to Plaintiffs’ restitution claim. APC’s Motion to Dismiss is granted with leave to amend as to Plaintiffs’ common law negligence claim, aiding and abetting claim, and
punitive damages prayer and granted with prejudice as to Plaintiffs’ restitution claim. Umpqua Defendants’ Motion to Dismiss is granted with leave to amend as to Plaintiffs’ common law negligence, breach of contract, and aiding and abetting claim and granted with prejudice as to Plaintiffs’ restitution claim. Plaintiffs are granted thirty (30) days leave from the date on which this order is filed to file a Third Amended Complaint addressing the deficiencies in the aforementioned dismissed claims that were granted with leave to amend.

7.  

Rapada v. Nooksack Indian Tribe

No. 74116-1-I, 2016 Wash. App. LEXIS 1471 (Wash. Ct. App. Jun. 20, 2016). Nadene Rapada was the accounting director for the Nooksack Indian Tribe (NIT). NIT terminated Rapada for processing a mileage reimbursement request without first having the request approved as required by NIT’s written accounting policy. Rapada did not dispute that she violated NIT’s official policy. She argued that after-the-fact approval was common practice at NIT and following that practice, rather than the official policy, was a good faith error in judgment.

The Employment Security Department (ESD) initially decided that Rapada was eligible for unemployment benefits. On NIT’s appeal of this decision, the ESD commissioner reversed concluding that Rapada was discharged for misconduct that amounted to wanton disregard of the employer’s interest and was thus ineligible for unemployment benefits. Rapada appealed to the superior court which reversed the commissioner’s decision.

The court concluded that, on the facts of this case, Rapada made an error in judgment in failing to verify the status of her reimbursement with Ames before cashing the check. A good faith error in judgment is not misconduct that disqualifies a claimant from receiving unemployment benefits. Because the court reversed the commissioner’s ruling, the superior court judgment was affirmed. Rapada requested attorney fees pursuant to RCW 50.32.160. Under RCW 50.32.160, a claimant is entitled to reasonable attorney fees when an appellate court reverses the decision of the commissioner. Because she prevailed here, Rapada was entitled to attorney fees and costs on appeal under RCW 50.32.160, assuming compliance with RAP 18.1(d). Affirmed.
E. Environmental Regulations

1. Cascadia Windlands v. Bureau of Indian Affairs

No. 14–35553, 2015 WL 5306321 (9th Cir. Sept. 11, 2015). Environmental organizations brought action against Bureau of Indian Affairs (BIA) challenging approval of timber sale in national forest under the National Environmental Policy Act (NEPA) and the Coquille Restoration Act (CRA), which Indian Tribe intervened in as a defendant. The District Court, 2014 WL 2872008, granted summary judgment to BIA and tribe. Environmental organizations appealed.

The appellate court held that: (1) it was permissible for BIA to aggregate past and reasonably foreseeable future actions to create baseline from which to consider incremental impact of project, and (2) objective listed in forest management plan, to protect an endangered species, was not a standard or guideline that BIA was required to comply with pursuant to CRA, and thus BIA did not violate CRA by failing to ensure project was consistent with recovery plan for endangered species.


No. 2:12-cv-3021, 2015 U.S. Dist. LEXIS 128745 (E.D. Cal. Sept. 23, 2015). This matter was before the Court pursuant to Plaintiffs’ Motions for Summary Judgment and Defendants’ Motions for Summary Judgment. This case involved the interrelated actions that Defendants took in connection with a proposed gaming facility and hotel fee-to-trust acquisition project. The Bureau of Indian Affairs (“BIA”) reviews and approves tribal applications pursuant to the Indian Reorganization Act (“IRA”). In 2002, Defendant Enterprise submitted an application to the BIA requesting that the Department of the Interior (“DOI”) accept trust title to a piece of land in Yuba County. Defendant Enterprise planned to build a gaming facility, hotel, and parking facilities on the land in Yuba County (“Yuba Site”). The proposed trust acquisition was analyzed in an Environmental Impact Statement (“EIS”) prepared under the direction and supervision of the BIA.
The Draft EIS was issued for public review and comments on March 21, 2008. After the comment period, a public hearing, and consideration and incorporation of comments received, the BIA issued the Final EIS (“FEIS”) on August 6, 2010. The BIA issued a Record of Decision (“ROD”) in November 2012 finding that a gaming establishment on the Yuba Site would be in the best interest of Enterprise and its members and would not be detrimental to the surrounding community.

Plaintiffs alleged that BIA violated the National Environmental Protection Act (“NEPA”) by: (1) narrowing the purpose of the proposed action in order to dismiss viable alternatives; (2) failing to take a “hard look” at Plaintiff United Auburn Indian Community’s socioeconomic interests and other interests; and (3) violated NEPA’s conflict-of-interest provisions by giving undue weight to one of Enterprise’s consultants; by not considering an adequate number of alternatives; and contended that the agency failed to take a “hard look” at the environmental impacts of the proposed casino.

Plaintiffs argued that Defendants violated the Indian Gaming Regulatory Act (“IGRA”) which generally prohibits gaming on lands acquired in trust after 1988, unless it fits an exception under 25 U.S.C. § 2719(a) and (b) or the Secretarial Determination Exception. However, the Assistant Secretary of Indian Affairs determined that gaming on the proposed Yuba site would be in the best interest of the Tribe and its citizens and would not be detrimental to the surrounding community. In addition, the Governor concurred with this determination.

Plaintiffs alleged that the Clean Air Act was violated since the Secretary failed to conduct a conformity determination. Plaintiffs argued that Defendants failed to accurately identify and describe the parcel of land to be taken into trust, alleging that Defendants used two land descriptions interchangeably. Plaintiffs argued that by failing to comply with NEPA and the IGRA, Defendants’ actions violated the Administrative Procedure Act (“APA”).

The Court was not convinced that Defendants violated NEPA or the IGRA and did not find that Defendants acted arbitrarily or capriciously. Therefore, the Court found that Defendants did not violate the APA. The Court granted Defendants’ and Intervenor Defendants’ Motions for Summary Judgment. The Court denied Plaintiffs’ Motions for Summary Judgment.
3. **Alaska Oil and Gas Ass’n v. Jewell**


The appellate court held that: (1) FWS was not required to identify where each component part of each primary constituent element (PCE) was located within each habitat by using scientific data establishing current use by existing polar bears; (2) five–mile increment measurement inland from the coast, to define the area of designation, was not arbitrary and capricious; (3) inclusion of area that was primarily an industrial staging area for oil and gas operations was not arbitrary and capricious; (4) as a matter of first impression for the circuit, compliance with procedural requirements for providing written justification to State was judicially reviewable; and (5) FWS complied with procedural requirements for written justification. Affirmed in part, reversed in part, and remanded.

4. **Alaska Dept. of Natural Resources v. U.S.**

No. 14–35051, 2016 WL 946917 (9th Cir. Mar. 14, 2016). State of Alaska brought action against landowners, who were Alaska natives, to quiet title to rights-of-way for four public trails that crossed their land, and seeking a declaratory judgment and a claim seeking to condemn for public use whatever portions of the rights-of-way the State did not already own. The district court dismissed for lack of subject matter jurisdiction. State appealed. The appellate court held that: (1) federal court lacked subject matter jurisdiction over action to quiet title to rights-of-way, and (2) federal court had jurisdiction over state’s condemnation action. Affirmed in part, vacated in part, and remanded.
5. Wyoming v. United States DOI

Case No. 2:15-CV-043 (Lead Case); Case No. 2:15-CV-041, 2016 U.S. Dist. LEXIS 82132 (D. Wyo. Jun. 21. 2016). This matter was before the Court on the Petitions for Review of Final Agency Action filed separately in each of the consolidated actions, challenging the Bureau of Land Management’s issuance of regulations applying to hydraulic fracturing on federal and Indian lands. On March 26, 2015, the Bureau of Land Management (“BLM”) issued the final version of its regulations applying to hydraulic fracturing on federal and Indian lands. 80 Fed. Reg. 16,128-16,222 (Mar. 26, 2015) (“Fracking Rule”).

The Court preliminarily enjoined the BLM from enforcing the Fracking Rule. Purportedly in response to “public concern about whether fracturing can lead to or cause the contamination of underground water sources,” and “increased calls for stronger regulation and safety protocols,” the BLM undertook rulemaking to implement “additional regulatory effort and oversight” of this practice. The BLM ultimately published its final rule regulating hydraulic fracturing on federal and Indian lands on March 26, 2015. The BLM determined the Fracking Rule fulfills the goals of the initial proposed rules: “[t]o ensure that wells are properly constructed to protect water supplies, to make certain that the fluids that flow back to the surface as a result of hydraulic fracturing operations are managed in an environmentally responsible way, and to provide public disclosure of the chemicals used in hydraulic fracturing fluids.” The Industry Petitioners and the States of Wyoming and Colorado filed separate Petitions for Review of Final Agency Action, seeking judicial review of the Fracking Rule pursuant to the Administrative Procedure Act (APA). The States of North Dakota and Utah, and the Ute Indian Tribe of the Uintah and Ouray Reservation, later intervened in the States’ action as Petitioners and various environmental groups intervened as Respondents, and the Court granted the parties’ motion to consolidate the two separate actions. Petitioners contend the Fracking Rule should be set aside because it is arbitrary, not in accordance with law, and in excess of the BLM’s statutory jurisdiction and authority. See 5 U.S.C. § 706(2)(A) & (C). The
Ute Indian Tribe additionally contends the Fracking Rule is contrary to the Federal trust obligation to Indian tribes.

Congress has not delegated to the Department of Interior the authority to regulate hydraulic fracturing. The BLM’s effort to do so through the Fracking Rule is in excess of its statutory authority and contrary to law. As this finding is dispositive as to each of the Petitions for Review, the Court need not address the other points raised in support of setting aside the Fracking Rule. Therefore, the Court holds the Fracking Rule is unlawful, and it is ordered that the BLM’s final rule related to hydraulic fracturing on federal and Indian lands, 80 Fed. Reg. 16,128 (Mar. 26, 2015), is hereby set aside.


No. CV-04-256, 2016 U.S. Dist. LEXIS 82610 (E.D. Wash. Jun. 24, 2016). Defendant asked the court to reconsider its April 1, 2016 “Order Re Reconsideration” in which it sua sponte reconsidered its “Order Granting Motion For Summary Adjudication, In Part” and found the Plaintiff Confederated Tribes Of The Colville Reservation (“Tribes”) could recover response costs for “enforcement activities” related to “removal” and/or “remedial action.”

In its “Order Re Reconsideration,” this court rhetorically asked why the phrase “enforcement activities” in 42 U.S.C. § 9601(25) is not sufficient to provide for an award of private litigants’ attorney’s fees associated with bringing a cost recovery action under § 9607(a)(4)(B), but should be sufficient when a State or an Indian tribe brings a cost recovery action under § 9607(a)(4)(A). This court’s answer was: “It makes sense simply because these are governmental entities with inherent enforcement authority, unlike private parties. This is recognized by the fact that governmental entities are entitled to “all costs of removal or remedial action . . . not inconsistent with the national contingency plan (“NCP”),” whereas private parties are entitled only to “necessary costs of response . . . consistent with the national contingency plan.” It is presumed that “all costs” incurred by a governmental entity are consistent with the NCP and a defendant has the burden of proving to the contrary. On the other hand, a private party has the burden of
proving not only that its costs were “necessary,” but that they are also consistent with the NCP. Governmental entities and private entities are clearly treated differently under § 9607 and that difference is sufficient to justify awarding States and Indian tribes response costs for “enforcement activities,” even though unlike the federal government (EPA), they are not acting pursuant to § 9604 or some other specific statutory provision of CERCLA.

Defendant contends the court clearly erred in concluding the Tribes have “inherent authority” to enforce CERCLA. According to Defendant, “the Tribes do not possess inherent authority to enforce a federal statute such as CERCLA” and § 9601(25) “does not convey enforcement authority to Indian tribes any more than it conveys such authority to other public entities or private parties.” The court did not clearly err in concluding in its “Order Re Reconsideration” that the Tribes can recover response costs for “enforcement activities” related to removal and/or remedial action. This includes attorney’s fees and litigation costs related to removal and/or remedial action. Defendants’ Motion For Reconsideration is denied.

F. Fisheries, Water, FERC, BOR

1. In re the General Adjudication of All Rights to Use Water in the Big Horn River System

   No. S–14–0257, 2015 WL 5439947 (Wyo. Sept. 16, 2015). In action involving ongoing general adjudication of water rights in river system, landowner filed objections to special master’s report and recommendation, which recommended partial reinstatement of cattle company’s expired permit, which conveyed water through ditch that ran through landowner’s property. The District Court adopted special master’s report and recommendation and entered its final order in general adjudication. Landowner appealed. The Supreme Court held that: (1) special master did not improperly place burden of proof on landowner, and (2) evidence was sufficient to support findings required to reinstate permit.

Plaintiffs’ motion for Rule 60(b)(5) relief was denied by this court in earlier proceedings, but the ruling was reversed on appeal. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wisconsin*, 769 F.3d 543, 546 (7th Cir. 2014). The court of appeals found that the 1991 judgment forbidding night hunting of deer by tribal members had been rendered obsolete by the passage of time and the state’s greater experience with night hunting of deer since 1991. Beginning in the late 1990s, the state had used state employees and private contractors to kill deer at night in many areas of the state to reduce the increase in the deer population and to prevent the spread of chronic wasting disease in deer. The program showed that night hunting was not as risky as it had seemed, as did the record of on-reservation tribal night hunting, which is not subject to state regulation. Accordingly, the court of appeals saw no reason to prohibit the tribes’ members from engaging in such hunting within the ceded territory, “given sensible regulations governing such hunting.”

Plaintiffs’ retained their hunting rights, including the right to hunt at night, when they ceded thousands of acres of northern Wisconsin to the United States in the early part of the nineteenth century. Their right to hunt deer at night throughout the ceded territory was prohibited in the final judgment entered in 1991 only because the court found then that the state defendants had shown such hunting to be a hazard to public safety, that the particular regulation was necessary to prevent the hazard and that it was the least restrictive alternative to the accomplish the safety purpose. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians*, 740 F. Supp. 1400, 1423 (W.D. Wis. 1990). Now, the tribes have been able to show that the prohibition on off-reservation night deer
hunting is no longer necessary for public safety purposes, when properly regulated. It remains plaintiffs’ right, as well as its responsibility, to promulgate and enforce the regulations; not defendants’.

Defendants’ role is limited to showing that plaintiffs’ regulations are inadequate. Defendants have focused on five areas in which they think plaintiffs’ proposed regulations are inadequate to protect public safety: (1) the “adequate backdrop” regulation; (2) notice; (3) pre-scouting; (4) the need for a spotter; and (5) the proposed start date for off-reservation night hunting. The objections of defendants State of Wisconsin, et al. to plaintiffs’ regulations for night hunting are denied as either discriminatory or unnecessary to prevent or ameliorate any substantial risk posed by tribal night hunting.

3. Penobscot Nation v. Mills

No. 1:12-cv-254, 2015 U.S. Dist. LEXIS 169342 (D. Me. Dec. 16, 2015). Before the Court were three motions for summary judgment: (1) the State Defendants’ Motion for Summary Judgment, or in the Alternative, for Dismissal for Failure to Join Indispensable Parties; (2) the United States’ Motion for Summary Judgment; and (3) the Motion for Summary Judgment by Plaintiff Penobscot Nation.

Plaintiff Penobscot Nation, which is a federally recognized American Indian tribe in Maine, filed this action seeking to resolve ongoing disputes between the tribe and the State of Maine regarding a section of the Penobscot River. The Court allowed the United States to intervene as a plaintiff on its own behalf and as a trustee for the Penobscot Nation. The Penobscot Nation asserted that it was prompted to file this case in response to the August 8, 2012 Opinion issued by then-Maine Attorney General William J. Schneider regarding the respective regulatory jurisdiction of the . . . Penobscot Nation and the State of Maine relating to hunting and fishing on the main stem of the Penobscot River.

The Penobscot Nation and the United States (together, Plaintiffs) maintain that the 2012 Attorney General Opinion reflected a misinterpretation of the law governing the boundaries of their reservation and their rights to engage in sustenance fishing. Thus, Plaintiffs sought a declaratory judgment clarifying both
those boundaries and tribal fishing rights within the Penobscot River.

The Court held that: (1) The plain language of the Maine Implementing Act (MIA) and the Maine Indian Claims Settlement Act (MICSA) is not ambiguous and does not suggest that any of the waters of the Main Stem section of the Penobscot River are included within the boundaries of the Penobscot Indian Reservation; (2) The Penobscot Indian Reservation as defined in MIA, Me. Rev. Stat. Ann. tit. 30, § 6203(8), and the MICSA, 25 U.S.C.S. § 1722(i), includes the islands of the Main Stem, but not the waters of the Main Stem; (3) The language of Me. Rev. Stat. Ann. tit. 30, § 6207(4) is ambiguous; (4) Interpreting § 6207(4) to reflect the expressed legislative will and in accordance with the special tribal canons of statutory construction, sustenance fishing rights provided in § 6207(4) allow the Penobscot Nation to take fish for individual sustenance in the entirety of the Main Stem section.

The Court ordered that declaratory judgment enter as follows: (1) in favor of the State Defendants to the extent that the Court hereby declares that the Penobscot Indian Reservation as defined in MIA, 30 M.R.S.A. § 6203(8), and MICSA, 25 U.S.C. § 1722(i), includes the islands of the Main Stem, but not the waters of the Main Stem; and (2) in favor of the Penobscot Nation and the United States to the extent that the Court hereby declares that the sustenance fishing rights provided in section 30 M.R.S.A. § 6207(4) allows the Penobscot Nation to take fish for individual sustenance in the entirety of the Main Stem section of the Penobscot River.

4. New Mexico v. Trujillo

No. 15–2047, 2016 WL 683831 (10th Cir. Feb. 19, 2016). New Mexico filed suit regarding water rights. The District Court entered order that adjudicated individual’s water rights based on special master’s summary judgment order. Individual property owner appealed. The appellate court held that: (1) district court’s certification of order as final appealable judgment did not clearly articulate “finality” or “no just reason for delay,” and therefore order fell short of proper certification; (2) order addressing individual’s water rights could not be considered final, as required
to be certified as final appealable order; (3) danger of injustice did not outweigh inconvenience and costs of piecemeal review, and thus order could not be reviewed under pragmatic finality doctrine; (4) order describing individual’s water rights expressly granted State’s request for injunction, and thus Court of Appeals could exercise jurisdiction to review it; and (5) individual inadequately presented argument on appeal that she was entitled to irrigate her land, and thus Court of Appeals declined to address it. Affirmed.

5.  

*Turunen v. Creagh*

No. 2:13-CV-106, 2016 U.S. Dist. LEXIS 43158 (W.D. Mich. Mar. 31, 2016). Plaintiff, Brenda Turunen, is a member of the Keweenaw Bay Indian Community (KBIC), a federally recognized Indian tribe in Michigan’s Upper Peninsula that is the successor-in-interest to the L’Anse and Ontonagon bands of the Lake Superior Chippewa Indians. In 1842, the Lake Superior Chippewa Indians signed a treaty with the United States of America, 7 Stat. 591 (the 1842 Treaty), in which the Indian signatories ceded large portions of the western Upper Peninsula of Michigan, but reserved “the right of hunting on the ceded territory, with the other usual privileges of occupancy.” 7 Stat. 591.

Plaintiff owned property that is within the “ceded territory” at issue in the 1842 Treaty. Plaintiff asserted that “the usual privileges of occupancy” reserved by the KBIC on the ceded territory included commercial farming and animal husbandry. Based on that interpretation of the 1842 Treaty, Plaintiff sought a declaration that she may—as a member of the KBIC—raise animals free from state regulation on her property within the ceded territory. Plaintiff’s claim rests on the twin propositions that the KBIC retained certain rights in the 1842 Treaty, and that she may exercise such rights based on her membership in the KBIC.

Although the Court was required to determine the scope of the rights retained by the KBIC to resolve Plaintiff’s claim, the KBIC was not a party to this action. Thus, the Court previously sought briefing from the parties regarding whether the KBIC should be joined pursuant to Federal Rule of Civil Procedure 19, and whether the case should be dismissed if the KBIC could not be joined. After the parties responded, the Court—at Plaintiff’s urging—ordered Plaintiff to notify the KBIC of the pending action and the
opportunity to intervene. The KBIC followed up to that notification with a letter to the Court stating that it would not intervene in the action, and further urging that the action be dismissed under Rule 19.

The Court concluded that the KBIC was a required party to this action and that joinder of the KBIC was not feasible. The Court further found that the first three factors under Rule 19(b) weigh in favor of dismissal. Although the fourth factor weighs against dismissal, such factor is not dispositive, particularly in light of the interests presented by the KBIC’s invocation of its sovereign immunity. Accordingly, the Court concluded this action should be dismissed pursuant to Rule 19.

6. Ninilchik Traditional Council v. Towarak

No. 3:15-cv-00205, 2016 U.S. Dist. LEXIS 51370 (D. Alaska Apr. 17, 2016). Defendants Tim Towarak (Chairman of the Federal Subsistence Board), Sally Jewell (Secretary of Interior), and Tom Vilsack (Secretary of Agriculture) (Defendants) moved to dismiss the complaint of plaintiff Ninilchik Traditional Council (NTC) pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6).

NTC’s two-count complaint, filed in October 2015, alleged that Defendants’ actions violate Section 804 of ANILCA and the Administrative Procedure Act in relation to three events: (1) the Board’s 2002 delegation of authority to the in-season manager; (2) Jeffry Anderson’s (during all relevant times, the in-season fishery manager) 2015 subsistence fishery closure; and (3) Defendants’ implementation of the Kenai river gillnet fishery regulation.

The plaintiff was NTC, the governing body of Ninilchik Village, a federally-recognized Indian tribe whose members have a customary and traditional use of all fish in the Kasilof and Kenai River drainages. Although Ninilchik Village members share “in an annual subsistence allocation of salmon from three federal fisheries on the Kenai River,” they alleged that they have “been unable to harvest this subsistence salmon allocation” due to “restrictive federal subsistence regulations limiting methods and means of harvest, and restrictive and arbitrary federal in-season subsistence management actions.”
In March 2014, NTC submitted two proposed regulations that would authorize residents of Ninilchik to operate two community subsistence gillnets: one in the Kenai River and the other in the Kasilof River. The Southcentral Regional Advisory Council, which is a regional advisory council established under Section 805 of ANILCA to provide opinions and recommendations to the Board on subsistence matters, considered NTC’s two gillnet fishery proposals and recommended that the Board adopt both. The Board voted to adopt NTC’s proposals and, after a five-month notice and comment period, promulgated final regulations authorizing the two gillnet fisheries.

On May 27, 2015, NTC submitted to Anderson an operational plan for the Kenai and Kasilof gillnet fisheries. Before deciding either submission, Anderson issued an emergency special action closing the federal subsistence fishery from June 18 until August 15 for early-run Chinook salmon in all federal public waters in the Kenai River downstream of Skilak Lake.

On July 13, “less than a month before the closure of the 2015 federal subsistence fishing season,” Anderson approved NTC’s operational plan for the Kasilof River gillnet and issued a permit to NTC. But Anderson still did not act on NTC’s request for a Kenai River gillnet permit. In a July 16 letter explained that he did not anticipate approving a Kenai River permit for the 2015 fishing season “because of the urgent need to protect early-run Chinook salmon.”

In late July NTC wrote two letters to the Board seeking relief. The Board convened on July 28 and considered NTC’s requests. After hearing testimony, the Board voted not to grant NTC any of the relief it had requested. Defendants’ motion to dismiss is granted in part and denied in part as follows: Defendants’ motion to dismiss NTC’s claim that the Board violated 50 C.F.R. § 100.10(d)(6) by not establishing “frameworks” to guide the delegation of its authority is DENIED; Defendants’ motion to dismiss NTC’s claim that the in-season manager’s failure to decide its Kenai gillnet permit application based on the merits of the operational plan violates 50 C.F.R. § 100.27(e)(10)(iv)(J) is denied; in all other respects, Defendants’ motion is granted.

7. United States v. Washington
No. C70-9213, Subproceeding No. 14-02, 2016 U.S. Dist. LEXIS 78661 (W.D. Wash. Jun. 15, 2016). This matter was before the Court on Nisqually Indian Tribe’s (“Nisqually”) and Squaxin Indian Tribe’s (“Squaxin”) Cross-Motions for Summary Judgment. The Nisqually and Squaxin asked the Court to interpret the Usual and Accustomed fishing grounds and stations (“U&A”) of the Squaxin pursuant to Paragraph 25(a)(1) of the permanent injunction. Specifically, Nisqually sought a determination that Squaxin has no adjudicated U&A east of a line running from Johnson Point to Devils Head, including the waters of the Nisqually Reach and around Anderson Island (“Subproceeding Area” or “disputed waters”). Nisqually also asked the Court to clarify the previous language of the Court concerning Squaxin’s U&A, and enjoin Squaxin from future fishing or fisheries-management actions in the Subproceeding Area. Squaxin argued that Judge Boldt did not intend to exclude the disputed waters, as demonstrated by the evidence before him at the time he made his decision, and sought a determination that the Squaxin U&A included those waters. The Court hereby finds and orders: (1) Nisqually Indian Tribe’s Motion for Summary Judgment is denied. (2) Squaxin Indian Tribe’s Motion for Summary Judgment is granted. This Court has determined that there is no evidence that Judge Boldt intended to exclude the disputed waters from the Squaxin U&A, and there is evidence in the record supporting that the Squaxin regularly fished in those waters.

8. United States v. Washington

No. 13-35474, 2016 U.S. App. LEXIS 11709 (9th Cir. Jun. 27, 2016). Holdings: (1) The record supported the district court’s determination that barrier culverts the State of Washington used when it laid roads over streams in the State violated the Stevens Treaties the United States entered with Indian tribes because they hindered salmon from swimming upstream to spawn, and the court did not exceed its powers when it ordered the State to prepare a list of state-owned barrier culverts within areas covered by the treaties and to fix or remove them. (2) There was no merit to the State’s claim that the United States waived its right to represent the tribes because it led the State to believe that its barrier culverts did not violate the treaties. (3) The court did not err when it dismissed the
State’s claim that the United States had to fix barrier culverts it installed on federal land in Washington before the State could be required to repair or remove its culverts. The court of appeals affirmed the district court’s order.

G. Gaming

1. Alabama v. PCI Gaming Auth.

2015 U.S. App. LEXIS 15692 (11th Cir. Ala. Sept. 3, 2015). Alabama sued under state and federal law to enjoin gaming at casinos owned by the Poarch Band of Creek Indians (the “Tribe”) and located on Indian lands within the state’s borders. As the Tribe itself was unquestionably immune from suit, Alabama instead named as defendants PCI Gaming Authority (“PCI”), an entity wholly owned by the Tribe that operates the casinos, and tribal officials in their official capacity.

Alabama claimed that the gaming at the casinos constitutes a public nuisance under Alabama law and should be enjoined. It put forth two novel theories to explain why its state law applies to the Tribe’s casinos. First, Alabama asserted that the Secretary of the Interior lacked authority to take land into trust for the Tribe; therefore, the Tribe’s casinos were not located on Indian lands, and Alabama may regulate the gaming there. Second, Alabama contended that by incorporating state laws governing gambling into federal law, 18 U.S.C. § 1166 creates a right of action for a state to sue in federal court to enforce its laws on Indian lands.

The district court rejected these arguments and dismissed the action on the grounds that the defendants were entitled to tribal immunity on nearly all of Alabama’s claims and Alabama failed to state a claim for relief. The appellate court upheld the judgment of the district court finding that the Tribe was entitled to sovereign immunity as to all of Alabama’s claims as the Indian Gaming Regulatory Act, 18 U.S.C.S. § 1166, gives states no right of action to sue. The appellate court held that Congress did not intend to create an implied right of action in § 1166. The court also held that the individual defendants were entitled to sovereign immunity as to Alabama’s state law claim. Judgment affirmed.
2. *Citizens Against Casino Gambling v. Jonodey Osceola Chauduri*

Nos. 11-5171, 11-5466, 13-2339, 13-2777, 2015 U.S. App. LEXIS 16439 (2d Cir. Sept. 15, 2015). The plaintiffs-appellants (“plaintiffs”) were organizations and individuals that oppose the operation of a casino in Buffalo, New York, by the Seneca Nation of Indians. They brought three successive lawsuits in the United States District Court for the Western District of New York against the National Indian Gaming Commission (“NIGC”), its Chairman, the United States Department of the Interior (“DOI”), and the Secretary of the Interior. In the three actions, the plaintiffs argued that the NIGC did not act in accordance with federal law in approving an ordinance and subsequent amendments to that ordinance that permitted the Seneca Nation to operate a class III gaming facility, a casino, on land owned by the Seneca Nation in Buffalo (“the Buffalo Parcel”). In the third lawsuit (“CACGEC III”), which addressed the NIGC’s approval of the most recent version of the ordinance, the district court denied the plaintiffs’ motion for summary judgment and entered judgment dismissing the case.

The appellate court held that the district court correctly dismissed the plaintiffs’ complaint in *CACGEC III* because the DOI and the NIGC’s determination that the Buffalo Parcel is eligible for class III gaming under the Indian Gaming Regulatory Act (“IGRA”), 25 U.S.C. §§ 2701-2721, was not arbitrary or capricious, an abuse of discretion, or in violation of law. The court further held that Congress intended the Buffalo Parcel to be subject to tribal jurisdiction, as required for the land to be eligible for gaming under IGRA. Finally, the court held that IGRA Section 20’s prohibition of gaming on trust lands acquired after IGRA’s enactment in 1988, 25 U.S.C. § 2719(a), does not apply to the Buffalo Parcel. Because the gaming ordinances at issue in the first two lawsuits (“CACGEC I” and “CACGEC II”) have been superseded by the most recent amended ordinance, the appeals of *CACGEC I* and *CACGEC II* are moot. Accordingly, the court affirmed the judgment of the district court in *CACGEC III* and dismissed the appeals of *CACGEC I* and *CACGEC II*.

Tribe brought action against the state and Gambling Control Commission seeking damages for breach of Indian Gaming Regulatory Act compact. The Superior Court granted summary judgment for state and Commission. Tribe appealed. The appellate court ruled that compact barred tribe from recovering damages as a remedy for breach. Affirmed.


Nos. 14–56104, 14–56105, 2015 WL 6445610 (9th Cir. Oct. 26, 2015). Indian tribe brought suit against California, asserting claims of mistake and misrepresentation regarding amendment to tribal-state gaming compact entered under Indian Gaming Regulatory Act (IGRA), and seeking injunctive relief. Indian tribe moved for summary judgment. The District Court granted motion on misrepresentation claim. Tribe moved to vacate to request further relief, which was denied. California appealed, and tribe cross-appealed.

The appellate court held that: (1) California misrepresented to tribe that no further licenses were available; (2) amendment was voidable and appropriate remedy was rescission and restitution; (3) California was not entitled to setoff for profits tribe gained from operating machines it would not have had absent amendment; (4) California’s misrepresentation was innocent not fraudulent; (5) California waived sovereign immunity; and (6) language of IGRA precluded bad faith claim against California.

5. *Massachusetts v. Wampanoag Tribe of Gay Head (Aquinnah)*

The Commonwealth of Massachusetts contends that operating gaming facilities without such a license would violate a 1983 agreement, approved by Congress in 1987, that subjects the lands in question to state civil and criminal jurisdiction (and specifically to state laws regulating gaming). Count 1 of the complaint alleged breach of contract, and Count 2 sought a declaratory judgment.

The Commonwealth, the Town of Aquinnah, the Aquinnah/Gay Head Community Association (AGHCA), and the Tribe have all moved for summary judgment. This case presented two fairly narrow issues. The first was whether a statute passed by Congress in 1988 (the Indian Gaming Regulatory Act, or IGRA) applies to the lands in question, which in turn raises the questions whether the Tribe exercises “jurisdiction” and “governmental power” over the lands. The second was whether IGRA repealed, by implication, the statute passed by Congress in 1987 (the act that approved the 1983 agreement). If the 1988 law (IGRA) controls, the Tribe can build a gaming facility in Aquinnah. If the 1987 law controlled, it cannot.

The complaint asserted a claim for breach of contract and requested a declaratory judgment that the Settlement Agreement allowed the Commonwealth to prohibit the Tribe from conducting gaming on the Settlement Lands. The Tribe removed the action to this Court on grounds of federal-question and supplemental jurisdiction. The Commonwealth moved to remand the action to state court, which the Court denied. Both the AGHCA and the Town filed motions to intervene. The Court granted those motions. The Tribe moved to dismiss the AGHCA complaint on the ground of sovereign immunity and failure to state a claim upon which relief can be granted. The Tribe separately moved to dismiss all three complaints, with leave to amend, for failure to join the United States, which it asserted was a required party under Fed. R. Civ. P. 19. The Tribe filed an amended answer to the Commonwealth’s complaint which included counterclaims against the Commonwealth and claims against three third-party defendants, all of whom are government officials of the Commonwealth sued in their official capacity.

The Court denied the Tribe’s motions to dismiss and granted the motion by the Commonwealth to dismiss the counterclaims against it. Remaining are the claims by the Commonwealth, the AGHCA, and the Town against the Tribe, and the Tribe’s
counterclaims against the government officials. The Commonwealth, the Town, the AGHCA, and the Tribe all moved for summary judgment.

The Court found that the Tribe has not met its burden of demonstrating that it exercises sufficient “governmental power” over the Settlement Lands, and therefore IGRA does not apply and it is clear that IGRA did not repeal by implication the Massachusetts Settlement Act. Accordingly, the Tribe cannot build a gaming facility on the Settlement Lands without complying with the laws and regulations of the Commonwealth and the Town. The Court granted the motions for summary judgment of the Commonwealth of Massachusetts, the Town of Aquinnah, and the Aquinnah/Gay Head Community Association, Inc. and denied the Tribe’s motion for summary judgment.


North Fork is a federally recognized Indian tribe, listed in the Federal Register. Prior to the initiation of the plan to build a gaming facility, the Tribe possessed only a 61.5-acre parcel in North Fork, California (which lies within the Sierra National Forest), held in trust by the United States for development of a community center, a youth center, and homes. In 2004, the Tribe put into action its plan to build a gaming facility by starting down
the path to acquisition of land in Madera County. A lengthy environmental impact study ("EIS"), with opportunity provided for public notice and comment, was conducted and the results published on August 6, 2010.

After reviewing the results of the EIS, the submissions of state and local officials and surrounding Indian tribes, and the likely economic impact on North Fork and the surrounding communities, the BIA recommended approval of (and requested the California Governor’s concurrence with) the Tribe’s bid for acquisition in trust of an approximately 305 acre plot of land in Madera County ("Madera parcel") for the benefit of North Fork pursuant to the Indian Reorganization Act ("IRA"), 25 U.S.C. § 465, in anticipation of North Fork’s construction of a C class III gaming facility as contemplated by IGRA. California’s Governor, Edmund Brown, Jr., gave his concurrence with the BIA recommendation on August 30, 2012.

On February 5, 2013, the federal government took the Madera parcel into trust for North Fork pursuant to the Indian Reorganization Act ("IRA"), 25 U.S.C. § 465, in anticipation of North Fork’s construction of a class III gaming facility as contemplated by IGRA. After discussions with representatives of the then-Governor, Arnold Schwarzenegger, regarding framing of a Tribal-State compact, Governor Schwarzenegger and the Tribe executed a gaming compact ("2008 Compact"). However, because the acquisition of the Madera parcel was stalled due to the lengthy EIS process, the 2008 Tribal-State compact was never presented to the legislature.

A second draft of the Tribal-State compact prepared by the Governor’s office and the Tribe was presented to Governor Brown. On the same date that the Governor gave his concurrence to the BIA recommendation for taking the Madera parcel into trust, his office executed a Tribal-State compact with North Fork and forwarded that compact to the legislature for ratification. The California Assembly and Senate passed AB 277 and the Governor approved it and the bill was filed with the Secretary of State. At some time shortly thereafter, the California’s Secretary of State forwarded the compact to the Secretary of the Interior for review and approval pursuant to 25 U.S.C. § 2710(d)(8). The Assistant Secretary of the Interior, Bureau of Indian Affairs, issued notice
that the compact between the State and North Fork was approved (to the extent that it was consistent with IGRA).

On November 4, 2014, California voters rejected Indian Gaming Compacts Referendum, labeled Proposition 48, to ratify the North Fork Tribe compact. Based on that referendum vote, the State of California refuses to recognize the existence of a valid Tribal-State compact with North Fork. The validity of the referendum and compact is the subject of litigation now pending before the California Fifth District Court of Appeal. After the 2014 referendum, the State refused to enter into negotiations with North Fork regarding a new Tribal-State compact, concluding that any attempt at negotiation of a compact regarding the Madera parcel would be futile. On that basis, North Fork brings the instant action, contending that the State’s failure to negotiate triggers the remedial provisions of IGRA.

The Court concluded that the State failed to enter into negotiations with North Fork for the purpose of entering into a Tribal-State compact within the meaning of § 2710. Accordingly, the parties were ordered to conclude a compact within 60 days of the date of this order.

7. **Bettor Racing, Inc. v. Nat’l Indian Gaming Comm’n**

No. 15-1335, 2016 U.S. App. LEXIS 1456, 812 F.3d 648 (8th Cir. Jan. 29, 2016). The National Indian Gaming Commission (NIGC) permissibly interpreted the Indian Gaming Regulatory Act as not requiring scienter for a violation under 25 U.S.C.S. § 2713. Absent a scienter requirement, the undisputed facts established that a contractor violated the Act by operating a pari-mutuel betting business at a tribe’s casino without an NIGC-approved contract, by modifying the contract without NIGC approval, and by holding the sole proprietary interest in the gaming operations. The $5 million fine imposed on the contractor did not violate the Eighth Amendment. Among other factors, the fine was less than the statutory maximum under § 2713(a)(1). Granting summary judgment without a hearing did not violate due process. Judgment affirmed.

8. **Estom Yumeka Maidu Tribe of the Enter. Rancheria of Cal. v. California**
No. 2:14-cv-01939, 2016 U.S. Dist. LEXIS 19330 (E.D. Cal. Feb. 16, 2016). The matter was before the Court on cross motions for judgment on the pleadings by Plaintiff the Estom Yumeka Maidu Tribe (hereinafter “Plaintiff”) and Defendant the State of California (hereinafter “Defendant”). Under the federal Indian Gaming Regulatory Act (“IGRA”), an Indian tribe seeking to conduct casino-style gaming on Indian land must request that the state enter into good faith negotiations to conclude a gaming compact. 25 U.S.C. § 2710(d)(3). Under California law, the governor is tasked with negotiating a compact, and the legislature is tasked with ratifying it. Cal. Const., Art. IV, § 19(f). In this case, Plaintiff negotiated and signed a compact (the “Compact”) with Governor Jerry Brown in 2012. However, the legislature essentially took no further action and did not hold a vote on ratification. The Compact eventually expired on its own terms in July 2014.

Plaintiff’s immediate remedy under the IGRA was to bring suit. After Plaintiff had introduced evidence that the state had not negotiated toward a compact in good faith, it is the state’s burden to show it has negotiated in good faith. Otherwise, the state is subject to a court order compelling it to conclude a compact within 60 days, with additional remedies should the state continue to reject the compact. 25 U.S.C. § 2710(d)(7)(B). Defendant’s position was that the legislature’s inaction cannot form the basis for suit under the IGRA, because only the governor negotiated the instant Compact. Plaintiff’s position was that the IGRA’s negotiation mandate extends to activities by the legislature. Both parties have moved for judgment on the pleadings on the issue of whether Defendant has negotiated the instant Compact in good faith, and thus whether Plaintiff was entitled to relief under the IGRA. The Court had carefully considered the factual and legal issues presented in the parties’ filings, and the arguments raised in the amicus brief submitted by the California legislature. The Court granted Plaintiff’s motion for judgment on the pleadings, and Denied Defendant’s motion.

9. *Amador Cnty. v. Jewell*
No. 05-00658, 2016 U.S. Dist. LEXIS 33791 (D.D.C. Mar. 16, 2016). At the center of this dispute was a proposed gaming operation on the Buena Vista Rancheria of the Me-Wuk Tribe located in Amador County, California. In 2000, pursuant to the Indian Gaming Regulatory Act (“IGRA”), 25 U.S.C. §§ 2701-2721, the Secretary of the United States Department of the Interior (the “Secretary”), approved a gaming compact between the Me-Wuk Tribe and the State of California. The gaming compact was later amended in 2004 to provide for an expanded gaming operation. Although it had not challenged the 2000 gaming compact, Plaintiff, Amador County, challenged the Secretary’s approval of the amended compact, claiming that the Buena Vista Rancheria did not qualify as “Indian land” – a requirement under the IGRA.

Before the Court were cross-motions for summary judgment. The Secretary argued that her approval of the amended gaming compact must be upheld because it was in accordance with the IGRA. First, the Secretary contends that Amador County was barred from contesting the Rancheria’s reservation status under the IGRA because the County stipulated to the Rancheria’s status as such in a settlement judgment in an earlier lawsuit between the County and the Me-Wuk Tribe. Second, the Secretary argued that even if this Court were to determine that the stipulated judgment does not have preclusive effect in this lawsuit, her approval of the amended compact still must be upheld because Congress granted her the authority to determine what lands qualify as reservations for purposes of the IGRA. Amador County, on the other hand, requested that this Court declare that the Buena Vista Rancheria was not Indian land under the IGRA and set aside the Secretary’s approval of the amended compact. The County contends that it did not, and indeed could not, stipulate to the Rancheria’s reservation status. It further argued that even if it did stipulate to the Rancheria’s reservation status, the stipulation did not have preclusive effect on the present litigation. Lastly, the County argues the term “reservation” as it was used in the IGRA is narrowly defined and the Buena Vista Rancheria does not fit within that narrow definition.

Having reviewed the parties’ submissions, the record of the case, and the relevant legal authority, the Court concluded that: (1) Amador County stipulated that it would treat the Buena Vista
Rancheria as a reservation; (2) Amador County is barred from arguing in this litigation that the Rancheria is not a reservation; and, alternatively, (3) the Secretary is authorized to declare that the Rancheria is a reservation for purposes of the IGRA. Therefore, the Court will deny Amador County’s motion for summary judgment and grant the Secretary’s cross-motion.

10. *Arizona v. Tohono O’odham Nation*

No. 13-16517, No. 13-16519, and No. 13-16520, 2016 U.S. App. LEXIS 5766 (9th Cir. Mar. 29, 2016). The Nation’s plan to build a casino and conduct Class III gaming on a certain parcel of land did not violate a gaming compact between the Nation and the State of Arizona. The land acquired and taken into trust pursuant to the Gila Bend Indian Reservation Lands Replacement Act was land taken into trust as part of a settlement of a land claim under § 2719 of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C.S. § 2719, and thus, IGRA did not bar the Nation from gaming on the parcel. The district court properly granted summary judgment in favor of the Nation on breach of Compact claims because the Compact specifically authorized Class III gaming on Indian lands that qualified for gaming under IGRA § 2719. The district court properly held that tribal sovereign immunity barred non-Compact-based claims for promissory estoppel, fraud in the inducement, and material misrepresentation. Orders affirmed.

11. *Tohono O’odham Nation v. Ducey*

No. CV-15-01135, 2016 U.S. Dist. LEXIS 42410 (D. Ariz. Mar. 30, 2016). In May 2013, this Court ruled that the Gaming Compact between the State of Arizona and the Tohono O’odham Nation did not prohibit the Nation from building a new casino in the Phoenix metropolitan area. *Arizona v. Tohono O’odham Nation*, 944 F. Supp. 2d 748 (D. Ariz. 2013) (“Tohono O’odham II”). Subsequently, the Nation began constructing a casino known as the West Valley Resort in Glendale, Arizona, a suburb of Phoenix. In April 2015, while construction was ongoing, the Director of the Arizona Department of Gaming (“ADG”), wrote a letter to the Nation reiterating the Department’s position that the Nation engaged in fraud during the formation of the Compact, and
asserting authority to withhold certification from the Resort’s vendors and employees based on this conduct. In response, the Nation brought this lawsuit, claiming that federal law preempts any state-law authority ADG might have to withhold these certifications.

The Director had asserted counterclaims against the Nation for promissory estoppel, fraudulent inducement, and material misrepresentation. The Director sought a variety of relief, including (1) a declaration that “ADG is not obligated to certify or authorize the Nation’s proposed class III gaming facility on the Glendale property or any other Nation-owned or operated class III gaming facility in the Phoenix metropolitan area”; (2) a judgment that “the Nation is estopped from opening any class III gaming facilities in the Phoenix metropolitan area”; (3) a declaration or injunction that the Nation is prohibited from conducting class III gaming activities on the Glendale property; (4) a declaration that the Compact is voidable and unenforceable and subject to rescission; and (5) reformation of the compact. The Nation moves to dismiss these counterclaims.

The court: (1) granted the Nation’s motion to dismiss with respect to the Director’s counterclaim for promissory estoppel; (2) struck the Director’s demands for reformation of the Compact and declaratory and injunctive relief with respect to casinos other than the West Valley Resort; (3) otherwise denied the Nation’s motion to dismiss.

12. *Jamul Action Comm. V. Chaudhuri*

No. 15-16021, 2016 U.S. App. LEXIS 13104 (9th Cir. Jul. 15, 2016, Amended Opinion). This case was about an Indian gaming casino in Jamul, California. The Jamul Indian Village, a federally recognized Indian tribe and a non-party to this suit (“Tribe”), was building a casino in Jamul. A sub-group of tribal members and organizations, including the Jamul Action Committee, the Jamul Community Church, and four residents of rural Jamul (collectively “JAC”), opposed the casino. This lawsuit was JAC’s most recent effort to stop its construction. JAC contended that the National Indian Gaming Commission (“NIGC”) violated the National Environmental Policy Act (“NEPA”) when it approved the Tribe’s gaming ordinance (“GO”) without first conducting a NEPA
environmental review. JAC petitioned the district court for a writ of mandamus under the Administrative Procedure Act (“APA”), arguing that the NEPA environmental review was “agency action unlawfully withheld.” The district court denied relief. The appellate court held that contrary to JAC’s arguments, NIGC’s approval of the Tribe’s gaming ordinance without conducting a NEPA environmental review did not violate NIGC’s obligations under NEPA because “where a clear and unavoidable conflict in statutory authority exists, NEPA must give way.” *Flint Ridge Dev. Co. v. Scenic Rivers Assn.* 426 U.S. 776 (1976) at 788. Though the district court relied on other grounds, we affirm its denial of plaintiff’s requested writ of mandamus. The decision of the district court was affirmed.

13. *Jamul Action Comm. V. Chaudhuri*

No. 2:13-cv-01920, 2016 U.S. Dist. LEXIS 104359 (E.D. Cal. Aug. 8, 2016). The plaintiffs in this action were a group of individuals, a non-profit association, and a community church from Jamul, California, together, the Jamul Action Committee (JAC). The JAC asked the court to stop construction of a casino on the Jamul Indian Village’s land, among related requests for declaratory relief. In short, the JAC alleged the casino was illegal because it was being constructed on land that federal law does not make eligible for gambling.

The defendants, who include federal officials, members of the Jamul Indian Village, and private corporations tasked with the construction and eventual management of the casino, move to dismiss the case on a number of jurisdictional and other grounds. The Jamul Indian Village itself is not a party.

The National Indian Gaming Commission (NIGC) published a notice in the Federal Register in April 2013, which stated that the NIGC would prepare a statement on the environmental impacts of an agreement between the Tribe and defendant San Diego Gaming Ventures, LLC (SDGV). 78 Fed. Reg. 21,398 (Apr. 10, 2013). According to the NIGC’s notice, SDGV would manage a casino the Tribe planned for construction outside Jamul, California. *See* 78 Fed. Reg. 21,399. The notice also explained that the casino would be constructed “on the Tribe’s Reservation.” *Id.* In a previous notice published in the Federal Register more than a
decade earlier, the NIGC and Bureau of Indian Affairs had not referred to this land as the Tribe’s “Reservation.” See Notice of Intent, 67 Fed. Reg. 15,582 (Apr. 2, 2002); see also Notice, 68 Fed. Reg. 1,475 (Jan. 10, 2003).

The JAC understood the NIGC’s April 2013 notice as a formal declaration that the Tribe “has a Reservation that qualifies as ‘Indian lands’ eligible for gaming” under the Indian Gaming Regulatory Act (IGRA). In the JAC’s view, this determination runs counter to federal law, because although the Tribe may have a beneficial interest in the land in question, that land “is not a reservation or trust land” as defined by IGRA.

The court found that the JAC’s first, second, third, fourth, and sixth claims must be dismissed because the Tribe is a necessary party and has not been joined. The JAC’s fifth claim must be restricted to its allegation that the federal defendants approved the Tribe’s gaming ordinance without conducting the review procedure required by NEPA. The court granted the tribally affiliated defendants’ motion to dismiss without leave to amend. The court granted in part the federal defendants’ motion to dismiss claim five into one for summary judgment to allow consideration of evidence on the limited question of whether the Tribe’s gaming management contract has been approved.

14. **North Fork Rancheria v. California**

No. 1:15-cv-00419, 2016 U.S. Dist. LEXIS 105825 (E.D. Cal. Aug. 10, 2016). Plaintiff North Fork Rancheria of Mono Indians of California (“North Fork”) had obtained judgment on the pleadings against the State of California (“State” or “California”) based on the failure of the State to negotiate with the tribe for the purpose of entering into a Tribal-State compact governing the conduct of class III gaming activities as required by the Indian Gaming Rights Act (“IGRA”), see 25 U.S.C. § 2710(d)(3)(A), after the California electorate voted down Proposition 48, the referendum that would have ratified the gaming compact between North Fork and California. In response to issues highlighted by the Picayune Rancheria of Chukchansi Indians (“Chukchansi”) in its motion to intervene, the Court ordered additional briefing from the parties
regarding whether a decision in one of the other actions regarding the proposed North Fork gaming site might impact this Court’s jurisdiction over this case. North Fork and the State agreed that this matter is justiciable regardless of the outcome of the other actions. They also agreed that no stay should be imposed. Chukchansi submitted briefing as amicus curiae, wherein it argues that this matter could be rendered non-justiciable by decisions in other proceedings. The Court declined to issue a stay and terminated the action in its entirety.

15. Frank’s Landing Indian Cmty. v. Nat’l Indian Gaming Comm’n

No. C15-5828, 2016 U.S. Dist. LEXIS 108581 (W.D. Wash. Aug. 15, 2016). This matter came before the Court on Defendants National Indian Gaming Commission (“NIGC”) and Jonodev Chaudhuri’s, in his official capacity as Chairman of the NIGC (“Chairman”), motion to dismiss. The Court grants the motion for the reasons stated herein.

The Community is a federally-recognized self-governing dependent Indian community located along the Nisqually River near Olympia, Washington. In 1987, Congress recognized the Community’s members “as eligible for the special programs and services provided by the United States to Indians because of their status as Indians” and “as eligible to contract, and to receive grants, under the Indian Self-Determination and Education Assistance Act for such services.” Pub. L. No. 100-153, § 10, 101 Stat. 886, 889 (1987). In 1994, Congress amended the law to state that the Community is recognized “as a self-governing dependent Indian community that is not subject to the jurisdiction of any federally recognized tribe.” Pub. L. No. 103-435, § 8, 108 Stat. 4566, 4569 (1994). This amendment stated that “[n]othing in this section may be construed to constitute the recognition by the United States that the Frank’s Landing Indian Community is a federally recognized Indian tribe.” Id. The section also noted that “notwithstanding any other provision of law,” the Community “shall not engage in any class III gaming activity” under the IGRA. Id.

On December 9, 2014, the Community submitted a purported Class II gaming ordinance to the NIGC for the Chairman’s review
and approval along with a resolution from the Community’s governing body, enacting the ordinance. The NIGC referred the matter to Interior’s Office of the Solicitor, requesting an opinion on whether the Community is a tribe within the meaning of the IGRA, who referred the matter to the Assistant Secretary — Indian Affairs (“AS-IA”), Kevin Washburn. On March 6, 2015, the AS-IA issued a memorandum to the NIGC Chairman conveying Interior’s conclusion that the Community is not an Indian tribe within the meaning of the IGRA because it is not a federally-recognized Indian tribe.

While it is possible for the Community to challenge the Secretary’s refusal to include the Community on the list of federally recognized tribes published yearly in the federal register, see Cherokee Nation of Oklahoma v. Babbitt, 117 F.3d 1489, 326 U.S. App. D.C. 139 (D.C. Cir. 1997), the Community’s instant dispute is with the Secretary and not the NIGC. In fact, any ruling that the NIGC had the authority to approve a gaming license for a community that the Secretary had not recognized would effectively convey more authority on the NIGC than Congress explicitly intended in the IGRA. Therefore, the Court granted Defendants’ motion to dismiss because the Community had failed to state a legally cognizable claim against the NGIC and the Chairman.

H. Jurisdiction, Federal

1. United States v. Osage Wind, LLC

No. 14-CV-704, 2015 U.S. Dist. LEXIS 132480 (N.D. Okla. Sept. 30, 2015). Before the Court were Defendants’ Motion to Dismiss or for Summary Judgment and Plaintiff’s Motion for Partial Summary Judgment as to Counts I and II of the Amended Complaint. Plaintiff, the United States of America filed this action on November 21, 2014. In the First Amended Complaint for Declaratory Judgment and Damages, Plaintiff alleged the Defendants’ construction activities interfere with the Osage Nation’s reserved mineral rights, and Defendants failed to obtain the necessary prior approvals before excavating the turbine foundations for the Project. Specifically, Plaintiff asserted that Defendants violated 25 C.F.R. § 211.48, which prohibits
“exploration, drilling, or mining operations on Indian land” without obtaining permission from the Secretary of the Interior, and 25 C.F.R. § 214.7, which forbids “mining or work of any nature” on reserved Osage County land unless a mineral lease covering such land is approved by the Secretary. Plaintiff alleged “Defendants initiated excavation work and substantial disturbance and invasion of the mineral estate” without obtaining the required prior approvals or appropriate lease.

The First Amended Complaint alleged five counts, all of which hinge on whether the Defendants violated 25 C.F.R. § 211 and/or 25 C.F.R. § 214. Count I sought a declaration regarding the applicability and violation of 25 C.F.R. § 211 as to Defendants’ construction activities. Count II sought a declaration regarding the applicability and violation of 25 C.F.R. § 214 as to Defendants’ construction activities.

Plaintiff filed a Motion for Partial Summary Judgment as to Counts I and II of the Amended Complaint, along with a Motion for Expedited Consideration. Defendants filed a Motion to Dismiss or for Summary Judgment. Defendants filed a Notice of Supplemental Authority, which Plaintiff moved to strike as improperly filed. Defendants filed a Notice to the Court, advising construction of the Osage Wind Farm has been completed and the Wind Farm has commenced commercial operation. The Court concluded that Plaintiff’s claims fail as a matter of law. Accordingly, the court granted Defendants’ Motion for Summary Judgment and denied Plaintiff’s Motion for Partial Summary Judgment. Further, the Court denied Plaintiff’s Motion for Expedited Consideration and Plaintiff’s Motions to Strike.

2. **Shingle Springs Band of Miwok Indians v. Caballero**

No. 13-15411, 2015 U.S. App. LEXIS 20094 (9th Cir. Nov. 19, 2015). Plaintiff-Appellee Shingle Springs Band of Miwok Indians (Tribe) alleged that Cesar Caballero infringed various trademarks related to the Tribe and a casino it owns and operates, the Red Hawk Casino, in violation of the Lanham Act, the California Business and Professions Code, and common law, and that Caballero cybersquatted on related domain names. The district court granted summary judgment to the Tribe on those claims and
permanently enjoined Caballero from using the marks in any way. Caballero appealed the district court’s judgment.

The trademarks allegedly infringed by Caballero fall into two categories: (1) marks related to the Tribe and its Rancheria (the Tribal Marks); and (2) the “Red Hawk Casino Mark.” The latter mark is registered with the United States Patent and Trademark Office; the Tribal Marks are not.

This evidence fails to carry the Tribe’s burden on summary judgment. There is insufficient evidence in the record to prove that Caballero offered “association services” within the meaning of the Lanham Act. Caballero’s own vague and conclusory statements are insufficient to establish that Caballero or his tribe provided or offered any services. The only remaining factual support for the Tribe’s allegations is a snapshot of Caballero’s website depicting a contact email address for those with “Enrollment Questions,” which, standing on its own, does not support the grant of summary judgment. Even if the “Enrollment Questions” heading on his website could be construed as constituting an offer of membership, what Caballero refers to as “association services,” solicitation of members in and of itself is insufficient to constitute an offer of a service without evidence as to what those prospective members would be joining. As to the Red Hawk Casino Mark, the Tribe has failed to present any evidence that Caballero used the mark in connection with a good or service. On the present record, no reasonable jury could conclude that Caballero offered or provided any service in connection with his use of either the Tribal Marks or the Red Hawk Casino Mark.

The Tribe also is not entitled to summary judgment on the cybersquatting claims. There is no evidence in the record, not even in Caballero’s brief exchange with the Tribe’s counsel at his deposition, that Caballero intended to profit by using the domain names involving the Tribal Marks or the domain names involving the Red Hawk Casino Mark. The Tribe therefore has failed to provide sufficient evidence on this statutory element of its claims for cybersquatting. Reversed and remanded.

3. **Miccosukee Tribe of Indians of Florida v. Cypress**

No. 14–12115, 2015 WL 9310571 (11th Cir. Dec. 23, 2015). Indian tribe brought action alleging that former tribal chairman,
director of finance, chief financial officer, tribe’s former attorneys, and investment firm violated Racketeer Influenced and Corrupt Organizations Act (RICO) and state law by embezzling tribal funds for their personal use, charging excessive fees, and managing tribe’s funds in manner allowing suspicious financial transactions to occur. Investment firm moved to compel arbitration. The District Court, 2013 WL 2158422, granted motion. The remaining defendants moved to dismiss. The District Court, 975 F. Supp. 2d 1298, granted motion. Tribe appealed. The appellate court held that: 1) alleged fraud upon authority of former chairman of tribe was issue to be raised in arbitration; 2) intra-tribal dispute doctrine was not triggered, and federal question jurisdiction existed; and 3) tribe failed to state RICO or RICO conspiracy claim. Affirmed.

4. **U.S. v. Janis**

No. 14–3888, 2016 WL 191934 (8th Cir. Jan. 15, 2016). Following denial of his motion to dismiss indictment, 40 F. Supp. 3d 1133, and of his motion for reconsideration, 2014 WL 4384373, defendant was convicted in the District Court of assault of federal officer, and he appealed. The appellate court held that: (1) tribal public safety officer was “federal officer”; (2) district court abused its discretion when it instructed jury that victim was federal officer; and (3) erroneous instruction was harmless. Affirmed.

5. **Hayes v. Delbert Servs. Corp.**

Our review of the record leads us to conclude that the arbitration agreement in this case is unenforceable. The agreement purportedly fashions a system of alternative dispute resolution while simultaneously rendering that system all but impotent through a categorical rejection of the requirements of state and federal law. The FAA does not protect the sort of arbitration agreement that unambiguously forbids an arbitrator from even applying the applicable law.

The district court erred in ordering the parties to arbitration because the arbitration agreement in the case was unenforceable; the arbitration agreement fashioned a system of alternative dispute resolution while simultaneously rendering that system all but impotent through a categorical rejection of the requirements of state and federal law, and the FAA did not protect arbitration agreements that unambiguously forbade an arbitrator from even applying the applicable law. We therefore reverse the district court’s order compelling arbitration and remand for further proceedings.

6. **U.S. v. Harlan**

No. 15–1552, 815 F.3d 1100, 2016 U.S. App. LEXIS 2602 (8th Cir. Feb. 16, 2016). Defendant was convicted in the District Court of domestic assault in Indian country by habitual offender. Defendant appealed. The appellate court held that: (1) defendant’s prior tribal court simple-assault conviction could be used as predicate offense in subsequent federal prosecution for domestic assault in Indian country by habitual offender; (2) sufficient evidence supported conviction; and (3) defendant’s sentence, which was at the bottom of the advisory Guidelines range, was substantively reasonable. Affirmed.

7. **Smith v. Western Sky Fin., LLC**

No. 15-3639, 2016 U.S. Dist. LEXIS 28452 (E.D. Pa. Mar. 4, 2016). This case presents an unusual and disconcerting collision between federal consumer protection laws and the sovereignty of Native American tribes and their courts. Defendants here make “payday” loans across the United States through the Internet, and they seek to have their loan agreements governed by tribal law and
challenged only in certain tribal courts or arbitral forums. Given the historic injustices visited upon Native Americans, the Supreme Court has understandably admonished that federal courts should tread lightly when it comes to intruding upon their sovereignty. See *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 107 S. Ct. 971, 94 L. Ed. 2d 10 (1987). Defendants here invoke these principles in moving to dismiss Plaintiff’s case. For the reasons set forth below, I have concluded that Native American sovereignty is not at stake in this case, and I agree with the Fourth Circuit (among others) that Defendants seek “to avoid federal law and game the system.” *Hayes v. Delbert Servs. Corp.*, 811 F.3d 666, 2016 WL 386016, at *9 (4th Cir., 2016). Defendants’ Motion to Dismiss will be denied.


On July 27, 2015, Defendants removed the case to this Court. Defendants asserted this Court has jurisdiction over this action pursuant to both 28 U.S.C. §§ 1331 and 1332, because (1) Plaintiff’s state-law claims necessarily raise disputed and substantial federal questions and (2) the actual party-in-interest is not The Cherokee Nation but the Cherokee Nation Businesses and/or Cherokee Nation Healthcare Services, both of which are citizens of Oklahoma that generate diversity jurisdiction. On August 17, 2015, Plaintiff filed a Motion to Remand pursuant to 28 U.S.C. § 1447(c), contending this Court lacks subject matter jurisdiction over this action. Defendants opposed remand.

On December 14, 2015, the Court determined that no federal-question jurisdiction existed over Plaintiff’s state-law claims. Defendants argued this Court has original jurisdiction over this action based on 28 U.S.C. § 1332, which provides, “[t]he district courts shall have original jurisdiction of all civil actions where the
matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between citizens of different states.” The defendant seeking removal must establish the existence of diversity jurisdiction by a preponderance of the evidence.

Here, Plaintiff challenged the existence of complete diversity because The Cherokee Nation, as an Indian tribe, is a sovereign nation that has no “citizenship” for purposes of §1332.1. However, Defendants argued Plaintiff was not itself responsible for operating healthcare services for tribal members. Rather, Plaintiff allegedly incorporates separate entities—Cherokee Nations Businesses and/or Cherokee Nation Healthcare Services—to provide these services, including the purchase of Risperdal. Defendants allege these corporate entities are the real party-in-interest, and they may generate diversity jurisdiction because they are citizens of Oklahoma.

The Court concluded Defendants have not satisfied their burden to show by a preponderance of the evidence that a separate corporate entity, rather than The Cherokee Nation, was the real party-in-interest in this case. Plaintiff has submitted sufficient evidence to suggest the corporate entities were not responsible for purchasing the Risperdal at issue. As the real party-in-interest, The Cherokee Nation had no citizenship for diversity purposes and cannot generate diversity jurisdiction. Accordingly, the Court lacked subject matter jurisdiction under 28 U.S.C. § 1332(a)(1). Plaintiff’s Motion for Remand was granted. Plaintiff’s second request for fees and costs pursuant to 28 U.S.C. § 1447(c) was denied.

9. State v. Hill

No. A147778, 2016 Ore. App. LEXIS 483, 277 Ore. App. 751 (Or. Ct. App Apr. 20, 2016). Defendant was convicted of second-degree disorderly conduct, ORS 166.025, and fourth-degree assault, ORS 163.160, as a result of an incident at a casino owned and operated by the Confederated Tribes of the Umatilla Indian Reservation. In the trial court, defendant moved for dismissal of the case, arguing that the trial court lacked subject matter jurisdiction. On appeal, he offers a new rationale for his position: because the incident occurred in Indian country (1) the state bore...
the burden, but failed, to present evidence regarding his non-Indian status, which was necessary for the court to determine its subject matter jurisdiction, and (2) even though he did not alert the court that his non-Indian status was required for the court’s jurisdiction, the court was required to dismiss the case. The state responded that, properly understood, defendant’s challenge is to personal jurisdiction over him and not the court’s subject matter jurisdiction over the crimes charged and that, therefore, his current jurisdictional argument cannot be considered because it is unpreserved.

Contrary to the state’s position, the court concluded that defendant raised a challenge to the court’s subject matter jurisdiction as circumscribed under federal law and that defendant correctly asserted that his non-Indian status was the determining factor in whether the trial court had jurisdiction over the charged crimes. However, although the record is silent regarding defendant’s non-Indian status, we rejected defendant’s contention that the proper disposition is an outright reversal. Rather, the court decided, as a matter of first impression in Oregon, that the better course is to vacate the judgment and remand to permit defendant an opportunity to provide the trial court with evidence sufficient to permit a conclusion that he is Indian. In this case, given the arguments made to the trial court, the issue of subject matter jurisdiction was not fully litigated. Defendant neither asserted that the trial court lacked subject matter jurisdiction because of his Indian status nor submitted evidence of that status to the trial court. Therefore, the court remanded for the trial court to permit defendant to attempt to meet his burden of production concerning his status as an Indian; and, if he did so, the court must conduct proceedings to determine defendant’s status as an Indian, during which the state will bear the burden of proof. If, on remand, the trial court concludes that it has jurisdiction, then it should reinstate the judgment. Vacated and remanded.


No. 15-13708, 2016 U.S. Dist. LEXIS 55866 (E.D. Mich. Apr. 27, 2016). This case was one of over thirty filed in this district in which defendant Blue Cross & Blue Shield of Michigan (Blue
Cross) was being sued by various businesses to recover funds Blue Cross illegally billed and retained in violation of its third-party administrator (TPA) agreements and in breach of its fiduciary duty under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et seq. A unique aspect of this case, however, was that the plaintiff, Little River Band of Ottawa Indians, is a tribal government. ERISA does not apply to certain governmental employee benefit plans. And Blue Cross insisted that the plaintiffs have not alleged enough facts in its complaint to establish that its plan falls within ERISA’s regulations.

Blue Cross has filed a motion under Federal Rule of Civil Procedure 12(b)(6) to dismiss the counts of the complaint brought under ERISA. The plaintiffs also alleged several state law claims, which Blue Cross also moved to dismiss as preempted by ERISA, if the former claims survive, and because a state intermediate appellate decision favors dismissal. Blue Cross also argued that the plaintiffs did not plead sufficient facts to support a specific theory seeking damages because Blue Cross paid too much for hospital services that were supposed to be capped at “Medicare-Like Rates.”

The motion to dismiss will be denied with one exception. The ERISA claims survive because the plaintiffs adequately alleged that less than “substantially all” of its plan participants perform commercial activities, thereby invoking a statutory exception to the exclusion from ERISA coverage. The state law claims, therefore, are preempted and will be dismissed, subject to revival if later in these proceedings the plaintiffs fail to prove its allegations concerning the census of its plan participants. The plaintiffs also have pleaded sufficiently the allegations necessary to satisfy the conditions precedent for recovery of damages for payments in excess of “Medicare-Like Rates.” The plaintiffs have alleged sufficient facts to establish a right to relief on their ERISA claims. Accordingly, it is ordered that the defendant’s motion to dismiss is granted in part and denied in part.


No. 5:16-cv-61, 2016 U.S. Dist. LEXIS 61475 (D. Vt. May 10, 2016). Plaintiffs George Feller and Willow Feller filed an action in Vermont Superior Court, Rutland Unit, Civil Division, against
Defendant Narragansett Indian Tribal Historic Preservation Office (NITHPO), alleging that NITHPO had failed to make payments required by a commercial promissory note, and seeking to foreclose upon a mortgage securing that note. NITHPO filed a Notice of Removal in this court, asserting subject-matter jurisdiction on the grounds that “there is a federal question arising out of a dispute from a private party against a federally recognized tribe, tribal governmental entity or agent, and under federal common law regarding the jurisdiction of Indian Tribal court.”

Plaintiffs filed a Motion to Remand the case back to state court under 28 U.S.C. § 1447(c), arguing that NITHPO has presented no federal question and that NITHPO cannot rely on diversity jurisdiction because the maximum amount in controversy is the amount of the underlying note of $30,000. NITHPO opposed remand.

NITHPO asserted that there is a federal question because NITHPO is a federally-recognized tribe, tribal government, entity, or agent. However, jurisdiction does not attach just because a case involves an Indian party. NITHPO contended that there is a federal question because this case “is about land now owned by an Indian Tribal Government.” Again, federal court jurisdiction is not created just because a case involves tribal property. NITHPO further argued that there are federal jurisdiction because the case involved “a non-governmental party attempting to attach the federal contracts and federal contract support dollars of a tribal government or tribal governmental entity for the purpose of payment,” because Plaintiffs have failed to exhaust tribal remedies, and because of immunity from suit.

In this case, NITHPO had not filed a motion to dismiss; the only motion now pending was Plaintiffs’ Motion to Remand. No disputes about exhaustion or immunity appear on the face of Plaintiffs’ Complaint. If there was an issue of federal common law in this case, it did not provide a basis for Plaintiffs’ foreclosure cause of action. The court therefore concluded that it lacks subject-matter jurisdiction, and that remand under 28 U.S.C. § 1447(c) was required. Plaintiffs’ Motion to Remand was granted, and this case was remanded to the Vermont Superior Court, Rutland Unit, Civil Division.

12. United States v. Alvirez
No. 11-10244, 2016 U.S. App. LEXIS 13966 (9th Cir. Aug. 1, 2016). Edgar Alvirez, Jr. appealed his jury conviction and sentence for assault resulting in serious bodily injury on an Indian reservation, in violation of 18 U.S.C. §§ 1153 and 113(a)(6). The court had jurisdiction pursuant to 28 U.S.C. § 1291 to review the district court’s judgment. The court concluded that the district court abused its discretion when it admitted the unauthenticated Certificate of Indian Blood as evidence to meet the elements of the governing statute. Accordingly, the court reversed Alvirez’s conviction and remand for further proceedings. In accordance with our recent en banc decision in Zepeda, the court concluded that the determination of federal recognition of a tribe was a question of law to be resolved by the judge. The court also concluded that the district court abused its discretion when it determined that the Certificate of Indian Blood offered into evidence by the government was a self-authenticating document under Federal Rule of Evidence 902(1). Because the error was not harmless, the court reversed the conviction.

13. **Bodi v. Shingle Springs Band of Miwok Indians**

No. 14-16121, 2016 U.S. App. LEXIS 14514 (9th Cir. Aug. 8, 2016). This appeal required the court to decide whether a federally recognized Indian tribe waives its sovereign immunity from suit by exercising its right to remove to federal court a case filed against it in state court. This question has divided the district courts, and it has been reached by only one of the appellate court’s sister circuits, which held that removal does not, standing alone, waive tribal immunity. See Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Fla., 692 F.3d 1200, 1206-08 (11th Cir. 2012). The court followed the lead of the Eleventh Circuit and held that the act of removal does not express the clear and unequivocal waiver that is required for a tribe to relinquish its immunity from suit. It was error to hold appellant tribe, when sued under the Family and Medical Leave Act and California law, waived sovereign immunity by removing the case to federal court because it stated no such unequivocal intent, as nothing in the removal statute, 28 U.S.C.S. § 1441, abrogated tribal sovereign immunity, and it promptly asserted an immunity defense upon removal to
federal court and voiced no intent to litigate on the merits, invoking the court’s jurisdiction only to resolve its immunity defense, and if it were possible to infer an intent to relinquish immunity from the act of removal, immunity was not waived as such an intent could not be implied. Holding the tribe’s removal waived its sovereign immunity was unfair because it was not fair to put tribes to a choice between asserting their right to removal and asserting a tribal immunity defense. Judgment reversed.

14. *Ute Indian Tribe of the Uintah & Ouray Reservation v. Myton*

No. 15-4080, 2016 U.S. App. LEXIS 14582 (10th Cir. Aug. 9, 2016). This appeal required the court to address once again the status of the Uintah Valley Indian Reservation. In the district court, the Ute Indian Tribe (“Tribe”) sought to obtain a permanent injunction preventing the State of Utah, the counties of Duchesne and Uintah, and the cities of Roosevelt and Duchesne (“state and local defendants”) from exercising civil and criminal jurisdiction on certain lands within the original exterior boundary of the Uintah Valley Reservation in a manner inconsistent with the court’s en banc opinion in *Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir. 1985) (en banc), cert. denied, 479 U.S. 994, 107 S. Ct. 596, 93 L. Ed. 2d 596 (1986). In opposing the injunction, the state and local defendants rely on *Hagen v. Utah*, 510 U.S. 399, 114 S. Ct. 958, 127 L. Ed. 2d 252 (1994), in which the Supreme Court held that the lands in question are not part of the Uintah Valley Reservation.

Notwithstanding *Hagen*, the district court held that it was bound under the “law of the case” doctrine to follow the mandate in *Ute Indian Tribe* and thus, that it was without authority to alter the existing jurisdictional boundaries as set forth in *Ute Indian Tribe*. The United States as amicus curiae urged the court to modify the mandate in *Ute Indian Tribe* only to the extent that it directly conflicts with *Hagen*. In 1985 this court resolved the issue en banc in a case the parties call Ute III.

This court held that all lands encompassed within the original Ute reservation boundaries established beginning in the 1860s — including all those lands that passed to non-Indian settlers between 1905 and 1945 — remained Indian country subject to federal and
tribal (not state and local) criminal jurisdiction. See *Ute Indian Tribe v. Utah (Ute III)*, 773 F.2d 1087, 1088-89, 1093 (10th Cir. 1985) (en banc), cert. denied, 479 U.S. 994, 107 S. Ct. 596, 93 L. Ed. 2d 596 (1986). After the Supreme Court denied certiorari, that might have seemed the end of it. After all, Ute III “disposed of all boundary questions at issue on the merits” and “left nothing for the district court to address [on remand] beyond the ministerial dictates of the mandate.” *Ute Indian Tribe v. Utah (Ute V)*, 114 F.3d 1513, 1521 (10th Cir. 1997).

The appellate court held that the district court erred in granting a town’s motion to dismiss a tribe’s action alleging that local officials sought to exercise criminal jurisdiction over tribal members on lands that were restored to tribal jurisdiction because a prior decision had determined that tribal reserves, remaining allotments, and restored lands were Indian country. The town included land that qualified as Indian country under the terms of that decision.

Reassignment of the dispute was required to ensure just and timely resolution because the district court had twice failed to enforce the mandate of the court of appeals. The district court’s order granting Myton’s motion to dismiss is reversed. This case and all related matters shall be reassigned to a different district judge. The court and parties are directed to proceed to a final disposition both promptly and consistently with this court’s mandates in *Ute V, Ute VI*, and this case.


No. 15-01538 (C.D. Cal. Aug. 16, 2016). Plaintiffs filed a complaint against County Sheriff John McMahon and Deputy Sheriff Ronald Sindelar in their official capacities on the grounds of: (1) violation of Public Law 280 by issuing motor vehicle citations without jurisdiction on reservation land; (2) interference with tribal self-government; (3) preemption of state authority; and (4) violation of plaintiffs’ civil rights. Plaintiffs allege that Defendants illegally enforced the California Motor Vehicle Code on Reservation land, issuing citations for various state law violations, including driving without a valid registration and driving with a suspended license, resulting in impoundment of Plaintiffs cars and significant expense in time and legal fees.
The land where at least three of the citations were issued is a one square mile plot of land known as Township 5N, Range 24E, SBM, Section 36 (“Section 36”). Plaintiffs sought an injunction to “enjoin Defendants from citing, arresting, impounding the vehicles of, and prosecuting members of the Chemehuevi Tribe for violations of the California Motor Vehicle Code sections 4000(a)(1), 16028(a), 14601.1(a)” in Section 36. The Court’s “pivotal question” was whether Section 36 was located within the boundaries of the Chemehuevi Tribe’s Reservation. Defendants argued that Section 36 is not in Indian country because it is not a part of the Indian reservation. Plaintiffs argued that Section 36 is within Indian country as it “lies within the boundaries of the Reservation as established by Congress through enactment of federal statutes and action of the President through issuance of a Secretarial order.” Under Public Law 280, California has limited jurisdiction over Indian country, depending on whether the state law at issue prohibits or regulates conduct.

The Court concluded that Section 36 is not part of the Chemehuevi Indian Reservation. However, 18 U.S.C. § 1151(a) says that Indian Country includes “all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation.” Indian country includes non-Indian land within the exterior boundaries of an Indian reservation, avoiding a “checkerboard jurisdiction” situation. Section 36 is a landlocked parcel surrounded on all sides by Chemehuevi Reservation land, a “near-perfect example of the type of checkerboard jurisdiction the Supreme Court counseled against.” Allowing Defendants to exercise state jurisdiction over Chemehuevi Tribal members in Section 36 would lead to a likelihood of “irreparable injury vis-à-vis the Tribe’s sovereignty.” EEOC v. Karuk Tribe Hous. Auth., 260 F.3d 1071 (9th Cir. 2001) at 1077. The court granted Plaintiffs’ motion for preliminary injunction and enjoined Defendants and their agents from citing, arresting, impounding the vehicles of, and prosecuting Chemehuevi tribal members for on-reservation violations of the California Vehicle Code.
I. Religious Freedom

1. Trapp v. Roden

No. 11863, 2015 WL 7356318 (Mass. Nov. 23, 2015). Inmates, who were adherents of Native American religious practices, brought action against Department of Correction challenging closure of purification lodge at correctional center. Following bench trial, the Superior Court, 2012 WL 6629681, entered judgment. Department appealed. On transfer, the Supreme Judicial Court held that: (1) closure violated the Religious Land Use and Institutionalized Persons Act of 2000; (2) Department failed to meet its burden of proof that closure decision was motivated by an actual compelling health interest; and (3) closure violated settlement agreement which resolved inmate’s prior lawsuit against Department.

2. Navajo Nation v. U.S. Dept. of Interior

Nos. 13–16517, 13–16519, 13–16520, 2016 WL 1359869 (9th Cir. Apr. 6, 2016). Tribe filed suit against United States Department of the Interior, National Park Service, and government officials, seeking immediate return of human remains and associated funerary objects taken from its reservation during inventory of remains and objects pursuant to the Native American Graves Protection and Repatriation Act (NAGPRA). The District Court, 2013 WL 530302, dismissed action as barred by sovereign immunity. Tribe appealed. The appellate court held that: (1) decision to apply NAGPRA to inventory remains from sacred site on reservation constituted final agency action, and (2) tribe’s claims were ripe for review. Reversed and remanded.

3. Oklevueha Native Am. Church of Haw., Inc. v. Lynch

No. 14-15143, 2016 U.S. App. LEXIS 6275 (9th Cir. Apr. 6, 2016). The government was properly granted summary judgment on plaintiffs’ claim under the Religious Freedom Restoration Act, 42 U.S.C.S. § 2000bb et seq., because even if plaintiffs’ use of cannabis constituted an exercise of religion, no rational trier of fact
could conclude on the record that a prohibition of cannabis use imposed a substantial burden under 42 U.S.C.S. § 2000bb-1(a) as nothing in the record demonstrated that a prohibition on cannabis forced plaintiffs to choose between obedience to their religion and criminal sanction, such that they were being coerced to act contrary to their religious beliefs. The government was properly granted summary judgment on plaintiffs’ claim under the American Indian Religious Freedom Act, 42 U.S.C.S. § 1996, because the Act did not create a cause of action or any judicially enforceable individual rights. Judgment affirmed.

J. Sovereign Immunity

1. **Public Serv. Co. of N.M. v. Approximately 15.49 Acres of Land in McKinley Cnty.**

   No. 15 CV 501, 2015 U.S. Dist. LEXIS 174900 (D.N.M. Dec. 1, 2015). The Public Service Company of New Mexico (PNM) filed a complaint for condemnation seeking a perpetual easement for electrical transmission lines. PNM brought this action to condemn a perpetual easement over five parcels of land owned by members of the Navajo Nation (Nation): (1) Allotment 1160, (2) Allotment 1204, (3) Allotment 1340, (4) Allotment 1392, and (5) Allotment 1877 (the Five Allotments). The Nation owns an undivided 13.6% interest in Allotment 1160 and an undivided .14% interest in Allotment 1392 (the Two Allotments). In its Motion to Dismiss the Nation argued that the Court lacks subject matter jurisdiction and asked the Court to dismiss it as a defendant because, as a sovereign nation, it is immune from suit. In addition, the Nation asked the Court to dismiss the Two Allotments because under Fed. R. Civ. P. 19, the Nation is an indispensable party that cannot be joined. The United States agreed that the Nation and the Two Allotments should be dismissed from the action. The Court dismissed without prejudice Plaintiff’s claims against the Navajo Nation and against Allotment Numbers 1160 and 1392.

2. **Dillon v. BMO Harris Bank, N.A.**

   No. 16-5, 2016 U.S. Dist. LEXIS 13433 (N.D. Okla. Feb. 4, 2016). Before the Court was non-party The Otoe-Missouria Tribe
of Indians’ (“the Tribe”) Motion to Quash the Subpoena of John Shotton and/or for Protective Order. Defendant BMO Harris Bank has served a subpoena on John Shotton, Chairman of the Tribe and Secretary/Treasurer of Great Plains Lending LLC (“Great Plains”), which is wholly-owned by and serves as an economic arm of the Tribe. BMO Harris subpoenaed Shotton to testify to the authenticity of loan documents produced in the underlying litigation. The Tribe asserted that the subpoena should be quashed because the Tribe and, by extension, Great Plains have sovereign immunity; thus, Shotton cannot be compelled to testify. BMO Harris argued that Shotton waived the tribe’s immunity by signing, for use in the underlying litigation, declarations regarding the authenticity of the loan documents. The Court found that the Tribe had not waived sovereign immunity with respect to the loan agreements at issue in Shotton’s declaration. While the Court recognized that this ruling may hinder BMO Harris in the underlying litigation, the “well-established doctrine” of tribal sovereign immunity cannot be abridged, even if application of the doctrine “works some inconvenience, or even injustice.” Alltel Communications, LLC v. DeJordy, 675 F.3d 1100 (8th Cir. 2012) at 1106. Therefore, the Tribe’s Motion to Quash was granted. United States Court of Appeals, Eighth Circuit.

3. Lewis v. Clarke

No. 19464, 2016 WL 878893 (Conn. Mar. 15, 2016). Motor vehicle driver and passenger brought action against Indian tribe member, claiming member’s negligence and carelessness in driving limousine, which was owned by tribal gaming authority, caused motor vehicle accident. The superior court, 2014 WL 5354956, denied member’s motion to dismiss based on tribal sovereign immunity. Member appealed. The Supreme Court held that tribal sovereign immunity extended to claims. Reversed and remanded with direction.


No. CV 16-00268 RSWL, 2016 U.S. Dist. LEXIS 61304 (C.D. Cal. May 9, 2016). Before the Court was Defendants Barona Band of Mission Indians of California, Barona Tribal Gaming Agency,
and Barona Resort & Casino’s (collectively “Defendants”) Motion to Dismiss (“Motion”). The action arose out of Plaintiff Clarence Butler’s (“Plaintiff”) alleged injury that occurred in the Barona Resort and Casino. Defendant Barona Band of Mission Indians of California (“the Tribe”) is a federally recognized Indian tribe with jurisdiction over the Barona Indian Reservation. Defendant Barona Tribal Gaming Agency, a.k.a. the Baron Tribal Gaming Commission (“the Gaming Agency”) and the Barona Resort and Casino (“the Casino”) are business entities.

At all relevant times, the Gaming Agency was the Tribe’s duly authorized agent and employee that operated and was responsible for the Tribe’s gaming, gambling, resort, and hotel operations. The Casino is the Tribe and the Gaming Agency’s employee in operating and maintaining the resort and Casino located on the Barona Indian Reservation. Pursuant to the Indian Gaming Regulatory Act of 1988, codified in 18 U.S.C. § 1166 et seq.; 25 U.S.C. § 2701 et seq. (“the Act”), the Tribe entered into a compact with the State of California (“the Compact”) in October 1999 to allow it to operate gambling facilities within the State. In the Compact, the Tribe agreed to comply with certain standards relating to public health and safety at its facilities, to maintain certain public insurance for personal injury claims by patrons injured at the facilities, to adopt a tort liability ordinance setting forth the terms and conditions under which it would waive its sovereign immunity relating to such claims, and the procedures for processing those claims. Accordingly, on December 22, 2009, the Tribe adopted a tort claims ordinance (“Barona Tort Claims Ordinance”). The Barona Tort Claims Ordinance clearly states that it waives immunity from suit only in Tribal Court.

On February 16, 2016, Plaintiff was standing in line at the Barona Casino to cash his gambling chips. Plaintiff was standing with his back towards the crowd, second in line before the cashier, when the stanchion holding the rope collapsed against Plaintiff’s right knee, injuring him. “Plaintiff suffered short term, long term and permanent physical injuries, pain, suffering, stress, anxiety, insomnia, as well as loss of income.” On February 26, 2014, Plaintiff filed his claim, notifying the Casino that he had suffered an injury. The Casino mailed Plaintiff, by Certified Receipt, and Plaintiff received through his counsel, a claim form and a copy of the 1999 Tort Claims Ordinance.
On May 4, 2015, the Tribe mailed a Notice of Rejection of Tort Claim with the forms for appeal. On May 26, 2015, Plaintiff appealed the Tribe’s rejection of his claim. Plaintiff alleges it has heard no response on its appeal. When subject matter jurisdiction was challenged under Federal Rule of Civil Procedure Rule 12(b)(1), the plaintiff had the burden of proving jurisdiction in order to survive the motion. Plaintiff has proffered no factual support to warrant this Court’s jurisdiction. This Court found that Plaintiff had failed to meet its burden to sufficiently allege this Court’s jurisdiction, and accordingly, Defendants’ Motion to Dismiss is granted without leave to amend.


No. 14-15975, 2016 U.S. App. LEXIS 9299 (9th Cir. May 11, 2016). Becky McVay appealed from the district court’s judgment dismissing claims for breach of contract and breach of the duty of good faith and fair dealing. McVay’s action arose from a slip and fall in a gas station convenience store owned and operated by the Fallon Tribal Development Corporation, which is owned by the Fallon Paiute-Shoshone Tribe (collectively, “the Tribe”). McVay sued the Tribe in an action that proceeded in tribal court until the claims against the Tribe were dismissed on the basis of tribal sovereign immunity. In the present separate lawsuit filed in federal court, McVay asserted claims against the Tribe’s insurer, Allied World Assurance Company (U.S.), Inc., and the company that administered the insurance policy, York Risk Services Group, Inc. (collectively, “Defendants”).

Under Nevada law, an individual who has no contractual relationship with an insurance company lacks standing to sue the insurance company for breach without evidence that the individual “substantially relied on the insurance company’s representations or . . . was a specific intended beneficiary of the insurance policy.” *Gunny v. Allstate Ins.*, 108 Nev. 344, 830 P.2d 1335, 1335-36 (Nev. 1992) (per curiam).

McVay did not allege that she has a contractual relationship with Defendants or that she relied on any representations made by Defendants. She did argue, however, that she has standing to sue Defendants as an intended beneficiary of the Tribe’s insurance policy with Defendants. This argument seems to be based on the
language of the Tribe’s policy, defining “insured” as “any person . . . to whom the Named Insured is obligated by virtue of a written contract or oral agreement to provide insurance such as is afforded by this policy.” McVay argued that there are two documents that reflect the Tribe’s agreement to provide coverage to her: (1) the Indian Self-Determination and Education Act, 25 U.S.C. § 450f(c) (“ISDEA”) and (2) the Tribe’s Corporate Charter.

To the extent McVay’s theory was that the ISDEA should prevent the Tribe from asserting a sovereign immunity defense against her tort claim, that argument would have had to have been made in the proceeding in which the Tribe actually asserted sovereign immunity.

Similarly, the existence of sovereign immunity does not transform the general rule that an insured person may not sue an insurer for a declaration of coverage until succeeding in litigation against the insured person. Because McVay was neither a party to nor a third-party beneficiary of the insurance contract between the Tribe and Allied, the district court was correct to hold that she may not proceed directly against Defendants for breach of contract or breach of the duty of good faith and fair dealing. The district court was also correct to deny leave to amend, because it was clear that McVay cannot cure the defects in her complaint. Affirmed.

6. Johnson v. Wind Creek Casino, Hotel

No. 16-0052, 2016 U.S. Dist. LEXIS 77804 (S.D. Ala. Jun. 15, 2016). This matter was before the Court on the defendant’s motion to dismiss. The defendant had presented the affidavit of the Tribal Chair of the Poarch Band of Creek Indians (“the Tribe”), which established that the defendant, Wind Creek Casino, Hotel, was owned by the Tribe and operated by the Poarch Band of Creek Indians Gaming Authority (“the Authority”). The defendant argued that the plaintiff’s lawsuit is thus barred by the doctrine of tribal sovereign immunity.

Because the plaintiff has the burden of establishing subject matter jurisdiction, she must show that the defendant has waived its immunity. The plaintiff had not done so; indeed, she did not even allege a waiver.

Instead, the plaintiff invoked Ex parte Young. That doctrine provides “an exception to sovereign immunity in lawsuits against
state officials for prospective declaratory or injunctive relief to stop ongoing violations of federal law,” and the Eleventh Circuit has “extended the Ex parte Young doctrine to tribal officials.” PCI Gaming Authority, 801 F.3d at 1288. But the plaintiff had not sued any tribal officials or any individuals of any description. Nor had she sought prospective equitable relief; all her complaint demanded is $3 million in damages. The doctrine therefore cannot save her lawsuit.

“Tribal sovereign immunity is a jurisdictional issue.” Furry, 685 F.3d at 1228; accord Taylor v. Alabama Intertribal Council Title IV J.T.P.A., 261 F.3d 1032, 1034 (11th Cir. 2001). Because the defendant was covered by such immunity, which had been neither abrogated nor waived, the Court lacked subject matter jurisdiction to entertain this action. The motion to dismiss was granted.

7. MMMG v. Seminole Tribe of Fla.

No. 4D15-235, 2016 Fla. App. LEXIS 9263 (Fla. Dist. Ct. App. June 15, 2016). Mobile Mike, a South Florida radio personality, owns Mobile Mike Promotions, Inc. (the “Production Company”). In 2011, the Production Company and the Seminole Tribe of Florida, Inc. (“STOFI”), a corporate entity of the Seminole Tribe (the “Tribe”), entered into an advertising joint venture called MMMG, LLC (the “Joint Venture”). STOFI later broke the Joint Venture agreement. The Production Company and the Joint Venture together filed a ten-count complaint against STOFI and other tribal members individually (collectively the “Defendants”). STOFI moved to dismiss, asserting the trial court lacked jurisdiction due to STOFI’s sovereign immunity. After a five-day evidentiary hearing, the trial court found that STOFI was protected by sovereign immunity, which it had not waived pursuant to STOFI’s charter and bylaws, and dismissed STOFI as a party. MMMG, LLC and Mobile Mike Promotions, Inc. appealed the involuntary dismissal of their complaint against a federal tribal corporation affiliated with the Seminole Tribe. We affirm the dismissal because the tribal corporation enjoyed sovereign immunity from suit, which was not effectively waived according to the procedure required in the corporation’s charter and bylaws. The order was affirmed.
8. *Hamaatsa, Inc. v. Pueblo of San Felipe*

No. S-1-SC-34287, 2016 N.M. LEXIS 148 (N.M. Jun. 16, 2016). The Pueblo of San Felipe (Pueblo) appealed from an opinion of the New Mexico Court of Appeals declining to extend the Pueblo, an Indian tribe, immunity from suit. Hamaatsa, Inc. (Hamaatsa) is a non-profit New Mexico corporation that owns land in Sandoval County. Adjacent to Hamaatsa’s property is land owned in fee by the Pueblo, a federally recognized Indian tribe. The Bureau of Land Management (BLM) conveyed to the Pueblo, in fee simple, the land at issue on December 13, 2001. The property, albeit adjacent and contiguous with reservation land, is not yet held in trust by the federal government as part of the Pueblo’s reservation.

The United States Department of the Interior, Bureau of Indian Affairs (BIA), awaits resolution of the instant dispute prior to taking the fee-simple parcel into trust. In its 2001 conveyance to the Pueblo, “the BLM reserved ‘an easement and right-of-way over, across, and upon a strip of land 40 feet wide along the existing road . . . identified in NMNM 95818, for the full use as a road by the United States for public purposes.’” Throughout this opinion we refer to the NMNM 95818 easement as “Northern R.S. 2477.”

On September 19, 2002, the BLM purported to quitclaim its interest in the Northern R.S. 2477 to the Pueblo. Access to Northern R.S. 2477 forms the basis of Hamaatsa’s December 30, 2010, complaint against the Pueblo. Hamaatsa uses Northern R.S. 2477 on the Pueblo’s property to access its land. In August 2009 Hamaatsa received a letter from the then Governor of the Pueblo stating that Hamaatsa had no legal right of access across the Pueblo’s property and that Hamaatsa’s use of Northern R.S. 2477 was a trespass. Hamaatsa continued to use the road and filed suit requesting that the district court declare that the Pueblo cannot so restrict Hamaatsa’s use of the road.

After a hearing on the motion to dismiss the district court denied the Pueblo’s motion, reasoning that the action was an in rem proceeding not seeking damages, to which sovereign immunity was no bar. The district court granted the Pueblo leave to seek an interlocutory appeal which was then granted by the Court
of Appeals on July 5, 2011. The district court stayed all proceedings pending resolution of the appeal. The Court of Appeals affirmed the district court’s denial of the Pueblo’s motion to dismiss. Holdings: (1) Because it was settled federal law that sovereign Indian tribes enjoyed immunity from suit in state and federal court, absent waiver of abrogation by Congress, the appellate court erred by affirming the denial of the Indian tribe’s motion to dismiss a neighboring property owner’s action requesting that the trial court declare that the Indian tribe could not restrict the property owner’s use of a road on the Indian tribe’s property. The court declined to deny the Indian tribe’s right to sovereign immunity on equitable grounds. (2) The court held that the Indian tribe properly raised its tribal sovereign immunity by a N.M. R. Ann. 1-012(B) motion to dismiss. Judgment vacated and case remanded to the trial court for dismissal for lack of subject matter jurisdiction.

9.  

Seminole Tribe of Fla. V. Schinneller

No. 4D15-1704, 2016 Fla. App. LEXIS 11411 (Fla. Dist. Ct. App. Jul. 27, 2016). The Seminole Tribe of Florida appeals an order denying its motion to dismiss based on sovereign immunity. It argues the trial court erred in failing to grant its motion to dismiss as a matter of law. The plaintiff filed a complaint against the tribe for personal injuries resulting from a slip and fall in a restroom at the Seminole Hard Rock Hotel and Casino. In her amended complaint, the plaintiff admitted the tribe is not subject to the civil jurisdiction of state courts unless its sovereign immunity is waived. The plaintiff admitted the only way the tribe can waive sovereign immunity is by a duly enacted resolution of the Tribal Council in legal session. But, she maintained the tribe did so when it adopted, and the National Indian Gaming Commission approved, Resolution No. C-195-06 on July 10, 2006. The resolution did not include a waiver of sovereign immunity. The appellate court found that the trial court departed from the essential requirements of law when it denied the tribe’s motion to dismiss a personal injury action on the basis of trial sovereign immunity, as a waiver of such immunity had to be unequivocally expressed and the tribe had established that no resolution, ordinance, or compact including a
waiver of immunity was enforceable in 2009 when plaintiff’s claim arose. Petition for certiorari granted.

10. **Findleton v. Coyote Valley Band of Pomo Indians**

No. A142560, 2016 Cal. App. LEXIS 627 (Cal. Ct. App. Jul. 29, 2016). Plaintiff filed a petition to compel mediation and arbitration against the Coyote Valley Band of Pomo Indians, seeking to enforce the mediation and arbitration clauses in a construction agreement and an on-site rental contract. The trial court granted the Tribe’s motion to quash service of summons and dismissed the case. The trial court concluded that it lacked jurisdiction over plaintiff’s claims because there had been no valid waiver of the Tribe’s sovereign immunity. The Court of Appeal reversed the order and remanded the case for further proceedings.

The court concluded that the Tribal Council was authorized to, and did, waive the Tribe’s sovereign immunity for purposes of arbitrating disputes arising under the Tribe’s contracts with plaintiff. The court deferred to the interpretation of the Tribe’s Constitution adopted by its General Council and Tribal Council, and not to the Tribe’s current position in its briefing, which was not an “interpretation” as contemplated by these authorities but a position undertaken in litigation. The General Council validly delegated its authority to waive tribal sovereign immunity to the Tribal Council when it adopted two resolutions. The waiver of the Tribe’s sovereign immunity extended to judicial enforcement of the right to arbitrate and of any arbitration award. The trial court’s order granting the Tribe’s motion to quash service of summons and dismissing the case was reversed, and the case was remanded for further proceedings.

11. **Navajo Nation v. Dalley**

No.15-cv-00799, 2016 U.S. Dist. LEXIS 103319 (D.N.M Aug. 3, 2016). This case was before the Court following a routine slip-and-fall lawsuit argued before the Honorable Bradford J. Dalley in New Mexico District Court. Although the causes of action in this lawsuit are relatively mundane, the jurisdictional issues presented to this Court are not. In the tribal-state gaming compact between the Navajo Nation and the State of New Mexico
(“Tribal-State Compact”), the Navajo Nation and the State of New Mexico agreed that tort actions related to Indian gaming that arose on Navajo tribal land could be adjudicated in New Mexico district court. In this declaratory judgment action, Plaintiffs had asked this Court to state that the Navajo Nation lacked sufficient authority to grant New Mexico district court’s jurisdiction over personal injury actions arising in gaming facilities in Indian country when signing the Tribal-State Compact.

The Honorable Bradford J. Dalley, the New Mexico District Court Judge whom presides over the slip-and-fall action at issue, in combination with the plaintiffs in that action, Harold and Michelle McNeal, are the Defendants in this case. They assert, with the assistance of the New Mexico Attorney General, that the Navajo Nation did have sufficient authority to grant the State of New Mexico jurisdiction over the slip-and-fall at issue here because the Navajo Nation has both the inherent authority as a sovereign nation to grant New Mexico jurisdiction and because Congress has granted the Navajo Nation authority under the Indian Gaming Regulatory Act (“IGRA”) to negotiate the Tribal-State Compact.

The court found that Navajo Nation has inherent authority to waive its sovereign immunity and waived its sovereign immunity to the state-court action at issue here when it ratified the Tribal-State Compact. The Navajo Sovereign Immunity Act does not prohibit this waiver. Instead, subsequent legislation and the ratification of the Tribal-State Compact itself abrogated the Navajo Nation’s sovereign immunity. As a result, the Plaintiffs cannot rely on the Navajo Sovereign Immunity Act to invalidate Section 8 of the Tribal-State Compact. The IGRA also does not prohibit the Navajo Nation’s waiver of sovereign immunity. Instead, the IGRA embodies contract-law principles that encourage the Tribes and states to determine for themselves the appropriate allocation of jurisdiction under IGRA. As a result, the Plaintiffs cannot rely on IGRA to invalidate Section 8 of the Tribal-State Compact. The Court reiterates that the Navajo Nation’s waiver of sovereign immunity is based fundamentally on the Tribe’s consent to be sued in New Mexico courts under Section 8 of the Tribal-State Compact. it is therefore ordered that Plaintiffs’ Motion for Summary Judgment is denied.
Enable Okla. Intrastate Transmission v. A 25Foot Wide Easement

No. CIV-15-1250-M, 2016 U.S. Dist. LEXIS 109854 (W.D. Okla. Aug. 18, 2016). This was a condemnation action to condemn a twenty-five (25) foot wide natural gas pipeline easement through an approximate 137-acre tract of land in Caddo County, Oklahoma, which had originally been an Indian allotment, held in trust by the United States Department of Interior, Bureau of Indian Affairs (“BIA”). Thirty-eight (38) Indians and the Kiowa Indian Tribe of Oklahoma (“Kiowa Tribe”) own undivided interests in the tract. The Kiowa Tribe obtained its approximately 1.1% undivided interest sometime after 2008, on the death of certain Indian owners and by operation of the American Indian Probate Reform Act. The original right of way expired in November 2000. On or about June 14, 2002, plaintiff’s predecessor-in-interest, Enogex, Inc. (“Enogex”), submitted to the BIA an application for a new 20-year term regarding the existing natural gas pipeline right-of-way which was approved.

On March 23, 2010, the BIA vacated the acting superintendent’s approval and remanded the case for further negotiation and instructed that if approval of a right-of-way was not timely secured that Enogex should be directed to move the pipeline. Enogex brought this action. Defendant United States contends that the tract at issue is tribal land and, as a result, the Court has no subject matter jurisdiction to condemn the easement. Additionally, all defendants contend that the Kiowa Tribe is a required party to this action, that the Kiowa Tribe cannot be joined in this action because it has sovereign immunity from suit, and under the factors set forth in Federal Rule of Civil Procedure 19(b), equity and good conscience mandate that this action be dismissed. Congressional legislation and Department of Interior regulations treat tribal land and allotted land differently.

The Court found that the Kiowa Tribe is a required party. Specifically, the Court found that because the Kiowa Tribe owns a 1.1% undivided interest in the tract at issue, Rule 71.1(c)(3) requires that the Kiowa Tribe be joined as a defendant in this case. While the Kiowa Tribe was a required party, the Court finds that the Kiowa Tribe cannot be joined as a party in this action. Accordingly, the Court finds that the Kiowa Tribe was a required
party under Rule 19(a) and Rule 71.1, that in light of its sovereign immunity, the Kiowa Tribe cannot be joined; and that under Rule 19(b), the Court, in equity and good conscience, must dismiss this action. For the reasons set forth above, the Court grants the Individual Defendants’ Motion to Dismiss and defendant United States’ Motion to Dismiss for Lack of Jurisdiction and Failure to Join a Necessary Party and dismisses this action.

K. Sovereignty, Tribal Inherent

1. C’Hair v. District Court of Ninth Judicial District

No. S–14–0198, 2015 WL 5037011 (Wyo. Aug. 26, 2015). Motorist brought negligent operation and negligent entrustment action against driver and owner of automobile, who were enrolled members of Indian tribe, after driver struck motorist on state highway within reservation. Motorist brought similar action in the Shoshone and Arapaho Tribal Court after driver and owner challenged jurisdiction of state court in their answers. The parties agreed to stay the state court action, and the Tribal Court dismissed motorist’s complaint on statute of limitations grounds. The District Court denied driver and owner’s motion for summary judgment. Driver and owner filed petition for writ of review, which was granted. The Supreme Court, en banc, held that: (1) the District Court had subject matter jurisdiction over matter, and (2) two-year limitations period from tribal law and order code did not apply.

2. Arrow Midstream Holdings, LLC v. 3 Bears Constr., LLC

No. 20150057, 2015 ND 302 (N.D. Dec. 29, 2015). Arrow Midstream Holdings, LLC and Arrow Pipeline, LLC (collectively Arrow) appealed, and Tesla Enterprises, LLC (Tesla) cross-appealed, from a judgment dismissing without prejudice for lack of jurisdiction its action against 3 Bears Construction, LLC (3 Bears) and Tesla for breach of contract and a declaration that Tesla’s pipeline construction lien is invalid. In 2013, Arrow, a Delaware limited liability company, hired 3 Bears, a North Dakota limited liability company, to be the general contractor for the construction of a pipeline located on a right-of-way easement acquired by Arrow from the Bureau of Indian Affairs over Indian trust land on
the Fort Berthold Indian Reservation. The easement was “for the purpose of installing oil, gas and water lines” and described the right-of-way as “11,882.77 feet in length and 13.520 acres in area (34.206 acres during construction), more or less, . . . and shall be buried a sufficient depth below the surface of the land so as not to interfere with cultivation.”

3 Bears, which has its principal place of business in New Town, entered into a subcontract with Tesla, an Alaska limited liability company, to supply materials and labor for the construction. 3 Bears is owned by two members of the Three Affiliated Tribes (Tribe) and is certified under the Tribal Employment Rights Ordinance (TERO). 3 Bears claimed Arrow was a covered employer who was required to comply with TERO rules. After the pipeline was completed, a dispute arose between 3 Bears and Tesla concerning amounts Tesla claimed it was owed by 3 Bears for work Tesla performed. In mid-2014, Tesla sent Arrow a notice of right to file a pipeline lien under N.D.C.C. ch. 35 24. Tesla recorded the pipeline lien against Arrow in the Dunn County recorder’s office in June 2014.

In July 2014, Arrow commenced this action in state district court challenging the validity of the pipeline lien, seeking indemnification, and claiming 3 Bears breached the parties’ contract. In August 2014, 3 Bears moved to dismiss for lack of subject matter jurisdiction. In November 2014, 3 Bears filed a complaint against Tesla and Arrow in Fort Berthold Tribal Court. 3 Bears sought a declaration that the pipeline lien was invalid, alleged Arrow had breached the master service contract, and requested an award of damages.

In December 2014, the state district court agreed with 3 Bears’ argument that it lacked subject matter jurisdiction over the lawsuit. The court concluded “exercising jurisdiction over this action under the circumstances presented here would infringe upon Tribal sovereignty.” The court further concluded, “at the very least, Arrow and Tesla, as a matter of comity, should be required to exhaust their tribal court remedies before this Court exercises jurisdiction.” The court dismissed the action “without prejudice to allow any of the parties to re-open the case without payment of another filing fee should it become necessary for purposes of enforcing the Tribal Court action or for any other reason.”
The appellate court held that appellate jurisdiction existed where a dismissal order and judgment effectively foreclosed litigation of a pipeline lien’s validity and breach of contract; the first Montana exception did not apply where the general contractor was an LLC formed under state law, not a member of the tribe, and thus, there was no consensual relationship between nonmembers and the tribe or its members; the district court erred in ruling that the tribal court had jurisdiction under the second Montana exception where the right-of-way pipeline easement was the equivalent of non-Indian fee land, the Tribe had not intervened in the action, and the case involved the validity of a pipeline construction lien filed under state law resulting from a contractual payment dispute between non-tribal members; state court jurisdiction was not foreclosed by incompatible federal law. Judgment reversed; case remanded.

3.  *Kelsey v. Pope*

No. 14-1537, 2016 U.S. App. LEXIS 28 (6th Cir. Jan. 5, 2016). Member of the Little River Band of Ottawa Indians petitioned for writ of habeas corpus after he had been convicted in tribal court of misdemeanor sexual assault for inappropriately touching tribal employee at Band’s community center, 2008 WL 6928233, and his sentence was affirmed on appeal. The District Court, 2014 WL 1338170, granted the petition. Tribe appealed. The appellate court held that: (1) tribe had inherent authority to prosecute tribal member for offense substantially affecting tribal self-governance interests, even when such offenses took place outside of Indian country; (2) Indian Civil Rights Act (ICRA) extended due process protections to member; (3) federal constitutional standards applied; and (4) decision of tribal Court of Appeals to recognize jurisdiction over conduct of member of Indian tribe in touching victim’s breasts through her clothing at tribe’s off-reservation community center did not violate due process as extended through ICRA. Reversed and vacated.

4.  *Wilson v. Doe*

No. C15-629, 2016 U.S. Dist. LEXIS 41543 (W.D. Wash. Mar. 29, 2016). Before the court were Defendant Horton’s Motion for Summary Judgment and Plaintiff’s Motion for Summary
Judgment. Plaintiff Curtiss Wilson was stopped by a Lummi Tribe police officer while driving on the Lummi Reservation after drinking at the Lummi Casino. Lummi Tribal Police Officer Grant Austick stopped Plaintiff, searched his 1999 Dodge Ram Pickup, and developed probable cause that Plaintiff was committing a DUI. Officer Austick then called the Washington State Patrol and Plaintiff was arrested. Plaintiff’s truck was towed by Defendant Horton’s Towing and impounded at the direction of the Washington State Trooper.

The following day, Lummi Tribal Police Officer Brandon Gates presented a “Notice of Seizure and Intent to Institute Forfeiture” (“Notice of Seizure”) from the Lummi Tribal Court to Horton’s Towing. The seizure and intent to institute forfeiture of Plaintiff’s vehicle was based on violations of the Lummi Nation Code of Laws (“LNCL”) 5.09A.110(d)(2) (Possession of Marijuana over 1 ounce), and authorized by LNCL 5.09B.040(5)(A) (Civil forfeiture section addressing Property Subject to Forfeiture, specifically motor vehicles used, or intended for use, to facilitate the possession of illegal substances.) Horton’s Towing released the truck to the Lummi Tribe.

Plaintiff brought suit in Whatcom County Superior Court and the case was removed. Plaintiff originally brought claims for outrage, conversion, and relief under 42 U.S.C. §§ 1983 and 1988. All of Plaintiff’s claims, save conversion, have been previously dismissed either voluntarily or by Court order. Plaintiff’s conversion claim against both Horton’s and the United States is based on Horton’s release of the vehicle to the Lummi Tribe pursuant to the order served by Gates. Defendant Horton’s moved for summary judgment, claiming the release of the vehicle was pursuant to the Notice of Seizure, and therefore with lawful justification. Plaintiff argued in response that the Notice of Seizure is invalid or not enforceable off the reservation. The United States moved for summary judgment based on, inter alia, Plaintiff’s failure to exhaust his administrative remedies. Plaintiff’s cursory Motion for Summary Judgment and attached declaration does nothing to rebut the appropriateness of summary judgment in Defendants’ favor. Rather, Plaintiff repeats the circumstances of his DUI and loss of his truck. The Court appreciates that the temporary loss of his vehicle caused Mr. Wilson—who has a limited, fixed income—great inconvenience, even distress.
However, this does not establish a genuine dispute of material fact in his case: rather, the facts are essentially undisputed. Not only has Plaintiff not established that his truck was seized without legal justification; he has not established that this Court has the jurisdiction to hear his case. Defendants’ Motions for Summary Judgment are granted and Plaintiff’s Motion is denied.

5. **Menominee Indian Tribe of Wis. v. DEA**

   No. 15-CV-1378, 2016 U.S. Dist. LEXIS 67259 (E.D. Wis. May 23, 2016). The Menominee Indian Tribe of Wisconsin filed this declaratory action against the United States Department of Justice and its Drug Enforcement Administration (hereinafter “the Government”) after federal agents raided reservation lands and seized a crop of hemp grown pursuant to a 2015 tribal ordinance legalizing the cultivation of hemp. The Tribe sought a judgment declaring that its cultivation of industrial hemp for agricultural or academic research purposes in connection with the College of Menominee Nation is lawful under a 2014 federal law, 7 U.S.C. § 5940, which created an exemption to the Controlled Substances Act for the cultivation of hemp in certain circumstances.

   Before the Court are the Government’s motion to dismiss and the Tribe’s motion for summary judgment. In May 2015, the Menominee Indian Tribe of Wisconsin, a federally-recognized Indian tribe, passed a tribal ordinance legalizing the cultivation of industrial hemp on the Menominee Reservation by licensees of the Tribe. Hemp has known uses in textiles, foods, papers, body care products, detergents, plastics and building materials. On October 23, 2015, federal agents entered the Menominee Reservation, and seized and destroyed the Tribe’s industrial hemp crop. The complaint states that the raid was conducted despite no known THC test exceeding 0.3 percent.

   On November 18, 2015, the Tribe filed this action for declaratory relief. The Tribe sought a declaration from this Court that its cultivation of industrial hemp for agricultural or academic research purposes in conjunction with the College of Menominee Nation is lawful under 7 U.S.C. § 5940. Specifically, the complaint includes three “claims” for declaratory relief corresponding to the statutory requirements for the exception: (1) that in passing a tribal
law legalizing the cultivation of industrial hemp on the Menominee Reservation, the Tribe acted as a "State," as required under § 5940; or alternatively (2) that the cannabis laws of the State of Wisconsin have no application to industrial hemp cultivation by the Tribe within the exterior boundaries of the Menominee Reservation, and that the cultivation of industrial hemp on the Menominee Reservation is therefore "allowed" under the laws of the State of Wisconsin, as required under § 5940; and (3) that the College of Menominee Nation is an "institution of higher education" under § 5940. The Government responded to the complaint by filing a motion to dismiss on numerous grounds. The Tribe responded with a motion for summary judgment. The court granted the Government’s motion to dismiss, and the Tribe’s motion for summary judgment was denied.

6. Pearson v. Dir. of the Dep’t of Licensing

No. C15-0731, 2016 U.S. Dist. LEXIS 80133 (W.D. Wash. Jun. 20, 2016). This matter was before the Court on the motions for summary judgment by Defendants Director of the Department of Licensing and Sergeant Andrew Thorne. On January 21, 2015, Swinomish Police Department Officer Hans Kleinman pulled over Plaintiff Susan Pearson for failing to obey a stop sign. Both the traffic violation and the traffic stop occurred on tribal trust land within the external boundaries of the Swinomish Reservation. Officer Kleinman ran Pearson’s name through a driver’s check and learned that her license was suspended three days earlier for unpaid tickets. Officer Kleinman arrested Pearson. During the search incident to arrest, Officer Kleinman found evidence of controlled substances on Pearson’s person. The tribal police officers subsequently seized Pearson’s 1999 GMC S-10 pickup truck.

Two days after Pearson’s arrest, Defendant Andrew Thorne, a sergeant with the Swinomish Police Department, received a call from Pearson asking where she should pick up her vehicle. Sgt. Thorne responded that Pearson could not retrieve her vehicle because the Swinomish Police Department was procuring a search warrant. Pearson then asked when her vehicle would be returned. Sgt. Thorne responded that the Tribe intended to initiate forfeiture proceedings because the vehicle was used to transport illegal narcotics on tribal land. Sgt. Thorne advised that Pearson would be
receiving a seizure notice from the Swinomish Tribal Court with a hearing date and that Pearson could retain an attorney if she wished. Upon obtaining a warrant, the Swinomish Police Department searched Pearson’s vehicle and discovered evidence of controlled substances. Pearson was given notice of the proceeding to forfeit her vehicle pursuant to tribal law. No attorney entered an appearance on her behalf, and Pearson did not file an answer.

After 20 days, the Swinomish Tribal Court entered an order forfeiting Pearson’s ownership pursuant to Swinomish tribal laws. Meanwhile, Pearson requested that the Washington State Department of Licensing (Department) place a hold on her certificate of title. Based on this request, the Department flagged Pearson’s certificate of title, indicating to the Department that ownership of the vehicle could not be transferred without a request by Pearson or a Washington State court order. The Department has no records indicating that the Swinomish Tribe has attempted to transfer title to Pearson’s vehicle. As of the time of filing of these motions, Pearson’s truck was still in the custody of the Swinomish Police Department. Pearson filed a complaint for damages and declaratory and injunctive relief against the Director of the Department in her official capacity and against several Swinomish tribal police officers, including Sgt. Thorne. Pearson asked this Court to enjoin the Department from transferring the certificate of ownership to itself pursuant to the Swinomish Tribe’s forfeiture order, and to award judgment against the tribal police officers for damages under 42 U.S.C. §1983. The court granted Defendants’ motions for summary judgment and dismissed with prejudice Pearson’s claims against the Director of the Department of Licensing and Sergeant Andrew Thorne.

7. United States v. Bearcomesout

No. CR 16-13, 2016 U.S. Dist. LEXIS 96117 (D. Mont. Jul. 22, 2016). Before the Court was Defendant Tawnya Bearcomesout’s Motion to Dismiss the Indictment based on Double Jeopardy. Bearcomesout argued that the Northern Cheyenne Tribe and the United States are no longer separate sovereigns, so her prosecution in the Northern Cheyenne Tribal Court and her prosecution in this Court are derived from the same source, in violation of the Fifth Amendment’s Double Jeopardy
Clause. The government argued that the Double Jeopardy Clause does not apply.

Bearcomesout was charged by Indictment with voluntary manslaughter and involuntary manslaughter, in violation of 18 U.S.C. §§ 1153(a) and 1112(a). Prior to the federal Indictment, the Northern Cheyenne Tribal Court charged and sentenced Bearcomesout with crimes arising out of the same events. Bearcomesout accepted an Alford plea in tribal court. She was sentenced to one year of incarceration with the Bureau of Indian Affairs Law Enforcement Services and a $5,000 fine for the charge of homicide as well as an additional one-year sentence and $2,000 fine for the charge of assault, with both periods of incarceration to run consecutively. Citing decades of “schizophrenic” case law, Bearcomesout argued that the law has evolved such that the Northern Cheyenne Tribe’s concept of self-governance and sovereignty has disappeared. As a result, Bearcomesout argued that the Tribe was “subject to the external whim of the United States” which inherently extinguishes the tribe’s sovereignty. Because the Tribe is not sovereign, Bearcomesout argued that her prosecution in Northern Cheyenne Tribal Court was in essence a federal prosecution, in violation of the Double Jeopardy Clause. Bearcomesout provided the Court with only conclusory allegations and no specific evidence that the Tribe had “little or no independent volition” in the Bearcomesout’s tribal prosecution. Zone, 403 F.3d at 1105. Accordingly, she does not meet the standard for an evidentiary hearing. See United States v. Koon, 34 F.3d 1416, 1439 (9th Cir. 1994). (To qualify for an evidentiary hearing, a defendant must, at the very least, “make more than `conclusory allegations’ of collusion.”) Bearcomesout’s Motion to Dismiss is denied.

8. Acres v. Blue Lake Rancheria Tribal Court

No. 16-cv-02622, 2016 U.S. Dist. LEXIS 105786 (N.D. Cal. Aug. 10, 2016). Plaintiff James Acres sought declaratory and injunctive relief against defendants Blue Lake Casino & Hotel (“BLC&H”), the Blue Lake Rancheria tribal court, tribal judge Lester Marston, and Anita Huff (“Clerk Huff”), asserted that the tribal court lacked jurisdiction over him in an underlying contractual dispute and that the individual court employees
exceeded their authority during the pendency of the tribal action. Defendants moved to dismiss to require Acres to exhaust his tribal remedies. Acres is an employee and president of Acres Bonusing, Inc. (“ABI”), a California distributor for Talo, Inc. BLC&H sued Acres and ABI in Tribal Court on January 12, 2016. That case concerns an agreement into which ABI and Acres entered with BLC&H for the purpose of providing BLC&H with the iSlot Platform, a casino gaming platform developed by Talo, Inc. (the “iSlot Agreement”). BLC&H’s complaint asserts claims for breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment, and fraudulent inducement.

On January 17, 2016, Acres was served with the summons and complaint in the tribal action. On February 16, 2016 Judge Marston issued an order rejecting special appearances and listing the ways in which the filings did not conform to the tribal court’s rules. The order provided Acres with 30 days to file an answer or responsive pleading. On March 9, 2016, Acres and ABI filed the instant action in federal court, alleging that it is “not possible for the Tribal Court to provide due process to non-members Acres” and that “because the tribal court answers to the Tribe’s Business Council, and the Business Council derives significant revenue for the Tribe from BLC&H, it is unreasonable to expect the Tribal Court to be an impartial arbiter in [this] dispute.”

Acres also asserted that he never consented to tribal jurisdiction and that “[b]y the Tribe’s own rules, [he] is clearly not subject to the Tribe’s jurisdiction because he had never done business with the Tribal Court’s territorial jurisdiction as a natural person.” Acres’ complaint presents five claims for declaratory and injunctive relief including a declaration that the iSlot Agreement does not establish tribal jurisdiction over non-members of the tribe and a declaration that the tribal court cannot provide due process in cases involving tribal plaintiffs and non-tribal defendants. Defendants’ motion to dismiss for lack of subject matter is granted.

L. Tax

1. Seminole Tribe of Florida v. Stranburg

No. 14-14524, 2015 WL 5023891 (11th Cir., Aug. 26, 2015). Tribe filed suit against the State of Florida and the director of the
Florida Department of Revenue seeking injunctive relief against state Rental Tax and Utility Tax imposed on two non-Indian corporations with 25-year leases to provide food-court operations at two tribal casinos. The district court summary judgment was in favor of the Tribe and the State appealed. The Court of Appeals affirmed as to the Rental Tax, holding that 25 U.S.C. 465 bars the tax in light of Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973). The court also affirmed on an issue of first impression – the effect of BIA regulations providing that “activities under a lease conducted on leased premises” are not subject to state taxation. 25 CFR 162.017(c). While the court did not defer to the Secretary’s determination of federal preemption, it agreed that the Rental Tax is preempted by federal law under Bracker. However, the court rejected the district court’s determination that the incidence of the Utility Tax falls on the Tribe and ruled that the Tribe has not established that the Utility Tax is generally preempted as a matter of law.


No. 89734-4, 2015 WL 5076289, __ Wash. 2d __ (Aug. 27, 2015). Trade association of Washington gasoline and automotive service retailers brought action against the State alleging that fuel tax compacts entered into with various Indian tribes which provide for refunds of gas tax paid were unconstitutional. The Superior Court, Grays Harbor County, dismissed for non-joiner of parties. Trade association appealed. The Supreme Court reversed and held that while Indian tribes were necessary parties, they were not indispensable so as to warrant dismissal. 175 Wash. 2d 214, 285 P.3d 52 (2012). On remand, the court dismissed on the merits and trade association appealed again. The Supreme Court, Justice Gonzales for a unanimous court, affirmed. Art. II, Sec. 40 of the Constitution expressly allows for refunds authorized by law for taxes paid on motor vehicle fuels. The then-applicable statutes (since repealed) authorized compacts that provide for refunds.

3. Flandreau Santee Sioux Tribe v. Gerlach
No. 14-4171, 2016 U.S. Dist. LEXIS 16682 (D.S.D. Feb. 11, 2016). Pursuant to the Indian Gaming Regulatory Act (IGRA), the Tribe and the State have in place a Tribal-State gaming compact (Compact), which controls the Tribe’s gaming operations. The Compact contemplates neither explicitly nor impliedly the State’s authority to apply its alcohol regulatory laws to the Tribe’s “gaming facility,” nor does it contemplate a State’s authority to impose its use taxes on nonmember activity made at the Casino, nor does it contemplate the State’s requirement that the Tribe collect and remit the use taxes from nonmember activities or purchases.

Irrespective of residential or tribal status, the Tribe offers its patrons “goods and services,” which include “bowling, shows and other live entertainment, lodging, food, beverages, package cigarettes, and other sundry items.” It is undisputed that the Tribe sold these various goods and services to nonmembers at the Casino. The Tribe has not remitted the relevant use taxes on nonmember sales to the State. The State has issued the Tribe three alcohol licenses, one for each of the three Casino encompassed businesses. These licenses are conditioned on the Tribe’s remittance of the State use tax pursuant to S.D.C.L. § 35-2-24. In 2009 and 2010, the Tribe sought from the State a renewal of its three alcohol licenses. Based on S.D.C.L. § 35-2-24, both requests were denied by the State as the statute directs that licenses are not to be reissued until use taxes incurred by nonmembers have been remitted.

The Tribe requested a hearing before the South Dakota Office of Hearing Examiners to review the State’s alcohol license denial. At the hearing, the Hearing Examiner concluded that all nonmember purchases at the Casino are subject to the use tax scheme, that the Tribe failed to remit the use taxes, and, therefore, the Tribe was not entitled to alcohol license renewal. Prior to the Hearing Examiner’s decision becoming final, the Tribe filed this action in federal court and simultaneously moved the Court for preliminary injunction enjoining state action pursuant to the Hearing Examiner’s decision. The Tribe and State made the motion for preliminary injunction moot by entering into a stipulation whereby the State recognized the three alcohol licenses’ continuing validity pending a decision on the merits in this case.
The Tribe did not appeal the Hearing Examiner’s decision to South Dakota state court.

The Tribe alleged that the State lacks authority to impose its use tax scheme on reservation land against nonmember Casino patrons and that IGRA preempts the field of taxation thereby barring the State’s imposition. The Tribe argued that all activity engaged in under the Royal River Casino name is “gaming activity” untaxable by the State by virtue of IGRA. Outside of IGRA, the Tribe maintains that the use tax and remittance requirements are preempted by the Indian Commerce Clause of the Federal Constitution, federal common law, and infringe on inherent tribal sovereignty; that the State’s tax imposition is unlawfully discriminatory as applied to the Tribe; that, as a predicate to funds contained in an escrow account pursuant to a 1994 Deposit Agreement between the Tribe and State being disbursed to the Tribe, the State is without power to impose its taxation scheme on the Tribe’s Casino; and that the alcohol licenses are conditioned on the S.D.C.L. § 35-2-24 tax remittance requirement is violative of 18 U.S.C. § 1161.

Before the Court was the Flandreau Santee Sioux Tribe’s (the Tribe) motion for judgment on the pleadings. In its motion, the Tribe asked the Court to declare that the Indian Gaming Regulatory Act (the IGRA) is broad enough in scope to cover sales of goods and services beyond that of just pure gameplay on a casino floor. In addition, the Tribe moved to dismiss the State’s counterclaim related to a 1994 deposit agreement (the “Deposit Agreement”) that the Tribe and State are parties to. The Deposit Agreement established an escrow account into which the Tribe was to pay a disputed tax amount pending the final resolution of a federal action pending in South Dakota District Court at the time. The Tribe’s motion is granted.

4. **Cypress v. United States**

The Tribe members sought declaratory relief to avoid paying federal income taxes on distributions, including gaming proceeds, paid out of the Tribe’s trust account. The district court dismissed the complaint for lack of subject matter jurisdiction, finding that the United States had not waived sovereign immunity for suits brought by individual Tribe members. The Tribe members now appeal the dismissal. The court agreed with the district court that the Government did not waive sovereign immunity. Accordingly, the court affirm the district court’s dismissal of this matter.

5. **White v. Schneiderman**


Plaintiffs sought a preliminary injunction enjoining enforcement of the Tax Law, and Supreme Court granted defendants’ cross motion pursuant to CPLR 3211(a)(7) and dismissed the complaint. Plaintiffs contend that we erred in determining in *Matter of New York State Dept. of Taxation & Fin. v Bramhall* (235 A.D. 2d 75, 667 N.Y.S. 2d 141, appeal dismissed 91 N.Y. 2d 849, 690 N.E. 2d 493, 667 N.Y.S. 2d 684) that the Treaty of 1842 and Indian Law § 6 bar the taxation of reservation land, but do not bar the imposition of, *inter alia,* “sales taxes on cigarettes . . . sold to non-Indians on the Seneca Nation’s reservations,” and request that we reconsider our determination. We adhere to our determination in *Bramhall*. It is well established that “the States have a valid interest in ensuring compliance with lawful taxes that might easily be evaded through purchases of tax-exempt cigarettes on reservations . . . . States may impose on reservation retailers minimal burdens reasonably tailored to the collection of valid taxes from non-Indians” (*Department of Taxation & Fin. of N.Y. v Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 73, 114 S. Ct. 2028, 129 L. Ed. 2d 52).
Although plaintiffs are obligated to pay the amount due as tax from non-Indians who have the tax liability, and from whom the amount is collected at the time of the sale, “this burden is not, strictly speaking, a tax at all” (Moe v Confederated Salish & Kootenai Tribes of Flathead Reservation, 425 U.S. 463, 483, 96 S. Ct. 1634, 48 L. Ed. 2d 96). Judgment modified. As modified, judgment affirmed. Declaratory judgment entered. It is adjudged and declared that Tax Law § 471 is not inconsistent with Indian Law § 6, the Treaty of 1842 (7 US Stat 586), or the Due Process or Commerce Clauses of the United States Constitution, and as modified the judgment is affirmed without costs.

6. Poarch Band of Creek Indians v. Hildreth


No. 12-CV-6276, 2016 U.S. Dist. LEXIS 95329 (E.D. N.Y. Jul. 21, 2016). Before the Court was defendant Mountain Tobacco Company’s (“King Mountain”) motion for partial summary judgment and plaintiff State of New York’s (the “State”) cross motion for summary judgment. King Mountain, a for-profit corporation formed and operating under the laws of the Yakama Indian Nation, manufactures and sells its own brand of cigarettes. King Mountain’s principal place of business is located on the Yakama Indian Nation Reservation. Delbert Wheeler, Sr., an enrolled member of the Yakama Nation, is the sole owner of King Mountain.
The State alleged that King Mountain has marketed, distributed, and sold its cigarettes in New York since at least June 1, 2010. King Mountain denied that allegation, but alleged that it “sells its cigarettes to Indian Nations, and to companies owned by a member of an Indian Nation, that are situated on Indian Nations, some of which are located within the boundaries of the State of New York[,]” It is undisputed that King Mountain has not filed reports or registrations with the New York State Department of Taxation and Finance (“DTF”). King Mountain moved for summary judgment with respect to the State’s claims under the CCTA, PACT Act, and New York Tax Law (“NYTL”).

King Mountain argued that the State’s CCTA claim must fail because, inter alia, it is exempt as an “Indian in Indian country.” King Mountain alleged that it is entitled to summary judgment on the PACT Act claim because its sale of cigarettes to Native Americans did not take place in “interstate commerce” as defined by the Act. King Mountain argued that the PACT Act’s definition of “State” does not encompass “Indian Country” and cites to the distinct definitions provided for each term. Although King Mountain conceded that it sold cigarettes to Valvo Candies on one occasion, it alleged that was an isolated sale that predated the effective date of the PACT Act. King Mountain alleged that the State’s third cause of action is barred by res judicata based on the prior Tax Proceeding. King Mountain argued that it is not liable under NYTL Sections 471 and 471-e because: (1) it did not possess unstamped cigarettes in New York State; and (2) Section 471 does not impose liability on a lawful out-of-state cigarette manufacturer because it is not an “agent” or “consumer” as defined by the statute.

With respect to the CCTA, the State argued that the “Indian in Indian Country” exemption is not applicable to King Mountain. Particularly, the State argues that the CCTA’s use of the term “Indian” refers to an individual member of a tribe, not an Indian-owned business. Additionally, the State alleged that even if King Mountain is an “Indian in Indian Country,” the CCTA exemption still does not apply because that exemption was meant to protect tribal governments and tribal sovereignty. The State argued that King Mountain’s arguments regarding the PACT Act are founded in a misreading of the statute. The State alleged that the term “state” in the PACT Act does not exclude Indian reservations
because pursuant to federal common law, “Indian country is ordinarily considered a part of a state’s territory.”

The State also argued that res judicata does not bar its claim because: (1) the underlying facts of the Tax Proceeding do not arise out of the same series of transactions as the underlying facts in this case; (2) the Tax Department and Attorney General are not in privity; and (3) King Mountain waived any res judicata defense by failing to assert it in its Answer.

The Court granted in part and denied in part, King Mountain’s motion for summary judgment and granted in part and denied in part the State’s motion for summary judgment. Summary judgment is granted in favor of King Mountain on the State’s first claim under the CCTA. Summary judgment on the second claim under the PACT Act is denied regarding the 2010 sale to Valvo Candies and granted in favor of King Mountain as to the balance of the State’s PACT Act claim. With respect to the State’s third claim under NYTL Sections 471 and 471-e, summary judgment is granted in favor of King Mountain regarding King Mountain’s alleged possession of unstamped cigarettes in New York State and granted in favor of the State regarding King Mountain’s failure to sell its unstamped cigarettes to licensed stamping agents. Summary judgment is granted in favor of the State on its fourth claim pursuant to Section 480-b. With respect to the State’s fifth claim, summary judgment is granted in favor of the State regarding its claim that King Mountain failed to file certifications pursuant to New York Executive Law Section 156-c.


No. 74842-4-I, 2016 Wash. App. LEXIS 1878 (Wash. Ct. App. Aug. 8, 2016). In State v. Comenout, our Supreme Court upheld the State’s exercise of nonconsensual criminal jurisdiction over tribal members selling unstamped cigarettes from an unlicensed store located on trust allotment property lying outside the borders of an Indian reservation. Edward Comenout challenged that decision in this administrative forfeiture action appeal arising out of the same seized cigarettes at issue in Comenout. He claimed Comenout is not binding because the case was remanded and
ultimately dismissed. But the court was bound by that decision unless and until the Washington Supreme Court or the United States Supreme Court rules otherwise. Neither court has done so. And under Comenout, it was clear the State court had personal and subject matter jurisdiction in this administrative forfeiture action and that Comenout was not exempt from the State’s cigarette tax as an “Indian retailer.” Because Comenout failed to establish any error of law or arbitrary and capricious action under the Administrative Procedure Act (APA) standards, we affirm.

M. Trust Breach and Claims

1. Sisseton Wahpeton Oyate of the Lake Traverse Reservation v. Jewell

No. 13-00601, 2015 U.S. Dist. LEXIS 124483 (D.D.C. Sept. 17, 2015). Pending before the Court was Defendants’ Motion to Dismiss, which sought dismissal of Plaintiff’s Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) based on lack of subject matter jurisdiction. This lawsuit was filed by four federally-recognized American Indian tribes seeking declaratory and injunctive relief against the Secretary of the Interior and the Secretary of the Treasury (“Defendants”) for their alleged breaches of fiduciary duties relating to tribal trust accounts. Plaintiffs amended their Complaint to add additional American Indian tribes, bringing the total number of Plaintiff-tribes to ten. Defendants moved to dismiss the Plaintiffs’ Complaint based on lack of jurisdiction. Defendants contended that the Court lacks subject matter jurisdiction because the government has not waived its sovereign immunity from the Plaintiffs’ claims.

The federal government has held funds and assets in trust for American Indian tribe beneficiaries for well over a century. Unfortunately, the federal government has failed to discharge its fiduciary duties in its role as trustee for the tribes, and those trust accounts have been mismanaged for almost as long as they have been in existence. See Cobell v. Norton, 240 F.3d 1081, 1086, 345 U.S. App. D.C. 141 (D.C. Cir. 2001). Plaintiffs sought declaratory relief that certain previous attempts to reconcile the trust accounts did not satisfy the government’s responsibility to provide a complete and accurate accounting of those accounts.
Plaintiffs also sought injunctive relief compelling Defendants to perform their duties to provide complete and accurate accountings, preserve any and all documents concerning Plaintiffs’ trust accounts, and make their accounts whole. Finally, Plaintiffs sought judicial review of the agencies’ actions under the Administrative Procedures Act (“APA”).

Defendants argued that Plaintiffs’ claims were improperly based on the “inherent fiduciary duty” between the federal government and Plaintiff-tribes, and that Plaintiffs have failed to properly identify the statute or regulation on which their claims are based. Defendants also argued that Plaintiffs did not sufficiently allege that the “complete and accurate trust accounting” they seek is demanded by law, which means that Plaintiffs failed to properly invoke the APA’s waiver of sovereign immunity. Defendants further contended that (1) Plaintiffs sought broad structural relief which is not proper under the APA, (2) Plaintiffs’ claims were impermissible programmatic challenges, (3) Plaintiffs’ claims related to recordkeeping should be dismissed because there is no private right of action, and (4) Plaintiffs’ claims for injunctive relief were actually seeking monetary damages which is outside the scope of the waiver of sovereign immunity and not within the Court’s jurisdiction. Finally, Defendants argued that Plaintiffs’ claims are time-barred under the applicable statute of limitations.

As a threshold matter, the Court noted that it has jurisdiction in the matter because the prospective relief Plaintiffs seek is a “civil action[] arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331. Because the government challenged whether it has waived sovereign immunity for Plaintiffs’ claims, this does not end the jurisdictional inquiry. The Court denied the Defendants’ Motion to Dismiss.

2. Cobell v. Jewell

No. 14-5119, 2015 U.S. App. LEXIS 16625 (D.C. Cir. Sept. 18, 2015). Plaintiffs’ appeal from the district court’s denial of additional compensation for expenses for the lead plaintiff was timely, and the order appealed from was both final under 28 U.S.C.S. § 1291 and ripe under U.S. Const. art. III. The district court properly denied the denial of additional compensation for expenses for the lead plaintiff because it expressly wrapped those
costs into an incentive award given to her earlier. The district court erred in categorically rejecting as procedurally barred the class representatives’ claim for the recovery of third-party payments. Judgment affirmed in part and reversed in part. Case remanded.

3. **Quapaw Tribe of Okla. v. United States**

No. 12-592L, 2015 U.S. Claims LEXIS 1275 (Fed. Cl. Oct. 1, 2015). This case involved the claims of the Quapaw Indian Tribe of Oklahoma for breach of fiduciary duty and breach of trust obligations. On April 6, 2015, the Quapaw Tribe filed a motion for partial summary judgment on three grounds: (1) that the Government is liable for annual educational payments of $1,000 from 1932 to the present under the Treaty of 1833; (2) that the Government is liable for $31,680.80 in unauthorized disbursements from the Quapaw Tribe’s trust accounts, as found in the 1995 Tribal Trust Funds Reconciliation Project Report prepared by Arthur Andersen LLP; and (3) that the Government is liable for $70,330.71 in transactions that should have been credited to the Quapaw Tribe’s trust accounts but were not, as reported in the 2010 Quapaw Analysis.

I. Educational Payments. The Treaty of May 13, 1833 between the United States and the Quapaw Indians contained terms under which the Quapaw Tribe would move to new lands and resolve past disputes with the Government. Among a host of terms describing what the Quapaw Tribe would receive, one provision provided for the United States to make an annual educational payment to the Quapaw Tribe. From 1932 through 2015, despite inquiries and demands from the Quapaw Tribe, the United States did not make this annual treaty payment of $1,000, and the President has never deemed the payment unnecessary. The Quapaw Tribe asserts that the Government’s failure to meet its treaty responsibility is a breach of a fiduciary obligation. The Quapaw Tribe claims damages of $1,000 per year from 1932 to 2015 ($83,000), plus investment income the funds would have earned had they been timely deposited. The accounting review known as “the Quapaw Analysis,” performed during 2004-2010, found no record that any educational payments required by the 1833 Treaty had been made from 1932 to the present. Defendant does not accept Plaintiff’s educational payments claim, and has
II. Unauthorized Disbursements. As a second basis for partial summary judgment, Plaintiff asserted that the congressionally authorized Tribal Trust Funds Reconciliation, which culminated in a December 31, 1995 report by Arthur Andersen LLP, identified three disbursements from the Quapaw Tribe’s trust accounts, totaling $31,680.80, that were not authorized. The 2010 Quapaw Analysis confirmed this total, and also calculated that, had those funds been kept in the trust account, they would have accumulated $903.00 in statutorily required interest as of September 30, 1992.

III. Transactions That Should Have Been Credited. As its third basis for partial summary judgment, Plaintiff claimed $70,330.71 in unauthorized transactions. The Quapaw Analysis refers to these amounts as “transactions posted to the Tribal Trust Accounts and transactions in which monies should have been received, or were received, but that cannot be verified (as posted) to the Tribal Trust Accounts. . . . The total dollar amounts unaccounted for before interest accrual is $70,331.” The Government has stated in discovery that it has no information regarding these transactions, but the Government updated its discovery response on October 24, 2014 to say that it now has information to contest these amounts, i.e., eight ledger sheets for account Q-32. As noted in Section II above, finality must attach to the Quapaw Analysis.

The Court will not permit Defendant to impeach this detailed report, when it could have produced documents or raised its concerns at a much earlier time. The Quapaw Analysis is binding upon the United States. Based upon the foregoing, the Court grants Plaintiff’s motion for partial summary judgment on its educational payments claim ($83,000), its unauthorized disbursements claim ($31,680.80), and its unauthorized transactions claim ($70,331), together with investment income that would have been earned if these amounts had been timely credited to the Quapaw Tribe’s account.

4. Goodeagle v. United States

In these Indian Tribe cases involving significant claims against the United States for breach of fiduciary duty, among other things, Plaintiffs filed a motion for discovery relief seeking an order in their favor on the following grounds: (1) the Government failed substantially and in multiple ways to produce documents in compliance with Rule 34 of the Court of Federal Claims Rules (“RCFC”); and (2) the Government failed to produce a witness or witnesses under RCFC 30(b)(6) who could respond to designated subjects listed in the deposition notice.

Plaintiffs also requested the imposition of sanctions, and the reimbursement for costs and fees associated with this motion under RCFC 37. Plaintiffs asserted that, at the beginning of discovery, they served the Government with reasonable requests for production of documents identifying specific topics relating to the relevant issues in these cases. Plaintiffs complained that, in violation of RCFC 34, the Government refused to organize its responsive documents by the requested topics. Also, Plaintiffs alleged that the Government procrastinated in its document production, producing 75 percent of the requested documents in the final six weeks of the discovery period without any organization or labeling. Plaintiffs argued that disorganized and unusable “data dumps” like this one are precisely an outcome that RCFC 34 is intended to avoid. Plaintiffs asked the Court to require the Government to re-produce its documents organized and labeled to correspond to the categories of documents contained in Plaintiffs’ requests.

The Government opposed Plaintiffs’ motion by arguing that its document production substantially complied with RCFC 34, and that many of Plaintiffs’ requests were overly broad and not amenable to the categorization requirement of the rule. The Government also asserted that it is not required to label and categorize publicly available documents, and that it produced some of the documents as they are kept in the usual course of business, thus negating a need to label and categorize.

Under the circumstances, the Court found that the Government failed to comply with RCFC 34 and its fiduciary trust obligations. Despite the expense that may be involved, the Government is directed to produce its responsive documents again, organized and labeled in a way that complies with Rule 34. Discovery has been
extended for three months to allow the completion of this effort. The only exception to this requirement is for documents that are available to the public, which need not be separately organized and labeled. Plaintiffs served on the Government a notice of deposition under RCFC 30(b)(6), identifying fifteen topics for examination. For six of these topics, the Government refused to produce a witness. For four other topics, the Government refused to produce a witness for the time period prior to 2007. For eight topics, the Government designated a witness, Mr. Paul Yates, Superintendent of the Miami Agency, but he was unable to provide answers on many of the eight topics for which he had been designated. Plaintiffs asked for the imposition of sanctions due to the Government’s failure to designate a proper witness under RCFC 30(b)(6). In Plaintiffs’ view, the Government should be prohibited from offering evidence at trial for any subject where its RCFC 30(b)(6) deponent failed to give testimony at the deposition.

The Court declined to impose such a severe sanction where there is no indication that the Government acted with willful neglect or bad faith. Also, there is no prior discovery order that has been violated. The better course, in the interest of full development of the facts, is to allow the Government a second chance to comply with Plaintiffs’ RCFC 30(b)(6) deposition notice. As with the Court’s reading of Plaintiffs’ document requests, the topics listed in the deposition notice were comprehensive, but not overly broad. Therefore, the Government is directed to produce knowledgeable persons who can respond under oath in a RCFC 30(b)(6) deposition on behalf of the United States. On October 15, 2015, the Court entered an order granting the parties’ joint motion to amend the pretrial schedule by adding three months to the remaining discovery tasks. Under the amended schedule, the parties will have until July 14, 2016 to complete all discovery. During this period, the parties will have opportunities to cure the discovery shortcomings that have occurred thus far. Accordingly, the Court will denied Plaintiffs’ claim for recovery of fees and costs without prejudice, subject to Plaintiffs reasserting the claim if the forthcoming discovery efforts are still unsatisfactory. Based upon the foregoing, Plaintiffs’ motion for discovery relief was granted in part and denied in part.

5. Flute v. U.S.
No. 14–1405, 2015 WL 9298089 (10th Cir. Dec. 23, 2015). Descendants of victims of United States Army’s 1864 massacre of certain bands of Cheyenne and Arapaho Indian tribes brought putative class action against federal government, Department of Interior (DOI), and Bureau of Indian Affairs (BIA), alleging breach of trust and seeking accounting of reparation payments promised to their ancestors by treaty and award of funds found still owing. The District Court, 67 F. Supp. 3d 1178, dismissed the action. Descendants appealed. The appellate court held that: (1) Department of Interior Appropriations Act of 2009 that tolled running of applicable statute of limitations for claims “concerning losses to or mismanagement of trust funds” did not relieve descendants of independent obligation to identify unequivocal waiver of immunity or express consent to be sued; (2) Treaty of Little Arkansas and 1866 Appropriations Act did not create ongoing fiduciary obligations to descendants; and (3) descendants were not entitled to accounting. Affirmed.

6. **Fletcher v. United States**

No. 02-CV-427, 2015 U.S. Dist. LEXIS 172877 (N.D. Okla. Dec. 30, 2015). In the early twentieth century, large quantities of oil and gas were discovered on lands belonging to the Osage Nation. Shortly thereafter, Congress enacted the Osage Allotment Act of 1906, Act of June 28, 1906, Pub. L. No. 59-321, 34 Stat. 539 (Osage Allotment Act or 1906 Act), which severed the mineral estate underlying Osage lands from the surface estate, placed the mineral estate in trust, and directed the Secretary of Interior to collect and distribute royalty income every quarter to persons on the 1906 tribal membership roll. The right to receive such royalty payments is called a “headright.” The sole remaining claim in this long-running case concerns the federal government’s duty to account to individual Osage headright owners. Certified as a class in 2014, plaintiffs are Osage Indians who receive headright payments pursuant to the 1906 Act. They brought this claim pursuant to the Administrative Procedure Act (APA) seeking an accounting of tribal trust funds held on their behalf. In particular, plaintiffs requested an accounting of the Osage tribal trust account, an account within the United States Treasury which holds Osage
royalty income prior to its distribution to the headright owners. The government maintained that the account at issue is held in trust for the Osage Nation only and that, as such, plaintiffs are not entitled to the accounting they seek.

The court held that the plaintiffs are entitled to accounting of the Osage tribal trust account in accordance with the requirements set forth herein and ordered that the government provide plaintiffs with an accounting of the Osage tribal trust account in accordance with the following requirements: (1) The accounting must run from the first quarter of 2002 until the last available quarter; (2) the accounting must be divided and organized either by month or by quarter; (3) The accounting must state the date and dollar amount of each receipt and distribution; (4) The accounting must briefly identify and describe the source of each trust receipt (i.e., the name of the payer/lessee and the contract number for the oil and/or gas lease on which the payment is made); (5) The accounting must state the name of the individual or organization to whom each trust distribution was made; (6) For headright distributions, the accounting must state the headright interest that each beneficiary possessed at the time of distribution; (7) The accounting must state the amount of interest income generated from the tribal trust account and the date on which such interest was credited to the account.

7. Wyandot Nation v. United States

No. 15-560C, 2016 U.S. Claims LEXIS 1 (Fed. Cl. Jan 4, 2016). Plaintiff, the Wyandot Nation of Kansas (Wyandot Nation), is an Indian tribe whose members trace their ancestry to the Historic Wyandott Nation and the Wyandotte Tribe of Indians. The Historic Wyandott Nation’s government-to-government relations with the United States were dissolved and terminated 160 years ago by the Treaty of January 31, 1855, 10 Stat. 1159 (1855 Treaty). Following the Historic Wyandott Nation’s termination, the Wyandotte Tribe of Indians was established as a reorganized tribe under Article 13 of the Treaty of February 23, 1867 (1867 Treaty). Plaintiff claimed to be both a successor-in-interest to all of the treaties entered into by the Historic Wyandott Nation with the United States and a part of the reorganized Wyandotte Tribe of Indians. The Wyandot Nation’s claims involve treaty trust funds
and trust land that the Government allegedly holds in trust for the Wyandot Nation. The funds Plaintiff claimed the Government holds in trust for it fall into two categories. Plaintiff’s “Category One trust funds are those funds described in Schedule A of the 1867 Treaty.” According to Plaintiff, its Category One funds “... were derived from the sale of Historic Wyandott Nation lands that were placed in United States Treasury trust accounts.” Plaintiff’s “Category Two trust funds are derived from easements for grants of rights-of-way for the use of two tracts of the Huron Cemetery trust land for Kansas City, Kansas streets since 1857.”

The Wyandot Nation filed a complaint against the United States for money damages arising from the Government’s alleged breach of trust and fiduciary obligations owed to the Wyandot Nation. The complaint contained four causes of action: (1) breach of fiduciary duties based on a failure to provide a full, accurate, and timely accounting of Category One treaty trust funds; (2) breach of fiduciary trust responsibilities based on a failure to collect, deposit, account for, and invest trust funds that should have been collected for use of Huron Cemetery trust lands by the City of Kansas City, Kansas; (3) mismanagement of Category One treaty trust funds and accounts; and (4) mismanagement of Category Two Huron Cemetery trust funds. Plaintiff requested full trust fund accountings from the United States based on the allegations in its first and second claims, and monetary damages from the Government based on the alleged mismanagement of Plaintiff’s funds and property in its third and fourth claims. Defendant filed a motion to dismiss Plaintiff’s complaint contending that Plaintiff’s claims should be dismissed as untimely, for failure to allege sufficient jurisdictional facts, or for failure to state a claim upon which relief can be granted. Additionally, Defendant argued that Plaintiff lacks standing to assert any claims regarding the Huron Cemetery. The Court granted the Government’s motion to dismiss Plaintiff’s claims.

8. *Alabama-Quassarte Tribal Town v. United States*
No. CIV-06-558, 2016 U.S. Dist. LEXIS 1620 (E.D. Okla. Jan. 7, 2016). Before the court was the Creek Nation’s motion to dismiss the First Amended Complaint. The Creek Nation argued that the court has no jurisdiction over Plaintiff’s claims against the Creek Nation absent an express waiver of the Creek Nation’s sovereign immunity. The Creek Nation further argued that Plaintiff’s claims regarding the Wetumka Project lands are untimely and barred by doctrines of estoppel and preclusion. The Alabama-Quassarte Tribal Town (hereinafter Plaintiff or AQTT) filed this case against the United States, the Secretary and the Associate Deputy Secretary of the United States Department of the Interior (hereinafter DOI), and the Secretary of the United States Department of the Treasury, alleging that certain lands known as the Wetumka Project lands were purchased for the benefit of Plaintiff.

The AQTT requested a declaratory judgment that the Defendants failed to fulfill their legal obligations and duties as trustees and an order compelling Defendants: (1) to assign the Wetumka Project lands to the AQTT, and (2) to provide the AQTT with a full and complete accounting of all the AQTT’s trust funds and assets. On November 17, 2008, in ruling on the Defendants’ motion for partial judgment on the pleadings, the court entered an Order & Opinion dismissing all claims related to the Wetumka Project lands.

The court found that the Wetumka Project lands were never placed in trust for the AQTT, the AQTT’s claims related to the Wetumka Project lands accrued on or before April 29, 1942, and thus those claims were time barred. The court further found that the Creek Nation is a necessary party to any claim regarding the Wetumka Project lands and could not be joined. Plaintiff’s claims related to the alleged tribal trust account, the “Surface Lease Income Trust,” remained.

On September 21, 2010, the court denied Defendants’ motion to dismiss and the parties’ cross motions for summary judgment. In that Order & Opinion, the court noted that from 1961 to 1976 income from surface leases on the Wetumka Project lands was deposited into an IIM account in the AQTT’s name. At some point, the funds in that account were moved into a Proceeds of Labor (hereinafter PL) account. The court continued to refer to those funds as the “Surface Lease Income Trust.” The court found that
Defendants ignored substantial evidence demonstrating that the Surface Lease Income Trust was created for the benefit of the AQTT and that Defendants’ conclusion on the ownership of the Surface Lease Income Trust was arbitrary and capricious.

The court remanded this action to Defendants for additional investigation and explanation. The court directed Defendants to assemble a full administrative record to include all of the evidence they possess with regard to the Surface Lease Income Trust and to reconsider their decision on the matter of ownership of that Trust. On remand, this action was referred to the Interior Board of Indian Appeals (IBIA). The Creek Nation entered an appearance in the matter and submitted a brief on the issues, “request(ing) the Interior Board of Indian Appeals to find and order that the Surface Lease Income Trust is the beneficial property of (the Creek Nation) and not AQTT.”

On October 23, 2014, the IBIA issued its final reconsidered decision on referral from the Assistant Secretary of Indian Affairs. The IBIA determined that the Surface Lease Income Trust was not held for the AQTT. Plaintiff filed its First Amended Complaint, adding the Creek Nation as a Defendant and adding a claim for appeal of the IBIA’s decision as again being arbitrary and capricious. Plaintiff also added a claim for assignment of the Wetumka Project lands, stating that on remand it discovered that the Creek Nation had passed a resolution assigning the Wetumka Project lands to the AQTT. The Court granted the Creek Nation’s motion to dismiss the First Amended Complaint.


   No. 14-1065, 2016 U.S. Dist. LEXIS 9333 (D.D.C. Jan. 27, 2016). Plaintiffs Leatrice Tanner-Brown and the Harvest Institute Freedman Federation, LLC (HIFF) filed this class action against Defendants Sally Jewell, the Secretary of the United States Department of the Interior, and Kevin Washburn, the Assistant Secretary for Indian Affairs at the Department of the Interior, in their official capacities seeking an accounting relating to alleged breaches of fiduciary duties concerning land allotted to the minor children of former slaves of Native American tribes. Defendants have filed a motion to dismiss the Complaint in its entirety on a variety of grounds. The Court finds that Plaintiffs lack standing
under Article III of the Constitution and will therefore grant Defendants’ motion and dismiss the Complaint for lack of jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.

10. **Inter-Tribal Council of Ariz., Inc. v. United States**


    The ITCA alleged that under the Act the government is required to make payments into a trust that was established for the benefit of the ITCA’s member tribes and for ensuring a lump sum payment to the ITCA’s trust fund at the end of a 30-year payment period. Under the Act, the trust was held by the government and maintained by annual payments from Collier. Under the terms of the trust agreement, Collier was also obligated to pay into an annuity fund designed to ensure a lump sum payment at the end of 30 years. The trust agreement gave the government a security interest in land owned by Collier as collateral on the 30-year payment obligation. Collier stopped making payments into the trust and into the annuity fund in 2012. The ITCA alleged that the government has breached its trust obligations by failing to make the payments itself when Collier stopped paying. Finally, the ITCA claims that the government breached its trust obligations by failing
to prudently invest the trust funds and by failing to provide a proper accounting of the funds.

The government has filed a motion to dismiss the complaint on the grounds that the government does not have any obligation under the Act to make up Collier’s missed payments to either the trust fund or the annuity. The government further argues that it has no trust obligation under the Act to monitor or supplement the value of the collateral or security obtained from Collier. In this connection, the government also argues that to the extent the ITCA’s breach of trust claims relate to the release of collateral more than six years ago, this portion of the claim is barred by the 6-year statute of limitations in 28 U.S.C. § 2501. In addition, the government asserted that the ITCA’s claims with regard to the collateral are not ripe because the government is in ongoing litigation against Collier in United States District Court for the District of Arizona (“the district court”) to resolve the collateral issues. The government further argued that the ITCA has failed to state a claim with regard to the government’s management of the trust fund. The government stated that the Act gave the government unreviewable discretion in making investment decisions and that there is no allegation of facts to show mismanagement. Finally, the government asserted that the court lacks jurisdiction to grant the ITCA’s claim for an accounting on the grounds that the ITCA cannot establish a claim for money damages based on management of the trust fund. In such circumstances, the government argues that the ITCA must go to the district court for an accounting. Based on these arguments, the government asks the court to dismiss the ITCA’s claims for lack of jurisdiction pursuant to Rule 12(b)(1) of the Rules of the United States Court of Federal Claims (“RCFC”) and for failure to state a claim pursuant to RCFC 12(b)(6).

The court agreed with the government that the court does not have jurisdiction over the ITCA’s claims based on the government’s failure to make up Collier’s missed payments. These claims fail for lack of jurisdiction on the grounds that the ITCA has not established a fiduciary obligation to make the payments under the Act and thus the ITCA has failed to establish a money-mandating breach of trust claim. However, the court found that the ITCA has identified potential money-mandating breach of trust claims with regard to the government’s alleged failure to monitor
and maintain adequate collateral to ensure the final payment into the fund. Yet, a portion of the collateral-related claims may be barred by the 6-year statute of limitations.

Thus, the court found that a final decision on its jurisdiction to hear those claims must await a determination of the merits. In addition, the court found that the ITCA has failed to state a claim to the extent that it argues the government breached its trust obligations by failing to hold the trust fund payments security in trust at the Department of Treasury rather than in a private annuity and certain interests in real property. Finally, the court agreed with the government that plaintiff has not stated a claim with regard to mismanagement of the trust fund and as such this court does not have jurisdiction to order an accounting. Accordingly, the government’s motion to dismiss is granted-in-part and denied-in-part.

11. Fredericks v. United States

No. 14-296L, 2016 U.S. Claims LEXIS 110 (Fed. Cl. Feb. 24, 2016). Five Indian heirs to their deceased father’s allotted lands have filed this breach of trust case, contesting actions taken by the Department of the Interior’s Bureau of Indian Affairs (‘‘BIA’’) regarding the estate’s lands and assets. After the death of plaintiffs’ father in 2006, BIA began probate proceedings, which lasted until 2013. The plaintiffs allege that during probate, and continuing to this day, the United States improperly granted and approved leases of their father’s land in violation of trust duties imposed by the Fort Berthold Mineral Leasing Act, Pub. L. No. 105-188, 112 Stat. 620 (1998), as amended by Pub. L. No. 106-67, 113 Stat. 979 (1999), and the American Indian Agricultural Resource Management Act (‘‘AIARMA’’), Pub. L. No. 103-177, 107 Stat. 2011 (1993) (codified as amended at 25 U.S.C. §§ 3701-46). They also allege a taking of property without just compensation in contravention of the Fifth Amendment. Pending before the court is the United States’ (‘‘government’s”) motion to dismiss under Rules 12(b)(1) and 12(b)(6) of the Rules of the Court of Federal Claims (‘‘RCFC”). The government’s principal arguments are that the Indian heirs lack standing because they had no property interests until the conclusion of probate, and that pertinent statutes impose no money-mandating duties on the government in favor of the
heirs. The government’s motion to dismiss is denied in part and otherwise deferred for prudential reasons, awaiting resolution of pending administrative proceedings. On or before March 11, 2016, defendant shall file an answer to plaintiffs’ amended complaint.

12. **Ramah Navajo Chapter v. Jewell**

No. 90 CV 957, 2016 U.S. Dist. LEXIS 27624 (D.N.M. Mar. 2, 2016). On September 30, 2015, the Court granted preliminary approval of the final settlement agreement (FSA) in this class action and ordered that notice be sent to all class members. The Court has ruled on the sole objection to the FSA in which the United South Eastern Tribes, Inc. argued that it was improperly excluded from the Class members listed in Appendix 2 of the FSA. The Court sustained in part and overruled in part the Objection. On January 8, 2016, the parties filed their Motion for Final Approval. The same day, Class Counsel filed their Consent Motion for Approval of Attorneys’ Fees. Class Counsel had filed their Class Counsel Application For Award Of Attorney Fees And Costs on September 29, 2015. The Court considered the FSA, the evidence, the arguments of the parties, including affidavits of Class Counsel and the Class Representatives. In addition, the Court heard arguments by Class Counsel, by other attorneys representing the Class, and by Counsel for the Government. During the hearing, the Court concluded that the FSA is in the best interest of the Class and should be approved. As to the Consent Motion for Approval of Attorneys’ Fees, during the January 20, 2016 hearing the Court asked whether the notice to the Class members clearly stated how the New Mexico Gross Receipts Taxes (NMGRT) on the attorneys’ fees would be paid. Class Counsel, Class Representatives, and Counsel for the Government conferred and reached an agreement clarifying responsibility for the payment of NMGRT on attorneys’ fees and said they would submit a written stipulation memorializing their agreement.

The Court found that the Joint Stipulation clarified the obligations regarding payment of the New Mexico Gross Receipts Taxes. On February 19, 2016, the Court entered an Order adopting the Joint Stipulation as a supplement to the FSA and approving the Joint Stipulation. The Application describes the work of Class Counsel, and by other attorneys in their law firms and by attorneys
specializing in Indian Law and in Supreme Court litigation. No objections to the Application were filed. The Government, in its role as trustee for all tribes and tribal organizations, supports the requested fee and agrees that an award of 8.5% of the amount paid from the Judgment Fund as defined in the FSA is fair and reasonable under the totality of the circumstances. The Court concludes that the requested attorneys’ fee of 8.5% of the amount paid from the Judgment Fund as defined in the FSA is fair and reasonable. Hence, the Court will grant the Consent Motion for Approval of Attorneys’ Fees and will approve the Application.

13. Two Shields v. United States

No. 2015-5069, 2016 U.S. App. LEXIS 7610 (Fed. Cir. Apr. 27, 2016). Indians’ claims that the government mismanaged oil-and-gas leases on Indian allotment land were precluded since a settlement in a prior action released all accrued land administration claims against the government, and the Indians did not exercise their right to opt out of the settlement which negated any inference that the Indians considered the settlement unfair. The statute authorizing the government to manage mineral leases on Indian allotment land did not include a general duty to disclose all information related to the administration of Indian trusts to support the Indians’ claim of a breach of a duty to disclose information concerning the Indians’ specific claims. No unconstitutional taking occurred through the settlement since the Indians elected not to opt out of the settlement and thus voluntarily forfeited their claims against the government. Decision affirmed.

14. Angasan v. United States

No. 3:15-cv-00195, 2016 U.S. Dist. LEXIS 60636 (D. Alaska May 4, 2016). Defendant United States of America, Department of the Interior, National Park Service (“the Park Service”) moved to dismiss the complaint of plaintiffs Ralph Angasan, Sr.; Vera Angasan; Fred T. Angasan, Sr.; Mary Jane Nielsen; Trefon Angasan, Jr.; Lydia Emory; Viola Savo; Val Angasan, Sr.; Martin Angasan, Sr.; Steven Angasan, Sr.; and Anishia Elbie (collectively, “Plaintiffs”) pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6). This case presented a dispute concerning the construction
of a road at Brooks Camp in the Katmai National Park and Preserve. Plaintiffs are the heirs of Palagia Melgenak, who established first use of land in the vicinity of Brooks Camp in the late 1800s. Following litigation with the United States, Plaintiffs were granted the land identified as United States Survey No. 7623 as a Native allotment under the Alaska Native Allotment Act.

Pursuant to a sales agreement (“Sales Agreement”), Plaintiffs then sold a portion of their allotment back to the United States (Lot 1) and granted the United States a conservation easement (“Conservation Easement” or “Easement”) over the remaining land (Lots 2 and 3). The land subject to the Conservation Easement is referred to as the “Protected Property.” A portion of the Protected Property (Lot 2) is designated as the “Exclusive Use Area,” over which Plaintiffs have retained the right of “exclusive, non-commercial use.” The Conservation Easement has three stated purposes: (1) “to preserve and protect the predominantly natural landscape and the wildlife and other park resources and values on the Protected Property;” (2) “to limit the impacts on the surrounding park lands and resources as a result of the use of the Protected Property;” and (3) “to increase opportunities for access by park visitors.” Section 2 of the Easement outlines the specific rights that Plaintiffs conveyed to the United States. The United States’ ability to develop the land is restricted under the parties’ agreements. With regard to Lot 1, Section (2)(a)(iv) of the Sales Agreement provides that the Park Service must “first consult with [Plaintiffs] concerning all proposed developments [and] improvements.” This restriction resembles the Lot 3 restriction found in Section 2(D)(2) of the Easement, which states that “new development” in Lot 3 shall not occur without the Park Service “first consulting and obtaining and considering the views of the” Plaintiffs.

Plaintiffs alleged that the Park Service violated the two above restrictions when it built a road that commences on Lot 1 “and passes through [Lot 3] to a barge loading zone directly adjacent to Lot 3” without first contacting or consulting with Plaintiffs. Their three causes of action seek the following relief: (1) a declaratory judgment stating that the Park Service’s conduct is wrongful; (2) an injunction prohibiting the Park Service from “using or entering upon the road” and requiring it to “promptly comply in all respects [with] the Conservation Easement;” and (3) restitution
damages. Additionally, the complaint’s prayer for relief sought an injunction requiring the Park Service to restore the Protected Property at its own expense. The Park Service’s motion to dismiss is granted in part and denied in part as follows: Plaintiffs’ first cause of action is dismissed to the extent it alleges a violation of the Alaska Native Allotment Act (the alleged violations of the Conservation Easement and 25 C.F.R. § 169.3(b) remain). Plaintiffs’ complaint is dismissed to the extent it states claims that arise out of the Park Service’s activities on Lot 1, the motion is denied in all other respects.

15. Wolfchild v. Redwood Cnty.

No. 15-1580, No. 15-2375, No. 15-3225, No. 153277, 2016 U.S. App. LEXIS 9976 (8th Cir. Jun. 1, 2016). Appellants-plaintiffs filed this purported class action claiming the right to title and possession of twelve square miles of land in southern Minnesota (“twelve square miles”). Specifically, Appellants alleged they are lineal descendants of the Mdewakanton band of the Sioux tribe who were loyal to the United States during the 1862 uprising (“loyal Mdewakanton”). Appellants claimed the Secretary of the Interior set apart the twelve square miles for the loyal Mdewakanton and their descendants and, thereby, the loyal Mdewakanton have the exclusive right to title, use, and possession of the twelve square miles. Appellees physically possess or claim a property interest in the twelve square miles. The issues underlying this case are complex, requiring interpretation of over 150-year-old statutes, regulations, and legislative history, understanding of past mistreatment of Indian tribes by the United States, and a complicated area of the law.

The appellate court held that: (1) The district court correctly held the Indians failed to state a claim under the federal common law as set forth in the Oneida Indian Nation progeny. (2) In contrast to a claim of aboriginal title, they directly asserted the 12 square miles vested in the loyal Mdewakanton band of the Sioux tribe pursuant to the Act of February 16, 1863 (Act). (3) The language of the Act directly contradicted any claim that the loyal Mdewakanton had aboriginal title to the 12 square miles. (4) The lawsuit concerned lands allocated to individual Indians, not tribal rights to lands. (5) It did not fall into the federal common law
articulated in the Oneida progeny. (6) The district court abused its discretion by imposing $281,906.34 in sanctions. (7) Remand was appropriate for the district court to consider the municipalities’ motion for costs pursuant to Fed. R. Civ. P. 54(d) and 28 U.S.C.S. § 1920. The motion to dismiss was affirmed, the imposition of sanctions vacated, and the case was remanded.

N. Miscellaneous


No. 15–00322, 2015 U.S. Dist. LEXIS 146995 (D. Haw. Oct. 29, 2015). Defendant Nai Aupuni was conducting an election of Native Hawaiian delegates to a proposed convention of Native Hawaiians to discuss, and perhaps to organize, a Native Hawaiian governing entity. Delegate candidates had been announced, and voting was to run from November 1, 2015 to November 30, 2015. Plaintiffs had filed a Motion for Preliminary Injunction seeking, among other relief, to halt this election. The voters and delegates in this election were based on a “Roll” of “qualified Native Hawaiians” as set forth in Act 195, 2011 Haw. Sess. Laws, as amended (the “Native Hawaiian Roll” or “Roll”). A “qualified Native Hawaiian” is defined as an individual, age eighteen or older, who certifies that they (1) are “a descendant of the aboriginal peoples who, prior to 1778, occupied and exercised sovereignty in the Hawaiian islands, the area that now constitutes the State of Hawaii,” Haw. Rev. Stat. (“HRS”) § 10H-3(a)(2)(A), and (2) have “maintained a significant cultural, social, or civic connection to the Native Hawaiian community and wishes to participate in the organization of the Native Hawaiian governing entity.” HRS § 10H–3(a)(2)(B).

Through a registration process, the Native Hawaiian Roll Commission (the “commission”) asked or required prospective registrants to the Roll to make the following three declarations: Declaration One. I affirm the unrelinquished sovereignty of the Native Hawaiian people, and my intent to participate in the process of self-governance. Declaration Two. I have a significant cultural, social or civic connection to the Native Hawaiian community. Declaration Three. I am a Native Hawaiian: a lineal descendant of the people who lived and exercised sovereignty in the Hawaiian
Islands prior to 1778, or a person who is eligible for the programs of the Hawaiian Homes Commission Act, 1920, or a direct lineal descendant of that person. Separately, the Roll also includes as qualified Native Hawaiians “all individuals already registered with the State as verified Hawaiians or Native Hawaiians through the Office of Hawaiian Affairs (“OHA”) as demonstrated by the production of relevant [OHA] records[.]” HRS § 10H–3(a)(4). Those on the Roll through an OHA registry do not have to affirm Declarations One or Two.

Plaintiffs filed suit on August 13, 2015, alleging that these “restrictions on registering for the Roll” violate the U.S. Constitution and the Voting Rights Act of 1965, 52 U.S.C. § 10301. As to the constitutional claims, they allege violations of (1) the Fifteenth Amendment; (2) the Equal Protection and Due Process clauses of the Fourteenth Amendment; and (3) the First Amendment. They further alleged that Nai Aupuni is acting “under color of state law” for purposes of 42 U.S.C. § 1983, and is acting jointly with other state actors. The Complaint sought to enjoin Defendants “from requiring prospective applicants for any voter roll to confirm Declaration One, Declaration Two, or Declaration Three, or to verify their ancestry.” The Complaint also sought to enjoin “the use of the Roll that has been developed using these procedures, and the calling, holding, or certifying of any election utilizing the Roll.” Plaintiffs have moved for a preliminary injunction, seeking an Order preventing Defendants “from undertaking certain voter registration activities and from calling or holding racially-exclusive elections for Native Hawaiians, as explained in Plaintiffs’ Complaint.” They seek to stop the election of delegates, and thereby halt the proposed convention. Plaintiffs’ Motion for Preliminary Injunction was denied.

2.  *Navajo Nation v. San Juan Cnty.*

No. 2:12-cv-00039, 2016 U.S. Dist. LEXIS 20533 (D. Utah Feb. 19, 2016). This case was about voting rights and the election districts in San Juan County, Utah. Plaintiffs are Navajo Nation—a federally recognized Indian tribe—and several individual Tribe members. Navajo Nation sued the County shortly after the County Commission redistricted in 2011, and directed two of its four claims for relief to the County’s three Commission election
districts. Navajo Nation alleged in its first claim for relief that the County Commission’s 2011 redistricting and its present three districts violate the Equal Protection Clause of the Fourteenth Amendment and the Fifteenth Amendment to the United States Constitution. It asserted in its second claim for relief that the same election districts violate § 2 of the Voting Rights Act.

Before the court are the parties’ cross-motions for summary judgment on Navajo Nation’s first claim. Navajo Nation pointed specifically to the Commission’s District Three, which the County established in 1986 to be majority Native American in the wake of a lawsuit brought against it by the United States Department of Justice. The District Three boundaries remain unchanged since they were drawn three decades ago. Navajo Nation claimed that the County Commission relied on race in its decision to maintain the District Three boundaries as part of the County’s redistricting in 2011. Navajo Nation urged the court to conclude under the strict scrutiny analysis that must follow that the County’s race-based decision-making was not narrowly tailored to further a compelling governmental interest, and is thus unconstitutional in violation of the Equal Protection Clause of the Fourteenth Amendment.

San Juan County responded that it had a compelling government interest in maintaining the decades-old District Three boundaries when it redistricted in 2011. It contended that it was legally required to do so to comply with the terms of a Consent Decree and a Settlement and Order entered when the County resolved the Department of Justice lawsuit against it in the 1980s.

The court found that the County’s position is unsupported by the language of the Consent Decree and Settlement and Order. These documents did not require the County to draw and maintain—in perpetuity—the 1986 District Three boundaries. The court concluded that the County lacked a compelling government interest in its racially-motivated districting decisions. As drawn in 1986 and maintained in 2011, the County’s Commission Districts violated the Equal Protection Clause and were unconstitutional. The court therefore granted summary judgment in favor of Navajo Nation, and denied the County’s cross-motion.

3. Kitras v. Town of Aquinnah
No. SJC-11885, 2016 Mass. LEXIS 246 (Mass. Apr. 19, 2016). Landlocked property owners’ (LPOs) declaratory judgment action, seeking a determination that they had easements by necessity over lot owners’ (LOs) land as a result of a partition of Native American common land, lacked merit because the LOs presented sufficient evidence to rebut the presumption that there was an intent to include rights of access at the time of the partition, which was over 100 years ago. The LPOs showed unity of title, a subsequent severance of that unity, and that the properties were landlocked despite agreed access, such that they established the presumption of an intent to create an easement by necessity. However, the LOs sufficiently rebutted the presumed intent through evidence of tribal custom and usage which provided free access rights, that other easements were created, and that the land was in poor condition at the time of partition. Judgment affirmed.
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