

12-21-2018

## August 2017 - August 2018 Case Law on American Indians

Thomas P. Schlosser

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### Recommended Citation

Schlosser, Thomas P. (2018) "August 2017 - August 2018 Case Law on American Indians," *American Indian Law Journal*: Vol. 7 : Iss. 1 , Article 2.

Available at: <https://digitalcommons.law.seattleu.edu/ailj/vol7/iss1/2>

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AUGUST 2017 – AUGUST 2018  
CASE LAW ON AMERICAN INDIANS

*Thomas P. Schlosser*

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# AUGUST 2017 – AUGUST 2018 CASE LAW ON AMERICAN INDIANS

*Thomas P. Schlosser\**

## I. UNITED STATES SUPREME COURT

### 1. *Patchak v. Zinke*

No. 16-498, 138 S. Ct. 897 (U.S. Feb. 27, 2018). Neighboring landowner brought action challenging decision of the Secretary of the Interior to take a parcel of land into trust on behalf of the Match–E–Be–Nash–She–Wish Band of Pottawatomi Indians for casino use pursuant to Indian Reorganization Act (IRA). The District Court, 646 F. Supp. 2d 72, dismissed action on the basis of standing and the Quiet Title Act. Landowner appealed. The appellate court, 632 F.3d 702, reversed. Certiorari was granted. The Supreme Court, 567 U.S. 209, 132 S. Ct. 2199, 183 L. Ed. 2d 211, affirmed. On remand, the District Court, 109 F. Supp. 3d 152, entered summary judgment against landowner, based on Congress’s enactment of the Gun Lake Trust Land Reaffirmation Act, which reaffirmed the Department’s decision to take the land into trust and stripped federal courts of jurisdiction over actions “relating to” the land. Appeal was taken. The appellate court, 828 F.3d 995, affirmed. Certiorari was granted. The Supreme Court held that Gun Lake Trust Land Reaffirmation Act did not violate separation of powers.

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## 2. *Upper Skagit Indian Tribe v. Lundgren*

No. 17–387, 138 S. Ct. 1649 (U.S. May. 21, 2018). Property owners brought action against Indian tribe, which owned land adjacent to owners’ property, seeking to quiet title to property that owners claimed to have acquired through adverse possession before original owner sold adjacent property to the tribe. Tribe moved to dismiss based on tribe’s sovereign immunity. The Superior Court, Skagit County, Dave Needy, J., denied motion, and Susan K. Cook, J., granted summary judgment to property owners. Tribe moved for direct discretionary review. After accepting review, the Supreme Court of Washington, 187 Wash. 2d 857, 389 P.3d 569, affirmed. Certiorari was granted. U.S. 138 S. Ct. 543. The Supreme Court, Justice Gorsuch, held that: (1) in rem nature of property owners’ action did not, by itself, establish that suit was outside scope of tribe’s sovereign immunity, and (2) Court would not affirm on alternative common-law ground that tribe could not assert sovereign immunity because suit related to immovable property located in Washington state that was purchased by the tribe in same manner as a private individual. Vacated and remanded.

## 3. *Washington v. U.S.*

No. 17-269, 138 S. Ct. 1832 (Mem), 86 USLW 361, 186 USLW 4400 (U.S. Jun. 11, 2018). The judgment is affirmed by an equally divided Court. Justice Kennedy took no part in the decision of this case.

### II. OTHER COURTS

#### A. *Administrative Law*

## 4. *Nakai v. Zinke*

No. 16–cv–1500, 279 F. Supp. 3d 38 (D.D.C. Aug. 23, 2017). Applicant for Indian preference brought pro se action against Department of Interior (DOI) and various DOI employees, challenging the denial of her application by the Bureau of Indian Affairs (BIA). Applicant moved to complete the administrative record, defendants moved to dismiss, and applicant moved to strike some of defendants’ arguments from their reply brief in support of their motion to dismiss. The District Court held that: (1) action was rendered moot by Solicitor of the Interior’s remand of application

back to the Regional Director of the BIA for reconsideration of applicant's application based on her Indian heritage pursuant to regulation governing Indian preference for BIA positions; (2) DOI's interpretation of the Lumbee Act, to preclude applicant for Indian preference from receiving benefit, based on her Lumbee heritage, was substantially justified, and thus, applicant would not be entitled to attorney fees under the Equal Access to Justice Act, even if she would prevail and be granted Indian preference on remand; and (3) district court would decline to strike arguments in DOI's reply brief supporting its motion to dismiss. Motion to dismiss granted; motions to complete the record and to strike denied.

#### **5. *Cherokee Nation v. Nash***

No. 13–01313, 267 F. Supp. 3d 86 (D.D.C. Aug. 30, 2017). Cherokee tribe brought action seeking declaration that descendants of freed non-Indian slaves no longer had rights to citizenship in tribe. Department of Interior (DOI) and putative class of freed slaves intervened as defendants. DOI filed counterclaim for declaration that freed slaves retained tribal citizenship under Article 9 of the Treaty with the Cherokee, 14 Stat. 799 (July 19, 1866). Parties filed cross-motions for summary judgment. The District Court held that: (1) term “all,” as used in treaty that guaranteed “all the rights of native Cherokees” to freed slaves of the tribe, was unambiguous in its scope and covered the entirety of rights with no limitation whatsoever; (2) treaty gave qualified free slaves the right to citizenship in Cherokee Nation to same extent that native Cherokees had; and (3) extant descendants of freed slaves, whose ancestors had resided in Cherokee Territory within six months of ratification, were entitled to rights of Cherokee citizens, including citizenship. Ordered accordingly.

#### **6. *Mdewakanton Sioux Indians of Minnesota v. Zinke***

No.16–2323, 264 F. Supp. 3d 116 (D.D.C. Sep. 1, 2017). Putative Indian tribe and three individuals who allegedly belonged to tribe brought action against Secretary of Department of the Interior and United States, alleging that Department's failure to consult regarding proposed amendments to constitution of Indian community and changes to federal land assignment system violated the Administrative Procedure Act (APA), and seeking declaratory and injunctive relief. Defendants moved to dismiss for failure to exhaust administrative remedies and on statute of limitations

grounds. The District Court held that: (1) plaintiffs failed to show that waiver was warranted for their failure to exhaust administrative remedies; (2) district court would convert government's motion to dismiss into motion for summary judgment; and (3) claim accrued, and six-year limitations period for suits against the United States began to run, when plaintiffs contacted Department requesting consultation regarding constitutional amendments and land assignments. Motion granted.

**7. *Forest County Potawatomi Community v. United States***

No. 15–105, 270 F. Supp. 3d 174 (D.D.C. Sep. 12, 2017). Indian tribe brought action under Administrative Procedure Act (APA) against the United States, challenging Department of Interior's (DOI) decision not to approve an amendment to a gaming compact between the tribe and State of Wisconsin under Indian Gaming Regulatory Act (IGRA). After a second tribe and its gaming authority were granted leave to intervene as defendants, 317 F.R.D. 6, plaintiff moved to supplement the administrative record, and intervenors moved both to supplement the administrative record and to exclude documents from the administrative record. The District Court held that: (1) administrative record would not be supplemented with records of meetings and calls among DOI official, Wisconsin, and another tribe; (2) administrative record would not be supplemented with news reports and other public documents relating to the proposed amendment; (3) administrative record would not be supplemented with four gaming compacts and compact-related agreements between other tribes and other states; (4) administrative record would not be supplemented with documents referred to in legal memoranda submitted by another tribe that opposed the amendment; (5) administrative record would not be supplemented with documents related to a settlement agreement in a separate suit involving another Indian tribe; and (6) administrative record would not be supplemented with financial reports that were not considered by DOI. Plaintiff's motion denied, and intervenor defendants' motion granted in part and denied in part.

**8. *Forest County Potawatomi Community v. Zinke***

No. 14–2201, 278 F. Supp. 3d 181 (D.D.C. Sep. 30, 2017). Requester, an Indian tribe, brought action against Department of the Interior and its component agencies under Freedom of Information Act (FOIA), seeking response to FOIA requests it had filed

regarding documents pertaining to another tribe that sought to open a competing gaming facility. Parties filed cross motions for summary judgment. The District Court held that: (1) internal records of environmental contractor that worked on competing facility were “created or obtained” by agencies; but (2) agencies did not control contractor’s internal records at time of FOIA request, which thus were not agency records under FOIA; (3) documents withheld were “commercial” within meaning of FOIA exemption applicable to privileged or confidential commercial documents; (4) disclosure of commercial documents did not pose serious risk to government’s ability to receive such information in future, but (5) disclosure of documents created a substantial likelihood of competitive harm to applicant tribe, so documents were exempt from disclosure under FOIA; and (6) agencies did not engage in policy or practice of FOIA noncompliance. Department and officers’ motion granted in part and denied in part; requester’s motion denied.

**9. *County of Amador, California v. United States  
Department of the Interior, et al.***

No. 15-17253, 872 F.3d 1012 (9th Cir. Oct. 6, 2017). County brought action against Department of Interior (DOI), challenging record of decision announcing its intention to take land into trust for benefit of Indian Tribe and allowing Tribe to build a casino on land. Tribe intervened as defendant. The District Court, 136 F. Supp. 3d 1193, granted summary judgment to DOI and Tribe. County appealed. The appellate court held that: (1) as matter of first impression, phrase “recognized Indian tribe now under Federal jurisdiction,” in IRA includes all tribes that are “recognized” at the time of the relevant decision and that were “under Federal jurisdiction” at the time the IRA was passed; (2) DOI’s interpretation of phrase “under Federal Jurisdiction” in provision of Indian Reorganization Act (IRA) defining an “Indian” entitled to IRA’s benefits was best interpretation; (3) DOI’s determination that tribe was “under Federal jurisdiction” when IRA was passed was not arbitrary and capricious; and (4) grandfathering provision in DOI regulation implementing Indian Gaming Regulatory Act’s (IGRA) “restored tribe” exception was in accordance with IGRA. Defendants’ motions granted, plaintiff’s denied.

**10. *Moody v. United States,***

No. 16–107C, 135 Fed. Cl. 39 (Fed. Cl. Oct. 13, 2017). Lessees, who had entered into five agricultural leases with Indian tribe, brought action against United States, alleging that government breached leases by terminating them and ordering lessees to vacate land, and that government’s actions constituted taking without just compensation under Fifth Amendment. Government moved to dismiss for lack of subject matter jurisdiction and for failure to state claim. The Court of Federal Claims held that: (1) there was no privity of contract between United States and lessees; (2) conversation between lessees and government official could not have created implied in fact contract; (3) government lacked authority to enter into implied in fact contract to allow lessees to continue farming after their leases were cancelled; and (4) because lessees alleged that government violated regulations in 25 C.F.R. §§ 162.247–162.256, rather than acted lawfully pursuant to the regulations, in terminating leases, lessees could not state Fifth Amendment takings claim. Motion to dismiss granted.

**11. *Nooksack Indian Tribe v. Zinke***

No. C17-0219, 2017 WL 5455519 (W.D. Wash. Nov. 14, 2017). This matter comes before the Court on Plaintiff’s motion for reconsideration of the Court’s Order denying Plaintiff’s motion for preliminary injunction and granting Defendants’ motion for summary judgment (*Dkt. No. 43*). This lawsuit was initiated by members of the Nooksack Tribal Council, including “holdover” members who continued to occupy their seats on the Council after their terms expired in March 2016. Defendants consist of the Department of the Interior (“DOI”), Bureau of Indian Affairs (“BIA”) and members of the agencies’ leadership. On May 11, 2017, the Court granted Defendants’ motion for summary judgment, holding that it did not have subject matter jurisdiction because the holdover Council lacked authority to bring its claims on behalf of the Tribe during the period where DOI had refused to recognize tribal leadership. The Court subsequently denied Plaintiff’s motion for a preliminary injunction. Plaintiff filed a motion for reconsideration and Defendants responded. Before the Court addressed the motion, the parties filed a joint motion for a 120-day stay of proceedings. The Court granted the stay and the parties filed a joint status report at the end of the 120-day period. During the stay, the parties conducted negotiations that resulted in the execution of a



Memorandum of Agreement (“MOA”) between Robert Kelly, the Chairman of the Tribal Council, and Michael Black, the Acting-Assistant Secretary of Indian Affairs. The MOA outlines a process through which the federal government will once again recognize the Nooksack Tribal Council as the governing body of the Nooksack Tribe. Under the MOA, the Tribe must hold a special election and the results must be endorsed by the BIA. In addition, the MOA reiterated that DOI only recognizes actions taken by the Nooksack Tribal Council prior to March 24, 2016 when a quorum existed. The special election is scheduled for December 2, 2017 to replace the “held-over” council members. In the parties’ joint status report, Plaintiff asked the Court to immediately renote its motion for reconsideration. Plaintiff’s motion for reconsideration was denied.

## 12. *Allen v. United States of America*

No. C16-04403, 2017 WL 5665664 (N.D. Cal. Nov. 27, 2017). In this Indian tribal rights action, plaintiffs move for summary judgment. Federal defendants oppose and cross-move for summary judgment. For the reasons herein, federal defendants’ motion is granted and plaintiffs’ motion is denied. Plaintiffs are a group of Indians seeking to organize as the Ukiah Valley Pomo Indian Tribe on the Pinoleville Rancheria where they reside. The Rancheria is already home to the Pinoleville Pomo Nation (previously known as the Pinoleville Indian Community and the Pinoleville Band of Pomo Indians), a federally recognized tribe, members of which also reside on the Rancheria. Though the two groups were previously a single, unified tribe, our plaintiffs have since relinquished their membership in the Pomo Nation. Based on the foregoing, the Regional Director acted within her discretion to determine that a tribe cannot be comprised of only a subset of the Indians residing on a reservation. Because plaintiffs comprise only a part of the group for whom the Pinoleville Reservation was established and are only some of the Indians living on the Reservation, the Regional Director was within her discretion when she denied them the right to seek organization. Her determination follows from the language of the statute and implementing regulation and is not “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”

### 13. *Bahe v. Office of Navajo*

No. CV-17-08016, 2017 WL 6618872 (D. Ariz. Dec. 28, 2017). Plaintiff Hedy Bahe, on behalf of her deceased husband, Jerry Bahe, seeks judicial review of the administrative decision by Defendant Office of Navajo and Hopi Indian Relocation (ONHIR) denying Plaintiff relocation benefits under the Navajo-Hopi Settlement Act. Before the Court are the parties' cross-motions for summary judgment. The motions are fully briefed and neither side requested oral argument. In 1882, a reservation was established in northeastern Arizona for the Hopi Nation and "such other Indians as the Secretary of Interior may see fit to settle thereon." *Bedoni v. Navajo-Hopi Indian Relocation Comm'n*, 878 F.2d 1119, 1121 (9th Cir. 1989). Members of the Navajo Nation subsequently settled on the reservation alongside the Hopi. "The Hopi and Navajo [Nations] coexisted on the 1882 reservation for seventy-five years, but became entangled in a struggle as to which [nation] had a clear right to the reservation lands." In 1962, this district court found that the two tribes held joint, undivided interests in most of the reservation, which was called the "joint use area" (JUA). Twelve years later, after establishment of the JUA failed to solve inter-tribal conflicts over the land, Congress passed the Navajo-Hopi Settlement Act in 1974. The Act authorized the district court to make a final partition of the reservation after mediation efforts between the nations had failed. *See Sekaquaptewa v. MacDonald*, 626 F.2d 113, 115 (9th Cir. 1980.) The Act also directed creation of the ONHIR's predecessor, the Navajo-Hopi Relocation Commission, to provide services and benefits to help relocate residents who were located on lands allocated to the other nation as a result of the court-ordered partition. *See Bedoni*, 878 F.2d at 1121-22; 25 U.S.C. § 640d-11. To be eligible for relocation benefits, a Navajo applicant bears the burden of demonstrating that he or she was (1) a legal resident on the Hopi Partitioned Lands (HPL) on December 22, 1974, and (2) a head of household on or before July 7, 1986. 25 C.F.R. § 700.147. In May 2005, Jerry Bahe, a member of the Navajo Nation, applied for relocation benefits. In October 2005, ONHIR denied Bahe's application, finding that he "did not reside on [HPL] on December 22, 1974." In November 2005, Bahe timely appealed ONHIR's decision. Bahe died in 2006, after which Plaintiff continued to pursue the claim pursuant to ONHIR's surviving spouse policy. An independent hearing officer (IHO) held an appeal hearing. In 2011, the IHO issued a written opinion upholding the ONHIR's denial,

finding that “[t]he greater weight of evidence shows that, on December 22, 1974, [Jerry Bahe] was a legal resident of Jeddito Island, an area which was later partitioned for the use of the Navajo [Nation].” The IHO’s ruling became Defendant’s final decision when it affirmed the ruling on July 18, 2011. Plaintiff then commenced this action for judicial review pursuant to 25 U.S.C. § 640d-14(g) and the Administrative Procedure Act (APA), 5 U.S.C. § 701 et. seq. On appeal, Plaintiff makes four arguments: (1) the IHO applied an incorrect legal standard when assessing whether Plaintiff was a resident of HPL at the time of the statutory cut-off date; (2) even if the IHO applied the correct legal standard, his decision is not supported by substantial evidence; (3) the IHO’s credibility findings are arbitrary and capricious; and (4) the ONHIR breached its fiduciary duty to Plaintiff. The court found that Defendant’s decision denying Plaintiff relocation benefits is reasonable and supported by substantial evidence. Accordingly, it is ordered that Defendant’s administrative decision denying Plaintiff’s application for relocation benefits is affirmed. The Clerk entered judgment accordingly and terminated this case.

**14. *Stand Up for California! v. United States Department of Interior***

No. 16-5327, consolidated with 16-5328, 879 F.3d 1177 (D.C. Cir. Jan. 12, 2018). Community groups and Indian tribe with competing casino brought action challenging Department of Interior’s decision to take a tract of land into trust for the North Fork Rancheria of Mono Indians and authorize it to operate a casino there. The District Court, 204 F.Supp. 3d 212, granted partial summary judgment to Department and dismissed remaining claims. Plaintiffs appealed. The appellate court held that: (1) Indian tribe constituted a “recognized Indian tribe” at time that Indian Reorganization Act (IRA) was passed; (2) substantial evidence supported Department’s conclusion that Indian tribe, as it currently existed, could trace its roots to Indians who lived on tribe’s reservation at time that IRA was passed; (3) court would defer to Department’s reasonable interpretation of provision of Indian Gaming Regulatory Act (IGRA) that required an Indian casino to not be a detriment to the surrounding community; (4) substantial evidence supported Department’s determination that permitting Indian tribe to operate a casino on its newly acquired lands would not be detrimental to the surrounding community; and (5) relevant date for Department’s

analysis of whether proposed casino would comply with Clean Air Act (CAA) requirements was when the Department initially made its determination, rather than when it reissued its determination on remand. Affirmed.

**15. *Chisoe v. Zinke***

No. 16-5172, 725 Fed. Appx. 614 (10th Cir. Feb. 16, 2018). Personal representative of estate of owner of restricted Indian land appealed decision of the Interior Board of Indian Appeals (IBIA) upholding denial of application to complete transfer of land to Bureau of Indian Affairs (BIA). The United States District Court for the Northern District of Oklahoma, No. 4:15-CV-00166, Claire V. Eagan, 2016 WL 5390890, affirmed. Personal representative appealed. The Court of Appeals, Scott M. Matheson, Jr., Circuit Judge, held that: (1) BIA had not made final decision to acquire property; (2) Secretary of the Interior acted reasonably in interpreting applicable statute and regulation to require that applicant be living at time of agency's decision regarding whether to take restricted Indian land into trust; and (3) remand was warranted for district court to determine whether personal representative was entitled to exception to exhaustion requirement. Affirmed in part, reversed in part, and remanded.

**16. *Burt Lake Band of Ottawa and Chippewa Indians v. Zinke***

No. 17-0038, 304 F. Supp. 3d 70 (D.D.C. Mar. 29, 2018). Plaintiff Burt Lake Band of Ottawa and Chippewa Indians (formerly known as the Cheboygan Band) describes itself as “the last ‘landless’ tribe in Michigan.” This case arises out of the fact that plaintiff has been seeking formal federal recognition, which would give the Burt Lake Band (or “the Band”) a number of rights and benefits, since at least 1935. In 1935, a group of the Band’s ancestors petitioned the Bureau of Indian Affairs (“BIA”) within the Department of Interior to be recognized under the Indian Reorganization Act of 1934. Am. The agency has never issued a final decision on the 1935 Petition. In 1985, the Band filed another petition. The 1985 petition went unanswered for more than 20 years, until it was denied in 2006. Plaintiff did not seek review of the 2006 decision. In 2014, the BIA initiated a rulemaking to reform the federal recognition process, and it solicited comments on a proposed rule that would revise the existing regulations. Fed. Acknowledgment of Am. Indian Tribes,

79 Fed. Reg. 30766 (proposed May 29, 2014) (to be codified at 25 C.F.R. pt. 83) (“Proposed Rule”). One of the provisions in the proposal sent out for notice and comment, would have allowed Tribes to re-petition the agency for recognition under certain circumstances. Ultimately, the agency chose not to adopt that provision, stating that “allowing for re-petitioning by denied petitioners would be unfair to petitioners who have not yet had a review,” and identifying other efficiency concerns. Fed. Acknowledgment of Am. Indian Tribes, 80 Fed. Reg. 37862, 37875 (July 1, 2015) (to be codified at 25 C.F.R. pt. 83) (“2015 Regulations”). Plaintiff filed this lawsuit on January 9, 2017 and filed an amended complaint on June 1, 2017. The amended complaint includes seven constitutional and statutory claims. Counts I, II, and III challenge the agency’s failure to issue a final decision on the 1935 Petition under the APA, the Due Process Clause, and the Equal Protection Clause of the 5th Amendment. Counts IV, V, and VI challenge the agency’s 2015 Regulations under the APA, the Due Process Clause, and the Equal Protection Clause. Counts IV, V, and VI will proceed because the Court finds that plaintiff has standing to challenge the 2015 Regulations.

#### **17. *Nipmuc Nation v. Zinke***

No. 14–40013, 305 F. Supp. 3d 257 (D. Mass. Mar. 30, 2018). The Nipmuc Nation (“Plaintiff”, “Nipmuc Nation” or “Petitioner 69A”), has filed a Petition for Review of a final administrative determination by Secretary Ryan Zinke, the United States Department of the Interior (“DOI”), Bureau of Indian Affairs (“BIA”), Office of Federal Acknowledgment, and the United States of America (collectively, the “Defendants”). Plaintiff seeks a ruling that the Defendants’ Final Determination against federal acknowledgment was arbitrary, capricious, and abuse of discretion, against the substantial evidence and not in accordance with the law (Count One); that the BIA failed to follow the applicable regulations set forth in 25 C.F.R. § 83 et seq. and therefore, the Defendants’ Final Determination against federal acknowledgment violated Plaintiff’s procedural due process rights (Count Two); and that the BIA’s refusal to consider evidence in support of Plaintiff’s Petition, despite its consideration of such evidence in the applications of other similarly situated tribes seeking federal acknowledgment, deprived Plaintiff of its right to equal protection under the law (Count Three). Essentially, Plaintiffs seeks a declaration that it has satisfied the

legal criteria for federal acknowledgment as an Indian tribe under the laws of the United States of America. Accordingly, Plaintiff asked the Court to vacate Defendants' Final Determination against federal acknowledgment and reverse it, or, alternatively, to vacate the Final Determination and remand Plaintiff's Petition to Defendants with instructions to reconsider the Petition consistent with the findings of this Court. The Court found that Defendants' determination that Plaintiff failed to satisfy the requisite criterion for federal acknowledgment was not arbitrary or capricious. Additionally, the Court did not find that either the procedure utilized by the Defendants, or their decision denying Plaintiff federal acknowledgment deprived the Plaintiff of its Fifth Amendment right to due process. Defendant's motion granted.

**18. *Butte County, California v. Chaudhuri***

No. 16-5240, 887 F.3d 501 (D.C. Cir. Apr. 13, 2018). County in which parcel of land was located that Indian tribe sought to have taken into trust to operate a casino on brought action against National Indian Gaming Commission (NIGC) challenging Secretary of Interior's decision to take land into trust. The District Court, 197 F. Supp. 3d 82, granted summary judgment to NIGC. County appealed. The appellate court held that: (1) Secretary did not abuse her discretion in reopening administrative record on remand; (2) Secretary's grant of 15-day extension to tribe to submit its response to county's submission of new evidence was not improper; (3) Secretary acted within her authority in setting a 20-day deadline for county to respond to tribe's expert's rebuttal report; and (4) Secretary's determination that members of modern-day tribe were biological descendants of members of pre-1850 tribe was not arbitrary and capricious. Affirmed.

**19. *Cachil Dehe Band of Wintun Indians of Colusa Indian Community v. Zinke***

No. 17-15245, No. 17-15533, 889 F.3d 584 (9th Cir. May 2, 2018). Indian tribe with a casino, citizens' groups, and individuals brought action to enjoin the Bureau of Indian Affairs (BIA) from taking parcel of land into trust for another Indian tribe so that it could build a casino and hotel complex. The District Court, No. 2:12-cv-03021-TLN-AC, 2015 WL 5648925, granted summary judgment to defendants and, 2017 WL 345220, denied reconsideration. Plaintiffs appealed. The Court of Appeals held that: (1) BIA had authority

under the Indian Reorganization Act (IRA) to take parcel of land into trust for the tribe seeking to build a casino; (2) BIA's decision under IRA, that the Indian tribe seeking to build a casino needed BIA to take parcel of land into trust for it for economic development, was not arbitrary and capricious; (3) BIA's misdescription of parcel of land in notice of final agency determination did not render its decision arbitrary and capricious; (4) BIA satisfied Indian Gaming Regulatory Act's (IGRA) requirement for consultation with the tribe that owned a casino; (5) regulatory definition of "nearby" Indian tribe, with which BIA was required to consult under IGRA, was not arbitrary and capricious; (6) district court did not abuse its discretion when it struck, as outside administrative record, expert declaration; (7) BIA's decision under IGRA, that mitigation measures would prevent detrimental harm to surrounding community from new Indian casino, was not arbitrary and capricious; and (8) BIA's final environmental impact statement (FEIS) satisfied National Environmental Policy Act (NEPA) requirements. Affirmed.

**20. *Stand Up for California! v. United States Department of Interior***

No. 1:17-00058, 315 F. Supp. 3d 289 (D.D.C. May 30, 2018). A Gambling advocacy group brought action against the Department of Interior, challenging adequacy of the administrative record for judicial review of the Department's decision to approve acquiring land in trust for Wilton Rancheria tribe of American Indians, seeking to supplement the administrative record and seeking discovery in form of privilege log from Department. The case arose from the Department's finalization of acquisition of land for the tribe's proposed casino, which was within an entirely different plot of land than tribe had proposed in its application to Bureau of Indian Affairs (BIA). The District Court held that: (1) plaintiff failed to show any unusual circumstances warranting supplementation of administrative record; (2) plaintiff made prima facie showing of bad faith warranting production of privilege log; and (3) defendant did not wholesale waive its deliberative process privilege for documents with consultant. Motion to supplement administrative record denied and motion for discovery granted.

**21. *Chinook Indian Nation v. Zinke***

No. C17-5668 RBL, 326 F. Supp. 3d 1128 (W.D. Wash. Jun. 20, 2018). This matter is before the Court on Defendants' Motion to

Dismiss. Plaintiffs are descendants of the historic Chinook Indian tribe and bring suit against the Department of the Interior (DOI) and the Bureau of Indian Affairs (BIA) in an effort to compel those agencies to add the Chinook Indian Nation (CIN) to the list of federally acknowledged tribes. Plaintiffs also challenge regulations promulgated by Defendants which prohibit the CIN from re-petitioning the federal government for tribal acknowledgment. Finally, Plaintiffs seek access to funds from a 1970 Indian Claims Commission judgment currently held in trust by the DOI for the Lower Band of Chinook and Clatsop Indians. Defendants move to dismiss all claims, arguing that the Court lacks subject matter jurisdiction to confer federal acknowledgment on the CIN. Defendants also argue that Plaintiffs lack standing to challenge the re-petition ban, and that the CIN's claims regarding the funds held in trust is not a final agency action which can be challenged under the Administrative Procedure Act (APA). For the reasons that follow, the Motion to Dismiss is granted in part and denied in part. This Court reaches the same conclusion as the Burt Lake court and determines that Plaintiffs have standing to challenge the re-petition ban contained in the 2015 federal acknowledgment regulations. Defendants' motion to dismiss Claims 2–5 seeks to have the Court prematurely address the merits of a re-petition under the 2015 regulations. At this juncture, however, the Court must construe the Amended Complaint in the light most favorable to the non-moving party and accept as true all well-pleaded allegations of material fact. Accordingly, the Court will not dismiss Plaintiffs' claims challenging the re-petition ban at this stage of the litigation. Defendants' motion to dismiss claims 2–5 is denied.

B. *Child Welfare Law and ICWA*

**22. *State in Interest of P.F.***

No. 20160247, 405 P.3d 755 (Utah Ct. App. Aug. 24, 2017). The State petitioned to terminate mother's parental rights to child. The Juvenile Court, No. 1032776, terminated parental rights. Mother appealed. The appellate court held that: (1) the placement of child with a non-Native American foster family did not violate the Indian Child Welfare Act (ICWA), and thus the trial court could consider the bond child had with foster family as grounds for good cause to depart from the ICWA placement preferences, and (2) the trial court was not required to provide special weight to the testimony of mother's expert. Affirmed.

**23. *Matter of Adoption of B.B.***

No. 20150434, 417 P. 3d 1 (Utah Aug. 31, 2017). Birth father, a member of a Native American tribe, moved to intervene in adoption



matter after birth mother, a member of the same tribe, had executed a voluntary relinquishment of parental rights, in which she listed her brother-in-law as child's father, and adoption agency had received custody of the child. Following its initial granting of birth father's motion to intervene, the Third District Court denied on reconsideration birth father's motion to intervene and denied birth mother's motion to withdraw her consent to the termination of her parental rights. Birth father appealed. The Supreme Court held that: (1) birth father was a parent under the Indian Child Welfare Act (ICWA) and had right to notice and to intervene in the adoption proceedings; (2) birth father had custody of child under the ICWA; (3) adoption proceedings were involuntary, not voluntary, as to birth father (4) trial court's order accepting birth mother's consent to child's adoption under the ICWA and terminating her parental rights was not properly presented to the Supreme Court for review; and (5) any defect in the timing of birth mother's consent to adoption of child did not deprive trial court of subject-matter jurisdiction. Reversed and remanded.

**24. *In Interest of S.E.***

No. ED 105382, 527 S.W. 3d 894 (Mo. Ct. App. Sep. 12, 2017). Child protection proceedings were initiated after mother's Indian children were alleged to have been abused and neglected. Children's tribe intervened in the proceedings. State then filed a motion to terminate mother's parental rights. Following a hearing, the Circuit Court terminated mother's parental rights. Tribe appealed. The appellate court held that: (1) Indian tribe had standing to appeal the judgment independently of mother; (2) alleged invalidity of mother's consent to termination of parental rights and trial court's alleged error in certifying child protection worker as an expert witness under the Indian Child Welfare Act (ICWA) did not result in manifest injustice, and thus plain error review was not appropriate; and (3) no manifest injustice resulted from alleged insufficiency under ICWA of the trial court's findings in support of the termination of parental rights, and thus plain error was not appropriate. Affirmed.

**25. *In re A.F.***

No. D072226, 18 Cal. App. 5th 833 (Cal. Ct. App. Nov. 29, 2017). After health and human services agency filed dependency petition on behalf of Indian minor child and recommended that child remain

in her maternal aunt's care, child's paternal grandmother filed de facto parent request, request for review of agency's placement decision, and request to change a court order. After jurisdictional and dispositional issues were bifurcated at contested jurisdiction and disposition hearing, the Superior Court made jurisdiction finding of dependency, and subsequently entered dispositional order placing child in the care of grandmother. Mother appealed. The appellate court held that: (1) Indian tribe's letter indicating its placement preference did not modify statutory placement preferences for Indian children, and (2) order placing child with her grandmother complied with statutory placement preferences. Affirmed.

**26. *Interest of K.S.D.***

No. 20170272, No. 20170273, 904 N.W. 2d 479 (N.D. Dec. 7, 2017). County Social Services filed petition to terminate mother's and father's parental rights to Native American children. The Juvenile Court terminated father's parental rights, and father appealed. The Supreme Court held that: (1) evidence supported findings that children were deprived, that deprivation would continue, and that father's continued custody would likely result in serious emotional or physical damage to children; (2) active efforts were made to provide remedial services and rehabilitative programs designed to prevent breakup of family, as prerequisite to termination of parental rights, under Indian Child Welfare Act (ICWA); (3) under ICWA, qualified expert testimony was required on whether father's continued custody of children was likely to result in serious emotional or physical damage to children. Remanded.

**27. *In Interest of J.J.T.***

No. 08-17-00162, 544 S.W. 3d 874 (Tex. App. Dec. 20, 2017). Department of Family and Protective Services filed petition to terminate parental rights to child, who was member of Navajo Nation. After denying the Navajo Nation the right to intervene in the proceedings, the District Court terminated parental rights of both parents and ordered child to remain in foster home. The Navajo Nation formally intervened pursuant to the Indian Child Welfare Act (ICWA) and filed a motion requesting a placement hearing. Navajo Nation then filed notice of appeal. The appellate court held that: (1) Navajo Nation had standing to appeal under ICWA; (2) ICWA section allowing tribe to intervene in child custody proceedings for an Indian child preempted state rule requiring a written intervention

pleading; and (3) evidence was sufficient to establish beyond a reasonable doubt that mother's continued custody of child was likely to result in serious emotional or physical damage to the child, and was not in the child's best interest. Reversed and remanded.

**28. *Matter of IW***

No. 115997, 419 P.3d 362 (Okla. Civ. App. Dec. 29, 2017). State petitioned to terminate parental rights of father of minor children of Native American descent, alleging father, who resided in Kansas, failed to correct conditions which led to minor children's deprived status after he pled no contest to domestic battery for spanking one child who suffered significant bruising. The District Court terminated father's parental rights. Father appealed, raising issues under state and federal Indian Child Welfare Act (ICWA). The appellate court held that: (1) expert was qualified to testify regarding placement of minor children, and (2) expert testimony was insufficient to support required finding under ICWA that continued custody of children with father was likely to result in serious emotional or physical damage to children. Reversed.

**29. *State in Interest of A.J.B.***

No. 20160954, 414 P.3d 552 (Utah Ct. App. Dec. 29, 2017). Division of Child and Family Services (DCFS) moved to terminate mother's parental rights to her minor child. The Eighth District Juvenile Court terminated mother's parental rights. Mother appealed. The appellate court held that: (1) child's relocation, after initial custody determination, to community within exterior boundaries of Indian tribe's reservation did not divest Juvenile Court of jurisdiction, and (2) Juvenile Court did not abuse its discretion by declining to contact tribal court before terminating parental rights. Affirmed.

**30. *Kiva O. v. State Department of Health & Social Services***

No.S-16605, 408 P.3d 1181 (Alaska Jan. 5, 2018). Office of Children's Services (OCS) sought authority of court to consent to medicating, over mother's objection, Indian child in OCS's custody with both an antidepressant and mood stabilizer, as recommended by child's psychiatrist. The Superior Court granted OCS's request. Mother appealed following denial of her request for a stay and motion for reconsideration. The Supreme Court held that:

(1) mother had fundamental constitutional liberty and privacy right that was substantially burdened by OCS's request for authority to medicate child over her objection; (2) OCS had compelling interest in child's medical care, as factor in determining whether trial court could override mother's fundamental constitutional liberty and privacy right by granting OCS's request to medicate child over mother's objection; (3) evidence supported finding that treating child with antidepressant was in child's best interests; (4) evidence supported finding that there were no available treatments less intrusive than treating child with antidepressant; and (5) evidence was insufficient to support finding that mood stabilizer was least intrusive available treatment to address child's medical needs. Affirmed in part, reversed in part, and remanded.

**31. *Diego K. v. Department of Health & Social Services, Office of Children's Services***

No. S-16374, 411 P.3d 622 (Alaska Feb. 23, 2018). Office of Children's Services (OCS) petitioned for removal of Indian child from parents' custody. The Superior Court ordered child removed from her parents' home. Parents appealed. The Supreme Court remanded for additional findings. Following remand, the Superior Court issued order clarifying its removal findings. Parents appealed. The Supreme Court held that information from status hearings, including unsworn statements made by OCS workers, could not be used by trial court to support its order authorizing removal of Indian child from parents' custody. Vacated and remanded.

**32. *Nguyen v. Gustafson***

No. 18-522, 2018 WL 1413463 (D. Minn. Mar. 21, 2018). This matter is before the Court on Plaintiff's Motion for a Preliminary Injunction. The underlying facts of this action concern divorce proceedings between Plaintiff James V. Nguyen and Defendant Amanda G. Gustafson. Gustafson is an enrolled member of the Shakopee Mdewakanton Sioux Community, while Nguyen is not a member. Nguyen and Gustafson were married in Las Vegas, Nevada in 2014, and are the parents of a minor child. Both parties now reside in Minnesota. In June 2017, Nguyen filed for dissolution of marriage in California state court, as he resided in California at that time. In July 2017, Gustafson filed for dissolution of marriage in the Shakopee Mdewakanton Sioux Community Tribal Court ("Tribal

Court”), a defendant in the current action. Defendant Henry M. Buffalo, Jr., Judge of the Tribal Court, was assigned the case. The California state court held a two-day evidentiary hearing to discuss custody and visitation. Upon receipt of a Tribal Court order dated August 10, 2017, in which that court confirmed its intent to proceed with the case, the California state court dismissed the proceedings before it. Shortly thereafter, Nguyen moved to Minnesota and filed for dissolution of marriage in Hennepin County. In his filings, Nguyen disclosed that he was not currently employed and did not receive any earned income, with the exception of some rental income from a leased property. He also alleged that although Gustafson was not currently employed, she received per capita payments as a member of the Shakopee Mdewakanton Sioux Community. On January 8, 2018, the Hennepin County court stayed Nguyen’s action as a matter of judicial expedience and comity, pending the proceedings in Tribal Court. In October 2017, Nguyen moved to dismiss the proceedings in Tribal Court, asserting that the court lacked personal and subject matter jurisdiction. Judge Buffalo issued a written ruling on November 10, 2017, in which he found that the Tribal Court had both subject matter and personal jurisdiction and had a substantial interest in continuing to exercise its jurisdiction. Nguyen then sought an appeal with the Court of Appeals for the Shakopee Mdewakanton Sioux Community (the “Tribal Court of Appeals”). He requested permission to appeal under the collateral order doctrine, and in the alternative, asked the Tribal Court to certify the November 10, 2017 decision for interlocutory appeal. On December 11, 2017, the Tribal Court denied Nguyen’s request for certification, and also found that his motion to dismiss did not fall within the collateral order doctrine. On January 30, 2018, the Tribal Court of Appeals denied Nguyen’s request for an appeal under the collateral order doctrine, and because it was not certified for interlocutory appeal. On March 7, 2018, Nguyen filed this action for injunctive and declaratory relief pursuant to 28 U.S.C. § 1331, under which non-Indians may bring a federal common law cause of action challenging tribal court jurisdiction. He seeks a declaration that the Tribal Court lacks jurisdiction over the dissolution proceedings and that proper jurisdiction rests in state court. In addition, he seeks a preliminary injunction to halt all current proceedings in Tribal Court and to prohibit any defendant from prosecuting Gustafson’s position in that court. Nguyen contends that he will suffer irreparable harm if forced to complete discovery and participate in proceedings in a court

system that lacks jurisdiction, and that he is likely to succeed on the merits of his contention that the Tribal Court lacks jurisdiction. The Court denied Plaintiff's Motion for Preliminary Injunction.

**33. *Matter of L.D.***

No. 17-0419, 414 P.3d 768 (Mont. Mar. 27, 2018). In child protection proceeding, the District Court terminated mother's parental rights. Mother appealed. The Supreme Court held that: (1) Department of Health and Human Services could not passively rely on inaction of Indian tribe to satisfy burden under Indian Child Welfare Act (ICWA) to actively investigate and ultimately make formal inquiry with tribe for conclusive determination of child's tribal membership eligibility, and (2) trial court could not rely on mother's stipulation or acquiescence that the Indian Child Welfare Act (ICWA) did not apply to child to satisfy its threshold duty to obtain conclusive determination from Indian tribe of child's tribal eligibility. Reversed and remanded.

**34. *In re Williams***

No. 155994, 915 N.W. 2d 328 (Mich. May 18, 2018). Foster parents petitioned to adopt children, whose biological father was member of Indian tribe, after father signed consent to termination of his parental rights. Father intervened and moved to withdraw his consent to termination of his parental rights. The Macomb Circuit Court, No. 2012-000291-NA, denied father's motion, and the Oakland Circuit Court, No. 2015-837756-AM, denied foster parents' adoption petitions. Foster parents and father appealed. The Court of Appeals, 320 Mich. App. 88, 902 N.W. 2d 901, affirmed in part, reversed in part, vacated in part, and remanded. Father applied for leave to appeal, which application was granted, 501 Mich. 870, 901 N.W. 2d 856. The Supreme Court held that: (1) specific adoptive placement was not required for father's consent to termination of his parental rights to be valid; (2) father was not required to have executed any additional consent in order to be statutorily-entitled, under the Michigan Indian Family Preservation Act (MIFPA), to withdraw his consent to termination of his parental rights; and (3) father's status as participant in child protection proceeding did not preclude father from benefiting from consent-withdrawal provision of the Michigan Indian Family Preservation Act (MIFPA). Reversed and remanded.

**35. *In re C.A.***

No. D073229, 24 Cal. App. 5th 511 (Cal. Ct. App. May 23, 2018). Dependency proceeding was initiated regarding child born with amphetamine and methamphetamine in her system at birth. Following determination that Indian Child Welfare Act (ICWA) did not apply to child's presumed father or biological father, the Superior Court, No. J519280, terminated mother's parental rights to child. Mother and presumed father appealed. The Court of Appeal held that:(1) record demonstrated ICWA did not apply based on biological father's initial claim of Native American heritage; (2) as an issue of apparent first impression, presumed father's claim of Native American heritage was insufficient to trigger ICWA notice requirements; and (3) record supported finding that mother was not entitled to parent-child relationship exception to adoption to preclude termination of parental rights. Affirmed.

**36. *Jane Doe 1 v. The Corporation of The President of The Church Of Jesus Christ Of Latter Day Saints, et al.***

No. 2:17-CV-0300, 2018 WL 3603087 (E.D. Wash. Jul. 6, 2018). Before the court is Defendants the Corporation of the President of the Church of Jesus Christ of Latter Day Saints and LDS Family Services' Motion for Summary Judgment. The Court has reviewed the record and files herein and is fully informed. For the reasons discussed below, the Motion is granted. Plaintiff was born in 1961. When she was approximately eight years old her mother entered her in the "Indian Student Placement Program" (ISPP), a program implemented by Defendant LDS Family Services on behalf of Defendant the Corporation of the President of the Church of Jesus Christ of Latter-Day Saints. The program placed Native American children with "foster" parents during the school year with the aim of providing better educational opportunities, and the children returned home in the summer. Pursuant to the ISPP, Plaintiff was taken in by LDS church members Donald Wayne Lewis and Mary Lewis. Defendants have presented concrete evidence that Plaintiff was diagnosed with PTSD and Plaintiff knew the PTSD was a result of the childhood abuse. Plaintiff fails to show that Plaintiff now suffers from a qualitatively different harm or symptom than that attending PTSD. Ultimately, as Plaintiff essentially admits in explaining she has been trying to bring this suit for over twenty years, Plaintiff has been aware of the harm upon which she brings this suit, and its

connection to the underlying abuse, for far too long to avoid the statute of limitations.

**37. *In re D.F., a Person Coming Under the Juvenile Court Law, Los Angeles County Department of Children and Family Services v. Carla M.***

No. B285396, 2018 WL 3599379 (Cal. Ct. App. Jul. 27, 2018). Appellant Carla M. (mother) appeals from the jurisdictional findings and dispositional order as to her daughter, D.F. She argues the court erred when it did not order reunification services, and that notice was inadequate under the Indian Child Welfare Act (25 U.S.C. § 1901 et seq. (ICWA)). Respondent, Los Angeles County Department of Children and Family Services (DCFS), conceded that ICWA notice was inadequate, but argues the court appropriately denied mother reunification services. We conclude that notice was improper and remand with directions to comply with ICWA. In all other respects the juvenile court's order is affirmed. At the time of the dispositional hearing, two of the Indian tribes who had been sent ICWA notices had not responded. At that hearing the court set a progress hearing to address ICWA. This timely appeal followed. Appellant argues that it was reversible error for the juvenile court to proceed with the dispositional hearing without first ensuring ICWA compliance. (Compare *Nicole K. v. Superior Court* (2007), 146 Cal. App. 4<sup>th</sup> 779, 781 [finding lack of ICWA notice should be remedied by vacating juvenile court orders] with *In re Brooke C.* (2005), 127 Cal. App. 4<sup>th</sup> 377, 383 [finding that when notice requirements of ICWA are not met, case may be remanded prior to termination of parental rights]). We decline to follow those courts which have reversed based on lack of ICWA compliance, finding remand to be the appropriate remedy. Upon remand, if the court finds that D.F. is an Indian child after providing proper notice, it shall conduct a new dispositional hearing in compliance with ICWA and related California law.

**38. *Carter v. Tahsuda***

No. 17-15839, 2018 WL 3720025 (9<sup>th</sup> Cir. Aug. 6, 2018). Plaintiffs-Appellants include Indian children, their adoptive parents and next friends. They filed this action in the United States District Court in Arizona against the Assistant Secretary of Indian Affairs for the Bureau of Indian Affairs, the United States Secretary of the Interior, and the Director of the Arizona Department of Child Safety,



seeking to challenge the constitutionality of various provisions of the Indian Child Welfare Act (“ICWA”), 25 U.S.C. § 1901 *et seq.* The Gila River Indian Community and the Navajo Nation intervened to defend the constitutionality of the Act. The district court concluded Plaintiffs lack Article III standing. Plaintiffs appeal from this dismissal. This Court holds this action is now moot. Adoption proceedings were pending at all times during the litigation in the district court. Defendants moved to dismiss the action, contending that Plaintiffs lacked standing and could not state a constitutional claim upon which relief could be granted. The district court examined the complaint with respect to each of the challenged provisions and ruled that Plaintiffs lacked standing because none had been harmed by any conduct traceable to ICWA. This Court does not reach the standing inquiry, however, because a subsequent development has rendered this action moot. Plaintiffs have never suggested they suffered any economic damages. Their original complaint sought only declaratory and injunctive relief relating to ICWA’s application to their adoption proceedings. While Plaintiffs’ appeal from the district court’s dismissal was going forward, however, Plaintiffs’ adoptions all became final. The relief Plaintiffs sought to redress their alleged injuries is no longer available to them. Vacated and remanded.

### C. *Contracting*

#### 39. *Becker v. Ute Indian Tribe of the Uintah and Ouray Reservation*

No. 16-4175, 868 F.3d 1199 (10th Cir. Aug. 25, 2017). Nonmember former contractor brought action against Indian tribe to enjoin tribal court proceedings seeking declaratory judgment that its contract with him was invalid. Tribe filed counterclaims against contractor and third party complaint against judge presiding over contractor’s state court action seeking injunction against state court proceedings. The District Court granted contractor’s motion for preliminary injunction and dismissed tribe’s counterclaims and third-party claims. Tribe appealed. The appellate court held that: (1) contractor failed to establish substantial likelihood of success on merits of his claim that tribal-exhaustion rule did not bar his state court action, and (2) tribe was not acting as “person” within meaning of § 1983 when it sought to enjoin contractor’s state court action. Affirmed in part, reversed in part, and remanded.

**40. *Guidiville Rancheria of California v. United States***

No. 15-15221, No. 15-17069, 704 Fed. Appx. 655 (9th Cir. Aug. 4, 2017). Developer and Indian tribe sued city for breach of land disposition agreement and for breach of implied covenant of good faith and fair dealing. The United States District Court for the Northern District of California, No. 4:12-cv-01326, Yvonne Gonzalez Rogers, J., 5 F. Supp. 3d 1142, dismissed claims and awarded legal fees to city. Tribe and developer appealed. The Court of Appeals held that: (1) tribe and developer stated actionable claim against city for violation of implied covenant of good faith and fair dealing, and (2) complaint plausibly alleged that city did not negotiate in good faith and thus breached agreement. Affirmed in part, reversed in part, and remanded.

**41. *Lummi Tribe of the Lummi Reservation, Washington v. United States***

No. 2016-2196, 870 F.3d 1313 (Fed. Cir. Sep. 12, 2017). Indian tribe and three tribal housing entities that qualified for and received Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA) block grants brought suit under the Tucker Act and Indian Tucker Act, alleging that Department of Housing and Urban Development (HUD) improperly deprived them of grant funds to which they were entitled. The Court of Federal Claims, 99 Fed. Cl. 584, dismissed Tribe's procedural claims. The Court of Federal Claims, 106 Fed. Cl. 623, subsequently vacated its decision and subsequently, 112 Fed. Cl. 353, entered partial summary judgment in Government's favor. The Court of Federal Claims, No. 1:08-00848, subsequently reaffirmed its prior ruling that NAHASDA was money mandating, giving Claims Court jurisdiction over claims. Government filed interlocutory appeal. The appellate court held that: (1) NAHASDA was not money-mandating statute, and (2) HUD's decision not to grant block grants to Tribe did not constitute illegal exaction. Vacated and dismissed.

**42. *Redding Rancheria v. Hargan***

No. 14-2035, 296 F. Supp. 3d 256 (D.D.C. Nov. 7, 2017). Indian tribe sought review of, inter alia, decision by Indian Health Service (IHS) rejecting tribe's application for reimbursement under federal catastrophic health emergency fund (CHEF) for health services benefits that were provisionally paid by tribally-funded self-

insurance plan, but ultimately determined by tribe through coordination of benefits system to be eligible for coverage under contract health services (CHS) program operated by tribe under Indian Self-Determination and Education Assistance Act (ISDEAA) compact. Tribe and IHS moved for summary judgment. The district court held that: (1) de novo standard of review, rather than Administrative Procedure Act's (APA) arbitrary and capricious standard, applied; (2) tribe's self-insured health services plan was not excluded from qualifying as payor of last resort under Indian Health Care Improvement Act (IHCIA); (3) plan's exclusionary clause did not prevent plan from qualifying as payor of last resort under IHS' policy exception to its regulation listing IHS as payor of last resort; (4) IHS' interpretation of its payor-of-last-resort regulation went beyond purpose of regulation; (5) IHCIA provision prohibiting contract remedies with respect to CHEF benefits did not preclude tribe's action; and (6) remand to IHS was warranted. Tribe's motion granted in part and denied in part; IHS' motion denied; remanded to IHS.

**43. *Ute Indian Tribe v. Lawrence***

No. 16-4154, 875 F.3d 539 (10th Cir. Nov. 7, 2017). Indian tribe brought action seeking declaratory judgment that state court lacked subject matter jurisdiction to hear non-Indian's breach of contract case against it, and injunction to halt state court proceedings. The District Court, No. 2:16-CV-00579-RJS, dismissed complaint, and tribe appealed. The appellate court held that district court had subject matter jurisdiction over action. The Tribe's claim—that federal law precludes state-court jurisdiction over a claim against Indians arising on the reservation—presents a federal question that sustains federal jurisdiction. Reversed and remanded.

**44. *Williams & Cochrane, LLP v. Quechan Tribe of the Fort Yuma Indian Reservation***

No. 3:17-01436, 2017 WL 7362744 (S.D. Cal. Nov. 7, 2017). Before the Court is Plaintiff's ex parte motion to seal select portions of its complaint and certain exhibits attached to the complaint. Plaintiff first filed this action on July 16, 2017. The case arises out of an attorney-client fee agreement that Plaintiff entered into with Defendant Quechan Tribe of the Fort Yuma Indian Reservation ("the Tribe"). Plaintiff's claims arise from the Tribe allegedly terminating Plaintiff as the Tribe's counsel three days prior to the

date on which the Tribe was set to sign a compact with the State of California. Plaintiff moved to file the case and the complaint under seal. The court denied the motion on August 17, 2017, explaining that sealing the case and or the entire complaint was unwarranted. The Court explained that “Plaintiff has offered no compelling reason why every paragraph in its 91-page complaint and why each of its thirty-nine exhibits must be filed under seal.” The Court explained, however, that “to the extent that Plaintiff wishes to protect the confidential and privileged information contained within the complaint, it must redact those portions of the complaint (and those portions of the exhibits).” On September 19, 2017, Plaintiff refiled its complaint with several redactions. Along with the complaint, Plaintiff has filed a motion to seal in which it asks the Court to approve the redacted complaint as filed and lodged with the Court an unredacted version of the complaint. The Court finds that the redactions are appropriate to prevent the disclosure of confidential attorney-client communications, attorney work-product, and confidential negotiations between the Tribe and the State of California. The Court concludes that Plaintiff has offered sufficient reason to warrant its proposed redactions to its complaint and attached exhibits. As a result, the Court grants Plaintiff’s motion to seal and accepts Plaintiff’s redacted amended complaint. The Clerk of Court is respectfully requested to file, under seal, the lodged unredacted copy of Plaintiff’s amended complaint.

**45. *Modoc Lassen Indian Housing Authority, et al. v. United States Department of Housing and Urban Development, et al.***

No. 14-1313, No. 14-1331, No. 14-1338, No. 14-1340, No. 14-1343, No. 14-1407, No. 14-1484, No. 15-1060, 881 F.3d 1181 (10th Cir. Dec. 22, 2017). Several Indian tribes separately brought action against Department of Housing and Urban Development (HUD), challenging HUD’s attempt to recapture alleged overpayments made to tribes under an affordable housing program created by the Native American Housing Assistance and Self-Determination Act (NAHASDA) without providing the tribes with administrative hearings. The district court entered judgment for tribes. HUD appealed and appeals were consolidated. On rehearing, the Court of Appeals, Moritz, Circuit Judge, held that: (1) HUD was not required under NAHASDA to conduct administrative hearings prior to attempting to recapture alleged overpayments; (2) HUD finding that tribes incorrectly received NAHASDA payments did not trigger

provision requiring hearings before finding improper expenditures; (3) HUD lacked the authority to recapture alleged overpayments via administrative offset; and (4) sovereign immunity precluded an award of money damages payable from NAHASDA grant funds carried over from prior years and funds that would be appropriated in future years. Affirmed in part, reversed in part, and remanded.

**46. *Becker v. Ute Indian Tribe of Uintah***

No. 2:16-cv-00958, 311 F. Supp. 3d 1284 (D. Utah Apr. 30, 2018). Non-Indian brought action against Indian tribe seeking declaratory judgment regarding tribal court's subject matter jurisdiction over breach of contract claims. Non-Indian moved for preliminary injunction to enjoin Indian tribe from proceeding in tribal court, and tribe moved for preliminary injunction to enjoin parties from proceeding in non-Indian's state court breach of contract action. The District Court held that: (1) it was substantially likely that Utah state court had subject matter jurisdiction over breach of contract claims, and thus non-Indian had likelihood of success on merits of position that tribal court did not have subject matter jurisdiction over claims, such that grant of a preliminary injunction in favor of non-Indian was warranted; (2) tribal parties did not have likelihood of success on merits of position that tribal court had subject matter jurisdiction over claims, and thus grant of a preliminary injunction in favor of tribe was unwarranted; and (3) tribal court's determination that tribal court had subject matter jurisdiction over breach of contract action was not entitled to preclusive effect or comity. Non-Indian's motion granted, and tribe's motion denied.

**47. *Ute Indian Tribe of Uintah v. Lawrence***

No. 2:16-cv-00579, 312 F. Supp. 3d 1219 (D. Utah Apr. 30, 2018). Indian tribe and tribal businesses brought action against state judge and non-Indian independent contractor seeking declaratory judgment that state court lacked subject matter jurisdiction to hear non-Indian's breach of contract case against it, and injunction to halt state court proceedings. Tribe moved for preliminary injunction. The District Court held that: (1) tribal court's ruling that it had jurisdiction over contractor was not entitled to preclusive effect; (2) money representing contractor's beneficial interest in portion of net revenue distributed to tribal holding company from tribe's oil and gas company did not constitute tribal trust property; (3) plaintiffs were not likely to succeed on merits of their claim that

state court lacked subject matter jurisdiction to hear contractor's case. Motion denied.

**48. *FSS Development Co., LLC v. Apache Tribe of Oklahoma***

No. 17-661, 2018 WL 2248457 (W.D. Okla. May 16, 2018). Before the Court are Defendants' Motion to Stay Pending Exhaustion of Tribal Court Remedies and Defendants' Motion to Dismiss. Plaintiff FSS alleges that on December 20, 2010, it (1) entered into an agreement with Defendant Apache Tribe of Oklahoma ("the Tribe") to develop a casino called the Red River Project on Apache land, and (2) loaned the Tribe \$2.2 million to cover development expenses in exchange for a promissory note. In the summer of 2017, Plaintiff sued the Tribe, the Apache Business Committee ("ABC") that allegedly negotiated the contracts for the Tribe, four individual ABC members, and a Tribe consultant for tortious interference with contract, breach of contract, and declaratory judgment. The Tribe then sued FSS in Apache tribal court for declaratory judgment that the agreements are void under federal and tribal law and, alternatively, for breach of contract. The Court, concerned about subject matter jurisdiction, ordered a hearing to determine whether to dismiss or stay the case. The main issue is complete preemption initiated by Defendants' Indian Gaming Regulatory Act ("IGRA") defenses – the parties agree that the Tribe defeats diversity jurisdiction, but dispute whether the IGRA's completely preemptive scope provides the Court with federal question jurisdiction. The Court dismissed Plaintiff's claims against the Tribe and ABC and stayed Plaintiff's tortious interference claim against the individual Defendants pending exhaustion of tribal remedies.

**49. *Williams & Cochrane, LLP v. Quechan Tribe of Fort Yuma Indian Reservation***

No. 3:17-01436, 2018 WL 2734946 (S.C. Cal. Jun. 7, 2018). Before the Court are several motions. Defendants Quechan Tribe of the Fort Yuma Indian Reservation ("Quechan," or the "Tribe"), Escalanti, and White (collectively, the "Quechan Defendants") have filed a motion to dismiss the operative First Amended Complaint ("FAC") and a motion to disqualify Williams & Cochrane as counsel for Plaintiffs other than itself. Defendants Armstrong, Rosette, Rosette & Associates, and Rosette, LLP (collectively, the "Rosette Defendants") have filed an anti-SLAPP motion to strike one of the claims in the FAC and a motion to dismiss the FAC. For the reasons

stated below, the Court GRANTS in part and DENIES in part the Quechan Defendants' motion to dismiss, DENIES the motion to disqualify, DENIES as moot the motion to strike, and GRANTS the Rosette Defendants' motion to dismiss. Plaintiffs' First Amended Complaint alleges the following relevant facts. Plaintiff Williams & Cochrane, LLP ("W&C"), is a California legal services partnership formed in 2010 by Cheryl Williams and Kevin Cochrane after they left their positions at the law firm of Rosette & Associates, PC. All other Plaintiffs in this case (the "Member Plaintiffs") are enrolled members of Quechan, which is a federally-recognized Indian tribe. Defendant Robert Rosette serves as the President and Director of Defendant Rosette & Associates, which is a general partner of Defendant Rosette, LLP. According to Plaintiffs, Rosette is an Indian law attorney who "has a history of representing individual persons or factions within tribes while purporting to represent the tribe itself." Defendant Richard Armstrong serves as senior of counsel at Rosette, LLP. Defendant Keeny Escalanti is a member of the Quechan Tribe who became Tribal Chairman in 2017. Defendant Mark William White II is a member of the Quechan Tribe who has served as a member of the Tribe's council. The Court dismisses Counts Three, Five, Six, Seven, and Eight. Because this is the first time the Court has addressed these deficiencies in Plaintiffs' pleadings, and for the additional reasons listed above, the Court dismisses these claims without prejudice. However, because the fee agreement between W&C and Quechan makes clear that W&C is not entitled to a "contingency fee" under Section 5, any amendment in an effort to save that aspect of the breach of contract claim would be futile. The Court therefore dismisses with prejudice Count One to the extent that it alleges a breach of Section 5 of the fee agreement.

**50. *Gila River Indian Community v. United States  
Department of Veterans Affairs***

No. 17-15629, 899 F.3d 1076 (9th Cir. Aug. 15, 2018). The Gila River Indian Community and Gila River Health Care Corporation (collectively, "the Community") sued the Department of Veterans Affairs ("the VA") for failing to reimburse the Community for the care it provides to veterans at tribal facilities. The Community argues that two provisions of the Patient Protection and Affordable Care Act require the VA to reimburse it even absent an agreement defining the terms of reimbursement. The district court dismissed

the Community's lawsuit after determining that the Veterans' Judicial Review Act, 38 U.S.C. § 511(a), deprived it of jurisdiction over the Community's claims. The Gila River Health Care Corporation (GRHC) is a wholly owned tribal organization that provides health care services to eligible persons. The GRHC was formed pursuant to the Indian Self-Determination and Education Assistance Act, which authorizes Indian tribes to contract with the federal government to provide services that were previously provided by the federal government. The health care that the GRHC provides is financed through funding agreements between the tribe and the Indian Health Service (IHS). Relevant to this case, the Community provides health care services to Indian and non-Indian veterans who are entitled to receive services from the VA. The Community alleges that many veterans have opted to receive care through the GRHC, rather than through the VA, due to ongoing issues with the care provided at VA facilities. Instead of providing reimbursements directly under the ACA, the VA developed template reimbursement agreements with the IHS, and it required recipients to enter into an agreement as a condition of receiving reimbursement. The Community argues that these template agreements improperly limit the scope of what it contends is a mandatory and self-executing right to reimbursement directly under the ACA. In the Community's view, the agreements, among other things, improperly require express consent by the VA to each reimbursement request, limit reimbursements to direct care services, and deny reimbursement to the Community for services provided to non-Indian veterans who receive treatment from the GRHC. In March 2016, the Community filed suit against the VA and the Secretary. The Community alleged that the VA had violated § 1623(b) by “forcing GRHC into a primary payer position on all services for which VA has refused to provide reimbursements.” The Community further alleged that the VA violated 25 U.S.C. § 1645(c) by refusing to process reimbursement requests and by conditioning reimbursement on entering into an agreement with the VA. The Community requested declaratory and injunctive relief, requiring reimbursement for services it had already provided to veterans as well as reimbursement for future services. The VA moved to dismiss the Community's complaint, arguing that the district court lacked subject matter jurisdiction under the Veterans' Judicial Review Act (“VJRA”), and that the complaint failed to state a claim. The VJRA provides that the Secretary of the VA “shall decide all questions of law and fact necessary to a decision by the Secretary under a law



that affects the provision of benefits by the Secretary to veterans.” 38 U.S.C. § 511(a). A decision by the Secretary is “final and conclusive and may not be reviewed by any other official or by any court.” The district court dismissed the complaint under Rule 12(b)(1) for lack of subject matter jurisdiction. The court did not reach the VA's alternative argument that the complaint failed to state a claim for relief under Rule 12(b)(6). The Community appeals. The Community argues that the district court has jurisdiction under 28 U.S.C. § 1362, which provides the district court with original jurisdiction over civil actions brought by Indian tribes that present a federal question. The Community did not make this argument in the district court, and it has therefore been waived. But even if it were properly before us, we would be obliged to hold that the general grant of subject matter jurisdiction in 28 U.S.C. § 1362, like other general grants of subject matter jurisdiction such as 28 U.S.C. § 1331, does not control over the specific limitation of subject matter jurisdiction contained in 38 U.S.C. § 511(a). Affirmed.

#### 51. *LaBatte v. United States*

No. 2017-2396, 899 F.3d 1373 (Fed. Cir. Aug. 16, 2018). Timothy LaBatte appeals from a judgment of the Court of Federal Claims (“Claims Court”), dismissing his complaint for breach of contract for lack of subject-matter jurisdiction. *LaBatte v. United States*, No. 16-798C, slip op. at 15 (Fed. Cl. July 28, 2017). Mr. LaBatte’s complaint alleges the following. In 1999, a group of Native American farmers filed a lawsuit against the Secretary of Agriculture, alleging that the United States Department of Agriculture (“USDA”) had discriminated against them in the administration of farm loan and other benefit programs, thereby violating the Equal Credit Opportunity Act, 15 U.S.C. § 1691. The district court certified a class, which included Mr. LaBatte, a farmer and member of the Sisseton Wahpeton Tribe of South Dakota. *See Keepseagle v. Veneman*, No. 99-3119, 2001 WL 34676944, at \*15 (D.D.C. Dec. 12, 2001). Ultimately, the government reached a class-wide settlement, known as the Keepseagle Settlement Agreement (the “Agreement”). According to the Agreement, the United States would provide a compensation fund totaling \$680 million. The Agreement established a two track process, “A” or “B,” for processing claims. Track A was limited to claimants seeking a standard set of payments of \$50,000 and other limited relief. The Track A process used documentary evidence and was conducted

with a paper only record. Claimants had to demonstrate by substantial evidence that they “applied, or attempted to apply, for a specific farm [loan] at a USDA office” and that the loan was “denied, provided late, approved for a lesser amount than requested, encumbered by a restrictive condition(s), or USDA failed to provide an appropriate loan service(s).” J.A. 114–15. Track A did not require proof of discrimination. Under Track B, a claimant could seek damages up to \$250,000, but the claimant had to establish by a preponderance of the evidence that the “treatment of the Claimant’s loan or loan servicing application(s) by USDA was less favorable than that accorded a specifically identified, similarly situated white farmer(s).” J.A. 117. Track B provided that the “identity of a similar situated white farmer” could be established “by a credible sworn statement based on personal knowledge by an individual who is not a member of the Claimant’s family.” Mr. LaBatte filed his claim under the Track B process, seeking \$202,700.52 in damages. It appears to be undisputed that Mr. LaBatte satisfies the relevant criteria for membership in the class. Mr. LaBatte identified two non-family persons who had personal knowledge of the USDA’s treatment of similarly situated white farmers. Mr. LaBatte’s witnesses were Russell Hawkins (“Hawkins”) and Tim Lake (“Lake”). Hawkins and Lake belonged to the same tribe as Mr. LaBatte—the Sisseton Wahpeton Sioux Tribe of South Dakota. When Mr. LaBatte prepared to submit a claim under the Settlement Agreement’s Track B process, both Hawkins and Lake worked for the Bureau of Indian Affairs (“BIA”), a government agency within the Department of the Interior. Both men agreed to provide Mr. LaBatte with a sworn declaration, detailing the USDA’s discriminatory acts to meet the criteria of the Agreement. After the initial declarations were prepared, but before Mr. LaBatte could finalize and revise the documents and obtain signatures, the United States directed Hawkins and Lake not to sign the declarations or to assist in revising the declarations. Hawkins and Lake were “directed or instructed by federal governmental officials not to sign declarations of facts that supported LaBatte’s claim,” and were instructed not to provide any additional information to Mr. LaBatte, preventing Mr. LaBatte from revising or elaborating on the information in the declaration. Mr. LaBatte alleges that “[b]oth witnesses, former Tribal Chair Hawkins and Lake had agreed to provide complete testimony and sign declarations on LaBatte’s behalf for his Track B process claim,” and that, because of the government’s interference, the declarations of Hawkins and Lake

were unable to be “review[ed], revis[ed], and ultimately execut[ed] prior to the LaBatte Track B process filing.” Mr. LaBatte alleges that these actions by the government breached the Agreement. Because Mr. LaBatte was unable to submit finalized, signed declarations, he instead submitted to the Neutral a declaration from his lawyer that detailed his attempts to obtain the information necessary. However, the Track B Neutral issued a final determination denying Mr. LaBatte’s claim for having “failed to satisfy the requirement of the Settlement Agreement, through a sworn statement, that named white farmers who are similarly situated to you received USDA loans or loan servicing that was denied to you.” Mr. LaBatte filed a motion to intervene in the proceedings underlying the Settlement Agreement in the United States District Court for the District of Columbia. Mr. LaBatte asserted, among other things, that government officials had breached the Settlement Agreement and its implied covenant of good faith and fair dealing, by preventing witnesses from signing declarations and providing information. The court denied Mr. LaBatte’s motion to intervene on the ground that it did not possess jurisdiction over his claims. Mr. LaBatte appealed the district court’s decision to the District of Columbia, which affirmed, explaining that the Settlement Agreement’s enforcement clause provided the district court with jurisdiction only to enforce the distribution of the funds. On July 5, 2016, Mr. LaBatte filed a complaint in the Claims Court. Mr. LaBatte alleged that the government “breached the Settlement Agreement and breached the government’s duty of good faith and fair dealing resulting in the loss of monetary damages,” by ordering Messrs. Hawkins and Lake not to sign and to refrain “from testifying and providing evidence on behalf of LaBatte’s claim.” As damages, Mr. LaBatte sought an award of his full Track B claim amount of \$202,700.52. The government moved to dismiss Mr. LaBatte’s complaint for lack of subject-matter jurisdiction and for failure to state a claim. The Claims Court granted the government’s motion and dismissed the complaint for lack of jurisdiction. Although the court recognized that it had jurisdiction over breach of settlement claims, the court concluded that it lacked jurisdiction over Mr. LaBatte’s case. The court decided that Mr. LaBatte had, in the Track B process of the Settlement Agreement, waived his right to judicial review to challenge the breach of the Agreement by the United States, because the Agreement contained a finality clause. Mr. LaBatte appealed, and we have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3). We

review decisions of the Court of Federal Claims de novo with respect to questions of law, including a dismissal for lack of subject-matter jurisdiction. We are confident that if, after further proceedings, the Claims Court finds that there was a breach, the court will be able to decide on an appropriate remedy to provide Mr. LaBatte what he would have received in the Track B process absent the breach. The Claims Court may consider whether reconstituting the Track B process for Mr. LaBatte is an appropriate or necessary step in arriving at such a remedy. We conclude that Mr. LaBatte has stated a claim for relief that falls within the subject-matter jurisdiction of the Claims Court. Reversed and remanded

D. *Employment*

**52. *Mendoza v. Isleta Resort***

No. A-1-CA-35520, 419 P.3d 1256 (N.M. Ct. App. Apr. 9, 2018). Employee of Indian tribe's casino filed a workers' compensation complaint against casino and its workers' compensation insurer. Following dismissal by a workers' compensation judge on the grounds of sovereign immunity, employee appealed. The Court of Appeals, Vigil, J., held that: (1) Indian Gaming Compact set forth an express and unequivocal waiver of sovereign immunity; (2) even if Indian Gaming Compact did not contain an express waiver of sovereign immunity, employee had a right to pursue her workers' compensation claim against insurer and its third-party administrator; (3) even if casino was determined to enjoy tribal sovereign immunity in the context of a workers' compensation claim, casino was not an indispensable party without which casino employee's claim could not go forward; and (4) employee was a third-party beneficiary to casino's workers' compensation insurance policy. Reversed and remanded.

**53. *Delebreau v. Danforth***

No. 17-C-1221, 2018 WL 2694527 (E.D. Wisconsin Jun. 5, 2018). Plaintiff Dawn Delebreau, who is representing herself, filed this action in September 2017 against Defendants Cristina Danforth, Melinda Danforth, Geraldine Danforth, Larry Barton, and Jay Fuss, all employees of the Oneida Nation, a federally recognized Indian tribe. Essentially, Delebreau alleges that she was terminated from her position as an administrative assistant at the Oneida Housing Authority because she identified and reported the misuse of housing

authority funds. This matter comes before the court on a motion to dismiss the complaint filed by four of the defendants, Cristina Danforth, Larry Barton, Melinda Danforth, and Geraldine Danforth. They argue that the complaint should be dismissed for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim under Rule 12(b)(6). For the reasons set forth below, the defendants' motion to dismiss will be granted and the complaint will be dismissed sua sponte as to Jay Fuss. Delebreau alleges she was wrongfully terminated from employment with the Oneida Nation due to the unspecified activities of several officers or employees of the Nation. Federal law recognizes and promotes the authority of sovereign Indian tribes to control their own economic enterprises. *Duke v. Absentee Shawnee Tribe of Okla. Housing Auth.*, 199 F.3d 1123, 1125 (10th Cir. 1999). Indeed, it has been long established that Indian tribes are "distinct, independent political communities, retaining their original natural rights" in matters of local self-government. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832). Tribal sovereign immunity protects Indian tribes from suit in their governmental activities, as well as their commercial activities, absent express authorization by Congress or clear waiver by the tribe. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998). Further, tribal sovereign immunity "extends to tribal officials when acting in their official capacity and within the scope of their authority." *Linneen v. Gila River Indian Cmty.*, 276 F.3d 489, 492 (9th Cir. 2002); *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 726–27 (9th Cir. 2008). Delebreau cites no federal statute or constitutional provision that overcomes the immunity of the Oneida Nation and its officers and employees to hire and fire tribal employees without outside interference. Consequently, Delebreau's complaint will be dismissed in its entirety.

E. *Environmental Regulations*

**54. *Dine Citizens Against Ruining Our Environment v. Bureau of Indian Affairs***

No. 16-08077, 2017 WL 4277133 (D. Ariz. Sep. 11, 2017). Before the Court is Intervenor-Defendant Navajo Transitional Energy Company's Motion to Dismiss. Plaintiffs Diné Citizens Against Ruining Our Environment ("Diné CARE"), San Juan Citizens Alliance, Sierra Club, the Center for Biological Diversity, and Amigos Bravos (collectively, "Citizens") have filed suit against the

Bureau of Indian Affairs (“BIA”), United States Department of the Interior (“DOI”), the Office of Surface Mining, Reclamation and Enforcement (“OSMRE”), Bureau of Land Management (“BLM”), R.K. Zinke, in his official capacity as Secretary of the United States Department of the Interior, and the United States Fish and Wildlife Service (“FWS”) (collectively, “Federal Defendants”). Plaintiffs allege that Federal Defendants violated the Endangered Species Act (“ESA”), the National Environmental Policy Act (“NEPA”), and the Administrative Procedure Act (“APA”) in the approval of: (1) a twenty-five year lease extension for operation of the Four Corners Power Plant (“FCPP”) by Intervenor-Defendant Arizona Public Service Company, (2) the renewal of certain right-of-ways for existing transmission lines, and (3) a 5,568-acre expansion of strip mining in the Navajo Mine’s Pinabete area. Federal Defendants’ actions were predicated on a Biological Opinion issued by FWS in April 2015, which Plaintiffs characterize as a mistaken determination that the “proposed authorizations for continued operations of the FCPP and the Navajo Mine ... will neither jeopardize the survival and recovery of, nor adversely modify designated critical habitat of the Colorado pikeminnow and razorback sucker, two endangered fish that are native to the San Juan River, in violation of the ESA.” Plaintiffs contend that remaining Federal Defendants’ reliance on FWS’ Biological Opinion violated the ESA and that Federal Defendants’ subsequent Record of Decision and Final Environmental Impact Statement were issued in violation of NEPA. This litigation followed. The Arizona Public Service Company (“APS”)—on its own behalf and as operating agent for the FCPP—was allowed to intervene as of right as a party defendant. Navajo Transitional Energy Company (“NTEC”) filed a Limited Motion to Intervene, which this Court granted on October 28, 2016. Intervenor-Defendant NTEC subsequently filed a Motion to Dismiss pursuant to Rules 12(b)(7) and 19 of the Federal Rules of Civil Procedure. All parties, with the exception of Intervenor-Defendant APS, oppose Intervenor-Defendant NTEC’s Motion to Dismiss. Intervenor-Defendant NTEC contends that it is a required party under Rule 19 of the Federal Rules of Civil Procedure, that cannot be joined by virtue of its sovereign immunity, and that the present action should therefore be dismissed in equity and good conscience. The Court found that Intervenor-Defendant is a required party under Rule 19 of the Federal Rules of Civil Procedure because it has a protected interest in the subject of the present litigation that only it can adequately protect. As an arm of the Navajo Nation,

however, Intervenor-Defendant NTEC enjoys sovereign immunity and since it has neither explicitly waived that immunity, nor has such immunity been abrogated or waived by Congress, it follows that Intervenor-Defendant NTEC cannot be joined. In equity and good conscience, the present case cannot continue without Intervenor-Defendant NTEC. Accordingly, it is ordered: (1) That Intervenor-Defendant NTEC's Motion to Dismiss is granted; (2) That this action is dismissed with prejudice in its entirety; (3) That the Clerk of Court shall terminate this action; and (4) That the Clerk of Court shall enter judgment accordingly.

**55. *Pawnee Nation of Oklahoma v. Zinke***

No. 16–CV–697, 2017 WL 4079400 (N.D. Okla. Sep. 14, 2017). Now before the Court is the motion to dismiss of Ryan Zinke, in his official capacity as Secretary of the United States Department of the Interior (“Interior”); the United States Bureau of Indian Affairs (“BIA”); and the United States Bureau of Land Management (“BLM”). Federal Respondents ask the Court to dismiss Plaintiffs’ Amended Complaint (“Am. Compl.”) under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction and under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim for which relief may be granted. Plaintiffs, the Pawnee Nation of Oklahoma and a group of individual members of the Pawnee Nation, own partial interests in allotted tracts of land within the boundaries of the former Pawnee reservation. Plaintiffs allege that BIA has approved seventeen leases (the “Pawnee leases”) that permit oil and gas development on tracts of land in which Plaintiffs allege an ownership interest. Owners of allotted lands may lease the mineral interests on their lands, subject to approval by the Secretary of the Interior. 25 U.S.C. § 396. Leases entered into under 25 U.S.C. § 396 are governed by the regulations at 25 C.F.R. Part 212. Those regulations provide that appeals of BIA decisions are governed by 25 C.F.R. Part 2. 25 C.F.R. § 212.58 (citing 25 C.F.R. § 211.58). The seventeen Pawnee leases were approved by the BIA Superintendent between July 2013 and November 2013. Appeals from the Superintendent’s decision are to the appropriate Regional Director (referred to as an “Area Director” in the regulations). Plaintiffs do not allege that they have appealed any of the decisions they challenge here, but claim that they did not receive the requisite notice under the regulations. Federal Respondents have moved to dismiss a subset of claims in the Amended Complaint. Federal

Respondents have challenged Plaintiffs' First, Fourth, Fifth, and Sixth Causes of Action that challenge the BIA's approvals of the Pawnee leases as violations of the Administrative Procedures Act ("APA") under the National Environmental Policy Act ("NEPA"), the American Indian Agricultural Resource Management Act ("AIARMA"), the National Historic Preservation Act ("NHPA"), and Executive Order 11988. In addition, Federal Respondents move to dismiss Plaintiffs' Fourth Cause of Action, which challenges BIA's approval of the Pawnee leases as well as BLM's approvals of Applications for Permits to Drill ("APDs") and sundry notices on the tracts of land covered by the seventeen leases, claiming that the approvals violate the American Indian Agricultural Resource Management Act. Finally, although their Sixth Cause of Action is plead as arising under the APA, Plaintiffs have argued that the violations of NEPA, AIARMA, NHPA, and Executive Order 11988 also amount to a breach of the United States' fiduciary trust duties. Having considered the arguments set forth in the parties' briefing relating to Federal Respondents' Motion to Dismiss, the Court finds that the Motion to Dismiss is GRANTED. Plaintiffs' First Cause of Action is dismissed in its entirety for lack of jurisdiction. Plaintiffs' Fourth, Fifth, and Sixth Causes of Action are also dismissed for lack of jurisdiction to the extent that they raise challenges to the approvals of the seventeen Pawnee leases identified in Plaintiffs' Amended Complaint. Plaintiffs' Fourth Cause of Action is also dismissed in its entirety for failure to state claim under Federal Rule of Civil Procedure 12(b)(6). To the extent Plaintiffs' Sixth Cause of Action alleges a claim for breach of a fiduciary trust duty, it is also dismissed for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).

**56. *United States v. Osage Wind, LLC***

No. 15-5121, No. 16-5022, 871 F.3d 1078 (10th Cir. Sep. 18, 2017). Federal government brought action against wind company that was building wind farm on Indian land, alleging that its excavation of soil, sand, and rock to place cement foundations to support wind turbines constituted "mining" that required a federally-approved mineral lease. The District Court, 2015 WL 5775378, granted summary judgment to wind company. Indian tribe sought to intervene and appeal. The appellate court held that: (1) Indian tribe was entitled to appeal district court's grant of summary judgment to wind company without having intervened in district court;



(2) tribe's claim was not precluded under doctrine of res judicata; (3) de minimis exception in regulation requiring mineral leases on Indian land did not apply to wind company's excavation; (4) definition of "mining" in regulation requiring mineral leases on Indian land is not limited to commercial extraction of minerals, but also includes acting upon the minerals to exploit the minerals themselves; and (5) wind company's excavation constituted mineral development. Reversed and remanded.

#### **57. *Wyoming v. Zinke***

No. 16-8068, No. 16-8069, 871 F.3d 1133 (10th Cir. Sep. 21, 2017). Industry organization petitioned for Administrative Procedure Act (APA) review of Bureau of Land Management (BLM) regulation governing hydraulic fracturing on lands owned or held in trust by the United States, seeking preliminary injunction. States of Wyoming and Colorado filed separate petitions for review. Following consolidation of the cases, North Dakota, Utah, and Ute Indian Tribe intervened, opposing the regulation, and multiple citizen groups intervened, defending the regulation. The District Court, No. 2:15-CV-00043-SWS, 2016 WL 3509415, entered order invalidating the regulation. BLM and citizen group intervenors appealed. The appellate court held that: (1) appeal from district court's order was unfit for review; (2) withholding review of district court's order would not impose hardship on BLM or citizen group intervenors; (3) dismissal, rather than abatement, of appeal was warranted; and (4) vacatur of district court's order invalidating regulation was warranted. Appeals dismissed as prudentially unripe; vacated and remanded with instructions.

#### **58. *Havasupai Tribe v. Provencio***

No. 15-15857, 876 F.3d 1242 (9th Cir. Dec. 12, 2017). Environmental groups and Havasupai Indian Tribe brought action under Administrative Procedure Act (APA) challenging Forest Service's conclusion that uranium mining company had valid existing rights to operate a uranium mine on land within a withdrawal area of public lands around Grand Canyon National Park that the Secretary of the Interior withdrew from new mining, seeking declaration that Forest Service was acting in violation of National Environmental Policy Act (NEPA). Mining companies intervened. The District Court, 98 F. Supp. 3d 1044, entered summary judgment in favor of Forest Service. Groups and Tribe appealed. The appellate

court held that: (1) Tribe had standing to bring action challenging Forest Service's action; (2) environmental group had standing to bring action challenging Forest Service's action; (3) Forest Service's conclusion that uranium mining company had valid existing rights to operate uranium mine constituted final agency action; (4) Environmental Impact Statement (EIS) was not required; (5) Forest Service's determination did not constitute undertaking under National Historic Preservation Act of 1966 (NHPA), and thus consultation was not required; and (6) environmental group lacked prudential standing to challenge merits of Forest Service's action under Mineral Act or FLPMA. Affirmed.

**59. *National Mining Association v. Zinke***

No. 14-17350, No. 14-17351, No. 14-17352, No. 14-17374, 877 F.3d 845 (9th Cir. Dec. 12, 2017). Miner and trade associations brought actions challenging Department of Interior's withdrawal of more than one million acres of National Forest System lands from mining location and entry. The District Court, 2014 WL 4904423 and 933 F. Supp. 2d 1215, granted summary judgment for government. Miner and associations appealed. The appellate court held that: (1) provision of Federal Land Policy and Management Act (FLPMA) permitting Congress to block withdrawals of land from mining location and entry by concurrent resolution, rather than in conformity with express procedures of Constitution's prescription for legislative action, was unconstitutional; (2) issue of whether unconstitutional legislative veto embedded in FLPMA was severable from large-tract withdrawal authority delegated to Secretary of Department of Interior in that same subsection was properly before court even though statutory legislative veto was not exercised by Congress; (3) miner and trade associations had standing to raise issue of whether unconstitutional legislative veto embedded in FLPMA was severable; (4) unconstitutional legislative veto embedded FLPMA was severable from large-tract withdrawal authority delegated to Secretary in that same subsection, and therefore invalidating legislative veto provision did not affect Secretary's withdrawal authority; (5) Secretary's decision to withdraw large tract of land to protect water resources in Grand Canyon watershed and Colorado River from possible water contamination was not arbitrary, capricious, or not in accordance with the law; (6) Secretary could withdraw large tracts of land under FLPMA in interest of preserving cultural and tribal resources;

(7) withdrawal to protect “other resources,” including visual resources and wildlife was not arbitrary, capricious; and (8) agency’s findings regarding quantity of uranium in area to weigh economic impact of withdrawal were not arbitrary, capricious. Affirmed

**60. *Caddo Nation of Oklahoma v. Wichita and Affiliated Tribes***

No. 16-6161, 2018 WL 3354882 (10th Cir. Dec. 18, 2017). In neighboring tribe’s action alleging that tribe seeking to build history center violated procedures required by National Historic Preservation Act (NHPA) and National Environmental Policy Act (NEPA) throughout planning process, neighboring tribe moved for emergency temporary restraining order preventing tribe from continuing construction until it complied with those procedures. After initially granting temporary restraining order, the District Court, 2016 WL 3080971, vacated order. Neighboring tribe appealed, and tribe moved to dismiss appeal. The appellate court held that neighboring tribe’s appeal of denial of temporary restraining order and preliminary injunction enjoining tribe’s construction of history center was moot. Appeal dismissed; remanded.

**61. *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers***

No. 16–1534 (and Consolidated Case Nos. 16–1769 and 16–267), 301 F. Supp. 3d 50 (D.D.C. Mar. 19, 2018). The Yankton Sioux Tribe challenges the construction and operation of the Dakota Access Pipeline (DAPL) under the National Historic Preservation Act, the National Environmental Protection Act, and the 1851 Treaty of Laramie. Specifically, Plaintiffs allege that Defendants—the U.S. Army Corps of Engineers, the U.S. Fish and Wildlife Service, and an assortment of federal employees of both agencies—violated the NHPA by failing to adequately consult with the Tribe regarding historical and cultural sites, violated NEPA by unlawfully segmenting their analyses of the pipeline’s environmental impacts, and violated the 1851 Treaty by granting approvals for DAPL without first obtaining the Tribe’s consent. Both sides have now filed Cross–Motions for Summary Judgment on the Tribe’s NEPA and Treaty-based claims. Defendants additionally urge the Court to dismiss as moot Plaintiffs’ NHPA counts, asserting that they are no

longer viable in light of DAPL’s completed construction. Agreeing that it can provide no effective remedy on this last score, the Court will dismiss the NHPA claims. It will also grant summary judgment for Defendants with respect to Plaintiffs’ Treaty-based count, which the Tribe essentially withdrew during briefing. Finally, the Court concludes that Plaintiffs have not shown that the Corps and FWS improperly “segmented” their analysis of the pipeline’s environmental consequences, thus yielding summary judgment for Defendants on the NEPA claims as well. United States’ motion granted.

**62. *Battle Mountain Band of Te-Moak Tribe of Western Shoshone Indians v. United States Bureau of Land Management***

No. 3:16–cv–0268, 302 F. Supp. 3d 1226 (D. Nev. Mar. 23, 2018). Indian band brought action alleging that Bureau of Land Management (BLM) and its district manager violated the National Historic Preservation Act (NHPA) by failing to reconsider their decision to allow mining project to proceed on land identified by band as traditional cultural property (TCP) and deemed eligible for inclusion on National Register of Historic Places by BLM. Project’s operator intervened and filed cross-claims alleging that BLM’s determination that land was eligible for inclusion on National Register violated National Historic Preservation Act (NHPA) and Administrative Procedure Act (APA). BLM and manager moved to dismiss operator’s cross-claims. The District Court, Larry R. Hicks, J., held that: (1) programmatic agreement gave operator ongoing consultation right with respect to National Register eligibility determinations for project land; (2) operator adequately alleged an injury in fact; and (3) operator had prudential standing to bring NHPA claims. Motion denied.

**63. *Coyote Valley Band of Pomo Indians of California v. United States Department of Transportation***

No. 15-04987, 2018 WL 1569714 (N.D. Cal. Mar. 30, 2018). Before the Court is the motion for summary judgment filed by Plaintiffs Coyote Valley Band of Pomo Indians of California (“Coyote Valley”) and The Round Valley Indian Tribes of California (“Round Valley”). Also before the Court is the cross-motion for summary judgment filed by the United States Department of Transportation (“USDOT”). This litigation arises out of the construction of 5.9-mile-long segment of U.S. Highway 101, which bypasses the City

of Willits, California (the “Willits Bypass Project”), and post-construction mitigation projects in the area. The FHWA and Caltrans issued a final Environmental Impact Statement (“EIS”) for the Willits Bypass Project in October 2006. In December 2006, the agencies issued a Record of Decision, which approved a variation of a four-lane freeway (“Modified Alternative J1T”). The Final EIS stated there would be no adverse effect on historic properties, if an environmentally sensitive area was established. The State Historic Property Officer (“SHPO”) concurred in that finding. This litigation focuses on the first phase. Construction on the first phase of the Willits Bypass Project is complete, and it was opened to traffic in November 2016. The second phase of the Willits Bypass Project remains unfunded. According to Plaintiffs, at the time the final EIS was issued, “Caltrans had only identified one archaeological site eligible for registry on the National Register of Historic Places” (“NHRP”), and they claim that “[s]ince 2013, Caltrans has identified at least thirty additional archaeological sites eligible for registry on the” NRHP. Coyote Valley’s Tribal Chairman, Michael Hunter, wrote to Charles Felder, a director at Caltrans, and requested “government-to-government” consultation. (Federal Highway Administration Administrative Record (“FHWA AR”) Caltrans Chairman Hunter stated that “[t]he primary and ongoing request we articulated at this meeting was the need for a Supplemental EIS to contend with the many ancestral archaeological sites that have been discovered subsequent to the approval” of the Final EIS “both in the Project Area and Mitigation parcels” of the Willits Bypass Project. As a result of the Court’s rulings on the Federal Defendants’ motions to dismiss, Plaintiffs’ claims against the Federal Defendants have been limited as follows: (1) the Federal Defendants violated Section 106 of the NHPA by failing to engage in government-to-government consultation with Plaintiffs (“the NHPA consultation claim”); and (2) after February 18, 2015, the date on which the Plaintiffs demanded that the Federal Defendants reassume responsibility for the Willits Bypass Project, the Federal Defendants directly violated the NHPA, NEPA, and the Federal Highway Statutes by failing to act in accordance with the requirements of those statutes. The Court denies Plaintiffs’ motion for summary judgment, and it grants, in part, and denies, in part, the Federal Defendants’ cross-motion for summary judgment.

**64. *Diné Citizens Against Ruining Our Environment v. Jewell***

No. CIV 15-0209, 312 F. Supp. 3d 1031 (D.N.M. Apr. 23, 2018). Organization of Navajo community activists and environmental organizations brought action against United States Department of the Interior (DOI), Secretary of the Interior, Bureau of Land Management (BLM), and its director, challenging BLM's approval of applications for permit to drill (APD) in the Mancos Shale formation of the San Juan Basin of northern New Mexico, alleging that BLM violated National Environmental Policy Act (NEPA) by failing to analyze direct, indirect, and cumulative effects of Mancos Shale fracking, by not preparing an Environmental Impact Statement (EIS) on fracking the Mancos Shale, and by taking action during the NEPA process, and that BLM violated the National Historic Preservation Act (NHPA) because it did not consider the indirect and cumulative effects on Chaco Park and its satellites and did not consult with the New Mexico State Historic Preservation Officer (SHPO), Indian tribes, or the public. Trade association of the oil-and-gas industry intervened as defendant. The District Court, 2015 WL 4997207, denied organizations' motion for preliminary injunction nullifying BLM's approval of APDs. The Court of Appeals, 839 F.3d 1276, affirmed. Organizations petitioned for review on the merits and moved for permanent injunction. The District Court held that organizations had standing to assert claims alleging that BLM violated NEPA; Appellate Court's affirmance of District Court's order denying organizations' motion for preliminary injunction did not bar, under law of the case doctrine, organizations' claims alleging NEPA violations; BLM's approval of applications for drilling permits did not violate NEPA; BLM satisfied NEPA's minimal public notice requirements; BLM's failure to consult SHPO was not arbitrary and capricious in violation of NHPA; and BLM's failure to consider effects of gas and oil wells in Chaco Park and its satellites did not violate NHPA. Petition dismissed; motion for permanent injunction denied.

**65. *Sisseton–Wahpeton Oyate of Lake Traverse Reservation v. United States Corps of Engineers***

No. 16-4283, 888 F.3d 906 (8th Cir. Apr. 25, 2018). Indian tribe and its chairman brought action alleging that Corps of Engineers violated Administrative Procedure Act (APA), Clean Water Act (CWA), and National Historic Preservation Act (NHPA) in issuing

permit and exemption determinations allowing adjacent landowner's construction of farm road across wetland adjacent to lake. The District Court ruled that Corps's determination letters constituted final agency actions, 918 F. Supp. 2d 962, dismissed some claims as untimely, 2014 WL 4678052, denied tribe's request for equitable tolling, 124 F. Supp. 3d 958, and denied plaintiffs' request for injunctive relief and remanded NHPA claims to Corps, 2016 WL 5478428. Plaintiffs appealed. The Court of Appeals held that: (1) Corps' letter to tribe indicating that roadways met requirements for CWA's farm-road exemption and each constituted single and complete project did not constitute "final agency action"; (2) tribe's claim that Corps' determination that roadway had not been recaptured was nonjusticiable challenge to enforcement decision; (3) tribe was not entitled to equitably toll statute of limitations; (4) Corps did not unlawfully stack permit and exemption verifications; and (5) district court's determination that Corps did not unlawfully stack permit and exemption verifications was final appealable decision. Affirmed.

**66. *Puyallup Tribe of Indians v. Washington State Shorelines Hearings Board, City of Tacoma***

No. 77748-3-1, 3 Wash. App. 2d 1057 (Wash. Ct. App. May 14, 2018). The Puyallup Tribe of Indians appeals the Shorelines Hearings Board's decision to affirm a shoreline substantial development permit. But, because the Board's decision is supported by substantial evidence, we affirm. We review decisions of the Shorelines Hearings Board to determine if the Board's factual findings are supported by substantial evidence and if these findings, in turn, support the Board's conclusions of law. The Board heard evidence concerning the risk of disturbing contaminated sediment, indications of contamination at the project site, the effectiveness of BMPs, and the adequacy of mitigation. The Board summarized and weighed the conflicting evidence in its decision. The Board found persuasive the respondents' evidence that there is a low risk of contamination at the project site, the identified BMPs adequately protect against that risk, any adverse impact will be short term, the proposed mitigation offsets adverse impacts, and, in the long term, the project will benefit the waterway's ecological function. Affirmed.

67. *Oglala Sioux Tribe v. U.S. Nuclear Regulatory Commission*

No. 17-1059, 896 F.3d 520 (D.C. Cir. Jul. 20, 2018). Powertech (USA), Inc. applied to the Nuclear Regulatory Commission for a license to construct a uranium mining project in the Black Hills of South Dakota. The Oglala Sioux Tribe, which has historical ties to the proposed project area, intervened in opposition because it feared the destruction of its cultural, historical, and religious sites. The staff of the Commission granted the license. On administrative appeal, the Commission decided to leave the license in effect – notwithstanding its own determination that there was a significant deficiency in its compliance with the National Environmental Policy Act – pending further agency proceedings to remedy the deficiency. The Commission grounded this decision on the Tribe’s inability to show that noncompliance with the Act would cause irreparable harm. In so doing, the Commission was following what appears to be the agency’s settled practice to require such a showing. The National Environmental Policy Act, however, obligates every federal agency to prepare an adequate environmental impact statement *before* taking any major action, which includes issuing a uranium mining license. The statute does not permit an agency to act first and comply later. Nor does it permit an agency to condition performance of its obligation on a showing of irreparable harm. There is no such exception in the statute. In fact, such a policy puts the Tribe in a classic Catch-22. In order to require the agency to complete an adequate survey of the project site before granting a license, the Tribe must show that construction at the site would cause irreparable harm to cultural or historical resources. But without an adequate survey of the cultural and historical resources at the site, such a showing may well be impossible. Of course, if the project does go forward and such resources are damaged, the Tribe will then be able to show irreparable harm. By then, however, it will be too late. The Commission’s decision to let the mining project proceed violates the National Environmental Policy Act. Indeed, it vitiates the requirements of the Act. We therefore find the decision contrary to law and grant the petition for review in part. Under the collateral order doctrine, we have jurisdiction to review the Commission’s decision to leave Powertech’s license in place – notwithstanding the NRC’s acknowledgment that it has not yet complied with the National Environmental Policy Act – on the ground that the Tribe failed to show irreparable harm. Because that



decision is contrary to law, we grant the petition for review in part and remand the case to the Commission for further proceedings consistent with this opinion.

F. *Fisheries, Water, FERC, BOR*

**68. *United States v. Washington***

No. C70-9213, Sub-proceeding No. 17-sp-01, 2017 WL 3726774 (W.D. Wash. Aug. 30, 2017). This matter comes before the Court on the Jamestown S’Klallam and Port Gamble S’Klallam Tribes’ (collectively “S’Klallam”) and Squaxin Island Tribe’s (“Squaxin”) motions to dismiss, or in the alternative, for summary judgment, and Skokomish Indian Tribe’s (“Skokomish”) cross-motion for summary judgment. In addition, the Court resolves what remains of Skokomish’s motion to stay the proceedings. S’Klallam requests that the Court grant it summary judgment on three bases: (1) the Skokomish request for determination is procedurally improper because the Skokomish fail to allege which jurisdictional provision they invoke; (2) the Skokomish request is legally invalid because it violates a settlement agreement: The Hood Canal Agreement; and (3) the Court has previously determined, unambiguously, that the Skokomish U&A is the Hood Canal and its drainage basin, and therefore it is not entitled to any ruling that it has primary fishing rights outside of that established U&A. The Squaxin move for summary judgment on essentially the same bases, albeit with slightly different legal arguments, and include an additional argument for dismissal on the basis that Skokomish failed to follow the pre-filing requirements established by this Court. Skokomish have opposed the S’Klallam and Squaxin motions and also move for summary judgment in their favor. Skokomish assert that they have complied with all pre-filing requirements and have appropriately asserted jurisdiction over this matter, and argue that both this Court and the Ninth Circuit Court of Appeals have already determined that their U&A and primary fishing right extend beyond the Hood Canal and its drainage basin. Accordingly, they assert that summary judgment in their favor is appropriate. The matter having been fully briefed, and having determined that oral argument is not necessary in this matter, the Court now grants S’Klallam’s and Squaxin’s motions for summary judgment, and denies Skokomish’s cross-motion for summary judgment.

**69. *United States v. Board of Directors of Truckee-Carson Irrigation District***

No. 16–15507, 708 Fed. Appx. 898 (9th Cir. Sep. 13, 2017). United States sued Truckee–Carson Irrigation District (TCID), which managed project controlling diversions from Truckee and Carson rivers, TCID’s board members, and all water users in project as class, seeking to recoup more than one million acre-feet of water unlawfully diverted in excess of applicable operating criteria and procedures (OCAPs) and to detriment of Pyramid Lake Paiute Tribe. After intervention by tribe as plaintiff, the District Court awarded government approximately 200,000 acre-feet of water and post-judgment interest, and denied TCID attorney fees under Equal Access to Justice Act (EAJA). Appeals were taken. The appellate court, 602 F.3d 1074, affirmed in part, vacated in part, and remanded. On remand, the District Court recalculated amount of excess diversions for four years. Appeals were taken. The appellate court, 723 F.3d 1029, ruled that extraordinary remedy of correcting its prior mandate was warranted. On remand, the District Court, 2015 WL 2185551, determined amount of water subject to recoupment for two years, and subsequently, 2016 WL 304309, denied government’s and tribe’s recoupment claims for those two years. Appeal was taken. The appellate court held that: (1) tribe’s claims were not barred by doctrine of res judicata; (2) tribe’s appellate arguments were not foreclosed by law of the case; (3) tribe did not waive appellate arguments supporting claims; (4) recoupment was available for excess diversions during portions of two years; and (5) tribe was entitled to equitable remedy of recouping 8,300 acre-feet of water for two years. Vacated and remanded.

**70. *Upper Skagit Indian Tribe v. Suquamish Indian Tribe***

No. 15-35540, 871 F.3d 844 (9th Cir. Sep. 22, 2017). Upper Skagit Indian Tribe filed Request for Determination as to the geographic scope of the Suquamish Indian Tribe’s usual and accustomed fishing grounds and stations as determined by the District Court, 384 F. Supp. 312, and 459 F. Supp. 1020, seeking determination that determination did not include Chuckanut Bay, Samish Bay, and a portion of Padilla Bay where the Upper Skagit has its own court-approved fishing grounds and stations determination. The District Court, Nos. 2:14-sp-00001-RSM 2:70-cv-09213-RSM, entered summary judgment finding that the District Court did not intend to

include the contested waters in its determination and entered summary judgment in Upper Skagit Tribe's favor. Suquamish Tribe appealed. The appellate court held that Upper Skagit Indian Tribe sufficiently met its burden to establish that there was no evidence before district court judge that Suquamish Indian tribe fished or traveled through contested areas, and thus Upper Skagit Tribe's usual and accustomed fishing grounds and station determination did not include those areas. Affirmed.

**71. *Sturgeon v. Frost***

No. 13-36165, 872 F.3d 927 (9th Cir. Oct. 2, 2017). Hunter who sought to use hovercraft to reach moose hunting grounds brought action against National Park Service (NPS), challenging its application of 36 C.F.R. § 1.2(a)(3), a regulation that prohibited use of hovercraft to National Preserve in Alaska. The United States District Court for the District of Alaska, H. Russel Holland, J., 2013 WL 5888230, granted summary judgment for NPS. Hunter appealed. The Court of Appeals, Nguyen, Circuit Judge, 768 F.3d 1066, affirmed in part, vacated in part, and remanded. The Supreme Court, Roberts, Chief Justice, 136 S. Ct. 1061, granted certiorari and vacated and remanded Court of Appeals' decision. On remand, the Court of Appeals, Jacqueline H. Nguyen, Circuit Judge, held that regulation preventing use of hovercraft in federally managed conservation areas applied to river in National Preserve. Affirmed.

**72. *Makah Indian Tribe, et al. v. Quileute Indian Tribe, et al.***

No. 15-35824, No. 15-35827, 873 F.3d 1157 (9th Cir. Oct. 23, 2017). In litigation over fishing rights in Western Washington, Indian tribe commenced subproceeding to determine usual and accustomed fishing grounds of two other tribes pursuant to Treaty of Olympia. Following bench trial, the district court, Nos. 2:09-sp-00001-RSM, 2:70-cv-09213-RSM, Ricardo S. Martinez, Chief Judge, determined tribes' rights and fishing boundaries, 129 F. Supp. 3d 1069, and corrected scrivener's error, 2015 WL 10853926. Plaintiff and state appealed. The appellate court held that: (1) district court did not clearly err in determining that word "fish," as used in Treaty, encompassed sea mammals; (2) tribes were not required to provide evidence of specific locations that they regularly and customarily hunted whales or seals; and (3) district court incorrectly drew longitudinal boundaries of tribes' U & A fishing grounds. Affirmed in part, reversed in part, and remanded.

**73. *Flathead Joint Board of Control v. State***

No. DA 16-0516, 389 Mont. 270 (Mont. Nov. 8, 2017). Board responsible for overseeing irrigation districts challenged the constitutionality of a water compact entered into between tribes, State, and the United States. The 20th Judicial District Court found that a section of the compact's administrative provisions provided "new immunity to the State and its agents" and therefore was unconstitutional, but that it was severable from the remainder of the compact. Board appealed. The Supreme Court held that: (1) challenge to the constitutionality of a water compact was justiciable, and (2) compact did not provide any new immunity to the State and thus Constitutional provision restraining legislature from asserting sovereign immunity did not apply. Affirmed in part and reversed in part.

**74. *United States v. Lummi Nation***

No. 15-35661, 876 F.3d 1004 (9th Cir. Dec. 1, 2017). In proceedings to adjudicate fishing rights reserved by 1855 Treaty of Point Elliott, Lower Elwha Band of S'Klallams, Jamestown Band of S'Klallams, Port Gamble Band of S'Klallams, and Skokomish Indian Tribe sought determination that Lummi Indian Tribe was violating 1974 District Court opinion in *United States v. Washington*, Boldt, J., 384 F. Supp. 312, by fishing in areas outside its adjudicated usual and accustomed grounds and stations. Following entry of summary judgment order in 1990 in favor of plaintiff tribes determining that 1974 opinion did not intend to include disputed areas within Lummi Tribe's usual and accustomed grounds and stations, the District Court dismissed action. Plaintiff tribes appealed. The appellate court, 235 F.3d 443, affirmed in part and reversed in part. On remand, the District Court, 2012 WL 4846239, entered summary judgment on Klallam Tribes' request for determination that Lummi Tribe's usual and accustomed grounds did not include eastern portion of Strait of Juan de Fuca or waters west of Whidbey Island. The appellate court, 763 F.3d 1180, reversed and remanded. On remand, the District Court, 2015 WL 4405591, entered summary judgment in favor of the Lower Elwha Klallam Tribe. Lummi Tribe appealed. The appellate court held that: (1) District Court's finding in *United States v. Washington*, 384 F. Supp. 312, that the usual and accustomed fishing places of the Lummi Indians at treaty times included the marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle, was ambiguous as to

whether the usual and accustomed fishing places of the Lummi Indians included the waters west of Whidbey Island, and (2) waters west of Whidbey Island were encompassed in usual and accustomed fishing places of the Lummi Indians. Reversed and remanded.

**75. *Navajo Nation v. Department of the Interior***

No. 14-16864, 876 F.3d 1144 (9th Cir. Dec. 4, 2017). Indian tribe brought action against Interior Department, Interior Secretary, Bureau of Reclamation, Bureau of Indian Affairs, and water districts alleging that United States failed in its trust obligation to assert and protect tribe's water rights and violated National Environmental Policy Act (NEPA) and Administrative Procedure Act (APA) through actions undertaken to manage flow of Colorado River's lower basin. The District Court, 34 F. Supp. 3d 1019, granted federal defendants' motion to dismiss. Tribe appealed. The appellate court held that: (1) tribe lacked standing to assert claim that preparation of environmental impact statement (EIS) and related documents by Secretary of Department of Interior relating to guidelines for determining when there was surplus of water from Colorado River for use within Arizona, California, and Nevada and storage of such surplus water would threaten its interests in obtaining adequate water; (2) allegations by tribe about future development of reliance interests in unadjudicated or unquantified reserved water rights, and that United States would be disinclined to revisit water rights adjudications after implementation of guidelines by Department of Interior clarifying how it would make "surplus" and "shortage" determinations of waters of Colorado River for delivery to Western states, did not show that tribe suffered injury needed for Article III standing; (3) alleged adverse affect on Indian tribe's generalized interest in availability of water did not show that tribe suffered injury needed for Article III standing; (4) breach of trust claim by tribe was predicated not on affirmative action, but rather failure to act; and (5) waiver of sovereign immunity applied to breach of trust claim by tribe. Affirmed in part, reversed in part, and remanded.

**76. *Baley v. United States***

No. 1-591L, 134 Fed. Cl. 619 (Fed. Cl. Sept. 29, 2017). Farmers filed class actions against United States, claiming that Bureau of Reclamation effected Fifth Amendment taking and violated their water rights under the Klamath River Basin Compact, by temporarily terminating water deliveries to farmers for irrigation in

order to preserve habitat of fish protected under Endangered Species Act (ESA) and to comply with government's tribal trust obligations to several Indian tribes. Following consolidation of actions and class certification, parties cross-moved for summary judgment. The Court of Federal Claims held that: (1) claims by shareholders in corporation that supplied irrigation water were barred; (2) claims by successors to signors of water rights applications were not barred; (3) claims by successors to signors of repayment contracts were not barred; (4) claims by some successors to signors of Warren Act contracts were barred; (5) claims by successors to leaseholders of land in wildlife refuges were barred; (6) termination of water deliveries did not affect taking or violate compact as farmers' water rights were subordinate to tribes' rights. Defendant's motion granted.

#### 77. *Clayvin Herrera v. State of Wyoming*

No. 2016-242, Fourth Judicial District, Sheridan County, State of Wyoming. Petition for Certiorari Granted, No. 17-532, (U.S. June 28, 2018). Issue: Whether Wyoming's admission to the Union or the establishment of the Bighorn National Forest abrogated the Crow Tribe of Indians' 1868 federal treaty right to hunt on the "unoccupied lands of the United States," thereby permitting the present-day criminal conviction of a Crow member who engaged in subsistence hunting for his family. Clayvin Herrera appeals from the Order Denying Motion to Dismiss, Striking Evidentiary Hearing and Granting State's Motion in Limine, entered on October 16, 2015 and the Judgment and Sentence entered by the Fourth Judicial Circuit Court on April 29, 2016. The Appellant frames the pertinent issues as follows: (1) Did the circuit court err in denying treaty-based immunity to Herrera by holding itself "bound by" an erroneous Tenth Circuit decision, and ruling -- that the establishment of the Big Horn National Forest (BHNF) in 1897 by presidential proclamation extinguished the Crow Treaty hunting rights? (2) Should the Court grant judgment of acquittal to Herrera, and dismiss the misdemeanor counts against him because the State did not, and cannot meet the controlling federal "conservation necessity" standard for prosecution of an otherwise immune treaty-hunter under state wildlife laws? Herrera is an enrolled member of the Crow Tribe and a resident of St. Xavier, Montana, which is

located on the Crow Reservation. In January 2014, Herrera and several other tribal members decided to hunt for elk on the Crow Reservation. They spotted several elk on the Reservation in the vicinity of Eskimo Creek. At some point, the elk crossed a fence, leaving the Crow Reservation and entering into the Big Horn National Forest in the State of Wyoming. Herrera and the others crossed the fence into Wyoming and continued to track the elk. They shot three bull elk and took the meat back with them to Montana. The elk were taken without a license and during a closed season. Herrera was cited with two misdemeanors, taking an Antlered Big Game Animal Without a License or During a Closed Season, a violation of W.S. § 23-3-102(d), and Accessory to Taking Antlered Big Game Animal Without a License or During a Closed Season, a violation of W.S. § 23-6-205. Herrera filed a Motion to Dismiss under the Supremacy Clause of the United States Constitution and the Fort Laramie Treaty of 1868. Herrera did not deny taking the elk, but he asserted that he had a right to hunt where and when he did under Article 4 of the 1868 Treaty with the Crow (“Crow Treaty”). He argued that this treaty gave the Crow Tribe the right to hunt off of the reservation on the “unoccupied lands of the United States” that fell within territory that had been ceded by the Crow, and that this treaty right was still valid and preempted state law. The circuit court entered its Order Denying Motion to Dismiss, Striking Evidentiary Hearings and Granting the State’s Motion in Limine. The trial court held that “[t]his issue of off-reservation treaty hunting rights is indistinguishable from the issue and arguments which were adjudicated in *Crow Tribe of Indians vs. Repsis*, 73 F.3d 982 (10th Cir. 1995).” The circuit court found itself to be “bound by the Tenth Circuit’s holding that Crow Tribe members do not have off-reservation treaty hunting rights anywhere within the state of Wyoming.” The circuit court also rejected Herrera’s argument that *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), had reversed and rejected the *Repsis* case as well as *Ward v. Race Horse*, 163 U.S. 504 (1896), upon which the *Repsis* decision was based. The circuit court agreed with the *Repsis* court’s decision that the off-reservation treaty hunting right was intended to be temporary and is no longer valid. The circuit court alternatively held that even if the treaty rights still existed, the regulation at issue met the “conservation necessity” standard, and therefore the regulation would apply to treaty hunters. Herrera filed a Petition for a Writ of Review, Writ of Certiorari and Writ of Prohibition with the Wyoming Supreme Court. The Wyoming Supreme Court denied the

Petition. The jury convicted Herrera and he was given concurrent sentences of one (1) year in jail suspended in lieu of unsupervised probation, three (3) years of suspended hunting privileges, and \$8,080.00 in fines and court costs. This appeal followed. Herrera is not challenging anything that occurred at his trial. Rather, he is appealing the circuit court's pretrial decisions on the validity of the off-reservation treaty hunting right. The circuit court was presented with the *Repsis* case, which had squarely addressed the interpretation of the Crow Treaty. The circuit court was free to adopt that decision if it found it to be persuasive and appropriate. The circuit court did adopt the analysis and conclusions of the *Repsis* case, and this Court finds that it was appropriate to do so. Herrera's primary argument is that the circuit court should not have found *Repsis* to be persuasive, because it was overruled by *Mille Lacs*. The circuit court rejected this argument, and as discussed above, this Court also concludes that *Mille Lacs* did not overrule *Repsis*. Rather, *Mille Lacs* reaffirmed the principle that the court must look at the language in the treaty to determine whether it was intended to be perpetual or if it was intended to terminate at the occurrence of a "clearly contemplated" event. The *Repsis* court applied this principle and determined that the off-reservation treaty hunting right in the Crow Treaty was no longer valid. It was therefore proper for the circuit court to adopt the reasoning in the *Repsis* decision, and bar Herrera from asserting the invalidated treaty hunting right as a defense to the criminal prosecution. Having reviewed the record, the briefs of the parties, and being otherwise fully advised, the Court affirms the circuit court's orders and the Judgment and Sentence. Now, therefore, it is hereby ordered that the circuit court's orders and the Judgment and Sentence are affirmed.

**78. *Ak-Chin Indian Community v. Central Arizona Water Conservation District***

No. CV-17-00918-PHX-DGC, 2018 WL 397233 (D. Ariz. Jan. 12, 2018). Crossclaim Defendants the United States, Department of the Interior ("DOI"), Bureau of Reclamation ("BOR"), and four officials of the DOI and BOR (collectively, the "United States") move to dismiss Defendant Central Arizona Water Conservation District's ("CAWCD") crossclaim against them under Rules 12(b)(1) and 12(b)(6). Plaintiff Ak-Chin Indian Community sued CAWCD to establish its right to certain water. CAWCD moved to join the United States as a necessary party defendant under Rule 19, and the Court



granted the motion. CAWCD then brought a crossclaim against the United States regarding CAWCD's obligation to provide the water to Ak-Chin on behalf of the United States. The crossclaim seeks injunctive and declaratory relief. CAWCD operates and maintains the Central Arizona Project ("CAP") pursuant to an operating agreement with the United States. As part of a 1984 settlement with Ak-Chin, the United States committed to deliver not less than 75,000 acre-feet ("AF") per year "from the main project works of the [CAP] to the southeast corner of the Ak-Chin Indian Reservation." Ak-Chin Water Rights Settlement Act of 1984, Pub. L. No. 98-530, §2(a), 98 Stat. 2698 (the "1984 Act"). Additionally, "[i]n any year in which sufficient surface water is available," the DOI "shall deliver such additional quantity of water as is requested by the Community not to exceed ten thousand acre-feet." *Id.* § 2(b). The 1984 Act identifies the CAP as the source of the mandatory 75,000 AF, but does not identify a source for the additional 10,000 AF. The parties refer to this additional 10,000 AF as "§ 2(b) water," and they dispute whether and under what circumstances CAWCD is obligated to supply it. Pursuant to a contract between the United States and Ak-Chin, Ak-Chin submits an annual schedule of its desired water deliveries to the DOI, which reviews the schedule for compliance with governing statutes and contracts and transmits it to CAWCD to arrange the water deliveries. CAWCD alleges that the United States transmitted a 2017 schedule that included § 2(b) water and would have forced CAWCD to supply water in excess of its obligations. The United States instructed CAWCD that the § 2(b) water was to come from "any unused Indian contract water." CAWCD argues that various statutes allocate a total of 136,645 AF of CAP water for use by the Ak-Chin and San Carlos Apache tribes each year. Further, CAWCD asserts that forcing it to supply § 2(b) water from "unused Indian contract water" violates the 2007 CAP Repayment Stipulation from prior litigation between CAWCD and the United States. Because § 2(b) water is "Excess Water" under the Stipulation, CAWCD argues that it has the "exclusive right in its discretion to sell or use [it] for any authorized purpose of the CAP." In short, the rights asserted and the remedies sought in the crossclaim are rooted in contract. The crossclaim therefore seeks relief impliedly forbidden by another statute—the Tucker Act—and the APA waiver of sovereign immunity does not apply. The crossclaim is barred by sovereign immunity. It is ordered that the United States' motion to dismiss CAWCD's crossclaim is granted.

**79. *Yurok Tribe v. Resighini Rancheria***

No. 16-cv-02471 RMI, 2018 WL 550233 (N.D. Cal. Jan. 25, 2018). Appeal filed with the 9th Circuit on February 26, 2018. This is an action in which the Yurok Tribe (“the Tribe”) seeks a declaratory judgment that the Resighini Rancheria (“the Rancheria”) and Gary Mitch Dowd, a member of the Rancheria, do not have any rights to fish in the Klamath River Indian fishery within the Yurok Reservation. The Complaint sets forth two claims for relief: (1) violation of the Hoopa-Yurok Settlement Act; and (2) violation of the Yurok Tribe’s exclusive federally reserved fishing right. Pending before the court is the Rancheria’s motion to dismiss for lack of subject matter jurisdiction. This action is dismissed with prejudice as against the Resighini Rancheria based on the Rancheria’s tribal sovereign immunity. The court finds that the Yurok Tribe has waived its claims against Defendant Dowd in his official capacity, and those claims are dismissed. Finally, the court dismisses the action without prejudice as against Defendant Dowd in his individual capacity for failure to join an indispensable party under Rule 19.

**80. *National Wildlife Federation, et al. v. State of Oregon, et al.***

No. 17-35462, No. 17-35463, No. 17-35465, No. 17-35466, No. 17-35467, No. 17-35502, No. 18-35111, No. 18-35152, 886 F.3d 803 (9th Cir. Apr. 2, 2018). Environmental conservation organizations brought action against National Marine Fisheries Service (NMFS), U.S. Army Corps of Engineers, and U.S. Bureau of Reclamation, challenging NMFS’s Endangered Species Act (ESA) biological opinion regarding salmonid species in Federal Columbia River Power System (FCRPS). State of Oregon intervened as plaintiff and states of Washington, Montana, and Idaho, as well as Indian tribes and other interested groups intervened as defendants. Following several rounds of appeals and remands to agencies to modify the biological opinion, the United States District Court for the District of Oregon, 184 F. Supp. 3d 861, found that NMFS violated ESA, Administrative Procedure Act (APA), and National Environmental Policy Act (NEPA) in part. Organizations and Oregon moved for injunctive relief to address violations. The District Court, 2017 WL 1135610, granted in part and denied in part motions for injunctive relief. Agencies and intervenor-defendants appealed. The Appellate Court held that: (1) conservation organizations’ injunction motions were not precluded by rule

establishing under what circumstances a motion for relief from judgment is permitted; (2) showing an extinction-level threat to a listed species is not required before an injunction can issue under the ESA; (3) district court did not err in basing its issuance of preliminary injunction on the harm from the operation of the FCRPS dams as a whole, rather than on the harm from only the spill-related components of the alternative proposed in NMFS's biological opinion; (4) district court properly concluded that operation of the FCRPS dams would cause irreparable harm to threatened and endangered salmonid species absent an injunction; (5) organizations adequately showed irreparable harm to their own interests; (6) preliminary injunction requiring increased amounts of spill was narrowly tailored to avoid the irreparable harm identified; and (7) conclusion that operation of dams would cause irreparable harm to salmonid species absent an injunction requiring operation of juvenile bypass facilities and associated passive integrated transponder (PIT) tag detection systems at dams was based on sufficient findings in the record. Affirmed in part.

#### **81. *United States v. Washington***

No. C70-9213, Sub-proceeding 17-02, 2018 WL 1933718 (W.D. Wash. Apr. 24, 2018). This subproceeding concerning the Muckleshoot Tribe's marine usual and accustomed fishing grounds and stations comes before the Court on the Swinomish Indian Tribal Community's, Port Gamble and Jamestown S'Klallam Tribes', Suquamish Tribes', and Tulalip Tribe's Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(1). The Muckleshoot Tribe opposes the motion, and the Nisqually Indian Tribe has joined in that opposition. The Moving Tribes assert that this Court lacks jurisdiction to hear this matter under Paragraph 25(a)(6) of the Order Modifying Paragraph 25 of the Permanent Injunction, entered on August 24, 1993, because the Muckleshoot Tribe's marine usual and accustomed fishing grounds and stations ("U&A") has already been specifically determined, and because the Muckleshoot asserted a contrary position to that advanced now in a prior subproceeding in which it succeeded. The Muckleshoot oppose the motion on the basis that the marine U&A asserted now has never been determined. The Nisqually, while not joining any substantive claims to the U&A, concurs with the procedural arguments made by the Muckleshoot with respect to its ability to invoke Paragraph 26(a)(6) jurisdiction.

For the reasons discussed herein, the Court agrees with the Moving Tribes, and hereby dismisses this subproceeding.

**82. *Hoopa Valley Tribe v. National Marine Fisheries Service***

No. 16-cv-04294-WHO, 2018 WL 2010980 (N.D. Cal. Apr. 30, 2018). On March 24, 2017, I issued permanent injunctions in two related cases, *Hoopa Valley Tribe v. Bureau of Reclamation*, No. 16-cv-4294, and *Yurok Tribe v. Bureau of Reclamation*, No. 16-cv-6863. See *Hoopa* Dkt. No. 111; *Yurok* Dkt. No. 70. The injunctions ordered the United States Bureau of Reclamation (the “Bureau”) to require certain types of water flows as part of their operation of the Klamath River Project in order to prevent irreparable harm to the SONCC Coho salmon, an endangered species. The plaintiffs in those two cases are two federally protected Klamath Basin Tribes, the Hoopa Valley Tribe and the Yurok Tribe, whose cultural heritage and economic wellbeing revolve around the salmon’s health, as well as the Pacific Coast Federation of Fishermen’s Associations, Institute for Fisheries Resources, and Klamath Riverkeeper. Certain organizations and persons interested in the Klamath River Project intervened in both cases on the side of the Bureau and the National Marine Fisheries Service (“NMFS,” and together with the Bureau, “federal defendants”), advocating the interests of ranchers and farmers in receiving needed water for their livelihoods. While all of the parties present important equitable concerns, the Court issued the injunctions because the law demands that endangered species are entitled to primary protection. Both federal defendants and intervenors filed timely notices of appeal in the two cases. Water year 2017 resulted in favorable conditions in the Klamath River, while water year 2018 has been significantly drier. On March 7, 2018, intervenors moved for relief from the judgment, or, in the alternative, a stay of enforcement of the injunctions, arguing that the application of the injunctions to water year 2018 is both unnecessary and inequitable due to new information not available at the time that the injunctions were issued. Federal defendants do not join in intervenors’ motion, but respond separately that they believe that full compliance with the injunctions is not possible as a result of the drier hydrological conditions, and propose a new plan. Plaintiffs oppose both intervenors’ motion and federal defendants’ proposal. Given the pendency of the appeal, the Court’s jurisdiction is limited. Pursuant to Federal Rule of Civil Procedure 62.1, the Court considered the

merits of intervenors' motion and denies it because they do not show newly discovered evidence sufficient to justify suspending or modifying the injunctions pursuant to Rule 60(b)(2), nor that prospective application of the injunctions would be inequitable pursuant to Rule 60(b)(5). Staying enforcement would not preserve the status quo, and the Court lacks jurisdiction to grant their requested stay while the appeal is pending. Nor would the Court do so in light of the evidence of record. With respect to federal defendants' proposed plan, the Court clarifies federal defendants' obligations under the injunctions – partial compliance with Measure 4 is necessary in the event that full compliance is not possible.

**83. *United States v. Walker River Irrigation District***

No. 15-16478, No. 15-16479, 890 F.3d 1161 (9th Cir. May 22, 2018). Federal government brought action to establish water rights in river basin on behalf of the Walker River Paiute Tribe. The District Court issued decision, 11 F. Supp. 158, and entered decree awarding water rights to various claimants. Federal government appealed. The Court of Appeals, 104 F.2d 334, reversed in part. On remand, the District Court amended and retained jurisdiction to modify decree. A river irrigation district filed a petition to enjoin state water resources control board from implementing restrictions on its water licenses. Tribe and federal government filed counterclaims asserting new water rights. The District Court, 2015 WL 3439106, granted irrigation district's motion to dismiss counterclaims for lack of subject matter jurisdiction, concluding that while continuing jurisdiction existed, counterclaims were new action barred by res judicata. Tribe and federal government appealed. The Court of Appeals held that: (1) continuing jurisdiction existed; (2) counterclaims were not new action; (3) dismissal based on res judicata was improper; and (4) Court of Appeals would reassign case. Reversed, remanded, and reassigned. We hold that the district court had continuing jurisdiction over the counterclaims and that it erred in dismissing the claims on res judicata or jurisdictional grounds without giving the parties an opportunity to brief the issue. Accordingly, we reverse and remand. On remand, we also order the reassignment of this case to another district judge.

**84. *Skokomish Indian Tribe v. Forsman***

No. 17-35336, 738 Fed. Appx. 406, 2018 WL 3017052 (9th Cir. Jun. 18, 2018). The Jamestown S'Klallam and Port Gamble

S’Klallam Tribes are required parties to this action to establish hunting rights. Like Defendants, these amici tribes’ interpretation of their reserved hunting rights conflicts with Skokomish’s primary-right claim, which entails the power to exclude members from *all* other Stevens Treaty Tribes from hunting in the land at issue. Therefore, the district court correctly concluded that deciding Skokomish’s claims against the Suquamish Defendants would necessarily decide Skokomish’s hunting rights in relation to *the amici tribes* and potentially other absent, non-party Stevens Treaty Tribes. Finally, the district court did not err in sua sponte denying Skokomish leave to amend its complaint. Skokomish has cursorily argued that it can remedy the absence of indispensable parties by adding the officers of the other Stevens Treaty Tribes to this action. Skokomish has failed, however, to allege that any tribe other than Suquamish has promulgated and is enforcing the type of tribal hunting regulation at issue. Leave to amend would therefore be futile.

**85. *United States v. United States Board of Water Commissioners***

No. 15-16316, No. 15-16317, No. 15-16319, No. 15-16321, No. 15-16323, No. 15-16489, 893 F.3d 578 (9th Cir. Jun. 22, 2018). Farmers sought review under court’s in rem jurisdiction of Nevada State Engineer’s and California State Water Resources Control Board’s approval of conservation organization’s and irrigation district’s change applications regarding their use of their water claims from Walker River. The District Court rejected Nevada’s and California’s rulings, refused to grant change applications, and remanded. Conservation organization and irrigation district appealed. The Court of Appeals held that: (1) district court’s remand order was sufficiently final for Court of Appeals to review; (2) California Water Board’s adjudication of irrigation district’s change applications should have been reviewed under abuse of discretion standard; (3) Nevada State Engineer’s finding was supported by substantial evidence; (4) farmers failed to demonstrate that they had any right to the stored water that would have been injured by irrigation district’s proposed change; and (5) irrigation district’s proposed change did not violate Decree’s prohibition on delivering water outside the basin of the Walker River. Reversed and remanded. Opinion, 890 F.3d 1134, superseded.

**86.     *The Klamath Tribes v. U.S. Bureau of Reclamation, et al.***

No. 18-cv-03078-WHO, 2018 WL 3570865 (N.D. Cal. Jul. 25, 2018). The Klamath Tribes have filed suit for declaratory and injunctive relief to protect two endangered species of sucker fish from risk of extinction surrounding the operation of the Klamath Irrigation Project (“Project”). They move for a preliminary injunction to require the United States Bureau of Reclamation (“Bureau”) to maintain the water in the Upper Klamath Lake during the irrigation season of 2018 at elevation levels suggested in a controlling Biological Opinion issued jointly by the United States Fish and Wildlife Service (“FWS”) and National Marine Fisheries Service (“NMFS”). The Bureau, FWS, and NMFS (collectively, “federal defendants”) as well as Klamath Water Users Association, Sunnyside Irrigation District, and Ben DuVal (collectively, “intervenor”), oppose the preliminary injunction and move to dismiss this case for improper venue, or alternatively to transfer venue. The federal defendants also move to dismiss one Count as nonjusticiable, and contend that it should at least be dismissed against NMFS because it lacks jurisdiction over the protected sucker fish. Various amici have filed briefs expressing their positions on venue and the preliminary injunction. While venue may be proper in the Northern District of California, it is more appropriate in the United States District Court for the District of Oregon: the Klamath Tribes are headquartered there, the sucker fish are there, the Upper Klamath Lake is there, and the Bureau and FWS have offices there. Only NMFS has an office in the Northern District, and it may not be long for this case given problems with Count III. The Court will let the transferee court address the pleadings as it will. There is reason for all parties to give urgent focus to the health of the sucker fish. The federal defendants represent that this is already happening, and the Court encourages the engaged scientists for all parties to work collaboratively and expeditiously to protect the sucker fish. The Klamath Irrigation Project is complex, and the endangered species within it are of paramount importance under the Endangered Species Act. That said, while this is a close case, the Klamath Tribes have not convinced the Court on this record that they are likely to prevail on the merits or that the sucker fish will suffer irreparable harm if I do not grant the relief the Klamath Tribes seek. There is substantial disagreement whether the lake elevation level is causing injury to the sucker fish, but there is no doubt that granting a mandatory injunction that cuts off water to the Klamath Irrigation District will

cause substantial harm to others that depend on it, including wildlife refuges, farmers and ranchers. The motion for preliminary injunction is denied.

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

No. 2017-2340, 900 F.3d 1350, 2018 WL 3945585 (Fed. Cir. Aug. 17, 2018). The Crow Creek Sioux Tribe (“Tribe”) is a federally recognized Indian tribe. Its reservation is located in South Dakota along the Missouri River. The Tribe filed suit against the United States in the Court of Federal Claims (“Claims Court”) seeking damages and declaratory and injunctive relief for the alleged taking of its water rights in violation of the Fifth Amendment, and for the alleged mismanagement of its water rights in violation of 25 U.S.C. § 162a(d)(8). The Claims Court dismissed the case for lack of subject-matter jurisdiction. The Crow Creek Indian Reservation (“Reservation”) was established in central South Dakota in 1863. The Missouri River overlies the Reservation's western boundary. Under the Supreme Court's decision in *Winters v. United States*, 207 U.S. 564, 28 S. Ct. 207, 52 L. Ed. 340 (1908), the creation of an Indian Reservation carries an implied right to unappropriated water “to the extent needed to accomplish the purpose of the reservation.” These reserved rights are known as *Winters* rights. They arise as an implied right from the treaty, federal statute, or executive order that set aside the reservation, and they vest on the date of the reservation's creation. The parties agree for purposes of the motion to dismiss that, pursuant to the *Winters* doctrine, the Tribe possesses a perfected right to sufficient water to fulfil the Reservation's purposes. In June 2016, the Tribe filed suit in the Claims Court seeking at least \$200 million in damages. The complaint alleged that certain, unspecified acts and omissions by the United States, presumably including the continued operation of the dams, have taken the Tribe's “*Winters* reserved water rights” without just compensation in violation of the Fifth Amendment. The complaint also alleged that the government breached its fiduciary duty to “[a]ppropriately manag[e] the natural resources located within the boundaries of Indian reservations,” 25 U.S.C. § 162a(d)(8), “by the acts and omissions described hereinabove, including failing to protect, quantify, assert or record Plaintiff's water rights, and instead continuously diverting, retaining, and appropriating that water to others and to Defendant's own use.” The complaint did not allege that the government's actions deprived the Tribe of sufficient water



to fulfill the reservation's purposes or that those actions would cause the Tribe to lack sufficient water in the future. The United States filed a motion to dismiss pursuant to Rule 12(b)(1) of the Court of Federal Claims for lack of subject-matter jurisdiction. The Claims Court granted the motion, noting that *Winters* only entitles the Tribe to sufficient water to fulfill the Reservation's purposes and explaining that nothing in the complaint suggests that the Tribe is “experienc[ing] a shortage of water” or that its water supply from the Missouri River is or will be “insufficient for [the Tribe's] intended pursuits.” The Claims Court rejected the Tribe's argument that its *Winters* reserved water rights can be injured by any “taking or diverting [of] waters from the Missouri River,” even if the diversion does not cause the Tribe to experience any water shortage. The court also noted that, while 25 U.S.C. § 162a(d)(8) “does direct the government to manage the natural resources of Indian tribes,” the statute “does not direct any specific actions to be taken by the government in that management.” The Claims Court therefore dismissed the suit for lack of subject-matter jurisdiction because it could not “identify an injury to the Tribe that has yet occurred.” The tribe timely appealed. The Claims Court's decision, while it sometimes uses the word “damages,” turns on the Tribe's underlying failure to allege an injury in fact. Indeed, the Claims Court concludes its opinion by stating that “[t]he jurisdictional problem ... arises from plaintiff's inability to identify an injury to the Tribe.” We think the Claims Court was correct in dismissing the case for lack of subject-matter jurisdiction because the Tribe failed to sufficiently allege injury. The Tribe argues that, because its *Winters* rights vested at the founding of the Reservation, any subsequent action affecting the waters of the Missouri River constitutes an injury of those rights, even if the action does not affect the Tribe's ability to draw sufficient water to fulfill the purposes of the Reservation. In so arguing, the Tribe appears to misunderstand what its water rights entail. As noted above, *Winters*, the sole source of the water rights asserted in this case, only entitles tribes to “that amount of water necessary to fulfill the purpose of the reservation, no more.” And because water rights are usufructuary in nature—meaning that the property right “consists not so much of the fluid itself as the advantage of its use”—the Tribe has no right to any particular molecules of water, either on the Reservation or up- or downstream, that may have been used or diverted by the government. The Tribe's *Winters* rights, which give the Tribe the right to use sufficient water to fulfill the purposes of the Reservation, simply cannot be injured by

government action that does not affect the Tribe's ability to use sufficient water to fulfill the purposes of the Reservation. Because the Tribe failed to allege an injury in fact, we affirm the Claims Court's dismissal for lack of subject-matter jurisdiction. Affirmed.

G. *Gaming*

**88. *Stockbridge–Munsee Community v. Wisconsin***

No. 17–cv–249-jdp, 299 F. Supp. 3d 1026, 2017 WL 4857646 (W.D. Wis. Oct. 25, 2017). Stockbridge–Munsee Tribe filed this lawsuit, claiming that the Ho–Chunk Nation’s casino violated Indian Gaming Regulatory Act (IGRA) and gaming compact that other tribe negotiated with state, and that state and its governor violated compact by refusing to enforce its provisions. Stockbridge–Munsee Tribe moved for preliminary injunction, and other tribe moved for judgment on pleadings. The District Court held that:(1) tribe’s claims accrued when state approved of casino and other tribe began operating it, and (2) continuing violations doctrine did not extend statutory period. Motion for judgment on pleadings granted; dismissed.

**89. *Amador County, California v. United States Department of the Interior***

No. 16-5082, 707 Fed. Appx. 720 (Mem) (D.D.C. Nov. 27, 2017). This petition for review was considered on the record from the United States District Court for the District of Columbia and on the briefs filed by the parties. See Fed. R. App. P. 34(a)(2); D.C. Cir. R. 34(j). The court has accorded the issues full consideration and determined that they do not warrant a published opinion. Amador County challenges the Department of the Interior’s authorization of gaming on land, known as the Buena Vista Rancheria, that is owned by the Me Wuk Tribe. Its suit turns on whether the Rancheria is a “reservation” within the meaning of the Indian Gaming Regulatory Act. See 25 U.S.C. §§ 2703(4), 2710. In 1987, in *Hardwick v. United States*, No. C-79-1710 (N.D. Cal. Apr. 21, 1987), the County and the Hardwick plaintiffs from the Buena Vista Rancheria agreed to a stipulated judgment stating that the County would treat the Buena Vista Rancheria “as any other federally recognized Indian reservation,” and that “all of the laws of the United States that pertain to federally recognized Indian Tribes and Indians shall

apply” to the Rancheria. Joint Appendix 31. As the district court found, the agreement’s plain language “unambiguously sets forth the parties’ intent that the County would treat the Buena Vista Rancheria as a reservation.” *Amador County v. S.M.R. Jewell*, 170 F. Supp. 3d 135, 144 (D.D.C. 2016). And as this court noted in an earlier appeal, such a clear manifestation of the “parties’ intent to be bound in future actions” precludes the County from arguing here that the Rancheria is not an Indian reservation. *See Amador County v. Salazar*, 640 F.3d 373, 384 (D.C. Cir. 2011) (citing *Otherson v. Dep’t of Justice*, 711 F.2d 267, 274 n.6 (D.C. Cir. 1983)). The district court’s order of March 16, 2016 is affirmed.

**90. *Sharp Image Gaming, Inc. v. Shingle Springs Band of Miwok Indians***

No. C070512, 15 Cal. App. 5th 391, 223 Cal. Rptr. 3d 362 (Cal. Ct. App. 2017), reh’g denied (Oct. 16, 2017), review denied (Dec. 20, 2017). Casino gaming company brought breach of contract action against Indian tribe stemming from a deal to develop a casino on tribal land. The Superior Court denied tribe’s motion to dismiss for lack of subject matter jurisdiction as well as motion for summary judgment, and, following trial, entered judgment on jury verdict for the company. Tribe appealed. The appellate court held that: (1) court was required to determine threshold question of whether agreements were management contracts or collateral agreements to a management contract subject to the Indian Gaming Regulatory Act (IGRA); (2) agreements were “management agreements” within meaning of IGRA; and (3) promissory note was a collateral agreement to a management contract within meaning of IGRA such that preemption applied. Reversed and remanded with directions.

**91. *Citizen Potawatomi Nation v. Oklahoma***

No. 16-6224, 881 F.3d 1226 (10th Cir. Feb. 6, 2018). Native American nation brought action against state of Oklahoma, seeking to enforce arbitration award obtained in connection with dispute under tribal-state gaming compact. The District Court, 2016 WL 3461538, entered order enforcing award. State appealed. The appellate court held that: (1) de novo review provision of binding arbitration clause in tribal-state gaming compact was legally invalid, and (2) district court erred in failing to sever binding arbitration clause from tribal-state gaming compact. Remanded with instructions to vacate arbitration award.

**92. Texas v. Ysleta del Sur Pueblo**

No. EP-17-CV-179-RPM, 2018 WL 1474679 (W.D. Tex. Mar. 26, 2018). The Court considered Defendants Ysleta del Sur Pueblo, the Tribal Council, and the Tribal Governor Carlos Hisa's [hereinafter collectively referred to as "Defendants"] "Motion to Dismiss First Amended Complaint" ("Motion"). This case is the latest iteration of a long-running dispute between Plaintiff and Defendants regarding enforcement of Texas gaming law on the Ysleta del Sur Pueblo [hereinafter "Pueblo" or "the Tribe"] reservation. In 1987, the United States enacted the Restoration Act ("the Act"), which "restored trust responsibility for the Pueblo to the federal government" from the State of Texas. The Act delineates the nature of the federal trust relationship and contains provisions regarding, inter alia, federal recognition of the Tribe, the rights and privileges of the Tribe (including eligibility for federal services and assistance), the relationship between federal, state, and tribal authority, and permanent physical improvements to the reservation. Most importantly for purposes of this case, the Act governs "Gaming Activities" conducted on the reservation [hereinafter "Pueblo gaming"]. Section 107 of the Act contains two provisions relevant to deciding the Motion. Section 107(a), in pertinent part, provides that: All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe. Any violation of the prohibition provided in this subsection shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas. Section 107(c) provides that "the courts of the United States shall have exclusive jurisdiction over any offense in violation of subsection (a) [i.e., the section prohibiting all gaming activities prohibited by the State of Texas] ...." The effect of subsections (a) and (c) of the Act is to federalize Texas gaming law, which currently operates "as surrogate federal law on the Tribe's reservation in Texas." *Ysleta del Sur Pueblo v. State of Tex.*, 36 F.3d 1325, 1334 (5th Cir. 1994). Essentially, any activity prohibited pursuant to Texas law is prohibited pursuant to federal law. The Court concludes that the Texas attorney general, who is statutorily authorized to sue based on the Texas common nuisance statute, maintains the capacity to bring suit in this case. Accordingly, Defendants Ysleta del Sur Pueblo, the Tribal Council, and the Tribal Governor Carlos Hisa's "Motion to Dismiss First Amended Complaint" is denied.

**93. *Pauma v. National Labor Relations Board***

No. 16-70397, No. 16-70756, 888 F.3d 1066 (9th Cir. Apr. 26, 2018). Tribal employer that operated casino on Indian reservation filed petition for review of order of the National Labor Relations Board (NLRB), No. 21-CA-125450, 363 NLRB No. 60, 205 L.R.R.M. 1591, 2015 WL 7873631, which affirmed as modified administrative law judge's (ALJ) decision, 2015 WL 3526140, that employer committed unfair labor practices in violation of the National Labor Relations Act (NLRA) by trying to stop union literature distribution in guest areas at casino's front entrance and in non-working areas near its employees' time clock. NLRB filed petition for enforcement of its order, and union intervened in opposition to employer. The Court of Appeals held that: (1) union could not raise collateral estoppel defense affirmatively waived by NLRB; (2) NLRB's determination that tribal employer was "employer" within meaning of the NLRA was entitled to *Chevron* deference; (3) federal Indian law did not preclude NLRB's determination that tribal employer was "employer" within meaning of the NLRA; (4) employer sufficiently exhausted its claim that it did not violate the NLRA; (5) substantial evidence supported NLRB's determination that tribal employer committed unfair labor practice by trying to stop employees' union literature distribution to customers outside casino's front entrance; and (6) substantial evidence supported NLRB's determination that tribal employer committed unfair labor practice by disciplining employee for distributing union literature near casino's time clock. NLRB's petition granted and employer's petition denied.

**94. *Fort Sill Apache Tribe v. National Indian Gaming Commission***

No. 14-958, 317 F. Supp. 3d 504, 2018 WL 2389724 (D.D.C. May 25, 2018). Indian tribe brought action against National Indian Gaming Commission (NIGC), its acting chairman, and United States, alleging that NIGC's decision not to reconsider and to affirm its prior decision, which determined that tribe was not eligible to operate casino, was arbitrary and capricious and that United States breached settlement agreement, under which tribe agreed to relinquish its lands on reservation and move to area within tribe's ancestral homeland. NIGC, acting chairman, and United States moved to dismiss and to reconsider prior order that allowed tribe to amend its complaint. In the late 1990s, the Tribe sought to open a

gaming facility on land within the boundaries of the KCA Reservation. The Comanche Nation, a separate tribal entity which also held lands on the KCA Reservation, opposed that plan and sued the United States to stop it. *See Comanche Nation, Okla. v. United States (Comanche Nation)*, Case No. CIV-05-328-F (W.D. Ok. Mar. 9, 2007). The Fort Sill Apache Indian Tribe intervened in the lawsuit. Pursuant to the Comanche Nation Settlement Agreement, the Fort Sill Apache Indian Tribe agreed to relinquish its lands on the KCA Reservation and move to a thirty-acre location in Akela Flats, New Mexico, an area within the Tribe's ancestral homeland. Plaintiff now seeks to establish gaming in the New Mexico lands. The District Court held that: (1) District Court that issued settlement agreement retained jurisdiction over the agreement, and thus, District Court lacked jurisdiction over tribe's breach of agreement claim, and (2) NIGC's decision not to reconsider and to affirm its prior decision was final agency action, and thus was subject to judicial review. Motion to dismiss granted in part and denied in part; motion for reconsideration granted. Having reaffirmed on reconsideration that the 2017 Decision constitutes final agency action subject to challenge in court, the Court will order the Defendants to produce the administrative record for the 2017 Decision, including any privilege log, within fourteen days of the date of this order. The Tribe's motion to compel is denied as premature.

**95. *California v. Picayune Rancheria of Chukchansi Indians of California,***

No. 16-15096, 725 Fed. Appx. 591 (Mem) (9th Cir. Jun. 5, 2018). Defendant-Appellants, individual members of the Picayune Rancheria of Chukchansi Indians of California Tribe ("the Distributees"), appeal the district court's entry of judgment and permanent injunction, which enjoined the Tribe and its agents from certain conduct related to ensuring the health, safety, and welfare of the public with respect to the Tribe's operation of its Chukchansi Gold Resort and Casino. The Distributees allege that the district court erroneously recognized a faction of tribal members as the rightful tribal leadership and failed to recognize and defer to tribal court rulings regarding the makeup of the Tribal Council and its election. The Court has jurisdiction pursuant to 28 U.S.C. § 1291 over the appeal of the district court's judgment and permanent injunction. Contrary to Appellee's assertion, the Distributees have

standing to pursue this appeal because the district court enjoined “all groups claiming to constitute the tribal government,” which arguably forms the basis of the Distributees’ claim. Nonetheless, the appeal fails on the merits. First, the injuries alleged by the Distributees, recognition of the Interim and New Tribal Councils and failure to recognize tribal court rulings, are not part of the district court’s decision. The district court did not determine which disputant tribal faction represented the rightful tribal council or leadership. Rather, the district court summarized the intra-tribal dispute among the factions, the actions taken by the BIA and the Interior Board of Indian Appeals with respect to the 2010 Interim Tribal Council, and the October 2015 Tribal Council Election. Further, the tribal court rulings referenced by the Distributees were irrelevant to the issues before the district court: the Tribe’s compliance with the provisions of the Class III gaming Compact between the Tribe and the State of California requiring the Tribe to ensure the public’s health, safety, and welfare in operating its Casino. Because the district court did not recognize one faction over another and did not err by failing to recognize tribal court rulings that were irrelevant to the issues before it, reversal of the district court’s judgment or permanent injunction would not redress or have a practical effect on the injuries alleged by the Distributees. On the merits, the district court did not abuse its discretion in granting the injunction. The State of California sufficiently established irreparable harm in the danger that the continued conflict over the tribal casino operations posed to public safety. There were no adequate remedies at law. The balance of hardships favored the State. The public interest was served by the entry of a permanent injunction. The district court acted entirely properly.

**96. *Navajo Nation et. al., v. Dalley***

No. 16-2205, 896 F.3d 1196, 2018 WL 3543643 (10th Cir. Jul. 24, 2018). The Appellants, the Navajo Nation and its wholly-owned government enterprise the Northern Edge Navajo Casino (together, the “Tribe” or “Nation”), entered into a state-tribal gaming compact with New Mexico under the Indian Gaming Regulatory Act (“IGRA”), 25 U.S.C. §§ 2701–2721. The Tribe agreed not only to waive its sovereign immunity for personal-injury lawsuits brought by visitors to its on-reservation gaming facilities, but also to permit state courts to take jurisdiction over such claims. Harold and Michelle McNeal (the “McNeals”) are plaintiffs in just such a state-

court action against the Tribe. Mr. McNeal allegedly slipped on a wet floor in the Northern Edge Navajo Casino. This slip-and-fall incident constituted the basis for the McNeals' tort claims against the Nation for negligence, *res ipsa loquitur*, and loss of consortium. Judge Bradford Dalley is a New Mexico state judge who presides over the ongoing state-court proceedings. The Tribe moved to dismiss the McNeals' complaint, arguing that the state court lacked jurisdiction because neither IGRA nor Navajo law permits the shifting of jurisdiction to a state court over such personal-injury claims. The state court rejected that motion. In response, the Tribe sought declaratory relief in federal court on the basis of the same arguments. The district court granted summary judgment for the McNeals and Judge Dalley, holding that IGRA permitted tribes and states to agree to shift jurisdiction to the state courts and that Navajo law did not prohibit such an allocation of jurisdiction. The Tribe timely appealed. Prior to oral argument, the Court ordered the parties to submit supplemental briefs as to whether the district court had jurisdiction. Along with the jurisdictional issue, the parties also dispute (1) whether IGRA permits an Indian tribe to allocate jurisdiction over a tort claim arising on Indian land to a state court, and (2) assuming that IGRA does allow for such an allocation, whether the Navajo Nation Council ("NNC") was empowered to shift jurisdiction to the state court under Navajo Law. After first concluding that the Court has jurisdiction to hear this appeal, the Court determined that IGRA, under its plain terms, does not authorize an allocation of jurisdiction over tort claims of the kind at issue here. Accordingly, the Court reverses the judgment of the district court and remand with instructions to grant the declaratory relief sought by the Nation.

**97. *State Of California, et al., v. Iipay Nation Of Santa Ysabel, et al.***

No. 17-55150, 898 F.3d 960, 2018 WL 3650825 (9th Cir. Aug. 2, 2018). The panel affirmed the district court's summary judgment in favor of the State of California and the United States in their action seeking injunctive relief prohibiting Iipay Nation of Santa Ysabel from continuing to operate Desert Rose Casino. Desert Rose Casino is exclusively a server-based bingo game that allows patrons to play computerized bingo over the internet. Iipay Nation is a federally recognized Indian tribe with tribal lands located in San Diego County, California. The panel held that Iipay Nation's operation of



Desert Rose Casino violated the Unlawful Internet Gambling Enforcement Act (“UIGEA”). The panel held that the Indian Gaming Regulatory Act protected gaming activity conducted on Indian lands, but the patrons’ act of placing a bet or wager on a game of Desert Rose Casino while located in California, violated the UIGEA, and was not protected by the Indian Gaming Regulatory Act. The panel further held that even if all of the “gaming activity” associated with Desert Rose Casino occurred on Indian lands, the patrons’ act of placing bets or wagers over the internet while located in a jurisdiction where those bets or wagers were illegal made Iipay Nation’s decision to accept financial payments associated with those bets or wagers a violation of the UIGEA. This case presents an issue of first impression: Does the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq.*, permit an Indian tribe to offer online gaming to patrons located off Indian lands in jurisdictions where gambling is illegal? Because we conclude that the Unlawful Internet Gambling Enforcement Act, 31 U.S.C. § 5361, *et seq.*, bars the activity at issue in this case, we affirm the district court’s order granting summary judgment to the State of California and the United States. As discussed above, DRB (like other forms of bingo, generally) is a Class II game. Thus, if DRB takes place on Indian lands, it is under Iipay’s jurisdiction, provided Iipay complies with certain regulatory requirements that are not at issue here. The UIGEA was passed to regulate online gambling. *See* 31 U.S.C. § 5361. Unlike IGRA or other gambling regulations, the UIGEA does not make gambling legal or illegal directly. Instead, the UIGEA makes it illegal for a “person engaged in the business of betting or wagering” knowingly to accept certain financial payments from an individual who is engaged in “unlawful Internet gambling.” 31 U.S.C. § 5363. Unlawful internet gambling occurs when an individual places or receives a “bet or wager by any means which

involves the use, at least in part, of the Internet where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands *in which the bet or wager is initiated, received, or otherwise made.*” 31 U.S.C. § 5362(10)(A) (emphasis added). A “bet or wager” includes “staking or risking” something of value, purchasing a lottery ticket, or transmitting “any instructions or information pertaining to the establishment or movement of funds by the bettor or customer in, to, or from an account with the business of betting or wagering.” 31 U.S.C. § 5362(1). Thus, the UIGEA does not prohibit otherwise legal gambling. But the UIGEA does create a system in which a “bet or wager” must be legal both where it is “initiated” and where it is “received.”

#### H. *Jurisdiction, Federal*

##### **98. *Jamestown S’Klallam Tribe v. McFarland***

No. 2:17–00293–WBS, 579 B.R. 853 (E.D. Cal. Sep. 19, 2017). Chapter 11 trustee brought adversarial proceeding against tribe, seeking to avoid and recover the value of certain allegedly fraudulent transfers. The bankruptcy court denied tribe’s motion to dismiss. The Tribe appealed. The District Court held that: (1) Bankruptcy Code provision abrogating the sovereignty of any governmental unit, abrogated tribe’s sovereign immunity with regard to trustee’s adversarial proceeding against tribe under provision allowing trustee to avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an allowable unsecured claim; (2) due to explicit abrogation of sovereign immunity in Bankruptcy Code provision abrogating the sovereignty of any governmental unit, in order to bring a claim against tribe under provision allowing trustee to avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an allowable unsecured claim, trustee needed only identify an unsecured creditor who, but for sovereign immunity, could have brought claim against tribe; (3) such interpretation in no way altered state law or created a new cause of action, and thus, trustee could bring such claim against tribe; (4) trustee’s service of summons and complaint for adversarial proceeding against tribe, by mail, was effective; and (5) trustee demonstrated good cause for delay in service of first amended complaint against tribe, and thus, the

bankruptcy court did not abuse its discretion in extending the time for service. Affirmed.

**99. *Toya v. Toledo***

No. CIV 17-0258 JCH/KBM, 2017 WL 3995554 (D.N.M. Sep. 19, 2017). This matter comes before the Court on Petitioner Milton Toya's First Amended Petition for Writ of Habeas Corpus for Relief from a Tribal Court Conviction Pursuant to 25 U.S.C. § 1303 filed June 9, 2017. Petitioner asserts that he was denied the right to counsel and the right to request a trial by jury during the course of his tribal-court prosecution. Respondents, on the other hand, contend that Petitioner has failed to exhaust his tribal remedies, leaving this Court without jurisdiction to resolve the Petition. The Honorable Judith C. Herrera referred this matter to me to "conduct hearings, if warranted, including evidentiary hearings, and to perform any legal analysis required to recommend to the Court an ultimate disposition of the case." Having reviewed the submissions of the parties and the relevant law, the Court finds that Petitioner has exhausted his tribal remedies or that resort to them would be futile. The Court furthermore concludes that there is merit to Petitioner's contentions, and therefore recommends that the Petition be granted. Petitioner was charged with four crimes: aggravated driving under the influence, liquor violation, driving on a revoked or suspended license, and open container. Petitioner asked to change his plea to not guilty and proceed to a jury trial. Petitioner also asked for an attorney. Judge Toledo advised Petitioner that he should have asked for an attorney and a trial before he pled guilty, and he denied Petitioner's request to change his plea. Judge Toledo told Petitioner that if he was unhappy with the decision, he could appeal to the Governor's office. However, it is made clear that Petitioner has no recourse in appealing to the Tribal Council or in requesting post-judgment relief from his criminal proceedings when examining the Pueblo of Jemez Rules of Criminal Procedure.

**100. *Jones v. Parmley***

No. 16-3603-cv, 714 Fed. Appx. 42, 2017 WL 4994468 (2nd Cir. Nov. 2, 2017). Members of Native American tribe filed suit against state troopers and other law enforcement officials arising out of defendants' conduct in dispersing tribe's political protest. Following settlement, 15 members of tribe who refused to settle proceeded to trial pro se. Following jury trial, the District Court entered judgment

for defendants, and tribe members appealed. The appellate court held that: (1) district court's trial management did not violate rights of tribe members to fair trial; (2) record contained no evidence of judicial bias that warranted district court's recusal; (3) personal involvement of defendants in alleged constitutional deprivations was prerequisite to award of damages under § 1983; (4) magistrate judge did not abuse her discretion in granting motions of tribe members' counsel to withdraw following tribe members' rejection of settlement. Affirmed.

#### **101. *Murphy v. Royal***

No. 07-7068, No. 15-7041, 875 F.3d 896 (10th Cir. Nov. 9, 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, D.C. No. 6:03-CV-00443, White, J., 497 F. Supp. 2d 1257, denied prisoner's petition, and, after prisoner filed second habeas petition, the District Court, D.C. No. 6:12-CV-00191, White, J., 2015 WL 2094548, denied prisoner's second 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.

#### **102. *Darnell v. Merchant***

No. 17-03063-EFM-TJJ, 2017 WL 5889754 (D. Kan. Nov. 29, 2017). Petitioner Bobbie Darnell, a member of the Kickapoo Tribe in Kansas (the "Tribe"), filed a Petition for Writ of Habeas Corpus pursuant to 25 U.S.C. § 1303 seeking relief from her tribal court convictions and sentence. Petitioner requests that the Court issue a writ of habeas corpus commanding her immediate release from jail in Brown County, Kansas, overturning her convictions in Kickapoo criminal cases numbers CRM016-11 and CRM016-23, and staying all further tribal court action against her. As explained below, the Court denies the Petition for Writ of Habeas Corpus because Petitioner has not exhausted her tribal remedies. After the district

court filed the sentencing order, Petitioner never filed a notice of appeal to the Kickapoo Supreme Court. But Petitioner contends that she does not have to exhaust her tribal remedies because she satisfies the exceptions to exhaustion set forth in *Burrell*. Specifically, Petitioner argues that the assertion of tribal jurisdiction was motivated by a desire to harass or was conducted in bad faith and that the assertion of tribal jurisdiction would be futile. She has not shown that any of the five exceptions to the exhaustion requirement apply in this case.

### **103. *State v. Todd***

No. 20170240, 904 N.W. 2d 40 (Mem) (N.D. Dec. 7, 2017). Timothy Lee Todd appeals from a criminal judgment entered after the district court found him guilty of being in actual physical control of a motor vehicle while under the influence of intoxicating liquor. Todd argues the district court lacked subject matter jurisdiction because he is an enrolled member of a federally-recognized tribe and he was conducting tribe-related business. Because Todd committed the offense beyond the exterior boundaries of a reservation, we conclude the district court had subject matter jurisdiction over this matter under N.D. Const. art. VI, § 8, and N.D.C.C. § 27–05–06. *See State v. Delorme*, 2013 ND 123, ¶ 12, 834 N.W. 2d 300 (quoting *Roe v. Doe*, 2002 ND 136, ¶ 8, 649 N.W. 2d 566) (stating that “outside of Indian country, the state has general criminal jurisdiction over all persons, including Indians”). Further, the district court did not abuse its discretion in rejecting Todd’s discovery claim, and its judgment is supported by substantial evidence. We summarily affirm under N.D.R. App. P. 35.1(a)(3), (4), and (7).

### **104. *State v. Comenout***

No. 48990–2–II, 1 Wash. App. 2d 1058 (Wash. Ct. App. Dec. 27, 2017). In a consolidated case, Robert Comenout Jr., Lee Comenout Sr., Marlene Comenout, and Robert Comenout Sr. (collectively the Comenouts) appeal their convictions following their Alford pleas to charges relating to the possession and sale of cigarettes in the operation of the Indian Country Store in Puyallup. The Comenouts allege that they are enrolled Indians doing business in Indian Country, and therefore that they are not subject to State criminal jurisdiction. The Indian Country Store is located on trust allotment property, but it is not within an Indian reservation. We hold that (1) the State has criminal jurisdiction over the Comenouts for

activity occurring on trust allotment property that is not located within an Indian reservation, (2) RCW 82.24.250, one of the statutes associated with their convictions, does not violate equal protection, (3) we decline to consider the Comenouts' claim that their respective informations were insufficient because they presented no meaningful argument on that claim, and (4) we decline to review the Comenouts' other claims that do not involve jurisdiction because they waived their right to appeal those claims when they pleaded guilty. Accordingly, we affirm the convictions of Robert Comenout Jr., Lee Comenout Sr., Marlene Comenout, and Robert Comenout Sr.

**105. *State v. Zack***

No. 34926-8-III, 2 Wash. App. 2d 667 (Wash. Ct. App. Mar. 8, 2018). Defendant was convicted in the Superior Court of assault of law enforcement officer, arising out of assault of jail officer while transporting defendant to hospital on deeded (fee) land within boundaries of reservation. Defendant appealed. As matter of first impression, the Court of Appeals held that State had jurisdiction to prosecute defendant, who was not enrolled member of tribe, for crime that occurred on fee land within boundaries of reservation. Affirmed.

**106. *Swinomish Indian Tribal Community v. BNSF Railway Company***

No. C15-0543RSL, 2018 WL 1336256 (W.D. Wash. Mar. 15, 2018). This matter comes before the Court on "BNSF Railway Company's Motion for Clarification and, if Necessary, Reconsideration." The Swinomish Indian Tribal Community filed this lawsuit in April 2015 alleging that BNSF Railway Company breached provisions of a Right-of-Way Easement Agreement ("Easement Agreement") that governed BNSF's access to tribal lands. The Tribe asserted breach of contract and trespass claims and sought damages, declaratory judgment, and injunctive relief. In its answer, BNSF admitted that "the Right-of-Way is on the north end of the Reservation" and "crosses a bridge over the Swinomish Channel and a bridge across Padilla Bay, both of which are within the Reservation." BNSF also raised preemption as an affirmative defense, arguing that the Tribe's claims are barred by the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C.

§ 10501 et seq. The parties filed cross-motions for summary judgment regarding the preemption defense. In support of its motion, the Tribe set forth facts relevant to the enforceability of the Easement Agreement, the Court's jurisdiction, and the nature of its claims. These facts were not disputed in the summary judgment memoranda. Although BNSF noted that a contested issue in the prior litigation was whether the rail line was within the boundaries of the Reservation, it admitted the fact for purposes of this litigation and offered no evidence that would suggest a genuine dispute. At oral argument, however, counsel announced that BNSF was, in fact, contesting whether the Tribe had any rights in the land underlying the railway. Again, no evidence was identified or provided in support of the supposed disputed issue of fact. In ruling on the cross-motions for summary judgment, the Court initially misconstrued plaintiff's breach of contract and trespass claims as arising under state law. The Tribe filed a motion for reconsideration, arguing that it was "suing to protect its interests in land that, pursuant to treaty, is held in trust for the Tribe by the United States government" and that its claims were therefore grounded in federal common law, not state law. The Tribe clearly linked the resolution of the preemption issue to its treaty rights in the land underlying BNSF's tracks, arguing that the treaty gave rise to a federally-protected interest and fundamentally changed the preemption analysis. Again, BNSF did not produce any evidence that the right-of-way fell outside the Reservation boundaries. Based on the record before it, the Court found that it had erred in its preemption analysis. A federal right arising from a treaty is, under the Supremacy Clause of the United States Constitution, Art. VI cl. 2, on equal legal footing with federal statutes: Preemption was simply not an issue. Thus, the Court implicitly adopted the admitted and factually undisputed allegation that BNSF's tracks are on tribal land. BNSF, having now lost the preemption battle, intends to contest a key fact underlying that analysis, even though it was admitted in its answer and regarding which it has not provided a shred of evidence. BNSF admits that its goal is to overturn the Court's preemption decision by showing that the Tribe has no treaty rights to the land under the tracks, that the Tribe's right is therefore merely a contract right arising under state law, and that the contract and trespass claims are preempted. This very issue has been resolved based on a record developed by the parties with full knowledge that the genesis of the Tribe's contractual right—whether it arose from a Treaty right or under state law—was a critical issue. BNSF chose not to submit evidence on

that issue, instead asserting a right to litigate this fact on its own schedule. It will not be permitted to do so. For all of the foregoing reasons, BNSF's request for clarification is granted. As part of the preemption analysis, the Court relied on the record evidence showing that the Tribe has a treaty right to the land under BNSF's tracks. That counsel can imagine a factual dispute regarding ownership—or the fact that BNSF's predecessor raised the issue in a prior litigation—does not mean that there is a genuine issue of disputed fact in this litigation. The Tribe's allegation of ownership was admitted, and BNSF declined to provide any evidence to support its periodic assertions that there may be some doubt regarding the issue. Its request for reconsideration is denied.

**107. *United States v. 99, 337 Pieces of Counterfeit Native American Jewelry***

No. 16-1304 KG-KBM, 2018 WL 1568725 (D.N.M. Mar. 27, 2018). This matter comes before the Court upon Claimant Romie Salem's Motion to Dismiss for Failure to State a Claim, filed March 6, 2017. Mr. Salem requests that the Court dismiss the United States' claim against his property, asserting he is an innocent bystander whose property the United States wrongfully seized. Mr. Salem further asserts that his property is now subject to forfeiture simply because it was stored in the same facility where other property subject to forfeiture was stored and that his property, therefore, is implicated in a criminal investigation not related to his property. The United States argues the Court should deny the Motion to Dismiss because the Verified Complaint for Forfeiture In Rem states a claim for relief. On February 1, 2018, the Court held a hearing on the Motion to Dismiss. The Court took the matter under advisement but allowed both parties to file supplemental reply briefs. The United States brings this civil action to forfeit and condemn property, alleging violations of: (1) 18 U.S.C. § 542 ("Entry of goods by means of false statements"), and forfeiture pursuant to 18 U.S.C. § 981(a)(1)(C); (2) 18 U.S.C. § 545 ("Smuggling goods in the United States"), and forfeiture pursuant to 18 U.S.C. § 545; (3) 19 U.S.C. § 1304 ("Marking of imported articles and containers"), and forfeiture pursuant to 19 U.S.C. § 1595a(c)(2)(E); and (4) 18 U.S.C. § 1956 ("Laundering of monetary instruments") and § 1957 ("Engaging in monetary transactions in property derived from specified unlawful activity"), and forfeiture pursuant to 18 U.S.C. § 981(a)(1)(A).



Defendants in rem include (a) 99,337 Pieces of Counterfeit Native American Jewelry; (b) 72,620 Pieces of Counterfeit Native American Jewelry; (c) 21,249 Pieces of Counterfeit Native American Jewelry; and (d) \$288,738.94 in Funds from Bank of America Account No.-3826 (collectively, Defendant Property). The allegations stem from an investigation by the United States Fish and Wildlife Service and the Indian Arts and Crafts Board into the sale of alleged counterfeit Native American jewelry and violations of the Indian Arts and Crafts Act (IACA) by Sterling Islands, Inc. (Sterling), located at 5815 Menaul Boulevard, NE, Albuquerque, New Mexico. The Complaint alleges Sterling and other associated businesses worked in concert both inside and outside the District of New Mexico to design, manufacture, import, and fraudulently sell counterfeit Native American Jewelry in violation of the IACA. As a result of the investigation, federal search warrants were obtained and executed on Sterling's business located at 5815 Menaul Boulevard NE, Albuquerque, New Mexico, where agents seized 53 boxes of alleged counterfeit Native American jewelry, including 99,337 pieces of jewelry. In addition, agents seized \$288,738.94. Agents also executed search warrants at Al Zuni Global Jewelry, located at 1603 West Highway 66, Gallup, New Mexico, where they seized 72,620 pieces of alleged counterfeit Native American jewelry and at 1924 Count Fleet Street SE, Albuquerque, New Mexico, where agents seized 21,249 pieces of alleged counterfeit Native American jewelry. Mr. Salem argues the Complaint fails to state a claim against his property because (1) it does not include his name or that of his company, "Turquoise Network;" (2) there are no allegations against him of any wrongdoing; and (3) there is no justification for the seizure of his property. Mr. Salem also argues there is "absolutely no way for [him] to know or reasonably expect that he or his property were involved at all." Having reviewed the entirety of the Complaint the Court determines that the Complaint states a claim against Defendant Property. It is therefore, ordered that Claimant Romie Salem's Motion to Dismiss for Failure to State a Claim is denied.

#### **108. *John v. Garcia***

No. C 16-02368 WHA, 2018 WL 1569760 (N.D. Cal. Mar. 31, 2018). Respondents move for the third time to dismiss this petition for writ of habeas corpus pursuant to the Indian Civil Rights Act. The parties herein belong to the Elem Indian Colony of Pomo

Indians (the “Tribe”). A general council comprising all qualified voting members governs the Tribe and delegates various powers to a biennially-elected executive committee. Following a disputed election in November 2014, two factions—petitioners and respondents—each purported to be the Tribe’s duly-elected executive committee. Respondents managed to establish themselves as such and remain in power as the current executive committee, though petitioners continued to contest the results of the 2014 election. On March 28, 2016, respondents issued an “Order of Disenrollment” to petitioners and other members of the Tribe. The disenrollment order accused petitioners of “violating the laws of Elem” and included a list of offenses. It stated, “If you are found guilty by the General Council of these offenses against the Tribe, you may be punished by ... DISENROLLMENT—loss of membership.” Recipients of the disenrollment order could submit a written answer within 35 days admitting or denying each accusation. Shortly after issuance of the disenrollment order, on April 30, 2016, petitioners filed this petition for writ of habeas corpus, alleging denial of due process and equal protection in violation of the Indian Civil Rights Act. Respondents had issued a “Disenrollment Notice of Default,” which claimed that petitioners’ time to answer the disenrollment order had passed. Petitioners and other recipients of the order were thus deemed to be in default and to have admitted the allegations against them. The Court is inclined to dismiss this petition. The volatility of relations between the two sides, however, is such that the potential need for relief in the near future remains a real possibility. This action, moreover, has been plagued by evolving and shifting facts and narratives, and testimony elicited during the hearing suggests some effects of respondents’ now-repudiated actions—such as the denial of medical services to petitioners based on their purported “disenrollment”—continue to reverberate. Respondents’ renewed motion to dismiss repeats their position that petitioners have not been and will not be disenrolled or banished in the foreseeable future. Based on the premise that no petitioner has been disenrolled or banished, or will be disenrolled or banished in the foreseeable future, respondents contend this petition must be dismissed for lack of subject-matter jurisdiction because it remains (1) unripe, (2) barred by tribal sovereign immunity, and (3) “a purely intra-Tribal dispute that should not be heard by this Court.” Their main thesis seems to be that petitioners cannot establish subject-matter jurisdiction under the ICRA because they failed to establish the requisite custody or detention for seeking such

relief. This order must agree. Since petitioners failed to establish the requisite custody or detention for seeking relief via a petition for writ of habeas corpus under Section 1303, this petition must be dismissed. Petitioners have not requested further leave to amend, and such leave would not be warranted in any event in light of the multiple opportunities already granted for petitioners to cure the deficiencies in their petition, including by taking discovery. Because this order concludes petitioners have not shown a “severe restraint” sufficient to invoke Section 1303, it does not reach the parties’ additional arguments, including arguments regarding exhaustion of administrative remedies or sovereign immunity. Respondents’ motion to dismiss is Granted. This petition is dismissed.

**109. *Olson v. North Dakota Department of Transportation***

No. 20170351, 909 N.W. 2d 676, 2018 WL 1722354 (N.D. Apr. 10, 2018). Harold Olson appeals a district court order affirming the North Dakota Department of Transportation’s (“Department”) revocation of his driving privileges for two years, following an arrest for driving under the influence. A deputy with the Mountrail County Sheriff’s Department testified he received a call from a Three Affiliated Tribes, also known as the Mandan, Hidatsa and Arikara Nation (“MHA”), officer on May 13, 2017 requesting assistance with a non-Indian he stopped and detained on tribal land. The district court affirmed the Department’s decision finding the deputy was acting under a request for assistance, which extended the deputy’s authority to arrest onto tribal land. The parties do not dispute the following facts: (1) Olson was discovered in his vehicle by a MHA officer on tribal land within the Fort Berthold Reservation, (2) the MHA officer requested assistance from the Mountrail County Sheriff’s Department, (3) the deputy completed an investigation and arrested Olson for driving under the influence on tribal land within the Fort Berthold Reservation, (4) Olson is an enrolled member of the Turtle Mountain Chippewa Tribe, and (5) the MHA officer and the deputy did not know Olson was an enrolled member at the time of the arrest. Olson argues the deputy lacked the authority to arrest him on tribal land and that a valid arrest is a prerequisite to revocation of his driving privileges. Absent a valid arrest, Olson argues the revocation order is not in accordance with the law. The Department contends the MHA officer’s request for assistance from Mountrail County extended criminal jurisdiction to the State. The appellate court found that the deputy lacked

authority to arrest Olson, a non-member Indian, on MHA tribal land and reversed the district court's order affirming the Department's revocation of Olson's driving privileges and reinstate Olson's driving privileges.

**110. *Tortalita v. Geisen***

No. 1:17-CV-684-RB-KRS, 2018 WL 3195145 (D.N.M. Apr. 24, 2018). This matter comes before the Court upon Petitioner's Petition for Writ of Habeas Corpus for Relief from a Tribal Court Conviction Pursuant to 25 U.S.C. § 1303 ("Petition"), filed June 29, 2017. On August 31, 2017, in accordance with 28 U.S.C. § 636(b)(1)(B), this Petition was referred to United States Magistrate Judge Kevin R. Sweazea to conduct any necessary hearings and to recommend an ultimate disposition. Having reviewed the record and the parties' briefing, the Magistrate recommends that the Court grant Petitioner's Petition and vacate Petitioner's underlying sentence and conviction. On September 16, 2016, Petitioner was arrested for Aggravated DWI; Reckless Driving; Resisting Arrest; Terroristic Threats; Probation Violation; Eluding; Open Container; Reckless Endangerment; Disorderly Conduct; and Invalid/Revoked Driver's License. He was brought before the Tribal Court on September 20, 2016, at which time he entered pleas of guilty. The Court adjudged Petitioner guilty, sentenced him to 544 days in jail, and assessed various fines and fees. On June 29, 2017, Petitioner filed the instant Petition for Writ of Habeas Corpus, alleging violations of the Indian Civil Rights Act of 1968 ("ICRA") 25 U.S.C. §§ 1301-1303. Specifically, Petitioner argues that he was (1) denied the right to assistance of counsel, in violation of 25 U.S.C. § 1302(a)(6); (2) denied the right to a trial by jury, in violation of 25 U.S.C. § 1302(a)(10); and (3) subjected to cruel and unusual punishment, in violation of 25 U.S.C. §§ 1302(a)(7)(A), (c). As the Tribal Respondents highlight in their brief, the terms "vacate" and "reverse" have, at times, been used almost interchangeably in ICRA actions. However, the terms implicate very different results. In light of the sanctity of tribal sovereignty, and the need to safeguard not just the rights of the individual, but also the rights of the tribe, it is imperative that the Court stay within its own lane when crafting appropriate relief in this case. For the reasons set forth above, it is hereby recommended that the Court grant Petitioner's Petition for Writ of Habeas Corpus and vacate Petitioner's underlying sentence

and conviction. It is further recommended that Petitioner be released from custody.

### 111. *Oviatt v. Reynolds*

No. 17-4124, 733 Fed. Appx. 929, 2018 WL 2094505 (10th Cir. May 7, 2018). Arrestees, who were lay advocates in tribe, brought action against tribal officials, alleging that officials had violated Fourth Amendment and Indian Civil Rights Act by incarcerating and searching them. The District Court granted officials' motion to dismiss for lack of subject matter jurisdiction. Arrestees appealed. The Court of Appeals held that: (1) Court of Appeals would exercise its discretion to deny appointment of United States Attorney as counsel for arrestees; (2) arrestees were not detained within meaning of Indian Civil Rights Act when they brought action against tribal officials; and (3) arrestees' Fourth Amendment claims were frivolous. We consider the plaintiffs "detained" only if they were subject at the time to "a severe actual or potential restraint on liberty." *Jeffredo v. Macarro*, 599 F.3d 913, 919 (9th Cir. 2010) (internal quotation marks omitted); *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 880 (2d Cir. 1996). The plaintiffs have alleged past arrests and incarceration. But they do not allege that they were under arrest or incarcerated when they sought habeas relief. Instead, the plaintiffs argue that they were "banished," relying on the Second Circuit's opinion in *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874 (2d Cir. 1996). We have not decided whether banishment satisfies the statutory requirement of detention. See *Walton v. Tesuque Pueblo*, 443 F.3d 1274, 1279 n.2 (10th Cir. 2006) (declining to decide whether banishment of a non-Indian from tribal lands constitutes detention under 25 U.S.C. § 1303). But even in the Second Circuit, a tribal member is considered "detained" only when permanently banished from the tribe. *Shenandoah v. U.S. Dep't of Interior*, 159 F.3d 708, 714 (2d Cir. 1998). On appeal, the plaintiffs use the word "banishment." But in district court, the plaintiffs did not allege banishment. Nor have they presented evidence of a permanent prohibition from entering the Ute Tribe's land. As a result, even if we were to follow *Poodry*, the plaintiffs' new allegation of "banishment" would not satisfy the detention requirement.

**112. *American Indian Health & Services Corporation v. Kent***

No. C081338, 24 Cal. App. 5<sup>th</sup> 772, 234 Cal. Rptr. 3d 583 (Cal. Ct. App. Jun. 19, 2018). Federally qualified health centers (FQHC) and rural health clinics (RHC) petitioned for writ of mandate seeking order requiring Department of Health Care Services to reimburse services provided to Medi-Cal patients. Prior to July 1, 2009, the Department processed and paid claims for these services. In 2009, in a cost-cutting measure due to budget problems, the Legislature enacted Welfare and Institutions Code section 14131.101 to exclude coverage for these services (and others) “to the extent permitted by federal law.” (§ 14131.10, subd. (d).) After the Department stopped paying claims for these services, various FQHC’s and RHC’s challenged the validity of section 14131.10, claiming it conflicted with federal Medicaid law. In *California Assn. of Rural Health Clinics v. Douglas* (9th Cir. 2013) 738 F.3d 1007 (CARHC), the Ninth Circuit held section 14131.10 was invalid to the extent it eliminated coverage for these services when provided by FQHC’s and RHC’s because the federal Medicaid Act imposed on participating states the obligation to cover these services by these providers. The Superior Court, No. 34-2014-80001828, granted petition in part and entered judgment in favor of the clinics. Department appealed. The Court of Appeal J., held that: (1) petition was not barred by sovereign immunity; (2) Department had adequate notice that coverage was mandatory; and (3) the Court of Appeal would decline to consider argument that separation of powers precluded entry of judgment. Affirmed.

**113. *Ho-Chunk, Inc. v. Sessions***

No. 17-5140, 894 F.3d 365 (D.C. Cir. Jul. 3, 2018). Tribal corporations brought action against United States Attorney General seeking declaratory judgment that they were not subject to Contraband Cigarettes Trafficking Act’s (CCTA) recordkeeping requirements. The District Court, 253 F. Supp. 3d 303, entered summary judgment in government’s favor, and corporations appealed. In 2016, the federal Bureau of Alcohol, Tobacco, Firearms and Explosives sent letters to Rock River, HCI Distribution, and Woodlands. The letters notified the companies that the Bureau intended to inspect and copy their records of tobacco transactions and asked them to name a mutually-acceptable inspection date within fifteen business days from receipt of the letters. The companies and their parent responded with a complaint

seeking a declaratory judgment that they are not subject to federal recordkeeping laws dealing with the distribution of cigarettes. The district court entered summary judgment against them. *Ho-Chunk, Inc. v. Sessions*, 253 F. Supp. 3d 303, 304 (D.D.C. 2017). Their appeal presents a question of statutory interpretation – do the federal recordkeeping laws cover these corporations? Yes. The Court of Appeals held that: (1) CCTA’s recordkeeping requirements applied to tribal corporations, and (2) tribal corporations were “persons” subject to CCTA’s recordkeeping requirements. Affirmed.

#### **114. *Cayuga Nation v. Campbell***

No. CA 17–01956, 163 A.D.3d 1500, 2018 WL 3567391 (N.Y. App. Div. Jul. 25, 2018). This litigation involves a long-standing dispute over which of two competing factions should have control of the Cayuga Nation (Nation), a sovereign Indian Nation and a member of the Haudenosaunee Confederacy, sometimes called the Iroquois Confederacy. Plaintiff, whose members constitute one of the two factions vying for control of the Nation (hereafter, plaintiff’s members), commenced this action seeking declaratory and injunctive relief as well as money damages. In the complaint, plaintiff’s members alleged that defendants, who are members of the other competing faction, were improperly in control of and trespassing on certain property of the Nation on which the Nation’s offices and security center, a cannery, a gas station and convenience store, and an ice cream store were located. Plaintiff moved for various interim relief, including a preliminary injunction directing defendants to vacate the subject property. Thereafter, defendants moved to dismiss the complaint on, inter alia, the ground that Supreme Court lacked subject matter jurisdiction because this matter required a determination whether plaintiff or defendants constituted the proper governing body of the Nation. In support of their motion, defendants contended that such a determination was beyond the authority of the courts of New York inasmuch as it usurped the sovereign right of the people of the Nation to determine their own leadership. In appeal No. 1, defendants appeal from an order that, among other things, granted plaintiff’s motion, issued a preliminary injunction, denied defendants’ motion, and determined that no undertaking pursuant to CPLR 6213(b) was required. We affirm. Here, the BIA determined that it will conduct government-to-government relations with plaintiff. Based on that determination, the BIA awarded an ISDA contract to plaintiff for the purpose,

among others, of running the Nation's office. In this action, plaintiff seeks several forms of relief, including possession of and the ability to run the Nation's office. Thus, although we may not make a determination that will interfere with the Nation's governance and right to self-determination, we must defer to the federal executive branch's determination that the Nation has resolved that issue, especially where, as here, that determination concerns the very property that is the subject of this action.

**115. *Northern Natural Gas Company v. 80 Acres of Land in Thurston County***

No. 8:17-CV-328, 2018 WL 3586527 (D. Neb. Jul. 26, 2018). This dispute involves the renewal of a right-of-way across tribal and allotted lands located within reservation boundaries of the Omaha Tribe of Nebraska. The plaintiff, Northern Natural Gas, filed this suit seeking to condemn individually owned interests in two parcels of allotted land: Allotment No. 742-2 and Allotment No. 742-4. The defendants in this case each have an individual interest in Allotment No. 742-2, Allotment No. 742-4, or both. Northern filed a partial motion for summary judgment asking the Court to confirm its right to condemn the individual interests in those Allotments. At least one defendant, Nolan J. Solomon, disputes Northern's power to condemn the property. For the reasons discussed below, the Court will grant Northern's motion for summary judgment. When the BIA renewed Northern's right-of-way across the Omaha Tribe's trust land, *see* 25 U.S.C. § 324, it also authorized that right-of-way to cross newly acquired trust interests deeded to the Tribe between February 8, 2018 and February 9, 2046. That means Solomon's February 23, 2018 conveyance to the Tribe is precisely the type of land acquisition the "New ROW" sought to include and govern. And because Solomon's conveyance is governed by the "New ROW," contrary to Solomon's contention, the Tribe has consented to Northern's right-of-way across Allotment No. 742-2 and Allotment No. 742-4. To that end, Solomon cannot use the Omaha Tribe's newly acquired interest in Allotment No. 742-2 and Allotment No. 742-4 to prevent the renewal of a right-of-way the Tribe has already consented to. Accordingly, Northern may condemn the remaining individually owned interests in Allotment No. 742-2 and Allotment No. 742-4. *See Pub. Serv. Co. of New Mexico v. Barboan*, 857 F.3d 1101, 1105 n.5 (10th Cir. 2017) (implying that allotted interests in mixed land may be subjected to condemnation if the "tribal interests



[are left] undisturbed”); *WBI Energy Transmission, Inc.*, 2017 WL 532281, at \*4 (allowing the condemnation action to proceed against the individual interests but not the tribal interests in tribal trust land). The Court will grant Northern’s partial motion for summary judgment.

#### **116. *Wilhite v. Awe Kualawaache Care Center***

No. CV 18-80, 2018 WL 3586539 (D. Mont. Jul. 26, 2018). Tammy Wilhite was employed as a registered nurse at the Awe Kualawaache Care Center. The Care Center is an entity owned by the Crow Tribe of Indians. One day, a patient at the Care Center informed Wilhite that he had been molested during transport. Wilhite reported the conversation to her supervisor. When nothing was done, White reported the incident to law enforcement. Wilhite was subsequently harassed by her supervisor and terminated from employment by the Care Center. Wilhite filed suit in federal district court, alleging solely that she was entitled to damages under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.*, (RICO). The Defendants filed a motion to dismiss Wilhite’s claim for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). The RICO Act does not touch exclusive rights of self-governance in purely intramural matters. Organized crime that controls or affects businesses engaged in interstate commerce is, by definition, not a purely intramural matter. *Consumer Financial Protection Bureau v. Great Plains Lending, LLC*, 846 F.3d 1049, 1052-1053 (9th Cir. 2017). holding Consumer Financial Protection Act of 2010 applied to tribe controlled lenders because they engaged in interstate commerce). Regarding the third *Coeur d’Alene* exception, the Defendants themselves state the RICO Act’s “legislative history makes absolutely no mention of Indian tribes or any intent on Congress’ part to have this statute apply to Indian tribes.” Contrary to the Defendants’ assertions, the third exception requires affirmative proof Congress did not intend to include tribes within a generally applicable statute. *Donovan v. Coeur d’Alene Tribal Farm*, 751 F.2d 1113, 1115 (9th Cir. 1985). the Defendants have not shown any of the Coeur d’Alene exceptions apply, the motion is denied.

#### **117. *State v. George***

No. 45196, 422 P.3d 1142, 2018 WL 3598926 (Idaho Jul. 27, 2018). This is a jurisdictional dispute. Tribal police arrested Shaula Marie

George (“George”) for possession of methamphetamine on the Coeur d’Alene Reservation. Upon discovery that George was not a member of the Coeur d’Alene Tribe, the case was referred to the Kootenai County district court. Thereafter, George filed a motion to dismiss based on lack of jurisdiction. The district court granted George’s motion, finding that despite the fact that George was not eligible to become a member of the Coeur d’Alene Tribe, George was an Indian; thus, the district court did not have jurisdiction. We affirm. Regarding the State’s concern that the Tribe would not prosecute George because it only prosecuted enrolled Tribe members, the district court recognized that as a state court it either had jurisdiction or it did not, and that jurisdiction was not based on whether other agencies had jurisdiction or exercised discretion in determining whether to prosecute. On May 16, 2017, the district court entered an order dismissing the case for lack of jurisdiction. The State timely appealed. We affirm the district court’s dismissal.

I. *Religious Freedom*

**118. *Hopi Tribe v. Arizona Snowbowl Resort Limited Partnership***

No. 16-0521, 418 P.3d 1032, 2018 WL 771809 (Ariz. Ct. App. Feb. 8, 2018). This case arises from the sale and use of reclaimed wastewater to make artificial snow for ski runs on the San Francisco Peaks (the Peaks) in northern Arizona. The Hopi Tribe (the Tribe), which opposes the use of reclaimed wastewater on the Peaks, appeals the dismissal of its complaint for lack of standing and the award of attorneys’ fees to the City of Flagstaff (the City) and Arizona Snowbowl Resort Limited Partnership (Snowbowl). At issue is whether the Tribe sufficiently alleged standing to maintain a common law public nuisance claim. For a private party to bring a claim of public nuisance, it must allege both an interference with a right common to the public and a special injury different in kind from that of the public. The parties do not dispute that the Tribe sufficiently alleged that the use of reclaimed wastewater interferes with the public’s right to use and enjoy the Peaks. Because we find the Tribe sufficiently alleged the use of reclaimed wastewater causes its members a special injury, different in kind than that suffered by the general public, by interfering with places of special cultural and religious significance to the Tribe, we reverse the trial court’s dismissal, vacate the orders denying the Tribe’s motion to amend

the complaint and awarding Snowbowl and the City attorneys' fees, and remand for further consideration.

**119. *Damon Young, Plaintiff, v. Deputy Warden Smith, et. al.***

No. 6:17-cv-00131, 2018 WL 3447179 (S.D. Georgia Jul. 17, 2018). Plaintiff, an inmate at Georgia State Prison in Reidsville, Georgia, filed the above-captioned action pursuant to 42 U.S.C. § 1983 and the Religious Land Use and Institutionalized Persons Act (“RLUIPA”), 42 U.S.C. § 2000cc-1 *et seq.*, contesting certain conditions of his confinement. Plaintiff also filed and was granted a Motion for Leave to Proceed in Forma Pauperis. In March 2017, Defendants Allen, Bobbit, and Hutchinson retaliated against Plaintiff for filing grievances and confiscated Plaintiff’s Native American religious books and catalogs as well as other items. Defendant Allen told Plaintiff that he could not have any Native American religious items while in Tier II, only the Bible or Koran. Defendants Bobbit and Hutchinson also precluded Plaintiff from utilizing his sacred religious items, which were stored in the property room, in his weekly prayer ceremonies. Plaintiff avers these Defendants’ retaliation and other actions violated his freedom of religion and equal protection rights, among others. Plaintiff also contends Defendant Allen violated these same rights when he denied Plaintiff from receiving kinnikinnick and a “Buffalo Skull” blanket, which Plaintiff states came in a preapproved mail package. For the reasons and in the manner set forth, I find Plaintiff plausibly states colorable: RLUIPA injunctive relief claims; First Amendment free exercise, establishment clause, and retaliation claims; Fourteenth Amendment equal protection and due process claims; Sections 1983 and 1985 conspiracy claims; and Eighth Amendment deliberate indifference to serious medical needs claims. The Motion to Dismiss should be denied.

**120. *Cobb v. Morris***

No. 2:14-CV-22, 2018 WL 842406 (S.D. Tex. Jan. 11, 2018). Plaintiff maintains that the TDCJ prison’s grooming policy, which prohibits long hair and/or a kouplock, imposes a substantial burden on his ability to practice his NA faith. Plaintiff testified at his Spears hearing that it is a tenet of his faith to grow his hair and to cut it only in times of mourning. However, the grooming policy requires that male offenders must keep their hair trimmed up the back of their

neck and head, and also trimmed around the ears. If an offender refuses to comply with the grooming standards, he is subject to disciplinary charges that can result in the loss of privileges, and possibly, adversely affect time-earning classification and good time credits. Plaintiff's First Amendment claim against Defendant Morris is virtually identical to the First Amendment claims raised against the same defendant in *Davis*. This Court in *Davis* concluded that Defendant Morris was entitled to summary judgment because the plaintiffs had not established that their First Amendment rights to exercise their religion had been violated. *Davis*, 2014 WL 798033, at \*18-19. The Fifth Circuit affirmed the dismissal of First Amendment claims. *Davis*, 826 F.3d at 266. Based on the foregoing, the undersigned respectfully recommends that Defendants' supplemental motion for summary judgment, which incorporates their original motion for summary judgment, be denied in part and granted in part. The summary judgment evidence establishes that Plaintiff is sincere in the practice of his NA faith and that the TDCJ grooming policy challenged by Plaintiff imposed substantial burdens on Plaintiff's religious exercise. Because the summary judgment evidence establishes a fact issue as to whether the TDCJ's grooming policy is the least restrictive means of maintaining the TDCJ's compelling security and costs interests, the undersigned respectfully recommends that Defendants' supplemental motion for summary judgment be denied with respect to Plaintiff's RLUIPA grooming policy claim. The undersigned further respectfully recommends that Defendants' supplemental summary judgment motion be granted to the extent that Plaintiff's First Amendment claims be dismissed with prejudice as foreclosed by the Fifth Circuit's decision in *Davis*. Plaintiff should be allowed to proceed to trial on his RLUIPA grooming policy claim against Defendant Davis.

J. *Sovereign Immunity*

**121. *Rosales v. Dutschke***

No. 2:15-cv-01145, 279 F.Supp.3d 1084, 2017 WL 3730500 (E.D. Cal. Aug. 30, 2017). Appeal Filed 9th Cir., Sep. 28, 2017. Indian lineal descendants of members of half-blood Indian tribe called Jamul Indian Village filed suit against officials of Bureau of Indian Affairs (BIA), tribal employees, and gaming corporations, claiming violation of Native American Graves Protection and Repatriation

Act (NAGPRA), compact between California and tribe, and state law, by alleged illegal disinterment and removal of human remains of descendants' families from cemetery during construction of casino, and seeking declaratory and injunctive relief and \$4 million in damages. Plaintiffs moved to substitute personal representative as party for deceased plaintiffs and moved for leave to amend complaint, and defendants moved to dismiss for lack of subject matter jurisdiction. The district court held that: (1) tribal employees were protected from suit by sovereign immunity, and (2) suit was barred by descendants' inability to join tribe as party. Plaintiffs' motions denied; defendants' motions granted.

**122. *Douglas Indian Association v. Central Council of Tlingit and Haida Indian Tribes of Alaska***

No. S-16235, 403 P.3d 1172 (Alaska Sep. 8, 2017). First Indian tribe brought action against second Indian tribe and two of its tribal officials after first tribe withdrew from consortium formed by second tribe to administer tribal transportation funds from federal government, but second tribe failed to remit first tribe's funds as required by agreement. The Superior Court, No. 1JU-15-00625, granted second tribe's motion to dismiss based on sovereign immunity. First tribe appealed. The Supreme Court held that: (1) tribal sovereign immunity is jurisdictional bar properly raised in motion to dismiss for lack of subject matter jurisdiction; (2) trial court did not abuse its discretion by denying jurisdictional discovery to first tribe; (3) Ex parte Young doctrine does not allow suit to proceed against tribal official based on contract claim merely because plaintiff seeks declaratory and injunctive relief; and (4) trial court did not have jurisdiction over first tribe's claims that officials were not protected by sovereign immunity because their actions were ultra vires. Affirmed.

**123. *Montella v. Chugachmiut***

No. 3:16-CV-00251, 283 F.Supp.3d 774, 2017 WL 4238859 (D. Alaska Sep. 25, 2017). Former employee of organization operated by tribal consortium brought action against organization, alleging discrimination in violation of Title VII and breach of implied covenant of good faith and fair dealing under Alaska law. Organization moved for summary judgment. The District Court held that: (1) organization was not an employer within the meaning of Title VII; (2) organization did not waive tribal sovereign immunity;

and (3) fact issues precluded summary judgment for organization on employee's claim of breach of implied covenant of good faith and fair dealing under Alaska law. Motion granted in part and denied in part.

**124. *Wilkes v. PCI Gaming Authority***

No. 1151312, \_\_ So. 3d \_\_, 2017 WL 4385738 (Ala. Sep. 25, 2017). Motorist and passenger brought action against truck driver and driver's employer, a casino and hotel owned by Indian tribe, raising negligence and wantonness claims and seeking compensation for injuries sustained in head-on collision with driver. The Elmore Circuit Court, CV-15-900057, entered summary judgment in favor of employer on basis of tribal sovereign immunity. Plaintiffs appealed. The Supreme Court held that doctrine of tribal sovereign immunity did not apply to shield Indian tribe from tort claims brought by non-tribal plaintiffs. Reversed and remanded.

**125. *Rape v. Poarch Band of Creek Indians***

No. 1111250, 250 So.3d 547, 2017 WL 4325017 (Ala. Sep. 29, 2017). Non-member patron brought action against Indian tribe that operated casino and various business entities owned by the tribe, alleging breach of contract and various tort claims arising out of disputed winnings from an electric bingo gaming machine. Defendants moved to dismiss, alleging the claims were barred by sovereign immunity and that tribe's court had exclusive jurisdiction of any claim. The Circuit Court, No. CV-11-901485, granted the motion. Patron appealed. The Supreme Court held that: (1) it would decline to decide whether casino was properly located on land considered Indian country; and (2) it would decline to decide whether dispute was a matter of internal or tribal relations or, alternatively, was a dispute specially consigned to the regulatory authority of a tribe by Congress. Affirmed.

**126. *Amerind Risk Management Corporation v. Blackfeet Housing***

No. 16 CV 1093, 2017 WL 4712211 (D.N.M Oct. 17, 2017). Plaintiff Amerind Risk Management Corporation (Plaintiff) seeks declaratory and injunctive relief from litigation brought by Defendant Blackfeet Housing (Defendant) in the Blackfeet Tribal Courts. The Court previously denied Defendant's motion to dismiss

for lack of jurisdiction after concluding that the Court has subject matter jurisdiction over this case under 28 U.S.C. § 1332 and personal jurisdiction over Defendant. The Court also found that Plaintiff has exhausted tribal remedies, so that its challenge to the jurisdiction of the Blackfeet Tribal Courts may go forward in this Court. Both parties have now moved for summary judgment. Although the issues before this Court are jurisdictional, at the root of the conflict between the parties is a dispute over insurance coverage. Plaintiff is a federally chartered tribal corporation formed under Section 17 of the Indian Reorganization Act, 25 U.S.C. § 5124 (formerly § 477). The charter tribes are the Red Lake Band of Chippewa Indians, the Confederated Salish and Kootenai Tribes of the Flathead Reservation, and the Pueblo of Santa Ana. Plaintiff was formed to provide risk-sharing self-insurance for tribal governments and entities in response to a lack of affordable insurance options on tribal lands. Plaintiff has over 400 tribal member entities that contribute capital to a risk pool for each line of coverage, from which Plaintiff pays all covered claims. Members' participation in the risk-sharing group is governed by contractual agreement. Defendant is a member entity that entered into a Participation Agreement (PA) in March 2012 to join Plaintiff's Tribal Operations Protection Plan (TOPP) risk pool. The PA provides that participants in TOPP "agree to jointly share in the costs of protecting against financial loss and in the monetary claims that may arise from financial loss." In return, the PA guarantees that TOPP will indemnify members "in accordance with any coverage documents issued to the Participant and this agreement, but only from the assets of TOPP." As a participant in TOPP governed by the March 2012 PA, Defendant obtained four insurance policies from Plaintiff. Defendant contacted Plaintiff in April 2013 regarding issues with some of its covered properties and subsequently made formal claims.. Plaintiff denied the claims in March 2014. Defendant, rather than invoking the dispute resolution procedures contained in the PA, filed suit against Plaintiff in the Blackfeet Tribal Court alleging breach of fiduciary duty, breach of contract, breach of the duty of good faith, and violations of Blackfeet tribal law. Plaintiff made a special appearance in the Blackfeet Tribal Court and moved to dismiss the suit for lack of jurisdiction, asserting sovereign immunity and relying on the choice of forum provision in the PA. But the Blackfeet Tribal Court denied Plaintiff's motion to dismiss after concluding that Plaintiff did not have tribal sovereign immunity and that the Blackfeet Tribal Court had jurisdiction to

decide Defendant's claim. Plaintiff appealed the jurisdictional issue to the Blackfeet Court of Appeals, which heard oral argument, but had not yet decided the case when Plaintiff filed this suit for declaratory and injunctive relief from the tribal litigation. The Blackfeet Court of Appeals issued its decision holding that Plaintiff did have tribal sovereign immunity as a Section 17 tribal corporation, but that Plaintiff had waived that immunity by including an arbitration clause in the PA. The Blackfeet Court of Appeals acknowledged Plaintiff's argument that any waiver of immunity was limited to the courts specified in the PA for enforcement of the arbitration provision, and stated that it would normally agree. But without giving any reason for broadening the limited waiver, the Blackfeet Court of Appeals appears to have concluded that it had jurisdiction. The Blackfeet Court of Appeals ordered the parties to "proceed to mediation as contemplated by the Participation Agreement and thereafter to arbitration if needed." The issue of the Blackfeet Tribal Court's jurisdiction is now before this Court. It is ordered that: (1) Plaintiff's motion for summary judgment is granted. A separate order of declaratory judgment and permanent injunction will be entered. (2) Defendant's cross-motion for summary judgment is denied.

**127. *Harvey v. Ute Indian Tribe of Uintah and Ouray Reservation***

No. 20160362, 416 P.3d 401, 2017 WL 5166885 (Utah Nov. 7, 2017). Businessman brought action against Indian tribe, tribal officials, various companies owned by the tribal officials, oil and gas companies, and other private companies, alleging, inter alia, tortious interference with economic relations, extortion, violation of Utah Antitrust Act, and civil conspiracy. The Eighth District granted defendants' motions to dismiss. Businessman appealed. The Supreme Court held that: (1) tribe did not waive sovereign immunity; (2) tribal officials, in their official capacities, were not entitled to sovereign immunity on claims to enjoin actions that exceeded tribe's jurisdiction; (3) tribal officials were not protected by sovereign immunity when sued for damages in their individual capacities; (4) tribe was not a necessary party to businessman's action against tribal officials; (5) tribal exhaustion doctrine prevented state courts from reviewing businessman's claims against tribal officials; (6) businessman was not entitled to grant of untimely motion to file supplemental pleadings; (7) businessman failed to



state claims against companies owned by tribal officials; (8) businessman failed to state claims against oil and gas companies; (9) there is no civil cause of action in Utah for extortion; and (10) state constitutional provision prohibiting “the exchange of black lists” was not self-executing. Affirmed in part, vacated in part, and remanded.

**128. *Wilmington Savings Fund Society v. Fryberg***

No. C17-1196, 2017 WL 6344185 (W.D. Wash. Dec. 12, 2017). Plaintiff Wilmington Savings Fund Society brings this foreclosure action against defendant Corey Fryberg. Corey Fryberg is a member of the Tulalip Tribes, a federally recognized Indian tribe, and the property at issue is trust land within the Tulalip Indian Reservation. The Tulalip Tribes is also a named defendant for having a possible interest in the property. Plaintiff’s initial complaint was filed on August 8, 2017. On August 17, 2017, the Court sua sponte issued an Order to Show Cause for plaintiff’s failure to provide the citizenship of the parties to establish diversity jurisdiction. On August 25, 2017, plaintiff filed an amended complaint, and on September 28, 2017, the Court vacated the Order to Show Cause. Now, defendant Tulalip Tribes moves to dismiss the case pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. Here, the Tulalip Tribes argues that dismissal is appropriate because diversity jurisdiction is lacking, the Tulalip Tribes is immune from suit, and plaintiff failed to exhaust tribal remedies. Each of defendant’s arguments independently supports dismissal: there is no complete diversity between the parties; the Tulalip Tribes is immune from suit; and plaintiff failed to exhaust tribal remedies. For all of the foregoing reasons, defendant’s motion is granted. The case is dismissed.

**129. *Wisconsin Department of Natural Resources v. Timber and Wood Products Located in Sawyer County***

No. 2017AP181, 906 N.W. 2d 707 (Wis. Ct. App. Dec. 19, 2017). Department of Natural Resources (DNR) brought action against Indian tribe and timber and wood products located on tribe’s land, seeking to recover termination severance tax that tribe allegedly owed under Forest Croplands Law after tribe’s forest croplands contract with the State expired. The Circuit Court granted tribe’s motion to dismiss. DNR appealed. The appellate court held that: (1) tribe did not clearly and unequivocally waive its sovereign immunity with respect to DNR’s claims, seeking to recover

termination severance tax, by executing transfer of land ownership forms stating it agreed to comply with Forest Croplands Law, and (2) tribe's sovereign immunity prevented DNR from pursuing in rem claim against timber and wood products located on tribe's land in order to satisfy termination severance tax. Affirmed.

**130. *Buchwald Capital Advisors v. Sault Ste. Marie Tribe of Chippewa Indians***

No. 16-cv-13643, 584 B.R. 706 (E.D. Mich. Jan. 23, 2018). Litigation trustee brought strong-arm proceeding to avoid allegedly fraudulent transfers, and Indian tribe named as defendant moved to dismiss on sovereign immunity grounds. The United States Bankruptcy Court for the Eastern District of Michigan, 516 B.R. 462, denied the motion, and Indian tribe appealed. The District Court, 532 B.R. 680, reversed and remanded. On remand, the Bankruptcy Court, 559 B.R. 842, granted motion to dismiss, and litigation trustee appealed. The District Court, Borman, J., held that: (1) allegedly unauthorized acts of tribal officials could not result in waiver of Indian tribe's immunity from suit on state law fraudulent transfer claims asserted, in strong-arm capacity, by litigation trustee of trust established under debtor's confirmed Chapter 11 plan; (2) any waiver of tribe's immunity by its acts in filing proofs of claim and participating in bankruptcy case would be limited to adjudication of matters raised by tribe's proofs of claim; (3) trustee could not rely on equitable alter ego or veil-piercing doctrine in order to make required showing of express, unequivocal, unmistakable and unambiguous waiver of Indian tribe's sovereign immunity. Affirmed.

**131. *Charles v. Ute Indian Tribe of the Uintah and Ouray Reservation***

No. 2:17-00321, 2018 WL 611469 (D. Utah Feb. 21, 2018). Plaintiff Grant Charles seeks in this action to enjoin defendants Ute Indian Tribe of the Uintah and Ouray Reservation (the "Ute Court") based upon a suit filed in the Ute Court, *Hackford v. Allred et al.*, Ute Case No. 16-259. Defendants filed three motions to dismiss. Richita Hackford, who is named as a defendant because her suit in Ute Court is the underlying case, filed a "Motion to Deny Complaint," which is treated as a motion to dismiss. The remaining defendants (the "Tribal Defendants") filed an initial motion to dismiss based on lack of subject matter jurisdiction and insufficient service of process.

After Ms. Hackford's claims in the Ute Court were dismissed by an order of the Ute Court dated June 5, 2017, the Tribal Defendants filed another motion to dismiss, further arguing that no case or controversy provides Article III standing in this action. A hearing on the motions was held on January 4, 2018. Based on the motions, the argument of the parties at the hearing, and for good cause appearing, the court finds as follows: (1) The Tribal Defendants' latter motion to dismiss is granted. In that motion to dismiss for lack of jurisdiction, the Tribal Defendants correctly analogized the present case to Board of Education for Gallup-McKinley County Schools v. Henderson, 696 Fed Appx. 355 (10th Cir. 2017). Because Ms. Hackford's case in Ute Court has been dismissed following an initial screening by the Ute Court, no case or controversy exists on which to decide the action. Mr. Charles's complaint must be dismissed on this basis. (2) As a further partial basis for dismissal, the tribe, the tribe's business committee, and the Ute Court are protected by tribal sovereign immunity. Plaintiff's primary argument for jurisdiction is based upon application of Ex Parte Young, 209 U.S. 123 (1908) to tribal officers. The court has jurisdiction over the Chief Judge of the Ute Court on that basis, but because Ex Parte Young is limited to suits against individuals, the court does not have jurisdiction over the other Tribal Defendants. (3) Defendants argue that the court does not have jurisdiction to review the Ute Court's exercise of authority over Mr. Charles. However, a federal court may determine under 28 U.S.C. § 1331 whether a tribal court has exceeded the lawful limits of its jurisdiction as a federal question. (4) The tribe and business committee argued that service of process on them was insufficient. That issue is moot. Judge Reynolds (subsequently replaced as a named defendant by Judge Stiffarm) did not move to dismiss on that basis, and the off-reservation service upon Judge Reynolds was sufficient to provide personal jurisdiction over him. (5) The United States is not an indispensable party to this action, and no relief is granted on that basis. (6) Ms. Hackford is dismissed as a defendant because her underlying suit in Ute Court was dismissed. Her motion to dismiss this action is therefore rendered moot. Therefore, it is hereby ordered that the Tribal Defendants' motion to dismiss for lack of subject matter jurisdiction is granted.

**132. *Munoz v. Barona Band of Mission Indians***

No. 17-cv-2092, 2018 WL 1245257 (S.D. Cal. Mar. 8, 2018). Plaintiff Christobal Munoz brought this action against Defendant Barona Band of Mission Indians (the “Tribe”) alleging violations of the Indian Civil Rights Act (“ICRA”). The Tribe has moved to dismiss the Complaint under Rules 12(b)(1) and 12(b)(6). Plaintiff is a former employee of the Defendant Tribe. Plaintiff was employed as a heavy equipment operator with the Barona Resort & Casino, which the Tribe owns and operates. He alleges that he suffered an injury in October 21, 2015 while working. He received workers compensation and medical treatment while his claim was investigated; his claim was subsequently denied around March 2016. Defendant allegedly terminated Plaintiff in September 2016 “for being on medical leave.” In February 2017, Plaintiff filed claims in the Tribal Court, alleging personal injury, workers compensation retaliation, and wrongful termination by the Tribe. The Tribal Court dismissed each of these claims on April 21, 2017. The Tribal Court ruled that Plaintiff’s personal injury claim was not serious, had not occurred while he was working at the Casino, and was barred by a six-month statute of limitations. The Tribal Court allegedly ruled on this claim without allowing him to submit medical evidence. The Tribal Court ruled that Plaintiff’s workers compensation claim was barred by a thirty-day statute of limitations and his wrongful termination claim was barred by a five-day statute of limitations. Plaintiff then filed claims in Tribal Court alleging due process violations based on the Tribal Court’s ruling on medical evidence at the demurrer stage and the Tribe’s statutes of limitations. The Tribe asserted that it had not waived sovereign immunity for his due process claims and there was no forum for his claims. Thereafter, Plaintiff reasserted his claims in Tribal Court regarding due process violations and claimed that the Indian Civil Rights Act (“ICRA”) had waived the Tribe’s sovereign immunity. The Tribe and Tribal Court disavowed this. Plaintiff filed his Complaint in this Court on October 12, 2017. He asserts violations of his due process rights under ICRA based on the same conduct he challenged in Tribal Court. Defendant moves to dismiss the Complaint on the ground that the Court lacks subject matter jurisdiction over this case in view of the Tribe’s sovereign immunity, which it argues has not been abrogated either by Congress or the Tribe. Although the Tribe also asserts a Rule 12(b)(6) challenge to Plaintiff’s claims regarding the Tribe’s statutes

of limitations, the Court declines to decide that issue because the Court concludes that it lacks jurisdiction over the Complaint. The Court grants Defendant's motion to dismiss and hereby dismisses the Complaint with prejudice for lack of subject matter jurisdiction based on tribal sovereign immunity.

**133. *In re: Money Centers of America, Inc., et al., v. Thunderbird Entertainment Center, Inc.***

No. 17-319, 2018 WL 1535464 (D. Del. Mar. 29, 2018). Trustee appeals the Bankruptcy Court's Order, *In re Money Centers of America, Inc.*, 565 B.R. 87 (Bankr. D. Del. 2017) ("Dismissal Order"), which dismissed Trustee's complaint against Thunderbird Entertainment Center, Inc. ("Thunderbird"), a wholly owned entity of the Absentee Shawnee Tribe of Oklahoma, seeking to avoid and recover certain transfers to Thunderbird. Debtors provided debit card and credit card processing for patrons of Thunderbird's casino. Patrons presented their credit or debit cards to Thunderbird, who would then run those cards through equipment provided by Debtors. If the transaction was approved, Thunderbird advanced funds to the patrons, and Debtors would obtain an amount equal to the advanced amount from the patrons' credit or debit card issuers and forward those funds to Thunderbird, less a fee. Debtors filed voluntary petitions for relief under Chapter 11 in March 2014. On March 21, 2016, the complaint against Thunderbird was filed, seeking to avoid and recover \$230,633.80 in allegedly preferential transfers or fraudulent conveyances paid by Debtors to Thunderbird in the 90 days prior to Debtors' bankruptcy filing. Thunderbird filed a motion to dismiss the complaint on May 5, 2016, arguing that it had not waived its tribal sovereign immunity and that the Bankruptcy Court lacked subject matter jurisdiction over the adversary proceeding. The Bankruptcy Court agreed and entered the Dismissal Order on February 28, 2017. On March 13, 2017, a timely appeal was filed. It is undisputed that Thunderbird is wholly owned by the Absentee Shawnee Tribe of Oklahoma and is a tribal corporation and tribal entity with sufficient relationship with the Absentee Shawnee Tribe to enjoy the tribe's sovereign immunity. The sole issue on appeal is whether the Bankruptcy Court correctly held that Congress did not abrogate tribal sovereign immunity in the Bankruptcy Code. Trustee opposed dismissal, asserting that Congress abrogated Thunderbird's sovereign immunity in 11 U.S.C. § 106. While Congress may waive tribal sovereign immunity by statute, the Supreme Court has held

that “such a congressional decision must be clear.” *Bay Mills*, 134 S. Ct. at 2031. Congressional waivers further “cannot be implied but must be unequivocally expressed.” *Santa Clara*, 436 U.S. at 58; *Bay Mills*, 134 S. Ct. at 2031-32 (“That rule of construction reflects an enduring principle of Indian law: Although Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government.”) Section 106 waives sovereign immunity for “governmental units” which are defined at § 101(27) as “a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government.” 11 U.S.C. § 106. Trustee argued that the reference to “other ... domestic government[s]” can only mean Indian tribes, thus the congressional waiver is clear and unequivocal. Recognizing a split of authority on this issue, the Bankruptcy Court rejected Trustee’s argument and adopted the rationale of *Buchwald Capital Advisors, LLC v. Papas (In re Greektown Holdings, LLC)*, 532 B.R. 680 (E.D. Mich. 2015) and *Whitaker v. Dakota Finance Corp. (In re Whitaker)*, 474 B.R. 687 (B.A.P. 8th Cir. 2012). See *Money Centers*, 565 B.R. at 101-03. These decisions, holding that Congress has not clearly and unequivocally expressed an intent to abrogate sovereign immunity of Indian tribes under §§ 106(a) and 101(27), were “well reasoned, and carefully construe the text of the Bankruptcy Code.” *Id.* at 103. On appeal, the Trustee argues that the Dismissal Order should be reversed because, in *Krystal Energy*, the only court of appeals to consider this issue determined that tribes are “domestic governments.” The Ninth Circuit held that “[i]t is clear from the face of §§ 106(a) and 101(27) that Congress did intend to abrogate the sovereign immunity of all ‘foreign and domestic governments.’” See *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1057 (9th Cir. 2003) (emphasis in original). “Indian tribes are certainly governments,” which the Supreme Court has described as “domestic dependent nations that exercise inherent sovereign authority over their members and territories.” *Id.* (citations omitted). “[T]he category ‘Indian tribes’ is simply a specific member of the group of domestic governments.” *Id.* at 1058. Trustee urges the Court to adopt this interpretation. Trustee argues that Thunderbird has offered no other possible definition for “other ... domestic governments],” which can only mean Indian tribes “because there is nothing else to which it could possibly refer.” Trustee further argues that Congress need not invoke any “magic words” (i.e., Indian tribes); rather, the intent to abrogate must simply be “clearly discernable from the statutory text

in light of traditional interpretive tools.” (Id. at 10). Conversely, Thunderbird argues that the Bankruptcy Court properly joined *Whitaker* in rejecting *Krystal Energy’s* reliance on “domestic dependent nations” language in prior cases, finding a waiver by implication, which is prohibited by Supreme Court precedent. Thunderbird contends that Congress included the catch-all “other ... domestic government[s]” to avoid any argument over terminology used by many types of local domestic governments not expressly identified – e.g., towns, townships, villages, boroughs, counties, and parishes. Thunderbird argues it would make little sense to include a catch-all provision solely to address Indian tribes, when the term “Indian tribe” would have been much clearer and consistent with the Supreme Court’s long-standing requirement that Congress be explicit in enacting waivers of tribal sovereign immunity. Thunderbird argues that the overwhelming weight of recent authority is in agreement and cites a recent decision on this issue from a bankruptcy court in the Third Circuit with nearly identical facts. (See D.I. 16 at 9 (citing *Subranni v. Navajo Times Publishing Co., Inc.*), 568 B.R. 616 (Bankr. D.N.J. 2016)). *Subranni* also involved a claim against a tribe to avoid preferential payments. The tribe moved to dismiss, arguing that §§ 106(a) and 101(27) were not sufficiently clear or unequivocal to constitute a waiver. The court adhered to the basic canons of statutory interpretation by following the plain language of § 106. “The plain language of [§] 106(a) is clear and unambiguous. It does not abrogate sovereign immunity for Indian tribes. If Congress had intended to abrogate sovereign immunity to Indian tribes under [§] 106, it could easily and expressly have done so, but it did not.” Id. at 625. The Court agrees with the reasoning set forth in *Whitaker*, *Greektown* and *Subranni*. In *Whitaker*, the Eighth Circuit Bankruptcy Appellate Panel adopted the bright line rule set forth in *In re National Cattle Congress*, 247 B.R. 259, 267 (Bankr. N.D. Iowa. 2000). Absent a specific mention of “Indian tribes” in the Bankruptcy Code, any finding of abrogation under § 106(a) necessarily relies on inference or implication, both of which are prohibited by the Supreme Court: Courts have found abrogation of tribal sovereign immunity in cases where Congress has included “Indian tribes” in definitions of parties who may be sued under specific statutes ... Where the language of a jurisdictional grant is unambiguous as to its application to Indian tribes, no more is needed to satisfy the *Santa Clara* requirement than that Congress unequivocally state its intent ... Where the language of a federal statute does not include “Indian tribes” in definitions of parties

subject to suit or does not specifically assert jurisdiction over “Indian tribes,” courts find the statute insufficient to express an unequivocal congressional abrogation of tribal sovereign immunity. The Court finds no error in the Bankruptcy Court’s conclusion that Congress did not unequivocally express an intent to abrogate sovereign immunity of Indian tribes in §§ 106(a) and 101(27). Section 101(27)’s reference to “other ... domestic government[s]” falls short of the clarity required for abrogation of tribal sovereign immunity. The Dismissal Order is affirmed.

**134. *Cain v. Salish Kootenai College, Inc.***

No. CV-12-181, 2018 WL 2272792, (D. Mont. May 17, 2018). The Ninth Circuit issued its opinion in this matter on July 10, 2017. *United States ex rel. Cain v. Salish Kootenai College, Inc.*, 862 F.3d 939 (9th Cir. 2017). The Ninth Circuit instructed this Court to determine on remand whether Defendant Salish Kootenai College, Inc. (the College) functions as an arm of the Confederated Salish and Kootenai Tribes (the Tribe) “and therefore shares the Tribe’s sovereign status” for purpose of the False Claims Act, 31 U.S.C. §§ 3729–3733. *Cain*, 862 F.3d at 943. The Ninth Circuit directed this Court to determine the College’s status by analyzing the relationship between the College and the Tribe using the factors described in *White v. University of California*, 765 F.3d 1010 (9th Cir. 2014). *Id.* At 945. The parties have conducted discovery on the relationship between the College and the Tribe. The College has filed a Renewed Motion to Dismiss. The College argues that Plaintiffs’ claims should be dismissed because the College functions as an arm of the Tribe. The Tribe has filed an amicus curiae brief. The Tribe agrees with the College. Plaintiffs oppose the College’s motion. Plaintiffs argue that the College is not an arm of the Tribe. The Court conducted a hearing on the College’s Renewed Motion to Dismiss. Plaintiffs ground their federal claims against the College in the False Claims Act. The False Claim Act permits suits against “any person” who defrauds the government by “knowingly present[ing] ... a false or fraudulent claim for payment or approval.” 31 U.S.C. § 3729(a)(1)(A). The False Claims Act excludes sovereign entities, including federally recognized tribes, from the term person. *Cain*, 862 F.3d at 941. Entities that function as an arm of a tribe are also excluded from the term person for purposes of the False Claims Act. *Id.* White instructs courts to employ a multi-factor analysis to determine whether an entity enjoys sovereign immunity



as an arm of the tribe. *White*, 765 F.3d at 1025. The factors include: (1) the method of creation of the entity; (2) the purpose of the entity; (3) the structure, ownership and management of the entity, including the amount of control the tribe has over the entity; (4) the sovereign's intent with respect to the sharing of its sovereign immunity with the entity; and (5) the financial relationship between the sovereign and the entity. *Id.* Application of these factors to the undisputed facts establishes that the College functions as an arm of the Tribe. All five *White* factors support a conclusion that the College functions as an arm of the Tribe. The College shares in the Tribe's sovereign immunity given its status as an arm of the Tribe. The College is not subject to suit under the False Claims Act. Accordingly, the College's Renewed Motion to Dismiss is granted.

**135. *Caddo Nation of Oklahoma v. Wichita and Affiliated Tribes***

No. 16-0559, 2018 WL 3354882 (W.D. Okla. Jul. 9, 2018). Plaintiff Caddo Nation of Oklahoma filed this suit seeking to prevent the construction of the Wichita Tribal History Center (the "History Center") by defendant Wichita and Affiliated Tribes ("Wichita Tribe"). The Caddo Nation sought a declaration that defendants had violated the National Historical Preservation Act ("NHPA") and the National Environmental Policy Act ("NEPA") and also sought injunctive relief barring construction of the Center. Plaintiff sought a temporary restraining order halting the construction efforts, which the court granted. The court later vacated the TRO and denied plaintiff's motion for a preliminary injunction. Plaintiff filed an interlocutory appeal from that decision but did not seek an injunction to stay the decision during the appeal. While the appeal was pending, the Wichita Tribe resumed construction of the History Center and the center was eventually completed. Due to that fact, the Court of Appeals concluded the relief sought by plaintiff was moot and dismissed the appeal. The case was remanded for further proceedings here. *Caddo Nation of Oklahoma v. Wichita and Affiliated Tribes*, 877 F.3d 1171 (10th Cir. 2017). Where the recipient tribe assumes the pertinent regulatory responsibilities, it must "specify that the certifying officer (i) consents to assume the status of a responsible Federal official under [NEPA or NHPA] ... and (ii) is authorized and consents on behalf of the recipient of assistance ... to accept the jurisdiction of the Federal courts for the purpose of enforcement of his responsibilities as such an official."

*Id.* at § 5304(g)(3)(D). It is undisputed that the Wichita Tribe assumed the responsibilities at issue and that defendant Parton, on behalf of the Wichita and Affiliated Tribes, requested the release of funds and consented to federal court jurisdiction with respect to the History Center project. Having invoked the congressionally authorized procedure for assumption of NEPA/NHPA regulatory determinations, the Wichita Tribe is bound by the legal consequences, including being subject to suit in federal court, that go with it. Sovereign immunity therefore does not prevent the court's consideration of the APA claims based on NEPA and NHPA. The court concludes otherwise as to the other claims asserted by plaintiff. The state law claims for unjust enrichment and equitable estoppel, as well as any claims based on the state of legal title to the property in question, are outside the scope of the immunity waiver applicable to the NEPA and NHPA claims, and plaintiffs have not pointed to any other Congressional abrogation of immunity as to such claims. Absent such action by Congress, suits based on such claims are barred by sovereign immunity absent a "clear waiver by the tribe." *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991). There is no suggestion here of such a waiver as to the state law claims. Further, plaintiff's submissions provide no basis for concluding that the actions of the individual defendants were other than within the scope of their activities and authority as officers of the Wichita Tribe, and sovereign immunity therefore bars the claims against them as well. The result is that sovereign immunity bars all of plaintiff's claims other than the NEPA/NHPA claims under the APA referenced above, and the court therefore lacks subject matter jurisdiction over them.

**136. *Saint Regis Mohawk Tribe v. Mylan Pharmaceuticals Inc.***

Nos. 2018-1638, 2018-1639, 2018-1640, 2018-1641, 2018-1642, 2018-1643, 896 F.3d 1322, 2018 WL 3484448 (Fed. Cir. Jul. 20, 2018). Mylan Pharmaceuticals, Inc., petitioned for inter partes review ("IPR") of various patents owned by Allergan, Inc., relating to its dry eye treatment Restasis. Teva Pharmaceuticals USA, Inc., and Akorn, Inc. (together with Mylan, "Appellees") joined. While IPR was pending, Allergan transferred title of the patents to the Saint Regis Mohawk Tribe, which asserted sovereign immunity. The Board denied the Tribe's motion to terminate on the basis of sovereign immunity and Allergan's motion to withdraw from the

proceedings. Allergan and the Tribe appeal, arguing the Board improperly denied these motions. We affirm. Significant features of the system confirm that inter partes review is an agency reconsideration rather than an adjudication of a private dispute and does not implicate sovereign immunity. Inter partes review brings to bear the same agency expertise as exists in initial examination. There is no requirement that a third-party petitioner have any interest in the outcome of the proceeding, much less Article III standing. *See* 35 U.S.C. § 311(a). Upon receiving a petition, the Director has complete discretion regarding whether to institute review. § 314; *Oil States*, 138 S.Ct. at 1371. The inter partes review procedures limit discovery, typically preclude live testimony in oral hearings, and do not mirror the Federal Rules of Civil Procedure. *Ultratec, Inc. v. CaptionCall, LLC*, 872 F.3d 1267, 1270 n.2 (Fed. Cir. 2017). If the third-party settles, the proceeding does not end, and the USPTO may continue on to a final written decision. § 317(a). The USPTO may intervene to defend its decisions on appeal, whether or not the third party petitioner remains in the case. § 143; *Cuozzo*, 136 S. Ct. at 2144. Inter partes review does not involve exercise of personal jurisdiction over the patent holder or adjudication of infringement. The only possible adverse outcome is the cancelation of erroneously granted claims. Notably, the Supreme Court has held that “adversarial proceedings” that do not involve the exercise of personal jurisdiction do not necessarily raise sovereign immunity concerns. *See Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 448, 124 S. Ct. 1905, 158 L. Ed. 2d 764 (2004) (bankruptcy). These features distinguish inter partes review from the proceeding in *FMC* and bolster the view that it is, like ex parte and inter partes reexamination, an executive proceeding that enlists third-party assistance. Sovereign immunity does not apply.

### **137. *Williams v. Big Picture Loans, LLC***

No. 3:17-cv-461, 2018 WL 3615966 (E.D. Va. Jul. 27, 2018). This matter is before the Court on Defendants Big Picture Loans and Ascension Technologies’ Motion To Dismiss For Lack Of Subject Matter Jurisdiction. Big Picture Loans, LLC (“Big Picture”) and Ascension Technologies, Inc. (“Ascension”) argue that the Court lacks subject matter jurisdiction over all claims asserted against them because they qualify as arms of the Lac Vieux Desert Band of Lake Superior Chippewa Indians (“the Tribe”) and are thereby entitled to tribal sovereign immunity. For the reasons set forth

below, the motion was denied. The Tribe's Business Ordinance created comprehensive procedures for the creation, operation, and dissolution of various tribal entities, including limited liability companies ("LLCs"). Relevant to this dispute, the Ordinance stated that a tribally-owned LLC with the Tribe as its sole member would "be considered a wholly owned and operated instrumentality of the Tribe and ... have all the privileges and immunities of the Tribe, including but not limited to the Tribe's sovereign immunity from suit, except as explicitly waived by the [LVD] Council." The Ordinance further indicated that those LLCs would be subject to the LVD Court's jurisdiction, but that such provision would not waive any claim to sovereign immunity in state or federal court. However, a closer look reveals that neither Big Picture nor Ascension fulfills those goals very well, if at all. The inadequacies of Hazen's general statements about the Tribe's use of Big Picture's revenues are detailed above. Because the extent to which the Tribe has actually used Big Picture's funds for the services noted by Hazen is unclear, the Court cannot tell whether granting immunity here "directly protects the ... Tribe's treasury, which is one of the historic purposes of sovereign immunity in general." *Allen*, 464 F.3d at 1047. Moreover, even assuming that Big Picture's lending operation and Ascension's support have contributed to the Tribe's economic self-development to some extent, those entities' actions have primarily enriched non-tribal entities like Eventide and, possibly, individuals like Martorello. The Bellicose purchase, and the resulting Note and Loan Agreement, have undoubtedly yielded some benefits for the Tribe. Yet, by limiting the Tribe's monthly distribution to a very small percentage of Big Picture's revenue, the Note forces the Tribe to receive those benefits at substantial cost, a reality that is illustrated by the sharp disparity in distributions received by the Tribe and Eventide since TED began repaying the loan. Consequently, as Plaintiffs note, granting immunity here might have the unintended consequence of preventing the Tribe from obtaining favorable terms in future business transactions, as non-tribal entities would not be inclined to offer repayment above a certain rate. Therefore, although Big Picture and Ascension serve the core purposes of tribal immunity to some extent, these circumstances cause this factor to weigh against immunity for both entities. For the reasons discussed, Big Picture and Ascension have the burden to prove arm-of-the-tribe immunity by a preponderance of the evidence. That means the weighing of factors must permit a finding of immunity. On this record, that balance actually falls the other

way, and weighing everything on the balance, the Court finds that neither entity qualifies as an arm of the Tribe. Therefore, Big Picture and Ascension are not immune from suit here.

K. *Sovereignty, Tribal Inherent*

138. *Coeur d'Alene Tribe v. Hawks*

No. 2:16-CV-366, 2017 WL 3699347 (D. Idaho Aug. 25, 2017). Before the Court is a motion to dismiss filed by the Hawks. The Tribe brought this action to domesticate and enforce a default judgment obtained against the Hawks in Tribal Court. The Tribe is also pursuing this same relief in Idaho State courts. The Hawks own real property along the St. Joe River with the Coeur d'Alene Reservation. They also own a boat garage and pilings within the St. Joe River. The Tribe claims that the boat garage and pilings are illegal encroachments and filed an objection in June of 2015 in the Coeur d'Alene-Spokane River Basin Adjudication (CSRBA). That litigation, a state water rights adjudication, is proceeding in the District Court of the Fifth Judicial District of the State of Idaho. Almost a year after filing that objection, the Tribe filed suit against the Hawks in Tribal Court for violation of the Tribal Code, claiming that the Hawks failed to obtain a Tribal permit before constructing the boat garage and pilings. The Tribal Court issued a default judgment in the form of a civil penalty of \$3,900. It is that judgment that the Tribe seeks to enforce in this Court. The Hawks responded by filing a motion to dismiss, arguing that this Court does not have jurisdiction to grant the Tribe the relief they seek. In the briefing on this motion, the Tribe concedes it is not relying on diversity jurisdiction, but argues instead that the Court has jurisdiction under the federal question provisions of 28 U.S.C. § 1331. In support, the Tribe cites *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 105 S. Ct. 2447 (1985). That case would provide sound support for this Court's jurisdiction over a lawsuit filed by the Hawks claiming that the Tribal Court had no jurisdiction to enter the judgment for \$3,900—that would place the Court squarely within *National Farmers*, and the dispute over whether the Tribal Court had jurisdiction over a non-member of the Tribe would be a federal question that would satisfy the jurisdictional demands of § 1331. But here, the Hawks have not challenged the Tribal Court's jurisdiction to make the award, and the Tribe has not sought a declaratory judgment that its courts had jurisdiction over the Hawks. Instead, the Tribe is simply asking a federal court to

domesticate and enforce a Tribal Court Judgment. While such a claim has a basis in Idaho law and can be enforced in Idaho courts pursuant to Idaho Code § 10-1401 et. seq., the Tribe cites no federal statute or law that is in dispute and that could be used to create a federal question. The posture of this case shifts it away from *National Farmers*, and places it squarely within *Miccosukee Tribe v. Kraus-Anderson Const. Co.*, 607 F.3d 1268, 1275 (11th Cir. 2010). There, a Tribe filed suit to enforce a Tribal Court Judgment, and the non-Tribal member defendant filed a motion to dismiss. The court granted the motion, distinguishing *National Farmers*. With no basis for federal jurisdiction, the Court is compelled to grant the motion to dismiss.

**139. *Quinault Indian Nation v. Pearson for Estate of Comenout***

No. 15-35263, No. 15-35267, 868 F.3d 1093 (9th Cir. Aug. 29, 2017). Indian tribe brought action alleging that tribal members violated Racketeer Influenced and Corrupt Organizations Act (RICO) by engaging in scheme to defraud it of cigarette taxes. After one member's death, his estate asserted counterclaims seeking declaratory judgment that member had not violated cigarette sales and tax code, order compelling grant of building and business permits, and mandamus relief, lost profits, and damages due to alleged antitrust and price-fixing scheme perpetrated by tribe. The District Court, No. 3:10-cv-05345, 2015 WL 1311438, granted tribe's motion to dismiss counterclaims and to voluntarily dismiss entire action. Estate appealed. The appellate court held that: (1) tribe's filing of suit did not constitute waiver of its sovereign immunity, and (2) district court did not abuse its discretion in denying estate leave to amend its answer and counterclaims. Affirmed.

**140. *FMC Corporation v. Shoshone-Bannock Tribes***

No. 4:14-CV-489, 2017 WL 4322393 (D. Idaho Sep. 28, 2017). Appeal filed, 9th Cir., Oct. 24, 2017. In several pending motions, the Tribes and FMC ask the Court to determine whether the Tribes may enforce a Judgment imposed by the Tribal Appellate Court. That Judgment imposes an annual permit fee of \$1.5 million. For over 50 years, FMC operated a phosphorus production plant on 1,450 acres of property FMC owned in fee in Pocatello, Idaho, lying mostly within the Shoshone-Bannock Fort Hall Reservation. FMC's

operations produced 22 million tons of waste products stored on the Reservation in 23 ponds. This waste is radioactive, carcinogenic, and poisonous. It will persist for decades, generations even, and is so toxic that there is no safe method to move it off-site. The waste's extreme hazards led the Environmental Protection Agency (EPA) to declare the site a CERCLA Superfund clean-up site and to charge FMC with violating the Resource Conservation and Recovery Act (RCRA). The EPA designed and implemented a program to contain the waste. To avoid litigation over the RCRA charges, FMC negotiated with the EPA over a Consent Decree. As a condition of agreeing to that Consent Decree, the EPA insisted that FMC obtain Tribal permits for work FMC would do under the Consent Decree on the Reservation. The Tribes, however, were demanding \$100 million for those permits, although they would drop the fee to \$1.5 million a year if FMC consented to Tribal jurisdiction. To get the lower permit fee, and to satisfy the EPA's condition that they obtain Tribal permits, FMC consented to Tribal jurisdiction. FMC challenged those permit fees in Tribal Courts by producing evidence that the stored waste had caused no harm and the EPA's containment program foreclosed any need to impose substantial fees. The Tribes produced evidence that the waste was severely toxic, would remain so for generations, and could not be moved off-site. After hearing this evidence, the Tribal Appellate Court issued a Judgment against FMC requiring them to pay an annual fee of \$1.5 million. The parties brought this action to resolve the issue whether the Tribes could enforce that Judgment. The Court finds that the Tribes have jurisdiction over FMC. The source of the jurisdiction is based on FMC's consent, discussed above, and the catastrophic threat FMC's waste poses to Tribal governance, cultural traditions, and health and welfare. Having identified the source of the Tribes' jurisdiction over FMC, the Court turns next to the scope of that jurisdiction. To the extent that Tribal jurisdiction is based on FMC's consensual relationship with the Tribe to pay \$1.5 million annually to store hazardous waste within the Reservation, the Tribes have jurisdiction to impose the \$1.5 million annual fee for as long as the waste is stored there. The Tribal Appellate Court relied on this ground of jurisdiction to impose its Judgment, and the Court finds that the Judgment must be enforced on that ground. Using an agreed-upon figure is fine when the basis of jurisdiction is a consensual relationship, but when jurisdiction is based instead on a catastrophic threat, the amount of the Judgment must bear some relationship to the Tribes' need to protect against the threat. Because there is no

such relationship in this record, the Court cannot enforce the Judgment on the basis of the catastrophic threat basis for Tribal jurisdiction. Nevertheless, the Court will enforce the Judgment because, as discussed above, it was properly entered under the consensual relationship basis for Tribal jurisdiction. Now therefore it is hereby ordered that the Tribes' motion to enforce the Judgment under Montana's first exception is granted. It is further ordered, that the motion to enforce the Judgment under Montana's second exception is granted in part and denied in part. It is granted to the extent it seeks a ruling that the Tribes had jurisdiction over FMC under Montana's second exception to impose an annual permit fee to store hazardous waste within the Reservation but is denied to the extent it seeks to enforce the Judgment of an annual permit fee of \$1.5 million, for the reasons discussed above.

**141. *Mitchell v. Tulalip Tribes of Washington***

No. C17-1279, 2017 WL 5010129 (W.D. Wash. Nov. 2, 2017). This matter comes before the Court on Defendant's motion to dismiss. Plaintiffs are three married couples, each of whom own a house on the Tulalip Indian Reservation in Snohomish County, Washington ("Homeowners"). Defendant Tulalip Tribes of Washington ("The Tribes"), is a federally recognized American Indian Tribe. Homeowners are not members of The Tribes. Homeowners seek declaratory and injunctive relief against The Tribes in regard to tribal ordinances that they allege are unlawfully encumbering their property. Although Homeowners' property is located on the Tulalip Reservation, they own title in fee simple. In 1999, The Tribes recorded a Memorandum of Ordinance that states The Tribes have land use regulatory authority over all properties located within the Reservation's boundaries. This regulatory ordinance appears as a special exception to coverage on Homeowners' title. In addition, the Tulalip Tribal Code contains a real estate excise tax provision that requires payment of 1% of the sale price of any transfer of real property within the boundaries of the Tulalip Reservation. This excise tax is also listed as a special exception on Homeowners' title. Homeowners allege that the regulatory ordinance and real excise tax place a cloud on their title and render it unmarketable. Homeowners ask the Court to: (1) declare The Tribes are without right to regulate or levy tax on Homeowners' property; (2) permanently enjoin The Tribes from excising a tax against Homeowners' property; and (3) quiet title to Homeowners' title free and clear of any encumbrances



arising from the regulatory ordinance or real estate excise tax. The Tribes argue that Homeowners' claims should be dismissed for three reasons. First, The Tribes assert the Court lacks subject matter jurisdiction because Homeowners are barred from bringing the lawsuit under the doctrine of tribal sovereign immunity. Second, it argues that Homeowners' claims are barred by res judicata because the Snohomish County Superior Court previously dismissed the identical claims with prejudice. Third, The Tribes assert that Homeowners' claims do not represent an Article III case or controversy because they are not ripe. The Court finds that Homeowners' claims are unripe and therefore does not address the issues of tribal sovereign immunity and res judicata. The Court will not issue a declaratory judgment because Homeowners' complaint does not demonstrate "that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *United States v. Braren*, 338 F.3d 971, 975 (9th Cir. 2003) (internal quotations omitted). The Tribe's motion to dismiss is granted. Homeowners' claims are dismissed without prejudice.

#### 142. *Coeur d'Alene Tribe v. Johnson*

No. 44478, 162 Idaho 754, 405 P.3d 13 (Idaho Nov. 3, 2017). Kenneth and Donna Johnson appealed a district court judgment recognizing a tribal judgment from the Coeur d'Alene Tribal Court (Tribal Court). The Johnsons owned land within the Coeur d'Alene Reservation (Reservation) on the banks of the St. Joe River and had a dock and pilings on the river. The Coeur d'Alene Tribe (Tribe) initiated an action in Tribal Court to enforce a tribal statute which required a permit for docks on the St. Joe River within the Reservation. The Johnsons did not appear and a default judgment was entered against them. The judgment imposed a civil penalty of \$17,400 and declared that the Tribe was entitled to remove the dock and pilings. On January 2016, the Tribe filed a petition to have the Tribal Court judgment recognized in Idaho pursuant to the Enforcement of Foreign Judgments Act. I.C. sections 10-1301, et seq. The district court held the Tribal Judgment was valid and enforceable, entitled to full faith and credit. However, the Idaho Supreme Court determined the district court was incorrect in holding the Tribal Judgment was entitled to full faith and credit, and the civil penalty was not entitled to recognition in Idaho courts. However, the Idaho Supreme Court held the Tribal Court had

jurisdiction over the Johnsons and the subject matter of this case; the Johnsons did not meet their burden of establishing the Tribal Court did not have jurisdiction, and the Johnsons were afforded due process in Tribal Court. In this case the judgment comprised two parts: (1) the civil penalty of \$17,400; and (2) the declaration that the Tribe had the right to remove the offending encroachment. The civil penalty was not enforceable under principles of comity. However, the penal law rule does not prevent courts from recognizing declaratory judgments of foreign courts. Therefore, the Idaho Supreme Court vacated the district court's judgment to the extent that it recognized the Tribal Court's judgment imposing the civil penalty of \$17,400. The Court affirmed the judgment recognizing the Tribal Court judgment regarding the Tribe's right to remove the dock and pilings. Affirmed in part, reversed in part, and remanded.

**143. *McKesson Corporation v. Hembree***

No. 17-CV-323, 2018 WL 340042 (N.D. Okla. Jan. 9, 2018). This proceeding concerns a lawsuit by the Cherokee Nation against a number of opioid distributors and pharmacies. However, the question before the Court is not the merits of the Cherokee Nation's lawsuit but rather the boundaries of Tribal Court jurisdiction. The Attorney General of the Cherokee Nation has filed suit not in state court but in the Tribal District Court of the Cherokee Nation. Do the Tribal Courts of the Cherokee Nation have jurisdiction over this particular action? The Court finds they do not. The Court finds that Tribal Court jurisdiction over Count I of the Tribal Court Petition is foreclosed as an unauthorized attempt to privately enforce the Controlled Substances Act. Further, in light of the Plaintiffs' nonmember status, the lack of authorization for tribal enforcement in the CSA or elsewhere, and clearly established authority that the CSA does not authorize a private right of action, the Court finds that the lack of Tribal Court jurisdiction over Count I is "so patently obvious as to defy exhaustion." *Thlopthlocco Tribal Town*, 762 F.3d at 1239. Accordingly, Plaintiffs are not required to exhaust their arguments in Tribal Court with respect to the CNUDPA claims. To require otherwise "would serve no purpose other than delay." *Id.* at 1238. The Tribal Court Petition asserts common-law claims of nuisance, negligence, unjust enrichment, and civil conspiracy against all defendants. Plaintiffs contend, first, that tribal jurisdiction is automatically foreclosed because none of the conduct

at issue occurred within Indian country. It is undisputed that the Distributors' and Pharmacies' facilities are not located on land owned by or held in trust for the Cherokee Nation. However, because *Montana* governs jurisdiction over nonmembers even within Indian country, the Court will determine first whether there is a colorable claim of jurisdiction under either the first or second *Montana* exception. The Court finds that Plaintiffs have shown that the lack of Tribal Court jurisdiction is sufficiently clear, such that further proceedings in the Tribal Court Action would serve no purpose other than delay. First, the Tribal Court's jurisdiction is presumptively invalid under *Montana* because the Distributors and Pharmacies are nonmembers of the Cherokee Nation. Second, it is clear that the conduct alleged in the Tribal Court Action falls well outside the Cherokee Nation's inherent sovereign authority to regulate conduct under the first *Montana* exception. Third, the Court does not find a colorable argument that the Tribal Court Action fits within the narrow second *Montana* exception. The clear lack of jurisdiction is sufficient to excuse Plaintiffs from the exhaustion requirement. Accordingly, the Court finds that Plaintiffs are substantially likely to show that the Tribal Court lacks jurisdiction in the Tribal Court Action and that exhaustion should not be required.

**144. *Kodiak Oil & Gas (USA) Inc. v. Burr***

No. 4:14-cv-085, No. 4:14-cv-087, 303 F.Supp.3d 964, 2018 WL 1440602 (D.N.D. Mar. 22, 2018). Before the Court are three separate motions for preliminary injunctive relief filed by Kodiak Oil & Gas (USA), Inc., now known as Whiting Resources Corporation, HRC Operating, LLC, and EOG Resources, Inc. Also before the Court are several motions to dismiss the complaints of Kodiak Oil, HRC Operating, and EOG Resources ("Plaintiffs"). On July 29, 2014, Kodiak Oil & Gas (USA), Inc., now known as Whiting Resources Corporation ("Kodiak Oil"), filed a complaint against Defendants Jolene Burr, Ted Lone Fight, Georgianna Danks, Edward S. Danks, and Judge Diane Johnson, in her capacity as the Chief Judge of the Fort Berthold District Court, seeking a declaration that the Fort Berthold Tribal Court ("Tribal Court") lacks jurisdiction over a suit filed by Defendants Jolene Burr, Ted Lone Fight, as well as Georgianna Danks and Edward S. Danks in Tribal Court against Kodiak Oil and others. In the underlying Tribal Court action, the Tribal Court Plaintiffs seek to recover royalties

pursuant to an Oil & Gas Mining Lease for Kodiak and others' improper flaring of natural gas associated with oil wells. On May 4, 2015, the Magistrate Judge ordered the federal court action brought by Kodiak Oil stayed upon agreement of the parties, "pending further action by the tribal court." EOG Resources, Inc. ("EOG Resources") also filed a complaint in this Court. As a named defendant in the same tribal court action brought against Kodiak Oil, EOG Resources similarly seeks a declaration the Tribal Court lacks jurisdiction over the suit filed by the Tribal Court Plaintiffs in Tribal Court. On May 1, 2015, EOG Resources requested a stay of the federal court action due to its pending motion to dismiss for lack of jurisdiction in the tribal court matter. Consequently, this Court ordered the federal action stayed "pending a ruling from the Three Affiliated Tribes District Court and a possible appeal from the tribal court decision." While both federal court actions were stayed, the matter proceeded in the Tribal Court, with Kodiak Oil and others filing motions to dismiss the tribal court action for lack of jurisdiction. On May 12, 2016, the Tribal Court issued a "Memorandum Opinion" in which the Tribal Court denied the motions to dismiss, concluding the Tribal Court has jurisdiction over the "straight-forward contract action." On appeal, the MHA Nation Supreme Court affirmed in part and reversed in part the order of the Fort Berthold District Court. The MHA Nation Supreme Court ultimately determined Kodiak Oil, EOG Resources, HRC Operating and other defendants are subject to MHA Nation's "legislative, executive and judicial jurisdiction" because they operate businesses and conduct business activities within the Fort Berthold Reservation. The MHA Nation Supreme Court first decided "Montana's rule and exceptions do not apply here, where the challenged non-Indian Petitioner's activities were all taken on Indian allotments held in trust." Essentially, the MHA Nation Supreme Court construed *Montana v. United States*, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981) narrowly to apply to lands within a reservation not owned by the Tribe or its members. However, the MHA Nation Supreme Court continued, and determined if *Montana* applies, the Tribal Court has jurisdiction over the matter based upon the 'consensual relationship' exception to the Montana rule, evinced "by the oil and gas leases executed by and between oil and gas companies and the individual Indian allottees." The MHA Nation Supreme Court also concluded the federal regulatory scheme of oil and gas leases for allotted lands does not preclude the Fort Berthold District Court from exercising

its jurisdiction over the matter. Nonetheless, the MHA National Supreme Court ultimately determined “judicial review is premature at this juncture because [the Tribal Court Plaintiffs] have not exhausted their administrative remedies.” The Court GRANTS Kodiak Oil, EOG Resources, and HRC Operating’s motions for preliminary injunction and ORDERS Defendants Jolene Burr, Ted Lone Fight, Georgianna Danks and Edward S. Danks enjoined from further prosecuting the underlying action in Tribal Court and Defendants Judge Mary Seaworth, in her capacity as Acting Chief Judge of the Fort Berthold District Court, and Yvette Falcon, in her capacity as the Court Clerk/Consultant of the Three Affiliated Tribes District Court of the Fort Berthold Indian Reservation, enjoined from exercising jurisdiction over the underlying Tribal Court action until a final determination of the Plaintiffs’ claims in federal court. Further, the Court DENIES the Tribal Court Defendants’ motions to dismiss.

#### 145. *Free v. Dellinger*

No. 18-cv-181, 2018 WL 3580769 (N.D. Okla. Jul 25, 2018). Now before the Court are the following motions: Plaintiff’s Motion for Preliminary Injunction and Brief in Support and Defendant Dellinger’s Motion to Dismiss Plaintiff’s Complaint for Failure to Exhaust Tribal Remedies. This case arises out of an ongoing dispute about gaming activities on land over which the Muscogee Creek Nation (MCN) claims to have exclusive jurisdiction. The land in question is located in Broken Arrow, Oklahoma and is known as the Bruner Parcel, and the MCN claims that Bruner Parcel is within the historical boundaries of the MCN Reservation. Bruner is a citizen of the MCN, but he was apparently a member of the Kialegee Tribal Town as well. On August 16, 2017, the MCN filed a civil action in the District Court of the MCN seeking a declaratory judgment and injunctive relief preventing defendants Bruner, The Kialegee Tribal Town, Jeremiah Hobia, Red Creek Holdings, LLC, and Luis Figueredo from taking any action in furtherance of gaming activity on the Bruner Parcel. The Kialegee Tribal Town was allegedly claiming that it had shared jurisdiction over the Bruner Parcel and it had issued a gaming license to Bruner. The MCN argues that it has sole jurisdiction over the Bruner Parcel, and it is seeking to prevent illegal gaming activity on its lands. The Court finds that this case should be dismissed, because plaintiff did not exhaust her tribal court remedies before filing suit in federal court to challenge the

jurisdiction of the MCN courts. Plaintiff has not met her burden to show that any of the exceptions to the exhaustion requirement are present, and it would be preferable to allow the tribal court to consider plaintiff's arguments concerning the existence of tribal jurisdiction in the first instance. The tribal court action was also in its early stages and the Court finds that there is not a sufficient factual record to consider whether plaintiff is subject to the jurisdiction of the MCN courts.

**146. *JP Morgan Chase Bank, N.A. v. Yamassee Tribal Nation, et al.***

No. 1:17-cv-00759, 2018 WL 3629940 (E.D. Cal. Jul. 30, 2018). On March 29, 2018, JPMorgan Chase Bank, N.A. ("Plaintiff" or "Chase") filed a motion for entry of default judgment, seeking declaratory and permanent injunctive relief against Peter P. Khamsanvong, Yamassee Tribal Nation, and Supreme Court of the Yamassee Native American Association of Nations ("Yamassee Supreme Court") (collectively, "Defendants"). Defendants have not opposed the motion. Upon review of the declarations, pleadings, and exhibits to the present motion, the Court recommends granting the motion for default judgment and awarding declaratory relief. On June 2, 2017, Plaintiff commenced this declaratory judgment action. Plaintiff alleges that on or about August 13, 2013, Defendant Khamsanvong obtained a residential loan in the amount of \$108,989.00 (the "Loan"), secured by a deed of trust, encumbering the real property known as 1906 West Aurora Avenue, Porterville, California 93257 (the "Property"). Carrington started non-judicial foreclosure proceedings on the property, and, on September 30, 2016, caused a notice of default to be recorded against title to the property. On December 13, 2016, the Yamassee Supreme Court issued an "Order to Show Cause/Default Judgment/Writ of Restitution [sic] In The Event Defendants Fail To Respond Within 21 Days Of Receipt Of This Order," naming Chase and Jamie Dimon, Chase's Chief Executive Officer, as defendants. The purported order to show cause alleges that Defendant Khamsanvong is "an enrolled tribal member of the Yamassee tribal nation" and that the Property, which was owned by Defendant Khamsanvong, is in "Indian country," and seeks remedies against the named defendants including "an accounting, restitution or payment of proceeds from an alleged 'securitization' of the mortgage note and damages in the amount of \$25 million dollars." On January 13, 2017, Plaintiff,

through a special appearance, responded to the Order Show Cause objecting to the Yamassee Tribal Nation and the Yamassee Supreme Court's purported jurisdiction over Plaintiff and Mr. Dimon. Plaintiff never received a response to its objection. Plaintiff seeks a judicial declaration that the Yamassee Tribal Nation or the Yamassee Supreme Court lacks any personal or subject matter jurisdiction over Plaintiff or its executives, employees and agents, including Mr. Dimon, and cannot award damages or any legal or equitable relief, in any manner or any amount, to Defendant Khamsanvong. Here, a review of the most recent List, 83 Fed. Reg. 4235-02, reveals no Indian tribe by the name of "Yamassee." Furthermore, several courts have found that the Yamassee are "not recognized as a separate sovereign nation" as they "do not have a treaty with the United States, are not recognized by the Bureau of Indians, and are not listed as a recognized Indian tribe in IRS Revenue Procedure 2002-64." The Yamassee Tribal Nation, therefore, is not a federally recognized Indian tribe entitled to the immunities and privileges available to other federally recognized Indian tribes, including adjudicative authority pursuant to the exercise of inherent sovereign authority. Thus, the Yamassee Tribal Nation has no adjudicative jurisdiction and any judgment issued by the Yamassee Supreme Court is necessarily null and void.

**147. *Rabang, et al., v. Kelly, Jr., et al.***

No. C17-0088, 2018 WL 3630295 (W.D. Wash. Jul. 31, 2018). This matter comes before the Court on Plaintiffs' response to the Court's order to show cause and Defendants' responses. Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby dismisses Plaintiffs' complaint without prejudice and without leave to amend for the reasons explained herein. This case arises out of the disenrollment of hundreds of members of the Nooksack Indian Tribe and subsequent Department of the Interior ("DOI") and Bureau of Indian Affairs ("BIA") decisions regarding the federal government's recognition of the Nooksack Tribal Council. Plaintiffs in this matter are "purportedly disenrolled" members of the Nooksack Indian Tribe. Defendants are current and former members of the Nooksack Indian Tribal Council and other figures within the tribal government. Plaintiffs bring suit against Defendants for alleged violations of the federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964 ("RICO"). Plaintiffs allege that

Defendants abused their positions within the tribal government to carry out a scheme to defraud them of money, property, and benefits “by depriving [them] of their tribal membership.” The Court previously stated that “if the DOI and BIA recognize tribal leadership after new elections, this Court will no longer have jurisdiction and the issues will be resolved internally.” These circumstances have come to pass. The DOI recognized the Nooksack Tribal Council as the Tribe’s governing body, following the agency’s validation of the December 2017 special election. The Court’s original basis for exercising jurisdiction under an exception to the tribal exhaustion rule no longer exists. The Court concludes that it lacks subject matter jurisdiction over Plaintiffs’ claims. In general, Indian tribes possess inherent and exclusive power over matters of internal tribal governance. *See Nero v. Cherokee Nation*, 892 F.2d 1457, 1463 (10th Cir. 1989); *Goodface v. Grassrope*, 708 F.2d 335, 339 (8th Cir. 1983). The determination of tribal membership has long been recognized as a matter of internal tribal governance to be determined by tribal authorities. The Court dismisses Plaintiffs’ complaint without prejudice and without leave to amend.

**148. *Stephen McCoy v. Salish Kootenai College, Inc.***

No. 17-88, 2018 WL 3824147 (D. Mont. Aug. 10, 2018). Before the Court is Salish Kootenai College, Inc.’s (the “College”) Motion to Dismiss. Plaintiff Stephen McCoy (“McCoy”) opposes the Motion. Amici Confederated Salish and Kootenai Tribes and the American Indian Higher Education Consortium have joined in support of the Motion. McCoy filed his Complaint asserting two claims: a sex-based discrimination claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and a sex-based discrimination claim under the Montana Human Rights Act, Mont. Code Ann. § 49-2-101 et seq. McCoy asserts this Court has jurisdiction because Title VII presents a federal question. The College moved the Court to enter a scheduling order for jurisdictional discovery because the Court lacks jurisdiction if the College is an arm of the Confederated Salish and Kootenai Tribes (the “Tribes”). The Court granted the unopposed motion, and the parties have now engaged in jurisdictional discovery. During the pendency of this case, the Ninth Circuit issued an opinion similar to this matter on July 10, 2017, in *United States ex rel. Cain v. Salish Kootenai College, Inc.*, 862 F.3d 939 (9th Cir. 2017). The Ninth Circuit instructed the district court to



determine on remand whether Defendant Salish Kootenai College, Inc. functions as an arm of the Confederated Salish and Kootenai Tribes “and therefore shares the Tribe’s sovereign status” for purpose of the False Claims Act, 31 U.S.C. §§ 3729-3733. *Cain*, 862 F.3d at 943. The Ninth Circuit directed the district court to determine the College’s status by analyzing the relationship between the College and the Tribe using the factors described in *White v. University of California*, 765 F.3d 1010 (9th Cir. 2014). Subsequently, on May 17, 2018, United States District Court Judge Morris entered a Memorandum and Order granting the College’s Motion to Dismiss in accordance with the White factors. *Fawn Cain, Tanya Archer, and Sandi Ovitt v. Salish Kootenai College, Inc. et al.*, Case No. CV-12-181-B-BMM, Doc. 108 (May 17, 2018). The Court finds that all five White factors support that the College functions as an arm of the Tribe. Consequently, the College shares in the Tribe’s sovereign immunity given its status as an arm of the Tribe. The College is not subject to suit under the Title VII and the College shares in the Tribe’s sovereign immunity. Therefore, the Court lacks subject matter jurisdiction over the claims asserted against the College and tribal court has exclusive jurisdiction over the state law claim. Accordingly, it is ordered the College’s Motion to Dismiss is granted. McCoy’s claims against the College are dismissed for lack of subject matter jurisdiction.

#### 149. *Drabik v. Thomas*

No. AC 38997, \_\_ A.3d \_\_, 2018 WL 3829155 (Conn. Ct. App. Aug. 14, 2018). The plaintiff, John Drabik, appeals from the judgment of the trial court dismissing his petition for a bill of discovery against the defendants, Elaine Thomas, a deputy tribal historic preservation officer for The Mohegan Tribe of Indians of Connecticut (tribe), James Quinn, the tribal historic preservation officer for the tribe, and the Tribal Council, the governing body of the tribe, on the ground of tribal sovereign immunity. Specifically, the plaintiff claims that the trial court improperly (1) decided that the petition should be dismissed on the ground that tribal sovereign immunity applies to petitions for a bill of discovery, and (2) determined that the defendants are entitled to tribal sovereign immunity. The plaintiff owns property in East Lyme that is not part of or adjacent to the reservation of the tribe. AT & T evaluated the plaintiff’s property as a potential location for a new cellular communications tower. As part of the application process to the

Connecticut Siting Council, the agency responsible for utility facilities' locations, AT & T submitted an electronic message with the proposed site to the Federal Communications Commission, which notified the tribe of the proposal. The tribe's response, written by Thomas, indicated that a site walk conducted on June 10, 2015, identified "substantial stone groupings" on the property adjacent to the plaintiff's property. According to the response, the proposed tower would "impact the view shed" of these "cultural stone features" and could "possibly cause impact to the overall integrity of the landscape." The response concluded that, in the opinion of the Mohegan Tribal Historic Preservation Office, the proposed tower would cause an adverse effect to "properties of traditional religious and cultural significance to the [tribe]." After receiving this response from the tribe, AT & T stopped considering the plaintiff's property as a potential site for the tower. On multiple occasions, the plaintiff made requests for clarification from Thomas and Quinn about the stone groupings, seeking more information about their location, substance, and historical and cultural significance, but no representative of the tribe responded to any of his repeated requests. The plaintiff filed a petition for a bill of discovery, alleging that he may have a cause of action of intentional interference with a business relationship against the defendants. The defendants filed a motion to dismiss, citing the doctrine of tribal sovereign immunity. The trial court granted the defendants' motion to dismiss the bill of discovery. The plaintiff then filed the present appeal, claiming that the court improperly found that sovereign immunity applied to bar a bill of discovery. The plaintiff acknowledges that "the [tribe] and its officers enjoy tribal sovereign immunity that protects them from most lawsuits in Connecticut Superior Court," but he insists, nonetheless, that tribal sovereign immunity does not bar a bill of discovery, as a bill of discovery seeks equitable relief and is distinct from the filing of a lawsuit. There are no allegations in the bill of discovery that Thomas or Quinn conducted the site walk, identified the stone groupings, failed to respond to the plaintiff's requests while acting outside of their official capacity, or otherwise exceeded the authority given to them by the tribe. As such, the facts as alleged do not support the plaintiff's claim that Thomas and Quinn were named as defendants in their individual capacities or otherwise exceeded the scope of their authority. Thus, the court correctly concluded that the defendants were protected by sovereign immunity and, therefore, properly granted the defendants' motion to dismiss. The judgment is affirmed.

**150. *Flandreau Santee Sioux Tribe v. Gerlach***

No. 14–4171, 269 F. Supp. 3d 910 (D.S.D. Sep. 15, 2017). Appeal Filed 8th Cir., Feb. 6, 2018. Indian tribe brought action, alleging that state was not entitled to collect use tax on non-gaming purchases by individuals that were not tribe members at casino that was subject of compact pursuant to the Indian Gaming Regulatory Act (IGRA), and related operations, as well as nearby convenience store. Tribe and state both moved for summary judgment. The District Court held that: (1) IGRA preempted state from imposing use tax on purchases made at casino and related operations that facilitated gaming activities; (2) IGRA did not preempt state’s imposition of use tax on purchases at convenience store by nonmembers; (3) state’s imposition of use tax on nonmembers for purchases at store was not preempted under *White Mountain Apache Tribe v. Bracker*, 100 S. Ct. 2578; (4) state’s imposition of use tax on purchases at store by nonmembers was not discriminatory; (5) burden upon tribe to collect and enforce use tax on nonmember purchases at store was not preempted by federal law, nor did it infringe upon tribal sovereignty; and (6) State was not entitled to condition issuance of liquor license to casino and related operations upon remittance of use tax for nonmember purchases at store. Motions granted in part and denied in part.

**151. *People ex rel. Becerra v. Rose***

No. C080546, 16 Cal. App. 5th 317 (Cal. Ct. App. Sep. 28, 2017). The People brought action against cigarette seller operating on Indian land allotments, alleged violations of the tobacco directory law, California Cigarette Fire Safety and Firefighter Protection Act, state excise tax laws, and unfair competition law, and seeking injunctive relief and civil penalties. The Superior Court, No. 176689, entered judgment for the People and imposed total civil penalty of \$765,000 as well as injunctive relief. Seller appealed. The appellate court held that: (1) California had jurisdiction over cigarette sales on Indian land allotments, and (2) uncontested findings of fact supported conclusion all 51,000 sales for which penalties were imposed occurred after seller was notified sales were illegal. Affirmed.

**152. *Seminole Tribe of Florida v. Biegalski***

No. 16-62775, 2017 WL 4570790, 2017 WL 4570790 (S.D. Fla. Oct. 12, 2017). The Seminole Tribe of Florida has filed suit, seeking injunctive relief and a declaratory judgment that Florida's imposition of a utility tax on the Tribe's use of electricity on its reservations or other property is improper. This is the second time the Tribe has sought relief from Florida's utility tax. Accordingly, Defendant Leon Biegalski has filed a motion to dismiss, arguing that the Tribe's second suit is foreclosed by claim preclusion. The Tribe, of course, vigorously opposes the application of claim preclusion to this suit. After careful analysis, the Court agrees with Biegalski and finds the Tribe's instant case should be dismissed. Because the Court finds the specific allegations presented in this case barred by claim preclusion, it grants Biegalski's motion to dismiss. The Tribe's complaint is therefore dismissed with prejudice.

**153. *Perkins v. Commissioner of Internal Revenue***

Docket No. 28215-14, 62018 WL 1146343, 129 Tax Ct. Rep. Dec. (RIA) 150.6 (T.C. Mar. 1, 2018). Married taxpayers petitioned for redetermination of income-tax deficiency arising from disallowance of exemption for income earned from selling gravel mined from land of Seneca Nation of Indians, of which wife was enrolled member. IRS moved for summary judgment. The Tax Court, held that: (1) General Allotment Act of 1887 did not exempt married taxpayers' income from gravel sales; (2) Canandaigua Treaty between federal government and Seneca Nation did not create income-tax exemption for individual member of Seneca Nation, at least insofar as income was not derived from land allotted to such member; (3) taxpayers were liable for additions to tax for failure to timely file returns; (4) IRS failed to meet its burden of production with respect to taxpayers' liability for accuracy-related penalties; and (5) in opinion by Lauber and Pugh, JJ., federal government's Treaty with the Seneca conferred rights on Seneca Nation of Indians, not its constituent members, and it covered only taxes imposed by State of New York. Motion granted in part and denied in part.

**154. *Barrett v. California Department of Tax and Fee Administration***

No. B276619, 2018 WL 2252657 (Cal. Ct. App. May 17, 2018). Selnek operates the Torres–Martinez Travel Center (Travel Center), which is located on tribal land. The Travel Center sells fuel, alcoholic beverages, food, and general merchandise to the public. In May and June 2014, Barrett purchased fuel and an alcoholic beverage from the Travel Center, his receipts either reflected that no sales tax had been collected, or did not indicate whether or not a state sales tax had been collected. Barrett informed the Board of Selnek’s tax delinquency, but the Board responded “that because of the difficulty of enforcing sales/use taxes against tribal corporations, ... [the Board] has ... declined to even attempt to apply and enforce sales/use tax statutes against Selnek.” Barrett asserts that the failure to collect sales and use taxes from the tribe and Selnek violates mandatory duties imposed by statute on respondents. Barrett therefore seeks a writ of mandate compelling respondents to calculate and collect delinquent taxes and penalties owed by the tribe, Selnek, and “other similarly situated retailers.” In the present petition for writ of mandate, appellant James Barrett alleges that several state agencies and administrators (collectively, respondents) unlawfully failed to collect state sales and use taxes owed by an Indian tribe and corporation. The trial court sustained respondents’ demurrer with leave to amend and, when Barrett failed to file an amended petition, dismissed the petition. Barrett appealed from the resulting judgment of dismissal. We affirm. As we discuss, a writ of mandate may issue to compel performance of a ministerial duty, but may not command the exercise of discretionary powers in a particular manner. Because Barrett has not alleged either the failure to perform a ministerial duty or the unreasonable or arbitrary exercise of discretionary power, his petition failed to state a claim for relief in mandate. (Code Civ. Proc., § 1085.) Accordingly, the trial court properly sustained respondents’ demurrer and entered judgment for respondents.

**155. *United States v. Jim***

No. 16-17109, 891 F.3d 1242 (11th Cir. Jun. 4, 2018). Government brought action against Indian tribe member seeking to reduce income tax assessments on gaming revenue distributions to judgment. Tribe intervened as a defendant. The District Court, No. 1:14–cv–22441, 2016 WL 7539132, granted in part

government's motion for summary judgment on affirmative defense that distributions were exempt from taxation under Tribal General Welfare Exclusion Act, following bench trial, 2016 WL 6995455, issued findings of fact and conclusions of law and entered judgment against defendants, and denied tribe's motion to alter or amend judgment. Defendants appealed. The Court of Appeals held that: (1) Indian general welfare benefits exemption did not apply to distributions; (2) distributions did not derive from tribal land, and, thus, were not exempt from federal taxation on such basis; (3) District Court did not abuse its discretion in denying tribe's motion to amend judgment entered against it. Affirmed. In this appeal, the member and the tribe contend that the District Court erred in concluding that the exemption for Indian general welfare benefits did not apply to the distributions. The tribe alone asserts that the District Court erroneously upheld tax penalties against the member and incorrectly attributed to the member the distributions of her husband and daughters. Lastly, the tribe argues that the District Court erred by entering judgment against it as an intervenor. We affirm the ruling of the District Court in each of these matters. The distribution payments cannot qualify as Indian general welfare benefits under GWEA because Congress specifically subjected such distributions to federal taxation in IGRA. The member has waived any arguments as to penalties or the amount assessed against her, and the tribe lacks a legal interest in those issues. The District Court did not err in entering judgment against the tribe because the tribe intervened as of right and the Government sought to establish its obligation to withhold taxes on the distributions.

**156. *White v. Schneiderman***

No. 59, 31 N.Y.3d 543, 2018 WL 2724989 2018 N.Y. Slip Op. 04028 (N.Y. Cir. Jun. 7, 2018). Tribal retailer and its owner brought action against state Attorney General and state tax commissioner, seeking declaration that requirement that they pre-pay amount of tax to be assessed on sale of cigarettes to non-Indians violated Indian Law and treaties between Seneca Nation and United States, and sought preliminary injunction enjoining enforcement of Tax Law. The Supreme Court granted defendants' cross motion to dismiss, and plaintiffs appealed. The Supreme Court, Appellate Division, 140 A.D.3d 1636, 33 N.Y.S. 3d 614, affirmed as modified, reinstating complaint for declaratory relief but concluding plaintiffs were not entitled to such relief. Plaintiffs were granted leave to

appeal. The Court of Appeals, Garcia, J., held that prepayment scheme did not constitute a tax, and thus did not violate federal law, and since prepayment scheme was not a tax, it did not violate Buffalo Creek Treaty of 1842, or state statute derived therefrom. Affirmed.

**157. *Flandreau Santee Sioux Tribe v. Sattgast***

No. 4:17-CV-04055-KES, 325 F.Supp.3d 995, 2018 WL 3432047, D.S.D. Jul. 16, 2018). Plaintiff, Flandreau Santee Sioux Tribe, filed this action against defendants Richard L. Sattgast, Andy Gerlach, and Dennis Daugaard seeking a judicial declaration that, under federal law, the State of South Dakota does not have the authority to impose the State's excise tax in connection to services performed by non-Indian contractors in the Tribe's on-reservation construction project. Plaintiff and defendants move for summary judgment. The Department of Revenue denied requests by the Tribe and its construction manager for an exemption for the casino construction project. As a result, Henry Carlson has paid contractor's excise tax under protest consistent with SDCL § 10-27-2. Henry Carlson's protest letters requested that the state issue refunds to the Tribe as the entity who paid the cost of taxes. The Tribe seeks to have a judicial declaration that the State does not "have the authority to impose the State's contractor's excise tax" and seeks a refund of the "contractor's excise tax paid, or to be paid, under protest." Currently, the Tribe estimates that the contractor's excise tax on the project will be approximately \$480,000. Here, similar to *Ramah* and *Bracker*, Congress created a comprehensive and pervasive regulatory scheme with the explicit intent of providing tribal governments with revenue and the ability to be self-sufficient. IGRA not only regulates gaming operations, but it also requires the Tribe to adopt a tribal resolution for the construction and maintenance of the gaming facility that is subject to approval by the Chairman of NIGC. 25 U.S.C. § 2710(2)(E). And unlike *Yee*, the Tribe did not engage in tax manipulation and the Tribe is a party to the transaction subject to the tax. The State's excise tax undermines the objective of IGRA because the tax is passed from the contractor to the Tribe which interferes with the Tribe's ability to make a profit from gaming activities. Thus, Congress intended for IGRA to completely regulate Indian gaming and there is no room for the State's imposition of an excise tax. In conclusion, the court finds that both barriers to the State's exercise of authority are present here. The

excise tax is pre-empted by federal law by IGRA. Also, the State's interests in imposing the excise tax do not outweigh the tribal and federal interests in promoting self-sufficiency because there is not a nexus between any services the State provides to the Tribe or the contractor and the imposition of the excise tax. Either barrier, on its own, is sufficient to find that state authority inapplicable. *Bracker*, 448 U.S. at 143, 100 S. Ct. 2578. Thus, the court finds that the State's excise tax is inapplicable. Because the court finds in favor of the Tribe under both prongs of the *Bracker* analysis, it does not reach the other theory raised by the Tribe – namely whether the Indian Trader Statutes pre-empt the State's ability to impose the contractor's excise tax.

**158. *United States v. King Mountain Tobacco Company, Inc.***

Nos. 14-36055, 16-35607, 899 F.3d 954, 2018 WL 3826230 (9th Cir. Aug. 13, 2018). In this case of first impression, we consider whether King Mountain Tobacco Company, Inc. (“King Mountain”), a tribal manufacturer of tobacco products located on land held in trust by the United States, is subject to the federal excise tax on manufactured tobacco products. The district court awarded the United States almost \$58 million for unpaid federal excise taxes, associated penalties, and interest. In 2006 the late Delbert Wheeler, Sr., a lifelong-enrolled member of the Yakama Nation in Washington State, purchased “80 acres of trust property ... from the Yakama Nation Land Enterprise, the agency of the Yakama Nation which is charged with overseeing the maintenance of real property held in trust by the United States for the benefit of the Yakama Nation and its members.” Wheeler then opened King Mountain Tobacco Company, which manufactures cigarettes and roll-your-own tobacco in a plant located on this trust land. King Mountain received a federal tobacco manufacturer's permit in February 2007. Today, King Mountain manufactures all of its tobacco products, and grows some of its own tobacco, on trust lands within the boundaries of the Yakama Nation. Some of those trust lands—including those on which King Mountain is located—are allotted to Wheeler, while others are allotted to other Yakama members. King Mountain initially obtained all of the tobacco for its products from an entity in North Carolina. But according to King Mountain, “[t]obacco has historically grown on the Yakama Nation Reservation.” Over time, King Mountain increased the proportion of tobacco grown on trust land and incorporated into its manufactured products. By the end of



2013, King Mountain's products were composed "of at least 55 percent tobacco grown exclusively on allotted land held in trust by the United States for the beneficial use of ... Wheeler." King Mountain also manufactures a small amount of "'traditional use tobacco' that is intended for Indian ... ceremonial use" and consists entirely of trust land-grown tobacco. The federal government imposes excise taxes on manufactured tobacco products, including cigars, cigarettes, and roll-your-own tobacco. Administered by the Treasury Department's Alcohol and Tobacco Tax and Trade Bureau ("TTB"), these excise taxes are assessed on the privilege of manufacturing tobacco products and determined at the time the tobacco products are removed from a factory or bonded warehouse. Although King Mountain initially paid federal excise taxes on its tobacco products, it began to fall behind in 2009. The Treasury gave King Mountain statutory notice, under I.R.C. § 5703(d), of the delinquent taxes and afforded the company an opportunity to show cause why the taxes should not be assessed. King Mountain did not challenge the statutory notice. Accordingly, the Treasury delegate timely made assessments against King Mountain for unpaid excise taxes, failure-to-pay penalties, failure-to-deposit penalties, and interest for periods in October, November, and December 2009. In February 2010, the Treasury issued King Mountain a Notice and Demand for Payment pursuant to I.R.C. § 6303. King Mountain paid the assessed taxes in installments over a five-month period in 2010, but it failed to pay the associated penalties and interest. Eventually, King Mountain ceased paying federal excise taxes altogether. This case has shuttled between the district court and our court on both procedural and substantive grounds. In 2012, the United States brought suit against King Mountain to collect the delinquent taxes. The district court granted the Government's motion to dismiss as to King Mountain and Wheeler on the basis that the claims were barred by the Anti-Injunction Act, 26 U.S.C. § 7421(a). The district court then granted summary judgment in favor of the United States on the merits, reasoning that neither the General Allotment Act nor the Treaty with the Yakamas precluded the imposition of federal excise taxes. On appeal, we held that the Yakama Nation's suit was barred by the Anti-Injunction Act. We thus vacated the judgment and remanded with instructions to dismiss the suit for lack of subject-matter jurisdiction. Back in the district court, the court granted summary judgment to the Government on King Mountain's liability for payment of the excise tax. Observing that the merits issues were "essentially identical" to those presented in the earlier Yakama case,

the court expressly incorporated its conclusions of law from the summary judgment order. The district court reserved ruling on the amount of liabilities owed by King Mountain, however, in order to enable King Mountain to obtain additional discovery. After further discovery, the district court granted summary judgment in favor of the government on the amount of King Mountain's liabilities—\$57,914,811.27. However, when the district court entered final judgment in favor of the government, it accidentally omitted this amount from its order. The government quickly moved to alter or amend the judgment pursuant to Federal Rule of Civil Procedure 59(e) to reflect that King Mountain owed “to the United States federal tobacco excise tax liabilities totaling \$57,914,811.27 as of June 11, 2013, plus interest and other statutory additions accruing after that date until paid in full.” King Mountain filed a timely notice of appeal, which is now before us. We affirm our longstanding rule that Indians—like all citizens—are subject to federal taxation unless expressly exempted by a treaty or congressional statute. In this case, neither the General Allotment Act nor the Treaty with the Yakamas expressly exempts King Mountain from the federal excise tax on manufactured tobacco products. King Mountain is therefore liable for payment of the tax and associated penalties and interest. Affirmed.

M. *Trust Breach and Claims*

**159. *Alabama-Quassarte Tribal Town v. United States***

No. 17-7003, 899 F.3d 1121, 2018 WL 3829245 (10th Cir. Aug. 13, 2018). Indian tribe brought action against United States, Secretary and Associate Deputy Secretary of Interior Department, Treasury Secretary, and another tribe seeking declaratory judgment that property acquired pursuant to Oklahoma Indian Welfare Act (OIWA) was purchased for its benefit, and order compelling government to assign property to it and provide it with accounting of related trust funds and assets. The District Court, No. 6:06-CV-00558 granted government's motion for partial judgment on pleadings, 2008 WL 11389448, granted other tribe's motion to dismiss, 2016 WL 93848, and entered summary judgment in government's favor, 2016 WL 7495806. Tribe appealed. The appellate court held that: (1) other tribe was necessary party; (2) other tribe did not waive its tribal immunity; and (3) Interior Board of Indian Appeals' (IBIA) determination that other tribe was

legal beneficiary of funds was supported by substantial evidence and was not arbitrary or capricious. Affirmed.

N. *Miscellaneous*

**160. *Navajo Nation Human Rights Comm'n v. San Juan County***

No. 2:16-00154, 281 F.Supp.3d 1136, 2017 WL 3972481 (D. Utah Sep. 7, 2017). Tribal human rights commission and registered voters who were members of Navajo Nation and residents of county filed suit against county, county clerk, and county commissioners, in their official capacities, claiming that county's voting procedures violated Equal Protection Clause and Voting Rights Act (VRA), and seeking injunctive and declaratory relief. Parties cross-moved for summary judgment. The District Court held that: (1) declaratory claims regarding prior voting procedures were moot; (2) amendment of complaint was warranted to add VRA declaratory claims regarding county's new voting procedures; (3) equal protection claims regarding new voting procedures were not sufficiently alleged; (4) claims for injunctive relief were not moot; (5) summary judgment was precluded for VRA claims challenging denial of early in-person voting for Indian voters; (6) summary judgment was precluded for VRA claims challenging adequacy of language assistance to Indian voters and methods of publicizing voting procedures; and (7) summary judgment was precluded on VRA claims against county commissioner. Motions denied.

**161. *Brakebill v. Jaeger***

No. 1:16-cv-008, 2018 WL 1612190 (D.N.D. Apr. 3, 2018). In August 2016, this Court carefully considered the Dataphase factors and concluded the public interest in protecting the right to vote for thousands of Native Americans who lacked a qualifying ID and cannot obtain one, outweighed the purported interests and arguments of the State. As a result, the North Dakota Secretary of State was enjoined from enforcing N.D.C.C. § 16.1-05-07 without any adequate "fail-safe" provisions that had been provided to all voters in North Dakota prior to 2013. In the past, North Dakota allowed all citizens who were unable to provide acceptable ID's to cast their vote under two types of "fail-safe" provisions which were repealed in 2013. In response to the preliminary injunction issued

August 1, 2016, the North Dakota Legislative Assembly amended and enacted a new election law (House Bill 1369). Plaintiffs' Motion for a Second Preliminary Injunction is GRANTED in limited part. Specifically, the North Dakota Secretary of State is enjoined from enforcing only certain subsections of N.D.C.C. § 16.1-01-04: (1) The Secretary of State is enjoined from enforcing Section 16.1-01-04.1(2)(b) which mandates the need for a "current residential street address." The Court is unaware of any other state that imposes such a requirement to vote. Neither the North Dakota Constitution nor the National Registration Voting Act imposes such a strict requirement. Instead, the Secretary of State shall allow a qualified voter to receive a ballot if they provide a valid form of ID as recognized in Section 16.1-01-04.1(3)(a) or another form of identification that includes either a "current residential street address" or a current mailing address (P.O. Box or other address) in North Dakota. (2) The Secretary of State is enjoined from enforcing N.D.C.C. § 16.1-01-04.1(3)(a)(2) which mandates only certain valid forms of identification. Instead, the Secretary of State shall also allow and accept as a valid form of identification an official form of identification issued by a tribal government; the Bureau of Indian Affairs (BIA), any other tribal agency or entity, or any other document, letter, writing, enrollment card, or other form of tribal identification issued by a tribal authority so long as those other forms of identification, (documents, letters, writings) set forth the tribal members name, date of birth, and current residential street address or mailing address.

**162. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. McKesson Corporation***

No. 18-cv-286, 2018 WL 2390120 (W.D. Wisc. May 25, 2018). Plaintiff the Lac Courte Oreilles Band of Lake Superior Chippewa Indians filed this case in state court against defendants, manufacturers and distributors of opioid medications, alleging violations of Wisconsin statutory and common law as a result of a conspiracy to cause national opioid addiction. Defendant McKesson Corporation removed the case to this court under the federal officer statute, 28 U.S.C. § 1442(a)(1). It appears that this court is just a pit stop: McKesson hopes to have the case transferred to the Northern District of Ohio for multidistrict litigation. *See In re Nat'l Prescription Opiate Litig.*, MDL No. 2804 (J.P.M.L. filed Sept. 25, 2017). The Judicial Panel on Multidistrict Litigation (JPML) issued

a conditional transfer order, but the transfer is stayed pending briefing on Lac Courte Oreilles's motion to vacate the conditional transfer order. See MDL No. 2804, Dkt. 1317 (Apr. 27, 2018). Meanwhile, in this court, Lac Courte Oreilles has filed a motion to remand the case to the Circuit Court for Sawyer County. McKesson has moved to stay consideration of the remand motion pending the MDL transfer. The court will grant McKesson's motion to stay litigation.

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