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## August 2016 - August 2017 Case Law on American Indians

Thomas P. Schlosser

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### **Cover Page Footnote**

Mr. Schlosser represents Tribes in fisheries, timber, water, energy, cultural resources, contracting, tax, and federal breach of trust. He is a director of Morisset, Schlosser, Jozwiak & Somerville, where he specializes in federal litigation, natural resources, and Indian tribal property issues. He is also frequently involved in tribal economic development and environmental regulation. In the 1970s, Tom represented tribes in the Stevens' Treaty Puget Sound fishing rights proceedings. Tom has a B.A. from the University of Washington and a J.D. from the University of Virginia Law School. Tom is a founding member of the Indian Law Section of the Washington State Bar Association and also served on the WSBA Bar Examiners Committee. Tom is a frequent CLE speaker and moderates an American Indian Law discussion group for lawyers at <http://forums.delphiforums.com/IndianLaw/messages>. He is a part time lecturer at the University of Washington School of Law and Seattle University School of Law. Case synopses are reprinted or derived from LexisNexis and Westlaw and are used with permission. For purposes of this symposium, the presenter has revised the synopses.

AUGUST 2016 – AUGUST 2017  
CASE LAW ON AMERICAN INDIANS

*by Thomas P. Schlosser\**

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# AUGUST 2016 – AUGUST 2017: CASE LAW ON AMERICAN INDIANS

*By Thomas P. Schlosser*

## I. UNITED STATE SUPREME COURT

### 1. *Lewis v. Clarke*

No. 15–1500, 2017 WL 1447161, 137 S. Ct. 1285 (U.S. Apr. 25, 2017). Motor vehicle driver and passenger brought action against Indian tribe member in his individual capacity, alleging that member's negligence in driving tribe-owned limousine carrying patrons of tribe-owned casino caused off-reservation motor vehicle accident on interstate freeway. The Connecticut Superior Court, 2014 WL 5354956, denied member's motion to dismiss based on tribal sovereign immunity. Member appealed. The Connecticut Supreme Court, 320 Conn. 706, 135 A.3d 677, reversed and remanded with directions. Certiorari was granted. The Supreme Court held that: (1) tribe member was the real party in interest in the suit brought against him in his individual capacity, and thus, tribe member was not entitled to tribal sovereign immunity, and (2) Indian tribe's indemnification statute for its employees did not make the tribe the real party in interest, as would support tribal sovereign immunity. Reversed and remanded.

### 2. *Patchak v. Zinke*

No. 16–498, Cert Granted 137 S. Ct. 2091, 2017 U.S. LEXIS 2894 (May 1, 2017). Case Below: *Patchak v. Jewell*, No. 15-5200, 828 F.3d 995, 2016 U.S. App. LEXIS 12984 (D.D.C. July 15, 2016). Petition for writ of certiorari granted limited to Question 1 of the petition, “Does a statute directing the federal courts to ‘promptly dismiss’ a pending lawsuit following substantive determinations by the court (including this Court’s determination that the suit ‘may proceed’) – without amending underlying substantive or procedural laws – violate the Constitution’s separation of powers principles?” 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 Pottawatomis 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 Pottawatomis Indians v. Patchak*, 132 S. Ct. 2199, 2212, 183 L. Ed. 2d 211 (2012), Congress passed the Gun Lake Trust Land Reaffirmation 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. 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, the District Court dismissed the case. The Court of Appeals held that: (1) Appellant landowner's suit contesting appellee Department of the Interior's taking of land in trust for appellee tribe failed because the Gun Lake Trust Land Reaffirmation 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.

## II. OTHER COURTS

### A. *Administrative law*

#### 3. *Chisoe v. Jewell*

No. 15-CV-0166-CVE-TLW, 2016 U.S. Dist. LEXIS 132239 (N.D. Okla. Sep. 27, 2016). This was an administrative appeal of agency action by the United States Department of the Interior. Plaintiff Darrell Chisoe (plaintiff) brought an appeal on behalf of his deceased father, Paul Chisoe (Chisoe), pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (APA).

Plaintiff argues that the agency decision was arbitrary and contrary to law because defendant failed to take restricted Indian land into trust as mandated by federal statute and Bureau of Indian Affairs (BIA) regulations. Defendant argued that the agency decision should be affirmed because the BIA cannot take land into trust for a deceased individual or an estate. Furthermore, plaintiff appeared to be putting forth not only new arguments, but also entirely new claims. The agency action at issue in the administrative appeal was the BIA's termination of plaintiff's fee-to-trust process on the basis of Chisoe's death. In plaintiff's opening brief, he asserted that he was "bring[ing] this proceeding pursuant to the Administrative Procedure Act upon failure of Defendant to take restricted Indian land in trust." Plaintiff's opening brief then made two arguments: that BIA's failure to take the property into trust violates (1) a federal statute and (2) the agency's own regulations. Terminating an application process and failing to take property into trust are two different agency actions. The first is an action appealable under the procedures contained in 25 C.F.R. § 2.7. The second is the failure of an official to act and is appealable under the procedures contained in 25 C.F.R. § 2.8. The claims plaintiff argues in the proceeding were not the claim addressed in the administrative proceeding. Therefore, the Court did not address the merits of plaintiff's claims argued in the opening brief and reply brief because they have not been administratively exhausted. The court affirmed the decision of the United States Department of the Interior Board of Indian Appeals.

#### **4. *Cal. Valley Miwok Tribe v. Jewell***

No. 2:16-01345 WBS CKD, 2016 U.S. Dist. LEXIS 147053 (E.D. Cal. Oct. 24, 2016). Plaintiffs Silvia Burley, Rashel Reznor, Anjelica Paulk, and Tristian Wallace brought this action against defendants Secretary of Interior Sally Jewell, Acting Assistant Secretary of Interior Lawrence Roberts, and Director of the Bureau of Indian Affairs (BIA) Michael Black for declaratory relief, injunctive relief, and due process violations arising out an administrative decision on the membership and leadership of the California Valley Miwok Tribe (Tribe). Before the court was plaintiffs' motion to stay enforcement of the Assistant Secretary's December 30, 2015, decision (December 2015 Decision). This action is part of a long-running leadership dispute over the Tribe

between the Burley Faction – made up of Burley, Reznor, Paulk, and Wallace--and Yakima Dixie. See *Cal. Valley Miwok Tribe v. United States*, 424 F. Supp. 2d 197 (D.D.C. 2006) (hereinafter “Miwok I”); *Cal. Valley Miwok Tribe v. United States*, 515 F.3d 1262, 380 U.S. App. D.C. 39 (D.C. Cir. 2008) (hereinafter “Miwok II”); *Cal. Valley Miwok Tribe v. Jewell*, 5 F. Supp. 3d 86 (D.D.C. 2013) (hereinafter “Miwok III”). In 1916, the United States acquired a parcel of land for the Tribe’s benefit. In a 2005 hearing, the BIA refused to accept a constitution submitted by Burley that alleged that the Burley Faction were the only Tribe members because the constitution did not reflect the participation of the whole community. This decision was upheld by the district court in Miwok I and the D.C. Circuit in Miwok II. While Miwok II was pending, the BIA notified Dixie and Burley that it would move forward with facilitating the Tribe’s organization. In December 2010, the Assistant Secretary determined that the tribal government was organized under the 1998 Resolution and General Council. In August 2011, the Assistant Secretary issued a revised decision that reached the same conclusion. He found (1) the citizenship of the Tribe consisted solely of Dixie and the Burley Faction and (2) the 1998 General Council was the Tribe’s government. Dixie challenged the August 2011 Decision. Based on the record, the Miwok III court held the August 2011 Decision was arbitrary and capricious. The court held that the Assistant Secretary ignored substantial evidence in the record and assumed conclusions without providing a factual basis. The court remanded the case to the Assistant Secretary. The Assistant Secretary issued his December 2015 Decision in response to the Miwok III remand. He held, based on the record and previous federal decisions, that the Tribe’s membership was not limited to five members and the 1998 General Council was not a tribal government. Finally, the Assistant Secretary found Dixie’s 2013 Constitution did not establish a tribal government, but he allowed Dixie to submit additional evidence to a Regional Director in order to determine whether the 2013 Constitution was validly ratified. Plaintiffs challenged the December 2015 Decision and brought this suit against the federal defendants. Because plaintiffs have failed to meet the second and third prongs for a preliminary injunction, the court thus does not need to address the likelihood of success on the merits. Accordingly, the court must deny. IT IS THEREFORE ORDERED that plaintiffs’

motion to stay the Assistant Secretary's December 2015 Decision pending final resolution of this case, considered as a motion for a preliminary injunction, be, and the same hereby is, DENIED.

### ***5. Upstate Citizens for Equal, Inc. v. United States***

Nos. 15-1688, 15-1726, 2016 U.S. App. LEXIS 20192 (2d Cir. Nov. 9, 2016). This case is the latest in a long line of lawsuits regarding the efforts of the Oneida Indian Nation of New York (the Tribe) to assert tribal jurisdiction over a portion of its indigenous homeland in central New York State. After the Supreme Court rejected the Tribe's claim to existing, historically-rooted jurisdiction over a portion of the homeland, *see City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 125 S. Ct. 1478, 161 L. Ed. 2d 386 (2005), the Tribe requested that the United States take approximately 17,000 acres of Tribe-owned land into trust on its behalf in procedures prescribed by § 5 of the Indian Reorganization Act of 1934. The entrustment that the federal government approved in 2008 gave the Tribe jurisdiction over approximately 13,000 acres of land in central New York, allowing the Tribe, among other things, to continue to operate its Turning Stone casino in Verona, New York. Plaintiffs-Appellants, two towns, a civic organization, and several residents of the area near the trust land, filed these lawsuits in an attempt to reverse the land-into-trust decisions. They now appeal from judgments of the Northern District of New York, granting the summary judgment motions of Defendants-Appellants, the United States and several federal officials. The District Court rejected Plaintiffs' claims that the land-into-trust procedures are unconstitutional and that certain provisions of the Indian Land Consolidation Act (ILCA), adopted in 1983, bar the United States from taking land into trust for the Tribe. We agree with the District Court that the entrustment procedure generally, and this entrustment in particular, lie within the federal government's long-recognized "plenary" power over Indian tribes: Neither principles of state sovereignty nor the Constitution's Enclave Clause, which requires state consent for the broadest federal assertions of jurisdiction over land within a state, prevents the federal government from conferring on the Tribe jurisdiction over these trust lands. We further hold that the Oneida Nation of New York is eligible as a "tribe" within the meaning of 25 U.S.C. §§ 465 and 2201(1) for land to be taken into



trust on its behalf. Accordingly, we AFFIRM the judgments of the District Court.

## 6. *Miranda v. Jewell*

No. 15-55245, 2016 U.S. App. LEXIS 22514 (9th Cir. Dec. 19, 2016). Margaret Miranda and members of her family (collectively, the “Plaintiffs”) are the daughters, granddaughters, and great-granddaughter of Rosa Pace, an enrolled member of the Santa Ynez Band of Chumash Mission Indians (the “Band”). Those Plaintiffs who are not already enrolled in the Band applied for enrollment, and those who are already enrolled applied to have their recorded degree of Santa Ynez blood increased. Under Santa Ynez law, for enrollment in the Band, a person is required to have one-quarter or more Santa Ynez blood. Whether the Plaintiffs who seek enrollment have the requisite one-quarter Santa Ynez blood (and whether the remaining Plaintiffs are entitled to blood-degree increases) depends on whether Rosa Pace, their common ancestor, was a full-blooded or half-blooded Santa Ynez Indian. The parties point to conflicting sources of evidence on this issue. A 1940 Census Roll of the Band’s members prepared by the Bureau of Indian Affairs (the “Bureau”) lists Pace as a full-blooded Santa Ynez Indian. On the other hand, a Membership Roll prepared by the Band in 1965 lists Pace’s blood degree as one-half. Relying on the 1965 Membership Roll, the Band denied the Plaintiffs’ applications, and the Plaintiffs appealed to the Bureau. The Bureau sustained the Band’s decision to reject the Plaintiffs’ applications. The Plaintiffs then filed this suit against Secretary of the Interior Sally Jewell and the Department of the Interior challenging the Bureau’s action on the Plaintiffs’ appeal under the Administrative Procedure Act, 5 U.S.C. §§ 500–596. The district court granted the Defendants’ motion for summary judgment, holding that the Bureau’s action was not “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” The Plaintiffs timely appealed. Regulations appearing in Part 62 of Title 25 of the Code of Federal Regulations provide that the Bureau “shall” hear an appeal from an Indian tribe’s denial of an enrollment application where the tribe’s “governing document” so provides. In disposing of such an appeal, the Bureau does not abuse its discretion where it defers to an Indian tribe’s “reasonable interpretation of [its] own laws.” The reasonableness of a tribe’s interpretation of its law is evaluated “based on the language of the

[tribe's] governing documents and the past practice of the [tribe].” *Aguayo v. Jewell*, 827 F.3d 1213, 1228 (9th Cir. 2016). Here, Article III of the Band’s Articles of Organization provides that a person is eligible for enrollment in the Band if she is the living descendant of a person whose name appears on the Band’s January 1, 1940 Census Roll and if she has one-fourth or more degree of Indian blood of the Band. Ordinance 2, passed by the Band’s General Council in 1965, defines “Indian blood of the Band” to mean “the total percentage of Indian blood derived from an ancestor . . . who [was] listed on the 1940 Census Roll.” Ordinance 2 also permits an applicant to appeal an adverse enrollment decision to the Bureau. The Plaintiffs argue that Article III requires the Band to look only to the 1940 Census Roll, and no other documents, to determine an applicant’s degree of Santa Ynez blood. Under Ordinance 2, however, the Band may consider “tribal records, information presented in the application or other sources of information” when evaluating an enrollment application. Thus, the Band has interpreted Article III as not forbidding the Band to review documents other than the 1940 Census Roll in determining an applicant’s degree of Indian blood of the Band. This interpretation is reasonable given the language of the Band’s governing documents and the past practice of the Band. Article III does not define the term “Indian blood of the Band,” and although it refers to no documents other than the 1940 Census Roll, it neither expressly nor impliedly prohibits the Band from considering such other documents when evaluating an enrollment application. Because the Band’s interpretation of Article III is “reasonable,” the Bureau did not abuse its discretion by deferring to it and sustaining the Band’s rejection of the Plaintiffs’ applications. Accordingly, the district court’s grant of summary judgment for the Defendants is affirmed.

***7. Mishewal Wappo Tribe Of Alexander Valley v. Ryan Zinke;  
Michael Black***

No. 15-15993, 2017 WL 1433323, 688 Fed. Appx. 480 (9th Cir. Apr. 24, 2017). The Mishewal Wappo Tribe of Alexander Valley (the Tribe) sued the Secretary and Assistant Secretary of the Department of Interior (the Federal Defendants), asserting claims for breach of fiduciary duty and violations under the Administrative Procedure Act. The district court granted the Federal Defendants' motion for summary judgment. (1) The district court correctly

concluded that all of the Tribe's claims relied upon a central allegation that the Federal Defendants unlawfully terminated the Alexander Valley Rancheria. We decline to address the Tribe's new argument that termination of the Rancheria did not terminate its status as a federally recognized tribe because the Tribe did not raise this argument before the district court. See *Robinson v. Jewell*, 790 F.3d 910, 915 (9th Cir. 2015). (2) The Tribe argues that the United States owes a continuing fiduciary duty to the Tribe, and that the existence of this duty precludes the running of the statute of limitations. We do not decide whether the Federal Defendants owe a fiduciary duty to the Tribe. If there is such a duty in this case, the existence of such a duty does not at all prevent the statute of limitations from running under the circumstances presented here. (3) The Tribe did not diligently pursue its rights or show that extraordinary circumstances prevented it from doing so. Equitable tolling is therefore not appropriate. The Tribe argues that the Federal Defendants induced it to not file an action or proceed through the administrative recognition process by representing in various ways that the Federal Defendants would restore the Tribe's Status as a federally recognized Tribe. The earliest piece of evidence the Tribe cites to support this claim is a 1987 letter from the Area Director of the Sacramento Area Office of the Bureau of Indian Affairs recommends that the BIA adopt a policy to extend federal recognition to various rancherias, including "Alexander Valley." Even assuming this letter induced the Tribe to refrain from pursuing other avenues of recognition or litigation to rectify the purportedly unlawful termination of the Rancheria, it was issued about twenty-six years after the Rancheria was terminated. The 1987 letter could not warrant tolling of the statute of limitations for the twenty years beforehand. The Tribe did not meet its burden to support equitable tolling. AFFIRMED.

#### **8. *Nooksack Indian Tribe v. Zinke***

No. C17-0219-JCC, 2017 U.S. Dist. LEXIS 72364 (W.D. Wash. May 11, 2017). This matter was before the Court on Plaintiff the Nooksack Indian Tribe's motion for preliminary injunction and Defendants' cross-motion to dismiss. Plaintiff the Nooksack Indian Tribe brought this action against Defendants, collectively the leadership of the Department of the Interior (DOI) and Bureau of Indian Affairs (BIA). Since 2007, Plaintiff has been a party to 638

contracts with the DOI and BIA, entered into pursuant to the Indian Self-Determination and Education Assistance Act. Plaintiff alleges “under the terms of these contracts, the defendants fund the Tribe to provide programs, functions, services, or activities of the [DOI] for the benefit of Indians because of their status as Indians.” Plaintiff brings this action partially “to compel the defendants to fully fund contracts awarded to the Tribe under the Indian Self-Determination and Education Assistance Act.” However, the purported disenrollment of hundreds of Nooksack tribe members in late 2016 and the recent tribal government changes, all completed when the Nooksack Indian Tribal Council lacked a quorum, are fundamental underlying facts in this action. On June 21, 2013, Nooksack Indian voters approved a membership requirement change to the Nooksack Constitution proposed by the Council. The change was challenged in the Nooksack tribal courts and upheld. However, the membership criteria change is currently before the DOI’s Interior Board of Indian Appeals for approval. In March 2016, the Nooksack Indian Tribal Council scheduled a general election to fill three council seats whose terms were set to expire on March 24, 2016. However, “the Tribe delayed the election, and the three Council members retained their seats as holdovers pending the election of their replacements.” Regardless of the reason for cancelling the 2016 election, as of March 24, 2016, only three of eight Council members occupy seats whose terms have not expired. Therefore, Defendants allege the Council has been acting without a quorum since March 24, 2016. The Court will refer to the Council group, as composed after March 24, 2016, as the holdover Council for clarity. On January 21, 2017, Plaintiff and the holdover Council allegedly conducted a general election to fill the three seats held by the holdover Council members whose terms had expired. There were no challenges to the election results. The results were “certified by the duly-appointed Election Superintended [sic], consistent with Nooksack law.” Defendants maintain their disapproval of the holdover Council, calling its conduct “abusive,” and alleging the Council has “used its de facto control to systematically abridge the rights of a disfavored group of tribal members, thereby depriving them of their right to fully participate in and receive benefits under federal programs.” The holdover Council, on behalf of the Nooksack Indian Tribe, now moves the Court to enter a preliminary injunction enjoining Defendants from “(1) taking further steps to reassume

responsibilities the Tribe performs for its enrolled members under its Public Law 638 contracts; (2) taking further actions based on three opinion letters written by [PDAS Roberts]; and (3) continuing to interfere with the Tribe's self-governance by refusing to acknowledge that the current, duly-elected members of the Nooksack Tribal Council are the Tribe's governing body." Defendants opposed the motion, and filed a cross-motion to dismiss, or in the alternative for summary judgment, arguing that the Court lacks jurisdiction over this case. (Dkt. No. 26.) Because Defendants challenge the Court's jurisdiction over this matter, the Court will consider the motion to dismiss first. These are very rare circumstances. The DOI found that the Nooksack Indian Tribal Council, currently existing as the holdover Council, lacks authority due to a lack of quorum. The DOI decisions stand during the interim until the DOI and BIA recognize a newly elected Nooksack Indian Tribal Council. This Court's lack of jurisdiction is not permanent or inflexible. If the DOI and BIA recognize Nooksack tribal leadership after new elections and the nation-to-nation relationship is resumed, the new tribal leadership would have authority to initiate an action against the federal government. However, under this set of facts and with a clear lack of recognition from the DOI and BIA, the Court must decline jurisdiction. Defendants' motion to dismiss for lack of subject matter jurisdiction IS GRANTED. The holdover Council's claims are DISMISSED with prejudice.

### **9. *Cherokee Nation v. Jewell***

No. CIV-14-428-RAW, 2017 U.S. Dist. LEXIS 82896 (E.D. Okla. May 31, 2017). On May 24, 2011, the Bureau of Indian Affairs (BIA), Eastern Oklahoma Region (Region) for the United States Department of the Interior (DOI) issued a Decision (2011 Decision) approving an amended application of the United Keetoowah Band of Cherokee Indians in Oklahoma (UKB) to take a seventy-six acre tract located in Cherokee County (Subject Tract) into trust for the use and benefit of the UKB Corporation. The UKB owns the Subject Tract in fee. The Subject Tract is also located within the former reservation of the Cherokee Nation. The Cherokee Nation filed this action challenging the 2011 Decision, pursuant to the Administrative Procedures Act, 5 U.S.C. §§ 701-706 (APA) and 25 U.S.C. § 465. The Cherokee Nation argues that the 2011 Decision is arbitrary and capricious, an abuse of discretion, and otherwise not

in accordance with law because, *inter alia*, there is no statutory or regulatory authority to take land into trust for the UKB Corporation, the Cherokee Nation's consent is required to take the Subject Tract into trust, the 2011 Decision violates its treaties, and ignores the administrative burdens that would be created by the trust acquisition. The Cherokee Nation urges this court to set aside the 2011 Decision and to enjoin the Secretary of the Interior (Secretary) from accepting the Subject Tract into trust. The 2011 Decision was arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law. Accordingly, the court finds in favor of the Cherokee Nation and remands this action to the Region. Furthermore, in accordance with the court's findings herein, the Secretary is enjoined from taking the Subject Tract into trust without the Cherokee Nation's written consent and full consideration of the jurisdictional conflicts and the resulting administrative burdens the acquisition would place on the Region. Before taking *any* land into trust for the UKB or the UKB Corporation, the Region shall consider the effect of *Carciere* on such acquisition.

**10. *Standing Rock Sioux Tribe, et al. v. U.S. Army Corps of Engineers, et al.***

No. 16–1534 (JEB), 255 F. Supp. 3d 101, 2017 WL 2573994 (D.D.C. Jun. 14, 2017). Indian tribes brought action under Administrative Procedure Act (APA) against Army Corps of Engineers alleging, *inter alia*, that Corps' authorization of crude oil pipeline under federally regulated waterway bordering tribes' reservations violated National Environmental Policy Act (NEPA), Rivers and Harbors Act (RHA), and Mineral Leasing Act (MLA). Indian tribes moved for partial summary judgment and Corps cross-moved for partial summary judgment. The District Court held that: (1) Corps took requisite "hard look" at risk of oil spill in its environmental assessment (EA) of pipeline; (2) Corps failed to take requisite "hard look" at methodological and data flaws in its assessment of oil spill risk identified in expert reports submitted to Corps; (3) Corps took requisite "hard look" at potential impact of construction of pipeline on tribe's water, fishing, and hunting treaty rights in its EA; (4) Corps failed to take requisite "hard look" at potential impact of oil spill on **tribe's** fishing and hunting treaty rights in its EA; (5) Corps adequately considered alternatives to proposed location of pipeline in its EA; (6) Corps' use of 0.5-mile

buffer in environmental-justice analysis under NEPA was arbitrary and capricious; (7) grant of easement under MLA did not violate Corps' trust responsibility to protect tribe's treaty rights; (8) Corps' conclusion that pipeline would not impair waterway, as required for issuance of RHA permit, was not arbitrary and capricious; and (9) Corps imposed sufficient liability on pipeline operator, as required for easement under MLA. Ordered accordingly.

*B. Child Welfare Law and Indian Child  
Welfare Act (ICWA)*

**11. *Renteria v. Shingle Springs Band of Miwok Indians***

No. 2:16-cv-1685-MCE-AC, 2016 U.S. Dist. LEXIS 119394 (E.D. Cal. Sep. 2, 2016). Plaintiffs Efrim and Talisha Renteria ("Plaintiffs") brought an action against the Shingle Springs Band of Miwok Indians ("Tribe"), its Tribal Council, its Tribal Court, Christine Williams in her official capacity as the Tribal Court judge, Regina Cuellar in both her official capacity as a member of the Tribal Council and her individual capacity as the appointed guardian of Plaintiffs' three minor nieces ("Minors"), all of whom are under seven years old. They seek to prevent the enforcement of Tribal Court's June 3, 2016 Order (June 3 Order) appointing Defendant Regina Cuellar as the legal guardian of the Minors. Their Complaint attacked the Tribal Court's jurisdiction over the custody proceedings, and further alleged that the June 3 Order is unenforceable in courts subject to the Fourteenth Amendment of the United States Constitution because the underlying proceedings violated Plaintiffs' due process rights. Plaintiffs are the maternal great aunt and uncle of the Minors. The Minors' parents were killed in a car accident on December 17, 2015. Their late father was a member of the 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, presented a copy of an emergency order issued by the Tribal Court of the Shingle Springs Band of Miwok Indians (Tribal Court) to Plaintiffs and forcibly removed the two youngest Minors (the eldest Minor remained hospitalized from injuries sustained in the car accident that killed her parents). 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) sexually abused them during their visits. Plaintiffs reported the abuse to the Visalia Police Department and the Tulare County Health & Human Services Agency. In the days that followed Plaintiffs' initial police report, the children were interviewed outside of Plaintiffs' presence on three separate occasions by social workers with no connection to the family. 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' permanent guardian over Plaintiffs' competing petition and objections. Defendant Cuellar's appointment became 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 Minors then went for visitation with Defendant Regina Cuellar on June 4 and 5. The failure to restrict Joseph's access to the Minors during this visit resulted in yet another instance of alleged sexual abuse. Plaintiffs declined to give custody of the Minors to the paternal family on June 12 and caused a Good Cause Report to be filed with the Tulare County District Attorney. Plaintiffs then filed this action on July 21, 2016. They seek a declaration that the Tribal Court lacked jurisdiction to appoint a guardian for the Minors in the first instance, a declaration that the proceedings that led to the appointment of Regina Cuellar violated Plaintiffs' due process rights, and an injunction preventing the enforcement of the June 3 Order outside of tribal lands. The Court issued a Temporary Restraining Order (TRO) enjoining enforcement of the Tribal Court's June 3 Order pending a hearing on Plaintiffs' Motion for Preliminary Injunction. As a result of that order, plaintiffs requested a supplemental TRO enjoining the enforcement of any additional Tribal Court orders in the custody proceeding pending the resolution of Plaintiffs' Motion. The Court denied Plaintiffs' application for a supplemental TRO for failure to comply with Local Rule 231. Defendants oppose Plaintiffs' Motion. They contend that the Court lacks jurisdiction over the Tribal Defendants, and that Plaintiffs' action cannot



proceed solely against Defendant Cuellar in her individual capacity under Rule 19(b). Defendants' sovereign immunity argument, while not entirely convincing, raises serious questions about the Court's jurisdiction over the Tribal Defendants. The Court, however, can provide Plaintiffs with the relief they seek by dismissing the Tribal Defendants and allowing this action to go forward against Regina Cuellar in her individual capacity. The Court dismisses the Tribal Defendants, finds that Federal Rule of Civil Procedure 19 does not mandate joinder, and proceeds to the merits of Plaintiffs' Motion solely with respect to Defendant Cuellar. As to their due process claim, the Court finds that Plaintiffs are entitled to preliminary injunctive relief and GRANTS Plaintiffs' Motion with respect to Defendant Cuellar in her individual capacity. Plaintiffs' action may proceed against Defendant Regina Cuellar in her individual capacity, and their Motion for Preliminary Injunction is GRANTED as to Defendant Regina Cuellar in her individual capacity. Defendant Cuellar is hereby ENJOINED from attempting to seek recognition or enforcement of the Tribal Court's June 3 Order appointing her as permanent guardian of the Minors outside of the Tribal Court pending a final disposition of this action on the merits.

#### **12. *State v. Reich-Crabtree (In re M.H.C.)***

No. 114552, 2016 Okla. LEXIS 91, 2016 OK 88 (OK, Sep. 13, 2016). Cherokee Nation filed a motion to transfer the deprived case of M.H.C. to tribal court upon natural mother's tribal enrollment. State of Oklahoma and foster mother objected. The district court granted the motion to transfer, finding State and foster mother failed to present clear-and-convincing evidence to overcome the presumption in favor of tribal court jurisdiction in cases concerning the Indian Child Welfare Act (ICWA). 25 U.S.C. §§ 1901-1963 (1978). Section 1911(b) of the ICWA controls a motion to transfer a child-custody proceeding from state court to tribal court where the child is an Indian child under the statutory definition. The questions presented to this Court are whether the district court erred when it (1) found ICWA applicable to a case where the child was not an Indian child when the case was filed and (2) found lack of good cause to keep the case in state court. As an aside, before this Court is also the question whether a finding of ICWA's applicability must be applied retroactively to all prior proceedings in the case. M.H.C. (the child) was born in September of 2013. The Oklahoma

Department of Human Services (DHS) placed the child in protective custody on November 5, 2013. In the initial petition filed on November 18, 2013, the State of Oklahoma declared ICWA's provisions applicable. On November 21, 2013, the Cherokee Nation appeared at the initial appearance, and the natural mother informed the court that she had a Certificate of Degree of Indian Blood but was not currently a tribal member. The natural mother was informed if she gained membership in the Cherokee Nation, ICWA would apply. The natural mother was also told if ICWA applied, the child would likely have to leave foster mother's care because foster mother was a non-ICWA compliant placement. No party informed the natural mother of ICWA's benefits and protections. The natural mother declined to enroll at the time. The appellate court found that the district court did not err in granting the motion to transfer the proceedings to the Cherokee Nation tribal court. The district court did not err in finding ICWA applicable upon the natural mother's enrollment in the Cherokee Nation. ICWA applies to the proceedings prospectively from the date the record supports its application. Appellants have failed to present clear-and-convincing evidence of "good cause" for the case to remain in the Rogers County District Court. Because the district court did not err in granting the motion to transfer to Tribal Court, we affirm the order granting the motion to transfer.

**13. *In re O.C.***

No. A147577, 2016 WL 6879279 (Cal. Ct. App. Nov. 22, 2016). County children and family services agency filed petition against mother and father to terminate their parental rights to minor children, who potentially had Indian heritage. Following hearing, the Superior Court found both children adoptable, that exception to adoption for sibling bond did not apply, and that Indian Child Welfare Act (ICWA) did not apply and terminated parental rights. Mother and father appealed. The appellate court held that trial court failed to comply with notice requirements of ICWA and state law. Reversed and remanded with directions.

**14. *Daniel H. and Linda H. v. Tyler R.*  
(*In re Adoption of Micah H.*)**

No. S-15-1080, 2016 Neb. LEXIS 169, 295 Neb. 213 (Neb. Dec. 2, 2016). This case presents the issue of whether the “active efforts” and “serious emotional or physical damage” elements of the federal Indian Child Welfare Act of 1978 (ICWA) and the Nebraska Indian Child Welfare Act (NICWA) apply to provide increased protection to the parental rights of a non-Indian, noncustodial parent of an “Indian child.” Daniel H. and Linda H., the maternal grandparents and guardians of Micah H., a minor child, appeal the order of the Saunders County Court denying their petition to adopt Micah. In their petition, Daniel and Linda alleged, among other things, that the child’s mother (their daughter), Allison H., had consented to the adoption; that the father, Tyler R., had abandoned Micah; and that terminating Allison’s and Tyler’s parental rights was in Micah’s best interests. In Tyler’s answer, he alleged that Micah was an “Indian Child” pursuant to ICWA and NICWA. Because neither party disputed that Micah met the “Indian child” definition under both acts, the county court applied those acts, which provide heightened protection to the rights of parents and tribes in proceedings involving custody, termination of parental rights, and adoption of Indian children. After a hearing on Daniel and Linda’s petition, the county court found that it was compelled to deny the petition, because it was “unable to find beyond a reasonable doubt that [Tyler] has abandoned the child.” The appellate court found that the county court erred in applying the “beyond a reasonable doubt” standard to the abandonment element and also in finding that Daniel and Linda were not required to show active efforts had been made to unite Tyler and Micah. We therefore reverse, and remand with directions to allow the parties to submit additional evidence in further proceedings consistent with this opinion. Reversed and remanded.

**15. *Oglala Sioux Tribe & Rosebud Sioux Tribe v. Fleming***

No. CIV. 13-5020-JLB, 2016 U.S. Dist. LEXIS 173571 (D.S.D. Dec. 15, 2016). The defendants continue to disregard this court’s March 30, 2015, partial summary judgment order. That order outlined the defendants’ violations of the rights of Indian children, parents, custodians and tribes guaranteed by the Due Process Clause

of the Fourteenth Amendment and by the Indian Child Welfare Act (ICWA). Notwithstanding testimony confirming that South Dakota Circuit Court Judges in Meade County, Brown County, Hughes County and Minnehaha County are conducting adversarial hearings in accord with the March 2015 order prior to the extended removal of Indian children from their homes, defendants refuse to reform their violative policies and practices. The court repeatedly invited the defendants to propose a plan for compliance with their constitutional and statutory obligations, but the defendants rejected that opportunity. This order discusses the need and the authority for this court to impose remedies to vindicate plaintiffs' rights. Orders for declaratory and injunctive relief are filed simultaneously with this order. On March 21, 2013, plaintiffs filed this civil rights action pursuant to 42 U.S.C. § 1983 asserting defendants' policies, practices and procedures relating to the removal of Indian children from their homes during state court 48-hour hearings violate the ICWA and the Due Process Clause of the Fourteenth Amendment. Defendants denied plaintiffs' claims. On July 11, 2014, plaintiffs filed two separate motions identified as the "Section 1922 Claims" and the "Due Process Claims." Following extensive submissions by the parties, on March 30, 2015, the court entered an order granting plaintiffs' motions (2015 order). By the 2015 order, the court reserved ruling on plaintiffs' request for declaratory and injunctive relief. On August 17, 2016, a hearing was held to address plaintiffs' prayer for relief (remedies hearing). For the reasons stated below, plaintiffs' request for a declaratory judgment is granted, plaintiffs' request for injunctive relief is granted in part and plaintiffs' request for appointment of a monitor is denied without prejudice as premature. Plaintiffs Oglala Sioux Tribe and Rosebud Sioux Tribe are Indian tribes officially recognized by the United States with reservations located within the State of South Dakota. The class of plaintiffs includes "all other members of federally recognized Indian tribes who reside in Pennington County, South Dakota, and who, like plaintiffs, are parents or custodians of Indian children." Defendant Lynne A. Valenti is the Secretary of the South Dakota Department of Social Services (DSS). Since January 2010, approximately one hundred 48-hour hearings involving Indian children are held each year in Pennington County. In March 2015, the court found that despite "the clear intent of ICWA, the [Department of the Interior] Guidelines and the SD Guidelines, all

of which contemplate evidence will be presented on the record in open court, Judge Davis relied on the ICWA affidavit and petition for temporary custody which routinely are disclosed only to him and not to the Indian parents, their attorney or custodians.” These undisclosed documents are not subject to cross-examination or challenge by the presentation of contradictory evidence. The practice of the state court was to “authorize DSS to perform the function of determining if, or when, the imminent risk of physical harm to an Indian child has passed and to restore custody to the child’s parents. . . . This authorization vests full discretion in DSS to make the decision if and when an Indian child may be reunited with the parents. The court found this abdication of judicial authority violated the protections guaranteed Indian parents, children and tribes under ICWA. In the March 2015 order, the court found the defendants violated plaintiffs’ due process rights under the Fourteenth Amendment during the course of 48-hour hearings. The violations are summarized as follows: (1) failing to appoint counsel in advance of the 48-hour hearing; (2) failing to provide notice of the claims against Indian parents, the issues to be resolved and the state’s burden of proof; (3) denial of the right to cross-examine adverse witnesses; (4) denying Indian parents or custodians the right to present evidence in their own defense; and (5) removing Indian children on grounds not based on evidence presented in the hearing. The Court ordered that plaintiffs’ request for a declaratory judgment and injunctive relief is granted.

#### **16. *A.D. by Carter v. Washburn***

No. CV-15-01259-PHX-NVW, 2017 WL 1019685 (D. Az. Mar. 16, 2017). Before the Court are motions to dismiss. In this action the adult Plaintiffs and those who have undertaken to speak for the child Plaintiffs attempt to challenge parts of the Indian Child Welfare Act (ICWA) as unconstitutional racial discrimination. They also challenge Congress’s power to enact laws regulating state court proceedings and ousting state laws concerning foster care placement, termination of parental rights, pre-adoptive placement, and adoptive placements of some off-reservation children of Indian descent. Plaintiffs seek a declaration that certain provisions of the ICWA and of the Guidelines for State Courts and Agencies in Indian Child Custody Proceedings published on February 25, 2015 (2015 Guidelines) by the Department of the Interior, Bureau of Indian

Affairs (BIA), violate the United States Constitution, federal civil rights statutes, and Title VI of the Civil Rights Act by requiring State courts to treat Indian children differently than non-Indian children in child custody proceedings. Plaintiffs wish to adjudicate here in advance of injury to themselves. They do not have standing to have this Court pre-adjudicate for state court judges how to rule on facts that may arise and that may be governed by statutes or guidelines that this Court may think invalid. IT IS THEREFORE ORDERED that the Federal Defendants' Motion to Dismiss First Amended Complaint, the State Defendant's Motion to Dismiss Plaintiffs' First Amended Civil Rights Complaint for Declaratory, Injunctive, and Other Relief, the Gila River Indian Community's Motion to Dismiss, and the Navajo Nation's Amended Motion to Dismiss are granted.

#### **17. *Jude M. v. State***

No. S-16233, 2017 WL 1533373, 394 P.3d 543 (Alaska Apr. 28, 2017). Office of Children's Services (OCS) filed petition to terminate father's parental rights to Native American child adjudicated as child in need of aid. The superior court declined to terminate parental rights, but instead established long-term guardianship over child placed with foster family out-of-state. Father appealed. The supreme court held that: (1) superior court had statutory authority to establish long-term guardianship over child after it declined to terminate father's parental rights; (2) regulation prohibiting agency from placing child in guardianship without evidence that parental rights have been terminated or suspended did not apply; (3) long-term guardianship was not de facto termination of father's parental rights that failed to comply with Indian Child Welfare Act (ICWA); (4) active efforts were made to provide remedial and rehabilitative services designed to prevent breakup of family, as prerequisite to foster care placement/guardianship under ICWA; (5) determination that father, who was convicted sex offender, posed significant risk of re-offending and that risk encompassed child, was not supported by expert testimony; (6) evidence supported finding that father was unable to meet child's caregiving needs, and thus, that father's continued custody of child was likely to result in serious emotional or physical harm; (7) evidence supported finding that long-term guardianship under

current foster family placement was in child's best interest. Vacated; remanded.

**18. *The People of the State of South Dakota in the Interest of A.O., V.O. and C.O., Children and Concerning V.S.O., Respondent, C.G, Indian Custodian and OGLALA SIOUX TRIBE, Intervener***

Nos. 27864 and 27999, 896 N.W. 2d 652, 2017 S.D. 30, 2017 WL 2290151 (S.D. May 24, 2017). Law enforcement removed A.O., V.O., and C.O. (the Children) from the home of their mother, V.S.O. (Mother), after discovering methamphetamine and drug paraphernalia in the home. Mother is an enrolled member of the Oglala Sioux Tribe (the Tribe). The same day, the State asked the circuit court to award temporary custody of the Children to the South Dakota Department of Social Services (the Department). The court granted the request. The Tribe was given timely notice and intervened. More than one year after the State initiated abuse-and-neglect proceedings against Mother the circuit court denied motions to transfer the case to the jurisdiction of the Tribe. Mother appeals the termination of her parental rights, raising one issue: Whether she was entitled to a hearing on the question whether good cause existed to deny the motions to transfer jurisdiction to the Tribe. Mother argued that the circuit court erred by denying the motions without holding an evidentiary hearing. The appellate court found that the circuit court was required to conduct an evidentiary hearing on the question whether good cause existed to deny Mother's and the Tribe's motions to transfer the proceedings to the Tribe's jurisdiction. The court was also required to make specific factual findings on this issue. The court failed to do so. Therefore, the court abused its discretion in denying the motions. The appellate court reversed the circuit court's final dispositional order and remanded with instructions for the court to hold an evidentiary hearing on the question whether good cause exists to deny the motions to transfer.

**19. *Doe v. Piper***

No. 15-2639 (JRT/DTS), 2017 U.S Dist. LEXIS 124308 (D. Minn. Aug. 4, 2017). Plaintiffs Jane and John Doe (the Does) brought this action seeking injunctive relief and a declaration that the portions of the Minnesota Indian Family Preservation Act (MIFPA), Minn. Stat.

§§ 260.751-260.835, that require notice to Indian tribes for any voluntary adoption involving an “Indian child” and provide relevant Indian tribes a right of intervention are unconstitutional. The remaining defendants in this case are the Commissioner of the Minnesota Department of Human Resources, Emily Johnson Piper, and the Minnesota Attorney General, Lori Swanson (collectively, Defendants). The Does challenge two particular MIFPA provisions. First, the Does challenge the “notice” provision, under which “a local social services agency, private child-placing agency, petitioner in the adoption, or any other party” must notify the applicable “tribal social services agency” if the agency or person “has reason to believe that a child who is the subject of an adoptive or pre-adoptive placement proceeding is or may be an ‘Indian child’” under the statute. Minn. Stat. § 260.761. Second, the Does challenge the “intervention” provision, which provides an Indian child’s tribe the right to intervene at any point in adoption proceedings involving the child. In April 2015, Baby Doe was born to the Does in Minneapolis, Minnesota. The Does are an unmarried couple, together since 2003, who live together with their children. The Does are both enrolled members of Indian tribes, Jane Doe in the Mille Lacs Band of Ojibwe, but neither domiciles within or resides on an Indian reservation. No court terminated the Does’ parental rights. Instead, the Does decided to voluntarily place Baby Doe for adoption and relinquish their parental rights. To facilitate Baby Doe’s adoption, the Does engaged a private direct placement agency that would allow the Does to choose Baby Doe’s adoptive parents. Neither of the chosen adoptive parents is of American Indian descent. The Does and the adoptive parents arranged an open adoption. The Does did not want to comply with the notice requirement because they did not want any tribe to learn of their adoption or risk a tribe’s intervention, which could lead to deviation from the adoption plan that they determined was best for their child. The Court found no threat of irreparable harm because the state court could protect the Does’ identities and the Mille Lacs Band of Ojibwe had already agreed not to intervene. Based on the foregoing, and all of the files, records, and proceedings herein, IT IS HEREBY ORDERED that:

1. Defendants’ Motion for Summary Judgment is GRANTED and
2. Plaintiffs’ Motion for Summary Judgment is DENIED.



## **20. *In re DETMER/BEAUDRY, Minors***

No. 336348, \_\_ N.W. 2d \_\_, 2017 WL 3614234 (Mich. App. Aug. 22, 2017). We consider here whether the special protections provided to Native American parents and children under state law apply when a child is taken from her mother’s care and residence and placed in her father’s care and residence. Respondent-mother and her children, AB and KD, are eligible for the protections afforded to Native American families under Michigan Indian Family Preservation Act (MIFPA). The trial court removed AB from the care and residence of respondent-mother, and this removal triggered the statutory protections set forth in MCL 712B.15(2). Concluding that one of respondent-mother’s children (AB) was “removed,” we hold that the special protections set forth in the MIFPA do apply to AB’s removal. Because the trial court failed to comply with those protections, we vacate and remand for further proceedings. With respect to the other child at issue in this appeal (KD), we hold that the special protections do not apply because KD was not removed from respondent-mother, but instead voluntarily placed by respondent-mother with KD’s father. The trial court erred by not affording respondent-mother and AB these protections and, accordingly, we vacate the trial court’s order of adjudication with respect to AB and remand for further proceedings consistent with this opinion.

### *C. Contracting*

## **21. *N. Arapaho Tribe v. LaCounte***

No. CV-16-11-BLG-BMM, 2016 U.S. Dist. LEXIS 143389 (D. Mont. Oct. 17, 2016). Plaintiffs Northern Arapaho Tribe (“NAT”) allege that Defendants violated their right to self-govern when Defendants converted NAT’s funds and federal funds and programs established by Congress for the benefit of NAT. Federal Defendants hold positions with the Bureau of Indian Affairs (“BIA”). NAT seeks declaratory and injunctive relief along with the establishment of a constructive trust that would serve as a vehicle to recover allegedly converted funds. NAT also filed a motion for preliminary injunction. Federal Defendants have filed a motion to dismiss the action on the grounds that: (1) the Court lacks subject matter jurisdiction, (2) NAT has failed to state a claim on which relief can

be granted, and (3) NAT has failed to join an indispensable party. The Shoshone Tribe and the United States entered into a Treaty on July 2, 1868. 15 State. 673. The treaty established the Wind River Reservation “for the absolute and undisturbed use and occupation of the Shoshonee Indians.” 15 State. 673. The Eastern Shoshonee Tribe (“EST”) settled in the Wind River Reservation. The United States placed NAT on the Wind River Reservation in 1878. The tribes share the Wind River Reservation. Each tribe governs itself by vote of its tribal membership at general council meetings or by vote of its elected business council. No member of one tribe may hold office or legislate for the other tribe. The tribes have not entered into a joint constitution to consolidate their respective governments. The federal government created the Joint Business Council (“JBC”) following the Indian Reorganization Act of 1934. The federal government apparently considered it easier to interact with the two tribes’ business councils in joint form. The JBC originally contained the requirement that a quorum comprise four members from each tribe. NAT formally withdrew its participation from the JBC in September 2014. The Complaint alleges that the former SBC Defendants continue to operate the JBC and hold themselves out to third parties as having authority to act for both tribes. EST allegedly changed the quorum for the JBC to require only four members from EST rather than the original requirement of four members from each tribe. SBC Defendants allegedly have used the JBC to move shared property, to transfer federal and tribal funds from a joint account to accounts solely controlled by the SBC, and to make important employment and personnel decisions that affect both tribes. NAT further alleges that SBC Defendants misappropriated joint 638 self-determination contracts. Specifically, NAT alleges that Federal Defendants have entered into 638 self-determination contracts with the JBC without the necessary approval from NAT. NAT alleges that Federal Defendants wrongfully have awarded 638 self-determination contracts to the JBC despite knowing that NAT had withdrawn from the JBC. Norma Gourneau, BIA Superintendent for the Wind River Agency, sent a letter to both tribes’ business councils on August 3, 2016. (“Gourneau Letter”). Gourneau acknowledged that the BIA had approved self-determination contracts with SBC-as-JBC “on a temporary basis.” Gourneau also stated that the BIA no longer would accept contract proposals for shared programs from either tribe without supporting resolutions

from both tribes. Gourneau cited to 25 U.S.C. § 5304(1) for support. Title 25 U.S.C. § 5304(1) prohibits the BIA from “letting or making” a self-determination contract “to perform services benefitting more than one Indian tribe” without “the approval of each such Indian tribe.” NAT requests that the Court enjoin Federal Defendants from (1) representing that SBC possesses authority to take actions on behalf of NAT; and (2) approving unilateral action by SBC that affects NAT’s property, assets, program decisions, personnel directive, budget approvals, or policy changes. The Court: (1) denied Defendants’ Motion to Dismiss; (2) granted Plaintiff’s Motion for Preliminary Injunction requiring that in accordance with the Gourneau Letter, Defendants shall refrain from approving 638 contracts for multi-tribal, shared services without the approval, via tribal government resolution, of both the Northern Arapaho Tribe and the Eastern Shoshone Tribe.

**22. *Swinomish Indian Tribal Cmty. v. BNSF Ry. Co.***

No. C15-543RSL, 2017 U.S. Dist. LEXIS 5497 (W.D. Wash. Jan. 13, 2017). This matter comes before the Court on plaintiff’s Amended Motion for Summary Judgment and defendant BNSF Railway Company’s Cross-Motion for Partial Summary Judgment. Plaintiff filed this suit in April 2015 alleging that defendant breached a Right-of-Way Easement Agreement (Easement Agreement), asserting claims of breach of contract and trespass, and seeking damages, declaratory judgment, and injunctive relief. Defendant raised preemption as an affirmative defense, arguing that plaintiff’s claims are barred by the Interstate Commerce Commission Termination Act (ICCTA), 49 U.S.C. § 10501 *et seq.* Plaintiff filed a motion for a summary determination of the preemption defense. Defendant cross-moved on the preemption issue and seeks judgment in its favor on the breach of contract, trespass, and injunctive relief claims. In the Easement Agreement Burlington Northern agreed to pay \$125,000 as full payment for all rent, damages and compensation of any sort, due for past occupancy of the right-of-way from date of construction in 1889 until January 1, 1989. Thereafter, Burlington Northern would pay \$10,000 per year, adjusted periodically based on the Consumer Price Index and changes in property values. The easement has an initial term of forty years, with two twenty-year extensions at Burlington Northern’s option. Burlington Northern promised to keep the Tribe informed as

to the nature and identity of all cargo transported by Burlington Northern across the Reservation through annual disclosures and to comply strictly with all Federal and State Regulations regarding classifying, packaging and handling of rail cars so as to provide the least risk and danger to persons, property and the natural environment of the Reservation. Burlington Northern also promised that unless otherwise agreed in writing, only one eastern bound train, and one western bound train would cross the Reservation each day. The number of trains and cars were not to be increased unless required by shipper needs. It is understood and agreed that if the number of crossings or the number of cars is increased, the annual rental will be subject to adjustment. The Tribe alleges that BNSF Railway Company, Burlington Northern's successor, has breached the terms and conditions of the easement and that the overburdening of the right of way constitutes a trespass. Since at least 1999, BNSF had not complied with the cargo reporting requirement despite requests from the Tribe. In October 2011, the Tribe contacted BNSF about reports that Tesoro Refining & Marketing Company, LLC, one of the oil companies with operations in Anacortes, Washington, intended to ship, and BNSF intended to carry, crude oil in 100-car trains across the reservation. The Tribe reminded BNSF of its obligation to obtain written approval for any such increase in traffic and expressed concern regarding the impact of the proposed increase on the Tribe's recently-completed hotel development project. BNSF did not respond. The Tribe sent a second letter in September 2012 when 100-car shipments from Tesoro began. In February 2013, BNSF confirmed that, in addition to the locals that serve the March Point refineries, unit trains of crude oil from North Dakota averaging 102 cars in each direction were crossing the reservation almost every day. The Tribe would not approve such shipments, and BNSF announced its intention to continue running the unit trains as it had been doing since 2012. This litigation followed, with the Tribe seeking declaratory and injunctive relief in addition to damages. The cross-motions for summary judgment raise three separate issues: (1) whether there has been a breach of contract; (2) whether the ICCTA preempts the Tribe's state law claims; and (3) whether the ICCTA preempts the remedies afforded by the Indian Right of Way Act (IRWA) for breach of the Easement Agreement. The court granted in part and denied in part the cross-motions for summary judgment. The Tribe is entitled to a

declaration that BNSF breached the terms of the Easement Agreement by failing to make annual disclosures regarding the cargo it was carrying across the reservation and by increasing the number of trains and cars traversing the reservation without first seeking to obtain the Tribe's written assent. The state law claims for damages, compelled disclosures, and an adjustment in rent are not preempted by the ICCTA. To the extent the Tribe seeks an injunction limiting the type of cargo or the number of trains or cars crossing the reservation, whether under a breach of contract, trespass, or estoppel theory, those remedies are unavailable in this jurisdiction. The Tribe may seek a declaration of its contractual rights from the Surface Transportation Board and/or it may initiate the right of way cancellation procedures provided under in the International Right of Way Association and its implementing regulations.

**23. *Navajo Nation v. United States Department of Interior.***

No. 16-5117, 852 F.3d 1124 (D.C. Cir. Apr. 4, 2017). Indian tribe brought action alleging that Bureau of Indian Affairs (BIA), an agency within Department of the Interior (DOI), violated Indian Self-Determination and Education Assistance Act (ISDEAA) by failing to disburse certain funding. The district court, 174 F. Supp. 3d 161, entered summary judgment in favor of DOI. Indian tribe appealed. The appellate court held that: (1) deadline for BIA to approve or reject tribe's proposal began to run on date tribe hand delivered proposal during partial government shutdown to exempted employee at BIA regional office, rather than date furloughed BIA employee who was responsible for such proposals returned to office; (2) tribe's silence, in face of repeated assertions by BIA concerning deadline, did not equitably estop tribe from disputing timeliness of BIA's response; and (3) partial government shutdown did not equitably toll deadline. Reversed.

**24. *Saginaw Chippewa Indian Tribe of Michigan v. Blue Cross Blue Shield of Michigan***

No. 16-cv-10317, 2017 WL 3007074 (E.D. Mich. Jul. 14, 2017). On January 29, 2016, Plaintiffs Saginaw Chippewa Indian Tribe of Michigan and the Welfare Benefit Plan (Plaintiffs or the Tribe) brought suit against Blue Cross Blue Shield of Michigan (BCBSM).

Plaintiffs' suit takes issue with BCBSM's management of Plaintiffs' "self-insured employee benefit Plan." The Counts which remain involve allegations that BCBSM charged Plaintiffs hidden fees. On April 10, 2017, the parties filed cross motions for partial summary judgment on the remaining Counts. The motions frame two issues: whether both of the Tribe's two benefit plans are subject to the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001(b), *et seq.*, and whether the fees collected for BCBSM's Physician Group Incentive Program (PGIP) violated BCBSM's fiduciary duties. ORDERED that, in accordance with Federal Rules of Civil Procedure 54, 56, and 58, on Count One and Count Two of Plaintiff's Amended Complaint against Defendants as they relate to payment of hidden access fees for the Employee Plan, judgment is entered in favor of Plaintiffs and against the Defendant in the amount of \$8,426,278.

**25. *Grand Traverse Band of Ottawa and Chippewa Indians and its Employee Welfare Plan v. Blue Cross Blue Shield of Michigan***

No. 14-cv-11349, 2017 WL 3116262 (E.D. Mich. Jul. 21, 2017). This Employee Retirement Income Security Act (ERISA) case has been pending for over three years and is currently before the Court on defendant Blue Cross Blue Shield of Michigan's motion to dismiss the amended complaint filed by plaintiffs Grand Traverse Band of Ottawa and Chippewa Indians and its Employee Welfare Plan. Plaintiffs are a federally-recognized tribe and have filed suit against Blue Cross Blue Shield of Michigan (BCBSM) for breach of fiduciary duty under ERISA and have also brought five state-law claims allegedly relating to a contract between the tribe, BCBSM, and Munson Medical Center. Plaintiffs maintain a self-funded employee welfare plan (Plan) governed by the ERISA, 29 U.S.C. § 1001 *et seq.* In 2000, plaintiffs hired BCBSM to "provide administrative services for the processing and payment of claims" under the plan. In 2007, new federal regulations implementing section 506 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 went into effect (hereinafter MLR regulations). These regulations stated that "[a]ll Medicare-participating hospitals . . . must accept no more than the rates of payment under the methodology described in this section as payment in full for all terms and services authorized by IHS, Tribal,

and urban Indian organization entities.” And “if an amount has been negotiated with the hospital or its agent,” the tribe “will pay the lesser of” the amount determined by the methodology or the negotiated amount. None of the parties’ disputes that these regulations apply to plaintiffs. Plaintiffs allege that defendant was “well aware of the MLR regulations” and “systematically failed to take advantage of MLR discounts available to Plaintiffs.” And “[a]s administrator of an ERISA plan, BCBSM owed a number of fiduciary duties” to plaintiff that were breached due to this failure to take advantage of the MLR discounts. Plaintiffs seek restitution, statutory attorney fees, and other damages, costs, and interest. For the reasons set forth above, defendant’s motion to dismiss is GRANTED as to Count I, Count II, Count III (implied covenant of good faith and fair dealing only), Count IV, Count V, and Count VI.

**26. *Enerplus Resources (USA) Corporation, v. Wilbur D. Wilkinson, et al.***

No. 16-3715, 865 F.3d 1094, 2017 WL 3271313 (8th Cir. Aug. 2, 2017). Enerplus Resources (USA) Corporation (Enerplus) mistakenly overpaid mineral royalties to Wilbur Wilkinson and demanded a return of the excess funds. In response, Wilkinson sued Enerplus in tribal court. Enerplus then filed suit in federal court, seeking the return of the excess funds and a declaration that the tribal court lacked jurisdiction over the dispute. The district court preliminarily enjoined Wilkinson from proceeding with his case in tribal court. Wilkinson appeals. Wilbur Wilkinson sued Peak North Dakota, LLC (Peak North) in tribal court. Subsequently, on October 4, 2010, Peak North and Wilkinson entered into a “Settlement Agreement, Full Mutual Release, Waiver of Claims and Covenant Not to Sue” (Settlement Agreement), whereby Peak North agreed to assign Wilkinson an overriding royalty interest (ORRI) in certain oil and gas leases located in North Dakota. Pursuant to the Settlement Agreement, Peak North and Wilkinson agreed that “any disputes arising under this Agreement and/or the transactions contemplated herein shall be resolved in the United States District Court for the District of North Dakota Northwest Division and such court shall have exclusive jurisdiction hereunder and no party shall have the right to contest such jurisdiction or venue.” In December 2010, Peak North merged with and into Enerplus, with Enerplus being the surviving entity. Because of an alleged clerical error between

August 2014 and October 2015, Enerplus claims it overpaid the ORRI due to Wilkinson by \$2,961,511.15. Upon discovering the error, Enerplus promptly, but unsuccessfully, sought return of the overpaid funds. On February 29, 2016, Wilkinson sued Enerplus in the Fort Berthold Tribal Court, alleging Enerplus breached the Settlement Agreement by underpaying Wilkinson. Enerplus subsequently brought this action in the federal district court, seeking (1) a preliminary injunction prohibiting Wilkinson from prosecuting any lawsuits in tribal court arising from or relating to the Settlement Agreement and prohibiting the tribal court from exercising jurisdiction over Enerplus in Wilkinson's tribal court case, and (2) an order requiring that the overpaid ORRI be deposited into the district court's registry. In response, Wilkinson moved to dismiss, arguing that (1) the Settlement Agreement is void, (2) Enerplus failed to exhaust tribal remedies, (3) the tribal court has jurisdiction, and (4) the requested preliminary injunction should be denied. The appellate court held that the district court's preliminary injunction was "within the range of choice available to the district court, account[ed] for all relevant factors, d[id] not rely on any irrelevant factors, and d[id] not constitute a clear error of judgment." Accordingly, the court affirmed the judgment of the district court.

#### D. *Employment*

##### 27. *Williams v. Poarch Band of Creek Indians*

No. 15-13552, 2016 U.S. App. LEXIS 18717 (11th Cir. Oct. 18, 2016). Christine J. Williams, the plaintiff below and appellant here, was employed for more than twenty-one years as the laboratory manager and chief medical technologist in the Health Department operated by the Poarch Band of Creek Indians (the Poarch Band), a federally-recognized tribe of Native Americans. The Department is located on reservation lands, and positions within it are considered to be jobs of Tribal government. Plaintiff asserts that her employment was terminated because of her age (which she described as "over 55"), and that she was replaced by a 28-year-old female who "did not have enough experience to be a lab manager." Plaintiff subsequently filed a complaint in the U.S. District Court, alleging a single claim of discrimination under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (ADEA). The Poarch Band moved to dismiss the suit, arguing that



the doctrine of tribal sovereign immunity deprived the court of subject matter jurisdiction. The Magistrate Judge to whom the action originally was assigned entered a report recommending that the motion be granted. Plaintiff's objections were overruled by the District Court Judge, who adopted the Magistrate's Report and Recommendation and dismissed the case. This appeal followed. The appellate court held that: (1) There was no evidence that the Tribe waived its immunity, either generally or in the present suit; (2) The Fitzpatrick decision did not assist her in her argument that a comparison of the term employer found in Title VII of the Civil Rights Act of 1964 with the ADEA's definition of that same term demonstrated that Congress intended to abrogate tribal immunity when enacting the ADEA; (3) The silence of the statutory text of the ADEA and its legislative history on the issue of whether Congress intended it apply to Indian tribes was ambiguous; (4) One could conclude that Congress never considered the ADEA's impact upon Indian tribes; (5) The weight of authority in the federal courts supported upholding the right of the Tribe to tribal sovereign immunity from a claim based upon the ADEA. The court ruled that the Poarch Band is entitled to tribal sovereign immunity from plaintiff's ADEA claim and affirmed the district court's decision to grant the Poarch Band's motion to dismiss for lack of subject-matter jurisdiction. Affirmed.

**28. *Window Rock Unified School District et. al. v. Reeves et. al.***

No. 13-16259, No. 13-16278, 861 F.3d 894 (9th Cir. Jun. 28, 2017). Public school districts that operated schools on land leased from Indian tribe brought action seeking declaratory judgment that tribal labor commission lacked jurisdiction over their employment decisions and practices conducted on reservation, and injunction to bar prosecution of their employees' claims against them in tribal courts. The District Court, No. 3:12-cv-08059, 2013 WL 1149706, entered summary judgment in districts' favor, and commission and employees appealed. The appellate court held that districts were required to exhaust their tribal remedies before seeking relief in federal court. Reversed and remanded.

E. *Environmental Regulations*

**29. *Battle Mt. Band v. United States BLM***

No. 3:16-CV-0268-LRH-WGC, 2016 U.S. Dist. LEXIS 115093 (D. Nev. Aug. 25, 2016). Before the court was plaintiff the Battle Mountain Band of the Te-Moak Tribe of Western Shoshone Indians' (Band) renewed motion for a temporary restraining order which the court construed as a motion for a preliminary injunction. Defendants the United States Bureau of Land Management (BLM) and Jill C. Silvey (collectively defendants), along with intervenor Carlin Resources, Inc. (Carlin), filed oppositions to the motion. This action involves the various agency decisions and federal permits issued by the BLM authorizing the construction of a power transmission line on land located in Elko County, Nevada that has been identified by the Band as its traditional cultural property (TCP) and has recently been deemed eligible by the BLM for inclusion on the National Register of Historic Places (National Register). Plaintiff Battle Mountain Band is one of four bands that comprise and make up the Te-Moak Tribe of Western Shoshone Indians (Te-Moak Tribe), a federally recognized Indian tribe. The Band currently resides on colony lands in close proximity to the Tosawihi Quarries. The Band contends that the entirety of the quarries, including the specific TCPs at issue in this action, are a vital spiritual, cultural, and economic center for the Band and other member bands of the Te-Moak Tribe. According to the Band, the quarries contain various TCPs like sacred sites, burial grounds, ceremonial locations, spiritual trails, and hunting grounds as well as, medicinal and natural resources central to its history, culture, and identity. Defendant BLM is the federal agency responsible for overseeing and administering public lands, including the public lands on which the Tosawihi Quarries and the identified TCPs exist. As part of its administration of these lands, the BLM is authorized to issue permits and leases for use of the land. Approximately eight years ago, Carlin's predecessors-in-interest applied for a permit from the BLM to convert certain land in the quarries from an exploratory mining area into a functional mining operation. Carlin, as the current owner of the mining rights, is the interested party to the various agency decisions and federal permits issued by the BLM. The Band argues that the public has a strong interest in the protection of historic property because Congress mandated a specific procedure for

federal agencies to follow as outlined in the National Historic Preservation Act (NHPA). The court agrees. However, the court notes that there is a comparable public interest in the protection of a business' reasonable investment-backed expectations when involved with government agencies. This public interest would be disserved by allowing the Band to attack a lengthy, expensive, and complex NHPA process years after the conclusion of the Record of Decision (ROD) and after an interested party like Carlin has invested millions of dollars in the project under that approved ROD. Further, the public's interest in protecting historic properties was successfully engaged in during the Section 106 process. Accordingly, the court shall deny the Battle Mountain Band's motion for preliminary injunctive relief.

**30. *Standing Rock Sioux Tribe v. United States Army Corps of Eng'rs***

No. 16-1534 (JEB), 2016 U.S. Dist. LEXIS 121997 (D.D.C. Sept. 9, 2016). The Standing Rock Sioux Tribe sued the United States Army Corps of Engineers (Corps) to block the operation of Corps permitting for the Dakota Access Pipeline (DAPL). The Tribe fears that construction of the pipeline, which runs within half a mile of its reservation in North and South Dakota, will destroy sites of cultural and historical significance. It filed a Motion for Preliminary Injunction, asserting principally that the Corps flouted its duty to engage in tribal consultations under the National Historic Preservation Act (NHPA) and that irreparable harm will ensue. The court concluded that the Corps likely complied with the NHPA and that the Tribe has not shown it will suffer injury that would be prevented by any injunction the Court could issue. The Motion was denied.

**31. *Sisseton-Wahpeton Oyate of the Lake Traverse Reservation v. United States Corps of Eng'rs***

No. 3:11-CV-03026-RAL, 2016 U.S. Dist. LEXIS 134399 (D.S.D. Sep. 29, 2016). Plaintiffs Sisseton-Wahpeton Oyate of the Lake Traverse Reservation (Tribe) and Robert Shepherd, the Tribe's then-Chairman, filed a Complaint and Amended Complaint seeking declaratory, injunctive, and other relief. Plaintiffs named as Defendants the United States Corps of Engineers (Corps), Steven E.

Naylor, in his official capacity as Regulatory Program Manager, and Robert J. Ruch, in his official capacity as District Commander. Plaintiffs' Complaint challenged the Corps granting of certain exemptions and permits under the Clean Water Act (CWA) to Merlyn Drake (Drake), and how it has dealt generally with Drake's requests and conduct on land adjacent to Enemy Swim Lake, which is within the exterior boundaries of the Tribe's reservation. This lawsuit centered on the Tribe's concern about development at Enemy Swim Lake within the Lake Traverse Reservation in South Dakota. The Tribe considers Enemy Swim Lake (Toka Nuwan Yapi) to be of tremendous cultural and religious significance. There are burial grounds at and near the lake, plants from the lake are used in ceremonies and for medicinal purposes, some tribal members spear and catch fish for sustenance from the lake, and many tribal members consider Enemy Swim Lake to be a sacred place. The land surrounding the lake is owned by the Tribe, tribal members, and non-tribal members. Drake, who is not a member of the Tribe, owns land adjoining Enemy Swim Lake. Drake has been constructing the farm roads and bridge, which are approximately one mile in length and travel through an inlet to and crossing near the shoreline of Enemy Swim Lake. Certain of Drake's prior receipt of exemptions and permits for activities on this property challenged in this litigation were time barred or otherwise dismissed. The remaining issues in this case involve certain exemptions and permits under the CWA received in 2006 and 2009 by Drake from the Corps relating to excavation and extraction activities to create farm roads and a bridge to improve access to a portion of Drake's land. The Court denied Plaintiffs' request for an injunction against the Corps, remanded to the Corps for reconsideration whether the 2009 gully crossings were the type of undertaking that could affect historic properties under 36 C.F.R. § 800.3(a) and to complete the Section 106 process if so necessary, and denied all other requests for relief requested by Plaintiffs.

### **32. *Karuk Tribe v. Stelle***

No. 16-15818, 2016 U.S. App. LEXIS 21637 (9th Cir. Dec. 5, 2016). Karuk Tribe and various environmental organizations invoked the provisions of the Endangered Species Act (ESA), 16 U.S.C. § 1536(a)(2), and the National Forest Management Act (NFMA), 16 U.S.C. § 1604(i); 36 C.F.R. § 219.10(e), to seek a

preliminary injunction blocking the government's salvage logging in a large burned area of the Klamath National Forest. The district court denied the preliminary injunction, and the logging project, known as the Westside Fire Recovery Project, continues to go forward. Plaintiffs appeal. We review the denial for abuse of discretion. There was none. The salvage logging has been undertaken to reduce the likelihood of more severe fires in the future. Plaintiffs' concern is with the loss of snags that are beneficial to owl and salmon habitats. The government was required, under the NFMA, to comply with the Klamath Forest Plan that spells out requirements for the retention of snags. The project met those requirements. The government's efforts to preserve large snags included (1) retaining large "legacy" green trees; (2) leaving untouched snags in hydrologic riparian areas; (3) designating additional snag retention areas; and (4) reducing surface fuels, which decreases the risk that future fire consumes even more snags. Plaintiffs rely on our decision in *Oregon Nat. Res. Council Fund v. Brong*, 492 F.3d 1120, 1126 (9th Cir. 2007), where we affirmed the entry of an injunction to prevent snag removal by means of clear cutting on a large scale and undertaken for governmental profit. Here, the Forest Service's motives are to prevent the danger of future fires, not economic gain, and the government has gone to pains to avoid the risks of large-scale clear cutting envisioned in *Brong*. Assuming that Plaintiffs have raised serious questions concerning the logging in riparian reserves under the NFMA, the equities favor the government because of the long term environmental, safety and economic benefits. *See Earth Island Inst. v. Carlton*, 626 F.3d 462, 475 (9th Cir. 2010). With respect to the ESA, National Marine Fisheries Service did not rely significantly, if at all, on the Forest Service's planned mitigation measures in reaching its no jeopardy conclusion. Plaintiffs cannot show a likelihood of success under the ESA. AFFIRMED.

**33. *Quechan Tribe of the Fort Yuma Indian Reservation v. United States DOI***

No. 13-55704, 2016 U.S. App. LEXIS 22919 (9th Cir. Dec. 21, 2016). HOLDINGS: (1) The Bureau of Land Management (BLM) did not improperly fail to determine whether a proposed wind energy facility met the substantive requirements of a desert conservation area plan since the BLM properly amended the plan to

accommodate the project, and the project was governed by the plan amendment rather than the plan itself; (2) The project was properly assigned an interim classification for the least restrictive amount of permissible change to the existing character of the landscape since the classification was included in the properly adopted amendment to the plan; (3) The BLM did not fail to consider the cumulative impacts of alternative energy projects on lands in the desert conservation area since the BLM sufficiently assessed the effects on visual and cultural resources, identified reasonably foreseeable future projects, and described the existing damage to cultural resources. Judgment affirmed.

**34. *Quinault Indian Nation v. Imperium Terminal Services, LLC***

No. 92552-6, 387 P.3d 670 (Wash. Jan. 12, 2017). Owners of terminals for storing petroleum products applied for substantial shoreline development permit (SSDP) based on plans to expand their operations. After the Department of Ecology (DOE) and the city issued mitigated determinations of nonsignificance (MDNS) and permits, a Native American tribe and citizens groups appealed. The Shoreline Hearings Board granted motions for partial summary judgment. Tribe and citizens group appealed to the Court of Appeals, which accepted direct review. The appellate court, 190 Wash. App. 696, 360 P.3d 949, affirmed Board's grant of summary judgment. Tribe and citizens group sought review by Supreme Court, which was granted. The Supreme Court held that: (1) owners' proposed expansion projects, which would facilitate the storage of additional fuel products that would arrive by train or truck and depart by ocean-bound ship, triggered review of owners' permit applications under Ocean Resources Management Act's (ORMA) statutory framework; (2) owners' proposed expansion projects qualified as "ocean uses" as defined in DOE's regulation implementing ORMA; (3) owners' proposed expansion projects qualified as "transportation" as defined in DOE's regulation implementing ORMA; and (4) owners' proposed expansion projects qualified as "coastal uses" as defined in DOE's regulation implementing ORMA. Reversed and remanded.

**35. *Protect Our Communities Foundation v. Black***

No. 14cv2261 JLS (JMA), 2017 WL 882278 (S.D. Cal. Mar. 6, 2017). Presently before the Court are Plaintiffs’ Motion for Summary Judgment. Tule Wind LLC plans to construct a number of wind turbines in southeastern San Diego County. The project consists of two phases. Phase I involves sixty-five turbines on federal land in the McCain Valley, and Phase II comprises twenty turbines on land held in trust for the Ewiiapaayp Band of Kumeyaay Indians (the Tribe) on ridgelines above the McCain Valley. The Bureau of Land Management (BLM) approved Phase I in 2011. This lawsuit pertains to BIA’s approval of Phase II. In 2011—prior to approval of either phase—BLM issued a Final Environmental Impact Statement (EIS) pursuant to the National Environmental Policy Act (NEPA) and its implementing regulations. Bureau of Indian Affairs (BIA) served as a cooperating agency on the EIS, which therefore permitted BIA to “use the EIR/EIS for [its own] approval processes” and “for consideration of [its own] required discretionary actions.” Although BIA ultimately adopted several eagle-specific mitigation measures in authorizing Phase II, determining that the adopted mitigation “scenario significantly reduces potential ‘take’ of golden eagles during operation for the life of the Proposed Action[,]” and that Phase II “would not create significant impacts after the implementation of mitigation measures contained in the [record of decision] (ROD) and the acquisition of all permits required by law.” In authorizing Phase II, the BIA considered the EIS, the “overall administrative record,” and “BIA’s mission to foster economic development for tribes.” The court found that because (1) the BIA permissibly relied on the 2011 Environmental Impact Statement, which it helped prepare; (2) the 2011 EIS rigorously considered Tule Phase II’s potential risk to golden eagles; and (3) no new information or developments triggered NEPA’s supplementation requirements, the Court concludes that BIA validly exercised its discretion in approving Tule Phase II. Accordingly, the Court GRANTS Defendants’ Motions for Summary Judgment and DENIES Plaintiffs’ Motion for Summary Judgment.

**36. *Standing Rock Sioux Tribe v. United States Army  
Corps of Eng'rs***

No. 16-1534 (JEB), 2017 U.S. Dist. LEXIS 31967 (D.D.C. Mar. 7, 2017). Since last summer, the question of whether Dakota Access should route its oil pipeline near the reservations of American Indian tribes has engendered substantial debate both on the ground in North and South Dakota and here in Washington. This Court, meanwhile, has focused on the specific legal challenges raised by the Standing Rock and Cheyenne River Sioux Tribes in their efforts to block government permitting of the pipeline. *See Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers (Standing Rock I)*, 2016 U.S. Dist. LEXIS 121997, 2016 WL 4734356 (D.D.C. Sept. 9, 2016). At the start of 2017, that pipeline was nearly complete, save a stretch, awaiting an easement, that was designed to run under the bed of Lake Oahe, a federally regulated waterway that forms part of the Missouri River and straddles North and South Dakota. Upon assuming office, President Trump directed an expedited approval process, and on February 8, the Army Corps of Engineers issued the easement that permitted Dakota Access to drill under the lake. Fearing that the presence of oil in the pipeline under Lake Oahe will cause irreparable harm to its members' religious exercise, Cheyenne River responded with a Motion for Preliminary Injunction, in which it argues that the easement's grant violates the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*, and requests that the Court enjoin the effect of the easement and thus the flow of oil, which is expected to commence in the next week or two. As the Court concludes that the extraordinary relief requested is not appropriate in light of both the equitable doctrine of laches and the Tribe's unlikelihood of success on the merits, it will deny the Motion.

**37. *Round Valley Indian Tribes of Cal. v. United States DOT***

No. 15-cv-04987-JSW, 2017 U.S. Dist. LEXIS 34923 (N.D. Cal. Mar. 10, 2017). This litigation arises out of a highway project that is under construction around the community of Willits, California (the Willits Bypass Project). Plaintiffs, the Coyote Valley Band of Pomo Indians of California (Coyote Valley) and the Round Valley Indian Tribes of California (Round Valley) (collectively Plaintiffs), allege the Federal Defendants violated the National Environmental



Protection Act (NEPA), Section 4(f) of the Department of Transportation Act, 49 U.S.C. section 303(f) (Section 4(f)), Section 18(a) of the Federal-Aid Highway Act, 23 U.S.C. section 138 (Section 18(a)), and the National Historic Preservation Act (NHPA). On July 1, 2007, the Federal Highway Administration (FHWA) entered into a Memorandum of Understanding (MOU) with defendant California Department of Transportation (Caltrans), in which the FHWA assigned certain responsibilities and liabilities for various projects, including the Willits Bypass Project, to Caltrans, pursuant to the Surface Transportation Project Pilot Delivery Program (the Pilot Program), 23 U.S.C. section 327. However, Caltrans did not assume the Federal Defendants' responsibilities for government-to-government consultation under the NHPA. Plaintiffs allege all Defendants, including the Federal Defendants: (1) failed to properly identify and protect the Plaintiffs' "ancestral, sacred, cultural, and archeological sites and resources;" and (2) destroyed certain sites during the construction of the Willits Bypass Project. Plaintiffs also allege all Defendants, including the Federal Defendants, failed to "(a) adequately address the direct, indirect, and cumulative cultural, environmental, and historic impacts of the Willits Bypass Project; (b) identify and finalize the details of the mitigation plan or its environmental and cultural impacts; and (c) commit to necessary mitigation measures." On October 30, 2015, Plaintiffs filed the original complaint in this case. On August 2, 2016, the Court granted the Federal Defendants' motion to dismiss. The Court concluded that the terms of the MOU would bar Plaintiffs' claims under NEPA and Section 4(f) and Section 18(a). The Court gave Plaintiffs leave to amend, and it directed Plaintiffs to specifically identify which Defendant acted, or failed to act, in a particular manner. On August 24, 2016, Plaintiffs filed the first amended complaint (FAC). In sum, the Court concludes Plaintiffs have alleged facts to state a claim based on alleged failure to engage in a government-to-government consultation process under NHPA. Accordingly, for the foregoing reasons, the Court grants, in part, and denies, in part the Federal Defendants' motion to dismiss.

**38. *Hopi Tribe v. U.S. Environmental Protection Agency***

No. 14-73055, 2017 WL 1046116, 851 F.3d 957 (9th Cir. Mar. 20, 2017). Indian tribe petitioned for review of Environmental Protection Agency's (EPA) federal implementation plan under the

Clean Air Act (CAA) for reduction of emissions from a coal-fired generating station, which tribe contended would result in the plant's closure with resulting harm to tribe's economic interests. The Appellate Court held that EPA did not violate any duty of the Government to consult with Indian tribe during rulemaking process. Petition denied.

**39. *Yazzie v. U.S. Environmental Protection Agency***

No. 14-73100, No. 14-73101, No. 14-73102, 2017 WL 1046117, 851 F.3d 960 (9th Cir. Mar. 20, 2017). Tribal conservation organizations and non-profit environmental organizations petitioned for review of United States Environmental Protection Agency's (EPA) source-specific federal implementation plan (FIP) under the Clean Air Act (CAA) for a coal-fired power plant on the Navajo Nation Reservation in Arizona. The Appellate Court held that: (1) federal government's partial ownership of power plant did not weigh against affording deference to EPA's interpretation of CAA and its implementing regulations; (2) EPA's determination that Tribal Authority Rule (TAR) applied to Navajo Nation was reasonable; (3) FIP was not subject to CAA regional haze program's requirement that all necessary emission reductions take place during the period of the first long-term strategy for regional haze; (4) EPA was not required to show by clear weight of the evidence that its FIP was better than best alternative retrofit technology (BART); (5) EPA's interpretation of phrase "distribution of emissions" as used in Regional Haze Regulation was reasonable; and (6) it was reasonable for EPA to give plant emission credit when evaluating whether FIP alternative resulted in greater emissions reductions than the BART. Petition denied.

**40. *Navajo Nation v. Cyprus Amax Minerals Co.***

No. CV-17-8007-PCT-DLR, 2017 U.S. Dist. LEXIS 77568 (D. Ariz. May 22, 2017). The Navajo Nation filed an unopposed motion to enter the parties' proposed consent decree (CD). The United States filed a similar motion in its related suit against Defendants. (No. CV-17-00140-DLR.) The Court granted the motions, finding the CD to be fair, reasonable, and consistent with the objectives of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The United States, on behalf of the Administrator of the United States Environmental Protection Agency (EPA), filed a complaint in this matter pursuant to Sections

106 and 107 of the CERCLA, 42 U.S.C. §§ 9606 and 9607, against Cyprus Amax Minerals Company (Cyprus Amax) and Western Nuclear, Inc. (Western Nuclear) (collectively, Settling Defendants). The Navajo Nation filed a complaint in this matter pursuant to Section 107 of CERCLA and Sections 2403, 2501 and 2503 of the Navajo Nation CERCLA (NNCERCLA), 4 N.N.C. §§ 2403, 2501 and 2503, against Settling Defendants. The United States and the Navajo Nation (collectively, Plaintiffs), in their complaint against the Settling Defendants, each seek, inter alia: (1) reimbursement of Past and Future Response Costs incurred, in the case of the United States, by EPA and other federal agencies, and in the case of the Navajo Nation, by the Navajo Nation, including the Navajo Nation EPA (NNEPA) and the Navajo Nation DOJ (NNDOJ), for response actions at the abandoned uranium mine sites and one transfer station in Arizona, New Mexico, and Utah, located on Navajo Nation lands, and listed in Appendix A (Mine Sites), together with accrued interest; and (2) performance of response actions by Settling Defendants at the Mine Sites consistent with the National Contingency Plan, 40 C.F.R. Part 300 (NCP). Settling Defendants do not admit any liability to Plaintiffs arising out of the transactions or occurrences alleged in the complaints, do not admit that any release or threatened release of hazardous substances occurred while they operated any Mine Site, nor do they acknowledge that the release or threatened release of hazardous substance(s) at or from any of the Mine Sites constitutes an imminent and substantial endangerment to the public health or welfare or the environment. Settling Federal Agencies do not admit any liability arising out of the transactions or occurrences as may be alleged in any claims by the Navajo Nation or counterclaims by Settling Defendants. Based on the information presently available to EPA and the Navajo Nation, EPA and the Navajo Nation believe that the Work at the Mine Sites will be promptly conducted by Settling Defendants if conducted in accordance with this CD and its appendices. The Parties recognize, and the Court by entering this CD finds, that this CD has been negotiated by the Parties in good faith and implementation of this CD will expedite the cleanup of the Mine Sites and will avoid prolonged and complicated litigation between the Parties, and that this CD is fair, reasonable, and in the public interest.

F. *Fisheries, Water, FERC, BOR*

**41. *United States v. Washington***

No. 13-35474, 2017 U.S. App. LEXIS 3816, 853 F.3d 946 (9th Cir. Mar. 2, 2017). The panel amended the opinion filed on June 27, 2016, and affirmed the district court's order issuing an injunction directing the State of Washington to correct culverts, which allow streams to flow underneath roads, because they violated, and continued to violate, the Stevens Treaties, which were entered in 1854-55 between Indian tribes in the Pacific Northwest and the Governor of Washington Territory. In 1970, the United States brought suit against the State of Washington on behalf of the Tribes to resolve a persistent conflict over fishing rights; and in a 1974 decision, the district court authorized the parties to invoke its continuing jurisdiction to resolve continuing disputes. The panel held that in building and maintaining barrier culverts within the Case Area, Washington violated, and was continuing to violate, its obligation to the Tribes under the Treaties. The panel also held that because treaty rights belong to the Tribes rather than the United States, it was not the prerogative of the United States to waive them. Concerning the State of Washington's cross-request seeking an injunction that would require the United States to fix its culverts before Washington repaired its culverts, the panel held that Washington's cross-request was barred by sovereign immunity, and Washington did not have standing to assert any treaty rights belonging to the Tribes. Specifically, the panel held that Washington's cross-request for an injunction did not qualify as a claim for recoupment. The panel held that the district court did not abuse its discretion in enjoining Washington to correct most of its high-priority barrier culverts within seventeen years, and to correct the remainder at the end of their natural life or in the course of a road construction project undertaken for independent reasons. The panel rejected Washington's objections that the injunction was too broad, that the district court did not defer to the State's expertise, that the court did not properly consider costs and equitable principles, that the injunction impermissibly intruded into state government operations, and that the injunction was inconsistent with federalism principles. Judgment affirmed.

**42. *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District***

No. 15-55896, 849 F.3d 1262 (9th Cir. Mar. 7, 2017). Indian tribe brought action against water district and desert water agency, seeking to have the court declare and quantify its federally reserved

rights to groundwater underlying its reservation and enjoin district and agency from interfering with tribe's rights to groundwater. Federal government intervened as a plaintiff. The District Court, No. 5:13-cv-00883-JGB-SP, 2015 WL 1600065, entered partial summary judgment in favor of tribe and government. District and agency appealed. The Appellate Court held that: (1) federal government impliedly reserved general water right when it established Indian reservation in desert; (2) tribe's implied general reserved water right extended to groundwater; and (3) any state water entitlements that tribe had to groundwater did not limit tribe's federal implied water right. Affirmed.

### ***43. Skokomish Indian Tribe v. Forsman***

No. C16-5639 RBL, 2017 U.S. Dist. LEXIS 42730 (W.D. Wash. Mar. 23, 2017). Before the Court was Defendant Suquamish Indian Tribe and its Tribal Councilmembers' Motion to Dismiss Plaintiff Skokomish Indian Tribe's claims against them. Skokomish Tribe sued Councilmembers and Fisheries Director of the Suquamish Tribe, alleging they violated Skokomish's hunting rights by allowing their tribal members to hunt in Skokomish's territory. Skokomish claims the Point No Point Treaty reserved to it the primary and exclusive hunting right within "Twana Territory." The Skokomish Tribe is a successor in interest to the Skokomish and Twana people. The 1855 Treaty of Point No Point is one of several treaties executed by Governor Stevens reserving hunting and fishing rights to its signatory tribes (the Stevens Treaties). In 1985, this Court confirmed Skokomish's primary fishing right in Twana Territory, roughly, Hood Canal. Skokomish argues the Court also confirmed its primary hunting right in Twana Territory. Skokomish alleges Defendants unlawfully promulgated and enforced hunting regulations allowing Suquamish hunting in Twana Territory. It seeks declaratory and injunctive relief confirming its primary hunting right and enjoining the Suquamish Tribe's enforcement of unlawful hunting in Twana Territory. Defendants seek dismissal of Skokomish's claims on four grounds: (1) Skokomish lacks Article III standing, (2) the suit against the Suquamish Tribe is barred by sovereign immunity, (3) legislative immunity precludes suit against Suquamish Tribal Officials promulgating hunting regulations, and (4) Skokomish failed to join the Suquamish Tribe and other Stevens Treaty Tribes as indispensable parties.

Defendants point out that Skokomish recently sued a host of state officials, asserting the same claims and seeking similar relief, in *Skokomish Indian Tribe v. Goldmark*, 944 F. Supp. 2d 1168, 1193 (W.D. Wash. 2014). Judge Robart dismissed that case because the adjudication of the signatory tribes' hunting rights in the region required Skokomish to join all of the tribes in one action, which it could not do. Skokomish argues this Court has jurisdiction because Defendant's unlawful hunting caused a concrete injury, redressable by a favorable judgment of this Court. Skokomish also argues *Ex Parte Young*, an exception to the Suquamish Tribe's sovereign immunity, allows this Court to grant injunctive relief enjoining the Suquamish Tribal Officers' unlawful acts. It argues that legislative immunity does not bar the suit because Suquamish Tribal Officers acted in their administrative and executive, not legislative, capacities in passing and enforcing hunting regulations. The Court granted Defendants' Motion to Dismiss for Skokomish's failure to join indispensable parties. Skokomish's claims were dismissed without prejudice.

**44. *Wild Fish Conservancy, et al. v. National Park Service, et al.***

No. 14-35791, 2017 WL 1381128, 687 Fed. Appx. 554 (9th Cir. Apr. 18, 2017). In a series of decisions, the Department of the Interior and the National Marine Fisheries Service (NMFS) approved the use of hatcheries operated by the State of Washington and the Lower Elwha Klallam Tribe (the Tribe) to restore Elwha River fish populations after a dam removal project. The Wild Fish Conservancy and others (collectively, the Conservancy) claim in this action that the Department and NMFS violated the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA) and that the Tribe's hatchery operations were "taking" threatened fish in violation of the ESA. The district court correctly held that NMFS's decision to prepare an Environmental Assessment (EA) instead of an Environmental Impact Statement (EIS) before approving the hatchery programs under Limit 6 was neither arbitrary nor capricious. *See Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1238–39 (9th Cir. 2005) (explaining standard of review). The Department had previously endorsed the use of hatcheries in the Elwha River in a 1996 EIS and decision. *See Or. Nat. Res. Council v. Lyng*, 882 F.2d 1417, 1424 (9th Cir. 1989)

(finding supplemental EIS not required where previous EIS and comprehensive management plan “had already contemplated” agency actions “of the type and magnitude proposed”). The subsequent EA reasonably concluded, after thorough analysis, that the risks posed by the hatchery programs were minimal and that approving the programs would have no significant impact on the environment. Because the EA satisfied NMFS's NEPA obligations, it also satisfied the Department's NEPA obligations. The Department participated in preparing the EA, and the EA expressly considered the effects of the Department's funding actions. The district court correctly found the Conservancy's initial claim that the Tribe was taking fish without authorization moot in light of NMFS's Limit 6 approval and Incidental Take Statement.

**45. *United States v. Washington***

No. 13-35474, 2017 WL 2193387 (9th Cir. May 19, 2017). The panel denied a petition for a panel rehearing and denied a petition for rehearing en banc on behalf of the court in an action in which the panel affirmed the district court's injunction directing the State of Washington to correct culverts, which allow streams to flow underneath roads, because they violated, and continued to violate, the Stevens Treaties, which were entered in 1854–55 between Indian tribes in the Pacific Northwest and the Governor of Washington Territory. Concurring in the denial of rehearing en banc, Judges W. Fletcher and Gould stated that the district court properly found that Washington State violated the Treaties by acting affirmatively to build state-owned roads, and to build and maintain salmon-blocking culverts under those roads. The Judges stated that there is ample evidence that remediation of the State's barrier culverts will have a substantial beneficial effect on salmon populations, resulting in more harvestable salmon for the Tribes. As an incidental result, there will also be more harvestable salmon for non-Indians. The district court crafted a careful, nuanced injunction, giving the United States much less than it requested. The Judges stated that the district court properly found a violation of the Treaties by the State, and that it acted within its discretion in formulating its remedial injunction. In an opinion respecting the denial of rehearing en banc, Judge O'Scannlain, joined by Judges Kozinski, Tallman, Callahan, Bea, Ikuta and N.R. Smith, and joined by Judges Bybee and M. Smith as to all but Part IV, stated that the panel opinion's reasoning ignored

the Supreme Court's holding in *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979), and this Circuit's cases, was incredibly broad, and if left unchecked, could significantly affect natural resource management throughout the Pacific Northwest, inviting judges to become environmental regulators. Judge O'Scannlain stated that by refusing to consider the doctrine of laches, the panel opinion further disregarded the Supreme Court's decision in *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005). The petition for rehearing and the petition for rehearing en banc, filed August 11, 2016, are DENIED.

**46. *Crow Creek Sioux Tribe v. United States***

No. 16-760 C, 132 Fed. Cl. 408, 2017 U.S. Claims LEXIS 604 (Fed. Cl. June 1, 2017). Plaintiff Crow Creek sued the United States through the Department of the Interior alleging a Fifth Amendment taking of its reserved water rights. *See Winters v. United States*, 207 U.S. 564, 576-78, 28 S. Ct. 207, 52 L. Ed. 340 (1908). Defendant filed a motion to dismiss pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction. Defendant also contends that the Government's bare trust relationship with Crow Creek does not provide the "money-mandating" statute or regulation necessary for jurisdiction in this court. *See United States v. Testan*, 424 U.S. 392, 400 (1976). Plaintiff's pleadings do not show how damages from an alleged taking could have accrued currently, and oral arguments did not clarify this threshold issue. Nevertheless, plaintiff urged the court to permit sufficient discovery for it to address defendant's jurisdictional arguments. Given the opportunity to inquire into the extent of defendant's diversion of its rights in the waters of the Missouri River, the Tribe argued it would be able to definitively establish damages. For example, counsel stated during oral arguments that plaintiff could hire experts to submit reports on various methods of obtaining appraised values for those waters. Plaintiff believes that those values would supply evidence of the damages that its case now lacks. In this case, however, opening discovery in response to defendant's motion to dismiss would result in a waste of resources for both parties. The jurisdictional problem of standing or ripeness arises from plaintiff's inability to identify an injury to the Tribe that has yet occurred. If we were to permit discovery for the purposes that plaintiff proposes, that effort could



only establish the value of water that has been diverted from the Missouri River over a period of time. Such a value would not equate to damages suffered by the Tribe in the circumstances of this case. For these reasons, we GRANT defendant's motion to dismiss pursuant to Court of Federal Claims Rule 12(b)(1).

**47. *Penobscot Nation v. Mills***

Nos. 16-1424, 16-1435, 16-1474, 16-1482, 861 F.3d 324 (1st Cir. Jun. 30, 2017). American Indian tribe brought action against state of Maine and various state officials, in response to opinion of state attorney general regarding regulatory jurisdiction of tribe and state related to hunting and fishing on stretch of river, seeking declaratory judgment clarifying boundaries of tribe's reservation and tribal fishing rights on river. United States intervened on its own behalf and as a trustee for tribe, and private interests, towns and other political entities intervened in support of state defendants. The District Court, 151 F. Supp. 3d 181, ruled that tribe's reservation included river's islands but not its waters, and sustenance fishing rights provided in reservation's implementing statute allowed tribe to take fish for sustenance in entirety of relevant stretch of river, and issued declaratory relief as to both points. Parties cross-appealed. The appellate court held that: (1) under Maine Indian Claims Settlement Act (MICSA), Penobscot Indian Reservation included only islands in the main stem of the Penobscot River which were included in Maine Implementing Act (MIA), but did not include any of the waters of the River itself, any portion thereof, or the submerged lands underneath; (2) tribe lacked Article III standing to bring claim seeking declaratory judgment clarifying tribal fishing rights on river; and (3) tribe's claim against defendants, seeking declaratory judgment clarifying tribal fishing rights on stretch of river, was not ripe for adjudication. Affirmed in part and vacated in part.

## G. Gaming

### 48. *United Auburn Indian Cmty. of the Auburn Rancheria v. Brown*

No. C075126, 2016 Cal. App. LEXIS 858 (Ct. App. Oct. 13, 2016). [See also *Citizens for a Better Way v. Brown*, No. C075018, 2016 Cal. App. Unpub. LEXIS 7409 (Ct. App. Oct. 13, 2016)]. In 2002 the Enterprise Rancheria of Maidu Indians of California (Enterprise Tribe) submitted a request to the United States Department of the Interior (Department) to acquire a site in Yuba County for the purpose of establishing a casino/hotel resort complex. Pursuant to statute, the Secretary was authorized to acquire land, within or without an existing reservation, for the purpose of providing land for Indians. The Governor gave his concurrence and simultaneously executed a tribal-state gaming compact for the Yuba County site. A competing gaming establishment, the plaintiff and appellant, which is owned by the United Auburn Indian Community of the Auburn Rancheria (Auburn Tribe), challenged the validity of the Governor's concurrence on the ground it constituted an illegal exercise of legislative power, which was neither delegated to the Governor, nor ancillary and incidental to his power to enter into gaming compacts with Indian tribes. The court disagreed on the ground the exercise of the power of concurrence is not legislative. The Auburn Tribe argued that even though federal *law* singles out the Governor as the arm of the state that must concur in the Secretary's determination under the Indian Gaming Regulatory Act (IGRA) that land acquired after 1988 is suitable for Indian gaming, no state law authorizes the Governor to so act. The Auburn Tribe maintains that such action is a legislative act that must be performed by the Legislature unless delegated to the Governor. The Auburn Tribe argued that the Governor's power to concur with the Secretary's determination that land acquired after 1988 is suitable for gaming, is not necessary to the Governor's authority to negotiate and conclude class III gaming compacts. Therefore, it argued the power to concur cannot be said to be ancillary or incidental to the Governor's legislative authorization to enter into class III gaming compacts with Indian tribes. The court took issue with the Auburn Tribe's underlying premise that the power to concur in the Secretary's determination is clearly a legislative power. Nothing about the Governor's concurrence defeated or materially impaired this function. The

Governor's power to concur has the characteristics of an executive, rather than a legislative act, thus the Governor's power does not depend on legislative delegation. The court concluded that the Governor's concurrence did not violate the separation of powers clause and also concluded that the concurrence is not a project under the California Environmental Quality Act (CEQA) because the Governor is not a public agency. The appellate court affirmed the judgment.

**49. *Seminole Tribe of Fla. v. Florida***

No. 4:15cv516-RH/CAS, 2016 U.S. Dist. LEXIS 155708 (N.D. Fla. Nov. 9, 2016). The Seminole Tribe of Florida operates casinos under a Compact entered into with the State of Florida under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (IGRA). The Compact became effective in 2010 and has a 20-year term. The Compact authorizes the Tribe to conduct banked card games, blackjack, for example, only during the first five years. That period has now ended. But there is an exception to the five-year limitation. The limitation does not apply, the Tribe may continue to conduct banked card games for the entire 20-year term, if “the State permits any other person [except another tribe] to conduct such games.” The Tribe and the State have filed lawsuits against one another that have been consolidated. The cases present two central issues: whether the exception to the five-year limitation has been triggered; and whether the State has breached a duty under IGRA to negotiate in good faith for a modification of the Compact. This order declares that the exception has been triggered—that the Tribe may conduct banked card games for the Compact's 20-year term. The order awards no further relief on the failure-to-negotiate claim.

**50. *Stand Up For Cal.! v. State of Cal.***

No. F069302, 2016 Cal. App. LEXIS 1078 (Cal. Ct. App. Dec. 12, 2016). Plaintiffs Stand Up for California! and Barbara Leach initiated this litigation by filing a complaint challenging the Governor's authority to concur in the decision of the Secretary of the United States Department of the Interior to take land in Madera County into trust for defendant North Fork Rancheria of Mono Indians for the purpose of operating a casino for class III gaming. The Governor's concurrence was a necessary element under federal

law for the granting of permission to North Fork to operate the casino on the land. While the case was pending, the Legislature passed a statute ratifying a compact previously negotiated and executed with North Fork by the Governor. This compact is a device authorized by federal law to allow a state to agree with an Indian tribe on the terms and conditions under which gambling can take place on Indian land within the state. Plaintiffs then initiated Proposition 48, a referendum by which, at the 2014 general election, the voters disapproved the ratification statute. The result *was* that the land remained in trust for North Fork, but the compact was not ratified, so class III gaming on the land was not approved. Subsequently, however, as a product of federal litigation between North Fork and the state, a set of procedures designed to function as an alternative to a state-approved compact was approved by the Secretary of the Interior. Appeals were filed from both judgments of dismissal, but the parties agreed to dismiss North Fork's appeal in the case challenging the referendum, leaving only the concurrence issue. The court held: After a referendum in which the voters defeated the Legislature's ratification under Gov. Code, § 12012.25, and Cal. Const., art. IV, § 19, subd. (f), of a tribal-state compact for gaming on newly acquired tribal land under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.*, the Governor did not have implied power to concur in a federal determination allowing gaming under 25 U.S.C. § 2719(b)(1)(A) because the state was not exercising any express power from which an implied power could be derived. The concurrence power was not inherent in the Governor's authority under Cal. Const., art. V, § 1, absent a state-approved compact. The Governor's authority regarding communication and information under Gov. Code, § 12012, and Cal. Const., art. V, § 4, did not extend to a concurrence. Because the Legislature's ratification was defeated, it provided no authority. Reversed and remanded. The judgment was reversed. The Governor's concurrence is invalid under the facts alleged in this case. Plaintiffs have stated a cause of action for a writ of mandate to set the concurrence aside on the ground that it is unsupported by legal authority.

**51. *Frank's Landing Indian Community v. National Indian Gaming Comm'n***

No. C15-5828BHS, 2017 U.S. Dist. LEXIS 37218 (W.D. Wash. Mar. 15, 2017). Prior History: *Frank's Landing Indian Cmty. v. Nat'l Indian Gaming Comm'n*, 2016 U.S. Dist. LEXIS 108581 (W.D. Wash., Aug. 15, 2016). This matter comes before the Court on the motion for summary judgment of Plaintiff Frank's Landing Indian Community (the Community). Also, before the Court is the cross-motion for summary judgment of the Defendants. The "Community filed its complaint against the National Indian Gaming Commission (the Commission) seeking injunctive and declaratory relief that it qualifies as an Indian tribe under the Indian Gaming Regulatory Act of 1988, 25 U.S.C. 2701 et. seq. (IGRA). The Commission and the Chairman moved to dismiss for lack of jurisdiction and for failure to state a claim. The Court granted the Commission and the Chairman's motion to dismiss, explaining that "the Community's dispute regarding qualification under the IGRA as an 'Indian tribe' is with the Secretary and not with the [Commission] or the Chairman." The Community moved for summary judgment. Defendants responded with their cross-motion for summary judgment. The Community is a self-governing dependent Indian community located along the Nisqually River near Olympia, Washington. In 1987, Congress recognized the members of the Community "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) (the "1987 Frank's Landing Act"). In 1994, Congress amended the law. The Commission 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 Commission 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. Therefore, it is hereby ORDERED that: 1. The Community's motion for summary judgment is DENIED; and 2. Defendants' cross-motion for summary judgment is GRANTED.

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

No. 16-1137, 853 F.3d 618, 2017 WL 1315642 (1st Cir. Apr. 10, 2017). Commonwealth of Massachusetts brought action in a Commonwealth court alleging that federally recognized Indian tribe's efforts to commence commercial gaming operations on tribal trust lands, pursuant to the Indian Gaming Regulatory Act (IGRA), without having obtained a license from the Commonwealth violated Indian Land Claims Settlement Act of 1987 (Massachusetts Settlement Act). Following removal, town and community association intervened and tribe filed counterclaim and third-party claims against Commonwealth and Commonwealth officials. Parties and intervenors moved for summary judgment. The District Court, 144 F. Supp. 3d 152, entered summary judgment for Commonwealth and intervenors. Tribe appealed. The appellate court held that: (1) tribe made necessary threshold showing that it exercised jurisdiction over the Settlement Lands at issue; (2) tribe exercised sufficient governmental power to trigger application of IGRA to Settlement Lands; and (3) IGRA effected partial repeal of Settlement Act. Reversed.

**53. *State of Kansas ex. Rel. Schmidt v. Zinke***

No. 16-3015, 861 F.3d 1024, 2017 WL 2766292 (10th Cir. Jun. 27, 2017). State of Kansas and board of county commissioners brought action against National Indian Gaming Commission (NIGC), arguing that legal opinion letter regarding eligibility of Indian lands for gaming was arbitrary, capricious, and erroneous as a matter of law. The District Court, 2017 WL 2766292, dismissed action. State and county appealed. The appellate court held that: (1) NIGC Acting General Counsel's legal opinion letter was not a reviewable final agency action under Indian Gaming Regulatory Act, and (2) NIGC Acting General Counsel's legal opinion letter did not constitute a reviewable final agency action under Administrative Procedure Act. Affirmed.

**54. *Pueblo of Pojoaque v. New Mexico***

No. 16-2228, 863 F.3d 1226, 2017 WL 3028501 (10th Cir. Jul. 18, 2017). Indian tribe brought action against state of New Mexico, Governor of New Mexico, and members of New Mexico Gaming

Control Board, alleging that New Mexico failed to negotiate new gaming compact in good faith under Indian Gaming Regulatory Act (IGRA) and that state officials conspired to deprive tribe of federal right to be free of state jurisdiction over activities that occurred on tribal lands. The District Court, 2015 WL 10818855, granted Indian tribe's motion for temporary restraining order (TRO) and preliminary injunction barring defendants from taking regulatory enforcement actions against non-Indian, state-licensed gaming manufacturer vendors doing business with Indian tribe's gaming enterprises. While defendants' interlocutory appeal from order granting injunction was pending, the District Court, 214 F. Supp. 3d 1028, entered order staying preliminary injunction and dismissing action, and then denied motion by tribe to vacate district court's order, 221 F. Supp. 3d 1289. Tribe appealed. The appellate court held that: (1) de novo review applied to issue on appeal of whether district court had jurisdiction to proceed to merits given interlocutory appeal of preliminary injunction and, even if it did, of whether it erred in concluding that IGRA did not preempt New Mexico's regulatory enforcement actions; (2) district court could reach merits of action even though preliminary injunction was pending on appeal; (3) traditional preemption analysis that looked to whether federal law expressly or implicitly preempted state law applied to New Mexico's regulatory enforcement actions; (4) IGRA did not expressly preempt New Mexico's regulatory enforcement actions against non-Indian, state-licensed gaming manufacturer vendors doing business with Indian tribe's gaming enterprises; and (5) IGRA did not implicitly preempt New Mexico's off-reservation actions. Affirmed.

**55. *Osceola Blackwood Ivory Gaming Group, LLC v. Picayune Rancheria Of Chukchansi Indians, et al.***

No. 1:17-cv-00394-DAD-BAM, 2017 WL 3190325, (E.D. Cal. Jul. 27, 2017). This matter came before the court for hearing of defendants' motion to dismiss pursuant to Federal Civil Procedure Rule 12(b)(1) for lack of subject matter jurisdiction. On March 16, 2017, plaintiff Osceola Blackwood Ivory Gaming Group, LLC (OBIG), commenced this action against defendants Picayune Rancheria of Chukchansi Indians (Chukansi Tribe) and Chukchansi Economic Development Authority (CEDA) alleging breach of contract and negligent interference with prospective economic

advantage. Plaintiff seeks an award of compensatory damages, restitutionary damages, punitive damages, and attorneys' fees and costs. In the complaint, plaintiff alleges the following. In October 2014, the Casino closed. Defendants subsequently began working to reopen the facility. On July 8, 2015, defendants contracted with plaintiff for "business consulting advice and services" related to the reopening of its casino (the Consulting Contract). The Consulting Contract provided that the agreement would take effect upon execution and would be effective for a term of twenty-four months or until the "facility becomes managed pursuant to a Management Agreement approved by the National Indian Gaming Commission" (NIGC). The contract also provided that defendants "expressly, unequivocally and irrevocably waive their sovereign immunity" for "any legal proceeding with respect to the Consulting Agreement, or any of the transactions contemplated in the Consulting Agreement." The Tribal Council for the Chukchansi Tribe approved the agreement by adopting Resolution No. 2015-31. On the same day the parties entered into the Consulting Contract, the parties also orally agreed to enter into a Management Agreement, and defendants promised to promptly submit the Management Agreement to the NIGC for approval. On July 29, 2015, defendants entered into the Management Agreement with plaintiff, which agreement the Chukchansi Tribal Council approved by adopting Resolution No. 2015-46. The contract stated that it had a term of five years and would take effect five days after the following conditions were met: (i) the Chairman of the NIGC granted written approval of the contract; (ii) the Chukchansi Tribe and NIGC concluded background investigations of plaintiff; and (iii) plaintiff received all applicable licenses and permits for the facility. From July to December 2015, plaintiff provided management and consulting services to defendants. The Casino reopened on December 31, 2015. In April 2016, the parties agreed to amend the Management Agreement to adjust plaintiff's compensation rate and to extend the term of the agreement from five to seven years. Defendants also agreed to submit a revised version of the agreement to the NIGC for approval. To date, defendants have failed to submit either the original Management Agreement or the proposed amended agreement to the NIGC. As a result of defendants' failure to submit either the agreement or the revised agreement to the NIGC for approval, plaintiff has experienced financial loss. On May 10,



2017, defendants filed the instant motion to dismiss plaintiff's complaint in its entirety based on this court's lack of subject matter jurisdiction. The court concludes that the addressing of plaintiff's claims does not require resolution of a substantial question of federal law, and that the court therefore lacks original jurisdiction over any claims asserted in plaintiff's complaint. For the reasons stated above Defendants' motion to dismiss is granted and this action is dismissed.

#### H. *Jurisdiction, Federal*

##### **56. *Alvarez v. Lopez***

No. 12-15788, 2016 U.S. App. LEXIS 16056 (9th Cir. Aug. 30, 2016). Member of Indian tribe filed petition for writ of habeas corpus alleging that his convictions and sentences by tribal court violated Indian Civil Rights Act (ICRA). The U.S. District Court for the District of Arizona, 2012 WL 1038746, denied petition, and petitioner appealed. After affirmance, 773 F.3d 1011, petition for panel rehearing was granted. The appellate court held that: (1) tribe deliberately waived any non-exhaustion defense, and (2) tribe violated petitioner's right to jury trial under Indian Civil Rights Act (ICRA). The court concluded that the inmate's interests in understanding the full contours of his rights under 25 U.S.C.S. § 1302, part of the Indian Civil Rights Act, outweighed any interests of the community. The inmate's right to "fair treatment" included the right to know that he would forfeit his right to a jury unless he affirmatively requested one. Judgment reversed, and case remanded.

##### **57. *Consumer Fin. Prot. Bureau v. Great Plains Lending, LLC***

No. 14-55900, 2017 U.S. App. LEXIS 1028 (9th Cir. Jan. 20, 2017). The panel affirmed the district court's decision compelling Tribal Lending Entities to comply with civil investigative demands issued by the Consumer Financial Protection Bureau. The Tribal entities are for-profit lending companies created by the Chippewa Cree, Tunica Biloxi and Otoe Missouri Tribes (Tribes). The Bureau initiated an investigation into the Tribal Lending Entities to determine whether small-dollar lenders violated federal consumer financial laws. The Tribes directed the Tribal Lending Entities not

to respond to the investigative demands. The panel held that the Consumer Financial Protection Act was a law of general applicability, and it applied to tribal businesses, like the Tribal Lending Entities involved in this appeal. The panel further held that Congress did not expressly exclude Tribes from the Bureau's enforcement authority. The panel also held that none of the three exceptions in *Donovan v. Coeur d'Alene Tribal Farms*, 751 F.2d 1113, 1115 (9th Cir. 1985), to the enforcement of generally applicable laws against Indian tribes applied to this case. The panel concluded that the district court properly held that the Bureau did not plainly lack jurisdiction to issue investigative demands to the tribal corporate entities under the Act. Order affirmed.

#### **58. *Jones v. United States***

No. 15-8629, 2017 U.S. App. LEXIS 1479 (Fed. Cir. Jan. 27, 2017). HOLDINGS: (1) Where decedent was shot during a police pursuit that ended on a Native American reservation, the trial court erred by dismissing the estate's claim for damages against the United States because the court improperly limited the scope of claims cognizable under the bad men provision of the Treaty with the Ute, 15 Stat. 619 (1868); (2) The estate claimed that officers concocted a false story that decedent shot himself, and failed to take custody of decedent's body and to secure it against desecration and spoliation of evidence; (3) The trial court erred in dismissing all the off-reservation actions as not cognizable; (4) Some of the alleged wrongs were a continuation of the conspiracy to cover-up the on-reservation killing; (5) The trial court erred in issue precluding claims, as the culpability of the federal officers for spoliation had never been decided. Vacated and remanded.

#### **59. *Wyoming v. United States EPA***

Nos. 14-9512 and 14-9514, 849 F.3d 861, 2017 U.S. App. LEXIS 3120 (10th Cir. Feb. 22, 2017). This case requires us to determine whether Congress diminished the boundaries of the Wind River Reservation in Wyoming in 1905. The Eastern Shoshone and Northern Arapaho Tribes jointly inhabit the Wind River Reservation. The State of Wyoming and the Wyoming Farm Bureau Federation challenge a decision by the Environmental Protection Agency (EPA) granting the Tribes' application for joint authority to

administer certain non-regulatory programs under the Clean Air Act (CAA) on the Reservation. As part of their application for administrative authority, the Tribes were required to show they possess jurisdiction over the relevant land. In their application, the Tribes described the boundaries of the Wind River Reservation and asserted that most of the land within the original 1868 boundaries fell within their jurisdiction. Wyoming and others submitted comments to the EPA arguing the Reservation had been diminished in 1905 by act of Congress, and that some land described in the application was no longer within tribal jurisdiction. After review, the EPA determined the Reservation had not been diminished in 1905 and the Tribes retained jurisdiction over the land at issue. Because the EPA decided the Tribes otherwise satisfied Clean Air Act program requirements, it granted their application. Wyoming and the Farm Bureau appealed the EPA's Reservation boundary determination. Regionally applicable final actions of the EPA are directly appealable to this court. Exercising jurisdiction under 42 U.S.C. § 7607(b)(1), we grant the petition for review, vacate the EPA's boundary determination, and remand for further proceedings consistent with this opinion. We find by its 1905 legislation, Congress evinced a clear intent to diminish the Reservation.

#### **60. *Tavares v. Whitehouse***

No. 14-15814, 2017 WL 971799, 851 F.3d 863 (9th Cir. Mar. 14, 2017). Petitioners, who were members of Indian tribe and excluded from tribal lands and facilities for allegedly libeling and slandering tribe, sought writ of habeas corpus under Indian Civil Rights Act (ICRA). The District Court, 2014 WL 1155798, dismissed petition. Petitioners appealed. The Appellate Court held that: (1) any disputes about per capita payments from an Indian tribe to a tribal member must be brought in a tribal forum, not through federal habeas proceedings; (2) temporary exclusion from Indian tribal land is not tantamount to a "detention," for purpose of detention requirement of habeas corpus provision of ICRA; and (3) exclusion of petitioners was not a "detention" within meaning of habeas provision of ICRA, as required for district court jurisdiction. Affirmed.

**61. *United States v. Jackson***

No. 15-1789, 2017 WL 1228564 , 853 F.3d 436 (8th Cir. Apr. 4, 2017). After his motion to dismiss the indictment was denied, defendant, an Indian, entered a conditional plea of guilty in the District Court, 2011 WL 7395040, to assault with a dangerous weapon and discharging a firearm during commission of crime of violence. Defendant appealed. The Court of Appeals, 697 F.3d 670, vacated and remanded. On remand, the District Court entered final judgment sentencing defendant to 136 months in prison. Defendant appealed. The Court of Appeals held that evidence supported district court's determination that reservation on which alleged assault occurred was not diminished by 1905 Act. Affirmed.

**62. *Rabang v. Kelly***

No. C17-0088-JCC, 2017 WL 1496415 (W.D. Wash. Apr. 26, 2017). This case arises out of the disenrollment of hundreds of Nooksack tribal members, and the subsequent Department of the Interior (DOI) and Bureau of Indian Affairs (BIA) decisions, also at issue in a related case before this Court. Plaintiffs in this matter are “purportedly disenrolled” members of the Nooksack Indian Tribe. Defendants Kelly, George, Smith, Solomon, Johnson, and Canete are members of the Nooksack Indian Tribal Council that Plaintiffs classify as the “holdover council” as of March 24, 2016. Defendants Dodge, King George, Romero, Edwards, and Armstrong are other actors within Nooksack tribal leadership and agencies. Plaintiffs allege “Defendants' scheme to defraud Plaintiffs and the federal government began with fraudulently preventing elections for over half of the eight” Nooksack Indian Tribal Council seats. The Nooksack Indian Tribal Council carries out tribal governance and consists of eight positions. Five members constitute a quorum for the Council. On October 17, 2016, Lawrence S. Roberts, DOI's Principal Deputy Assistant Secretary of Indian Affairs, issued a decision to the holdover council Defendants stating: “In rare situations where tribal council does not maintain a quorum to take action pursuant to the Tribe's Constitution, the Department of the Interior does not recognize actions taken by the Tribe. This is one of those exceedingly rare situations. Accordingly, I am writing to inform you and the remaining Council members that the [DOI] will only recognize those actions taken by the [Nooksack Indian Tribal]

Council prior to March 24, 2016, when a quorum existed, and will not recognize any other actions taken since that time.” However, also on October 17, 2016, the holdover council Defendants mailed Plaintiffs and over 275 other Tribal members a “Notice of Involuntary Disenrollment.” On November 9, 2016, the holdover council Defendants mailed the disenrolled members a “Legal Notice of Disenrollment” and stated that a disenrollment “meeting date” had been set via teleconference for November 16, 17, or 18, 2016. On November 14, 2016, Principal Deputy Assistant Secretary Roberts issued a second decision to the holdover council Defendants reiterating “until a Council is seated through an election consistent with tribal law . . . , we will not recognize any “referendum election” including the purported results posted on the Tribe's Facebook page on November 4, 2016, claiming to disenroll current tribal citizens. . . .” On February 2, 2017, Plaintiffs filed their amended complaint, alleging violations of the Racketeer Influenced and Corrupt Organizations Act (RICO). Defendants Kelly, George, Smith, Solomon, Johnson, Canete, King George, Romero, Edwards, and Armstrong filed this motion to dismiss for lack of subject matter jurisdiction and failure to state a claim. For the foregoing reasons, Defendants' motion to dismiss is GRANTED in part and DENIED in part. The Court DISMISSES the § 1962(c) money laundering claim and all § 1962(c) claims against Defendant Armstrong. However, these claims are dismissed without prejudice because dismissal with prejudice is “improper unless it is clear, upon de novo review, that the complaint could not be saved by any amendment.” *Krainski v. Nev. ex rel. Bd. of Regents of Nev. Sys. of Higher Educ.*, 616 F.3d 963, 972 (9th Cir. 2010).

### **63. *Denise Lightning Fire v. United States***

No. 3 15-CV-03015-RAL, 2017 U.S. Dist. LEXIS 72316 (D.S.D. May 9, 2017). Plaintiffs Denise Lightning Fire and Wakiyan Peta are the legal guardians of SC, a minor child. The Plaintiffs sued the United States under the Federal Tort Claims Act (FTCA), 28 U S C §§ 1346(b), 2671-2680, alleging that the negligence of a federal employee caused SC to be burned by hot oil while cooking frybread at the Cheyenne-Eagle Butte School. The United States filed a motion to dismiss for lack of jurisdiction under Rule 12(h)(3), or in the alternative, a motion for summary judgment under Rule 56(c) of the Federal Rules of Civil Procedure. SC was a student attending the

Cheyenne-Eagle Butte School on the Cheyenne River Indian Reservation and participating in her home economics class, learning how to make stuffed frybread. As SC was putting her piece of frybread into the hot oil, water on the fork contacted the hot oil and caused the oil to spatter onto her hand, wrist, neck and face. After SC screamed in pain, her teacher, Peggy Henson, began running cold water over the burns and notified the school office. SC was taken to the Eagle Butte Indian Health Services facility for treatment. Plaintiffs presented an administrative claim for SC's injuries, pain and suffering, and emotional distress to the Bureau of Indian Affairs (BIA) and to the Bureau of Indian Education (BIE). Plaintiffs' administrative claim was denied. In September 2015, Plaintiffs filed this claim under the FTCA, requesting damages for SC's physical pain, loss of enjoyment of life, mental and emotional suffering, past and future medical expenses, prejudgment interests, costs and attorney's fees. The United States answered the Complaint, denying that SC's teacher, Henson, was a federal employee. The United States then filed a motion to dismiss or alternatively a motion for summary judgment. The motion to dismiss argued that Henson was not a federal employee for purposes of the FTCA, so this Court did not have subject matter jurisdiction over the Plaintiffs' complaint. The motion for summary judgment argued in the alternative that if this Court found Henson to be a federal employee, her conduct was protected under the discretionary function exception to the FTCA. The court granted Defendant's Motion to Dismiss.

#### **64. *United States v. Antonio***

No. CR 16-1106 JB, 2017 U.S. Dist. LEXIS 85436 (D.N.M. June 5, 2017). This matter comes before the Court on the Defendant's Motion to Dismiss for Lack of federal subject matter jurisdiction, filed April 10, 2017 (Motion). The primary issue is whether the Court has jurisdiction over this matter under the Indian Pueblo Land Act Amendments of 2005, Pub. L. No. 109-133, 119 Stat. 2573 (Dec. 20, 2005), codified at 25 U.S.C. § 331 Note, because the automobile collision giving rise to Plaintiff United States of America's criminal prosecution against Defendant Jeffrey Antonio, which occurred on private land, nonetheless occurred within the exterior boundaries of the 1748 Spanish land grant to the Sandia Pueblo, which Congress confirmed in the Act of December 22,

1858, 11 Stat. 374, 374 (1859). The Court concludes: (i) the automobile collision giving rise to this criminal cause of action occurred within the exterior boundaries of the 1748 Spanish land grant; and, consequently, (ii) under 25 U.S.C. § 33m the Court has jurisdiction over this matter. Accordingly, the Court denies Antonio's Motion.

### **65. *In re Roberts Litigation***

No. 15-35404, 693 Fed. Appx. 630, 2017 WL 2928130 (9th Cir. Jul. 10, 2017). Sherri Roberts, a non-Indian, was arrested twice pursuant to bench warrants issued by the Northern Cheyenne Tribal Court. She brought a *Bivens* action against three Bureau of Indian Affairs law enforcement officers (BIA Officers), alleging that both arrests violated her Fourth and Fifth Amendment rights. She also brought a Federal Tort Claims Act (FTCA) claim against the United States for the second arrest, alleging false arrest, false imprisonment, and negligent infliction of emotional distress. The district court granted summary judgment against Roberts on all claims. The district court correctly granted summary judgment against Roberts on the Fourth and Fifth Amendment claims on the ground that the BIA Officers had qualified immunity. Because the BIA Officers did not violate clearly established constitutional law when they arrested Roberts pursuant to a facially valid warrant issued by the tribal court, they are entitled to qualified immunity. The officers' good faith reliance on the facially valid warrant was not unreasonable. The district court correctly granted summary judgment against Roberts on the FTCA claims alleging false arrest, false imprisonment, and negligent infliction of emotional distress because Roberts's second arrest was made pursuant to facially valid warrant. The bench warrant was issued pursuant to the tribal judge's correct determination that Roberts failed to appear at a status conference, which established probable cause to arrest her. Thus, the lawful arrest is a "complete defense" to Roberts's false arrest or imprisonment claims. The BIA Officer did not engage in a "negligent act or omission." Affirmed.

**66. *United States ex rel. Cain v. Salish Kootenai College, Inc.***

No. 15-35001, 2017 WL 2924090 (9th Cir. Jul. 10, 2017). Former employees filed qui tam action under False Claims Act (FCA) alleging that college located on Indian reservation, college foundation, and college's board members knowingly provided false progress reports on students in order to keep grant monies coming from Department of Health and Human Services ad Indian Health Service. The United States District Court for the District of Montana, No. 9:12-cv-00181, dismissed complaint, and employees appealed. The appellate court held that: (1) Indian tribe was not "person" subject to suit under FCA, and (2) issue of whether college was arm of tribe was matter to be addressed in first instance by district court following jurisdictional discovery. Reversed and remanded.

**67. *Dennis Ruchert v. John Pete Williamson; Nez Perce Tribal Police; and Nez Perce Tribe***

No. 3:16-cv-00413-BLW, 2017 WL 3120267 (D. Idaho Jul. 21, 2017). Pending before the Court is Defendants' Motion to Dismiss for Lack of Jurisdiction. This negligence action arises from a motor vehicle collision on March 27, 2014, involving Plaintiffs Dennis Ruchert and Cheryl Ruchert and Defendant John Pete Williamson, an employee of the Nez Perce Tribal Police Department. On March 8, 2016, Plaintiffs filed suit in state court, alleging that the collision was caused by Williamson's negligence and seeking damages for personal injuries and property damage. Defendants had the action removed to this Court on September 14, 2016. Soon thereafter, the United States filed the present Motion to Dismiss for lack of subject matter jurisdiction. The United States Attorney for the District of Idaho, on behalf of the Attorney General, filed a certification pursuant to 28 U.S.C. § 2679(d)(1) stating that Williamson was acting within the scope of his employment with the Nez Perce Tribal Police Department at the time of the accident. The certification also attests that Defendants Williamson, Nez Perce Tribal Police, and Nez Perce Tribe were performing authorized functions under the tribe's funding contract with the Bureau of Indian Affairs pursuant to the Indian Self Determination and Education Assistance Act (ISDEAA). Accordingly, the United States argues that it must be



substituted as the sole named defendant in this action and that Plaintiffs' exclusive remedy lies under the Federal Tort Claims Act (FTCA). Because Plaintiffs failed to file an administrative tort claim with Williamson's employing agency prior to filing suit, as required by the FTCA, the United States argues that this court lacks subject matter jurisdiction to hear their claims. The Court granted Defendants' Motion to Dismiss and the matter was dismissed without prejudice.

#### **68. *Murphy v. Royal***

Nos. 07-7068 & 15-7041, 866 F.3d 1164, 2017 WL 3389877 (10th Cir. Aug. 8, 2017), Opinion Amended and Superseded on Denial of Rehearing en banc by *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017). After Oklahoma state prisoner's conviction for first-degree murder and death sentence were affirmed on appeal, 47 P.3d 876, he filed petition for writ of habeas corpus. The District Court for the Eastern District of Oklahoma, 497 F. Supp. 2d 1257, denied prisoner's petition. Prisoner appealed. The appellate court held that: (1) prisoner's claim was governed by clearly established federal law; (2) Oklahoma state appellate court rendered merits decision on prisoner's claim that state court lacked jurisdiction because crime occurred on Indian land; (3) Oklahoma state appellate court's decision was contrary to clearly established federal law; and (4) Congress did not disestablish Indian reservation, and thus Oklahoma state court lacked jurisdiction to prosecute defendant for murder that occurred on reservation. Reversed and remanded.

#### **69. *United States v. Bearcomesout***

No. 16-30276, 2017 WL 3530904 (9th Cir. Aug. 17, 2017). Tawnya Bearcomesout appeals from the district court's denial of her motion to dismiss the indictment and challenges her guilty-plea conviction for involuntary manslaughter, in violation of 18 U.S.C. §§ 1153(a) and 1112(a). Bearcomesout argues that the Double Jeopardy Clause barred her successive homicide prosecutions by the Northern Cheyenne Tribe and the United States government because the two entities are not separate sovereigns. This argument is foreclosed. *See Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1870-72 (2016) (successive prosecutions for the same offense are not barred by the Double Jeopardy Clause if brought by separate sovereigns, and

Indian Tribes “count as separate sovereigns under the Double Jeopardy Clause”). Furthermore, Bearcomesout has not shown impermissible collusion between the United States government and the Northern Cheyenne Tribe such that an exception applies under *Bartkus v. Illinois*, 359 U.S. 121 (1959). See *United States v. Lucas*, 841 F.3d 796, 803 (9th Cir. 2016) (impermissible collusion occurs where “the prosecutors of one sovereign so thoroughly dominate or manipulate the prosecutorial machinery of the other sovereign that the latter retains little or no volition in its own proceedings” (internal quotations omitted)). AFFIRMED.

I. *Religious Freedom*

**70. *Begnoche v. D.L. Derose***

No. 16-3723, 676 Fed. Appx. 117, 2017 WL 378741 (3rd Cir. Jan. 12, 2017). State prisoner brought § 1983 action against various prison officials, alleging that officials prevented him from exercising his Native American religious beliefs, that prisoners of non-Christian faiths were provided disparate treatment, that prison staff tampered with his legal correspondence, and that prison grievance system was inadequate. The District Court of the Middle District of Pennsylvania, 2016 WL 4611545, granted in part officials’ motion to dismiss, granted in part prisoner’s motion for reconsideration, and granted officials’ motions for summary judgment. Prisoner appealed. The Court of Appeals held that: (1) officials did not deprive prisoner of his First Amendment right to practice his religion, and (2) officials did not interfere with prisoner’s exercise of his Native American religious beliefs or violate the Establishment Clause. Affirmed.

J. *Sovereign Immunity*

**71. *Meyers v. Oneida Tribe of Indians of Wis.***

No. 15-3127, 2016 U.S. App. LEXIS 16515 (7th Cir. Sep. 8, 2016). When Congress enacted the Fair and Accurate Credit Transaction Act (FACTA) in 2003, it included within the Act a provision to reduce the amount of potentially misappropriable information produced in credit and debit card receipts. The Act prohibits merchants from printing on the receipt the credit card expiration date and more than the last five digits of the credit or debit card number.

The plaintiff in this case, Jeremy Meyers, used his credit card to make purchases at two stores owned by the defendant, the Oneida Tribe of Indians of Wisconsin, and received an electronically-printed receipt at each store that included more than the last five digits of his credit card as well as the card's expiration date. Meyers brought a putative class action in the Eastern District of Wisconsin for violations of FACTA, but the district court determined that the defendant, an Indian Tribe, was immune from suit under the Act. Meyers appealed and the appellate court affirmed, holding: (1) Since the Indian Tribe had sovereign immunity, plaintiff could not obtain relief from the Tribe through his suit; (2) Congress simply had not unequivocally abrogated the sovereign immunity of Indian Tribes under the FACTA provision at issue in the case; (3) Contrary to plaintiff's assertion, the district court did not dismiss his claim because it concluded that Indian Tribes were not governments; (4) It dismissed his claim because it could not find a clear, unequivocal statement in FACTA that Congress meant to abrogate the sovereign immunity of Indian Tribes; (5) The question here was not whether the Tribe was subject to the Fair Credit Reporting Act (FCRA), it was whether plaintiff could sue the Tribe for violating the FCRA. Dismissal affirmed.

**72. *Buchwald Capital Advisors, LLC v. Papas (In re Greektown Holdings, LLC)***

Nos. 08-53104, 10-05712, 2016 Bankr. LEXIS 3605 (U.S. Bankr. E.D. Mich. Sep. 29, 2016). The Litigation Trustee (Plaintiff) by this adversary proceeding essentially seeks to avoid aspects of a restructuring and financing transaction whereby Greektown Holdings, LLC, a Debtor, directly or indirectly transferred money to multiple parties, including the Sault Ste. Marie Tribe of Chippewa Indians and its political subdivision Kewadin Casinos Gaming Authority (together, the Tribe Defendants). Plaintiff brought this fraudulent transfer action under 11 U.S.C. §§ 544 and 550, incorporating Mich. Comp. Laws §§ 566.34 and 566.35. This Opinion follows the District Court's Opinion, *In re Greektown Holdings, LLC*, 532 B.R. 680 (E.D. Mich. 2015) reversing this Court's Opinion at 516 B.R. 462 (Bankr. E.D. Mich. 2014). This Court had concluded that 11 U.S.C. § 106(a) abrogated the Tribe Defendants' sovereign immunity, but the District Court (a) reversed on appeal finding that the statute does not thereby waive tribal

sovereign immunity; and (b) remanded the case for further proceedings relative to whether or not the Tribe Defendants had waived sovereign immunity. This Opinion deals with what constitutes a “clear waiver by the tribe.” The Tribe Defendants’ initial argument is that the indicated clear waiver may only be accomplished by the required passage of duly adopted resolutions by the boards governing each of the Tribe Defendants. It is undisputed that no such resolutions were ever adopted. Further, it is also an undisputed fact that the Tribe Defendants never entered into any contract containing provisions purporting to waive sovereign immunity. Plaintiff responds arguing that, notwithstanding the lack of enacted resolutions, the Tribe Defendants can and should be seen as having waived their sovereign immunity by virtue of their conduct in, or incident to, these bankruptcy and related proceedings, as well as the involved underlying business transactions. Specifically that alleged conduct involves the Tribe Defendants having pervasive involvement in the events leading up to and after the Debtors’ bankruptcy filings, including the Tribe Defendants doing the following: (a) intermingling the functions of the various tribal and non-tribal parties in carrying out the Debtors’ business; (b) utilizing the Debtors as their agents and causing the Debtors to make the alleged fraudulent transfers; (c) directing the Debtors to initiate their bankruptcy petitions; (d) dominating and controlling the Debtors, directing their post-petition litigation strategy, and sharing the same professionals; and (e) filing in the bankruptcy cases multiple proofs of claim, objections to plan confirmation, and an application for allowance of administrative expense claim. Based on these facts and events, Plaintiff argues that (1) the Tribe Defendants should be considered as legally standing in the shoes of the Debtors as their equivalents via theories of alter ego, piercing the corporate veil, and/or agency; and (2) by reason of such, the Tribe Defendants thusly should be seen as having voluntarily waived their sovereign immunity. The questions presented thus are: (a) is appropriate and specific governing board action the only way the Tribe Defendants can waive their sovereign immunity; and (b) if not, and if waiver can be accomplished by conduct, was there such a waiver in the circumstances of this case? The court held that: (1) An Indian tribe did not waive tribal sovereign immunity in a bankruptcy trustee’s action alleging that the tribe was the recipient of fraudulent transfers from bankruptcy debtors, since the tribe’s

assertion of claims in the bankruptcy cases did not constitute the required express, unequivocal, unmistakable, and unambiguous waiver of immunity; and (2) Even if the trustee could prove that the tribe effectively filed the bankruptcy petitions on behalf of the debtors under theories of alter ego, piercing the corporate veil, and/or agency, such asserted waiver of tribal sovereign immunity by implication was legally insufficient to meet the high standard of an express waiver of immunity. Motion to dismiss granted.

### **73. *Crawford v. Couture***

No. DA 16-0282, 2016 Mont. LEXIS 976, 2016 MT 291 (Mont. Nov. 15, 2016). Robert Crawford appeals from an April 20, 2016, District Court order granting a motion to dismiss Crawford's claims against Flathead Tribal Police Officer Casey Couture (Couture), the Flathead Tribal Police Department, and the Confederated Salish Kootenai Tribal Government. The issue on appeal was whether the District Court erred when it dismissed Crawford's claims for lack of subject matter jurisdiction. On March 13, 2012, Crawford was pulled over by Couture on the Flathead Reservation. Couture identified each person in the vehicle, arrested one, letting Crawford and the others leave. Couture was then in contact with Crawford's parole officer, who informed Couture that Crawford was in violation of his parole because he did not have permission to be traveling in that area. On March 17, 2012, Lake County Deputy Sheriff Levi Read (Read) arrested Crawford on the Flathead Reservation upon a warrant issued by Butte-Silver Bow County Probation for parole violations. The State charged Crawford with criminal possession of dangerous drugs. A jury found him guilty. Crawford appealed his conviction and we affirmed in *State v. Robert Lee Crawford*, 2016 MT 96, 383 Mont. 229, 371 P.3d 381. During his appeal, Crawford filed the instant complaint in state court seeking recovery from the named defendants. Crawford alleged numerous claims including libel, slander, false imprisonment, and injuries involving property due to inappropriate conduct by Couture. The Tribes, on behalf of the Tribes, Couture, and the Police Department filed a motion to dismiss the complaint or in the alternative for summary judgment. The District Court granted the Tribes' motion to dismiss based on lack of subject matter jurisdiction and the sovereign immunity of the Tribe. Crawford appealed. The appellate court found that the (1)

district court properly dismissed Crawford's claims based on lack of subject matter jurisdiction and sovereign immunity. Affirmed.

**74. *Clema v. Colombe***

No. 16-2004, 676 Fed. Appx. 801, 2017 WL 360486 (10th Cir. Jan. 25, 2017). Suspect brought § 1983 action against tribal police officer and county, alleging that his arrest was unlawful. The United States District Court for the District of New Mexico granted summary judgment for defendants. Suspect appealed. The Court of Appeals held that: (1) officer was public employee entitled to immunity under New Mexico Tort Claims Act (NMTCA); (2) officer had probable cause to arrest suspect; and (3) an arrest supported by probable cause cannot be the basis for a claim of false imprisonment or malicious prosecution. Affirmed.

**75. *Lundgren v. Upper Skagit Indian Tribe***

No. 91622-5, 2017 Wash. LEXIS 219 (Wash. Feb. 16, 2017). Sharline and Ray Lundgren and the Upper Skagit Indian Tribe own adjacent properties in Skagit County, Washington. A barbed wire fence runs along the southern portion of the Tribe's land. The fence spans the width of the Tribe's lot, with a gate approximately halfway along the fence line. The land between the fence and the southern boundary of the Tribe's lot is the land at issue in this case. The Lundgrens bought the 10 acres of land immediately south of the disputed property in 1981. The property had been in their extended family since 1947. The Lundgrens established that the fence on the disputed property has been in the same location since at least 1947, and that for as long as their property has been in the family, they have treated the fence as the boundary line. Since 1947, the Lundgren family exclusively has harvested timber, cleared brush, kept the fence clear of fallen trees, and treated the disputed property on the southern side of the fence as their own. In September 2014, the Tribe notified the Lundgrens in a letter that the fence did not represent the boundary and that they were asserting ownership rights to the entire property deeded to them in 2013. The Lundgrens asked the court to quiet title in the disputed property to them and sought injunctive relief. The Lundgrens moved for summary judgment, arguing they acquired title to the disputed property by adverse possession or by mutual recognition and acquiescence long before

the Tribe bought the land. The Tribe moved to dismiss under CR 12(b)(1) for a lack of subject matter jurisdiction based on the Tribe's sovereign immunity and under CR 12(b)(7), which requires joinder of a necessary and indispensable party under CR 19. HOLDINGS: (1) Action to quiet title to property on a theory of adverse possession was not barred by the court's inability to assert personal jurisdiction over the Indian tribe due to sovereign immunity because the action was a proceeding in rem and, following a merit-based determination under Wash. Super. Ct. Civ. R. 19, it could not be said that the Indian tribe had an interest that would be adversely affected in the litigation; (2) When no interest is found to exist, especially in an in rem proceeding, nonjoinder presents no jurisdictional barriers; (3) Because the Indian tribe did not have an interest in the disputed property, the tribe's sovereign immunity was no barrier to the in rem proceeding. The trial court's denial of the Indian tribe's motion to dismiss and its grant of summary judgment to the plaintiffs were affirmed by the reviewing court.

**76. *Pacheco v. Salt River Pima-Maricopa Indian Cmty.***

No. CV-16-01947-PHX-GMS, 2017 U.S. Dist. LEXIS 23352 (D. Ariz. Feb. 16, 2017). Pending before the Court is Defendant Salt River Pima-Maricopa Indian Community's Motion to Dismiss. Robert Pacheco is a former police officer for Salt River Pima-Maricopa Indian Community. The Salt River Pima-Maricopa Indian Community (the Community) is a sovereign Native American Indian Tribe. In 2014, Mr. Pacheco suffered from a chronic medical condition that required him to be absent from work for an extended period of time. He alleges that he initially filed for and received forms for approved leave under the Family and Medical Leave Act (FMLA), and that the Community improperly revoked his leave and discharged him. Soon after the Complaint was filed, the Community moved to dismiss under Rule 12(b)(1). Both parties concede that the Community is a federally recognized Native American Indian Tribe, and it is therefore entitled to the presumption of tribal sovereign immunity. However, Plaintiff asserts that tribal sovereign immunity should not apply in this case because it was effectively waived by the Community's alleged adoption of FMLA standards for its continuous leave policy. Even assuming that the Community has adopted the FMLA standards, this argument fails. Without any explicit reference to "court enforcement, suing or being sued, or any

other phrase clearly contemplating suits against” the tribe, the tribe’s adoption of FMLA policies do “not amount to an unequivocal waiver” of sovereign immunity. Therefore, the Community did not waive its tribal sovereign immunity by adopting FMLA policies and standards. IT IS THEREFORE ORDERED that the Community’s Motion to Dismiss is granted.

**77. *Bruguier v. Lac du Flambeau Band of Lake Superior Chippewa Indians***

Nos. 16-cv-604-jdp, 16-cv-605-jdp, 2017 WL 684230 (W.D. Wis. Feb. 21. 2017). Plaintiffs Jeaninne Bruguier and Joni Theobald asserted claims under Title VII and state law, alleging that defendants wrongfully terminated their employment and otherwise violated their rights because of plaintiffs’ political activities. Defendants Lac du Flambeau Band of Lake Superior Chippewa Indians, L.D.F. Business Development Corporation, and Henry St. Germaine jointly moved to dismiss these actions on several threshold issues. The court will dismiss all Title VII claims under Federal Rule of Civil Procedure 12(b)(6) for plaintiffs’ failure to state a claim. Tribal sovereign immunity precludes their claims, and an Indian tribe is not an employer under Title VII. The court will decline to exercise supplemental jurisdiction over the state-law claims and dismiss both cases. IT IS ORDERED that: (1) Defendants Lac du Flambeau Band of Lake Superior Chippewa Indians, Henry St. Germaine, and L.D.F. Business Development Corporation’s motion to dismiss is GRANTED; (2) These cases are DISMISSED.

**78. *Harper v. White Earth Human Resource***

No. 16–1797 (JRT/LIB), 2017 WL 701354 (D. Minn. Feb. 22, 2017). MEMORANDUM OPINION AND ORDER ADOPTING REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE. Plaintiff Leigh Harper brings this action *pro se* against Defendants White Earth Human Resource, White Earth Boys and Girls Club, and White Earth Education Department (collectively Defendants). Harper alleges that she worked at the White Earth Boys and Girls Club and that she was fired “to prevent her grievances and complaints from being acted on.” Harper alleges various statutory and constitutional claims, including violations of



the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Rehabilitation Act, the Americans with Disabilities Act, Minn. Stat. § 181.961, the Fifth and Fourteenth Amendment to the U.S. Constitution, the Indian Civil Rights Act, and the Revised Constitution of the Minnesota Chippewa Tribe. On June 17, 2016, Defendants filed a motion to dismiss for lack of subject matter jurisdiction. An agency is entitled to sovereign immunity if it “served as an arm of the sovereign tribes, acting as more than a mere business.” *Hagen*, 205 F.3d at 1043. Sovereign immunity covers the actions of tribal governments and tribal agencies unless it has been unequivocally waived or abrogated by Congress. The supporting documents that Harper submitted indicate that White Earth Tribe was her employer. Despite these concessions, Harper argues that because the alleged actions were not carried out by members of the White Earth government acting within the scope of their authority, the actions are not protected by sovereign immunity. However, contrary to Harper’s assertion, tribes or tribal officials need not explicitly invoke sovereign immunity; instead, courts assume that the tribe is immune unless Congress has expressly abrogated that protection, or the tribe has expressly waived its immunity. Thus, the tribal entities sued here are entitled to sovereign immunity, and Harper’s lawsuit is barred absent abrogation or waiver. Harper’s claims are DISMISSED with prejudice.

**79. *In re Money Center of America, Inc.***

Case No. 14–10603 Jointly Administered, Adv. Proc. Case No. 14–50437, Adv. Proc. Case No. 16–50410, 2017 WL 775780, 565 B.R. 87 (D. Del. Feb. 28, 2017). Chapter 11 trustee brought adversary proceeding to recover allegedly preferential transfers made to tribal entity the operated casino for benefit of Indian tribe. In separate proceeding, another tribal entity brought adversary proceeding for determination that sums owed to it under its financial services agreement with debtor were not included in property of the estate, and trustee counterclaimed for recovery of prepetition preferential transfers. Tribal entities moved to dismiss trustee’s complaint or counterclaims based on their alleged tribal sovereign immunity. The Bankruptcy Court held that: (1) entities which operated casinos for benefit of Indian tribes had sufficiently close relationship to tribes to share in tribes’ sovereign immunity; (2) Congress did not unequivocally express its intent to abrogate

sovereign immunity of Indian tribes, such that Indian tribes, or closely-affiliated entities that operated casinos on tribes' behalf, could not be object of preference avoidance proceedings absent a waiver of their tribal sovereign immunity; (3) waiver issue could not be determined on motion to dismiss; (4) bankruptcy statute that barred creditor that was recipient of avoidable transfer from recovering on its claim until transfer was repaid was not operative as to tribal entity; and (5) tribes and tribal entities were not "governmental units," under statute providing that "governmental unit" that had filed a proof of claim was deemed to have waived its sovereign immunity with respect to a claim against that governmental unit which was property of the estate, and which arose out of the same transaction or occurrence. Motion granted in part and denied in part.

**80. *Federated Indians of Graton Rancheria v. Kenwood Investments No. 2, LLC***

A147281, 2017 WL 895800 (Cal. Ct. App. Mar. 7. 2017). Federated Indians of Graton Rancheria (the Tribe) entered into an agreement with Kenwood Investments No. 2, LLC (Kenwood), whereby Kenwood would provide consulting services concerning the development of a casino on a particular site. In connection with this agreement, the Tribe approved a resolution waiving its sovereign immunity from suit by Kenwood. The parties subsequently amended the agreement to allow for the development of another site. Litigation ensued when the Tribe allegedly failed to make required payments to Kenwood, and the Tribe claimed its waiver of sovereign immunity did not apply because of the amendment to the contract. The trial court disagreed and entered judgment for Kenwood and also awarded Kenwood attorney fees pursuant to an indemnity clause in the agreement. We affirm the trial court's findings regarding sovereign immunity but reverse the award of attorney fees.

### **81. *Union Pacific Railroad Company v. Runyon***

No. 3:17-cv-00038-AA, 2017 WL 923915, 320 F.R.D. 245 (D. Ore. Mar. 8, 2017). Railroad brought action against members of county board of commissioners and Columbia River Gorge Commission seeking declaration that Interstate Commerce Commission Termination Act (ICCTA) preempted permitting process imposed by county ordinance and that application of county ordinance to prohibit railroad's project to build new track violated commerce clause. Environmental organizations intervened as defendants. Indian tribes moved to dismiss with prejudice for failure to join tribes as required party. The District Court held that: (1) tribes were necessary party; (2) tribes' interest in their treaty-reserved fishing rights related to subject matter of railroad's action, as required to be necessary party; (3) tribes' interest in their treaty-reserved fishing rights would not be adequately represented by defendants, as required to be necessary party; (4) joinder of tribes was not feasible; (5) tribes were indispensable party, warranting dismissal with prejudice; and (6) public rights exception did not apply to preclude dismissal. Motion granted.

### **82. *Dahlstrom v. Sauk-Suiattle Indian Tribe***

No. C16-0052JLR, 2017 U.S. Dist. LEXIS 40654 (W.D. Wash. Mar. 21, 2017). Before the court is Defendants Sauk-Suiattle Indian Tribe of Washington (the Sauk-Suiattle or the Tribe), Community Natural Medicine, PLLC (CNM), Christine Morlock, Robert Morlock, and Ronda Metcalf's (collectively Defendants) motion to dismiss Plaintiff Raju Dahlstrom's claims against them. On January 12, 2016, Mr. Dahlstrom filed a complaint under seal pursuant to the *qui tam* provisions of the False Claims Act (FCA), 31 U.S.C. §§ 3729-33, and the Washington State Medical Fraud and False Claims Act (MFFCA), RCW 74.66.005 *et seq.* The Sauk-Suiattle is a federally recognized Native American tribe in Darrington, Washington. CNM is a health clinic in Arlington, Washington, owned by Dr. Morlock and Mr. Morlock. The complaint also lists Dr. Morlock, Mr. Morlock, and Ms. Metcalf (collectively, Individual Defendants), who is the Director of the Indian Health Service (IHS) and the Health Clinic of the Sauk-Suiattle, as defendants. The Sauk-Suiattle employed Mr. Dahlstrom from 2010 through his termination on December 8, 2015. The Tribe initially

hired Mr. Dahlstrom as a Case Manager, but in April 2015, the Tribe promoted him to Director. Mr. Dahlstrom alleges that Defendants knowingly presented or caused to be presented false or fraudulent claims to the United States — and by extension, the State of Washington. The Sauk-Suiattle tribe is a federally recognized Native American tribe. The Tribe is thus immune from Mr. Dahlstrom’s *qui tam* FCA claims. Because the Sauk-Suiattle has sovereign immunity with respect to Mr. Dahlstrom’s *qui tam* suit, whether CNM is also immune depends on whether it “functions as an arm of the tribe.” The court concludes that Defendants have not met their burden of establishing that CNM is an arm of the tribe. The court therefore denies Defendants’ motion to dismiss CNM on the basis of sovereign immunity. Mr. Dahlstrom is suing Individual Defendants in their individual capacities. Defendants argue that Individual Defendants “were tribal employees or agents or officials acting in their official tribal capacity.” Defendants argue that the Tribe’s sovereign immunity, therefore, extends to Individual Defendants. The court concludes that Individual Defendants are not immune from suit due to sovereign immunity. Being fully advised, the court GRANTS Defendants’ motion to dismiss with respect to Mr. Dahlstrom’s claims against the Sauk-Suiattle but DENIES the motion with respect to Mr. Dahlstrom’s claims against CNM, Dr. Morlock, Mr. Morlock, and Ms. Metcalf.

**83. *Lesperance v. Sault Ste. Marie Tribe of Chippewa Indians***

No. 2:16-cv-232, 2017 WL 1505329 (W.D. Mich. Apr. 27, 2017). Plaintiff fell and hurt herself in a tribal store. She sued the Tribe in tribal court and lost because the tribal court found that Plaintiff failed to comply with the procedural requirements embedded in the Tribal ordinance waiving sovereign immunity for injuries in public buildings. Plaintiff then filed this federal action to overturn the decision of the tribal court system. The Court has sympathy for Plaintiff’s position on the particulars of this record, but the Court has no jurisdiction to overturn the Tribe’s application of its own sovereign immunity ordinance in its own tribal courts. Accordingly, this matter is **DISMISSED** for lack of subject matter jurisdiction. The Court takes no position on the merits of the Tribe’s interpretation and application of its own ordinance.

**84. *Pub. Serv. Co. of N.M. v. Barboan***

No. 16-2050, 2017 U.S. App. LEXIS 9204 (10th Cir. May 26, 2017). HOLDINGS: (1) A public utility company was precluded from condemning Indian tribal land for an easement for an electrical transmission line since the statutory authority to condemn lands previously allotted to individual Indians did not extend to tribal lands which the United States held in trust for the tribe even if the tribe reacquired the lands long after allotment; (2) Tribal lands which were not subject to condemnation included lands in which the tribe held any fractional interest since, when all or part of a parcel of allotted land owned by one or more individual Indians was transferred to the United States in trust for the tribe, that land became tribal land not subject to condemnation. Order affirmed.

**85. *Frank Ireson v. Avi Casino Enterprises, Inc.***

No. 2:17-CV-987 JCM (VCF), 2017 WL 2960526 (D. Nev. Jul 10, 2017). Presently before the court is defendant AVI Casino Enterprises, Inc., doing business as AVI Resort & Casino's (AVI) motion to dismiss for lack of jurisdiction. The instant action concerns a slip-and-fall incident in a Fort Mojave Tribe casino. On April 8, 2015, AVI's property was undergoing renovations. As a result of those renovations, and AVI's alleged negligence, Ireson tripped on a piece of metal about two to three inches long sticking out of the floor. As a result of fall, Ireson slammed against the concrete floor, allegedly sustaining "significant and substantial injuries upon his person requiring immediate medical care." Ireson required an ambulance to take him to the hospital. On June 29, 2015, Ireson's counsel sent a letter advising AVI of Ireson's claim, to which there was no reply. On December 16, 2016, a demand for settlement was sent to AVI, at which time Ireson received a response asserting he failed to comply with the Fort Mojave Indian Tribal Tort Claims Ordinance. The instant action for negligence was filed on April 6, 2017. In the instant motion, AVI asserts sovereign immunity and moves to dismiss pursuant to Rule 12(b)(1). AVI argues in its motion to dismiss that the casino "functions as an arm of the tribe and is protected by tribal sovereign immunity." Here, AVI is a tribal corporation. AVI is a tribal corporation formed under tribal law, is wholly-owned and operated by the Fort Mojave Tribe, is governed by the tribal council, operates on tribal land, and its

revenue is deposited into the tribal treasury. Ireson contends in his response to AVI's motion to dismiss that AVI's "sovereign immunity is not absolute under these facts" and that AVI has implicitly waived its sovereign immunity. To support his argument, Ireson relies on the "sue and be sued" clause in the tribal enabling ordinance. The court disagrees as "the cited ordinance was repealed and replaced." The existence of a tribal procedure for the provision of tort remedies is, itself, evidence that the tribe has not waived sovereign immunity. Moreover, Ireson provides no legal basis for the argument that failure to give notice of those tort remedies is grounds for waiver of sovereign immunity. In light of the foregoing, AVI's motion to dismiss will be granted. Ireson's complaint will be dismissed without prejudice.

**86. *Miccosukee Tribe of Indians of Florida v. Lewis Tein, P.L.***

No. 3D16-2826, 227 So. 3d 656, 2017 Fla. App. LEXIS 11442 (D. Fla. Aug. 9, 2017). HOLDINGS: (1) A suit by an Indian Tribe's former lawyers against the Tribe alleging civil remedies for criminal practices, § 772.103(3), Fla. Stat., and four counts of malicious prosecution, was barred by the Tribe's sovereign immunity; (2) Although the Tribe had waived its immunity in a prior lawsuit for the limited purpose of allowing questioning of a Tribe attorney about documents he had produced, and had waived its immunity in three prior suits against the attorneys, these waivers did not extend to the lawyers' suit; (3) The immunity waivers in the prior four cases did not extend to subsequent litigation, even though the subsequent case was related and arose out of the same facts; where the prior litigation ended and the new case began was the point that the waiver was unclear and not explicit. Trial court's order reversed, and case remanded for the trial court to grant the Tribe's motion to dismiss.

**87. *Stillaguamish Tribe of Indians v. Washington***

No. 3:16-cv-05566-RJB, 2017 WL 3424942 (W.D. Wash. Aug. 9, 2017). This matter was before the Court on cross motions for summary judgment filed by the defendants, State of Washington and Robert W. Ferguson (the State) and the plaintiff, Stillaguamish Tribe of Indians (the Tribe). The primary, and ultimately dispositive, issue before the Court is the enforceability of a sovereign immunity waiver in a contract, Salmon Project Agreement 04-1634, which

was signed by Mr. Pat Stevenson, an employee and non-member of the Tribe. Mr. Stevenson has been the Tribe's Environmental Engineer for approximately thirty years. Mr. Stevenson is not an enrolled member of the Tribe and is therefore not eligible to be a Director. Salmon Project Agreement No. 04-1634 sets out contractual obligations of the Tribe and the Salmon Recovery Funding Board (SRFB), the entity responsible for administering the Salmon Funding Accounts for the State of Washington. In consideration for a state grant of \$497,000, the Tribe, referred to in the agreement as the "Sponsor," was to execute a project entitled, "Steelhead Haven Landslide Remediation." Two sections of Salmon Project Agreement No. 04-1634 are pertinent to this case. The indemnification clause, provides: To the fullest extent permitted by the law, the Sponsor expressly agrees to and shall indemnify, defend and hold harmless the State ... against all claims, actions, costs, damages, or expenses of any nature arising out of or incident to the Sponsor's or any Contractor's performance or failure to perform the Agreement. Section 41 provides: Any judicial award, determination, order, decree or other relief, whether in law or equity or otherwise, resulting from the action shall be binding and enforceable. Any money judgment against the Tribe, tribal officers and members, or the State of Washington ... may not exceed the amount provided for in Section F—Projecting Funding of the Agreement. C. The Tribe hereby waives its sovereign immunity as necessary to give effect to this section, and the State of Washington has waived its immunity to suit in state court. These waivers are only for the benefit of the Tribe and State and shall not be enforceable by any third party[.] Mr. Stevenson managed the Steelhead Haven Landslide Remediation project, which took several years to complete, on behalf of the Tribe. In summary, by its own terms Salmon Project Agreement 04/1635 clearly waives the Tribe's sovereign immunity, but the agreement is not binding on the Tribe. The agreement was not entered into with the requisite authority, because neither the Tribe's constitution, prior policies and practices, nor any resolution delegating the Board's plenary waiver power show an unequivocal waiver of sovereign immunity. Therefore, on the issue of waiving sovereign immunity, summary judgment should be granted against the State and in favor of the Tribe. Because the Court finds that the Tribe did not waive its sovereign immunity, the Court does not reach the State's equitable arguments.

K. *Sovereignty, Tribal Inherent*

88. *Rosebud Sioux Tribe v. Colombe*  
(*In re Estate of Colombe*)

No. 27587, 2016 S.D. LEXIS 102, 2016 S.D. 62 (S.D. Aug. 31, 2016). An estate appealed from a circuit court's decision to grant comity to a Rosebud Sioux Tribal Court order. The order pierced a business's corporate veil and held decedent personally liable for a judgment in favor of the Rosebud Sioux Tribe. Charles Colombe, a member of the Rosebud Sioux Tribe (RST) died on June 9, 2013. His son, Wesley Colombe, filed a petition for informal probate in Todd County, Sixth Judicial Circuit, and was appointed as personal representative of Charles's estate (the Estate). In February 2014, Wesley provided written notice to creditors. The RST filed a notice of creditor's claim, seeking to enforce an April 19, 2012, Rosebud Sioux Tribal Court (Tribal Court) order and judgment for \$527,146.76. In response, Wesley filed a notice of disallowance of claim, asserting the RST could not show that the order was entitled to comity by satisfying the requirements of SDCL 1-1-25. The circuit court granted comity to the tribal court order and judgment. Wesley, on behalf of the Estate, appealed. The April 19, 2012, tribal court judgment was the culmination of more than a decade of steady litigation between RST and BBC Entertainment Inc. (BBC). Aspects of the case have been reviewed by the Tribal Court, the Rosebud Sioux Tribe Supreme Court (RST Supreme Court), the federal district court, and the Eighth Circuit Court of Appeals. The circuit court did not err by granting comity to Judge Meyers's Tribal Court order pursuant to SDCL 1-1-25. Although not specifically authorized by Article XI, §§ 2 and 4 of the RST Constitution or RST Code § 9-1-5, Judge Meyers's appointment was authorized under RST Code § 4-2-8 as a long-standing tribal practice. Moreover, the proceedings did not deprive Charles of due process. He had several opportunities to appeal the Tribal Court rulings to the RST Supreme Court and elected not to do so. The enforcement of the Tribal Court judgment does not violate public policy. Affirmed.



### 89. *Soldier v. Dougherty*

No. CIV-16-958-M, 2016 U.S. Dist. LEXIS 133506 (W.D. Okla. Aug. 31, 2016). Petitioners, appearing with counsel, filed a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241. The matter was referred to the undersigned Magistrate Judge for initial proceedings consistent with 28 U.S.C. § 636(b)(1)(B). For the following reasons, it is recommended that the Petition be dismissed without prejudice upon filing. Petitioners GoodEagle and Easley alleged that they were arrested at Iowa tribal headquarters on August 19, 2016, and Petitioner Big Soldier alleged he was arrested on the same date by a Lincoln County law enforcement officer at the Lincoln County Jail, “when he went to see about posting bond” for Petitioners GoodEagle and Easley. Petitioners state that they are being detained in the Lincoln County Jail, “for allegedly violating an Iowa tribal district court gag order by speaking to attorney Peggy Big Eagle” concerning an Indian Child Welfare Act case pending in that tribal court. Petitioners allege[d] that their arrest and detention violate “tribal, state and federal Constitution and the Indian Child Welfare Act.” Petitioners request “an immediate hearing for petitioners to obtain their liberty,” service of process by the United States Marshals Service, and a “reasonable attorney fee of \$10,000 at \$200/hour against defendants and each of them.” Respondents named in the Petition include Dougherty, in his capacity as the Sheriff of Lincoln County, Oklahoma. A federal court reviewing such an action must first determine whether the petitioner has exhausted tribal remedies. *See Dry v. CFR Court of Indian Offenses for the Choctaw Nation*, 168 F.3d 1207, 1209 (10th Cir. 1999). Thus, exhaustion of tribal remedies is generally required prior to review in federal court of a habeas action challenging tribal court proceedings. Petitioners assert[ed] that they have attempted to file, through a representative, a “Motion to Set Aside the Permanent Gag Order,” but that Respondent Rowe refused to file the Motion because Petitioner’s representative was not a member of the tribal bar although her application is pending. Petitioners assert[ed] that they are being held in the Lincoln County Jail without any documentation of the basis for their detention or means to obtain their freedom, but Petitioners also acknowledge that “[t]ribal courts commonly require cash bonds” and that they are aware they are being detained for allegedly violating a tribal court order. Under these circumstances, it does not appear that exhaustion of tribal

remedies would be futile. Accordingly, the Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 be dismissed without prejudice for failure to exhaust tribal remedies.

**90. *State v. Priest***

Nos. 32221-1-III, 33704-9-III, 2016 Wash. App. LEXIS 2568 (Ct. App. Oct. 25, 2016). David Randall Priest sought, through a personal restraint petition, relief from his convictions for possession of a stolen motor vehicle and possession of stolen property in the third degree. Priest contended that the superior court lacked jurisdiction over him and the prosecution because he is an enrolled member of the Confederated Tribes of the Colville Nation and any crimes occurred solely on tribal land. Because the only evidence of possession of stolen property showed the property to be on reservation land, we hold that the trial court lacked jurisdiction to entertain the prosecution against David Priest. The appellate court vacated his convictions, judgment, and sentence.

**91. *Corp. of Latter Day Saints v. LK***

No. 2:16-cv-00453-RJS-BCW, 2016 U.S. Dist. LEXIS 159025 (D. Utah Nov. 16, 2016). This case relates to lawsuits presently pending before the Navajo Nation District Court. In those cases, Defendants RJ, MM, BN, and LK (Doe Defendants) allege that they suffered abuse years ago after Plaintiffs, the Corporation of the President of the Church of Jesus Christ of Latter-Day Saints and LDS Family Services, placed them off-reservation with LDS families as part of the Indian Student Placement Program (ISPP). In their Amended Complaint, Plaintiffs here seek a declaration that the Navajo Nation District Court lacks jurisdiction to adjudicate the underlying cases, and request an injunction prohibiting Doe Defendants from proceeding with their cases in Tribal Court. Plaintiffs argue that the Tribal Court clearly lacks jurisdiction over Doe Defendants' claims, and that this court should so find now, without requiring Plaintiffs to exhaust their Tribal Court remedies by presenting their jurisdictional arguments to the Tribal Court in the first instance. Two motions are before the court: (1) Plaintiffs' Motion for Preliminary Injunction and (2) Defendants' Motion to Dismiss. Doe Defendants filed three separate actions in the Navajo Nation District Court, District of Window Rock, Arizona. In the cases before the

Tribal Court, Doe Defendants allege injuries resulting from their placement with LDS families while participating in the ISPP between 1965 and 1983. The ISPP “continued for over forty years, ending in approximately 1990, with tens of thousands of Navajo Nation children having participated.” As part of the program, Doe Defendants and their families agreed that Doe Defendants, who were children at the time, would be placed during the school year in homes of LDS Church members outside of the reservation to attend public school. Doe Defendants allegedly suffered sexual abuse while living with these families. Doe Defendants do not claim that any of the sexual abuse at issue occurred on the reservation or on property owned by the Navajo Tribe. At this stage of the case, the court is required to accept the Plaintiffs’ allegations as true. The court therefore accepts for purposes of deciding Doe Defendants’ Motion to Dismiss that none of the alleged abuse occurred on the reservation, and that none of the placement decisions were made on the reservation. Doe Defendants assert eight causes of action in their Tribal Court cases: (1) childhood sexual abuse, (2) assault and battery, (3) negligence, (4) negligent supervision/failure to warn, (5) intentional infliction of emotional distress, (6) equitable relief, (7) common law nuisance and request for injunctive relief, and (8) violations of Navajo Common Law. Plaintiffs responded to Doe Defendants’ Tribal Court complaints by filing this federal court action. Plaintiffs seek a declaration that the Navajo Nation District Court lacks jurisdiction to consider Doe Defendants’ lawsuits. Plaintiffs also filed a Motion for Preliminary Injunction asking this court to enjoin Doe Defendants from proceeding with their cases in Tribal Court. The court found that Plaintiffs failed at this stage in the proceeding to meet their substantial burden of showing that Tribal Court jurisdiction is clearly foreclosed. While it appears that jurisdiction over certain claims — including those for direct liability for the sexual assaults — may be foreclosed, it is not clear that Tribal Court jurisdiction is clearly lacking for all of Doe Defendants’ claims. Because Plaintiffs request an injunction that would prevent Doe Defendants from proceeding in Tribal Court on any of their claims, it was Plaintiffs’ burden to show that all routes to jurisdiction were clearly foreclosed. The court GRANTS Doe Defendants’ Motion to Dismiss. Plaintiffs must first exhaust their remedies in the Tribal Court before seeking redress in this court. The case is

dismissed without prejudice. The court DENIES as moot Plaintiffs' Motion for Preliminary Injunction.

**92. *Jimenez v. Salt River Pima-Maricopa Indian Cmty.  
Council Mbrs***

No. CV-16-00089-PHX-DJH, 2016 U.S. Dist. LEXIS 172943 (D. Ariz. Dec. 13, 2016). This matter is before the Court on Defendants' Motion to Dismiss Amended Complaint pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Plaintiff Raymond Jimenez, a member of the Salt River Pima-Maricopa Indian Community (SRPMIC), alleges in the Amended Complaint that on December 19, 2014, he received an order from the SRPMIC council members that prohibits him from occupying certain Community buildings and adjoining grounds without obtaining prior express permission. Plaintiff alleges that this order is illegal and in violation of his due process rights under the Indian Civil Rights Act (ICRA) and the SRPMIC Constitution. Plaintiff claims he was not charged with a crime or arrested for the alleged "confrontational incidents" that apparently formed the basis for the letter and order issued to Plaintiff. In addition to the factual allegations, Plaintiff argues in the Amended Complaint that the Defendants are not protected by sovereign immunity. He further contends that the *Ex Parte Young* doctrine authorizes a suit against officers of a sovereign government where the plaintiff alleges continuing unlawful conduct and seeks declaratory and injunctive relief only. For relief, Plaintiff requests that the Court "restore [his] rights to be free" and his right to employment, which Plaintiff claims has been blocked as a result of the allegedly illegal order. Plaintiff further claims he "is not here for money" but to enforce his due process rights. Also referenced in the Amended Complaint is a decision by the SRPMIC Court after Plaintiff filed an Emergency Motion raising the same claims he now asserts here. In its Order dated January 30, 2015, the SRPMIC Court made factual findings regarding the content of the December 2014 letter/order issued to Plaintiff by the SRPMIC Council. The Order also included conclusions of law regarding the jurisdiction of the SRPMIC Court, in which the Court explained that its jurisdiction is limited to certain types of disputes and does not encompass reviews of Tribal Council actions or claims alleging violations of the SRPMIC Constitution. The Court therefore concluded it lacked jurisdiction to hear and determine the merits of Plaintiff's claims.

The Court also pointed out that Plaintiff did not challenge the order with the Tribal Council itself, even though the letter that accompanied the order invited Plaintiff to provide written reasons if he believed the order should be rescinded. Defendants argue that the doctrine of sovereign immunity bars Plaintiffs claims. In addition, Defendants argue that Plaintiffs claim under the ICRA fails as a matter of law because Plaintiff is not seeking habeas corpus relief, which is the only remedy the ICRA allows. The Court found that Plaintiff does not allege that SRPMIC waived its sovereign immunity, or that Congress authorized a suit against the tribe or its council members under the circumstances presented here. Plaintiff therefore failed to establish any basis to override SRPMIC's sovereign immunity. Consequently, this action must be dismissed. Accordingly, IT IS HERE BY ORDERED that Defendants' Motion to Dismiss Amended Complaint is GRANTED.

**93. *Mullally v. Gordon***

No. 13-55152, 2016 U.S. App. LEXIS 22506 (9th Cir. Dec. 19, 2016). HOLDINGS: (1) The Chemehuevi Indian Tribe's tribal court entered judgment on the former manager's defamation and conversion claims; (2) The district court did not err by recognizing the tribal court's judgment under principles of comity; (3) The tribal court had both personal and subject matter jurisdiction over the manager's defamation and conversion claims; (4) The manager was afforded due process by the tribal court; (5) His claims were reviewed by two separate tribal bodies; (6) The district court did not err by dismissing his intentional misrepresentation and promissory fraud claims or by granting summary judgment as to his intentional interference with contractual relations claim. Judgment affirmed.

**94. *People ex rel. Owen v. Miami Nation Enterprises***

No. S216878, 2016 WL 7407327 (Cal. Dec. 22, 2016). The People brought action against five payday lenders for injunctive relief, restitution, and civil penalties for violations of the of the Deferred Deposit Transaction Law (DDTL). Two lenders controlled by Indian tribes specially appeared and moved to quash service of summons. The Superior Court, Los Angeles County, denied motion. The Supreme Court granted review, superseding the opinion of the Court of Appeal. The Supreme Court held that: (1) entity asserting

tribal immunity bears the burden of showing by a preponderance of the evidence that it is an “arm of the tribe”; (2) when determining whether an entity is an “arm of the tribe” entitled to tribal immunity, courts should apply a five-factor test that considers (1) the entity’s method of creation, (2) whether the tribe intended the entity to share in its immunity, (3) the entity’s purpose, (4) the tribe’s control over the entity, and (5) the financial relationship between the tribe and the entity; abrogating *Trudgeon v. Fantasy Springs Casino*, 71 Cal. App. 4th 632, 84 Cal. Rptr. 2d 65, *Redding Rancheria v. Superior Court*, 88 Cal. App. 4th 384, 105 Cal. Rptr. 2d 773, and *American Property Management Corp. v. Superior Court*, 206 Cal. App. 4th 491, 141 Cal. Rptr. 3d 802; and (3) lenders did not have immunity under the “arm of the tribe” doctrine. Reversed and remanded.

**95. *Knighton v. Cedarville Rancheria of Northern Paiute Indians***

No. 16-cv-02438-WHO, 2017 WL 616465 (E.D. Cal. Feb. 15, 2017). Plaintiff Duanna Knighton, the former Tribal Administrator for defendant Cedarville Rancheria of Northern Paiute Indians (the Tribe), seeks declaratory and injunctive relief against the Tribe, Cedarville Rancheria Tribal Court (Tribal Court), and Tribal Court Judge Patricia R. Lenzi (Tribal Judge Lenzi) (collectively defendants) to avoid Tribal Court jurisdiction over claims that she defrauded the Tribe and breached her fiduciary duties to it. Defendants move to dismiss Knighton’s complaint because the Tribal Court has jurisdiction. I agree that it has both regulatory and adjudicative authority over its former employee under the facts alleged; accordingly, it has subject matter jurisdiction. Defendants’ motion is GRANTED WITH PREJUDICE.

**96. *Acres v. Blue Lake Rancheria***

No. 16-cv-05391-WHO, 2017 WL 733114 (N.D. Cal. Feb. 24, 2017). Plaintiff James Acres seeks declaratory and injunctive relief against the Blue Lake Rancheria Tribe (Tribe), the Blue Lake Rancheria Tribal Court (Tribal Court) and its Chief Judge, Lester Marston, alleging that the Tribal Court has conducted itself in bad faith in asserting jurisdiction over him in an underlying contractual fraud case because Judge Marston refused to recuse himself from the case and misrepresented his relationship with the Tribe. Judge

Marston has now recused himself from the Tribal Court case and appointed the Hon. James Lambden, a retired California Court of Appeal Justice with no prior connection to the Tribe, to preside over the matter. Given Judge Marston's recusal and the appointment of a neutral judge, there is insufficient evidence of bad faith for the exception to apply. Acres does not meet any of the exceptions to the exhaustion requirement. He must exhaust his tribal remedies before bringing an action of this kind in federal court. The Tribe's motion to dismiss is GRANTED.

**97. *French v. Starr***

No. 15-15470, 2017 U.S. App. LEXIS 9690 (9th Cir. Jun. 1, 2017). Plaintiff Roger French appeals the district court's grant of summary judgment in favor of Defendants, who are members of the Tribal Court and Tribal Council of the Colorado River Indian Tribes (CRIT). French argues CRIT lacked jurisdiction to adjudicate eviction proceedings relating to his leasehold (the Permit) on the California side of the Colorado River (the Western Boundary lands) because French's lot is not part of the Colorado River Indian Reservation. Both the Permit and the assignment of that Permit to French described the lot in question as within the Colorado River Indian Reservation. French paid rent pursuant to the Permit, first to the Bureau of Indian Affairs for the benefit of CRIT and then directly to CRIT, from 1983 through 1993. French is therefore estopped from contesting CRIT's title. *See Richardson v. Van Dolah*, 429 F.2d 912, 917 (9th Cir. 1970), *Goode v. Gaines*, 145 U.S. 141, 152, 12 S. Ct. 839, 36 L. Ed. 654 (1892) (estoppel does not depend on validity of landlord's title), *Williams v. Morris*, 95 U.S. 444, 455, 24 L. Ed. 360 (1877) (when tenant gains possession, tenant is estopped from denying title of landlord). Once French's challenge to CRIT's title is resolved, this case is squarely controlled by *Water Wheel Camp Recreational Area, Inc. v. La Rance*, 642 F.3d 802 (9th Cir. 2011) (CRIT properly exercised jurisdiction over an unlawful detainer action for breach of lease by a non-tribal member within the Western Boundary lands). AFFIRMED.

**98. *Norton v. Ute Indian Tribe of the Uintah and Ouray Reservation***

No. 15-4170, 862 F.3d 1236, 2017 WL 2952256 (10th Cir. Jul. 11, 2017). Nonmember police officers brought action against Indian tribe, its business committee, tribal court, acting chief judge of tribal court, and parents of person killed by officers, seeking to halt allegedly unlawful exercise of tribal court jurisdiction over underlying action that was brought against them by tribe, decedent's estate, and parents alleging wrongful death, trespass, and other torts. The United States District Court for the District of Utah, No. 2:15-CV-00300, denied defendants' motions to dismiss, and granted officers' motion for preliminary injunction. Defendants appealed. The Court of Appeals held that: (1) tribe's trespass claim fell within jurisdiction of tribal court under *Montana v. United States* exception to principle that tribe generally lacked authority to regulate nonmember conduct; (2) tribe's trespass claim fairly could be called catastrophic for tribal self-government, as required to fall within jurisdiction of tribal court under *Montana v. United States* exception; (3) tribal exhaustion was not required for claims against nonmember police officers alleging false imprisonment, false arrest, assault and battery, wrongful death, spoliation of evidence, and conspiracy; (4) state interest was not implicated by nonmember state police officers pursuing Indian tribe member on tribal land for on-reservation offense, and thus tribal jurisdiction was not barred over trespass claim against officers; (5) bad faith exception from exhaustion of available tribal court remedies was not available as to trespass claim against nonmember police officers; (6) *Ex parte Young* exception to sovereign immunity applied to tribal official, sued in his official capacity, in suit seeking to halt allegedly unlawful exercise of tribal court jurisdiction; and (7) tribe, its business committee, and tribal court were not subject to *Ex parte Young* exception, and thus were entitled to tribal sovereign immunity. Vacated and remanded.

**99. *Bishop Paiute Tribe v. Inyo County***

No. 15-16604, 863 F.3d 1144, 2017 WL 3044643 (9th Cir. Jul. 19, 2017). Indian Tribe brought action against county, sheriff, and county district attorney, following arrest of Tribal police officer, seeking declaration that Tribe had right to investigate violations of



tribal, state, and federal law, and to detain and transport or deliver a non-Indian violator encountered on the reservation to the proper authorities, and seeking injunction prohibiting defendants from arresting, criminally charging, interfering with, or threatening tribal police department officers who exercised their lawful duties. The United States District Court for the Eastern District of California, No. 1:15-00367, 2015 WL 4203986, dismissed. Tribe appealed. The Court of Appeals held that: (1) district court's order dismissing Tribe's action for lack of jurisdiction was final appealable order; (2) Tribe adequately pleaded federal question; (3) Indian Law Enforcement Reform Act (ILERA) did not displace federal common law upon which Tribe's complaint relied; (4) Tribe had standing to bring action; (5) action was ripe; and (6) action was not mooted by Tribe's letter responding to county sheriff's cease and desist letter. Reversed and remanded.

#### L. *Tax*

##### **100. *City of Snoqualmie v. King County Exec. Dow Constantine***

No. 91534-2, 2016 Wash. LEXIS 1376 (Wash. Dec. 22, 2016). The City of Snoqualmie challenged the validity of state legislation authorizing Indian tribes to make payments to the State in lieu of the State's taxing their property. The city claimed that payments made in lieu of taxation are themselves taxes that violate constitutional provisions requiring uniformity of taxation, prohibiting the State from surrendering its power to tax, and specifying the circumstances when the legislature may delegate its taxing authority. The Superior Court on March 4, 2015, granted partial summary judgment in favor of the City, ruling that the City had standing to challenge the constitutionality of the legislation and that payment in lieu of taxation under the legislation was a property tax that violated constitutional requirements and prohibitions. The Supreme Court, held that (1) The tribe's payment in lieu of tax (PILT) was not a tax at all, but rather, a charge that tribes paid to compensate municipalities for public services provided to the exempt property; (2) Because the PILT was not a tax, it was not subject to Wash. Const. art. VII's tax requirements and thus, the trial court's judgment was improper; (3) The city had standing to challenge the PILT, both on its own behalf and in the form of representative standing on behalf of its residents; (4) The PILT's purpose was to

allow the tribe to alleviate a burden to which it contributed; (5) The PILT was meant to offset the burden created by the tax exemption, in order to compensate the municipality for the services the tribal exempt land required. Judgment reversed.

### **101. *Tulalip Tribes v. Washington***

No. 2:15-cv-00940, 2017 U.S. Dist. LEXIS 1646 (W.D. Wash. Jan. 5, 2017). Before the Court was Defendants' Motion for Summary Judgment, Plaintiff's Motion for Partial Summary Judgment Regarding Government Services Provided Outside the Boundaries of Quil Ceda Village, and Plaintiff-Intervenor's Motion for Order Regarding Government Services. As alleged in the Complaint, Plaintiff Tulalip Tribes is a federally-recognized Indian tribal government, and the Consolidated Borough of Quil Ceda Village (Village) is a political subdivision of the Tulalip Tribes. Together, Tulalip and the Village are suing the State of Washington and Snohomish County, along with state and county officials, for declaratory and injunctive relief. Specifically, Plaintiffs challenge three taxes imposed by the State of Washington and Snohomish County on non-Indian businesses and their patrons within the boundaries of Quil Ceda Village: retail sales and use taxes, Wash. Rev. Code §§ 82.08, 82.12, 82.14; business and occupation taxes, Wash. Rev. Code § 82.04; and personal property taxes, Wash. Rev. Code § 84. Plaintiffs' in their complaint sets forth three grounds for the illegality of the taxes. First, they allege the taxes violate the Indian Commerce Clause of the United States Constitution. Second, they allege the taxes are preempted by federal law. And third, they allege the taxes interfere with Tulalip's tribal sovereignty. The United States intervened as an additional plaintiff and alleged the same three counts. In their motion for summary judgment, Defendants argue that the Indian Commerce Clause does not bar the taxes at issue; Congress has not preempted the taxes at issue, which can be determined without a fact-intensive inquiry; and the taxes do not violate Tulalip's tribal sovereignty. Plaintiffs, including the United States, move for an order that government services provided outside the Village and not directly supporting commerce in the Village have no legal effect for this action. The Court GRANT[ED] in part and DENIE[D] in part Defendants' Motion for Summary Judgment. The Motion was GRANTED as to Count I and denied as to Counts II and III. The Court DENIE[D] Plaintiffs' and Plaintiff-

Intervenor’s Motion for Partial Summary Judgment Regarding Government Services.

**102. *Desert Water Agency v. United States Department of the Interior***

No. 14-55461, 2017 WL 894462, 849 F.3d 1250 (9th Cir. Mar. 7, 2017). Political subdivision of the State of California brought action under the Administrative Procedures Act (APA) against the United States Department of the Interior and its Bureau of Indian Affairs (BIA), challenging a federal regulation that the subdivision believed might preempt certain taxes and fees the subdivision assessed against non-Indians who leased lands within an Indian reservation. The United States District Court for the Central District of California, No. 5:13-cv-00606, dismissed action for lack of standing. Subdivision appealed. The Court of Appeals, held that federal regulation did not preempt taxes and fees that political subdivision assessed against non-Indians who leased lands within an Indian reservation, and thus subdivision lacked standing to challenge the regulation. Affirmed.

**103. *Cougar Den, Inc., a Yakama Nation corporation, Respondent, v. Washington State Department Of Licensing, Appellant***

No. 92289-6, 392 P.3d 1014, 2017 WL 1192119 (Wash. Mar. 16, 2017). The issue in this case centers on the interpretation of the “right to travel” provision in Article III of the Yakama Nation Treaty of 1855, 12 Stat. 951, 952-53 (1855), in the context of importing fuel into Washington State. The Washington State Department of Licensing (Department) challenges Cougar Den Inc.’s importation of fuel without holding an importer’s license and without paying state fuel taxes under former chapter 82.36 RCW, *repealed by* LAWS OF 2013, ch. 225, § 501, and former chapter 82.38 RCW (2007). Cougar Den is a Confederated Tribes and Bands of the Yakama Nation (Yakama Nation) corporation that transports fuel from Oregon to the Yakama Indian Reservation, where it is sold. Kip Ramsey, Cougar Den’s owner and president, is an enrolled member of the Yakama Nation. Cougar Den began transporting fuel in 2013 from Oregon to the Yakama Indian Reservation. Cougar Den contracted with KAG West, a trucking company, to transport

the fuel into Washington from March 2013 to October 2013. On December 9, 2013, the Department issued assessment number 756M against Cougar Den, demanding \$3.6 million in unpaid taxes, penalties, and licensing fees for hauling the fuel across state lines. Cougar Den appealed the assessment to the Department's ALJ, who held in his initial order that the assessment was an impermissible restriction under the treaty. Upon review, the director of the Department reversed the ALJ and entered findings of fact and conclusions of law. Cougar Den then petitioned for review of the final order by the Department. The Yakima County Superior Court, sitting in an appellate capacity, reversed the director's order and held that the taxation violated the tribe's right to travel. The Department appealed the superior court's decision and sought direct review under RAP 4.2(a)(2). The Supreme Court granted direct review and affirmed.

**104. *New York v. United Parcel Service, Inc.***

No. 15–1136, 2017 WL 1135257, 253 F. Supp. 3d 583 (S.D.N.Y. Mar. 24, 2017), Opinion Corrected and Superseded, 2017 WL 2305380 (May 25, 2017). This lawsuit concerns a non-tribal member, United Parcel Service, Inc. (UPS), which allegedly transported, inter alia, cigarettes from and between New York State Indian reservations for a number of shippers (Relevant Shippers). Plaintiffs, the State of New York and the City of New York (collectively, plaintiffs, and, respectively, the State and/or the City), assert that in transporting unstamped (and therefore untaxed) cigarettes, UPS has violated an Assurance of Discontinuance (AOD) it signed with the State in 2005, as well as New York Executive Law (NY. Exec. Law) § 63(12); New York Public Health Law (PHL) § 1399-ll; the Prevent All Cigarette Trafficking Act (“PACT Act”), 15 U.S.C. §§375-78; the Contraband Cigarettes Trafficking Act (CCTA), 18 U.S.C. §§ 2341-46; and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-68.3. UPS has disputed that it ever violated its obligations under the AOD or knowingly transported unstamped cigarettes from or between Indian reservations to unauthorized recipients. The Court found that UPS violated its obligations under the AOD in a number of respects and, in addition, knowingly transported cigarettes from and between Indian reservations for all but one of the shippers (the Liability Shippers). For this reason and others, UPS's arguments against any

liability fail. The Court finds that plaintiffs are entitled to compensatory damages as well as monetary penalties in amounts yet to be determined, but not injunctive relief or the appointment of a monitor.

**105. *Mescalero Apache Tribe v. Commissioner of Internal Revenue***

No. 11, 2017 WL 1278708, 148 T.C. Tax Ct. Rep. Dec. (RIA) 148.11 (U.S. Tax Ct. Apr. 5, 2017). This is a worker classification case about hundreds of workers whom their employer – an Indian tribe – called independent contractors but whom the Commissioner called employees. The Mescalero Apache Tribe has moved to compel discovery of the IRS's records of those workers. During the 2009-11 tax years the Tribe either employed or contracted with several hundred workers. During each of these years the Tribe timely issued Forms W-2 to its employees, and Forms 1099 to its contractors. This case began when the Commissioner audited the Tribe on suspicion that some of the workers classified as contractors were really employees. Reclassification would make the Tribe liable for taxes for its workers whom it improperly labeled as contractors. But it sees a way out: Section 3402 lets an employer in this situation escape tax liability if it can show the workers whom it labeled independent contractors paid income tax on their earnings. One way to do this would be for the Tribe to ask each worker to complete Form 4669, Statement of Payments Received. The Tribe tried to do that, but it was only partly successful because many of the Tribe's former workers have moved, and some live in hard-to-reach areas where they lack cell-phone service and even basic utilities. The Tribe wants the IRS to search the records of those 70 workers to determine whether they reported their Form 1099 income and paid their tax liabilities and then to adjust the Tribe's liability accordingly. The Tribe's current motion to compel discovery—this time in compliance with our rules—asks that we decide an issue that it turns out we have not yet analyzed in any opinion: Can an employer take discovery of its workers' IRS records to reduce its own tax liability under section 3402? The Commissioner objects, claiming that this is barred under section 6103 and that it amounts to a prohibited shift of the burden of proof from the Tribe to the Commissioner. We hold that the Tribe's workers' return information is disclosable under section 6103(h)(4)(C). Because the Tribe seeks

information that is both disclosable and discoverable, we hold for the Tribe.

**106. *Cayuga Indian Nation of New York v. Seneca County, New York***

No. 11-CV-6004 CJS, 2017 WL 1653026 (W.D.N.Y. May 2, 2017). This action challenges Seneca County’s ability to impose and collect *ad valorem* property taxes on parcels of real estate owned by the Cayuga Indian Nation of New York. The Cayuga Nation contends both that Seneca County cannot impose the property taxes, because the subject properties are “located within an Indian reservation,” and cannot sue to collect the taxes, because the Cayuga Indian Nation enjoys sovereign immunity from suit. Now before the Court is the Cayuga Nation’s motion to dismiss Seneca County’s counterclaim, which seeks a declaratory judgment that the subject properties, which the Cayugas ostensibly sold two centuries ago and then recently re-purchased, “are not now an Indian reservation for purposes of New York Real Property Tax Law § 454 or Indian Law § 6 or [‘]Indian Country[‘] for purposes of 18 U.S.C. § 1151.” In recent years, the Cayuga Nation purchased at least five parcels of land in Seneca County, within the same geographic area as the Cayuga Indian Reservation that was established in 1789. Seneca County imposed property taxes on the Cayuga-owned properties, but the Cayuga Nation refused to pay the taxes. Thereafter, Seneca County initiated tax foreclosure proceedings against the Cayuga Nation. In response to those foreclosure lawsuits, the Cayuga Nation commenced this lawsuit. The Cayugas’ pleading seeks two types of relief. First, the Amended Complaint seeks a declaration that the County cannot foreclose on, or otherwise “acquire, convey, sell or transfer title” to, “Nation-owned properties” within Seneca County. Second, the Amended Complaint seeks an injunction, prohibiting the County from making “any further efforts” to foreclose on, acquire, convey or otherwise sell “Nation-owned properties in Seneca County;” prohibiting the County from “interfering in any way with the Nation’s ownership, possession, and occupancy of such lands.” Plaintiff’s application to dismiss Defendant’s counterclaim is granted, with prejudice.

### **107. *Ho-Chunk, Inc. v. Sessions***

16-cv-01652 (CRC), 2017 WL 2274940 (D.D.C. May 24, 2017). Tribal-owned corporations engaged in distribution of cigarettes brought action against the Attorney General of the United States, seeking declaration clarifying whether certain recordkeeping requirements of the Contraband Cigarettes Trafficking Act (CCTA) applied to Indian tribal entities. Defendant moved for summary judgment. The District Court held that: (1) CCTA’s recordkeeping requirements applied to Indian tribal entities, and (2) tribal governments, and thus tribal-owned entities, were “persons” within meaning of CCTA and fell within scope of the Act. Motion granted.

### **108. *Perkins v. United States***

No. ORDER 16-CV-495, 2017 U.S. Dist. LEXIS 123543 (W.D.N.Y. Aug. 4, 2017). This case presents what appears to be an issue of first impression: whether a treaty between the United States and Native Americans ensuring the free use and enjoyment of tribal land bars taxes on income derived directly from the land—here, the sale of gravel mined on the land. Although at least two circuit courts have suggested in dicta that “income derived directly from the land” might be exempt from taxation under such treaties, they did so to distinguish that scenario from cases where an exemption was sought for income earned in ways that do not relate to the land itself. *See Lazore v. Comm’r*, 11 F.3d 1180 (3d Cir. 1993); *Hoptowit v. Comm’r*, 709 F.2d 564 (9th Cir. 1983). And for the reasons that follow, this Court finds that the plaintiffs have plausibly stated a claim for relief under two treaties with the Native American Seneca Nation. On June 16, 2016, Fredrick and Alice Perkins commenced this action against the United States. The plaintiffs, one of whom is “an enrolled member of the Seneca Nation,” removed gravel, with permission, from the Seneca Nation Allegany Territory and later sold it. After receiving a “notice of deficiency” from the Internal Revenue Service, the plaintiffs paid taxes on the income from the sale. In the amended complaint, they alleged that they are owed a tax refund, interest, and penalties —totaling \$9,863.68—because their income from the sale of gravel is not taxable under the Treaty with the Six Nations at Canandaigua of November 11, 1794 (Canandaigua Treaty), and the Treaty with the Seneca of May 20, 1842 (1842 Treaty). The United States has moved to dismiss the

amended complaint. On September 16, 2016, this Court referred this action to Magistrate Judge Hugh B. Scott. The Court adopted the recommendation of Judge Scott regarding the claims under the Canandaigua Treaty but rejected the recommendation regarding the claims under the 1842 Treaty. Accordingly, the government's Motion to Dismiss [was] denied.

M. *Trust Breach and Claims*

**109. *Marcia W. Davilla, et al. v. Enable Midstream Partners, L.P., et al.***

No. CIV-15-1262, 2017 WL 1169710 (W.D. Okla. Mar. 28, 2017). Before the Court is plaintiffs' Motion for Partial Summary Judgment on Liability for Their Trespass Claim and for a Permanent Injunction. Defendants are the owner and operator of a network of natural gas transmission pipelines across Oklahoma. Defendants' transmission pipeline crosses an approximate 137-acre tract of land in Caddo County, Oklahoma, which had originally been an Indian allotment to Millie Oheltoint (Emaugobah), held in trust by the United States Department of the 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, varying from 28.6% down to less than .9%. The original right of way expired on November 20, 2000. On or about June 14, 2002, defendants' predecessor-in-interest, Enogex, Inc. (Enogex), submitted a right-of-way offer to the BIA and made an offer to plaintiffs for a new twenty-year easement, which was rejected by a majority of the landowners. Despite the rejection by a majority of the landowners, on June 23, 2008, the Interim Superintendent of the BIA's Anadarko Agency approved Enogex's application for the renewal of the right-of-way easement for twenty years. Plaintiffs appealed the Interim Superintendent's decision, and on March 23, 2010, the BIA vacated the interim superintendent's decision. The BIA determined that it did not have authority to approve the right-of-way without the consent of plaintiffs or their predecessors in interest and that the price offered by defendants was unreasonable. The BIA 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. A new right-of-way has not been granted, and defendants have continued to operate the natural



gas pipeline. The Court finds defendants' continuing trespass on plaintiffs' property is clearly not unintentional. Additionally, plaintiffs have objected to the renewal of the easement and defendants continued use of the pipeline from the time defendants first sought the renewal of the easement. Accordingly, the Court finds that in light of their continuing trespass, defendants should be permanently enjoined from using the pipeline under the tract at issue and should be required to move the pipeline within six (6) months of the date of this Order.

**110. *Fletcher v. United States***

No. 16-5050, 2017 WL 1419010, 854 F.3d 1201 (10th Cir. Apr. 21, 2017). Tribal members brought class action against federal government, seeking an accounting to determine whether the federal government had fulfilled the fiduciary obligations it chose to assume as trustee to oversee the collection of royalty income from oil and gas reserves and its distribution to tribal members. The United States District Court for the Northern District of Oklahoma, 2012 WL 1109090, dismissed the tribal members' claims, and they appealed. The Court of Appeals, 730 F.3d 1206, reversed and remanded. On remand, the United States District Court for the Northern District of Oklahoma, 153 F. Supp. 3d 1354, D.C. No. 4:02-CV-00427, ordered government to provide an accounting. Tribal members appealed. The Court of Appeals held that: (1) district court did not abuse its discretion in setting time period of accounting, and (2) district court did not abuse its discretion when it fashioned scope of accounting. Affirmed.

**111. *Napoles, et al. v. Rogers, et al.***

No. 16-cv-01933, 2017 WL 2930852 (E.D. Cal. Jul, 10, 2017). On December 27, 2016, petitioners in this action filed a petition for writ of habeas corpus pursuant to the Indian Civil Rights Act, 25 U.S.C. § 1303. On January 28, 2017, they filed an amended petition which is now the operative pleading in this case. On May 5, 2017, respondents Poncho, Rogers, Romero, Vega, and Williams (collectively, the Tribal Council respondents) and respondent Kockenmeister, a tribal court judge, separately moved to dismiss the amended petition. At the core of this case is an intra-tribal dispute regarding the ownership of certain parcels of land on the Bishop

Paiute Reservation located in eastern California. The amended petition alleges petitioners were unlawfully detained by respondents when they were denied access to their family land and were cited for trespass when attempting to enter the disputed land. Respondents represent that the citations issued to petitioners are purely civil in nature, and that petitioners can only be fined and not incarcerated pursuant to those citations. On May 5, 2017, the same day petitioners moved to stay these proceedings, respondents moved to dismiss the petition for habeas relief now pending before this court. Because the court concludes that petitioners have not been subjected to “detention” within the meaning of § 1303, it lacks jurisdiction over this habeas action. Respondents’ motions to dismiss the pending petition for a writ of habeas corpus are granted, and the writ of habeas corpus is dismissed.

N. *Miscellaneous*

**112. *Navajo Nation Human Rights Comm’n v. San Juan Cnty.***

No. 2:16-cv-00154-JNP-BCW, 2016 U.S. Dist. LEXIS 143454 (D. Utah Oct. 14, 2016). Before the court is a Motion for Preliminary Injunction filed by Plaintiff Navajo Human Rights Commission and others against Defendants San Juan County, John David Nelson, Phil Lyman, Bruce Adams, and Rebecca Benally. Plaintiffs alleged that San Juan County’s voting procedures violate the Voting Rights Act. Plaintiffs brought the Preliminary Injunction Motion, requesting that the court require the County to implement new voting procedures before the November 2016 general election. San Juan County is a sparsely populated and geographically vast political subdivision of the State of Utah, occupying the state’s southeastern corner. The County’s southern boundaries encompass a large section of the federally established Navajo Reservation. As a result, approximately half of the County’s residents are members of the Navajo Nation. Most of the County’s Navajo residents live within the boundaries of the Reservation. This motion for preliminary injunction comes before the court in the context of a lawsuit initiated by the Navajo Human Rights Commission and several named plaintiffs who allege that the voting procedures in place in San Juan County violate the Voting Rights Act. The voting procedures at issue here span several years of elections. Prior to 2014, the County conducted elections through nine polling places

open on Election Day. Each polling place provided some form of language assistance to Navajo-speaking voters. In 2014, the County transitioned to a predominantly mail-in voting system, leaving a single physical polling location operating at the County Clerk's office in Monticello, Utah. Ballots were distributed to voters through available mailing addresses approximately one month prior to Election Day. This system was in place for the 2014 election cycle. During 2014 and early in 2015, the Navajo Nation and the Navajo Human Rights Commission officially opposed the mail-in system, asserting that the closure of polling locations and switch to mailed ballots burdened rural Navajo voters. The Commission filed the Complaint underlying this Motion on February 25, 2016, alleging that the mail-in ballot system violated the Voting Rights Act and the Fourteenth Amendment to the United States Constitution. Shortly thereafter, Defendants filed their Answer, which asserted that the County was making significant changes to its election procedures in anticipation of the June 2016 primary elections. For the June 2016 elections, the County maintained the predominantly mail-in voting system, but also opened three physical polling locations on the Navajo Reservation and provided language assistance to voters through Navajo-speaking translators on Election Day. On August 3, 2016, Plaintiffs filed the Motion for Preliminary Injunction, asserting that whether the County employed the 2014 mail-in voting system or the June 2016 procedures, the elections to be held in November 2016 would violate Sections 2 and 203 of the Voting Rights Act. Defendants filed a Memorandum in Opposition to the Motion. The court concludes that Plaintiffs' motion for preliminary injunction should be denied. It is so ordered.

**113. *Navajo Nation, et al. v. San Juan County, a Utah governmental subdivision***

No. 2:12-00039, 2017 WL 3016782 (D. Utah Jul. 14, 2017). Plaintiffs, Navajo Nation and several individual tribe members (Navajo Nation), sued Defendant San Juan County, claiming the County Commission and School Board election districts violated the Equal Protection Clause of the Fourteenth Amendment, the Fifteenth Amendment, and Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. The court previously found both sets of districts unconstitutional under the Equal Protection Clause. The court did not decide whether the School Board or County Commission

districts violated Section 2 of the Voting Rights Act. The court then outlined a process for adopting legally sound remedial districts. The court suggested it would adopt San Juan County's proposed remedial plans if they cured the identified violations and were otherwise legally sound. San Juan County's remedial plans fail to pass constitutional muster. Specifically, the court concludes race was the predominant factor in the development of District 3 of the School Board plan and Districts 1 and 2 of the County Commission plan. The County's consideration of race requires strict scrutiny analysis of these districts. The court concludes the County has failed to satisfy strict scrutiny and, therefore, these districts are unconstitutional. Taking account of "what is necessary, what is fair, and what is workable" given the circumstances of this case, the court concludes the new districts must be a product of an independent, neutral process, with ample opportunity for participation and feedback from the parties. For these reasons, the court declines to evaluate the proposed remedial plans submitted by Navajo Nation. It will instead appoint a special master to assist the court in formulating lawful remedial districts. SO ORDERED.

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