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Case Law On American Indians

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CASE LAW ON AMERICAN INDIANS

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TABLE OF CONTENTS

I. UNITED STATES SUPREME COURT 436

II. OTHER COURTS 436

A. Administrative Law..... 436

B. Child Welfare Law And ICWA 447

C. Contracting..... 457

D. Employment..... 467

E. Environmental Regulations 467

F. Fisheries, Water, FERC, BOR..... 471

G. Gaming..... 484

H. Jurisdiction, Federal..... 489

I. Religious Freedom..... 499

J. Sovereign Immunity..... 500

K. Sovereignty, Tribal Inherent 514

L. Tax 522

M. Trust Breach & Claims..... 525

N. Miscellaneous..... 535

CASES 536

I. UNITED STATES SUPREME COURT

1. McGirt v. Oklahoma

140 S. Ct. 2452, 2020 WL 3848063 (U.S. July 09, 2020). Reservations. Land in Oklahoma reserved for Creek Nation was not disestablished and remained “Indian country” under the federal Major Crimes Act. Following defendant's conviction for three serious sexual offenses in state court, defendant, an enrolled member of an American Indian tribe, applied for postconviction relief, arguing that only federal courts had jurisdiction under the federal Major Crimes Act (MCA). The Oklahoma District Court, Wagoner County, denied the application. Defendant appealed. The Oklahoma Court of Criminal Appeals affirmed. Defendant's petition for a writ of certiorari was granted. The Supreme Court, Justice Gorsuch, held that: (1) Congress established a reservation for Creek Nation; (2) government's allotment agreement with Creek Nation did not terminate Creek Reservation; (3) Congress's intrusions on Creek Nation's promised right of self-governance did not disestablish Creek Reservation; (4) historical practices, demographics, and other extratextual evidence were insufficient to prove disestablishment of Creek Reservation; (5) Creek Nation originally holding fee title to land did not make land “dependent Indian community,” rather than reservation; (6) eastern Oklahoma is not exempt from the MCA; and (7) potential for transformative effects was insufficient justification to disestablish Creek Reservation. Judgment of the Court of Criminal Appeals reversed. Chief Justice Roberts filed dissenting opinion in which Justice Alito and Justice Kavanaugh joined, and in which Justice Thomas joined in part. Justice Thomas filed dissenting opinion.

II. OTHER COURTS

A. Administrative Law

2. George v. Office of Navajo and Hopi Indian Relocation

2019 WL 4081144 (D. Ariz. Aug. 29, 2019). Plaintiff Rosita George seeks judicial review of an administrative decision by Defendant Office of Navajo and Hopi Indian Relocation (“ONHIR”) denying her relocation benefits under the Navajo-Hopi Settlement Act. For reasons stated below, Plaintiff's motion is denied and ONHIR's motion is granted. In 1882, a large reservation was established in Arizona for use by the Hopi Nation and “such other Indians as the Secretary of the 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. *Id.* In the decades that followed, attempts to resolve inter-tribal conflicts ultimately resulted in the Navajo-Hopi Settlement Act in 1974. *Id.* The Act authorized the district court to partition the reservation and created ONHIR's predecessor to help relocate tribal members who resided on land partitioned to the other tribe. *Id.* at 1121-22. To be eligible for relocation benefits, a Navajo applicant has the burden of showing that she was (1) a legal resident of 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. Plaintiff was born on July 23, 1965 and was a legal resident of the HPL on December 22, 1974. A.R. 162. After graduating high school in 1985, Plaintiff moved in with her sister Lorena Tsinnijinnie. *Id.* While living with Lorena, Plaintiff was not responsible for her living expenses. All told, Plaintiff’s documented earnings from January 1, 1986 through July 7, 1986 were \$742.62. *Id.* On October 21, 2009, ONHIR denied Plaintiff’s application for relocation benefits, finding that she did not obtain head-of- household status during the relevant time period. *Id.* at 51-52. Plaintiff appealed the decision. The Court affirms the finding of the Hearing Officer that Plaintiff failed to meet her burden of showing that she was a head of household as of July 7, 1986. Ordered that ONHIR’s motion for summary judgment is Granted.

3. Cherokee Nation v. Bernhardt

936 F.3d 1142, 2019 WL 4197483 (10th Cir. Sept. 05, 2019). Bureau of Indian Affairs was not required to obtain consent of Indian tribe to take into trust land that sat entirely within boundaries of its former reservation. Indian tribe brought action against Department of the Interior and Bureau of Indian Affairs officials, in which another federally recognized tribe intervened, challenging Bureau's decision to grant intervenor's application asking that it take into trust parcel of land that sat entirely within boundaries of first tribe's former reservation to enable intervenor to develop it into tribal and cultural center. The United States District Court for the Eastern District of Oklahoma, No. 6:14-CV-00428-RAW, Ronald A. White, Chief Judge, 2017 WL 2352011, entered judgment in favor of first tribe and enjoined Bureau from accepting parcel into trust. Defendants and intervenor appealed. The Court of Appeals, Eid, Circuit Judge, held that: 1) District Court's order was final and appealable, not an administrative remand; 2) Bureau was authorized under the Indian Reorganization Act (IRA) to take subject land into trust; 3) Bureau was not required to obtain consent of first tribe to take land into trust for other tribe; 4) Bureau's consideration of jurisdictional- conflicts criterion of regulation governing land-into-trust applications was not arbitrary and capricious; and 5) Bureau's consideration of administrative-burden criterion of regulation governing land-into-trust applications was not arbitrary and capricious. Reversed in part and vacated in part.

4. Stand up for California v. U.S. Department of Interior

410 F. Supp. 3d 39, 2019 WL 4992183 (D.D.C. Oct. 07, 2019). Department of Interior's analysis of water supply, associated with land in trust for Indian tribe to build casino, provided well-considered decision. Nonprofit organization and individuals brought action challenging decision of the United States Department of the Interior and its Bureau of Indian Affairs (BIA) to acquire land in trust for tribe, alleging that defendants' actions did not comply with relevant statutes. Parties brought cross motions for summary judgment. The District Court, Trevor N. McFadden, J., held that: 1) tribe was federally recognized Indian tribe; 2) organization lacked standing to assert

encumbrances claim under Indian Gaming Regulatory Act (IGRA); 3) tribe qualified for IGRA's restored lands exception; 4) Department's analysis of water supply provided fully informed and well-considered decision; 5) Department's analysis of traffic impact resulting from new parking structure provided reasoned decision making; 6) Department was not required to perform new or supplemental environmental impact statement (EIS); and 7) timing of Department's decision to acquire land did not show impermissible predetermination. Motions granted in part and denied in part.

5. Oneida Indian Nation v. United States Department of the Interior

789 Fed. Appx. 271, 2019 WL 5302822 (2nd Cir. Oct. 21, 2019). Likelihood of confusion between names of tribes was not sufficient injury to confer standing to challenge decision to publish changed name. Background: Indian tribe in New York brought action against Department of the Interior (DOI) under Administrative Procedure Act (APA) alleging abuse of discretion and violation of United States Code arising out of Assistant Secretary's decision to publish changed name of Wisconsin tribe to Oneida Nation in Federal Register, and approval of name-change amendment in Department's regional office's secretarial election. Department moved to dismiss for lack of subject matter jurisdiction. The United States District Court for the Northern District of New York, Mae A. D'Agostino, J., 336 F. Supp. 3d 37, granted motion. Tribe appealed. The Court of Appeals held that: 1) proceeding in the Trademark Trial and Appeal Board of the United States Patent and Trademark Office (TTAB) could not form basis for New York tribe's standing to challenge DOI's decision to publish changed name of Wisconsin tribe, and 2) likelihood of confusion between names was not sufficient injury to confer standing for New York tribe to challenge decision to publish changed name of Wisconsin tribe. Affirmed.

6. Allen v. United States

797 Fed. Appx. 302, 2019 WL 7369426 (9th Cir. Dec. 31, 2019). Federal Substantial evidence supported Department of the Interior's conclusion that group of Native Americans was ineligible to organize as separate tribe. Group of Native Americans sought review of decision by Department of the Interior that they were ineligible to organize as a separate tribe under the Indian Reorganization Act and its implementing regulations on Rancheria that was set aside for Pinoleville Pomo tribe. The United States District Court for the Northern District of California, No. 3:16-cv-04403-WHA, William H. Alsup, J., 2017 WL 5665664, entered summary judgment in favor of government. Native Americans appealed. The Court of Appeals held that: 1) arbitrary and capricious standard of the Administrative Procedure Act (APA), rather than Indian law canon of construction, applied on appeal; 2) Department did not improperly consider factor from federal acknowledgement regulations that went beyond criteria set forth in statutory definition of term "tribe"; 3) substantial evidence supported Department's conclusion that Native Americans were ineligible to organize as a separate tribe; 4) group of Native Americans did not qualify as "tribe,"

within meaning of statutory and regulatory definitions; and 5) Department was not required to follow APA's notice-and-comment rulemaking procedures in determining that Native Americans were ineligible to organize as a separate tribe. Affirmed.

7. Chinook Indian Nation v. Bernhardt

2020 WL 128563 (W.D. Wash. Jan. 10, 2020). This matter is before the Court on the parties' Cross-Motions for Partial Summary Judgment. Plaintiff Chinook Indian Nation (CIN) is a tribal group and nonprofit corporation comprised of individuals claiming descent from the historic Chinook Tribe of the Columbia River Basin. This case stems from CIN's decades-long battle to gain federal recognition as a Native American tribe from Defendant U.S. Department of Interior (DOI). CIN began their petition process in 1981, briefly received recognition in 2001, but then saw the decision reversed in 2002. *See* Dkt. # 45 at 7-9. Under then-existing DOI regulations, the 2002 denial barred CIN from re-petitioning for recognition. In 2014, a proposed amendment to the DOI regulations would have created an exception to the ban on re-petitioning for groups able to demonstrate that the reasons for their denial are no longer valid. However, DOI ultimately eliminated this exception and continued to bar re-petitioning in the 2015 Final Rule, despite changing other aspects of the recognition requirements. CIN now challenges this decision to maintain the ban on re-petitioning in the 2015 regulation, arguing that it exceeds DOI's statutory authority, is arbitrary and capricious, and violates the Fifth Amendment's Equal Protection Clause. To be viewed as an independent entity by the United States, a Native American tribe must gain recognition by the Federal Government. Since 1978, DOI has controlled the tribal recognition process through its "Part 83" regulations, which set procedures for petitioning and establish mandatory criteria that petitioners must meet. The Part 83 regulations have been amended twice. The first set of amendments occurred in 1994. The second set of amendments to the Part 83 regulations was finalized in 2015, but the Proposed Rule—which is integral to CIN's claims—was published in 2014. *See* Federal Acknowledgment of American Indian Tribes, 79 Fed. Reg. 30766 (May 29, 2014). Acknowledging that "[t]he current [recognition] process has been criticized as 'broken,'" the Proposed Rule aimed to "make the process and criteria more transparent, promote consistent implementation, and increase timeliness and efficiency, while maintaining the integrity of the process." *Id* at 30766. The Court agrees with CIN—DOI's reasons for eliminating the re-petition ban exception from the Final Rule are illogical, conclusory, and unsupported by the administrative record in violation of the APA. DOI "entirely failed to consider an important aspect of the problem" when it did not explain why banning re-petitioning is appropriate in light of the Final Rule's amended standards. *See Providence Yakima Medical Center v. Sebelius*, 611 F.3d 1181, 1190 (9th Cir. 2010). The Final Rule is remanded to DOI to further consider its justification for the re-petition ban or otherwise alter the regulation consistent with this Order.

8. Littlefield v. Mashpee Wampanoag Indian Tribe

951 F.3d 30, 2020 WL 948895 (1st Cir. Feb. 27, 2020). Indian tribe was required to have been under federal jurisdiction when Indian Reorganization Act (IRA) became law to qualify as “Indian.” Local residents brought action challenging decision of the Department of the Interior's Bureau of Indian Affairs (BIA) to approve the taking of two areas of land into trust for the benefit of Indian tribe pursuant to the Indian Reorganization Act (IRA). The United States District Court for the District of Massachusetts, William G. Young, J., 199 F. Supp. 3d 391, granted residents' motion for summary judgment. Indian tribe appealed. The Court of Appeals, Lynch, Circuit Judge, held that Indian tribe was required to have been under federal jurisdiction when the IRA became law to qualify under the IRA's second definition of “Indian.” Affirmed.

9. Sault Ste. Marie Tribe of Chippewa Indians v. Bernhardt

442 F. Supp. 3d 53, 2020 WL 1065406 (D.D.C. Mar. 05, 2020). Department of the Interior did not have authority to verify that tribe's planned use of self-sufficiency fund income was proper. Sault Ste. Marie Tribe of Chippewa Indians sought review of a decision of the Department of the Interior's denial of Tribe's request to take certain parcels of land into trust, for use as a casino. Following intervention by three commercial casinos, the Nottawaseppi Huron Band of the Potawatomi, and the Saginaw Chippewa Indian Tribe of Michigan, Tribe, Department, and intervenors all moved for summary judgment. The District Court, Trevor N. McFadden, J., held that: 1) Under the Michigan Indian Land Claims Settlement Act, Department did not have authority to verify that Tribe's planned use of self-sufficiency fund income to acquire land to be held in trust by the Secretary of the Interior, was proper under the parameters of the Act; 2) Tribe acquired parcel of land for a permissible purpose under the Act, i.e., the “enhancement of tribal lands”; 3) Secretary of the Interior did not have a clear duty to take parcel of land into trust, and thus, district court would not order the Secretary to do so; and 4) Department did not unreasonably delay in issuing its decision, and thus, district court would not order Department to decide within 90 days whether parcel was acquired with self-sufficiency fund income. Motions granted in part and denied in part.

10. Upper Lake Pomo Association v. United States

804 Fed. Appx. 638, 2020 WL 1243736 (9th Cir. Mar. 16, 2020). District court did not abuse its discretion in denying motion to hold federal officials in contempt for violating order to restore Indian lands to trust status. Daughter of member of Indian Tribe moved to hold federal officials in civil contempt of 1979 order granting partial summary judgment and 1983 order and final judgment on claims for declaratory and injunctive relief, which entitled Tribe members to convey their lands that were improperly converted to private property back to the United States to be held in trust for benefit of the Tribe. United States District Court for the Northern District of California,

Phyllis J. Hamilton, Chief Judge, 2018 WL 3956468, denied motion. Daughter appealed. The Court of Appeals held that district court did not abuse its discretion in denying daughter's motion for contempt. Affirmed.

11. Cherokee Nation v. Bernhardt

2020 WL 1429946 (N.D. Okla. Mar. 24, 2020). Plaintiffs The Cherokee Nation (Nation) and Cherokee Nation Entertainment, LLC (CNE) challenge the July 30, 2012 decision (the 2012 Decision) of the Assistant Secretary – Indian Affairs (Assistant Secretary) of the U.S. Department of the Interior to take a 2.03-acre parcel into trust for gaming purposes for the use and benefit of the United Keetoowah Band of Cherokee Indians in Oklahoma Corporation (UKB Corporation). In 1985, the UKB asked the Secretary of the Interior to take 5.755 acres into trust. The then-Assistant Secretary denied this request on the grounds that the UKB was not authorized to exercise concurrent jurisdiction “over Cherokee lands within the former Cherokee Reservation,” and because the Nation’s consent was required under 25 C.F.R. § 151.8. In 1986, the UKB purchased the 2.03-acre parcel and began to offer public bingo there. In 1988, the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701, et seq., was enacted. Among other things, IGRA provides that gaming shall not be conducted on lands acquired by the Secretary of the Interior in trust for the benefit of an Indian tribe after October 17, 1988 unless the Indian tribe has no reservation on October 17, 1988 and such lands are located in Oklahoma and “are within the boundaries of the Indian tribe’s former reservation, as defined by the Secretary.” 25 U.S.C. § 2719(a)(2)(A)(i). In the “Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999” (1999 Appropriations Act), Congress explicitly amended previous language as follows: [T]he sixth proviso under [the 1992 Appropriations Act] is hereby amended to read as follows: “Provided further, That until such time as legislation is enacted to the contrary, no funds shall be used to take land into trust within the boundaries of the original Cherokee territory in Oklahoma without consultation with the Cherokee Nation[.]” In April 2006, the Region denied a trust acquisition request by the UKB for a 76- acre parcel. After a number of twists and turns, the UKB amended its application to take the 76 acres into trust for the UKB Corporation rather than the UKB tribe, and pursuant to 25 U.S.C. § 5203, rather than § 5 of the IRA, 25 U.S.C. § 5108. On May 21, 2011, the Region granted the UKB’s amended application. In September, 2019, the Tenth Circuit Court of Appeals reversed the injunction preventing the Secretary of Interior from taking the 76- acre parcel into trust. *Cherokee Nation v. Bernhardt*, 936 F.3d 1142 (10th Cir. 2019), *petition for cert. filed*, Jan. 23, 2020 (No. 19-937). The circuit panel held that: (1) the BIA need not consider the definition of “Indian” under the IRA when taking land into trust pursuant to the OIWA. Put another way, the court concluded that “section 3 of OIWA was not meant to be constrained by the definition of ‘Indian’ in the IRA” and, “[b]ecause it is undisputed that the UKB is a ‘recognized tribe or band of Indians residing in Oklahoma’ ... that has incorporated pursuant to OIWA ... the BIA properly concluded that statutory authority exists for the Secretary to take the [76-acre parcel] into trust for the UKB Corporation.” *Id.* at 1155.; (2) the Nation’s consent is not required for the

BIA to take the 76-acre parcel into trust. *Id.* at 1155-59; and (3) the BIA’s consideration of two regulatory factors for land-into-trust acquisitions – “jurisdictional problems and potential conflicts of land use which may arise,” and whether the BIA is “equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status” – was not arbitrary and capricious. *Id.* at 1159-62. OIWA’s reference to the IRA implicitly grants the Secretary authority to take land into trust for incorporated Oklahoma tribal groups (like the UKB). 936 F.3d at 1149 (emphasis in original). The appellate court’s reasoning demonstrates that the Assistant Secretary reasonably concluded that the OIWA provides statutory authority for the Department to take the 2.03-acre parcel into trust for the UKB Corporation. Under the circumstances, the court shall enter a Judgment declaring that that the July 30, 2012 decision of the Assistant Secretary – Indian Affairs, U.S. Department of the Interior, to take the 2.03-acre parcel into trust for the benefit of the United Keetoowah Band of Cherokee Indians in Oklahoma Corporation for the purpose of conducting Indian gaming was arbitrary and capricious and contrary to law; that the Cherokee Nation’s “former reservation” is not the “former reservation” of the United Keetoowah Band of Cherokee Indians in Oklahoma under 25 U.S.C. § 2719(a)(2)(A)(i) and 25 C.F.R. § 292.9; and that because the 2.03-acre parcel is not within the “former reservation” of the UKB, gaming regulated by the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721, cannot be conducted on the 2.03-acre parcel pursuant to 25 U.S.C. § 2719(a)(2)(A)(i). Defendants David Bernhardt, in his official capacity as Secretary of the Interior, is hereby enjoined from taking the 2.03-acre parcel into trust for gaming purposes for the United Keetoowah Band of Cherokee Indians in Oklahoma Corporation.

12. Burt Lake Band of Ottawa and Chippewa Indians v. Bernhardt

2020 WL 1451566 (D.D.C. Mar. 25, 2020). DOI's decision not to amend regulation to allow re-petitioning by Indian tribes previously denied federal recognition was arbitrary and capricious. Indian tribe brought action against Department of the Interior seeking review of decision not to include provision in amended regulation to allow limited re-petitioning by tribes previously denied federal recognition, and asserting due process and equal protection claims. Parties cross-moved for summary judgment. The District Court, Amy Berman Jackson, J., held that: 1) Department acted within its authority when it decided not to include re-petitioning provision, but 2) Department's decision not to include provision was arbitrary and capricious. Plaintiff's motion granted; defendants' motion denied.

13. Western Refining Southwest, Inc. v. U.S. Department of the Interior

450 F. Supp. 3d 1214, 2020 WL 1536149 (D.N.M. Mar. 31, 2020). This case is before the Court on review of two decisions by the Interior Board of Indian Affairs (“IBIA”). The Court has jurisdiction to review that decision under the Administrative Procedures Act (“APA”), 5 U.S.C. § 701 et seq. This case presents the novel question of whether the IBIA may lawfully require consent from not only the holder of a life estate in an Indian allotment, but also that person’s heirs, before granting a right-of-way over the property. The Court concludes that it was not improper for the IBIA to look to the common law to fill gaps in the relevant statutory scheme, nor was it improper for it to apply its decision retroactively to the right-of-way sought by Western. However, the IBIA erred by raising the issue sua sponte and then ruling on it without giving the parties an opportunity to be heard. Plaintiffs (collectively, “Western”) operate a buried crude oil pipeline that runs 75 miles from the San Juan Basin to an oil refinery near Gallup, New Mexico. The pipeline traverses tribal, federal, state, and privately-owned land, and Western holds easements for rights-of-way across 74.48 miles of the pipeline. However, this case arises from a dispute over the easement for a .52-mile segment of pipeline that crosses Navajo Indian Allotment No. 2073—land that is held in trust by the United States and allotted to individual citizens of the Navajo Nation. Western’s argument has two parts. First it relies on Tenth Circuit decisions limiting an agency’s ability to use administrative adjudicatory proceedings to overthrow a rule on which a party has previously relied. Next, it argues that principles of due process and equal protection require—via the five-factor test set forth by the Tenth Circuit in *Stewart Capital Corp. v. Andrus*, 701 F.2d 846, 848 (10th Cir. 1983)—that the Court reverse the IBIA’s ruling. Neither argument is persuasive under the facts of this case. Western argues that the Tenth Circuit’s decisions in *De Niz Robles v. Lynch*, 803 F.3d 1165 (10th Cir. 2015) and *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142 (10th Cir. 2016) demonstrate that the IBIA created a new rule through its adjudication procedures and then wrongfully applied it retroactively to overturn the BIA’s renewal of Western’s easement. No party before the BIA or the IBIA had raised the issue of whether the owner of a life estate holds the power to grant a right-of-way that extends past his or her lifetime. No remainderman had asserted his rights. Rather, the IBIA raised the issue on its own, and then decided it without giving the parties an opportunity to be heard. Thus, Western has not waived its right to appeal the IBIA’s sua sponte decision on remainderman consent. Accordingly, the Court concludes that the IBIA was arbitrary and capricious in denying Western’s application for right-of-way based on a legal issue that was one of first impression and which none of the parties raised or were permitted to brief prior to the IBIA’s decision. Thus, Western’s appeal should be granted. The IBIA’s decisions overturning the twenty-year renewal of Western’s right-of-way over Allotment No. 2073 are hereby reversed.

14. Hudson v. Zinke

453 F. Supp. 3d 431, 2020 WL 1821120 (D.D.C. Apr. 10, 2020). Certification of Indian tribe's secretarial election based on quorum of registered voters, as opposed to all adult members, was contrary to law. Enrolled member of the Three Affiliated Tribes of Fort Berthold Reservation in North Dakota sought review of Interior Board of Indian Appeals' approval of tribes' secretarial election which amended the tribes' constitution and bylaws to change composition of Tribal Business Council, alleging that election lacked requisite 30% quorum under tribal constitution and Indian Reorganization Act. Parties cross-moved for summary judgment. The District Court, Tanya S. Chutkan, J., held that as matter of first impression, certification of tribe's secretarial election based on quorum of registered voters, as opposed to quorum of adult members of tribe, was contrary to law. Plaintiff's motion granted; defendant's motion denied.

15. Tsi Akim Maidu of Taylorsville Rancheria v. United States Department of the Interior

2020 WL 1974213 (E.D. Cal. Apr. 24, 2020). This matter is before the court pursuant to Defendant United States Department of the Interior, Defendant Ryan Zinke, and Defendant Michael S. Black's (collectively "Defendants") February 25, 2019, Motion to Dismiss. For the reasons set forth below Defendants' Motion to Dismiss is GRANTED in part and DENIED in part. In 1958, the Department of the Interior was authorized to distribute the assets of forty-one rancherias to "individual Indians" under the California Rancheria Act ("CRA"). Defendants allegedly sold the Taylorsville Rancheria under the CRA in 1966. Plaintiff filed its original complaint December 15, 2016, seeking a declaration from the Court that it "is a federally [recognized] tribe" and that its members "are Indians whose status have not been vanquished." Defendants argued Plaintiff was on notice of its loss of federal recognition since "at least 1979, when it was not included on the first published list of federally recognized tribes," and "has not been included on the list ever since." *Id.* at 15–17. In the alternative, Defendants argued Plaintiff knew it was not a federally recognized tribe in 1998 when it filed its letter of intent to petition for acknowledgement as an Indian tribe. *Id.* at 16 n.4. This Court granted Defendants' motion to dismiss solely on the Statute of Limitations issue on January 3, 2019. Defendants assert that the FAC is nearly identical to the original and that Plaintiff again alleges the same facts this Court cited in finding Plaintiff was on notice of the loss of its tribal status in 1998, when it filed its intent to petition for acknowledgment as an Indian tribe. *Id.* Defendants argue "none of these new allegations address, much less show, that plaintiff was not [on] notice of its loss of federal tribal status until six years before filing its complaint, which is the limited purpose for which the Court allowed amendment." Because the FAC and Plaintiff's Opposition, when read together, appear to challenge the Department of the Interior's decision in its 2015 letter that Plaintiff is ineligible for Part 83 acknowledgment, this Court finds that such a claim would not be time-barred under the Administrative Procedure Act's six-year statute of limitations. Therefore, the claim as to that decision may proceed as an APA judicial review case in the normal course. For the foregoing

reasons, the motion is Granted as to the loss of status claim with prejudice and Denied as to the challenge to the Department's 2015 letter denying eligibility for Part 83 acknowledgment.

16. Club One Casino, Inc. v. Bernhardt

959 F.3d 1142, 2020 WL 2745319 (9th Cir. May 27, 2020). Indian tribe had some jurisdiction over off-reservation property used for casino-style gaming. Operators of two cardroom gaming facilities in California brought action pursuant to the Administrative Procedure Act (APA) against Department of the Interior, Secretary of the Interior, and Acting Assistant Secretary for Indian Affairs challenging the issuance of Secretarial Procedures permitting Indian tribe to conduct casino-style gaming on off-reservation property located approximately 25 miles from one operator's gaming facility and approximately 65 miles from the other operator's facility. The United States District Court for the Eastern District of California, *Anthony W. Ishii*, Senior District Judge, 328 F. Supp. 3d 1033, granted summary judgment in favor of defendants. Operators appealed. The Court of Appeals, Murguia, Circuit Judge, held that: 1) Indian tribe had some jurisdiction over off-reservation property used for casino-style gaming; 2) Enclaves Clause did not apply to off-reservation land taken into trust for Indian tribe; and 3) federal cessation statute, requiring state to grant jurisdiction over land, did not apply. Affirmed.

17. Mdewakanton Band of Sioux in Minnesota v. Bernhardt

464 F. Supp. 3d 316, 2020 WL 2800615 (D.D.C. May 30, 2020). This is an action for a writ of mandamus requiring the Department of the Interior to list the Mdewakanton Band of Sioux in Minnesota as a federally recognized Indian tribe. Plaintiffs argue that the United States has already recognized the Mdewakanton Band through various treaties and congressional acts, and therefore, Interior is required to list it as federally recognized. Defendants have moved to dismiss, arguing, among other things, that the Mdewakanton Band has failed to exhaust administrative remedies. For that reason, as explained below, the Court will grant the motion. Before filing this suit, the Mdewakanton Band allegedly submitted a petition under 25 C.F.R. § 83 “seeking reaffirmation” as an acknowledged tribe. Compl. ¶¶ 6, 200. That regulation, known simply as Part 83, was promulgated by Interior under the Indian Reorganization Act and sets out procedures for Indian groups to obtain formal recognition. *Id* ¶ 149. Because 25 C.F.R. § 83.3 states that it “applies only to indigenous entities that are not federally recognized Indian tribes,” Plaintiffs assert that Part 83 does not apply to them because they are recognized, just not listed—but that they still submitted a Part 83 petition out of an “abundance of caution.” *Id* ¶¶ 150–51, 200. Interior did not act on the petition. Plaintiffs do not seek review of Interior's inaction on their 2014 petition under the Administrative Procedure Act (APA). Defendants moved to dismiss the complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Nothing about the current administrative scheme leaves Plaintiffs without administrative recourse. Indeed, Part 83 explicitly contains “criteria for a previously federally acknowledged petitioner” by which a tribe may produce evidence that it had

“treaty relations with the United States.” 25 C.F.R. § 83.12. Because Part 83 provides an administrative process to adjudicate Plaintiffs’ claim that the Mdewakanton Band is federally recognized and should be added to Interior’s list, resort to administrative remedies is not “clearly useless” and Plaintiffs’ futility argument fails. For all these reasons, Defendant’s Motion to Dismiss, will be granted.

18. Mashpee Wampanoag Tribe v. Bernhardt

466 F. Supp. 3d 199, 2020 WL 3037245 (D.D.C. June 05, 2020). This case involves a challenge to a decision of the Secretary of the Interior determining that the Mashpee Wampanoag Tribe (the “Tribe” or “Mashpee”) did not meet either the first or second definition of “Indian” in the Indian Reorganization Act (“IRA”) because the Tribe was not “under federal jurisdiction” as of 1934. The Secretary had reached the opposite conclusion in 2015, but that decision was challenged and a federal district court in Massachusetts ultimately remanded for the Secretary to reassess the Tribe’s application under the court’s reading of the statute. On remand, the Secretary issued the decision that the Mashpee Tribe challenges here. Upon careful consideration of the parties’ filings, the Court will grant the plaintiff’s motion for summary judgment and remand to the agency for further proceedings. The United States Secretary of the Interior (the “Secretary”) is delegated the authority to acquire land in trust for Indian tribes. 25 U.S.C. § 5108. The Secretary’s authority under the IRA is cabined by whether a tribe meets the statute’s definition of “Indian,” which is found in § 19 of the statute and codified at 25 U.S.C. § 5129: The term “Indian” as used in this Act shall include all persons of Indian descent [1] who are members of any recognized Indian tribe now under Federal jurisdiction and [2] all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include [3] all other persons of one-half or more Indian blood. 25 U.S.C. § 5129. In 2009, the United States Supreme Court interpreted the IRA’s definition of “Indian” when the State of Rhode Island challenged the Secretary’s plan to accept land in trust for use by the Narragansett Indian Tribe, which occupied much of present-day Rhode Island in colonial times. *Carcieri v. Salazar*, 555 U.S. 379, 381-82 (2009). The Court analyzed only the first of the three definitions of “Indian” in § 19 of the IRA and held that the word “now” in the phrase “now under federal jurisdiction” did not refer to the time of the statute’s application, but rather referred to 1934, the year in which the IRA was enacted. *Id.* at 395. The meaning of the phrase “under federal jurisdiction” was not a question before the Court in *Carcieri v. Salazar*, so the majority did not elaborate on the meaning of that phrase. In a concurring opinion, however, Justice Breyer expressed some views on this matter. He noted that the Court’s interpretation of “now” as meaning “in 1934” was “less restrictive than it first appears” because “a tribe may have been ‘under federal jurisdiction’ in 1934 even though the federal government did not believe so at the time. The Littlefield plaintiffs challenge the Secretary’s interpretation of the IRA’s second definition of “Indian,” arguing that the Mashpee Tribe did not qualify under a proper reading of the IRA’s second definition, and therefore the Secretary lacked authority to acquire the land in trust. *Id.* at

394. The district court agreed. It interpreted the IRA's second definition of "Indian" as "us[ing] the word 'such' to indicate that the 'members' to which it refers are those described in the first definition." *Littlefield v. U.S. Dep't of Interior*, 199 F. Supp. 3d 391, 397 (D. Mass. 2016). The phrase "under federal jurisdiction" in the IRA's first definition of "Indian" therefore also qualifies the IRA's second definition of "Indian." The court stated that "the Mashpees are not considered 'Indians' " under the IRA's second definition "because they were not under federal jurisdiction in June 1934," and the Secretary therefore "lacked the authority to acquire land in trust for them, at least under the rationale ... offered in the Record of Decision." *Id.* The Secretary's subsequent rejection of the evidence that individual Mashpee students were educated at a BIA school directly contradicted the M-Opinion, administrative precedent, and judicial precedent. On remand, the Secretary must accept this evidence as probative evidence and view it "in concert" with the other probative evidence to determine whether the Tribe was under federal jurisdiction before 1934. The M-Opinion allows for evidence about tribal members to support a finding that a tribe, itself, was under federal jurisdiction. The Secretary's stated reason for discounting the 1911 BIA school census therefore is inconsistent with the M-Opinion. The Court also concludes that the Secretary failed to treat the reports and surveys in the record consistently with the M-Opinion and the Department's precedent. As discussed below, the reasons given by the Secretary for discounting various reports and surveys in the record are insufficient and conflict with the way in which the Department has treated similar evidence in the past. The Court hereby directs the Department to apply the two-part test in M-37209 – correctly this time – on remand. For the foregoing reasons, the Court will grant the Mashpee Tribe's motion for summary judgment and deny the federal defendants' and defendant-intervenors' motions for summary judgment.

19. John v. Secretary of Interior through Acting Assisting Secretary Bureau of Indian Affairs

808 Fed. Appx 541, 2020 WL 3074202 (9th Cir. June 10, 2020). Appellants Timothy John et al. appeal the district court's decision granting summary judgment to the Secretary of the Interior. Appellants argue that the Secretary's decision to exclude them from the Western Shoshone Judgment Roll was arbitrary, capricious, and unlawful. We have jurisdiction under 28 U.S.C. § 1331, and we affirm. Appellants filed their initial applications to be included on the Western Shoshone Judgment Roll in 2010. The Bureau of Indian Affairs Regional Office denied their request. The Regional Office found that because Appellants' great-great grandmother Hattie Dyer was not 4/4 Shoshone, all eight Appellants lacked the requisite blood quantum level to be included on the roll. Appellants concede that if Hattie Dyer was anything less than 4/4 Shoshone, they are ineligible for inclusion on the Judgment Roll. Appellants argue that because the traditional census rolls typically relied upon by the Secretary show that Hattie Dyer was 4/4 Shoshone, the Secretary arbitrarily and capriciously determined that she was one-half Paiute when he relied on other evidence in the decision. The regulations here, however, permit the Secretary to consider "other documents acceptable to the Secretary" in evaluating whether an individual is eligible for inclusion on the Western Shoshone Judgment Roll. *See* 25 C.F.R. § 61.4(k)(2). The Secretary relied upon

the evidence from the 1977 Northern Paiute Judgment Roll appeal filed by Hattie’s daughter, as well as the Administrative Law Judge’s letter from Hattie Dyer’s probate hearing, when the Secretary determined that Appellants are ineligible for benefits from the Roll. These materials both indicate that Hattie Dyer was not full-blooded Shoshone, and provide substantial evidence supporting the Secretary’s determination that Hattie Dyer was at least one-half Paiute. Because the Secretary permissibly concluded that Hattie Dyer was not 4/4 Shoshone, his decision to exclude Appellants from the Western Shoshone Judgment Roll was lawful. Affirmed.

20. Prairie Band Potawatomi Nation v. Mnuchin

2020 WL 3402298 (D. D.C. June 11, 2020). Plaintiff Prairie Band Potawatomi Nation asks the court on an emergency basis to enjoin the Secretary of Treasury from disbursing the remaining 40% of \$8 billion that Congress allocated under the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) to assist Tribal governments combat the COVID-19 pandemic. *See* Pl.’s Mot., ECF No. 2. The Secretary intends to start disbursing those funds, which total \$3.2 billion, as early as tomorrow, Friday, June 12, 2020. Plaintiff contends that the Secretary’s initial 60% distribution of CARES Act funds to Tribal governments was arbitrary and capricious under the Administrative Procedure Act (APA), because it relied exclusively on a population data set from the Department of Housing and Urban Development that undercounted Plaintiff’s tribal population and, consequently, resulted in a \$7.65 million underfunding of its proportionate share of CARES Act funds. *See generally* Pl.’s Mot. For the reasons that follow, Plaintiff’s motion for injunctive relief is denied. First, Plaintiff fails to demonstrate a likelihood of success on the merits. In *Lincoln v. Vigil*, the Supreme Court stated that, “as long as [an] agency allocates funds from a lump-sum appropriation to meet permissible statutory objectives, § 701(a)(2) [of the APA] gives the courts no leave to intrude. ‘To that extent,’ the decision to allocate funds ‘is committed to agency discretion by law.’” 508 U.S. 182, 193 (1993) (citing 5 U.S.C. § 701(a)(2)) (cleaned up); *see also Physicians for Social Responsibility v. Wheeler*, 956 F.3d 634, 642 (D.C. Cir. 2020). It would be patently unfair to make Tribal governments wait any longer to receive the remaining CARES Act funds. The Secretary already has well surpassed the 30-day period within which Congress ordered the distribution of emergency relief to Tribal governments. *See* 42 U.S.C. § 801(b)(1); *see generally Agua Caliente Band of Cahuilla Indians v. Mnuchin*, No. 20-cv- 01136 (APM), 2020 WL 2331774 (D.D.C. May 11, 2020). And the Secretary, finally, is on the cusp of distributing those funds. The public interest clearly favors the distribution of \$3.2 billion now, and not until after this belatedly filed dispute—involving a meaningful but relatively small amount for one tribe—is resolved. For the foregoing reasons, Plaintiff’s motion for injunctive relief is denied.

21. Winnemucca Indian Colony v. United States ex rel. Department of the Interior

819 Fed. Appx 480, 2020 WL 3170850 (9th Cir. June 15, 2020). This is a dispute between two groups, referred to as the Wasson faction and the Ayer faction, over which group is the rightful

tribal government of the Winnemucca Indian Colony. Although the district court proceedings on review were largely a victory for the Wasson faction, the Ayer faction argues the district court lacked subject matter jurisdiction over this case from the start. We conclude that the district court lacked subject matter jurisdiction and remand with instructions to dismiss. Finality is a jurisdictional requirement to obtaining judicial review under the APA. There was no final agency action here because at the time the complaint was filed, the Bureau of Indian Affairs (BIA) had not reached a final decision on whether it would recognize any group as the Colony’s tribal council, or whether any such recognition was warranted. Instead, the BIA was in the middle of complying with a remand order from the Interior Board of Indian Appeals (IBIA) to answer those very questions. Vacated and Remanded with instructions to Dismiss.

22. Agua Caliente Band of Cahuilla Indians v. Mnuchin

2020 WL 3250701 (D.D.C. June 15, 2020). This matter is once again before the court on a motion for preliminary injunction. Plaintiffs are Indian tribes that seek, for a second time, to compel Secretary of the Treasury Steven Mnuchin to allocate undistributed funds appropriated by Congress under the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat 281 (2020) (“CARES Act”), to aid Tribal governments in combating the devastating impacts of the COVID-19 pandemic. Under Title V of the CARES Act, Congress set aside \$8 billion for Tribal governments, 42 U.S.C. § 801(a)(2), and directed the Secretary to distribute such funds “not later than 30 days after March 27, 2020,” that is, by April 26, 2020. *Id.* § 801(b)(1). On May 11, 2020—16 days after the CARES Act’s statutory deadline—the court denied Plaintiffs’ first request for injunctive relief. See *Agua Caliente Band of Cahuilla Indians v. Mnuchin*, Case No. 20-cv-01136 (APM), 2020 WL 2331774 (D.D.C. May 11, 2020). The court found that “Plaintiffs ... [had] not carried their burden to show that the Secretary’s delay thus far is so egregious as to warrant mandamus relief today.” *Id.* at *1. The court so held, in part, because only six days earlier—May 5, 2020—the Secretary had begun to distribute 60% of the \$8 billion and had announced steps to gather information and determine a formula for distributing the remaining 40% of funds. The court reiterates what it said in denying the Prairie Band Plaintiff’s motion for injunctive relief: “[I]t would be patently unfair to make Tribal governments wait any longer to receive the remaining CARES Act funds.” Prairie Band Mem. Op. at 4. The 80 days they have waited, when Congress intended receipt of emergency funds in less than half that time, is long enough. The equities and the public interest favor immediate disbursement of the remaining Title V funds. For the foregoing reasons, Plaintiffs’ Renewed Motion for Preliminary Injunction is granted.

23. Solenex LLC v. Bernhardt

962 F.3d 520, 2020 WL 3244004 (D.C. Cir. June 16, 2020). Oil and Gas. Delay by Department of the Interior in canceling oil and gas lease, 33 years after it was executed, was not arbitrary and

capricious. Assignee of oil and gas lease on federal land brought action under the Administrative Procedure Act (APA), challenging decision by the Secretary of the Interior to cancel the lease. The United States District Court for the District of Columbia, Richard J. Leon, Senior District Judge, 334 F. Supp. 3d 174, granted assignee's motion for summary judgment and denied government's cross-motion for summary judgment. Government appealed, and conservation groups and Indian tribe intervened and appealed. The Court of Appeals, Millett, Circuit Judge, held that: agency's delay in canceling lease did not alone render its cancellation decision arbitrary and capricious, and 2) agency's alleged failure to consider leaseholder's reliance interests did not render cancellation decision arbitrary and capricious. Vacated and remanded.

24. Confederated Tribes of Chehalis Reservation v. Mnuchin

471 F. Supp. 3d 1, 2020 WL 3489479 (D.D.C. June 26, 2020). Under Title V of the Coronavirus Aid, Relief, and Economic Security Act, or CARES Act, Congress appropriated \$8 billion for “Tribal governments” to combat the COVID-19 pandemic. This consolidated case concerns who qualifies as a “Tribal government” under the CARES Act. Plaintiffs are a group of federally recognized tribes from the lower 48 states and Alaska; they ask this court to permanently enjoin the Secretary of the Treasury from making Title V payments to Alaska Native regional and village corporations, or ANCs. ANCs are not federally recognized tribes; rather, they are for-profit corporations established by Congress in 1971 under the Alaska Native Claims Settlement Act and recognized under Alaska law. The CARES Act defines “Tribal governments” to mean “the recognized governing body of an Indian Tribe.” The Act in turn defines “Indian Tribe” by cross-referencing the definition of that term in another statute: the Indian Self-Determination and Education Assistance Act. The Secretary asserts that the ISDEAA definition must be read to, in effect, exempt ANCs from satisfying the eligibility clause. That interpretation, the Secretary claims, is faithful to congressional design, because the Confederated Tribes’ alternative reading, if accepted, would render the listing of ANCs in the ISDEAA definition surplusage and defeat Congress’s intent to make ANCs eligible for ISDEAA self-determination contracts. Though the court ruled at the preliminary injunction stage that ANCs likely did not qualify for CARES Act funds, as explained below, the court now concludes otherwise: ANCs qualify as “Indian Tribes,” and their boards of directors are “recognized governing bod[ies],” for purposes of the CARES Act. Accordingly, the court holds that ANCs are eligible for Title V funding. The parties agree that, as a matter of pure grammar, the eligibility clause contained in the definition of “Indian Tribe” in ISDEAA and the CARES Act applies to ANCs. *See* Hr’g Tr. at 54–55; Intervenor’s Opp’n at 4–5; Confederated Tribes Mot. at 13–14. The eligibility clause plainly modifies each of the nouns that precedes it, including ANCs. Here, according to the Secretary, Congress expressly inserted ANCs into the statutory text, despite knowing that ANCs could not satisfy the eligibility clause because of their status as for-profit corporations. Subjecting ANCs to the eligibility clause therefore would negate their addition, rendering the inclusion of “Alaska Native regional or village corporation” surplusage. Although a close question, the court is now convinced that, in 2020 when Congress

passed the CARES Act, it could not have intended the eligibility clause to apply ANCs. Admittedly, reading the ISDEAA definition as the Secretary posits gives rise to an odd grammatical result. No one disputes that an “Alaska Native village”—the first entity listed in the Alaska clause—must satisfy the eligibility clause to qualify as an “Indian tribe” under ISDEAA. See *Confederated Tribes of Chehalis Reservation v. Mnuchin*, 456 F. Supp. 3d 152, 168 (D.D.C. 2020). An Alaska Native village that is not “recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians” cannot contract with a federal agency under ISDEAA. That reading, however, creates the strange result that the eligibility clause modifies the first in the series of three nouns that comprises the Alaska clause, but not the last two. That is an unnatural reading, to be sure. The court’s primary goal, however, is to discern the “intent embodied in the statute Congress wrote.” *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001). Treating ANCs as not subject to the eligibility clause achieves that purpose. Congress expressly included ANCs in the definition of “Indian tribe” under ISDEAA to make them eligible to enter into self-determination contracts with federal agencies. By incorporating wholesale ISDEAA’s definition of “Indian Tribes” into the CARES Act, Congress declared ANCs to be eligible for Title V emergency relief funds. ISDEAA’s drafting history lends support to this conclusion. The court also concludes that, to the extent there is ambiguity in the definition of “Indian tribe,” the Secretary’s position is entitled to Skidmore deference. Under *Skidmore v. Swift & Co.*, the weight a court affords to an agency interpretation “will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” 323 U.S. 134, 140 (1944). The court does no more than opine on the status of ANCs under ISDEAA and the CARES Act, and it reaches a holding that is consistent with longstanding treatment of ANCs under ISDEAA by the federal government. The court’s ruling in no way elevates ANCs to “super-tribal status” as the Confederated Tribes Plaintiffs maintain; nor does it allow ANCs to “compete” with federally recognized tribes in any other context as the Cheyenne River Sioux Plaintiffs fear. The court’s decision simply recognizes that ANCs are eligible for CARES Act funds, as Congress intended—no more, no less. For the foregoing reasons, the court grants the Secretary’s and Defendant-Intervenors’ Motions for Summary Judgment, and denies Plaintiffs’ Motions for Summary Judgment.

25. Holy v. United States Department of Interior

2020 WL 3542251 (D.S.D. June 30, 2020). Plaintiffs are citizens of the Oglala Sioux Tribe (“OST”) and members of the Constitutional Reform Committee Task Force (“Task Force”), a group convened to draft proposed amendments to the OST Constitution. They brought this suit against defendants, federal officials and agencies, alleging the Bureau of Indian Affairs (“BIA”) failed to extend a deadline to submit a petition for an election. Plaintiffs also assert the one-year limit established by regulation is arbitrary and that defendants’ alleged failure to extend the deadline violated a trust responsibility owed to them as Native Americans. Defendants moved to

dismiss the complaint. For the reasons given below, the court grants defendants' motion and dismisses the complaint. Plaintiffs are members of the Task Force. The Task Force collected signatures for the petition required to hold an election, beginning on May 21, 2018. However, on May 28, the OST Tribal Council “decided to table the constitutional reform initiative” pending “feedback” from the tribal districts. Nevertheless, the Task Force was able to obtain 4,856 signatures for the petition by May 2019. The Task Force formally requested an election on May 8, 2019, by submitting the petition to defendant John Long, the Superintendent of BIA’s Pine Ridge Agency. On June 17, defendant Danielle McQuillen, the then-Acting Regional Director of BIA’s Great Plains Regional Office, found the petition invalid in a letter sent to Ms. New Holy. BIA concluded 1,292 of the petition’s 4,825 signatures were invalid for a number of reasons. Docket 15-1 at p. 2. It confirmed the validity of 3,563 signatures, less than the required 4,094 which constituted one-third of all eligible OST voters. The IRA governs ratifying proposed amendments to the OST Constitution. Amendments “become effective when ratified by a majority vote of the adult members of the tribe ... at a special election authorized and called by the Secretary [of the Interior] under such rules and regulations as the Secretary may prescribe[.]” 25 U.S.C. § 5123(a)(1). Here, there is no source of law requiring the BIA to waive its petition deadline. Waiver is clearly discretionary. 25 C.F.R. § 1.2. Because the APA does not permit judicial review of the BIA's alleged failure to waive the regulation establishing the signature collection deadline, defendants retain the United States' sovereign immunity. Count I is dismissed for lack of subject-matter jurisdiction. The court does not have the power to judge the wisdom of BIA’s choice in the regulations. Count II is dismissed for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). Count III asserts, in its entirety, that defendants “acted arbitrarily, capriciously, and in direct violation of federal law and their trust responsibility to Plaintiffs by failing to exercise their discretion pursuant to 25 C.F.R. § 1.2 and unreasonably failing to proceed with the secretarial election. To state a breach of trust claim, plaintiffs must “identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties.” *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003). Plaintiffs do not identify any source of law establishing a trust duty BIA owes them as individuals with regard to secretarial election signature collection rules. For the reasons given above, it is Ordered that defendants' motion to dismiss (Docket 8) is granted. It Is Further Ordered that the complaint is dismissed.

26. Grondal v. Mill Bay Members Association, Inc.

471 F. Supp. 3d 1095, 2020 WL 3892462 (E.D. Wash. July 09, 2020). This case involves an eleven-year dispute over land on the banks of Lake Chelan known as Moses Allotment No. 8, or “MA-8.” MA-8 is highly fractionated allotment land, held in trust by the United States Government for Indian allottees who are predominantly members of the Confederated Tribes of the Colville Reservation. Plaintiffs in this case are non-Indians who represent a group of individuals who purchased camping memberships to use MA-8 for recreational purposes allegedly

through 2034. Plaintiffs purchased these camping memberships from William Evans Jr., who had leased MA-8 from the Indian allottees in accordance with federal regulations, in order to sell camping memberships to Plaintiffs. The problem is that Evans' lease of MA-8 expired in 2009, not 2034, due to his failure to renew it. Because Plaintiffs' right to use MA-8 flowed from Evans' lease, that right expired in 2009 along with the lease. Accordingly, It Is Hereby Ordered: Plaintiffs have had no right to occupy any portion of MA-8 after February 2, 2009. Plaintiffs are in trespass, and their removal from the subject property is authorized. Judgment is entered for the Government (Federal Defendants) on its trespass counterclaim.

27. Singer v. Office of Navajo and Hopi Indian Reservation

2020 WL 4530477 (D. Ariz. Aug. 06, 2020). Plaintiff Bernaleen Singer seeks judicial review of the administrative decision by the Office of Navajo and Hopi Indian Relocation (“ONHIR”) denying her application for relocation benefits under the Navajo-Hopi Settlement Act. (Doc. 1.) At issue are the parties’ cross-motions for summary judgment, which are fully briefed. (Docs. 29-32, 39- 41.) For the following reasons, the Court will grant Ms. Singer’s motion, deny ONHIR’s motion, and remand ONHIR’s decision for further proceedings consistent with this decision. Congress passed the Navajo-Hopi Settlement Act in 1974, which authorized the district court to make a final partition of the reservation after federally mandated mediation efforts between the nations failed. *See Sekaquaptewa v. MacDonald*, 626 F.2d 113, 115 (9th Cir. 1980). The Act also directed creation of ONHIR’s predecessor, the Navajo-Hopi Relocation Commission, to provide services and benefits to help relocate residents located on lands that the partition allocated to the other nation. *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. The Court remands this case to the IHO to decide whether Ms. Singer was a party to a valid common law marriage, thereby giving her head of household status, prior to July 7, 1986. It Is Ordered that Ms. Singer’s motion for summary judgment, insofar as it requests remand for further proceedings, (Doc. 29) is Granted. ONHIR’s motion for summary judgment (Doc. 31) is Denied. The matter is Remanded for further proceedings consistent with this decision.

28. Alegre v. United States

2020 WL 4673099 (S.D. Cal. Aug. 12, 2020). Presently before the Court is Defendants United States of America, Department of the Interior, and Individual Defendants Michael Black, Weldon Loudermilk, Amy Dutschke, and Javin Moore’s (sued in their official capacities) (collectively, “Federal Defendants”) motion to dismiss for lack of jurisdiction Plaintiffs’ third cause of action in Plaintiffs’ Fourth Amended Complaint. For the reasons set forth below, the Court Grants Federal Defendants’ motion to dismiss, and Dismisses Plaintiffs’ third cause of action from the Fourth

Amended Complaint Without Leave to Amend. The following facts are taken from the Fourth Amended Complaint and construed as true for the limited purpose of resolving the instant motion. Plaintiffs are the descendants of Jose Juan Martinez, Guadalupe Martinez, and their daughter Modesta Martinez Contreras (collectively, “Martinez Ancestors”). (Fourth Amended Complaint ¶¶ 12–19.) Plaintiffs are split into Groups A and B. *Id.* Group A Plaintiffs include Plaintiffs who are: residents of San Diego County, “direct lineal descendants of Jose Juan Martinez and Guadalupe Martinez,” and “direct lineal descendants of Modesta Contreras.” *Id.* ¶ 15. Group A Plaintiffs are enrolled in the San Pasqual Band of Mission Indians (“the Band”) but are not federally recognized as Band members by the Bureau of Indian Affairs (“BIA”). *Id.* Group B Plaintiffs are also San Diego County residents, are enrolled in the Band, and are federally recognized by the BIA as Band members. *Id.* ¶ 18. Group A Plaintiffs assert each of the Martinez Ancestors were full blood San Pasqual Indians. *Id.* ¶ 28. In 2005, Group A Plaintiffs submitted their applications to the Enrollment Committee for enrollment with the Band. *Id.* ¶ 29. The Enrollment Committee unanimously voted that Plaintiffs had established they were qualified for enrollment. *Id.* This determination “was predicated on a finding that Plaintiffs’ ancestor Modesta’s blood degree should be increased from 3/4 to 4/4” because “both of Modesta’s parents were full blood San Pasqual Indians, based upon the totality of the documentary evidence.” *Id.* ¶ 30. The Band’s General Council then unanimously agreed with the Enrollment Committee on April 10, 2005. *Id.* ¶ 30. Later, on September 12, 2005, the Band’s Business Committee concurred with both the General Council and the Enrollment Committee and sent its findings to former Superintendent of the Southern California Agency, James Fletcher (“Fletcher”). *Id.* ¶ 31. Group A Plaintiffs allege that under federal law and the Tribal Constitution, they were eligible to be enrolled and federal recognized as San Pasqual Indians, and that Federal Defendants were required to accept the Tribal recommendations unless the recommendation was “clearly erroneous.” *Id.* On September 22, 2005, the Enrollment Committee—in a separate proceeding—requested the BIA increase Modesta’s blood degree from 3/4 to 4/4-degree San Pasqual blood. Plaintiffs filed suit, alleging that Federal Defendants’ failure to add the Group A Plaintiffs to the Band and instead enrolling non-San Pasqual individuals into the Tribe constituted a violation of Group A Plaintiffs’ Fifth Amendment right to equal protection under the law. *Id.* ¶ 49. In addition, Plaintiffs’ FAC alleges “ten specific acts” which demonstrate Defendants violated the Equal Protection Clause of the Fifth Amendment, including by: enrolling non-San Pasqual persons into the Band; and by enrolling Group A Plaintiffs’ cousins into the Band, but not Plaintiffs. As background, the Band’s Constitution gives the Secretary of the Interior final authority over tribal enrollment decisions. *See Alto v. Black*, 738 F.3d 1111, 1116 (9th Cir. 2013). The Band’s Constitution also “expressly incorporates federal regulations, adopted in 1960 and formerly codified at 25 C.F.R. §§ 48.1–48.15 (“the 1960 Regulations”), which addressed tribal enrollment criteria, the process for completing an initial membership roll, the procedures for keeping the membership roll current, and the purposes for which the roll was to be used.” *Id.*; see also 25 Fed. Reg. 1829 (Mar. 2, 1960) (codified at 25 C.F.R. pt. 48) (providing the content of the 1960 Regulations). But the 1960 Regulations are of no help to Plaintiffs. First, the 1960 Regulations were removed from the Code in 1996, and so

this fact alone renders Plaintiffs' argument for waiver of sovereign immunity ineffective. *See Alto*, 738 F.3d at 1116 n.1. At best, Plaintiffs' claim is that the government officials acted wrongfully or erroneously by rejecting Plaintiffs' enrollment request, and by failing to provide notice to Plaintiffs. The allegations at issue here are not claims that any of the Individual Defendants acted or failed to act in excess of their statutory authority. *Dalton v. Specter*, 511 U.S. 462, 472 (1994) (executive actions in excess of statutory authority are not ipso facto unconstitutional). Here, Plaintiffs point solely to the Fifth Amendment and 25 C.F.R. § 48 as the source of law creating specific fiduciary duties to which monetary damages may be inferred. Even if Plaintiffs could clear the hurdle of jurisdiction, as explained above, the Ninth Circuit has already held that the Fifth Amendment does not provide for monetary relief, and the Fifth Amendment due process clause may not be interpreted as mandating monetary damages. *Munns v. Kerry*, 782 F.3d 402, 413 (9th Cir. 2015). And as already explicated above, 25 C.F.R. § 48 is no longer in existence and is of no help to Plaintiffs in their argument that the regulation demonstrates fiduciary obligations. *Alto*, 738 F.3d at 1116 n.1. Thus, for the reasons stated herein, the Court Grants Federal Defendants' motion to dismiss Plaintiffs' third cause of action.

29. The Shawnee Tribe v. Steven T. Mnuchin

2020 WL 4816461 (D.D.C. Aug. 19, 2020). Plaintiff Shawnee Tribe asks the court for an order preliminarily enjoining the Secretary of the Department of Treasury ("Secretary") from distributing not less than \$12 million in funds remaining of the \$8 billion that Congress allocated under Title V of the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") to assist Tribal governments with expenditures incurred due to the COVID-19 pandemic. Plaintiff challenges the manner in which the Secretary allocated a portion of the \$8 billion. Specifically, on May 5, 2020, the Department of Treasury announced that the first tranche of CARES Act funds disbursement would rely on "Tribal population data used by the Department of Housing and Urban Development (HUD) in connection with the Indian Housing Block Grant (IHBG) Program." See U.S. DEPT OF TREASURY, Coronavirus Relief Fund Allocations to Tribal Governments (May 5, 2020) [hereinafter Allocation Mem.], at 2, available at <https://home.treasury.gov/system/files/136/Coronavirus-Relief-Fund-Tribal-Allocation-Methodology.pdf> (last accessed on August 18, 2020). Plaintiff contests the Secretary's selection of the HUD tribal population data as arbitrary and capricious in violation of the Administrative Procedure Act ("APA"). This is the second case to come before this court challenging the Secretary's use of the HUD tribal population data. In the first case, the Prairie Band Potawatomi Nation argued that the Secretary's decision to rely on the HUD tribal population data was arbitrary and capricious because it undercounted the tribe's actual population. *See Prairie Band Potawatomi Nation v. Mnuchin*, No. 20-cv-1491 (APM), 2020 WL 3402298 (D.D.C. June 11, 2020). The court denied the Prairie Band plaintiff's motion, in part, on the ground that the manner in which the Secretary allocated the lump-sum CARES Act appropriation was not a reviewable agency action under the APA. *Id.* at *1. Plaintiff Shawnee Tribe now attempts to avoid that conclusion, arguing

not just that the HUD tribal population data was flawed, but that it was “objectively false” because it counts the Shawnee Tribe as having zero enrolled members when, in fact, the Tribe has more than 2,113 tribal citizens. See Pl.’s Mot. at 1–2. The Shawnee Tribe’s argument fares no better than the one asserted in *Prairie Band*. The Secretary’s selection of the HUD tribal population data set, however imperfect it may be, is a discretionary agency action that is not subject to judicial review. For the reasons stated below, Plaintiff’s motion for injunctive relief is denied. In this Circuit, a “presumption of non-reviewability” attaches to an agency’s “allocation of funds from a lump-sum appropriation.” See *Physicians for Soc. Resp. v. Wheeler*, 956 F.3d 634, 642 (D.C. Cir. 2020) (internal quotation marks omitted) (emphasis added). The court applies this presumption of non-reviewability here, just as it did in *Prairie Band*. Next, Plaintiff maintains that this court’s reliance on *Vigil* was misplaced. See Pl.’s Reply at 4. Plaintiff argues that, “[u]nlike in *Vigil* where there was no statutory language on the proper use or administration of the appropriated funds, Title V’s statutory scheme does contain limitations on the allocation and use of funds, such that a reviewing court can discern the intent of Congress.” *Id.* (citation omitted). But the CARES Act evinces no greater congressional intent to constrain agency action than the statutes at issue in *Vigil*. The Secretary’s choice of a particular tribal population data set therefore is not judicially reviewable. For the foregoing reasons, Plaintiff’s motion for a preliminary injunction is denied.

B. Child Welfare Law And ICWA

30. Matter of Adoption of T.A.W.

11 Wash. App. 2d 1031, 2019 WL 6318163 (Wash. Ct. App. Nov. 22, 2019). CW, the biological father of TAW, an Indian¹ child, appeals from the trial court order terminating CW’s parental rights and granting TAW’s stepfather’s adoption petition under the Indian Child Welfare Act (ICWA) and the Washington State Indian Child Welfare Act (WICWA). CW argues that (1) the trial court improperly concluded that there had been “active efforts” to provide him with remedial services and rehabilitative programs designed to prevent the breakup of the Indian family as required under ICWA and WICWA, (2) the trial court erred when it found that the guardian ad litem (GAL) was qualified as an expert witness under ICWA based on its erroneous finding that the GAL had over 30 years of experience as a GAL, and (3) the trial court erred in concluding that continuing CW’s parental rights would likely result in serious emotional or physical damage to TAW. We hold that although facilitating visitation can be a remedial service, it was not reasonably available under the circumstances after September 2012. Thus, CW does not show that the trial court erred when it concluded that CB and RB had proved they had made active efforts to provide CW with remedial services and rehabilitative programs designed to prevent the breakup of the Indian family as required under ICWA. We further hold that CW waived his argument challenging the GAL’s qualifications as a qualified expert witness and that, in light of this holding, any error in the trial court’s finding that the GAL had 30 years of experience is harmless. Finally, we hold that the trial court’s findings support its conclusion that continuing CW’s parental rights would

likely result in serious emotional or physical damage to TAW. Accordingly, we affirm. The trial court also discussed the effect of the existence of the Tribal [c]ourt restraining order and CW's incarcerations on CB and RB's "active efforts" to maintain TAW's relationship with CW. The trial court concluded, In the present case, this [c]ourt must give full and complete effect to the Tribal Court [r]estraining [o]rder against [CW]. Finally, we hold that the trial court's findings support its conclusion that continuing CW's parental rights would likely result in serious emotional or physical damage to TAW. Accordingly, we affirm. A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

31. Philbert P. v. Douglas P.

2020 WL 605171 (N.M. Ct. App. Jan. 13, 2020). Philbert P., maternal great-uncle (Uncle) of S.P. (Child), his then eleven-year-old nephew, appeals an order denying his petition for kinship guardianship of, Child, pursuant to NMSA 1978, § 40-10B-8(B)(3) (2015) of the Kinship Guardianship Act (the KGA), NMSA 1978, §§ 40-10B-1 to -15 (2001, as amended through 2015). The district court denied Uncle's petition and ordered that Child be reunited with his biological Father. We affirm. Douglas P. (Father) and Valerie P. (Mother) raised Child together as the primary family unit for the first five to six years of Child's life. In its final order, the district court found that the Indian Child Welfare Act of 1978 (the ICWA), 25 U.S.C. §§ 1901- 1963 (2018), applied to this matter; that Uncle did not establish by clear and convincing evidence that extraordinary circumstances existed for granting his petition for kinship guardianship, and; that it was in Child's best interests to be raised by his biological father. Non-parents seeking guardianship in opposition to a biological parent bear the burden of proving extraordinary circumstances, and must do so by clear and convincing evidence. *Id.* ¶ 10. Father is an enrolled member of the Warm Springs Band of Indians and also has Yakama heritage. Child is an enrolled member of the Yakama Nation. On February 15, 2007, the Yakama Tribal Court for the Confederated Tribes and Bands of the Yakama Nation issued an order of paternity. Because Uncle did not meet his burden required by the KGA, we need not address whether the ICWA applies and whether he met the identical burden of proof under the ICWA's similar statutory scheme. We affirm the district court's denial of Uncle's petition for kinship guardianship.

32. Matter of D.J.S.

12 Wash. App. 2d 1, 456 P.3d 820 (Wash. Ct. App. Jan. 28, 2020). In merely providing father with referrals, Department of Social and Health Services failed to make active efforts to prevent breakup of Indian family. Department of Social and Health Services (DSHS) filed petition to terminate parental rights of father, who was enrolled member of Indian tribe, to child. Following trial, trial court ordered termination of parental rights. On father's appeal, DSHS agreed to remand case for second trial for failure to notify tribal nation of proceedings. Following new trial, the

Superior Court, Chelan County, No. 17-7-70024-2, Tracy S. Brandt, J., ordered termination of parental rights. Father appealed. The Court of Appeals, Fearing, J., held that: 1) DSHS failed to afford parent with all ordered and necessary services, 2) offer of parenting services concurrent with substance abuse treatment would have been futile; 3) DSHS failed to make active efforts to prevent breakup of Indian family; 4) remand was necessary to determine whether active efforts to prevent breakup of Indian family would have been futile; 5) sufficient evidence supported finding that continuing relationship between father and child would impede child's welfare; and 6) sufficient evidence supported finding that father's custody of child would result in serious emotional or physical harm to child. Reversed and remanded with instructions.

33. Matter of Dependency of F.Y.O.

12 Wash. App. 2d 1037, 2020 WL 1024912 (Wash. Ct. App. Mar. 02, 2020). Following a four-year dependency and a five-day trial, the court terminated Michael Foster's parental rights to his child. On appeal, Foster contends the Department of Children, Youth, and Families (Department) failed to carry its burden to prove several statutory prerequisites to termination. He also contends the Department failed to meet its additional burden under the federal and state Indian Child Welfare Acts, ICWA2 and WICWA. However, because unchallenged findings and substantial evidence support termination, we affirm. F.Y.O., an Indian child, was born in March 2015 and will be five years old as of March 2020. F.Y.O. has lived his entire life in the care of a maternal aunt. The termination trial took place over five days in April 2019. Foster did not attend the first three days of trial. At the hearing, the court considered the testimony of Tim Cole (the Department social worker assigned to Foster) Louise Doney (a Fort Belknap Tribal representative), Dr. Dana Harmon (a psychologist), Minu Ranna-Stewart (a clinical supervisor at Harborview Center for Sexual Assault and Traumatic Stress), Joey Johnson (an intervention treatment supervisor at Evergreen Recovery Centers), Elisabeth Yaroschuk (the court-appointed special advocate (CASA) assigned to F.Y.O.), and Foster, and admitted 46 exhibits into evidence. On May 3, 2019, the trial court terminated Foster's parental rights. Before a parent's rights to an Indian child can be terminated, ICWA requires that: Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful. 25 U.S.C. § 1912(d); RCW 13.38.130(1) (WICWA's identical requirement). Under WICWA, "active efforts" means "timely and diligent efforts to provide or procure such services, including engaging the parent or parents or Indian custodian in reasonably available and culturally appropriate preventive, remedial, or rehabilitative services. This shall include those services offered by tribes and Indian organizations whenever possible." RCW 13.38.040(1)(a). Several uncontested findings establish that the Department, indeed, actively identified services for Foster, encouraged Foster to participate in services, supported Foster's regular visitation of F.Y.O., and provided Foster with financial and transportation assistance. Doney, the Fort Belknap representative at trial, agreed that

the Department had exerted active efforts in this case. We affirm the court's termination order. We concur: Andrus, J, Appelwick, C.J.

34. *Matter of T.J.*

302 Or. App. 531, 462 P.3d 315 (Or. Ct. App. Mar. 04, 2020). Mother's minimization of father's domestic violence was insufficient to support child's out-of-home placement when parents were no longer in contact. Department of Human Services (DHS), which removed infant child from mother's home after father was arrested for assaulting mother, petitioned for dependency jurisdiction. The Circuit Court, Klamath County, Roxanne B. Osborne, J., asserted dependency jurisdiction as to both parents, found that DHS had made active efforts to prevent breakup of family as required by Indian Child Welfare Act (ICWA), and placed child in foster care. Father appealed. The Court of Appeals, Ortega, J., held that: 1) DHS proved by clear and convincing evidence that there was nonspeculative and current risk of harm to child from father's domestic violence against mother, as required to support dependency jurisdiction over child, and 2) DHS failed to prove by clear and convincing evidence that returning infant child to mother was likely to result in serious emotional or physical damage to child. Affirmed in part, reversed in part, and remanded.

35. *In re A.M.*

47 Cal. App. 5th 303, 260 Cal. Rptr. 3d 412 (Cal. Ct. App. Mar. 05, 2020). Child Welfare. Indian Child Welfare Act (ICWA) notice requirements were not triggered in dependency proceeding. County Department of Public Social Services (DPSS) sought to terminate mother's parental rights to her two children. The Superior Court, Riverside County, No. RIJ1700999, Matthew Perantoni, J., terminated mother's parental rights. Mother appealed. The Court of Appeal, Codrington, J., held that: 1) DPSS and Juvenile Court did not have "reason to know" that children were Indian children, and thus, the Indian Child Welfare Act (ICWA) notice requirements were not triggered, and 2) DPSS's inquiry into whether children were Indian children was appropriate and complied with ICWA and state law. Affirmed.

36. *In re N.D.*

46 Cal. App. 5th 620, 259 Cal. Rptr. 3d 826 (Cal. Ct. App. Mar. 16, 2020). Because CWS sought continuance of foster care placement, it was required to complete its ICWA inquiry and notification process before disposition hearing. Child Welfare Services (CWS) filed juvenile dependency petition, alleging that fathers one-month-old twin children were at substantial risk of harm based on their failure to thrive. The Superior Court, Santa Barbara County, Nos. 19JV00160 and 19JV00161, Arthur A. Garcia, J., removed children from custody of father, who alleged that he had Native American Indian heritage, and continued their placement in foster care, and father appealed. The Court of Appeal, Tangeman, J., held that because CWS sought continuance of foster

care placement, it was required to complete its Indian Child Welfare Act (ICWA) inquiry and notification process at least 10 days before disposition hearing. Reversed and remanded.

37. Matter of K.G.

840 S.E.2d 914, 2020 WL 1264004 (N.C. Ct. App. Mar. 17, 2020). Trial court had reason to know that child welfare action involved Indian child, requiring compliance with ICWA notice provisions. County social services department initiated child welfare action. In entering its permanency planning order, the District Court, Wilkes County, David V. Byrd, J., determined that the Indian Child Welfare Act (ICWA) did not apply to the proceedings. Mother appealed. The Court of Appeals, Murphy, J., held that trial court had reason to know that action involved Indian child, requiring compliance with ICWA notice provisions. Remanded.

38. Peidlow v. Williams

459 P.3d 1136, 2020 WL 1316358 (Alaska Mar. 20, 2020). Child Welfare. Superior Court was required to grant full faith and credit to Tribal Court custody order. Father brought action for shared custody of Indian child, mother requested sole legal custody and primary physical custody, and grandparents petitioned for visitation. The Superior Court, Second Judicial District, Utqiagvik (Barrow), Angela M. Greene, J., awarded sole legal and physical custody of child to father, and allowed mother supervised visitation, and further found that the Tribal Court had no jurisdiction over the case. Mother subsequently moved to modify custody. The Tribal Court claimed jurisdiction, and ordered that the child would be placed in trial physical custody with the mother, but remain in the legal custody of the tribe. The Superior Court, Second Judicial District, Utqiagvik (Barrow), Angela M. Greene, J., denied mother's motion to modify custody and ruled the Tribal Court's order was not enforceable. Mother appealed. The Tribal Court's motion to intervene was denied, and it appealed. The Supreme Court, Bolger, C.J., held that the Superior Court was required to grant full faith and credit to Tribal Court custody order. Vacated and remanded. Stowers, J., filed dissenting opinion.

39. In re A.M.G.

2020 WL 1488345 (Minn. Ct. App. Mar. 23, 2020). Appellants challenge the district court's transfer, pursuant to Minn. Stat. § 260C.771, subd. 3(b) (2018), of their adoption petition to tribal court. We reverse and remand. This dispute arises from appellants J.G. and A.G.'s (collectively appellants) attempt to adopt four children (collectively the children). The children, aged 10 to 16 years old are all members of Respondent White Earth Band of Chippewa (White Earth). In November 2011, child-protection proceedings involving the children were initiated in White Earth tribal court. A.B. and C.R.'s parental rights were "voluntarily suspended" by the tribal court in May 2013. In May 2015, the children's maternal aunt, L.R., and her partner, M.G., adopted the

children in tribal court. L.R. passed away in June 2015, and M.G. passed away in March 2016. In his will, M.G. appointed his nephew, J.G., as the children’s guardian. The Minnesota district court issued appellants letters of guardianship over the children in July 2016. In August 2018, A.B. moved the tribal court to reinstate her parental rights. In February 2019, appellants petitioned for adoption of the children in district court. The tribal court reinstated A.B.’s parental rights in March 2019, and White Earth moved the district court to dismiss appellants’ adoption petition for lack of jurisdiction. Following a hearing, the district court determined that it had concurrent jurisdiction over appellants’ adoption petition and therefore denied White Earth’s motion to dismiss. However, the district court also determined that state law required transfer of the adoption proceedings to tribal court. This appeal followed. 25 U.S.C. § 1911(a) provides for exclusive tribal-court jurisdiction over custody proceedings involving an Indian child who resides or is domiciled within the tribe’s reservation, or is a ward of a tribal court. This section does not apply to the children in this case because, following their adoption, they no longer resided or were domiciled within the White Earth reservation, nor were they wards of the tribal court. § 1911(b) of ICWA requires the transfer to tribal court of “any [s]tate court proceeding for the foster care placement of, or termination of parental rights to, an Indian child.” 25 U.S.C. § 1911(b). In *R.S.*, the supreme court held that § 1911(b) is unambiguously limited to the two enumerated proceedings and therefore did not allow for the transfer of preadoptive-placement proceedings to the tribal court. 805 N.W.2d at 50. Good cause existed to deny the transfer because the tribal court does not possess jurisdiction over the adoptive- placement proceeding. When Indian children neither reside nor are domiciled on their tribe’s reservation, as is the case here, the supreme court interpreted § 1911(b) as conveying to the tribal courts “presumptive jurisdiction” over two types of child- custody proceedings only: foster care placements, and terminations of parental rights. *R.S.*, 805 N.W.2d at 51. The supreme court went on to state in *R.S.* that “Congress has not granted tribal courts jurisdiction over preadoptive and adoptive placement proceedings involving Indian children who do not reside and are not domiciled on their tribe’s reservation.” Therefore, the district court’s order transferring the petition to tribal court is reversed, and the appellants’ petition to adopt the children is remanded to the district court. Reversed and remanded.

40. In re Guardianship of Retz

2020 WL 1488346 (Minn. Ct. App. Mar. 23, 2020). Appellant-tribe argues that the district court erred by determining that the guardianship proceedings were not subject to the Indian Child Welfare Act (ICWA) and that notice to the children’s tribe was therefore not required. See 25 U.S.C. § 1901- 63 (2012). Appellant-biological mother argues that the district court erred by denying her motion to intervene, reasserts and supports appellant-tribe’s arguments, and raises additional arguments of her own. We affirm. In 2011, appellant White Earth Band of Chippewa (White Earth), via its tribal courts, removed four siblings (the children) from their biological parents—C.R. and appellant A.B. The tribal court “suspended” A.B. and C.R.’s parental rights pursuant to tribal law—an action that appellants assert is distinct from a “termination.” Thereafter,

the children began living with their grand-aunt, L.R., and her partner, M.G. (collectively, the adoptive parents), who formally adopted the children through the tribal courts in 2015. White Earth asks us to selectively account for the tribal laws and proceedings at issue here. Were we to conclude that A.B. is the parent for the foster-care-placement analysis under ICWA, we would have to entirely disregard the children’s adoptions; but the parties present us with no reason to question their validity. White Earth provides no arguments with which we could harmonize their assertions that A.B.’s parental rights were both “terminated enough” to permit adoption of the children “in all respects the same as though born to” the adoptive parents; and yet not so terminated that subsequent transfers of custody should be considered “removals” from A.B.’s parenthood under ICWA. Therefore, we reject White Earth’s contention that A.B. is the parent for purposes of the ICWA foster-care-placement analysis. For the same reasons we affirm the district court’s denial of White Earth’s petition to invalidate, we also affirm its denial of A.B.’s motion to intervene. For the foregoing reasons, the district court did not err in determining that 25 U.S.C. § 1903(1)(i) did not apply to the guardianship proceedings, that White Earth was therefore not entitled to notice, and that its petition to invalidate must be denied. Affirmed.

41. Matter of J. M. N.

303 Or. App. 600, 464 P.3d 506 (Or. Ct. App. Apr. 15, 2020). Child Welfare. Insufficient evidence supported finding that termination of Indian mother's parental rights would be in best interest of child. After child was found to be within juvenile court's jurisdiction, State filed application to terminate parental rights of mother, an enrolled member of an Indian nation, as to child, who lived with his permanent guardian. The Circuit Court, Josephine County, No. 18JU10156, Pat Wolke, J., entered judgment terminating parental rights. Mother appealed. The Court of Appeals, Mooney, J., held that: 1 sufficient evidence supported finding that mother was unfit, but 2 insufficient evidence supported finding that termination of mother's parental rights would be in child's best interest. Reversed. DeVore, J., filed dissenting opinion.

42. Daphne O. v. Department of Health & Social Services

2020 WL 1933651 (Alaska Apr. 22, 2020). The parents of an Indian child appeal the termination of their parental rights, arguing that the Office of Children’s Services (OCS) failed to meet its active efforts burden and that the superior court’s qualification of the expert witness required by the Indian Child Welfare Act (ICWA) was erroneous. We previously remanded this case for supplemental findings on OCS’s active efforts. And in light of our recent *Eva H. v. State, Department of Health & Social Services, Office of Children’s Services* decision, we also requested additional briefing from the parties on the question whether returning to the custody of either parent would likely cause the child serious emotional or physical damage. The superior court held an evidentiary hearing, issued supplemental findings on OCS’s active efforts, and reaffirmed the termination of parental rights. We now conclude that OCS narrowly met its active efforts burden,

particularly in light of the parents' unwillingness to cooperate and to maintain regular contact with OCS. The court found that Daphne failed to maintain regular contact with Mabel's foster parent and Mabel's therapist. Because William refused to take advantage of the opportunities OCS provided for remedial services and visitation, we hold that the superior court did not clearly err by finding that OCS had met its active efforts burden with respect to William. The court's findings demonstrate that OCS's efforts, although far from perfect, were sufficiently active to permit us to affirm the court's parental rights termination. The court also used language from Browning's expert report to make its serious damage finding, and Browning's expert report addressed precisely the situation William raises, noting that "if [Mabel] w[ere] returned to either parent, she would likely be placed with either the [grandparents] again or someone else who does not place M[abel's] best interests and safety as a priority." The court therefore appears to have credited Browning's view that William's legal custody would cause Mabel serious damage. Because the record supports that conclusion, we are not left with "a definite and firm conviction that a mistake has been made." We Affirm the superior court's parental rights termination as to both parents.

43. Cora G. v. Department of Health & Social Services, Office of Children's Services

461 P.3d 1265, 2020 WL 1969400 (Alaska Apr. 24, 2020). A witness as to a child's mental injury must be offered and affirmatively accepted as qualified expert in judge- tried "child in need" proceeding. A child in need of aid (CINA) proceeding was brought seeking to terminate mother and father's parental rights. The Superior Court, Third Judicial District, Seward, Charles T. Huguelet, J., terminated rights in a judge- tried case. Mother and father appealed, and appeals were consolidated. The Supreme Court, Winfree, J., held that: as a matter of first impression, an expert witness as to a child's mental injury must be offered and affirmatively accepted as qualified expert in a judge- tried CINA proceeding; trial court's error in failing to qualify State's witness as an expert witness on child's mental injury was not harmless; and clear and convincing evidence did not support finding that conduct by or conditions created by parent resulted in mental injury to child. Vacated and remanded.

44. In re M.R.

48 Cal. App. 5th 412, 261 Cal. Rptr. 3d 786 (Cal. Ct. App. Apr. 29, 2020). County Community Services Agency's inclusion of overbroad "follow all recommendations" language in reunification case plan was harmless. County Community Services Agency (Agency) filed dependency petition with regard to two children. The Superior Court, Stanislaus County, Nos. VJDP-19-000154 & JVDP-19- 000155, Ann Ameral, J., adjudged the children dependents of the court and continued their removal from the parents. Appeal was taken. The Court of Appeal, Poochigian, J., held that: follow all recommendations language in services section of case plan that identified the goals of returning minors home to mother's care was insufficient to identify specific goals and the appropriateness of the planned services in meeting those goals, but the inclusion of overbroad all recommendations language was harmless. Affirmed.

45. People In Interest of K.C.

2020 WL 2759686 (Colo. App. May 28, 2020). This is an appeal from a judgment terminating the parent-child legal relationship between D.C. (mother) and her children, K.C. and L.C. (the children). The latter are not Indian children as defined by the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901-1963 (2018), but are eligible for enrollment with the Chickasaw Nation (the Nation). We vacate the judgment and remand with directions. In May 2018, the Logan County Department of Human Services (the Department) filed a petition in dependency and neglect regarding the then-one-month-old twin children. Mother reported that she did not have Indian heritage, but the children's father (who is not a party to this appeal) indicated that he had "Chickasaw" heritage. The Department sent notice to the Nation, which responded in a letter dated October 22, 2018. In its letter, the Nation indicated that father and the children were "eligible for citizenship" through the lineage of the paternal grandfather who was an enrolled citizen. The Nation further stated that once "either the biological father or the children are enrolled, the children will qualify as 'Indian Children.'" Presumably aware that their current status did not make the children Indian children as defined by ICWA, see 25 U.S.C. § 1903(4) (2018), the Nation's letter went on to request the children's enrollment as members of the Nation, attached forms for enrollment and tribal citizenship, and demanded assistance in completing these forms from the children's parents or legal guardian, the latter of which, at all relevant times, was the Department. On appeal, mother does not challenge the statutory grounds for termination but instead asserts that the judgment must be vacated and remanded because the Department failed to take steps to enroll the children at the Nation's request. Specifically, she contends that, under the circumstances here, the reasonable efforts standard set forth in §§ 19-1-103(89) and 19-3-208, C.R.S. 2019, must be read to impose on the Department the responsibility to assist with the children's enrollment. On different reasoning, we agree with mother that the judgment must be vacated and remanded. We conclude that in dependency and neglect proceedings, when the notified tribe communicates to the county department the desire to obtain tribal citizenship or membership for enrollment-eligible children, the department must, at the earliest time possible, deposit the tribe's response with the juvenile court. Accordingly, we conclude that to meet its responsibilities, the department in a dependency and neglect proceeding must deposit with the juvenile court, at the earliest possible time upon receipt, any tribal response indicating the tribe's interest in obtaining citizenship or membership of an enrollment-eligible child. Furthermore, as detailed more specifically *infra* Part II.C, it is for the juvenile court, not the county department, to decide whether tribal enrollment is in the children's best interests. Thus, we further conclude that the timely deposit of the tribe's enrollment-related request with the juvenile court is sufficient, as a matter of law, to satisfy any notice-related reasonable efforts requirements of the department implied under §§ 19-1-103(89) and 19-3-208. Nonetheless, we highlight that, in considering a request from an interested tribe, ICWA and the 2016 Guidelines explicitly encourage enrollment. We vacate the termination judgment and remand for further proceedings consistent with this opinion.

46. Matter of Adoption of B.B.

469 P.3d 1093, 2020 WL 4345817, 2020 UT 53 (Utah July 28, 2020). Unmarried birth father, who was member of Indian 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 child. Following its initial granting of birth father's motion to intervene, the Third District Court, Salt Lake, Ryan M. Harris, J., 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, Himonas, J., 417 P.3d 1, reversed and remanded. On remand, the Third District Court, Salt Lake City Department, Keith A. Kelly, J., granted tribe's motion to transfer the adoption proceedings to tribal court, and prospective adoptive parents appealed. The Supreme Court, Lee, Associate C.J., held that: 1) appellate court would not defer to district court's factual determination that mother remained domiciled on Indian reservation throughout her stay in Utah; 2) evidence indicated that mother moved to Utah, where she had child, with the intent to remain there, such that mother was domiciled in Utah at time of child's birth within meaning of Indian Child Welfare Act's (ICWA) exclusive tribal jurisdiction provision; 3) forms signed by mother relinquishing her parental rights and obligations, in context of formal adoption setting, did not constitute an "abandonment" of child that transferred parental rights and obligations, along with child's domicile, to that of his biological father; and 4) ICWA allowed mother initially domiciled on Indian reservation to legitimately establish a new domicile in Utah and invoke jurisdiction of the Utah courts in pursuing adoption. Reversed and remanded.

47. Matter of E.J.B.

375 N.C. 95, 846 S.E.2d 472, 2020 WL 4726567 (N.C. Aug. 14, 2020). On appeal, Respondent-father asks this Court to vacate the trial court's order terminating his parental rights and remand the matter to the trial court for compliance with all requirements under the Indian Child Welfare Act (the Act). Because we conclude that the trial court failed to comply with the Act's notice requirements and that the post termination proceedings before the trial court did not cure the errors, we remand the matter to the trial court so that all of the requirements of the Act can be followed. Seven DSS court reports filed prior to a hearing included Respondent-father's statements about his affiliation with the Cherokee Indian tribe. The trial court converted the matter to a Chapter 50 civil custody action and terminated the jurisdiction of the Juvenile Court. Respondent-father gave notice of his appeal on 11 October 2017. Each relevant tribe was served by mail, with return receipt requested. As of 30 August 2019, the Eastern Band of Cherokee Indians and the Cherokee Nation tribes both replied and indicated that the children were neither registered members nor eligible to be registered as members of those tribes. The United Keetoowah Band of Cherokee Indians tribe received the notice in August 2019 but failed to respond. Ultimately, the trial court found that the

Act did not apply. We conclude that the post termination notices failed to comply with the Act and therefore cannot cure the trial court's error. Here, the record shows that the trial court had reason to know that an Indian child might be involved. In eight separate filings, DSS indicated in its court reports that Respondent-father indicated that he had Cherokee Indian heritage. Respondent-father also raised his Indian heritage during a Child and Family Team Meeting, and his comments were included in a report filed by DSS with the trial court. Although the trial court had reason to know that an Indian child might be involved in these proceedings, the trial court failed to readdress its initial finding that the Act did not apply and failed to ensure that any Cherokee tribes were actually notified. The trial court was required to ask each participant in the proceeding, on the record, whether that participant knows or has reason to know that the matter involves an Indian child and inform them of their duty to inform the trial court if they learn any subsequent information that provides a reason to know that an Indian child is involved. *See* 25 C.F.R. § 23.107(a).⁹ The party seeking the termination of parental rights, DSS, was required to notify the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of the tribe's right to intervene. 25 U.S.C. § 1912(a). Here, there is no evidence in the record that the trial court inquired at the beginning of the proceeding whether any participant knew or had reason to know that an Indian child was involved or informed the participants of their continuing duty to provide the trial court with such information. Upon careful review of the notices sent, we observe that the notices also failed to fully comply with these regulations. The notices failed to include: 1) the children's birthplaces, as required by 25 C.F.R. § 23.111(d)(1); 2) notice of the tribe's right to intervene, as required by 25 C.F.R. § 23.111(d)(6)(iii); 3) notice of the tribe's right to request an additional twenty days to prepare for the hearing, as required by 25 C.F.R. § 23.111(d)(6)(v); and 4) notice of the tribe's right to petition for a transfer of the proceeding to tribal court, as required by 25 C.F.R. § 23.111(d)(6)(vi). Each of the three notices sent by DSS failed to comply with the Act and were not sent in a timely manner. Reversed and Remanded.

C. Contracting

48. Swinomish Indian Tribal Community v. Azar

406 F. Supp. 3d 18, 2019 WL 4261368 (D.D.C. Sept. 09, 2019). ISDEAA did not require inclusion of third-party payments in calculating contract support costs that tribe could recover from Indian Health Service. Indian tribe brought action under Contract Disputes Act and Declaratory Judgment Act, as allowed by Indian Self Determination and Education Assistance Act (ISDEAA), for alleged breach of contract and statutory violation by Indian Health Service (IHS). Parties filed cross-motions for summary judgment. The District Court, Dabney L. Friedrich, J., held that: 1) it had subject matter jurisdiction over action; 2) IHS did not sufficiently raise statute of limitations defense; and 3) ISDEAA did not require inclusion of such third-party payments in calculating contract support costs (CSC) funds that tribe could recover from IHS. IHS's motion granted.

49. Fort McDermitt Paiute and Shoshone Tribe v. Azar

2019 WL 4711401 (D.D.C. Sept. 26, 2019). The Indian Self-Determination and Education Assistance Act provides eligible Indian tribes with the option to contract with federal agencies to directly assume operations of services and programs that those agencies ordinarily provide. This action concerns just such an arrangement. The Fort McDermitt Paiute and Shoshone Tribe negotiated with the Indian Health Service to take over operations of two health programs that that agency had been providing. The Tribe, as the statute provides, submitted a “final offer,” which the agency rejected in full. But a rejection may be based only on the four grounds enumerated in the statute § 5387(c)(1)(A). Since the 1970s, IHS has operated a health clinic in McDermitt, Nevada, (“the Clinic”) through the Schurz Service Unit for the benefit of the Tribe’s members. AR 143. Since 1993, IHS has also operated the Fort McDermitt Emergency Medical Services (“EMS”) program, again mainly for the benefit of the Tribe. See AR 144. In January 2013, the Tribe designated a separate tribe, the nearby Pyramid Lake Paiute Tribe (“Pyramid Lake”) as its “tribal organization” for purposes of contracting with IHS to undertake operations of the EMS program. In July of that year, Pyramid Lake submitted a contract proposal to assume operation of the EMS program and requested \$502,611 in annual funding—the amount that IHS had expended on the program the prior year. See Joint SOF ¶ 3; AR 144–45. About a month later, IHS suspended the EMS program, before formally closing it on September 30, 2013. AR 144–45. IHS then rejected Pyramid Lake’s proposal that same day. AR 145. Pyramid Lake promptly filed an action in this district challenging IHS’s rejection. See *Pyramid Lake Paiute Tribe v. Burwell*, 70 F. Supp. 3d 534 (D.D.C. 2014). After an unsuccessful attempt at further negotiations, the Court ordered IHS to award Pyramid Lake the full \$502,611 requested. See *Pyramid Lake Paiute Tribe v. Burwell*, Case No. 1:13-cv-01771 (CRC), 2015 WL 13691433 (D.D.C. Jan. 16, 2015). Several months later, the Tribe rescinded its authorization for Pyramid Lake to contract the EMS program on its behalf and notified IHS that it intended to directly operate that program as well. Joint SOF ¶ 7. In July 2016, the Tribe submitted its draft compact and funding agreement to IHS for assumption of the EMS program and the Clinic and the parties entered into negotiations. *Id.* ¶ 8; see also AR 135. IHS rejected each of the Tribe’s proposals about the issues in dispute. See AR 130–41. Only one of those issues—the level of recurring funding for H&C—remains in dispute. In its final offer, the Tribe proposed a recurring amount of \$1,106,453 to cover operations of both the EMS program and the Clinic. *Id.* ¶ 12. IHS rejected the Tribe’s final-offer proposal for recurring H&C funding because “the amount of funds proposed in the final offer exceeds the applicable funding level to which the [T]ribe is entitled under [Title V of the ISDEAA].” AR 138 (second alteration in original) (quoting 25 U.S.C. § 5387(c)(1)(A)(i)). To justify that finding, IHS makes two principal arguments. First, IHS claims that the Tribe improperly requests funds from the Schurz Service Unit that were allocated to another tribe—namely, Winnemucca. See Defs.’ MSJ at 21–23. Second, IHS argues that the Tribe seeks funding based on expenditures made from third-party revenue from the EMS program and the Clinic, funds that the Tribe, rather than IHS, will now collect and that IHS therefore cannot be required to award to the Tribe. See *id.* at 24–27. The Court is unpersuaded.

In short, IHS’s conception of the appropriate funding amount is foreclosed by the language of the Act. The provision governing funding in Title I states that “[t]he amount of funds ... shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract.” *Id.* § 5325(a)(1) (emphasis added). The minimum level of funding is determined by the program covered by the contract, not by the identity of the tribe seeking to operate that program. Under the statute, IHS cannot now withhold those funds for operation of the very same program because the Tribe seeks to run the Clinic itself. That amount, the Court reasoned, is not limited to a particular tribe’s “budgeted tribal share.” IHS’s second justification for rejecting the Tribe’s proposal poses the more difficult question. According to IHS, the expenditure figure that the Tribe relied on for the Clinic—the \$603,842 amount that it added to the existing \$502,611 obligation for the EMS program— was only partially comprised of funding from the H&C budget. IHS supplemented the rest of the Clinic’s operating costs with what it deems “third-party revenue,” largely Medicaid reimbursements for services provided by the Clinic and EMS program and a separate grant for diabetes treatment services. IHS’s approach to the recurring funding amount rests on a fundamental misunderstanding of the minimum level of funding it must provide to the Tribe under § 5325(a)(1). But § 5325(a)(1) dictates that the recurring funding amount be determined by the funds provided to operate a program. The provision does not further cabin that amount based on how and from which sources IHS had been cobbling together those funds. Indeed, if the Court were to accept IHS’s position that contracting tribes are limited to only that amount budgeted for a program, IHS could dictate the minimum funding amount for any particular tribe by strategically reorganizing its appropriated funds. Thus, IHS’s insistence that the level of H&C funding budgeted for the Clinic and the EMS program is the definitive benchmark is misguided. IHS once again runs headlong into the language of the statute. § 5325(a)(1) instructs that the Tribe is entitled to no less than the amount that IHS “would have otherwise provided for the operation of” the EMS program and the Clinic. The clear and unavoidable meaning of that provision is that IHS must provide in funding to the Tribe an amount that is at least equal to what it otherwise would have spent operating the EMS program and the Clinic itself. Nowhere does the statute provide exceptions based on the source of that funding, even if the particular source IHS had been using, upon transfer of operations to the contracting tribe, dematerializes. As a result, the Court finds that an injunction requiring IHS to accept the recurring funding amount proposed by the Tribe and to amend the funding agreement accordingly is the appropriate remedy *See Pyramid Lake Paiute Tribe v. Burwell*, 70 F. Supp. 3d 534, 545 (D.D.C. 2014). For all the above reasons, the Court will grant Plaintiff’s Second Motion for Summary Judgment.

50. Clements v. Confederated Tribes of Colville Reservation

2019 WL 6051104 (E.D. Wash. Nov. 15, 2019). Before the Court is a Motion to Dismiss, ECF No. 8, by Defendants the Confederated Tribes of the Colville Reservation (“the Tribes”) and the Court of the Confederated Tribes of the Colville Reservation (“the Tribal Court”). Defendants seek

dismissal for lack of subject matter jurisdiction under Fed. R. Civ. P. Rule 12(b)(1), and for failure to state a claim under Fed. R. Civ. P. 12(b)(6). Plaintiff James Clements formed South Bay Excavating, Inc. (“South Bay”) in 1987. The Olympia, Washington, company provided excavation services. In November 2016, Defendant the Tribes entered into a “Contract for Repair and/or Construction Services” with South Bay to complete the “CTCR 12 Fiber Projects” for the Tribes (“the Contract”). The Contract was executed in Nespalem, Washington, where the Tribes are headquartered, and provided for South Bay's installation of optical fiber cable for \$2,457,194, with payments remitted to South Bay on a detailed schedule and a scheduled completion date of October 31, 2017. The Contract further provided for the “Tribal Courts of the Colville Confederated Tribes” to have “sole and exclusive jurisdiction over disputes arising from the Contract.” Following execution of the Contract, the Tribes allegedly paid South Bay for work pursuant to the Contract. The Tribes allege that South Bay “walked off of the job” on approximately June 1, 2017, without notice and without any indication of how it would complete the project. The Court finds that Plaintiffs have not exhausted their tribal remedies, because the issue of whether the Tribal Court has personal jurisdiction over the Plaintiffs has not been resolved. At this juncture, the Court must determine only whether the tribal court has a colorable claim to exercising jurisdiction over Defendants. *See Atwood v. Fort Peck Tribal Court Assiniboine*, 513 F.3d 943, 948 (9th Cir. 2008); *Stock W. Corp. v. Taylor*, 964 F. 2d 912, 919-20 (9th Cir. 1992). The information before this Court indicates that the civil lawsuit against Plaintiffs proceeding in Tribal Court arises out of Plaintiffs' commercial dealing on the reservation with the Tribes. The alleged breach of a contract that was formed with the Tribes at tribal headquarters fits naturally within the first Montana exception, recognizing tribal civil jurisdiction concerning “the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.” *Montana v. U.S.*, 450 U.S. 544, 565-66 (1981). Therefore, the Court finds that there is a colorable claim to tribal jurisdiction. Therefore, It Is Hereby Ordered: Defendants' Motion to Dismiss, is Granted.

***51. Confederated Tribes of Warm Springs Reservation of Oregon
v. Vanport International, Inc.***

428 F. Supp. 3d 384, 2019 WL 6879736 (D. Or. Dec. 16, 2019). Tribes had no right to recover timber sale proceeds as against third party who purchased timber resold by tribal enterprise which had not paid tribes. Confederation of tribes who were beneficial owners of timber, the legal title to which federal government held in trust for tribes, and who wholly owned tribal forest enterprise which purchased said timber, brought action against private company to which tribal enterprise sold tribal timber, seeking to recover, from private company, value of tribal timber which tribal enterprise had purchased but for which it had not made payment, alleging that, absent payment, title to timber had never passed to enterprise. Tribes moved for summary judgment. The District Court, Marco A. Hernandez, J., held that: 1) governing contracts provided that title did not pass absent payment; but 2) private company's payments to tribal enterprise amounted to payments to

tribes; 3) such payments to tribes amounted to payments to federal government; and 4) even if payments to enterprise were not equivalent to payments to tribes and government, tribes had no right to recover from private company. Motion denied.

52. JW Gaming Development, LLC v. James

2020 WL 353536 (N.D. Cal. Jan. 21, 2020). Before me are several disputes, chief among them two warring interpretations of the 2012 promissory note that memorialized plaintiff JW Gaming, LLC's \$5,380,000 investment in the casino project of defendant Pinoleville Pomo Nation. No casino was ever constructed. Because the Tribe breached the note and unequivocally waived sovereign immunity, JW Gaming is entitled to judgment on the pleadings for breach of contract. On October 2, 2019, the Ninth Circuit affirmed my Order denying the Individual Tribal Defendants' assertion of sovereign immunity, finding that I did not err in concluding that judgment in favor of JW Gaming would bind them as individuals rather than the Tribe itself. Viewing the contract as a whole, I conclude that the parties intended that JW Gaming be able to recover on the Note in the event that no casino was ever built. The Tribe clearly and unequivocally waived its sovereign immunity with respect to the instant action. JW Gaming's motion for judgment on the breach of contract claim is Granted without limitation on recourse, and judgment shall be entered accordingly. It Is So Ordered.

53. Gilbert v. Weahkee

2020 WL 779460 (S.D. Feb. 18, 2020). Plaintiffs, Native Americans residing in Rapid City, South Dakota, bring this action challenging the decision of the Indian Health Service ("IHS") to enter into a self-determination contract with the Great Plains Tribal Chairmen's Health Board ("the Health Board"). The contract permits the Health Board to operate portions of IHS's facilities in Rapid City, including the Sioux San hospital, now known as the Oyate Health Center. Plaintiffs assert the contract violates the Fort Laramie Treaty of 1868 between the United States and the Great Sioux Nation and the Indian Self-Determination and Education Assistance Act ("ISDEAA"). They ask the court to enjoin the contract and reinstate IHS control over the Rapid City facilities. Defendants moved to dismiss the complaint. As detailed below, the court finds plaintiffs do not have zone-of-interest standing to sue for relief under the ISDEAA, the Fort Laramie Treaty does not provide a private right of action under these circumstances, and the Health Board is an indispensable party that cannot be joined due to sovereign immunity. The court dismisses the complaint, denies injunctive relief and denies all other pending motions as moot. The Interior Board of Indian Appeals ("IBIA") held in 1997 that the OST, CRST, and RST could authorize a separate tribal organization to assume IHS functions in the Rapid City Service Unit. The Health Board is incorporated as a nonprofit corporation under South Dakota law. The OST, CRST and RST are all members of the Health Board. The Rapid City Service Unit is currently operated jointly between the Health Board and IHS. The Health Board ostensibly provides services

to OST and CRST citizens, while IHS serves RST citizens and citizens of other tribes. However, IHS represents that both it and the Health Board have an “open-door” policy whereby they will each serve Native Americans from any tribe. In the ISDEAA, Congress declared it is federal policy to establish “a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.” 25 U.S.C. § 5302(b). The ISDEAA’s seemingly-broad right of action provision does not open the courthouse doors to individual litigants concerned with self-determination contracts. The provision gives federal district courts “original jurisdiction over any civil action or claim ... arising under” the ISDEAA. 25 U.S.C. § 5331(a). However, Congress specified in the provision that a federal court may order “injunctive relief” to force agencies “to award and fund an approved self-determination contract[.]” *Id.* This specification indicates a focus in the right of action on the ISDEAA’s overarching goal—to enable tribes and tribal organizations to assume federal functions through self-determination contracts. The court finds Congress did not intend to “expressly negate[.]” the traditional zone of interests analysis for courts evaluating the scope of the ISDEAA’s right of action. *Bennett v. Spear*, 520 U.S. 154, 163 (1997). ISDEAA case law, while not specifically resolving whether individuals have a right of action to challenge self-determination contracts, does confirm the law is concerned primarily with interactions between tribes and federal agencies. The United States Courts of Appeal for the Eighth, Ninth, and Eleventh Circuits, as well as the Court of Federal Claims, have each held the ISDEAA does not permit private parties to sue for harms incurred pursuant to a self-determination contract. The Eighth Circuit found “by definition, the ISDEAA does not contemplate that a private party... can enter into a self-determination contract.” *FGS Constructors, Inc. v. Carlow*, 64 F.3d 1230, 1234 (8th Cir. 1995) (referencing 25 U.S.C. § 5304(j)). The court finds plaintiffs, who seek to abrogate the contract between IHS and the Health Board, do not fall within the zone of interests protected by the ISDEAA. Accordingly, the ISDEAA does not require the Health Board to be democratically accountable to the Rapid City Native American community to qualify as a tribal organization able to enter into a self-determination contract. The Health Board cannot feasibly be joined due to its sovereign immunity. The Southern Division of this court held in 2012 that the Health Board is entitled to share in the sovereign immunity of its component tribal nations. *J.L. Ward Assocs., Inc. v. Great Plains Tribal Chairmen’s Health Bd.*, 842 F. Supp. 2d 1163, 1171-77 (D.S.D. 2012). For the reasons given above, it is Ordered that defendants’ motion to dismiss is granted as described in this order.

54. Dotson v. Tunica Biloxi Gaming Commission

2020 WL 1493028 (L.A. Feb. 27, 2020). Before the Court are two Motions to Dismiss filed by Defendants, alleging tribal immunity and failure to effect service of process. Because the Tunica-Biloxi Gaming Commission has sovereign immunity, its Motion to Dismiss should be GRANTED. Because Plaintiff failed to serve process on the other Defendants, the Motion to Dismiss pursuant to Fed. R. Civ. P. rule 4(m) should be GRANTED as to all other Defendants. Dotson alleges

Defendants conspired to steal her slot machine jackpot of \$20,500,000. Dotson contends that, when her slot machine stopped, it showed at the bottom “20 5”. Dotson contends she was entitled to another free spin, but the machine would not spin, so she hit the service button. Defendant Piazza arrived, told Dotson she had not won, cashed Dotson out on the machine, moved the “reel,” and took Dotson’s “ticket. The video showed an error code of 20 5, stating it was a jammed coin and printer error. Defendants sued in their official capacities as tribal officers may assert sovereign immunity. *See Lewis v. Clarke*, 137 S. Ct. 1285, 1291 (2017). Accordingly, to the extent Dotson’s suit against Commissioner Newman and Commissioner Bobby Pierite is against them in their official capacities, it should be, and is dismissed due to sovereign immunity.

55. Swinomish Indian Tribal Community v. BNSF Railway Company

951 F.3d 1142, 2020 WL 1038679 (9th Cir. Mar. 04, 2020). Enforcement of easement agreement was not an unreasonable interference with rail transportation, and thus was not impliedly preempted by the ICCTA. Federally recognized Indian tribe brought action against railway company, asserting claims for breach of contract and trespass regarding right-of-way easement agreement for railroad constructed across tribal land, and seeking damages, declaratory judgment, and injunctive relief. Parties cross-moved for summary judgment. The United States District Court for the Western District of Washington, Robert S. Lasnik, Senior District Judge, 228 F.Supp.3d 1171, granted tribe’s summary judgment motion, denied railway company’s cross- motion for summary judgment, but found that tribe’s state law claims for injunctive relief were preempted by the Interstate Commerce Commission Termination Act (ICCTA), 2017 WL 2483071, granted tribe’s motion for reconsideration on preemption issue, and 2018 WL 1336256, clarified and denied railway company’s motion for reconsideration. Railway company filed interlocutory appeal. The Court of Appeals, William A. Fletcher, Circuit Judge, held that: 1) the ICCTA does not repeal the Indian Right of Way Act; 2) enforcement of easement agreement was not an unreasonable interference with rail transportation, and thus injunctive relief was not impliedly preempted by the ICCTA; and 3) ICCTA abrogates neither the general treaty-based federal common law right of tribes to exclude non-Indians from Indian lands, nor the explicit right to exclude contained in the Treaty of Point Elliott. Affirmed and remanded.

56. Rosebud Sioux Tribe v. United States

450 F. Supp. 3d 986, 2020 WL 1516184 (D.S.D. Mar. 30, 2020). 1868 Treaty of Fort Laramie imposed on United States trust duty to provide competent physician-led health care to members of Rosebud Sioux tribe. Indian tribe and its members brought action alleging that Indian Health Services’ (IHS) decision to place tribe’s hospital emergency department on “divert status” violated United States’ treaty, statutory, and common law trust duties. Parties filed cross-motions for summary judgment. The District Court, Roberto Lange, Chief Judge, held that: 1) 1868 Treaty of Fort Laramie imposed on United States trust duty to provide competent physician-led health care to tribal members; 2) lump sum appropriations that Indian Health Services (IHS) received from

Congress did not negate existence of trust duty; 3) Indian Health Care Improvement Act (IHCA) did not impose any affirmative trust duties on United States for Indian health care; and 4) tribe satisfied redressability requirement for standing to bring action. Motions granted in part and denied in part.

57. Applied Sciences & Information Systems, Inc. v. DDC Construction Service, LLC

2020 WL 2738243 (E.D. Va. Mar. 30, 2020). Before the Court is Defendant DDC Construction Services, LLC's ("DDC 4C" or "Defendant") Motion to Dismiss. For the reasons set forth below, Defendant's Motion to Dismiss is Granted. The Navajo Nation is a federally-recognized Indian tribe. In 2004, the tribe's governing body, Navajo Nation Council, established Dine Development Corporation ("DDC"), a wholly-owned corporation of the Navajo Nation, to "facilitate economic development in and for the Navajo Nation and its citizens by, among other things, forming and assisting to capitalize subsidiary corporations." To determine whether an entity is an arm of the tribe, or sufficiently close to permit the entity to share in the tribe's immunity, the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit") has adopted the first five non-exhaustive factors of the arm-of-the-tribe immunity analysis from *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173 (10th Cir. 2010). The Court finds that after balancing the factors in the arm-of-the-tribe immunity analysis, four of the five factors weigh in favor of immunity. Therefore, this Court finds that DDC 4C is entitled to immunity as an arm of the Navajo Nation tribe. Though an Indian tribe and its economic arms might have sovereign immunity, they will be subject to suit if they waive this immunity. To participate in the SBA 8(a) program, a tribal entity must include as part of its articles of incorporation, an "express sovereign immunity waiver language, or a 'sue and be sued' clause which designates United States Federal Courts to be among the courts of competent jurisdiction for all matters relating to SBA's programs, including, but not limited to, 8(a) [Business Development] program participation, loans, and contract performance." 13 C.F.R. 124.109(c)(1). DDC 4C included this waiver in Article Eight of its Articles of Organization which provides that "[t]he Company is authorized to sue and be sued in any court of competent jurisdiction, including the United States Federal Court, for all commercial matters relating to the United States Business Administration's programs." DDC 4C's Operating Agreement elaborates on this waiver noting that "[t]he Company may sue and be sued in the Navajo Nation Courts and the United States Federal Courts for all commercial matters related to the Small Business Administration's programs, includ[ing] but not limited to 8(a) Business Development program participation, loans and contract performance." Though some of the contracts DDC 4C purchased from ASciS were federal contracts awarded pursuant to the SBA 8(a) Program, the essence of ASciS' complaint has nothing to do with these particular contacts. ASciS' claims are breach of contract claims based on the enforcement of the APA, a private agreement and a subsequent settlement agreement. Therefore, Plaintiff's claims are not included in DDC 4C's waiver of sovereign immunity which is limited to matters dealing with the SBA. There is no other indication in the record to suggest that DDC 4C waived tribal immunity. Plaintiff

has therefore failed to show that Defendant waived immunity. Where Defendant has met its burden for tribal immunity, and Plaintiff has failed to show that this immunity was abrogated or waived, Plaintiff's complaint must be dismissed.

58. *Williams v. Medley Opportunity Fund II, LP*

965 F.3d 229, 2020 WL 3968078 (3rd Cir. July 14, 2020). Plain language of arbitration agreement between lenders and borrowers indicated that only tribal law claims could have been brought in arbitration. Borrowers that received loans from lender, which was an online entity owned by an Indian tribe, brought action against lender's holding company, and members of company's board of directors, alleging claims under the Racketeer Influenced and Corrupt Organizations Act (RICO) and Pennsylvania law. The United States District Court for the Eastern District of Pennsylvania, Mitchell S. Goldberg, J., 2019 WL 9104165, denied motion to compel arbitration by company and members. Company and members appealed. The Court of Appeals, Shwartz, Circuit Judge, held that: 1) as a matter of first impression, arbitration agreements that limit a party's substantive claims to those under tribal law, and hence forbid federal claims from being brought, are unenforceable; 2) plain language of arbitration agreement showed that only tribal law claims could have been brought in arbitration; 3) provision in loan agreement that it was governed by federal law, as applicable under Indian Commerce Clause, did not apply to arbitration agreement; 4) arbitration agreement contained impermissible prospective waiver of right to bring claims under federal law; and 5) provisions in arbitration agreement requiring application of tribal law were integral to agreement, and thus were not severable. Affirmed.

59. *Gibbs v. Haynes Investments, LLC*

967 F.3d 332, 2020 WL 4118239 (4th Cir. July 21, 2020). Choice-of-law clauses in arbitration clauses were prospective waivers of borrowers' statutory rights and were unenforceable based on public policy. Borrowers who entered into loan agreements with online lenders owned by Native American tribes brought putative class action against limited liability companies (LLC) that had invested in lenders, and LLCs' principal, alleging that lenders were actually funded and operated by LLCs and their principal, who used the tribes' ownership status to make usurious loans, in violation of Virginia laws and the Racketeer Influenced and Corrupt Organizations Act (RICO). The United States District Court for the Eastern District of Virginia, M. Hannah Lauck, J., 368 F.Supp.3d 901, denied LLCs' and principal's motion to compel arbitration. LLCs and their principal appealed. The Court of Appeals, Agee, Circuit Judge, held that: 1) borrowers challenged delegation clauses in arbitration agreements with sufficient force to permit district court, rather than arbitrator, determine whether arbitration agreements were enforceable, and 2) choice-of-law clauses in agreements constituted prospective waivers of borrowers' statutory rights and were thus unenforceable as a matter of public policy. Affirmed.

60. *Gibbs v. Sequoia Capital Operations, LLC*

966 F.3d 286, 2020 WL 4118283 (4th Cir. July 21, 2020). Choice-of-law provisions in arbitration agreements within loan contracts violated prospective waiver doctrine, so that agreements were unenforceable. Borrowers brought putative class action against online lenders owned by Native American tribes, alleging violation of Virginia's usury law and Racketeer Influenced and Corrupt Organizations Act (RICO). The United States District Court for the Eastern District of Virginia, M. Hannah Lauck, J., 421 F.Supp.3d 267, denied lenders' motion to compel arbitration. Lenders appealed. The Court of Appeals, Agee, Circuit Judge, held that: 1) District Court properly considered the enforceability of the delegation clause, and 2) arbitration agreements in loan contracts were not enforceable. Affirmed.

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

2020 WL 4569558 (E.D. Mich. Aug. 07, 2020). On January 29, 2016, Plaintiffs Saginaw Chippewa Indian Tribe of Michigan and the Welfare Benefit Plan (“Plaintiffs” or “the Tribe” or “SCIT”) brought suit against Blue Cross Blue Shield of Michigan (“BCBSM”). Plaintiffs’ allegations arose from BCBSM’s administration of group health plans for employees of the Tribe and members of the Tribe. Plaintiffs alleged that BCBSM was charging hidden fees, overstating the cost of medical services, and violated its ERISA fiduciary duties by failing to demand Medicare Like Rates (“MLR”) from medical service providers. In its order, the Court determined that Plaintiffs had two separate health care plans with BCBSM. One plan was for members of the Tribe and the other was for employees of the Tribe. The Court determined that only the plan for the employees was governed by ERISA. Plaintiffs appealed the order to the Sixth Circuit. The Sixth Circuit affirmed the Court’s judgment with the exception of the dismissal of Plaintiffs’ MLR claims. The Sixth Circuit found that [T]he Tribe does not assert that the MLR regulations impose an additional duty on fiduciaries beyond what ERISA itself requires. Instead, the Tribe bases its claim on the text of ERISA itself, which requires fiduciaries to act prudently and solely in the interest of the plan’s participants and beneficiaries. *See* 29 U.S.C. § 1104(a)(1). Now, Plaintiffs acknowledge that the federal law requiring MLR intended to regulate “Medicare-participating hospitals” in order to benefit “Tribe[s] or Tribal organization[s] carrying out a CHS program of the IHS”. Plaintiffs contend that BCBSM breached its fiduciary duty by “[p]aying excess claim amounts to Medicare- participating hospitals for services authorized by a tribe or tribal organization carrying out a CHS program.” In order to receive CHS services, an individual must first gain approval from the Tribe’s CHS program. Federal regulation provides: In nonemergency cases, a sick or disabled Indian, an individual or agency acting on behalf of the Indian, or the medical care provider shall, prior to the provision of medical care and services notify the appropriate ordering official of the need for services and supply information that the ordering official deems necessary to determine the relative medical need for the services and the individual’s eligibility. 42 C.F.R. § 136.24(b). Upon receiving approval from the ordering official, a purchase

order is issued from the ordering official to the medical care provider. 42 C.F.R. § 136.24(a). At issue in this case is whether a medical service is eligible for Medicare-Like Rates when an employee health care plan engaged by the tribe uses a source of funding other than CHS funds to pay for the service. The Tribe's entitlement to Medicare-Like Rates originates from the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 ("MMA"). PL 108-173 (HR 1). The MMA was intended to provide a program for prescription drug coverage under the Medicare Program, to amend the Internal Revenue Code to permit certain deductions, and to make other changes to the Social Security Act. *See id.* Specifically, § 506(a) of the MMA amended 42 U.S.C. § 1395cc to include a new provision granting the Secretary of Health and Human Services (the "Secretary") the authority to require Medicare payments to hospitals providing services on behalf of the Indian Health Service, an Indian tribe, or a tribal organization. The "Medicare-like" payment rate will constitute payment in full to Medicare-participating hospitals that deliver services to American Indians and Alaska Natives referred through IRS-funded programs. The final rule, entitled "§ 506 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003-Limitation on Charges for Services Furnished by Medicare Participating Inpatient Hospitals to Individuals Eligible for Care Purchased by Indian Health Programs" (72 FR 30706), includes all IHS-funded health care programs, whether operated by the IHS, Tribes, Tribal organizations, or Urban Indian organizations. The effective date for the final rule was July 5. The tribe would not benefit from the MLR because it would not be paying for the actual service. Such a result would be contrary to the intent of the statute. Accordingly, MLR is only applicable for those services funded by CHS. BCBSM was not authorized nor did it pay for services using funds from CHS. Accordingly, MLR was not applicable to BCBSM's payments to medical providers. BCBSM did not have a fiduciary duty under ERISA to pay for Plaintiffs' medical services at MLR as alleged in Count I of Plaintiffs' amended complaint because only services funded by the Tribe's CHS program qualified for MLR. For that same reason, BCBSM could not have violated the Health Care False Claims Act as alleged in Count IV or breached a common law fiduciary duty as alleged in Count VI. For these reasons, BCBSM's Motion for Summary Judgment will be granted. It is further Ordered that Plaintiffs' Amended Complaint is Dismissed with Prejudice.

D. Employment

No cases this year that principally involve employment law.

E. Environmental Regulations

62. Pit River Tribe v. Bureau of Land Management

939 F.3d 962, 2019 WL 4508340 (9th Cir. Sept. 19, 2019). Geothermal Steam Act permitted production-based continuations of unproven leases on lease-by-lease basis, not on unit-wide basis. Indian tribe and environmental organizations brought actions alleging that Bureau of Land

Management's (BLM) continuation of unproven geothermal leases violated Geothermal Steam Act (GSA), National Environmental Policy Act (NEPA), National Historic Preservation Act (NHPA), and federal government's fiduciary trust obligation to Indian tribes. After cases were consolidated, the United States District Court for the Eastern District of California, John A. Mendez, J., entered judgment on pleadings in BLM's favor, and plaintiffs appealed. The Court of Appeals, 793 F.3d 1147, reversed and remanded. On remand, the United States District Court for the Eastern District of California, John A. Mendez, J., 2017 WL 395479, entered summary judgment in plaintiffs' favor, and BLM appealed. The Court of Appeals, Christen, Circuit Judge, held that: it had jurisdiction to review district courts order, and unproven geothermal leases were not eligible for 40-year unit continuation based on single proven lease in unit. Affirmed.

63. Protect Our Communities Foundation v. LaCounte

939 F.3d 1029, 2019 WL 4582841 (9th Cir. Sept. 23, 2019). BIA complied with mitigation measure listed in EIS prepared in connection with proposed industrial-scale wind facility on Indian reservation. Environmental organizations brought action alleging that Bureau of Indian Affairs' (BIA) approval of industrial-scale wind facility on Indian reservation violated Administrative Procedure Act (APA), National Environmental Protection Act (NEPA), and Bald and Golden Eagle Protection Act. Tribe and project developer intervened. The United States District Court for the Southern District of California, No. 3:14-cv-02261-JLS-JMA, Janis L. Sammartino, J., 240 F.Supp.3d 1055, entered summary judgment in BIA's favor, and groups appealed. The Court of Appeals, Gould, Circuit Judge, held that: 1) BIA complied with mitigation measure listed in environmental impact statement (EIS); 2) EIS adequately considered alternatives; 3) NEPA did not require BIA to prepare supplemental EIS; 4) BIA's approval of project was not contrary to law; and 5) BIA did not act arbitrarily and capriciously by not conditioning its approval on project developer obtaining take permit under Bald and Golden Eagle Protection Act. Affirmed.

64. Rosebud Sioux Tribe v. Trump

428 F. Supp. 3d 282, 2019 WL 7421956 (D. Mont. Dec. 20, 2019). Indian tribes sufficiently alleged that President violated treaties by issuing without their consent permit oil pipeline that crossed their territory. Indian tribes brought action against United States President, various governmental agencies, and energy company, seeking declaratory and injunctive relief for claims that defendants violated Indian treaties, the Foreign Commerce Clause, various federal statutes and regulations, and tribes' inherent sovereign powers when President issued presidential permit to energy company for cross-border oil pipeline. Defendants moved to dismiss. The District Court, Brian M. Morris, J., held that: 1) tribes alleged concrete and particularized injury as required for standing; 2) tribes' injury was certainly impending and fairly traceable to issuance of permit; 3) tribes' injury was redressable; 4) tribes stated plausible Foreign Commerce Clause claim; 5) tribes sufficiently alleged that President violated Indian treaties; 6) tribes sufficiently alleged that

President violated statutory obligations owed to them; and 7) tribes sufficiently alleged that permit violated their inherent sovereign powers. Motion granted in part and denied in part.

65. Menominee Indian Tribe of Wisconsin v. Environmental Protection Agency

947 F.3d 1065 (7th Cir. Jan. 27, 2020). Indian tribe brought action challenging decision by Environmental Protection Agency (EPA) and Army Corps of Engineers not to exercise jurisdiction over mining company's application for dredge-and-fill permit submitted pursuant to Clean Water Act (CWA). Mining company intervened. The United States District Court for the Eastern District of Wisconsin, William C. Griesbach, Chief Judge, 360 F.Supp.3d 847, dismissed complaint, and tribe appealed. The Court of Appeals, Scudder, Circuit Judge, held that: 1) letters from EPA and Corps to Indian tribe explaining that it was state, not federal government, that had jurisdiction over permit did not constitute final agency actions subject to judicial review; 2) EPA's decision to withdraw its objections to states proposed issuance of permit was not subject to judicial review; and 3) EPA and Corps had no obligation under National Historical Preservation Act to consult with tribe about mining project. Affirmed. Hamilton, Circuit Judge, concurred.

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

440 F. Supp. 3d 1, 2020 WL 1441923 (D.D.C. Mar 25, 2020). Impact Statements. Corps of Engineers was required to prepare environmental impact statement (EIS) before granting easement for oil pipeline to cross under river. Indian tribes filed suits, under Administrative Procedure Act (APA), claiming that Army Corps of Engineers' grant of easement for Dakota Access Pipeline (DAPL) to carry crude oil under Missouri River, which was federally regulated waterway bordering tribes' reservations, violated National Environmental Policy Act (NEPA), National Historic Preservation Act (NHPA), and Mni Waconi Act. Following consolidation, the United States District Court for the District of Columbia, James E. Boasberg, J., 255 F.Supp.3d 101, granted in part and denied in part parties' cross-motions for partial summary judgment, and remanded. On remand, Corps issued determination finding no significant environmental impact (FONSI) from pipeline crossing under waterway, thus exempting Corps from preparing environmental impact statement (EIS) under NEPA. Parties again cross-moved for summary judgment. The District Court, Boasberg, J., held that: 1) Corps was required to prepare EIS under NEPA; 2) NHPA claims were moot; 3) Corps did not breach trust duty under Mni Waconi Act; and 4) Corps did not breach any fiduciary duty under Mni Waconi Act. Motions granted in part and denied in part; remanded.

67. Confederated Salish and Kootenai Tribes v. Lake County Board of Commissioners

454 F. Supp. 3d 957, 2020 WL 1891263 (D. Mont. Apr. 16, 2020). The Court grants the motion of Plaintiff Confederated Salish and Kootenai Tribes and denies the joint motion of Defendants

Lake County Board of Commissioners (“Lake County”) and Lori Lundeen. In 1855, the Tribes ceded to the United States most of their aboriginal lands in Montana and Idaho, reserving for their exclusive use the Flathead Indian Reservation. Under the terms of the Hell Gate Treaty, non-Indian settlers could reside within the Reservation’s boundaries only with the Tribes’ permission. Just over a year after the *Lone Wolf* decision, Congress passed the Flathead Allotment Act, authorizing the executive branch to survey and allot lands within the Reservation. Under the Indian Reorganization Act of 1934, Congress halted the policy of allotment and authorized the Secretary of the Interior “to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public-land laws of the United States.” Indian Reorganization Act, 73 Cong. Ch. 576, 48 Stat. 984 § 3 (June 18, 1934). Even so, the return of unsold lots in Big Arm to tribal control happened slowly. Defendant Lori Lundeen owns 40 acres of land bordering the western boundary of the former Big Arm townsite, which she hopes to develop as an RV park. With the blessing of the Lake County Board of Commissioners, Lundeen began construction on a road through Big Arm, connecting an existing gravel road, Seventh Street, with her property. The Bureau of Indian Affairs issued a notice of trespass to Sandry Construction, the contractor Lundeen hired to develop the property. Under the circumstances, the Tribes are entitled to summary judgment, and the Defendants do not have jurisdiction to develop E Street.

68. Coalition to Protect Puget Sound Habitat v. U.S. Army Corps of Engineers

466 F. Supp. 3d 1217, 2020 WL 3100829 (W.D. Wash. June 11, 2020). On October 10, 2019, the Court found (a) that there is insufficient evidence in the administrative record to support the U.S. Army Corps of Engineers’ conclusion that the 2017 reissuance of Nationwide Permit (“NWP”) 48 would have minimal individual and cumulative impacts on the aquatic environment for purposes of the Clean Water Act (“CWA”) and (b) that the Corps’ environmental assessment related to NWP 48 did not satisfy the requirements of the National Environmental Policy Act (“NEPA”). In issuing NWP 48, the Corps opted to interpret the “similar in nature” requirement of 33 U.S.C. § 1344(e)(1) broadly, with the result that it was virtually impossible to evaluate the impacts of “commercial shellfish aquaculture activities” in a way that captured all of the varying operations in the varying ecosystems throughout the nation. The Corps’ issuance of a nationwide permit, at least with respect to activities in the waters of the State of Washington, was found to be arbitrary and capricious and not in accordance with NEPA or the CWA. Despite the statutory direction to “set aside agency action” that is found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” the Court has discretion to leave the unlawful agency action in place while the agency corrects the identified errors or deficiencies. 5 U.S.C. § 706(2). The circumstances in which a remand without vacatur is appropriate are “rare,” *Humane Soc’y v. Locke*, 626 F.3d 1040, 1053 n.7 (9th Cir. 2010), or “limited,” *Cal. Communities Against Toxics, v. U.S. Env’tl. Prot. Agency*, 688 F.3d 989, 992 (9th Cir. 2012). Because the APA creates a “presumption of vacatur” if an agency acts unlawfully, the presumption must be overcome by the

party seeking remand without vacatur. Under these circumstances, it is hereby Ordered as follows: 1) NWP 48 and all authorizations or verifications under it are Vacated in the State of Washington. This vacatur is hereby Stayed for sixty days to allow the Corps and/or Intervenors to appeal and obtain a stay from the Ninth Circuit; 2) The vacatur is also Stayed as to the following activities: a) maintenance and harvesting activities (conducted in accordance with the terms of the current verification) for shellfish that were already planted/seeded as of the date of this Order; b) seeding/planting activities (conducted in accordance with the terms of the current verification) occurring within six months of the date of this Order in areas that do not contain mature native eelgrass beds, as well as to maintenance and subsequent harvesting of the beds seeded/planted under this subsection; c) shellfish activities (conducted in accordance with the terms of the current verification) which occur pursuant to and to provide treaty harvest in furtherance of treaty rights adjudicated under *United States v. Washington*.

69. *Standing Rock Sioux Tribe and Cheyenne River Sioux Tribe v. U.S. Army Corps of Engineers*

471 F. Supp. 3d 71, 2020 WL 3634426 (D.D.C. July 06, 2020). Indian tribes filed suits, under Administrative Procedure Act (APA), claiming that Army Corps of Engineers' grant of easement for construction and operation of Dakota Access Pipeline (DAPL) to carry crude oil under Lake Oahe, which was reservoir lying behind dam on Missouri River and was federally regulated waterway bordering tribes' reservations, violated National Environmental Policy Act (NEPA), National Historic Preservation Act (NHPA), and Mni Waconi Act. Following consolidation, the District Court, James E. Boasberg, J., 255 F.Supp.3d 101, granted in part and denied in part parties' cross-motions for partial summary judgment, and remanded. On remand, Corps issued determination finding no significant environmental impact (FONSI) from pipeline crossing under waterway, thus exempting Corps from preparing environmental impact statement (EIS) under NEPA. The District Court, Boasberg, J., 2020 WL 1441923, granted in part and denied in part cross- motions for summary judgment, remanded for Corps to complete EIS, and requested separate briefing, on status of easement and oil pending completion of EIS, in which tribes argued for vacatur of permits granting easement and government opposed vacatur. The District Court, Boasberg, J., held that: 1) Seriousness of deficiencies of Corps' decision not to prepare EIS weighed in favor of vacatur of easement and emptying pipeline during remand, and economic disruption did not weigh decisively in favor of remand without vacatur; and 3) environmental disruption did not weigh decisively in favor of remand without vacatur. Vacated.

F. Fisheries, Water, FERC, BOR

70. *In re CSRBA Case No. 49576 Subcase No. 91-7755*

165 Idaho 517, 448 P.3d 322 (Idaho Sept. 05, 2019). Tribe's non-consumptive reserved water rights carried priority date of time immemorial. United States Department of the Interior, as trustee

for the Coeur d'Alene Tribe, filed 353 claims in the Coeur d'Alene-Spokane River Basin Adjudication (CSRBA) seeking judicial recognition of federal reserved water rights to fulfill purposes of Tribe's Reservation, which Tribe joined. State and others objected to claims asserted by United States and Tribe. On parties' cross-motions for summary judgment, the Fifth Judicial District Court, Twin Falls County, Eric J. Wildman, J., allowed certain claims to proceed and disallowed others, and subsequently granted motion to reconsider by State and motion to modify by United States and Tribe. Parties appealed. The Supreme Court, Stegner, J., held that: 1) tribal agreements and Act of Congress did not constitute change in condition in Reservation that prevented executive order from establishing Reservation's purposes; 2) tribal agreements and Act did not demonstrate Congressional intent to abrogate Tribe's water rights or Reservation's purposes; 3) formative documents and historical context demonstrated Reservation had homeland purpose, for purposes of establishing water rights; 4) tribe was not entitled to control water level of lake; 5) formative documents did not demonstrate intent to encompass industrial, commercial, or aesthetic uses of water; 6) Tribe retained water rights for instream flows located on Reservation, on both tribal-owned and non-tribal-owned lands; 7) Tribe voluntarily relinquished any water rights to off-Reservation instream flows; and 8) as an issue of first impression, Tribe's non-consumptive reserved water rights carried priority date of time immemorial. Affirmed in part, reversed in part, and remanded. Burdick, C.J., filed opinion concurring in part and dissenting in part, in which Horton, J., concurred.

71. United States v. Washington

2019 WL 5963052 (W.D. Wash. Nov. 13, 2019). The Swinomish Indian Tribal Community (“Swinomish”), the Tulalip Tribes (“Tulalip”), and the Upper Skagit Indian Tribe (“Upper Skagit”) initiated this sub-proceeding against the Lummi Nation (“Lummi”). Dkt. #3.1 Swinomish, Tulalip, and Upper Skagit (collectively, the “Region 2 East Tribes”), seek to establish that “[t]he adjudicated usual and accustomed fishing places of the Lummi Nation do not include Region 2 East.” *Id.* On November 4, 2019, the Lummi Indian Business Council filed a regulation purporting to open portions of Region 2 East to crab fishing on November 6, 2019. That same day, Swinomish filed its motion for a temporary restraining order. Upper Skagit and Tulalip filed similar motions for temporary restraining orders on November 5, 2019. The motions all seek an order enjoining Lummi from opening the Shellfish Region 2 East (generally, the waters east of Whidbey Island) winter crab fishery. Having reviewed the motions and the record herein, the Court enters this temporary restraining order. Judge Boldt determined the Lummi usual and accustomed fishing places (“U&A”) in 1974. *United States v. Washington*, 384 F. Supp. 312, 360 (W.D. Wash. 1974). Judge Boldt determined 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, and particularly Bellingham Bay.” *Id.* Since that time, Lummi has not opened any portion of Region 2 East to crab fishing. The State of Washington and the treaty tribes share management responsibility and, as relevant here, “enter into shellfish management

agreements for each shellfish management area in order to regulate treaty and non-treaty harvest in accordance with the principles of fairness, conservation, and sharing.” Dkt. #11 at ¶ 4. Overall harvest quota is allocated 50% to the State and 50% to the tribes. *Id.* The tribal harvest quota within Region 2 East has historically been managed by the Region 2 East Tribes and the Suquamish Indian Tribe (“Suquamish”), which has a limited U&A in the southern tip of Region 2 East. *Id.* at ¶ 7. On this record, the Court does not find that the likelihood of success on the merits tips sharply in favor of either side. But the Court also concludes that from the motions, briefing, and declarations submitted, there is little question that there are serious questions as to the geographic boundaries of the Lummi U&A, and whether the Lummi has U&A in Region 2 East. The Court does find that the Region 2 East Tribes have adequately demonstrated that irreparable harm is likely in the absence of the relief they seek. The Court concludes that allowing Lummi entrance into a fishery that it has not participated in for the last 45 years is likely to result in irreparable injury to the Region 2 East Tribes. The Court has little problem concluding that the equities and the public interest favor injunctive relief here. Put most succinctly, “Lummi will suffer no harm if this Court preserves the status quo. Its fisheries can proceed as they have for the last 45 years, The Court further finds and ORDERS: 1) The Swinomish Motion for Temporary Restraining Order); Upper Skagit Indian Tribe’s Motion for Temporary Restraining Order); and the Tulalip Motion for Temporary Restraining Order are GRANTED. 2) The Lummi Nation is hereby ENJOINED from opening or participating in any crab fishery in Region 2 East, until the Court has ruled on the parties’ motions for preliminary injunction and shall take action necessary to assure its members comply with this Order.

72. Baley v. United States

942 F.3d 1312, 2019 WL 5995861 (Fed. Cir. Nov. 14, 2019). Bureau of Reclamation's termination of water deliveries to farmers in order to preserve fish habitat did not constitute Fifth Amendment taking. Farmers filed class actions against United States, claiming that Bureau of Reclamation effected Fifth Amendment taking and violated their water rights, under Klamath River Basin Compact between California and Oregon, by temporarily terminating water deliveries to farmers for irrigation in order to preserve habitat of three species 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, the Court of Federal Claims, Marian Blank Horn, Senior Judge, 134 Fed. Cl. 619, entered summary judgment for government. Farmers appealed. The Court of Appeals, Schall, Circuit Judge, held that: 1) tribes' reserved water rights were senior to class of farmers' rights to irrigation water, and Bureau of Reclamation's temporary termination of water deliveries to farmers did not effect Fifth Amendment taking or impair farmers' water rights under interstate compact, and 2) final State adjudication and quantification was not required under Oregon law before Reclamation temporarily terminated water deliveries to farmers. Affirmed.

73. Slaughter v. National Park Service

2019 WL 6465093 (D. Mont. Dec. 02, 2019). This case is about the tension between local residents and several Indian Tribes and hunters over a small patch of public land near Gardiner, Montana, where bison roam from Yellowstone National Park in search of food during winter. In 2005, a convergence of federal, state, and tribal interests opened bison hunting on the public land to Indian Tribe and Montana hunters. Every winter since, Indian Tribes and Montana hunters have harvested roaming bison on the public land. The local residents (the Plaintiffs) own homes and other property next to the public land and object to the bison hunt for several reasons. The public land in question is a quarter-mile-square area at the mouth of what is known as Beattie Gulch. In recent years, the number of Tribes claiming treaty rights to hunt bison in the area has risen to six. This has led to the harvest of as many as 200-300 bison during the hunting season from the small plot of public land. For significantly longer than records were kept, the Tribes have hunted bison in what is now Montana, sometimes traveling hundreds of miles to do so. All of the Tribes recount the deeply fundamental connection their people and history have to bison, an inherent bond between human, land, and animal forged since time immemorial. Because of this sacred bond, the Tribes specifically negotiated with the United States during Western Expansion to preserve their sovereign hunting rights to bison: “The exclusive right of taking fish in all the streams ... is further secured to said confederated tribes and bands of Indians ... together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon unclaimed land.” Yakima Treaty 1855, 12 Stats., 951. “The exclusive right of taking fish ... the privilege of hunting, gathering roots and berries and pasturing their stock on unclaimed lands in common with citizens, is also secured to them.” Walla Walla Treaty 1855, 12 Stats., 945. “The exclusive right of taking fish ... is further secured to said Indians ... together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.” Hellgate Treaty 1855, 12 Stats., 975. The Tribes manage the bison hunt through coordination with each other and the federal and state agencies involved. Participants in the bison hunt must attend the annual hunt orientation. The Plaintiffs describe the bison hunt as a chaotic killing field. On some days, 20-30 Indian hunters line up along the land, waiting for the bison to cross the boundary. When the bison cross, the hunters gun down the bison simultaneously. After the bison are field dressed, unsightly gut piles are left strewn around the field, attracting bears, wolves, and birds. The Plaintiffs are afraid a stray bullet is going to hit them or their homes. They have trouble renting cabins to tourists during the hunting season because the killing field is unpleasant. Lastly, the sight of bison being shot is traumatic and robs them of the opportunity to photograph or otherwise enjoy the bison. On October 23, the Plaintiffs filed a motion for a temporary restraining order and a preliminary injunction. Some of the Tribes’ bison hunting season was already underway. The state season was set to begin November 15. On November 14, the D.C. federal court denied the Plaintiffs’ motion for a temporary restraining order and transferred the case to the District of Montana. Rather than against the Tribes, the lawsuit is against the Department of the Interior, the National Park Service, the Forest Service, Yellowstone National Park, and the Department of Agriculture. The lawsuit

alleges the federal agencies violated the Yellowstone Management Act, the Forest Service Organic Act, the National Environmental Policy Act, and the Administrative Procedure Act, when they approved the 2019 bison hunt. (Doc. 1 at 2-3). The 2019 bison hunt was approved in December 2018. (Doc. 4-12 at 1). Here, the Court declines to examine whether the Plaintiffs are likely to succeed on the merits or if they raise serious questions going to the merits because it finds none of the remaining three Winter factors weigh in their favor. The Plaintiffs have failed to show harm is irreparable and likely. The 2019 bison hunt was publicly approved in December 2018 yet the Plaintiffs waited until late October 2019 to seek a preliminary injunction, after the bison hunting season had already begun for some Tribes and was mere weeks away for Montana hunters. Plaintiffs had the opportunity and motivation to seek a preliminary injunction well ahead of the 2019 hunting season but chose to wait until the season began anyway. The Court holds the delay weighs against finding any of the alleged harm is irreparable or likely. The Court cannot conclude the rental business is likely to go extinct due to the bison hunt without business records, market trends, and other evidence that establishes the bison hunt threatens the extinction of the rental business. The alleged harm from a stray bullet or the spread of Brucellosis may be irreparable but the Plaintiffs have not demonstrated either is likely. It is undisputed thousands of bison roam freely year-round only minutes down the road in Yellowstone National Park where hunting is not allowed. As for the Plaintiffs' trauma, it is not irreparable because the Plaintiffs could choose not to watch the bison hunt, thereby preventing their trauma. Here, the balance of hardships and public interests weighs heavily in favor of the Defendants and the public, particularly the Tribes. The Plaintiffs' motion for a preliminary injunction is denied.

74. Muckleshoot Indian Tribe v. Tulalip Tribes

944 F.3d 1179, 2019 WL 6885507 (9th Cir. Dec. 18, 2019). Fishing. District court lacked jurisdiction over tribe's sub-proceeding seeking to obtain additional U&As in saltwater of Puget Sound. In proceedings adjudicating treaty-reserved fishing rights in Washington State, Muckleshoot Indian Tribe brought action seeking to obtain additional usual and accustomed fishing grounds and stations (U&As) in saltwater of Puget Sound. Other tribes moved to dismiss sub-proceeding, arguing that the district court lacked subject matter jurisdiction because the scope of the Muckleshoots' U&As in the saltwater of Puget Sound had been specifically determined by previous order. The United States District Court for the Western District of Washington, Ricardo S. Martinez, Chief Judge, granted motion to dismiss. Muckleshoot tribe appealed. The Court of Appeals, Jed S. Rakoff, J., held that district court lacked jurisdiction over tribe's sub-proceeding seeking to obtain additional U&As in saltwater of Puget Sound. Affirmed. Ikuta, Circuit Judge, filed a dissenting opinion.

75. United States v. Uintah Valley Shoshone Tribe

946 F.3d 1216 (10th Cir. Jan. 09, 2020). Uintah Valley Shoshone Tribe lacked authority to issue

licenses authorizing its members to take wildlife from Uintah and Ouray Reservation. United States brought action to enjoin non-federally-recognized Indian tribe and its individual members selling hunting and fishing licenses that authorized members to take wildlife from Indian reservation. On cross- motions for summary judgment, the United States District Court for the District of Utah, Bruce S. Jenkins, Senior District Judge, 2018 WL 4222398, found that tribe lacked authority to issue licenses, but declined to issue permanent injunction. Parties filed cross-appeals. The Court of Appeals, Tymkovich, Chief Judge, held that: 1) mixed-blood Utes maintained their individual hunting and fishing rights on Uintah and Ouray Reservation after their membership in Ute Tribe was terminated; 2) those rights were neither alienable, assignable, transferable, nor descendible; 3) mixed-blood Utes could not convert their hunting and fishing rights into separate tribal rights; 4) tribe lacked authority to issue hunting and fishing licenses; and 5) district court did not abuse its discretion in denying permanent injunction. Affirmed.

76. Hawkins v. Bernhardt

436 F. Supp. 3d 241, 2020 WL 516036 (D.D.C. Jan. 31, 2020). Plaintiffs, a group of landowners in the Upper Klamath Basin in Oregon, seek declaratory and injunctive relief against defendants, officials in the Bureau of Indian Affairs (“BIA”) and the Department of the Interior, to prevent enforcement of the Klamath Tribes’ reserved water rights. In particular, plaintiffs challenge two protocol agreements executed by the Klamath Tribes and the BIA, setting forth procedures for the enforcement of the tribes’ water rights, arguing that in signing the agreements, the BIA unlawfully delegated federal power to the tribes and, additionally, violated the National Environmental Policy Act (“NEPA”). Defendants move to dismiss the plaintiffs’ amended complaint for lack of subject matter jurisdiction and for failure to state a claim. The defendants are correct that the plaintiffs lack standing, and thus the amended complaint is dismissed under Rule 12(b)(1). For more than a thousand years, the Klamath Tribes “hunted, fished, and foraged in the area of the Klamath Marsh and upper Williamson River,” in southern Oregon. *United States v. Adair*, 723 F.2d 1394, 1397 (9th Cir. 1983). In 1864, the Tribes ceded approximately 12 million acres of land to the United States by treaty, and, in exchange, the United States reserved roughly 800,000 acres for the Tribes. *Id.* at 1398; Treaty with the Klamath (“Klamath Treaty”), 16 Stat. 707 (1864). Article I of the Klamath Treaty granted the tribes “the exclusive right to hunt, fish, and gather on their reservation.” *Adair*, 723 F.2d at 1398; 16 Stat. 708. Article II created a [trust fund] designed to “advance [the Tribes] in civilization ... especially in agriculture.” *Id.* In 1954, Congress terminated federal supervision of the Tribes. *See* Klamath Termination Act, 68 Stat. 718 (1954) (codified at 25 U.S.C. § 564, now omitted). The Termination Act did not, however, abrogate the Tribes’ treaty rights to hunt, fish, and gather. *Kimball v. Callahan*, 493 F.2d 564, 568-69 (9th Cir. 1974); *Adair*, 723 F.2d at 1411–12. Pursuant to the Termination Act, certain tribal members elected to withdraw from the tribes in exchange for the cash value of their proportionate interest in the tribal property. *Kimball*, 493 F.2d at 567. In 1986, Congress restored the Klamath Tribes to federal recognition. *See* Klamath Indian Tribe Restoration Act, 100 Stat. 849 (1986) (codified at 25 U.S.C. § 566). The Restoration Act “restored the Tribes’ federal services, as well as the government- to-government

relationship between the Tribe and the United States,” but “did not alter existing property rights,” meaning previously sold reservation lands were not returned. *Klamath Tribe Claims Committee v. United States*, 106 Fed. Cl. 87, 90 (2012). In 1975, the United States filed suit in Federal District Court in Oregon, seeking a declaratory judgment to determine the respective water rights of the Klamath Tribes. The district court’s finding that the Tribes had implied water rights “necessary to preserve their hunting and fishing rights,” under the 1864 Klamath Treaty, *United States v. Adair*, 478 F. Supp. 336, 350 (D. Or. 1979), was affirmed, *Adair*, 723 F.2d at 1399 (holding that the Tribes possessed a right “to as much water on the Reservation lands as they need to protect their hunting and fishing rights”). Adjudication over protected water levels took place between 1976 and 2013 in lengthy state-run administrative proceedings in Oregon. The United States, the Tribes, and private landowners—including many of the plaintiffs in this case—filed thousands of claims in the state’s administrative proceeding, known as the Klamath Basin Adjudication. See *id.* At the close of the administrative phase of the Klamath Basin Adjudication, the Oregon Water Resources Department (“OWRD”) issued findings of fact and an order of determination on March 7, 2013, which was amended on February 14, 2014. OWRD’s Amended and Corrected Findings of Fact and Order of Determination (“ACFFOD”) provisionally determined more than 700 claims, including claims brought by the United States as trustee on behalf of the Klamath Tribes. Plaintiffs and the United States both filed exceptions, see Defs.’ Mot. at 11, which remain pending and “are not likely to be resolved for several more years,” Am. Compl. ¶ 20. Notwithstanding these appeals, determined claims under the ACFFOD are in effect, pursuant to ORS 539.130(4). See Am. Compl. ¶ 19. A watermaster appointed by the OWRD is tasked with enforcing such claims. See ORS 540.045(a)-(b). To enforce their rights under the ACFFOD, water users issue “calls” to the watermaster, who, upon investigation, regulates upstream usage to maintain necessary supply to satisfy senior downstream water rights. See Defs.’ Mot. at 12. In 2013, following OWRD’s preliminary determination, the BIA and the Klamath Tribes entered into one of the two protocol agreements challenged in this lawsuit, in order to delineate procedures for the issuance of calls enforcing the Tribes’ water rights. Am. Compl. ¶ 22; Defs.’ Mot., Ex. 1, Protocol Agreement Between the Klamath Tribes and the Bureau of Indian Affairs (May 30, 2013) (“2013 Protocol Agreement”), ECF No. 17-1. The 2013 Protocol Agreement established that a representative of the Tribes would, when necessary, “contact[] OWRD to make calls for enforcement of the Tribal water rights.” 2013 Protocol Agreement ¶ 1. Prior to making such a call, the Tribes would notify the BIA. Pursuant to the agreement, the BIA would then “timely provide an email response to the call. Although this agreement authorized the United States to initiate calls on behalf of the tribes, should the Tribes not issue a call notice when necessary, see *id.* at 5, both the Tribes and the United States retained an “independent right to make a call” such that if “the Parties cannot agree on whether to make a call, either Party may independently make a call and the other will not object to the call,” *id.* ¶ 7. In 2019, the BIA and Klamath Tribes replaced the 2013 Protocol Agreement with an Amended Protocol Agreement to provide for seasonal “standing calls” and enable “OWRD to more consistently monitor, observe, and, when necessary, regulate junior water users.” Defs.’ Mot., Ex. 2, Protocol Agreement Between the Klamath Tribes and the Bureau of Indian Affairs

(Mar. 7, 2019) (“2019 Protocol Agreement”), Preamble, ECF No. 17-2. The 2019 Protocol Agreement set forth procedures for issuing standing calls twice yearly, “one for the irrigation season (beginning on or about March 1) and one for the non-irrigation season (beginning on or about November 1).” *Id.* The Agreement also extended the time periods by which the BIA was to respond to proposed calls, to seven business days for proposed standing calls, and three business days for other calls. *See id.* ¶¶ 2–3. Again, the amended agreement retained the “independent right” of each party to make a call without the other’s concurrence. *Id.* In June 2013, following enforcement calls made by the Tribes with the concurrence of the BIA, pursuant to the Protocol Agreement, OWRD issued orders directing the plaintiffs and other landowners in the Upper Klamath Basin to cease all irrigation. State authorities then initiated settlement negotiations that, in April 2014, resulted in a comprehensive water settlement between the tribes and landowners called the Upper Klamath Basin Comprehensive Agreement (“UKBCA”). *Id.* ¶ 26. The UKBCA effectively lowered the water levels protected by the Tribes’ rights, and established new, lower levels “designed to support fish and wildlife resources important to the Klamath Tribes while also providing irrigation opportunities for plaintiffs and other irrigators ...” *Id.* ¶ 28. The Tribes and United States issued calls between 2014 and 2016 to enforce these lower, agreed- to water levels (referred to as “instream flows” and “streamflow levels”) under the UKBCA. *Id.* at ¶ 29. On December 28, 2017, the former secretary of the Interior issued a Negative Notice in the Federal Register terminating the UKBCA after Congress left the agreement unfunded. *See id.* at ¶ 31; 82 Fed. Reg. 61582 (Dec. 28, 2017). In 2017 and 2018, after the UKBCA’s collapse, the Tribes and the United States issued calls seeking to enforce the tribes’ water rights at the levels previously determined by the ACFOD rather than the lower levels specified in the UKBCA. In April 2019, the Tribes and United States again issued calls to OWRD “for enforcement of the full instream flow level water rights.” The plaintiffs assert that the requirements of standing are met due to two procedural injuries: first, under the Protocol Agreements, the government unlawfully delegated federal power to make calls for the enforcement of federal reserved water rights to the Tribes; and second, that the government violated NEPA “in each of 2013 and 2017 through 2019” by failing to conduct an environmental impact study before acceding to the Tribes’ calls for enforcement. Notwithstanding the hardships alleged by the plaintiffs arising from OWRD’s enforcement of the Tribes’ water rights, the plaintiffs have failed to meet the standing requirements of causation and redressability. In these circumstances, plaintiffs lack standing because they have demonstrated neither causation nor redressability. With or without the Protocol Agreements, the Tribes remain entitled to seek enforcement of their water rights at the levels quantified by the ACFOD. Here, as in *St. John’s United Church, Klamath Water Users Association, and Ashley*, the plaintiffs challenge government action in order to remedy harm ultimately caused by enforcement of a third-party’s senior water rights. Yet the third party, the Klamath Tribes, are entitled to enforce their senior water rights, as established in *Adair* and quantified by the ACFOD, regardless of whether the Protocol Agreements stand. In these circumstances, the plaintiffs have not shown, as they must, that the Tribes are likely to abandon enforcement if the remedy plaintiffs seek—rescission of the challenged Protocol Agreements—is granted. Accordingly, this case must be dismissed due to the

plaintiffs' lack of standing.

77. Narragansett Indian Tribal Historic Preservation Office v. Federal Energy Regulatory Commission

949 F.3d 8 (D.C. Cir. Feb. 07, 2020). Tribe lacked Article III standing to obtain prospective injunctive relief of requiring FERC to amend regulations. Indian tribe petitioned for review of order of the Federal Energy Regulatory Commission (FERC) denying motion to intervene in a natural gas pipeline certificate proceeding after the certificate to build a pipeline had issued, and 2018 WL 6261555 and 2018 WL 395255, denying reconsideration of order allowing construction to commence, and seeking an order compelling FERC to amend its regulations so that it could not repeat the alleged violations of the National Historic Preservation Act in the future in connection with irreparable destruction of ceremonial stone features of cultural and religious importance while pipeline was in the process of being completed. The Court of Appeals, Millett, Circuit Judge, held that procedural injury was not redressable, and thus tribe lacked standing to obtain prospective injunctive relief. Petition dismissed.

78. Kiamichi River Legacy Alliance, Inc. v. Bernhardt

439 F. Supp. 3d 1258, 2020 WL 1465885 (E.D. Okla. Feb. 11, 2020). Governor and chief of Native American tribes were required parties in action brought by organization, alleging violation of Endangered Species Act. Environmental organization and members, which sought to support endangered freshwater species, brought action against Secretary of Department of the Interior, state governor, mayor of city, executive director of state Water Resources Board, chairman of board of trustees of city water utilities trust, governor of Native American tribe, and chief of another Native American tribe, alleging that tribal water settlement agreement into which tribes had entered with Department, state, and Water Resources Board could have affected species of endangered mussels, and that tribes did not consult with United States Fish and Wildlife Service before entering into agreement, as required by Endangered Species Act (ESA), and that plan to be implemented could harm mussels, in violation of ESA. Governor and chief of tribes moved to dismiss. The District Court, Ronald A. White, Chief Judge, held that: 1) Congress did not unequivocally express waiver of tribal sovereign immunity in Endangered Species Act; 2) governor and chief were required parties; 3) governor and chief were indispensable parties; and 4) action was not ripe. Motion granted.

79. Snoqualmie Indian Tribe v. Washington

2020 WL 1286010 (W.D. Wash. Mar. 18, 2020). This matter is before the Court on Defendants State of Washington, Governor Jay Inslee, and Washington Department of Fish & Wildlife Director Kelly Susewind's Motion to Dismiss under Rule 12(c). Dkt. # 29. In 1855, members of

several Washington tribes signed the Treaty of Point Elliott, which ceded Indian-owned land in exchange for various rights. Plaintiff Snoqualmie Indian Tribe claims it is a signatory to the Treaty and therefore holds hunting and gathering rights under it. Complaint, Dkt. # 1, at 6-8. However, a previous case adjudicating fishing rights found that the Snoqualmie Tribe was not a successor in interest to the Treaty signatories because it had not maintained an organized structure since 1855. *See United States v. State of Wash.*, 476 F. Supp. 1101, 1104 (W.D. Wash. 1979), *aff'd*, 641 F.2d 1368 (9th Cir. 1981). The State now moves to dismiss by arguing, among other things, that this prior determination precludes the Snoqualmie's claims in this case. The Court agrees and Grants the State's Motion. The Snoqualmie correctly point out that the Bureau of Indian Affairs (BIA) acknowledged the Tribe's participation in the Treaty of Point Elliott when approving its petition for federal recognition in 1997. *See Final Determination To Acknowledge the Snoqualmie Tribal Organization*, 62 Fed. Reg. 45864-02, 45865 (1997) ("The Snoqualmie tribe was acknowledged by the Treaty of Point Elliott in 1855 and continued to be acknowledged after that point."). This is not the first time a court has evaluated the Snoqualmie's rights under the Treaty of Point Elliott. In 1974, the Snoqualmie and four other tribes intervened in a case, "arguing that they were also signatories to the Stevens Treaties and entitled to fishing rights." *United States v. State of Wash.*, 98 F.3d 1159, 1161 (9th Cir. 1996) (recounting history of 1970's proceedings). Judge Boldt ultimately concluded that the Snoqualmie had "not lived as a continuous separate, distinct and cohesive Indian cultural or political community" and "not maintained an organized tribal structure in a political sense." *United States v. State of Wash.*, 476 F. Supp. 1101, 1109 (W.D. Wash. 1979) (Washington II). Consequently, Judge Boldt held that the Snoqualmie Tribe was "not an entity that is descended from any of the tribal entities that were signatory to the Treaty of Point Elliott" and had no fishing rights as a result. *Id.* The Snoqualmie appealed, but the Ninth Circuit affirmed the district court's decision. *United States v. Washington*, 641 F.2d 1368 (9th Cir. 1981). The tribes appealed to the Supreme Court but were denied certiorari. *Duwamish, Samish, Snohomish, Snoqualmie & Steilacoom Indian Tribes v. Washington*, 454 U.S. 1143 (1982). "Although the effects of Judge Boldt's 1979 decision have been thoroughly litigated, this case presents a new question: does the determination in Washington II that the Snoqualmie have no fishing rights under the Treaty of Point Elliott preclude a finding that the Tribe has hunting and gathering rights? Issue preclusion "bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, even if the issue recurs in the context of a different claim." *Garity v. APWU Nat'l Labor Org.*, 828 F.3d 848, 858 n.8 (9th Cir. 2016). The doctrine applies if: "(1) the issue necessarily decided at the previous proceeding is identical to the one which is sought to be relitigated; (2) the first proceeding ended with a final judgment on the merits; and (3) the party against whom [issue preclusion] is asserted was a party or in privity with a party at the first proceeding." *Id.* at 858 n.8. Here, the second and third elements are clearly met; the Snoqualmie are the same tribal entity that intervened in Washington II, and the Ninth Circuit's decision affirming the district court was a final judgment on the merits. Issue preclusion only requires that the issue decided was essential to a final judgment about *something*; the relevant issue may be broader than the claim that was adjudicated. *See Taylor v. Sturgell*, 553 U.S. 880, 892

(2008). Otherwise, issue and claim preclusion would be the same. As the Ninth Circuit recognized, both hunting and fishing issues hinge on the same question of identity between the original signatories and the present-day tribe. Because the factual issue at the heart of the Snoqualmie's claims has been resolved against them in a previous proceeding, this case must be Dismissed with prejudice.

80. United States v. Washington

2020 WL 1917037 (W.D. Wash. Apr. 20, 2020). On May 8, 2015, the Skokomish Indian Tribe ("Skokomish") filed a Request for Dispute Resolution under § 9 of the Revised Shellfish Implementation Plan ("RFD"), requesting the Court resolve ongoing disputes between Skokomish and Gold Coast Oyster, LLC ("Gold Coast"). The court has jurisdiction to resolve this dispute under authority conferred by the Stipulation and Order Amending Shellfish Implementation Plan ¶ 9.1 (April 8, 2002) ("SIP"). The Court notes it allowed the Tribes great latitude in the presentation of evidence at trial. However, the Tribes never sought to amend the RFD to include additional claims or additional tidelands for dispute resolution in this case. Therefore, the Court has considered evidence unrelated to the Disputed Tidelands as contextual; however, this case is narrowed to the claims surrounding the Disputed Tidelands only. The Court declines to extend the scope of this case to any issue beyond the disputed issues raised in the RFD involving the Disputed Tidelands. The Tribes request the Court find Gold Coast has violated both the SIP and the PSA. The Court finds there is sufficient evidence to show Gold Coast violated the SIP. § 6.3 of the SIP requires a Grower to provide written notice ("6.3 Notice") to the affected Tribe(s) of the Grower's intention to enhance an existing natural bed or create a new artificial bed. A § 6.3 Notice must include the location and species of the proposed bed and a summary of information known to the Grower. Thus, the Tribes have shown, by a preponderance of the evidence, that Gold Coast did not provide the Tribes with adequate opportunities to inspect and/or survey the Disputed Tidelands and, thus, impeded the Tribes' abilities to exercise their Treaty Rights. However, the Tribes have not shown Gold Coast has violated the PSA by harvesting prior to conducting a survey. While the Court has found Gold Coast violated the SIP, the evidence relied on by the Tribes to show additional violations of the SIP and the PSA is insufficient. Furthermore, there does not appear to be evidence, beyond speculation, that: (1) shows the amount of shellfish harvested by Gold Coast; (2) shows from what tidelands Gold Coast harvested those shellfish; (3) shows, if Gold Coast did harvest a tideland, Gold Coast took the Tribes' treaty share of shellfish; or (4) differentiates the amount of shellfish Gold Coast allegedly harvested and the amount of shellfish Gold Coast purchased and resold. The Tribes rely on Gold Coast's DOH certificates to prove Gold Coast harvested from Hood Canal tidelands. However, there is no evidence to show that, because Gold Coast obtained a DOH certificate, it necessarily means the specific tideland has been harvested. Thus, the Tribes have not shown they are entitled to compensatory damages. The Tribes seek declaratory and injunctive relief and compensatory damages. For the above stated reasons, the Court is unable to determine the Tribes are entitled to a number or poundage of shellfish and are

not entitled to compensatory damages. However, the Court enters injunctive relief.

81. Gila River Indian Community v. Cranford

459 F. Supp. 3d 1246, 2020 WL 2537435 (D. Ariz. May 12, 2020). Pending before the Court is Defendants Joyce Cranford, David Schoubroek, Eva Schoubroek, Donna Sexton, Marvin Sexton, and Patrick Sexton (collectively, “Defendants”)’ Rule 12(b)(1) Motion to Dismiss for Lack of Jurisdiction or to Abstain. Plaintiff Gila River Indian Community (“GRIC”) is a sovereign Indian nation organized and federally recognized pursuant to § 16 of the Indian Reorganization Act of June 18, 1934. 25 U.S.C. § 5123. In 1859, Congress withdrew this land from the public domain to establish what is now known as the Gila River Reservation. From 1876 to 1915, seven Executive Orders enlarged the Reservation to its current size of over 370,000 acres. *Id.* The United States continues to hold this land in trust for GRIC. *Gila River Indian Cmty. v. Henningson, Durham & Richardson*, 626 F.2d 708, 709 (9th Cir. 1980). Bisecting this land is the Gila River. The Reservation is located near the confluence of the Gila and Salt Rivers, downstream of non-tribal landowners who settled along the Gila River after the Reservation’s establishment. The Decree, which continues to govern the use of Gila River water from its source in New Mexico to its confluence with the Salt River, is administered and enforced by a court- appointed water commissioner. This Court’s jurisdiction over the Decree continues to the present day. (See Decree at 113.). Defendants’ lands lack Decree rights. On August 14, 2019, GRIC filed a Complaint in this Court alleging that Defendants are unlawfully pumping Gila River water in derogation of its rights. (Compl. ¶¶ 1–6.) GRIC requests that the Court: (1) declare that Defendants are irrigating their lands with waters of the Gila River without associated Decree rights; (2) declare specifically which of Defendants’ wells are pumping Gila River water; (3) order that the Gila Water Commissioner cut off and seal Defendants’ wells; and (4) enjoin Defendants from diverting Gila River water to irrigate their lands. (*Id.* at 10–11). On September 26, 2019, Defendants filed their Motion, arguing that (1) the Court lacks jurisdiction to hear GRIC’s claims, and (2) in the alternative, the Court must abstain in deference to the ongoing Gila Adjudication. The issues squarely before the Court are: (1) whether the Court has jurisdiction over an action brought by a tribe to enjoin non-tribal landowners, who are not parties to the Decree and whose lands lack appurtenant Decree rights, from pumping Gila River mainstem subflow; and (2) if so, whether the Court must or should abstain in deference to the ongoing Gila Adjudication. Claims clearly within § 1362’s scope are those brought by a tribe “to protect its federally derived property rights.” *See Fort Mojave Tribe v. Lafollette*, 478 F.2d 1016, 1018 (9th Cir. 1973); *Gila River Indian Community v. Henningson, Durham & Richardson*, 626 F.2d 708, 714 (9th Cir. 1980); see also *Mescalero Apache Tribe v. Martinez*, 519 F.2d 479, 482 (10th Cir. 1975) (jurisdiction under § 1362 “premised” on “finding a federally derived right”). Because GRIC brought suit to protect these federally derived property rights, GRIC’s claims fall clearly within the scope of § 1362. Further supporting this conclusion is that the “United States could have brought this case in its capacity as trustee.” The Arizona Supreme Court recognized as much in in the context of

groundwater rights, when it held that once a federal reservation establishes a reserved right to groundwater, it may invoke federal law to protect its groundwater from subsequent diversion to the extent such protection is necessary to fulfill its reserved right. *In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 195 Ariz. 411, 989 P.2d 739, 750 (1999). This case presents a substantial issue of federal law, and the Court has jurisdiction under § 1331. The Court has jurisdiction under 28 U.S.C. § 1362 and alternatively, under 28 U.S.C. § 1332. Neither the prior exclusive jurisdiction doctrine nor any abstention doctrine apply. Defendants' Rule 12(b)(1) Motion to Dismiss for Lack of Jurisdiction or to Abstain is denied.

82. Yurok Tribe v. U.S. Bureau of Reclamation

2020 WL 2793945 (N.D. Cal. May 29, 2020). Plaintiffs the Yurok Tribe, et al., seek to lift the stay of litigation to which the parties stipulated on March 27, 2020, asserting that defendants U.S. Bureau of Reclamation and the National Marine Fisheries Service ("NMFS") (collectively, the "Bureau") failed to comply with the terms of the stipulation. The Yurok Tribe also seeks a temporary restraining order ("TRO") requesting that the Court order the Bureau to allocate an additional 16,000 acre-feet ("AF") of water to the Environmental Water Account ("EWA") for the purposes of Klamath River flows. First, the Yurok Tribe appears to concede that, notwithstanding the April 1 allocation, the 4,142-foot trigger in the UKL obligated the Bureau to engage in consultation to rearrange its water allocation, including, if necessary, to the supplemental water added to the EWA. Second, although the Yurok Tribe contends that the Bureau may not eliminate supplemental water allocated for the river, the record does not indicate that it did so. Third, the record does not support the Yurok Tribe's position that the Bureau's consultation process violated the Interim Plan. The parties do not dispute that the Bureau entered into extensive negotiations, including the FASTA process, in an attempt to allocate the water appropriately. The problem of low lake levels is ongoing and the Bureau is required to address it; the Bureau may not ignore the low lake levels in April and May simply because the requirements for June are not explicitly set. The Bureau has not violated the Interim Plan, either explicitly or in spirit. For the above reasons, the Yurok Tribe's motion to lift the stay of litigation is Denied, and its motion for a TRO is Denied As Moot.

83. United States v. Walker River Irrigation District

2020 WL 4059689 (D. Nev. July 20, 2020). This is an approximately 100- year-old case regarding apportionment of the water of the Walker River, which begins in the high eastern Sierra Nevada mountains of California, and ends in Walker Lake in Northern Nevada. *See U.S. v. Walker River Irrigation Dist.*, 890 F.3d 1161, 1165-69 (9th Cir. 2018) ("Walker IV") (reciting the history of this case); *see also* Google Maps, Walker River, <https://goo.gl/maps/jJsuqbBJB7KbrBaW8> (last visited July 16, 2020) (showing the river). Before the Court is Plaintiff the United States of America's motion for judgment on the pleadings seeking judgment on five affirmative defenses in

response to Plaintiff's counterclaims, which essentially seek to reopen a 1936 decree governing water rights in the Walker River to secure increased water rights for the Walker River Paiute Tribe ("Tribe").¹ (ECF No. 2606 ("Motion")). Because the Court finds Plaintiff is entitled to judgment as a matter of law on these particular affirmative defenses,²—and as further explained *infra*—the Court will grant the Motion. Briefly, the parties' rights to use water from the Walker River are governed by a decree entered in 1936, as modified following a Ninth Circuit remand (the "1936 Decree"). See *United States v. Walker River Irrigation District*, 890 F.3d 1161, 1162, 1166-67 (9th Cir. 2018)[hereinafter "*Walker IV*"]. The dispute currently before the Court involves claims filed by Plaintiff as counterclaims in the 1990s to effectively reopen the 1936 Decree to secure additional water rights for the Tribe. See *id.* at 1167-68. Defendants have filed answers to those counterclaims, in which they assert certain affirmative defenses to Plaintiff's counterclaims. Plaintiff first argues the equitable defense of laches does not apply when, as here, Plaintiff is acting in its sovereign capacity to protect a property right held in trust by the United States for the benefit of an Indian tribe. (ECF No. 2606 at 7-22; see also *id.* at 9-10). Defendants respond that "even if laches, waiver, and estoppel do not apply in the most technical sense to the [Plaintiff's] claims, they, like *res judicata*, at a minimum inform the principles of finality and repose that do limit and preclude the [Plaintiff's] claims." That may be true, but it also does not make Plaintiff's assertion any less true. The Court thus agrees with Plaintiff. Plaintiff asserts *Winters* rights in its counterclaims. *Winters* rights are "federal reserved water rights" that apply to Indian reservations, based on the implication that the federal government "reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation" when the government creates an Indian reservation. *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262, 1268 (9th Cir. 2017) ("Agua Caliente") (citations omitted). The Court finds that laches is unavailable as an affirmative defense because Plaintiff is acting in its sovereign capacity to protect a property right held in trust by the United States for the benefit of the Tribe. In sum, the Court will grant Plaintiff's Motion as to Defendants' affirmative defense of laches. For similar reasons, the Court will also grant Plaintiff's Motion as to Defendants' asserted affirmative defenses of waiver and estoppel. Plaintiff's motion for judgment on the pleadings is granted. It is further ordered Plaintiff is entitled to judgment as a matter of law in its favor on the following affirmative defenses: (1) laches; (2) estoppel/waiver; (3) no reserved rights to groundwater; (4) the United States is without the power to reserve water rights after Nevada's statehood; and (5) claim and issue preclusion.

G. Gaming

84. Seneca Nation of Indians v. New York

420 F. Supp. 3d 89, 2019 WL 5865450 (W.D.N.Y. Nov. 08, 2019). Arbitration panel did not act in manifest disregard of IGRA when it issued award requiring tribe to pay state contributions under gaming compact. Indian tribe filed petition and motion to vacate arbitration awards in favor of state, with respect to dispute concerning whether tribe was required to pay state revenue-sharing

payments under terms of parties' gaming compact during compact's renewal period. State cross-petitioned to confirm arbitration awards. The District Court, William M. Skretny, Senior District Judge, held that: 1) deadline for serving notice of motion to vacate arbitration award was measured with respect to final award, not the partial final award on liability; 2) partial final award on liability was not final award subject to review; 3) it was upon issuance of final award requiring tribe to make state contribution payments during compact renewal period that proceedings became subject to review; 4) tribe failed to demonstrate that panel acted in manifest disregard of the law; 5) resort to primary-jurisdiction doctrine was not necessary; and 6) award of attorney fees to the state was not warranted. State's petition granted; tribe's petition and motion denied.

85. Video Gaming Tech, Inc. v. Rogers County Board of Tax Roll Corrections

475 P.3d 824, 2019 WL 6877909 (Okla. Dec. 17, 2019). County taxation of electronic gaming equipment owned by non-Indian lessor and used exclusively in tribal gaming was preempted. Taxpayer, a non-Indian owner of electronic gaming equipment leased to Indian tribe's business entity, brought action against county board of tax roll corrections, seeking review of assessment of ad valorem taxes. The District Court, Rogers County, Sheila A. Condren, J., granted summary judgment to board. Taxpayer appealed. The Supreme Court, Darby, V.C.J., held that ad valorem taxation of equipment was preempted by Indian Gaming Regulatory Act (IGRA). Reversed and remanded.

86. Cayuga Nation v. Tanner

448 F. Supp. 3d 217, 2020 WL 1434157 (N.D.N.Y. Mar. 24, 2020). IGRA preempted village's attempt to enforce local laws and ordinances to regulate Indian tribe's Class II gaming activity on Indian lands. Indian tribe brought action against village, village board, and individual village officials, alleging that Indian Gaming Regulatory Act (IGRA) preempted village's efforts to regulate, block, or restrict Class II gaming activity on land owned by tribe and seeking injunction preventing village from enforcing its local laws and ordinances against the property. Parties cross-moved for summary judgment. The District Court, David N. Hurd, J., held that: 1) collateral estoppel did not apply; 2) res judicata did not apply; 3) land parcel at issue qualified as "Indian lands" under IGRA; and 4) IGRA preempted village's attempt to enforce local laws and ordinances to regulate tribe's Class II gaming activity. Tribe's motion granted; village's motion denied.

87. State v. Ysleta Del Sur Pueblo

955 F.3d 408, 2020 WL 1638408 (5th Cir. Apr. 02, 2020). Balance of hardships favored permanent injunction prohibiting Indian tribe from operating gaming activities. Attorney General, on behalf of the State of Texas, brought action against federally recognized Indian tribe, seeking to enjoin the tribe from operating certain gaming activities. The United States District Court for

the Western District of Texas, Philip R. Martinez, J., 2019 WL 639971, granted summary judgment in favor of the State, 2019 WL 5026895, denied Indian tribe's motion for reconsideration, and, 2019 WL 5589051, granted Indian tribe's motion to stay the injunction pending appeal. Indian tribe appealed. The Court of Appeals, Willett, Circuit Judge, held that: 1) Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act, rather than more permissive Indian Gaming Regulatory Act (IGRA), governed Indian tribe's gaming activity; 2) Indian tribe was subject to Texas's gaming regulations, which functioned as surrogate federal law; 3) balance of hardships favored permanent injunction prohibiting Indian tribe from operating gaming activities; and 4) even if Texas nuisance law reached gaming activity, Indian tribe's gaming operation was not exempted, authorized, or otherwise lawful activity regulated by federal law under the nuisance law, and thus, the law provided basis for Attorney General to bring action on State's behalf. Affirmed.

88. Osceola Blackwood Ivory Gaming Group LLC v. Picayune Rancheria of Chukchansi Indians et al.

2020 WL 1919583 (5th Cir. Apr. 21, 2020). This appeal arises out of a contract dispute between appellant Osceola Blackwood Ivory Gaming Group LLC (Osceola) and Respondents Picayune Rancheria of Chukchansi Indians (the Tribe) and Chukchansi Economic Development Authority (collectively Chukchansi). According to Osceola, Chukchansi fraudulently prevented the execution of a management agreement related to the operation of the Chukchansi Gold Resort and Casino (the casino), resulting in the loss of millions of dollars to Osceola. The merits of this dispute were not reached, however, as the matter was dismissed on sovereign immunity grounds following an early motion to quash. Ultimately, the critical facts are clear and not in dispute. The NIGC has not approved the Agreement. Under the plain language of the document, the Agreement has not become binding, the effective date has not been set, and thus no waiver of sovereign immunity specifically dependent upon the start of the Agreement has become effective. Similarly, the language of the Agreement is clear that no waiver could exist until the effective date of the Agreement, at the earliest. As that date was never set, no waiver arose that would permit the current lawsuit to proceed. The trial court thus correctly held that the suit was barred on sovereign immunity grounds. The judgment is affirmed.

89. Stand Up for California! v. U.S. Department of the Interior

959 F.3d 1154, 2020 WL 2745320 (9th Cir. May 27, 2020). Indian gaming conducted pursuant to secretarial procedures are not subject to Johnson Act. Nonprofit organization brought action against Department of the Interior (DOI) challenging its issuance of procedures that authorized Indian tribe to operate class III gaming on parcel of land under Johnson Act, National Environmental Policy Act (NEPA), and Clean Air Act (CAA). United States District Court for the Eastern District of California, Anthony W. Ishii, Senior District Judge, 328 F.Supp.3d 1051, granted summary judgment to DOI. Nonprofit organization appealed. The Court of Appeals,

Gould, Circuit Judge, held that: 1) Indian gaming conducted pursuant to secretarial procedures are not subject to Johnson Act; 2) Indian Gaming Regulatory Act (IGRA) does not categorically bar application of NEPA to Secretary's actions in prescribing procedures for conducting gaming; and 3) district court erred by categorically precluding Clean Air Act's requirements in context of IGRA. Affirmed in part, vacated in part, and remanded.

90. Treat v. Stitt

473 P.3d 43, 2020 WL 4185827 (Okla. July 21, 2020). Governor exceeded his authority by entering into new tribal gaming compacts. Petitioners brought declaratory judgment action, alleging Governor lacked authority to enter into two tribal gaming contracts on behalf of the State, and that the agreements did not bind the State. The Supreme Court, Winchester, J., held that the Governor exceeded his authority by entering into new tribal gaming compacts. Declaratory relief sought granted.

91. Peoria Tribe of Indians of Oklahoma v. Campbell

2020 WL 4334907 (N.D. Okla. July 28, 2020). Before the Court is the Motion to Remand filed by plaintiff, the Peoria Tribe of Indians of Oklahoma (the “Peoria Tribe” or “Tribe”). Doc. 24. In its motion, the Tribe argues that this case should be remanded to the District Court of Ottawa County, Oklahoma, because—contrary to the representations in the Notice of Removal and Status Report filed by defendants Stuart D. Campbell (“Campbell”) and Doerner Saunders Daniel & Anderson, L.L.P. (“Doerner Saunders”)— federal jurisdiction is lacking. The Tribe filed suit against Defendants in Ottawa County District Court on September 26, 2019, alleging state law claims for legal malpractice; breach of fiduciary duty; deceit/fraudulent concealment and failure to disclose; money had and received; and unjust enrichment. Doc. 2- 1, Petition at 1. Defendants removed the case to this Court pursuant to 28 U.S.C. § 1332, federal question jurisdiction. Subsequently, the tribe filed the pending motion to remand. The Tribe's Petition alleges that during the applicable period of its claims, Campbell was employed by, and was a partner/shareholder of the Sneed Lang and Doerner Saunders law firms. *Id.* It states that Campbell was also the sole shareholder of Baxcase, L.L.C. (“Baxcase”), a separate law firm that he used as a business entity for the performance of legal services. *Id.*, ¶4. The Petition alleges that on or about March 2, 2004, Direct Enterprise Development, LLC (“DED”), an Oklahoma limited liability company owned and controlled by David J. Qualls and Tony D. Holden, entered into a Development Agreement with the Peoria Tribe to develop and manage the Casino for a term of five years. *Id.* On or about June 3, 2005, it was submitted to the Chairman of the National Indian Gaming Commission (“NIGC”) for review and approval, as required by 25 U.S.C. § 2710(d)(9), and certain paragraphs of 25 U.S.C. § 2711. *Id.* The NIGC's review of the Agreement resulted in the discovery of a separate contract between DED and Baxcase, which gave Baxcase (and, as a result, Campbell) the right to five percent of the management fee DED received under the Agreement. *Id.*, ¶13. According to

the NIGC, this arrangement gave Baxcase and Campbell a financial interest in the operation of the Casino. Therefore, both Campbell and Baxcase were required by 25 U.S.C § 2711 and 25 C.F.R. § 533.3(d) to undergo a background investigation and suitability determination before the Agreement could be approved. *Id.* In a February 16, 2007 letter, the NIGC also informed DED that the proposed treatment of depreciation in the Business Plan DED submitted was contrary to the Agreement, the Indian Gaming Regulatory Act (“IGRA”) and applicable NIGC regulations, and that it resulted in an inflated management fee. In a letter dated February 20, 2007, DED informed the NIGC that the compensation provision for Baxcase and Campbell changed to a monthly fee, which was not based on a percentage of the management fees. *Id.*, ¶15. DED submitted an affidavit signed by DED co-owner Holden and a revised agreement between DED and Baxcase. *Id.* As a result, Baxcase and Campbell avoided the scrutiny of a background investigation and suitability determination. *Id.* The NIGC subsequently approved the 2012 Agreement, on September 13, 2012. *Id.* During this process, neither DED nor Campbell reported to NIGC or the Peoria Tribe Business Committee any changes in the manner in which Baxcase and Campbell were compensated, or how DED was calculating its management fee. *Id.* Campbell acted as attorney for the Peoria Tribe in connection with the casino operations and litigation from 2005 until at least May of 2018, providing continuous representation of the Peoria Tribe for all legal matters involving the Casino. *Id.*, ¶21. Approximately a year after the NIGC approved the Agreement in 2007, DED— without notice to or approval of either the Business Committee or NIGC, but with Campbell's knowledge and approval—secretly abandoned the modifications in the Revised Business Plan. DED reverted to the illegal and previously disapproved treatment of depreciation, thereby inflating its management fees. *Id.*, ¶22. The Business Committee first learned of the unlawful actions by Campbell, Baxcase, DED, Qualls, and Holden when its members received copies of a September 28, 2017 letter from the Chair of the NIGC to DED, Qualls, and the Peoria Tribe's Chief. *Id.*, ¶29. That letter informed the Business Committee of the wrongful actions of DED, its resulting receipt of excess management fees contrary to its agreements with the Peoria Tribe and Baxcase, and Campbell's financial interest in the management of the Casino. *Id.* A cause of action “arises under” federal law when “the plaintiff's well-pleaded complaint raises issues of federal law.” *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 163 (1997). “For statutory purposes, a case can ‘aris[e] under’ federal law in two ways.” *Gunn v. Minton*, 568 U.S. 251, 257 (2013). First, a case arises under federal law when federal law creates the cause of action asserted. *Id.* Second, “federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress.” *Id.* at 258 (citing *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, 545 U.S. 308, 314 (2005)). In *Becker v. Ute Indian Tribe of the Uintah and Ouray Reservation*, 770 F.3d 944 (10th Cir. 2014), Plaintiff, a contractor for the Ute Indian Tribe of the Uintah and Ouray Reservation, sued the tribe in the United States District Court for the District of Utah, alleging claims for breach of contract, breach of covenant of good faith and fair dealing, and accounting claims. The Tribe moved for dismissal pursuant to Fed. R. Civ. P. 12(b)(1) and Rule 12(b)(6). Plaintiff asserted that the district court had federal jurisdiction

because the case raised substantial issues of federal law, including (1) whether the contract required approval by the United States Secretary of the Interior under 25 U.S.C. §§ 81 or 2103; (2) whether the contract was a valid “Minerals Agreement” under the Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101-2108; (3) whether the Tribe could invoke sovereign immunity; and (4) whether the tribe had agreed to submit to the district court's jurisdiction. *Id.* at 946. The district court granted the Tribe's Motion to Dismiss for lack of subject matter jurisdiction, reasoning that federal question jurisdiction cannot depend solely on federal defenses and concluding that Plaintiff's complaint did not raise a substantial question of federal law. *Id.* On appeal, the Tenth Circuit—citing *Gunn*—acknowledged that even where a claim finds its origins in state law rather than federal law, as did Plaintiff's claims, the Supreme Court identified “ ‘a special and small category’ of cases in which arising under jurisdiction still lies.” *Id.* at 947. However, applying the four-part analysis set out in *Gunn*, the court concluded that Becker's federal issues were “merely federal defenses, which do not give rise to federal question jurisdiction under 28 U.S.C. § 1331.” *Id.* at 948. Accepting, for purposes of the pending motion, that the hypothetical “case within a case” involved the Notice of Violation issued by IGRA, defendants failed to demonstrate that the resolution of the Tribe's malpractice claim against the attorneys will have any effect on Indian gaming laws in general or on IGRA's claims against the Tribe. Accordingly, the Tribe's Motion to Remand (Doc. 25) was granted, and the Court Clerk was directed to remand this action to the District Court for Ottawa County, Oklahoma.

H. Jurisdiction, Federal

92. United States v. Begay

934 F.3d 1033 (9th Cir. Aug. 19, 2019). Conviction for second-degree murder in Indian country did not qualify as a categorical crime of violence, requiring reversal of a firearms conviction. Defendant was convicted, following a jury trial in the United States District Court for the District of Arizona, Neil V. Wake, J., of second-degree murder and discharging a firearm during a crime of violence in Indian country. He appealed. The Court of Appeals, D.W. Nelson, Circuit Judge, held that: 1) district court did not plainly err in failing to instruct the jury on an absence of heat of passion as an element of second-degree murder; but 2) Defendant's conviction for second-degree murder in Indian country did not qualify as a categorical crime of violence. Affirmed in part, reversed in part, and remanded for resentencing. Smith, Circuit Judge, filed an opinion dissenting in part.

93. Chemehuevi Indian Tribe v. McMahon

934 F.3d 1076 (9th Cir. Aug. 19, 2019). Indian tribe and four enrolled tribal members filed a § 1983 action against county sheriff and deputies for allegedly contravening federal statutory and constitutional rights by deputies detaining and issuing citations to tribal members for violating

California regulatory traffic laws. The United States District Court for the Central District of California, Dolly M. Gee, J., granted Defendants summary judgment and subsequently denied Plaintiffs' Motion to Amend the judgment. D.C. No. 5:15-cv-01538-DMG-FFM. Plaintiffs appealed. The Court of Appeals, Hurwitz, Circuit Judge, held that: 1) Deputies issued citations within Indian country; 2) Deputies lacked jurisdiction to enforce state regulatory traffic laws in Indian Country; 3) Enrolled members had a cause of action under § 1983; but 4) Tribe lacked a cause of action under § 1983. Affirmed in part, vacated and remanded in part.

94. United States ex rel. Dahlstrom v. Sauk-Suiattle Indian Tribe of Washington

No. C16-0052JLR, 2019 WL 4082944 (W.D. Wash. Aug. 29, 2019). Before the court are: (1) Defendants Christine Marie Jody Morlock, Robert Larry Morlock, and Ronda Kay Metcalf's (collectively, "Individual Defendants") Motion for Summary Judgment (MSJ (Dkt. # 64)), and (2) Individual Defendants' Motions in Limine. The court granted Individual Defendants' summary judgment motion and dismissed this action with prejudice. Mr. Dahlstrom was initially hired as a social worker for Defendant Sauk-Suiattle Indian Tribe of Washington's ("the Tribe") Indian Child Welfare Department in 2010. Mr. Dahlstrom became the Director of the Department in 2011. On April 30, 2015, the Tribe appointed Mr. Dahlstrom interim Health and Social Services ("HSS") Director. In July 2015, the Tribe appointed him HSS Director. As an at-will employee, Mr. Dahlstrom acknowledged that the Tribe "may terminate [his] employment at any time, with or without cause." The Tribal Counsel terminated his employment without cause on December 4, 2015. Mr. Dahlstrom asserts claims under the federal False Claims Act ("FCA"), 31 U.S.C. § 3729, et seq., and the Washington Medicaid Fraud False Claims Act ("the Washington Medicaid Fraud FCA"), WASH. REV. CODE § 74.66. Both the United States and the State of Washington opted not to intervene in this suit. Based on the foregoing analysis, the court also granted the individual defendants' Motion for an Award of attorney fees pursuant to 31 U.S.C. § 3730(d)(4) and WASH. REV. CODE § 74.66.070(d)(4). In addition, within fourteen days of the filing date of this order, the court ordered Mr. Dahlstrom's counsel to show cause why the court should not apportion part of its award of fees against him personally, pursuant to 28 U.S.C. § 1927, Rule 11(b) or the court's inherent authority.

95. Lozeau v. Anciaux

2019 MT 235, 397 Mont. 312, 449 P.3d 830 (Mont. Oct. 1, 2019). Tribal ordinance was a "resolution" that could consent to criminal jurisdiction by State. Defendant, who was detained in county jail, filed a habeas corpus petition, alleging that State lacked jurisdiction with regard to felony convictions given that Defendant was enrolled member of Indian tribe who committed crime within boundaries of reservation. The District Court, Lake County, No. DV-19-6, James A. Manley, P.J., dismissed the petition for failure to state a claim. Defendant appealed. The Supreme Court, Mike McGrath, C.J., held that tribal ordinance constituted a "resolution" that could

constitute tribe's consent to criminal jurisdiction by state. This jurisdiction exists under state statute's consent procedure and federal statute authorizing state to acquire criminal jurisdiction over offenses committed by or against Indians on Indian reservations within state. Affirmed.

96. Chegup v. Ute Indian Tribe of the Uintah and Ouray Reservation

No. 2:19-CV-00286-DAK, 2019 WL 6498177 (D. Utah Dec. 3, 2019). Defendants Ute Indian Tribe of the Uintah and Ouray Reservation, Tribal Business Committee for the Ute Indian Tribe of the Uintah and Ouray Reservation, and others filed Motions to Dismiss Plaintiffs Angelita Chegup, Tara Amboh, Mary Carol Jenkins, and Lynda Kozlowicz's Civil Rights Complaint and their Petition for Writ of Habeas Corpus. Plaintiffs are enrolled members of the Ute Indian Tribe of the Uintah and Ouray Reservation (the "Tribe"), which is a federally recognized Indian tribe in the State of Utah. Defendants Luke Duncan, Tony Small, Shaun Chapoose, Edred Secakuku, Ronald Wopsock, and Sal Wopsock are members of the Tribal Business Committee for the Ute Indian Tribe of the Uintah and Ouray Reservation (the "Business Committee"), the governing body of the Tribe. In 2018, the Tribe filed a lawsuit in federal court, in the District of Columbia, wherein it alleged that the United States was violating federal law by treating certain reservation lands as though they were owned by the United States outright rather than in trust for the Tribe. The Tribe claimed that, as a result, the United States has been wrongfully appropriating revenue relating to the sale or lease of lands within the Uintah and Ouray Reservation (the "Reservation"). Accordingly, the Tribe sought injunctive relief along with an order quieting title in the name of the United States. After the Tribe filed the lawsuit, Plaintiffs filed a motion to intervene. Specifically, Plaintiffs argued that the subject land should be preserved for the Uintah Band of Ute Indians, not the Tribe. In October 2018, the Business Committee received a complaint from seventy members of the Tribe requesting the banishment of Plaintiffs based on alleged acts arising from Plaintiffs' attempted intervention into the Tribe's case that seriously threatened the peace, health, safety, morals, and general welfare of the Tribe. The following month, the Business Committee issued Resolution No. 18-472, beginning the process of banishing Plaintiffs. In addition to initiating the banishment process, the resolution mandated that the complaint and a notice of the hearing be served to the Plaintiffs. The notice provided that Plaintiffs could appear with counsel and present evidence on their own behalf. The hearing was meant for the Business Committee to decide whether Plaintiffs should be banished from the Reservation. Plaintiffs obtained counsel on the day of the hearing but given the short time period between receiving the notice and the date of the hearing, their attorney was unable to appear in person. Accordingly, on behalf of all Plaintiffs, Amboh wrote to the Business Committee and suggested allowing their counsel to appear telephonically. When Plaintiffs were called into the Business Committee Chambers for the hearing, the Business Committee informed them that they would not allow Plaintiffs' attorney to appear telephonically, whereupon, Plaintiffs left the hearing before it began. Nevertheless, the Business Committee proceeded with the hearing and passed a motion to banish Plaintiffs pursuant to Tribal Ordinance No. 14-004. Following the hearing, the Business

Committee promptly issued an Order of Banishment to each Plaintiff. The Orders provided that (1) Plaintiffs were temporarily excluded, banished, and ordered subject to removal from the Reservation for five years; (2) Plaintiffs caused the Tribe financial losses of \$242,982.93 and were fined in that amount; (3) Plaintiffs' dividends and bonuses would be garnished at a rate of up to 100% until the fine was paid in full; (4) Plaintiffs' rights to tribal employment and housing were revoked during the term of their banishment; (5) Plaintiffs could only enter the Reservation for a limited number of purposes; and (6) based on those limitations, Plaintiffs would be required to provide the Business Committee with fourteen days' written notice of their intent to visit the Reservation and the purpose for the visit. Because Plaintiffs were unaware of any type of appellate review process to challenge the Business Committee's decision to banish them, they filed the instant suit on April 29, 2019. The United States District Court for the District of Utah, like the Second Circuit, is persuaded that Plaintiffs failed to establish that they have been or are detained for purposes of § 1303. In reaching its conclusion that banishment must be permanent to have jurisdiction under § 1303, the Tavares district court expressed concern regarding its authority to adjudicate a case involving an Indian tribal government. The presumption that the Court lacked jurisdiction is of particular force here because Petitioners challenged the Indian tribal government's decision. The Supreme Court repeatedly emphasized that Congress' authority over Indian matters is extraordinarily broad and the role of courts in adjusting relations between and among tribes and their members correspondingly restrained. Thus, as the Ninth Circuit observed in *Jeffredo* and *Lewis*, even though this case is deeply troubling on the level of fundamental substantive justice, the Court is not in a position to modify doctrines of sovereign immunity. *Tavares v. Whitehouse*, 2014 WL 1155798 (E.D. Cal. 2014), at *11. The court joined the clear weight of authority and concludes that for banishment to constitute detention under § 1303, it must be permanent. Thus, because Plaintiffs' banishment is of a limited duration, they failed to establish the "in custody" requirement. Consequently, the court lacked subject-matter jurisdiction, and Plaintiffs' complaint and petition were dismissed.

97. Red Cliff Band of Lake Superior Chippewa Indians v. Bayfield County

432 F. Supp. 3d, 2020 WL 108672 (W.D. Wis. Jan. 09, 2020). County's application of its comprehensive zoning ordinance to fee simple land held by members of sovereign American Indian tribe within tribe's reservation violated federal Indian law. Sovereign American Indian tribe brought action against the county, seeking declaration that enforcement of the county's zoning code on fee simple land held by tribal members within tribe's reservation violated federal Indian law. Tribe moved for summary judgment. The district court, William M. Conley, J., held that the application of zoning ordinance violated federal Indian law. The motion was granted.

98. Leachmand v. United States [sic]

No. CV-19-82-GF-BMM, 2020 WL 1511262 (D. Mont. Mar. 30, 2020). Plaintiffs. James

Leachman filed a claim against Defendant United States of America. Leachmans sought compensatory damages, attorney fees, and costs and expense of suit. Leachmans alleged that the Court possessed subject matter jurisdiction under 42 U.S.C. § 1982, 28 U.S.C. § 1331, and 28 U.S.C. § 1346. The Government sought to dismiss the claims based on a lack of subject matter jurisdiction, sovereign immunity, statute of limitations, and failure to state a claim. Leachmans alleged that they entered into an oral contract, in 2012, with James Holen. The alleged oral contract called for the Holens to provide daily care and maintenance to sixty-two horses owned by Leachmans on the Holens' property. The Holens' property lies within the exterior boundaries of the Fort Peck Indian Reservation. James Holen is an enrolled member of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation. Holens filed an action against Leachmans in Fort Peck Tribal Court, on June 19, 2012. Holens asserted breach of contract and other claims. The Fort Peck Tribal Court issued a series of rulings in favor of the Holens. Leachmans appealed. The Fort Peck Tribal Court of Appeals reversed these rulings on the basis that the Fort Peck Tribal Court had violated the Leachmans' rights to due process and equal protection of the laws. Leachmans filed a claim under the Federal Tort Claims Act, on April 18, 2019. The Government agrees that the BIA entered into a contract with the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation ("Tribe") to fund the Fort Peck Tribal Court. (Doc. 4 at 20.) The Tribe operates its court system with this funding from the BIA. Leachmans contend that this funding arrangement imposes potential liability upon the BIA, and through it, the United States, arising from illegal or improper rulings by the Fort Peck Tribal Court. (Doc. 8 at 2.) Leachmans cite no authority for this proposition other than to resort to the snarky comment that any other outcome would result in an injustice: "Too bad. So sad. Good luck with that." Accordingly, the court ordered that the Government's Motion to Dismiss Leachmans' be granted.

99. Scott v. Paisley

No. CV 19-63-GF-DLC-JTJ, 2020 WL 1527896 (D. Mont. Mar. 31, 2020). Plaintiff Luke John Scott's ("Scott") *pro se* Complaint, alleged that Defendants violated his rights under the U.S. and Montana Constitutions and the Indian Civil Rights Act ("ICRA"). Scott alleged that, beginning on July 7, 2017, tribal authorities— through "sho[dd]y [and] prejudicial investigation techniques and discriminatory charging and prosecuting decisions" arrested and held him on rape and strangulation charges. Although the tribal charges were ultimately dismissed, Scott asserted that they formed the basis of one of the federal charges before him. (In a separate matter arising from events that took place on the Fort Peck Indian Reservation in 2019, the United States charged Scott with Assault Resulting in Serious Bodily Injury and Felony Child Abuse.) Scott argued that the Magistrate Judge erroneously concluded that "[the] Tribal Officials act under the color of tribal law and are therefore not 'Federal officials,' and are immune from suit under 42 U.S.C. § 1983 or *Bivens*." However, the question here is not one of immunity, but instead concerns whether Scott has stated a valid cause of action. To maintain an action under § 1983 against individual defendants, [a plaintiff] must show: (1) that the conduct complained of was committed by a person

acting under the color of state law; and (2) that this conduct deprived them of rights, privileges, or immunities secured by the Constitution or laws of the United States. Accordingly, “tribal defendants can [] be held liable under § 1983 only if they were acting under color of state, not tribal, law.” *Pistor v. Garcia*, 791 F.3d 1104, 1114–15 (9th Cir. 2015). Analogously, to maintain an action under *Bivens*, a plaintiff must show that the conduct complained of was committed by a person acting under the color of federal law and resulted in a constitutional violation. *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 397 (1971). Scott’s complaint does not allege that any Tribal Defendant acted under the authority of anything other than tribal law. Accordingly, the Court agrees with Judge Johnston’s determination that Scott fails to state a claim under either § 1983 or *Bivens* against the Tribal Defendants regarding his arrests, prosecutions, incarcerations, and treatment in tribal courts and tribal jails. The appeal was dismissed without prejudice.

100. Campbell v. Honor the Earth

No. A19-1232, 2020 WL 1909717 (Minn. Ct. App. Apr. 20, 2020). Appellant-Defendant Honor the Earth challenged the district court’s order denying its Motion to Dismiss Respondent-Plaintiff Margaret Campbell’s claims, under the Minnesota Human Rights Act for lack of subject-matter jurisdiction. The court concluded that the district court has subject-matter jurisdiction over the claims and affirmed the lower court’s ruling. In January 2019, Minnesota resident Margaret Campbell sued her former employer, Honor the Earth (HTE), alleging claims under the Minnesota Human Rights Act. Generally, Campbell alleged that HTE took no action to respond to her complaints that an HTE coworker sexually harassed her. HTE denied almost all of the allegations in Campbell’s complaint. HTE also filed a separate motion to dismiss for lack of subject-matter jurisdiction. HTE argued that the district court lacks jurisdiction over Campbell’s claims due to the incidents alleged in the complaint having occurred primarily within the White Earth Reservation and because LaDuke is a member of the White Earth Band of Ojibwe. HTE asserted that a federal law commonly known as Public Law 280 precludes the district court from exercising subject-matter jurisdiction over the case. The district court denied HTE’s Motion to Dismiss. The district court correctly concluded that Public Law 280 is not implicated by Campbell’s complaint against HTE. State district courts generally have jurisdiction over civil actions, within their respective districts. *See* MINN. STAT. § 484.01 subd. 1(1) (2018). But Indian tribes retain sovereignty over both their members and their territory. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207, 107 S. Ct. 1083, 1087 (1987). Thus, in matters involving Indians, state courts only have jurisdiction as permitted by federal law. Public Law 280 granted state court jurisdiction to designated states, including Minnesota, over certain matters to which Indians are parties. However, Public Law 280 in no way limits state court jurisdiction over matters where neither party to the proceeding is Indian. As the district court correctly concluded, neither Public Law 280 nor tribal immunity apply because this case involved a Minnesota citizen suing a Minnesota nonprofit corporation. The lower court’s ruling was affirmed.

101. United States v. Unzueta

No. 20-20121, 2020 WL 2733890 (E.D. Mich. May 26, 2020). On February 14, 2020, a criminal complaint was issued against Defendant Alfredo Martin Unzueta for domestic assault by a habitual offender “within Indian country” in violation of 18 U.S.C. § 117. The affidavit in support of the complaint provided that the victim told police that she is Indian. The police verified that she was in the Saginaw Chippewa Tribal Court and that they are aware that the Tribal Court cannot charge someone with a crime committed within the reservation’s boundaries unless that person is Indian. Unzueta is non-Indian. On March 3, 2020, the Court received a letter from the victim informing the Court that she was “not a tribal member or descendant of any federally recognized tribe.” Attached was a letter from the Tribal Enrollment Office of the Saginaw Chippewa Indian Tribe which provided: Per your request, I am writing to confirm that you are not a Member of the Saginaw Chippewa Indian Tribe or a descendant. Because neither Defendant nor the victim were allegedly Indian, she recommended that the Court hold an evidentiary hearing to determine whether federal jurisdiction existed. After analyzing the Major Crimes Act, the Indian Country Crimes Act, federal enclave jurisdiction, and the Assimilative Crimes Act, she concluded that “the status of the victim matters and that this Court’s jurisdiction depends on it.” Defendant has been charged under 18 U.S.C. § 117, Domestic Assault by an Habitual Offender, which provides: (a) In general.-- Any person who commits a domestic assault within the special maritime and territorial jurisdiction of the United States or Indian country and who has a final conviction on at least two separate prior occasions in Federal, State, or Indian tribal court proceedings for offenses that would be, if subject to Federal jurisdiction (1) any assault, sexual abuse, or serious violent felony against a spouse or intimate partner, or against a child of or in the care of the person committing the domestic assault; or (2) an offense under chapter 110A, shall be fined under this title, imprisoned for a term of not more than five years, or both, except that if substantial bodily injury results from five violations under this section, the offender shall be imprisoned for a term of not more than ten years. 18 U.S.C. § 117 (emphasis added). 18 U.S.C. § 117 applies to “[a]ny person who commits a domestic assault within [...] Indian country” who has two prior convictions of assault. The statute does not require that either the perpetrator or victim be Indian. Accordingly, it is irrelevant whether the victim in this case is or is not an Indian. Because the indictment alleges that the incident occurred within Indian country, jurisdiction exists. Accordingly, the court ordered that the report and recommendation, be rejected.

102. Confederated Tribes and Bands of Yakama Nation v. Yakima County

963 F.3d 982, 2020 WL 3495307 (9th Cir. June 29, 2020). This case prompted the court to decide if the State of Washington may exercise criminal jurisdiction over members of the Confederated Tribes and Bands of the Yakama Nation who commit crimes on reservation land. To answer that question, the court interpreted a 2014 Washington State Proclamation that retroceded—that is,

gave back—“in part,” civil and criminal jurisdiction over the Yakama Nation to the United States, but retained criminal jurisdiction over matters “involving non-Indian defendants and non-Indian victims.” If “and,” as used in that sentence, is conjunctive, then the State retained jurisdiction only over criminal cases in which no party— suspects or victims—is an Indian. If, by contrast, “and” is disjunctive and should be read as “or,” then the State retained jurisdiction if any party is a non-Indian. The court concluded, based on the entire context of the Proclamation, that “and” is disjunctive and must be read as “or.” The district court’s decision was affirmed. Historically, the states possessed criminal jurisdiction over crimes involving only non-Indians on Indian reservations. But criminal jurisdiction over Indians on Indian reservations has not been as constant. For much of early United States history, criminal jurisdiction over Indians on reservation land was generally concurrent between the United States and independent tribes, subject to some exceptions. That arrangement changed in 1953, when Congress passed Public Law 280. Washington assumed some of this Public Law 280 jurisdiction in 1963. WASH. REV. CODE § 37.12.010. The State’s assumption of jurisdiction depended on the location of the offense and the persons involved. Later, Congress authorized any state to voluntarily give up “all or any measure of the criminal or civil jurisdiction, or both,” that it had acquired pursuant to Public Law 280—a process called “retrocession.” 25 U.S.C. § 1323(a). In 2012, Washington codified a process for retrocession, defined as “the state’s act of returning to the federal government” the jurisdiction obtained “under federal Public Law 280.” WASH. REV. CODE §§ 37.12.160(9)(a)–(b). The Yakama Nation availed itself of this process by filing a retrocession petition in July 2012. In its petition, the Yakama Nation requested, “pursuant to [Wash. Rev. Code §] 37.12,” complete “retrocession of both civil and criminal jurisdiction on all Yakama Nation Indian country”—that is, the full jurisdiction Washington had assumed on fee lands. In early 2014, Governor Jay Inslee issued a Proclamation recognizing that the Yakama Nation was requesting full retrocession of civil and criminal jurisdiction obtained “under federal Public Law 280,” other than over issues relating to “mental illness” or “civil commitment of sexually violent predators” “both within and without the external boundaries of the Yakama Reservation.” However, the Proclamation only granted the Yakama Nation’s request “in part.” (1) Within the exterior boundaries of the Yakama Reservation, the State shall retrocede full civil and criminal jurisdiction in the following subject areas of Wash. Rev. Code § 37.12.010: Compulsory School Attendance; Public Assistance; Domestic Relations; and Juvenile Delinquency. (2) Within the exterior boundaries of the Yakama Reservation, the State shall retrocede, in part, civil and criminal jurisdiction in Operation of Motor Vehicles on Public Streets, Alleys, Roads, and Highways cases in the following manner: Pursuant to Wash. Rev. Code § 37.12.010(8), the State shall retain jurisdiction over civil causes of action involving non-Indian plaintiffs, non-Indian defendants, and non-Indian victims; the State shall retain jurisdiction over criminal offenses involving non-Indian defendants and non-Indian victims. (3) Within the exterior boundaries of the Yakama Reservation, the State shall retrocede, in part, criminal jurisdiction over all offenses not addressed by Paragraphs 1 and 2. The State retains jurisdiction over criminal offenses involving non-Indian defendants and non-Indian victims. (Emphasis added). The State then sent the Proclamation to the Department of Interior (“DOI”) with an accompanying cover

letter from Governor Inslee. In the cover letter, the Governor asked DOI to accept the retrocession. The Governor's letter also went a step further by attempting to clarify language in the Proclamation. According to the Governor's letter, the usage of "and" in Paragraphs 2 and 3 to describe the parties over which the State retained jurisdiction was intended to mean "and/or," not just "and." This application is seen in the phrase "non-Indian defendants and non-Indian victims," in Paragraph 3. DOI accepted the State's retrocession per the Governor's request. *See* Acceptance of Retrocession of Jurisdiction for the Yakama Nation, 80 Fed. Reg. 63583-01 (Oct. 20, 2015). But DOI's published acceptance simply acknowledged that the United States was accepting "partial civil and criminal jurisdiction over the Yakama Nation which was acquired by the State of Washington under [Public Law 280]," without addressing the Governor's proposal. The Yakama Nation's interpretation would require the conclusion that the State incorrectly believed it could retrocede pre-Public Law 280 jurisdiction but elected to retain only that "part." In sum, only one interpretation of the Proclamation is plausible because only one interpretation gives meaning to every word. Based on the Proclamation as a whole and by giving the phrase "in part" meaning, the court concluded that the word "and" in the phrase "non-Indian defendants and non-Indian victims," in Paragraphs 2 and 3, should be interpreted as the disjunctive "or." Interpreted as such, the State retained criminal jurisdiction in Paragraphs 2 and 3 over cases in which any party is a non-Indian. The United States Court of Appeals for the Ninth Circuit thereby affirmed the district court's ruling.

103. Nathan Samuel Collett, et al., v. State of Utah

No. 2:14-CV-871, 2020 WL 3496960 (D. Utah June 29, 2020). The Report and Recommendation issued by United States Magistrate Judge Paul M. Warner, on February 11, 2020, recommended that the action be dismissed for failure to state a claim upon which relief may be granted. The termination of Plaintiffs' status as federally recognized Indians resulted in, inter alia, the loss of federal supervision over Plaintiffs' property and the ability to receive certain federal services and benefits, affected land boundaries, and subjected Plaintiffs to state law as Utah citizens. Plaintiffs' consolidated amended complaint challenged the legality and implementation of the Act as well as certain events and consequences that resulted from the termination of their federal Indian status. Plaintiffs' claims and allegations have been litigated, either expressly or impliedly, in *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972), wherein the Supreme Court expressly approved of the formation of the UDC under the Act and affirmed the UDC's decision-making authority. *Id.* at 143-44. The Court also affirmed the termination of federal supervision of the UDC and its shares, and the Court recognized and affirmed that the Act provided for the termination of mixed-blood status as federally recognized Indians. *Id.* at 149-50. Since then, numerous other cases have addressed similar issues and related arguments. *See Hagen v. Utah*, 510 U.S. 399 (1994); *United States v. Uintah Valley Shoshone Tribe*, 946 F.3d 1216 (10th Cir. 2020); *Hackford v. Babbitt*, 14 F.3d 1457 (10th Cir. 1994); *Maldonado v. Hodel*, 977 F.2d 596 (10th Cir. 1990); *see also Morton v. Mancari*, 417 U.S. 535 (1974); *United States v. Von Murdock*, 132 F.3d 534 (10th Cir. 1997)

(concluding Ute Termination Act was not racially discriminatory and thus did not violate due process or equal protection aspects of the Fifth Amendment, and the Act did not violate the First Amendment). The new legal theories raised in Plaintiffs' Objection were a futile attempt, to attack the validity and enforcement of the Act and UDC. The action was dismissed, with prejudice, in its entirety.

104. Oneida Nation v. Village of Hobart

968 F.3d 664 (7th Cir. July 30, 2020). A village located entirely within reservation boundaries lacked authority to enforce a special events permit ordinance against Oneida Nation. Oneida Nation brought an action for declaratory and injunctive relief challenging legal authority of village located within reservation's original boundaries to enforce its special events permit ordinance against tribe, its officers, and its employees. Village filed a counterclaim for declaratory relief. The United States District Court for the Eastern District of Wisconsin entered summary judgment for Village. *Oneida Nation v. Vill. Of Hobart, Wisconsin*, 371 F. Supp. 3d 500 (E.D. Wis. 2019). Oneida Nation appealed. The Court of Appeals, Hamilton, Circuit Judge, held that: 1) the village lacked authority to enforce permit ordinance; 2) the issue preclusion did not bar Nation from challenging village's legal authority to enforce ordinance against Nation; and 3) the exceptional circumstances did not warrant application of ordinance. The United States Court of Appeals for the Seventh Circuit reversed and remanded the lower court's decision.

105. Lezmond Charles Mitchell v. United States of America

971 F.3d 1081 (9th Cir. Aug. 23, 2020). Petitioner Lezmond Mitchell filed two motions: a motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255, or, in the alternative, for relief under 28 U.S.C. § 2241. Mr. Mitchell was sentenced to death in this district in *United States v. Mitchell*, CR 01-1062-001-PCT-DGC. He was confined at the United States Penitentiary in Terre Haute, Indiana (Register #486585-008), and his execution was scheduled for the following week. The Court denied the motions. The victims, a sixty-three-year-old grandmother and her nine-year-old granddaughter, were also Navajos, and the crimes occurred on the Navajo Indian reservation in Arizona. *Id.* Mr. Mitchell faced capital punishment under the Federal Death Penalty Act ("FDPA"), 18 U.S.C. §§ 3591–98, based on his conviction for carjacking resulting in death. *Id.* at 945–46. Under the Major Crimes Act, 18 U.S.C. § 1153(a), the federal government may prosecute serious crimes such as murder and manslaughter involving intra-Indian offenses committed in Indian country. *Id.* The FDPA eliminated the death penalty for federal prosecutions of Indian defendants under the Major Crimes Act, subject to being reinstated at the election of a tribe's governing body – the "opt-in" provision. 18 U.S.C. § 3598. The Navajo Nation declined to opt into the federal death penalty. *Id.* "[T]he Navajo Nation opposes the death penalty on cultural and religious grounds," and the Attorney General of the Navajo Nation expressed the Navajo Nation's opposition to the United States seeking capital punishment in Mr. Mitchell's case in a letter

to the United States Attorney for the District of Arizona. *Id.* at 948. As a result, when the United States prosecuted Mr. Mitchell it could not seek the death penalty on the two murder charges. Instead, it pursued a death sentence by charging Mr. Mitchell with carjacking resulting in death, a crime of nationwide applicability not covered by the opt-in requirement. *Id.* Mr. Mitchell was given a death sentence on the carjacking count in accordance with the jury's unanimous verdict. *Id.* at 942. On appeal, Mr. Mitchell argued, inter alia, that because the Navajo Nation never opted in to the federal capital punishment scheme, the death sentence violated tribal sovereignty. The Ninth Circuit considered Mr. Mitchell's claims in detail and issued an opinion on September 5, 2007, affirming his conviction and sentence. *United States v. Mitchell*, 502 F.3d 931 (9th Cir. 2007). On June 9, 2008, the Supreme Court denied Mr. Mitchell's petition for certiorari. *Mitchell v. United States*, 553 U.S. 1094 (2008). Mr. Mitchell argued that the United States violated the sovereignty of the Navajo Nation by seeking the death penalty. He also argued that his rights to due process and a fair trial were violated by alleged collusion between the United States government and tribal law enforcement, ineffective assistance of counsel, and decisions of the federal courts in his habeas proceedings. In summary, Mr. Mitchell has not come close to showing that decisions of the IACHR (the Inter-American Commission on Human Rights—an organization formed under the auspices of the Organization of American States) on criminal cases pending in U.S. courts are binding as a matter of law on those courts. The Court accordingly denied his motion and his stay request.

I. Religious Freedom

106. Hopi Tribe v. Arizona Snowbowl Resort Limited Partnership

No. 1 CA-CV 16-0521, 2020 WL 3526664 (Ariz. Ct. App. June 30, 2020). This case returned to the Arizona Court of Appeals on remand from the Supreme Court of Arizona. The appellate court previously held that the Hopi Tribe sufficiently alleged that the use of reclaimed wastewater to make artificial snow on parts of the San Francisco Peaks (the “Peaks”) caused a special injury to survive dismissal of its public-nuisance claim and vacated an award of attorney’s fees to Arizona Snowbowl Resort Limited Partnership (“Snowbowl”) and the City of Flagstaff (the “City”) (collectively, the “Appellees”). *Hopi Tribe v. Ariz. Snowbowl Resort Ltd. P’ship* (Hopi Tribe II), 244 Ariz. 259, 261, 264–65, ¶¶ 4, 10–16 (Ct. App. 2018). The Supreme Court of Arizona vacated the appellate court’s opinion, holding as a matter of law that “environmental damage to public land with religious, cultural, or emotional significance to the [Hopi Tribe] is not special injury for public nuisance purposes,” and ordered us to determine whether the fee award to Appellees is supportable and appropriate under Arizona Revised Statutes (“A.R.S.”) § 12-341.01(A) (authorizing an award of attorney’s fees to the prevailing party in a contested action arising out of an express or implied contract). *Hopi Tribe v. Ariz. Snowbowl Resort Ltd. P’ship* (“*Hopi Tribe III*”), 245 Ariz. 397, 399, 406–07, ¶¶ 1, 37, 430 P.3d 362 (2018). The background of the Hopi Tribe’s attempts to prevent the dissemination of reclaimed wastewater on parts of the Peaks is well-documented. *See, e.g., Hopi Tribe III*, 245 Ariz. at 399, ¶¶ 2–5. Having examined the overall “nature of the action and the

surrounding circumstances” of this case, the appellate court is convinced the requisite causal link between the Hopi Tribe’s claim and the contract—one which the Hopi Tribe has attacked in one form or another for years—exists. *Marcus v. Fox*, 150 Ariz. 333, 335 (1986). Accordingly, the court held that the Hopi Tribe’s public-nuisance action arose out of a contract for purposes of ARIZ. REV. STAT. § 12-341.01(A). Although ARIZ. REV. STAT § 12-341.01(A) authorizes an award of fees, eligibility does not automatically establish entitlement. Instead, the superior court has broad discretion in determining whether and how much to award. *See Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 569-71 (1985); ARIZ. REV. STAT § 12- 341.01(B) (permitting an award of “reasonable attorney fees”). The Hopi Tribe challenged both aspects of the fee award. The appellate court reviewed decisions to award fees and the amount awarded for an abuse of discretion, and stated it “will not disturb the trial court’s discretionary award of fees if there is any reasonable basis for it.” *Orfaly v. Tucson Symphony Soc’y*, 209 Ariz. 260, 265, ¶ 18, 99 P.3d (Ct. App. 2004) (quoting *Hale v. Amphitheater Sch. Dist. No. 10*, 192 Ariz. 111, 117, ¶ 20, 961 P.2d 1059 (Ct. App. 1998)). Snowbowl sought \$292,774 in attorney’s fees and \$10,574 in computerized legal research, for a total request of \$303,349. About a month later, Snowbowl filed an amended declaration in support of their application. Snowbowl’s amended declaration notified the court of a computational error in their attorney’s fees calculation, thereby reducing their request for attorney’s fees to \$291,594. The computerized legal research figure remained the same, amounting to a total award of \$302,169—an approximately \$1200 difference from the initially requested amount—which the superior court ultimately accepted. Thus, the superior court did not abuse its discretion by finding the final figure to be accurate and supported by Snowbowl’s documentation. The superior court’s award of attorney’s fees was affirmed. Appellees request attorney’s fees on appeal under ARIZ. REV. STAT § 12- 341.01(A). In Arizona Court of Appeals’s discretion, it declined this request.

J. Sovereign Immunity

107. Oertwich v. Traditional Village of Togiak

413 F. Supp. 3d 963 (D. Alaska Sept. 12, 2019). The Native tribe and individual officers and employees of the tribe were entitled to sovereign immunity from Plaintiff's tort claims. Plaintiff filed action against Alaskan Native tribe and individual officers and employees of the tribe, seeking declaratory and injunctive relief, as well as compensatory and punitive damages, asserting various claims based on the tribe's decision to ban Plaintiff from its village after Plaintiff brought alcohol into village. Defendants moved to dismiss based on lack of subject-matter jurisdiction and failure to state a claim. The District Court, John W. Sedwick, Senior District Judge, held that: 1) Defendants were entitled to sovereign immunity from Plaintiff's tort claims; 2) immovable property exception to sovereign immunity did not apply to Plaintiff's claims; 3) Plaintiff sought injunction to protect himself from Defendants' future acts did not defeat tribe's sovereign immunity; 4) the tribe's acceptance of federal funding did not constitute waiver of sovereign

immunity; 5) Plaintiff failed to state claim against tribal officers in their individual capacity, to extent Plaintiff asserted that officers' alleged ultra vires actions were based on tribe's decision to banish; 6) Plaintiff failed to state claim under Indian Civil Rights Act (ICRA) against Defendants; and 7) Plaintiff failed to state 1983 Fourth Amendment claim against Defendants. The motion was granted.

108. Gibbs v. Stinson

421 F. Supp. 3d 267 (E.D. Va. Sept. 30, 2019). The district court found that an arbitration provision in a loan agreement purporting to disclaim state and federal law, which required application of tribal law, was not enforceable. Borrowers brought a putative class action against owners of a corporation allegedly involved in rent-a-tribe schemes to control lenders owned by Native American tribes, in order to make loans and charge usurious interest rates under protection of tribal sovereign immunity. Borrowers alleged claims under the Racketeer Influenced and Corrupt Organizations Act (RICO) and Virginia's usury laws, and owners moved to transfer the action from Virginia to Texas, to compel arbitration, and to dismiss for failure to state a claim. The United States District Court for the Eastern District of Virginia, M. Hannah Lauck, J., held that: 1) transfer of action to Texas was unwarranted; 2) question of validity of delegation provisions in arbitration agreements was for the district court, rather than arbitrator; 3) arbitration provisions were not enforceable as to borrowers' claims arising out of loans from two lenders; 4) arbitration provision was enforceable as to borrowers claims against third lender, and thus individuals and corporations were entitled to compel arbitration as to claims by borrowers that had borrowed from that lender; 5) borrowers sufficiently alleged claim under Virginia usury statute; 6) borrowers sufficiently alleged RICO claims against individuals and corporations. The motion was granted in part and denied in part.

109. JW Gaming Development, LLC v. James

778 F. Appx. 545 (9th Cir. Oct. 02, 2019). Several individual defendants (collectively the “tribal defendants”) appealed the district court’s order denying their motion to dismiss the claims against them on the basis of sovereign immunity. Because the facts are known to the parties, the United States Court of Appeals for the Ninth Circuit repeats them only as necessary to explain its decision. The district court did not err in denying the tribal defendants’ motion to dismiss the fraud and RICO claims that JW Gaming Development, LLC (“JW Gaming”) filed against them. Under the appellate court’s “remedy-focused analysis,” the Tribe is not the real party in interest with respect to such claims. *Maxwell v. County of San Diego*, 708 F.3d 1075, 1088 (9th Cir. 2013). The claims are explicitly alleged against the tribal defendants in their individual capacities, and JW Gaming seeks to recover only monetary damages on such claims. If JW Gaming prevails on its claims against the tribal defendants, only they personally—and not the Tribe—will be bound by the judgment. Any relief ordered on the claims alleged against the tribal defendants will not, as a

matter of law, “expend itself on the public treasury or domain,” will not “interfere with the [Tribe’s] public administration,” and will not “restrain the [Tribe] from acting, or ... compel it to act.” *Id.* (internal quotation marks omitted). Accordingly, such claims are not shielded by the Tribe’s sovereign immunity. See *Lewis v. Clarke*, 137 S. Ct. 1285, 1290–92, (2017); *Pistor v. Garcia*, 791 F.3d 1104, 1112–14 (9th Cir. 2015); *Maxwell*, 708 F.3d at 1088–90. Affirmed.

110. State v. Bellcourt

937 N.W.2d 160 (D. Minn. Dec. 16, 2019). Tribal police officer had authority to seize and cite Defendant outside reservation property for offense that occurred outside reservation. Defendant was convicted in the District Court, Becker County, Gretchen D. Thilmoney, J., of two gross-misdemeanor offenses for failing to stop for a school bus. Defendant appealed. The Minnesota Court of Appeals, Johnson, J., held that: 1) cooperative agreement between county and Indian tribe for regulation of law enforcement services on reservation property did not limit course and scope of tribal police officer's employment to geographic area of reservation; and 2) tribal police officer was within course and scope of his employment when he seized and cited Defendant outside officer's jurisdiction, and thus evidence gathered during seizure was admissible. The lower court’s decision was affirmed. Smith, J., filed a dissenting opinion.

111. Eglise Baptiste Bethanie De Ft. Lauderdale, Inc. v. Seminole Tribe of Florida

No. 19-CV-62591, 2020 WL 43221 (S.D. Fla. Jan. 03, 2020). This cause came before the Court upon Defendant Seminole Tribe of Florida’s Motion to Dismiss. For the reasons set forth below, the Seminole Tribe’s Motion was granted; Auguste’s Motion was granted; and Plaintiffs’ Motion to Amend was denied. Plaintiffs initiated this action on October 17, 2019, asserting claims against Defendants Aida Auguste and the Seminole Tribe of Florida (collectively, “Defendants”). On September 22, 2019, the plaintiff’s congregation convened for a meeting to approve the process for the selection and installation of Pastor Auguste’s successor. ECF No. [21] ¶ 8. The congregational meeting ultimately “devolved into a pushing, shoving and punching affair between the supporters of the Board of Directors and the supporters of [Defendant] Auguste,” which necessitated police intervention to restore order. *Id.* On September 29, 2019, “Eglise Baptiste conducted its weekly Sabbath services in the religious structure located on the Church Property.” *Id.* While those services were in progress, Defendant Auguste and her supporters, escorted by six armed officers from the Seminole Police Department and without judicial authorization entered church property, “disabled the Church Property’s surveillance cameras,” “expelled from the Church Property all the worshipers who opposed Auguste,” “changed the locks to the doors of the religious structure located on the Church Property,” “seized the business records of Eglise Baptiste,” and “locked the gates to the Church Property.” *Id.* In this case, Defendant Seminole Tribe is entitled to tribal sovereign immunity based on the extensive case law from both the Supreme Court and the United States Court of Appeals for the Eleventh Circuit establishing that

an Indian tribe is entitled to immunity from suit unless there is a clear waiver by the tribe or some unequivocal statutory abrogation of such immunity by Congress. *See Kiowa Tribe v. Mfg. Techs.*, 523 U.S. 751,754 (1998); *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 785 (2014); *Furry v. Miccosukee Tribe of Indians of Fla.*, 685 F.3d 1224, 1233 (11th Cir. 2012); *Sanderlin v. Seminole Tribe*, 243 F.3d 1282, 1286 (11th Cir. 2001) (quoting *Florida v. Seminole Tribe*, 181 F.3d 1237, 1243 & n.8 (11th Cir. 1999); *Florida Paraplegic, Ass'n, Inc. v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126, 1131 (11th Cir. 1999). Accordingly, Defendant Seminole Tribe was dismissed from this action. As to the motion to amend, “where the identity of the governing body or bodies that exercise general authority within a church is a matter of substantial controversy, civil courts are not to make the inquiry into religious law and usage that would be essential to the resolution of the controversy.” *Maryland & Virginia Eldership of Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 369-70 (1970). “[Q]uestions of church discipline and the composition of the church hierarchy are at the core of ecclesiastical concern.” *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 717 (1976). “Thus, federal courts will not interfere with the decisions of a religious body adjudicating the relationships of members in that body; as a matter of jurisprudence federal courts will defer to the decision of the religious body.” *Grunwald v. Bornfreund*, 696 F. Supp. 838, 840 (E.D.N.Y. 1988). “[D]enial of leave to amend is justified by futility when the ‘complaint as amended is still subject to dismissal.’” *Burger King Corp. v. Weaver*, 169 F.3d 1310, 1320 (11th Cir. 1999); see *Dysart v. BankTrust*, 516 F. App'x 861, 865 (11th Cir. 2013) (same); *St. Charles Foods, Inc. v. Am.'s Favorite Chicken Co.*, 198 F.3d 815, 822-23 (11th Cir. 1999). Based on the analysis above, the Court concludes that permitting any further amendment would be futile in this case. Plaintiffs’ Second Amended Complaint would not have survived a motion to dismiss due to the same issues discussed above with regard to tribal sovereign immunity and the non-justiciable questions of church governance. Accordingly, Defendant Seminole Tribe of Florida’s Motion to Dismiss was Granted.

112. Pierson v. Hudson Insurance Company

No. C19-0289-JCC, 2020 WL 583825 (W.D. Wash. Feb. 06, 2020). The court granted Defendants’ motion to dismiss for the reasons explained herein. On January 21, 2015, Plaintiff was pulled over and arrested by a Swinomish police officer while driving on tribal land. Swinomish police officers subsequently seized Plaintiff’s pickup truck because it had been used to transport illegal narcotics onto tribal land. Officer Thorne, a Swinomish police officer, told Plaintiff that she would be unable to retrieve her pickup because the department was procuring a search warrant for the vehicle and the tribe was initiating forfeiture proceedings. Plaintiff failed to challenge the tribe’s forfeiture proceedings in tribal court and subsequently brought suit against Officer Thorne in Skagit County Superior Court, seeking an injunction and damages under 42 U.S.C. § 1983. *See Pearson v. Thorne*, Case No. C15-0731-JCC, Dkt. No. 2-1 (W.D. Wash. 2015). The case was later removed to this Court. *Id.*, Dkt. No. 1. Thorne filed a motion for summary judgment in March 2016, which was granted by the district court in June 2016. *Id.*, Dkt. Nos. 24, 33. The court

dismissed Plaintiff's complaint against Thorne because (1) Officer Thorne enjoyed sovereign immunity, (2) Officer Thorne was not an appropriate defendant under § 1983 because he was not acting under the color of state law, and (3) Plaintiff failed to exhaust her tribal remedies. Plaintiff attempted to challenge Officer Thorne's assertion of sovereign immunity in that suit, alleging that it was contrary to Washington Revised Code § 10.92, a Washington state law that requires that insurance companies insuring tribes waive sovereign immunity in relevant insurance policies. No insurance companies were named as defendants in the prior lawsuit. Plaintiff brought this suit, in February 2019, alleging that (1) Hudson's insurance contract was implicitly amended by 25 U.S.C. § 5321(c)(3)(A) to contain a waiver of sovereign immunity, it breached that contract by asserting sovereign immunity, and Plaintiff is the intended third-party beneficiary to that contract; and (2) Hudson is liable to Plaintiff for its violation of 25 U.S.C. § 5321(c)(3)(A). In *Pearson v. Thorne*, Plaintiff argued that Thorne could not assert sovereign immunity under Wash. Rev. Code § 10.92, which requires insurance companies to waive tribal sovereign immunity for their insureds. Case No. C15-0731-JCC, Dkt. No. 32 (2015) at 2–3. Plaintiff asserted that Thorne should not have been protected by sovereign immunity because of 25 U.S.C. § 5321—a statute bearing a strong resemblance to RCW 10.92. Specifically, § 5321(c)(3)(A), provides that an insurance company insuring a tribe must include a provision within the policy that “waive[s] any right it may have to raise as a defense the sovereign immunity of an Indian tribe from suit” to the extent of the coverage. Although Plaintiff raised a new argument in support of her assertion, she is litigating the same issue—namely, whether Thorne should have been protected by sovereign immunity in the original lawsuit. “[A] grant of summary judgment constitutes a final judgment on the merits and has the same preclusive effect as a full trial of the issue.” *Nat'l Union Fire Ins. Co. of Pittsburgh v. Nw. Youth Servs.*, 983 P.2d 1144, 1148 (Wash. Ct. App. 1999). For the foregoing reasons, Defendants' Motion to Dismiss was granted and the case was dismissed with prejudice.

113. Genskow v. Prevost

2020 WL 1676960 (E.D. Wis. Apr. 06, 2020). Plaintiff Madelyn P. Genskow filed this pro se action against Defendants Stacey Prevost, Nate Ness, Eddie Metoxen, and Brandon Van de Hei—each an officer of the Oneida Nation's police department—claiming that the defendants unreasonably and with excessive force removed Genskow from a meeting of the General Tribal Council of the Oneida Nation. For the reasons that follow, the defendants' Motion to Dismiss was granted and Genskow's Motion to Add a Defendant was denied. In this case, the defendants contended that the court lacks subject matter jurisdiction because Genskow's claims are barred under the doctrine of sovereign immunity. The question of sovereign immunity, however, is not jurisdictional. *Meyers v. Oneida Tribe of Indians of Wisconsin*, 836 F.3d 818, 820 (7th Cir. 2016). Genskow is a seventy-seven-year-old elder of the Oneida Nation, a federally recognized Indian tribe. *See* 83 Fed. Reg. 4235, 5238 (Jan. 30, 2018). She claimed that the defendants, employees of the Oneida Nation and officers of the Oneida Police Department, used excessive force and harassed, intimidated, and embarrassed her when they removed her from a conference room at the

Radisson Hotel, a tribal building located on tribal land, in front of 1,500 tribal members during a General Tribal Council meeting held on July 10, 2018. Genskow said her microphone was silenced after she raised continuous calls for “Point of Order” because the Tribal Chairman refused to recognize her. The Chairman then directed the defendants to physically remove her from the meeting. Genskow alleged that the defendants each grabbed one of her limbs, carried her out of the room, and placed her outside the hotel. The more difficult question is whether Genskow’s suit against the individual tribal police officers for injuries she allegedly sustained during her removal is likewise barred. In *Lewis v. Clarke*, 137 S. Ct. 1285 (2017), the Court was guided by the principles of sovereign immunity as they apply to actions seeking to hold state and local government officials liable for torts committed in the course of their employment and drew upon the distinction between individual- and official-capacity suits. “In an official- capacity suit,” the Court noted, “the relief sought is only nominally against the official and in fact is against the official’s office and thus the sovereign itself.” *Id.* at 1291. Suits brought against an official in his or her personal capacity, on the other hand, “seek to impose individual liability upon a government officer for actions taken under color of state law.” *Id.* (quoting *Hafer v. Melo*, 502 U.S. 21, 25, 112 S. Ct. 358 (1991)). Thus, to the extent Genskow’s suit was against the defendants in their individual capacity, it would seem under *Lewis* that they were not immune. This case differs from *Lewis*, however, in that it was brought by a tribal member against tribal officers for acts that took place on tribal land. Here, by contrast, Genskow sought to impose liability on tribal police officers who physically removed her from a meeting of the Nation’s governing body on tribal land at the direction of the Tribal Chairman when she persisted in calling for a point of order despite the Chairman’s refusal to recognize her. The allegations of her complaint and the relief she sought, in the form of injunctive relief against the Nation and \$4,000,000 in damages, strongly suggest that her suit is in reality against the Nation. At the very least, tribal sovereignty must mean that Indian tribes are free to conduct the meetings of their own governing bodies without the threat of a federal lawsuit every time they rule a disruptive member out of order and have him or her removed. Defendant’s motion to was therefore Granted and the action was dismissed.

114. Acres Bonusing, Inc. v. Marston

No. 19-CV-05418-WHO, 2020 WL 1877711 (N.D. Cal. Apr. 15, 2020). Plaintiffs James Acres and Acres Bonusing, Inc. (“ABI”) brought this malicious prosecution action against multiple lawyers, law firms, and court personnel who were involved in a previous contractual fraud case filed against plaintiffs by Blue Lake Casino & Hotel (“Blue Lake Casino”), in Blue Lake Rancheria Tribal Court. For the reasons set forth below, the United States District Court for the Northern District of California granted the motions to dismiss as to all three sets of defendants, on grounds of tribal sovereign immunity. As sovereigns, Tribal Nations are generally immune from suit. *Lewis v. Clarke*, 137 S. Ct. 1285, 1288 (2017). Sovereign immunity extends to tribal officials when they act in their official capacity and within the scope of their authority; however, when tribal officials act beyond their authority they lose their right to the sovereign’s immunity. *See Id.*; *Imperial*

Granite Co. v. Pala Band of Mission Indians, 940 F.2d 1269, 1271 (9th Cir. 1991). Even when a tribal employee is sued for actions taken within the scope of her employment, a personal suit can proceed unless the court determines that “the sovereign is the real party in interest.” *Id.* at 1290-91. Sovereign immunity therefore bars suits when “the remedy sought is truly against the sovereign.” *Id.* at 1290. The court found that all of the defendants were functioning as the Tribe’s officials or agents, when the alleged acts were committed and dismissed the complaint based on tribal sovereign immunity. The real party in interest here is the tribe because adjudicating this dispute would require the court to interfere with the tribe’s internal governance. As the Sacramento County Superior Court found, “[t]hese are not insignificant or immaterial questions in the malicious prosecution action, since the case involves alleged malicious prosecution only in the Tribal Court.” *Acres v. Marston*, No. 34201800236829CUPOGD, 2019 WL 8400826, at *12 (Cal. Super. Feb. 11, 2019) (emphasis in original). Just as entertaining the suit in *Brown* would require the court to question an inherently tribal function, entertaining this suit would require me to question the judicial function of the Blue Lake Rancheria Tribal Court. The real party in interest here is the Tribe itself. For these reasons, Attorney Defendants’ motion to dismiss on grounds of tribal sovereign immunity was Granted. This case is more similar to *Hardin*, where the tribe was a real party in interest because Plaintiffs sued high-ranking tribal council members for voting to eject him, than it is to *Lewis*, where the tribe was not a real party in interest because Plaintiffs sued a tribal employee for negligence in driving casino customers to their homes off of the tribe’s lands. The Blue Lake Defendants are named as individual defendants but the tribe is the real party in interest. It was the tribe, not any of the individual Blue Lake Defendants, who sued Plaintiffs in the underlying tribal court case. For the reasons discussed above, the court dismissed the complaint against Blue Lake Defendants because of tribal sovereign immunity. In addition, the court briefly addressed the Blue Lake Defendants’ alternative defenses of judicial immunity and quasi-judicial immunity. Judges are absolutely immune from civil liability for damages for acts performed in their judicial capacity. *See Pierson v. Ray*, 386 U.S. 547, 553-55 (1967). Accordingly, this case was dismissed.

115. Eyck v. United States

463 F. Supp. 3d 969, 2020 WL 2770436 (D.S.D. May 28, 2020). Pending before the Court is a Motion to Dismiss, filed by defendant, Robert Neuenfeldt (“Neuenfeldt”). For the following reasons, Neuenfeldt’s Motion to Dismiss is granted in part and denied in part. On June 18, 2017, Micah Roemen (“Roemen”) and Morgan Ten Eyck (“Ten Eyck”) were passengers in a vehicle driven by Tahlen Bourassa (“Bourassa”). Neither Bourassa, Roemen, or Ten Eyck are Indians. Plaintiffs allege that in the early morning hours of June 18, 2017, Flandreau Tribal Police Officers, along with Moody County Deputy Sheriffs, the South Dakota Highway Patrol, and the City of Flandreau Police Department stopped a vehicle driven by Bourassa. Plaintiffs allege that defendant Neuenfeldt, Chief of Police for Flandreau Santee Sioux Tribe threatened to take Bourassa to jail and that Bourassa then fled in his vehicle. In the course of the pursuit, Bourassa

lost control of his vehicle and rolled several times, throwing all three occupants from the vehicle. As a result of the accident, Ten Eyck is completely incapacitated and Plaintiffs have sustained thousands of dollars in medical bills for their daughter's care. Plaintiffs submitted an Administrative Tort Claim in the amount of \$150,000,000 to the United States Department of the Interior pursuant to 28 U.S.C. § 2675. On December 3, 2018, the United States Department of the Interior denied Plaintiffs' administrative claim. In their Complaint, he alleged claims for negligence against "Defendants"; a claim against Neuenfeldt under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 397, 91 S. Ct. 1999, 29 L.Ed.2d 619 (1971); a common law assault and battery claim against Neuenfeldt; and a Bivens action against Unknown Supervisory Personnel of the United States. Plaintiffs allege that at all relevant times, the employees of the Police Department of the Tribe were performing functions pursuant to a § 638 contract entered into with the United States Government which renders them employees of the United States Government. Neuenfeldt argues that such claims are barred by tribal sovereign immunity because the Complaint alleges that Neuenfeldt was acting as the Tribe's Chief of Police when he allegedly engaged in such conduct. On March 18, 2019, the United States Attorney filed a Certification of Scope of Employment pursuant to 28 C.F.R. § 15.4, Doc. 12, certifying that Officer Neuenfeldt was an employee of the federal government and was acting within the scope of his office or employment at the time of the alleged conduct with respect to Counts I and III of the complaint alleging negligence and common law assault and battery. The Certification further states that Officer Neuenfeldt was not acting within the scope of his employment with respect to Counts II and IV of the complaint alleging Bivens claims against Neuenfeldt and Unknown Supervisory Personnel of the United States for alleged violations of his Constitutional rights. The United States Attorney states in its certification that constitutional tort claims such as those alleged in Counts II and IV are not cognizable under the FTCA, and that the United States and its agencies are not proper Bivens defendants due to sovereign immunity. Neuenfeldt argues that this court lacks subject matter jurisdiction over the claims against him because tribal sovereign immunity extends to his actions. The assertion of tribal "[s]overeign immunity is a jurisdictional question" which should be considered irrespective of the merits. *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1244 (8th Cir. 1995); see also *Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 418 (9th Cir. 1989). If Neuenfeldt "possess[es] sovereign immunity, then [this court has] no jurisdiction to hear [plaintiff's claims against him]." See *Rupp*, 45 F.3d at 1244. Neuenfeldt argues that because Plaintiffs have alleged that Neuenfeldt was acting in his capacity as the Tribe's Chief of Police at all times relevant to this action, Plaintiffs' claims against him are barred by tribal sovereign immunity. As discussed in more detail below, the fact that Neuenfeldt was acting at all times in his capacity as the Tribe's Chief of Police is insufficient, on its own, to invoke the doctrine of tribal sovereign immunity. In this case, Plaintiffs are proceeding under Bivens against Neuenfeldt in his individual capacity. However, "a plaintiff cannot circumvent tribal immunity 'by the simple expedient of naming an officer of the Tribe as a defendant, rather than the sovereign entity.'" *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 727 (9th Cir. 2008); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 270, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997)(stating that in

determining whether a state official may be liable for money damages in his official capacity, courts should not rely wholly on “the elementary mechanics of captions and pleading.”). In order to determine if sovereign immunity applies, courts must ask whether lawsuits brought against officers or employees of the tribe “represent only another way of pleading an action against an entity of which an officer is an agent.” *Kentucky v. Graham*, 473 U.S. 159, 165-66, 105 S. Ct. 3099, 87 L.Ed.2d 114 (1985). An allegation, such as that made by Neuenfeldt, “that an employee [such a Neuenfeldt] was acting within the scope of his employment at the time the tort was committed is not, on its own, sufficient to bar a suit against that employee on the basis of tribal sovereign immunity.” See *Lewis v. Clarke*, — U.S. —, 137 S.Ct. 1285, 1288, 197 L.Ed.2d 631 (2017) (emphasis added). Instead, courts must determine whether tribal sovereign immunity applies by evaluating whether the sovereign is the “real party in interest.” *Lewis*, 137 S.Ct. at 1290. “[T]he general criterion for determining when a suit is in fact against the sovereign is the effect of the relief sought.” *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 107, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984). Thus, [a] suit is against the sovereign if ‘the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,’ or if the effect of the judgment would be ‘to restrain the Government from acting or to compel it to act.’ *Pennhurst*, 465 U.S. 89 at 102, n.11, 104 S.Ct. 900 (citing *Dugan v. Rank*, 372 U.S. 609, 620, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963)). In *Stanko v. Oglala Sioux Tribe*, 916 F.3d 694, 698 (8th Cir. 2019), the court held that tribal officers can be sued individually for violating the constitutional rights of non-Indians while on tribal lands, but the court did not specifically address the issue of tribal sovereign immunity, nor did it suggest that tribal sovereign immunity may never bar individual capacity suits against tribal officers, particularly when they are exercising the inherent sovereign powers of the Tribe. The Federal Tort Claims Act (FTCA) “accords federal employees absolute immunity from common-law tort claims arising out of acts they undertake in the course of their official duties.” *Osborn v. Haley*, 549 U.S. 225, 229, 127 S.Ct. 881, 166 L.Ed.2d 819 (2007) (citing 28 U.S.C. § 2679(b)(1)); see also *United States v. Smith*, 499 U.S. 160, 161-62, 111 S.Ct. 1180, 113 L.Ed.2d 134 (1991). Under the FTCA, “an action against the United States is the only remedy for injuries caused by federal employees acting within the scope of their employment.” *Anthony v. Runyon*, 76 F.3d 210, 212-13 (8th Cir. 1996). The purpose of the FTCA is “to shield covered employees not only from liability but from suit” and to place the “cost and effort of defending the lawsuit ... on the Government’s shoulders.” *Osborn*, 549 U.S. at 248, 252, 127 S.Ct. 881 (2007). Accordingly, it is hereby Ordered that Neuenfeldt’s Motion to Dismiss, is Granted in Part and Denied in Part as follows: (1) Counts I and III of the Complaint alleging negligence and common law assault and battery shall be Dismissed Without Prejudice against defendant Neuenfeldt; Counts I and III shall proceed against defendant United States of America; and (2) The Motion to Dismiss Count II of the Complaint alleging a Bivens claim against defendant Neuenfeldt is Denied; and (3) To the extent Neuenfeldt’s motion seeks to dismiss Count IV of the Complaint alleging a claim for relief for “supervisory responsibility for violations of the civil right color of law (Bivens action),” his motion is Denied for lack of standing.

116. Howard v. MMMG, LLC

299 So. 3d 40, 2020 WL 3443832 (Fla. Dist. Ct. App. June 24, 2020). Larry Howard petitions for a writ of certiorari seeking review of circuit court orders denying his motion for summary judgment based on tribal sovereign immunity. We grant the petitions because the trial court departed from the essential requirements of law in concluding that disputed issues of material fact precluded summary judgment. The Seminole Tribe (“the Tribe”) is a federally recognized Native American tribe governed by a tribal council, which is duly chartered and recognized by the U.S. Department of the Interior, pursuant to § 16 of the Indian Reorganization Act of 1934. The Seminole Tribe of Florida, Inc. (STOFI) is a tribal corporation, also chartered and approved by the United States Department of the Interior, pursuant to § 17 of the Act. STOFI’s ownership is vested in the approximately 4,000 registered members of the Tribe and a board of directors controls its operations. At all times material to this action, Howard was on the STOFI board of directors. In 1995, the Tribe enacted Ordinance C-01-95 to address sovereign immunity and waiver of immunity. Michael Wax, aka Mobile Mike, a South Florida radio personality, owns Mobile Mike Promotions, Inc. In 2011, Wax’s company and STOFI entered into a joint venture agreement and formed MMMG, LLC (the “Joint Venture”) to “provide promotional, advertising and marketing services” to STOFI. STOFI later violated the agreement. Wax’s company and the Joint Venture (collectively “Mobile Mike”) filed a complaint against STOFI and other tribal members individually. Mobile Mike alleged that STOFI officials, including Howard, acted outside the scope of their authority by directing STOFI to divert its business away from the Joint Venture to Redline Media Group, Inc. (“Redline”), which was owned by fellow tribe member Sallie Tommie. In 2014, STOFI and the STOFI officials moved to dismiss asserting sovereign immunity. The circuit court found that STOFI was entitled to tribal sovereign immunity and entered an order dismissing with prejudice all claims against STOFI. As to the STOFI officials, the circuit court found disputed factual allegations on the issue of whether the STOFI officials were acting within the scope of their duties and did not dismiss the claims against them. This court affirmed the dismissal as to STOFI. *See MMMG, LLC v. Seminole Tribe of Fla., Inc.*, 196 So. 3d 438, 439 (Fla. 4th DCA 2016). After this court affirmed the circuit court’s dismissal, Mobile Mike commenced a new “derivative” action in 2016. “[A] tribal official - even if sued in his ‘individual capacity’ - is only ‘stripped’ of tribal immunity when he acts ‘manifestly or palpably beyond his authority’ ” *Bassett v. Mashantucket Pequot Museum & Research Ctr. Inc.*, 221 F. Supp. 2d 271, 280 (D. Conn. 2002) (second alteration in original) (quoting *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 359 (2d Cir. 2000)). “[I]f the actions of an officer do not conflict with the terms of his valid statutory authority, then they are the actions of the sovereign, whether or not they are tortious under general law....” *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 695, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949)). As the circuit court correctly concluded when it granted summary judgment for the other STOFI officials, they were acting within the scope of their authority. None of Mobile Mike’s allegations establish that Howard or any of the STOFI officials acted outside the scope of their authority. The circuit court departed from the essential requirements of law when it denied

the motion for summary judgment as to Howard. Accordingly, the petitions for writ of certiorari are granted.

117. Cadet v. Snoqualmie Casino

2020 WL 3469222 (W.D. Wash. June 25, 2020). Before the court is Defendant Snoqualmie Casino's ("Snoqualmie" or "the Casino") response to the court's order to show cause why it is entitled to tribal sovereign immunity. The court concludes that Snoqualmie is entitled to tribal sovereign immunity and DISMISSES this case for lack of subject-matter jurisdiction. Ms. Cadet lives in Bellevue, Washington. On or about May 3, 2018, she paid Snoqualmie ten dollars for round-trip transportation via bus from Seattle to the Casino. However, she missed the last bus home that night and had no money to take a taxi. Ms. Cadet claims she told the security guards that she had come on the bus and asked for a "courtesy ride," but the Casino called the police instead. Ms. Cadet, who is black, claims that Snoqualmie's staff assisted the police officers in degrading, abusing, assaulting, and injuring her because of her complexion. Here, the Casino functions as an "arm of the Tribe," and the Casino is therefore immune from suit unless the Snoqualmie Tribal Council has expressly waived sovereign immunity in this case. To remain consistent with the controlling case law and the Tribe's constitution, any waiver of Snoqualmie's sovereign immunity must be clear and unambiguous. The Tribe's Tort Claims Act, which was enacted by the Snoqualmie Tribal Council, provides a limited waiver of sovereign immunity. The Act states that "[t]he sovereign immunity of the Tribe is waived only in the following instances," including "[i]njuries proximately caused by the negligent acts and/or omissions of the Tribe, its agents, employees or officers." Acts at 52 (Tort Claims Act § 6.0(d)). The Tort Claims Act does not mention federal court jurisdiction at all, but it does state that the Act "is not intended to be a general waiver of the Tribe's sovereign immunity, and it shall be narrowly and strictly construed." Acts at 50 (Tort Claims Act § 3.0). The Tort Claims Act further states that it "sets forth the exclusive manner in which tort claims involving the Snoqualmie Indian Tribe shall be filed, administered and adjudicated" and that the waiver is "expressly conditioned upon the claimant's full and complete compliance with all of the procedures set forth in this chapter." *Id.* at 50 (Tort Claims Act § 3.0). Moreover, "[a] tort claim for monetary damages against the Tribe shall be forever barred unless ... [it] is commenced in Tribal Court in accordance with the provisions of this Chapter." *Id.* at 56 (Tort Claims Act § 12.0(e)). Finally, the Act contains detailed procedural rules that must be followed to file tort claims in the Snoqualmie Tribal Court, indicating that the Tribal Council intended the waiver to apply to suits filed in tribal court and not federal district court. *See Id.* at 53-54 (Tort Claims Act § 10.0). Thus, the waiver of sovereign immunity located within the Tort Claims Act does not unequivocally indicate that the Tribe has waived its immunity from suits filed in federal court; instead, the waiver provides a remedy to those who are harmed while on tribal grounds through the tribal court system. The absence of a clear and unequivocal waiver to be sued in federal court means that the Tribe's waiver of sovereign immunity does not extend to Ms. Cadet's suit. Therefore, the Tribe's immunity remains intact, and the court lacks

subject-matter jurisdiction in this case. *See Bank of Oklahoma v. Muscogee (Creek) Nation*, 972 F.2d 1166, 1171 (10th Cir. 1992). There is no evidence on the record that Ms. Cadet complied with the Tribe’s tort claims procedural requirements. Thus, even if Ms. Cadet could bring her case in federal court, the Tribe conditioned its waiver of sovereign immunity upon Ms. Cadet’s strict adherence to several procedural requirements, and Ms. Cadet fails to establish that she satisfied those requirements. In sum, the Casino functions as an “arm of the Tribe,” and the Tribe has not unequivocally waived its sovereign immunity in this case. Therefore, tribal sovereign immunity compels the court to dismiss this case for lack of subject-matter jurisdiction.

118. Thomas G. Landreth v. United States of America

2020 WL 4347377 (W.D. Wash. July 29, 2020). Landreth owns property abutting Lake Quinault in the Olympic National Park. This is at least his fourth attempt to obtain a judicial determination that the United States does not own the waters of and submerged lands under Lake Quinault (up to the ordinary high-water mark) in trust for the benefit of the Quinault Indian Nation (QIN), but rather that Washington State owns those lands and the United States or QIN has tortiously converted them. The Quiet Title Act expressly does not include a waiver of sovereign immunity where the disputed land is Indian land: The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands[.] 28 U.S.C. § 2409a (a) (1978) (emphasis added). *See State of Alaska v. Babbitt*, 38 F.3d 1068, 1072 (9th Cir. 1994); and *United States v. Mottaz*, 476 U.S. 834, 843 (1986). The QTA also includes a 12-year limitations period, which would have accrued when QIN first started treating the “disputed” property as its own. The United States points out that it did so at least three times that Landreth has identified, the latest of which was 1977. The United States’ Motion to Dismiss Landreth’s tort claim against it is GRANTED and that claim too is Dismissed. Furthermore, this Court does not have jurisdiction over Landreth’s claim for money damages over \$ 10,000. Under the “Tucker Act,” 28 U.S.C. § 1491, the United States Court of Federal Claims has exclusive jurisdiction over such claims. For these reasons, the United States’ Motion to Dismiss is GRANTED and Landreth’s claims against it are Dismissed for lack of subject matter jurisdiction. Native American tribes and their governing bodies possess sovereign immunity and may not be sued absent express and unequivocal waiver of immunity by the tribe or abrogation of immunity by Congress. Landreth’s claims are inconsistent with settled law. QIN argues that Landreth cannot state a claim to “remove the cloud of ownership on his property” under the QTA: The Indian land exception to the QTA’s waiver of the United States’ immunity creates an “insuperable hurdle” to suits to challenge the government’s interest in Indian trust or restricted land. *Id.* at 1075. It also applies without regard to whether there is an alternate means of review and may leave a party with no forum for its claims. This is correct, and Landreth seems to concede as much, though he points out that that would leave him with no recourse. His frustration is understandable, but the fact that he has no remedy is not a basis for inferring a waiver of sovereign

immunity, or ignoring the QTA's plain language. Finally, Landreth's remaining claims (for money damages, possible criminal prosecution, and potential renegotiation of the Treaty of Olympia) are baseless and do not cure the fatal-to-his-claims jurisdictional problem. QIN's Motion to Dismiss [Dkt. No. 25] for lack of subject matter jurisdiction is Granted and Landreth's claims against QIN are Dismissed. Because the Court does not have the power to adjudicate his claims, the dismissal is without prejudice.

119. Eglise Baptiste Bethanie De Ft. Lauderdale v. Seminole Tribe of Florida

824 Fed. Appx. 680, 2020 WL 4581439 (11th Cir. Aug. 10, 2020). Before the district court, Eglise Baptiste Bethanie De Ft. Lauderdale, Inc., and Andy Saint-Remy (plaintiffs) sued the Seminole Tribe of Florida and Aide Auguste (defendants), alleging various causes of action including claims under 18 U.S.C. § 248. The Tribe moved for dismissal under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction, arguing that, because it is a federally recognized Indian tribe, it was entitled to tribal sovereign immunity. Auguste sought dismissal as well and argued, in part, that the plaintiffs' allegations involved non-justiciable questions of internal church governance. The district court agreed with the defendants and dismissed the action. This appeal followed. We affirm the district court. That the plaintiffs allege criminal violations under § 248 cannot change our conclusion; where tribal sovereign immunity applies, it "bars actions against tribes regardless of the type of relief sought." *Freemanville Water Sys., Inc. v. Poarch Band of Creek Indians*, 563 F.3d 1205, 1208 (11th Cir. 2009). Also unavailing is the plaintiffs' contention that tribal sovereign immunity is inapplicable here because the alleged conduct occurred off-reservation. Seminole Tribe is entitled to tribal sovereign immunity and was appropriately dismissed from this suit. Next, we turn to the plaintiffs' claims against Auguste. Before reaching the plaintiffs' § 248 claim, a court would need to determine whether Auguste was the rightful successor to the church's leadership and, if she was, whether Auguste had the authority to exclude the plaintiffs from the church's property. Answering these questions would require us to inquire into church rules, policies, and decision-making and questions of church governance are manifestly ecclesiastical. *See Serbian Eastern Orthodox Diocese for U.S. of America and Canada v. Milivojevic*, 426 U.S. 696, 717 (1976) ("[Q]uestions of church discipline and the composition of the church hierarchy are at the core of ecclesiastical concern."). Auguste's decision to exclude the plaintiffs from church property and the related events are part and parcel of ecclesiastical concerns (e.g., matters of church governance, administration, and membership). The adjudication of these issues would "excessively entangl[e] [us] in questions of ecclesiastical doctrine or belief"—the very types of questions we are commanded to avoid. *See Crowder v. Southern Baptist Convention*, 828 F.2d 718, 722 (11th Cir. 1987) (footnote omitted). Summed up, the district court correctly determined that it could not adjudicate the claim against Auguste because the dispute was "strictly and purely ecclesiastical in its character." *See Milivojevic*, 426 U.S. at 713. The claim against Auguste was appropriately dismissed. We therefore Affirm the district court's dismissal of the plaintiffs' complaint.

120. *In re Internet Lending Cases*

53 Cal. App. 5th 613, 267 Cal. Rptr. 3d 783, 2020 WL 4745994 (Cal. Ct. App. Aug. 17, 2020). This appeal, before us for the second time, involves a representative action brought by plaintiff and appellant Kathrine Rosas against various defendants for their alleged participation in illegal internet payday loan practices. Defendant and Respondent in this matter, AMG Services, Inc. (AMG), is a wholly owned tribal corporation of former defendant Miami Tribe of Oklahoma (Tribe), a federally recognized Indigenous American tribe. AMG’s motion to dismiss for lack of personal jurisdiction was granted by the trial court on the basis of tribal sovereign immunity—a ruling that Rosas herein challenges as erroneous as a matter of both law and fact. In her previous appeal, we reversed and remanded for further proceedings in light of a then recent California Supreme Court decision, *People v. Miami Nation Enterprises* (2016) 2 Cal. 5th 222, 211 Cal. Rptr. 3d 837, 386 P.3d 357 (*Miami Nation*). In *Miami Nation*, the defendants, like AMG, included several tribal business entities affiliated with two federally recognized tribes, defendants Miami Tribe of Oklahoma and Santee Sioux Nation, that were allegedly involved in illegal lending practices. (*Miami Nation*, supra, 2 Cal. 5th at p. 230, 211 Cal. Rptr. 3d 837, 386 P.3d 357.) The California Supreme Court held that these affiliated entities were not immune from suit as “arms of the tribe” under a newly devised five-factor test that “takes into account both formal and functional aspects of the relationship between the tribes and their affiliated entities” and places the burden of proof on the entity claiming immunity. *Id.* Accordingly, in *Rosas I*, in light of this new standard, we issued the following mandate when remanding the matter back to the trial court: “AMG is entitled to an opportunity to further develop the evidentiary record in light of its newly- announced burden under *MNE* [Miami Nation] to prove by a preponderance of the evidence that it is an ‘arm of the tribe’ entitled to tribal immunity. (*MNE*, supra, 5 [2] Cal. 5th at p. 236 [211 Cal. Rptr. 3d 837, 386 P.3d 357].)” *Rosas I*, supra, at pp. 5–6. The court granted the motion to quash and dismiss for lack of personal jurisdiction filed by AMG, again specially appearing, and denied Rosas’s motion to strike AMG’s motion to dismiss and for sanctions. In doing so, the trial court accepted AMG’s argument that *Miami Nation’s* arm-of-the-tribe test should be applied to the current facts relating to its ownership and control at the time of the hearing rather than the facts that existed at the time the operative complaint was filed (or any other previous time). The court also credited AMG’s newly produced, undisputed evidence concerning significant changes made to AMG’s structure and governance since the prior court ruling—changes that, in effect, removed the nontribal actors (mainly, Scott Tucker and his affiliates) from positions of authority and control and ended its involvement in the business of financial lending. Applying these new facts to the *Miami Nation* test, the court found AMG entitled to immunity as an arm of the tribe. For reasons discussed below, we now affirm the trial court’s order to dismiss AMG from this case. Under tribal control, AMG worked to settle the enforcement actions pending against it in both federal and California courts. As part of these settlements, AMG agreed to terms that included permanently ceasing all of its payday loan operations and forfeiting many millions of dollars, including \$21

million to the Federal Trade Commission (FTC) in connection with its enforcement action. Further, on February 10, 2016, AMG executed a non-prosecution agreement (NPA) with the United States Attorney for the Southern District of New York. Pursuant to the NPA, AMG was barred from committing any future crime and agreed to forfeit \$48 million in proceeds from its payday lending business to the United States government. Rosas contends in the present appeal: (1) the trial court erred in finding as a matter of law that AMG's right to tribal sovereign immunity must be assessed as of the time of the hearing on its motion to dismiss rather than as of the time of its alleged wrongdoing or the filing of the complaint; (2) AMG failed to meet its burden to prove under *Miami Nation* that it was an "arm of the tribe" and, as such, entitled to immunity; (3) AMG waived its right to claim immunity; (4) the trial court should have used its equitable authority to strike AMG's immunity defense based on its abuse of the litigation process; and (5) the trial court exceeded the scope of the remittitur this court issued in *Rosas I* when remanding for further proceedings in light of *Miami Nation*. Based on cases discussing the doctrine of immunity in related contexts, we uphold the trial court's legal finding that whether AMG enjoys tribal sovereign immunity in this case should be assessed as of the time of the hearing on its motion to dismiss. As the United States Supreme Court aptly explained when discussing foreign sovereign immunity, "such immunity reflects current political realities and relationships, and aims to give foreign states and their instrumentalities some present 'protection from the inconvenience of suit as a gesture of comity.'" *Republic of Austria v. Altmann* 541 U.S. 677, 696 (2004). The order to dismiss AMG from this case is affirmed. AMG shall recover costs on appeal.

K. Sovereignty, Tribal Inherent

121. Spurr v. Pope

936 F.3d 478, 2019 WL 4009131 (6th Cir. Aug. 26, 2019). Personal protection order (PPO) against non-Indian was a civil, rather than criminal, protection order, and thus tribal court had jurisdiction to issue PPO. Stepmother, a non-Indian and non-tribal member who lived outside boundaries of land belonging to Nottawaseppi Huron Band of the Potawatomi (NHBP), a federally recognized, sovereign Indian tribe brought action against NHBP, chief judge of tribal court who had issued a personal protection order (PPO) prohibiting stepmother from having contact with stepson, a tribal member, and NHBP's highest court which affirmed PPO, alleging that tribal court lacked jurisdiction to issue the PPO, and seeking declaratory and injunctive relief. The United States District Court for the Western District of Michigan, Janet T. Neff, J., granted defendants' motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim. Stepmother appealed. The Court of Appeals, Cook, Circuit Judge, held that: 1) tribal sovereign immunity barred suit against NHBP and NHBP's highest court; 2) PPO was a civil, rather than criminal, protection order, and thus tribal court had jurisdiction to issue PPO; and 3) statute providing special domestic violence criminal jurisdiction over a defendant who has special ties to a tribe for criminal conduct involving domestic violence and dating violence, or violations of protection orders, did

not apply to tribal court's exercise of civil jurisdiction to issue a civil PPO. Affirmed.

122. State v. Ziegler

2019 WL 4164893 (Minn. Ct. App. Sept. 03, 2019). Appellant argues that he was arrested by Red Lake police officers and, because Red Lake police officers are not “peace officers” under Minnesota law, the district court erred by failing to conclude that his arrest was unlawful. He maintains that, because his arrest was unlawful, the evidence must be suppressed and his conviction vacated. We affirm. In the early morning hours of July 16, 2017, Red Lake Tribal Police Officer Matt Smith (Officer Smith) received a report of a reckless driver within the Red Lake Reservation. Officer Smith responded to the reported location and found a vehicle that had driven off the road into a ditch near Ponemah. Appellant was unable to provide Officer Smith with a driver's license or other form of identification. At approximately 1:00 a.m., after appellant provided Officer Smith with inconsistencies concerning his identity, the officer contacted the Beltrami County Police Department. During the process of pulling appellant's vehicle from the ditch, Officer Smith observed alcohol in plain view in the vehicle. As we have explained before, the United States Supreme Court has “recognized a tribal police officer's authority to detain a person suspected of violating a state criminal law and to deliver the person to state law-enforcement authorities. The conduct of Officers Smith and Wicker amounted to nothing more than a brief, temporary detention of appellant. The detainment was based on Officer Smith's observation that appellant was disturbing public order on the reservation and his reasonable belief that appellant “was a direct threat to the safety of other people due to his impairment.” Pursuant to *Duro* and *Thompson*, the officers were permitted to temporarily detain appellant and deliver him to the proper agency with jurisdiction over his actions. *See Duro v. Reina*, 495 U.S. 676, 697 (1990); *State v. Thompson*, 929 N.W.2d 21, 23-24 (Minn. Ct. App. 2019). The officers' conduct was reasonable and did not amount to an arrest. *See, e.g., State v. Moffatt*, 450 N.W.2d 116, 120 (Minn. 1990); *Thompson*, 929 N.W.2d at 27 n.1. The district court properly dismissed in its entirety appellant's suppression motion. Affirmed.

123. Caddo Nation of Oklahoma v. Wichita and Affiliated Tribes

786 Fed. Appx. 837, 2019 WL 4898669 (10th Cir. Oct. 04, 2019). APA-based NEPA and NHPA claims against tribe that built new history center with HUD grant were not barred by tribal sovereign immunity. Native American nation brought suit against another tribe, asserting that tribe violated the National Environmental Policy Act (“NEPA”) and the National Historic Preservation Act (NHPA) while building a tribal history center funded by the Department of Housing and Urban Development. Following remand, 877 F.3d 1171, plaintiff filed an amended complaint focusing on the operation of the center, and the tribe moved to dismiss. The United States District Court for the Western District of Oklahoma, 2018 WL 3354882, determined that all but the NEPA and NHPA claims were barred by tribal sovereign immunity, and that the NEPA and NHPA claims

were mooted by the completion of the history center. Plaintiff appealed. The Court of Appeals, Murphy, Circuit Judge, held that: 1) claims against tribe were not barred by tribal sovereign immunity, but 2) claims against tribe were moot to the extent construction of the center was complete. Affirmed in part, reversed in part, and remanded.

124. Corporation of President of Church of Jesus Christ of Latter- Day Saints v. BN

2019 WL 5423937 (D. Utah Oct. 23, 2019). Before the court are two motions—Plaintiff Corporation of the President of the Church of Jesus Christ of Latter-Day Saints and Plaintiff LDS Family Services’ (Plaintiffs) Motion for Preliminary Injunction, (ECF No. 7) and Defendant BN’s Motion to Dismiss, (ECF No. 17). As explained below, the court stays the case because Plaintiffs have not exhausted Tribal remedies. The court therefore DENIES Plaintiffs’ Motion for Preliminary Injunction and DENIES Defendant’s Motion to Dismiss. “In May 2016, BN filed a complaint in the Navajo Nation District Court, District of Window Rock, Arizona ... alleging that Plaintiffs are liable for injuries she claims to have suffered decades ago while living in Utah during her participation in a program called the Indian Student Placement Program ” “After being served with BN’s complaint, Plaintiffs filed an action in this Court requesting that BN be enjoined from proceeding with her claims in the Navajo District Court because that court lacked subject-matter jurisdiction.” On November 16, 2016, Judge Shelby entered an order dismissing the 2016 Case—concluding that “Plaintiffs must exhaust their Tribal Court remedies before seeking relief from this court.” On October 23, 2017, Plaintiffs “filed a motion in the Navajo District Court to dismiss BN’s complaint for lack of subject-matter jurisdiction.” On May 25, 2018, the District Court of the Navajo Nation, Judicial District of Window Rock, Arizona entered an order denying Plaintiffs’ Motion. *See* ECF No. 2-2 at 5; ECF No. 29-1 at 36. The District Court of the Navajo Nation stated that the Plaintiffs’ “primary argument” was that the Navajo Court “lack[ed] jurisdiction over them because they are not members of the Navajo Nation and the allegations of sexual abuse giving rise to the case occurred in the state of Utah or outside the Navajo Nation.” ECF No. 29-1 at 33. The District Court of the Navajo Nation found “jurisdiction based on the Treaty of 1868, Navajo Nation laws, and application of the Montana Test.” The tribal district “court’s order [did] not analyze” Plaintiffs’ “factual challenge, nor make an explicit finding regarding the location placement decisions were made.” On September 25, 2018, Plaintiffs “sought a writ of prohibition from the Navajo Nation Supreme Court prohibiting the Navajo District Court from exercising jurisdiction.” In this writ, Plaintiffs provided that the parties had conducted some jurisdictional discovery. (“After some initial jurisdictional discovery, [BN] responded to the motion to dismiss. The Navajo Nation Supreme Court noted that Judge Shelby had ‘declined to issue’ Plaintiffs’ injunction in the 2016 case “citing among other things, the failure of the [Plaintiffs] to exhaust tribal remedies. “ECF No. 2-3 at 3. The Navajo Nation Supreme Court also provided that “[t]he threshold issue is whether there is evidence that the [Navajo Nation] district court clearly lacks jurisdiction sufficient to warrant the issuance of a permanent writ of prohibition.” ECF No. 2-3 at 4. The Supreme Court continued: “[w]hen involving jurisdiction, a

writ of prohibition will issue when the lower court clearly has no jurisdiction” ECF No. 2-3 at 4 (citing *Kang v. Chinle Family Court*, No. SC-CV-37-18, slip op. at 4 (Nav. Sup. Ct. September 21, 2018)). The Navajo Supreme Court further provided that “[j]urisdiction is a fact specific inquiry.” ECF No. 2-3 at 5 (citing *Manygoats v. Cameron Trading Post*, 8 Nav. R. 3. ((Nav. Sup. Ct. 2000)). The Court continued, “the District Court must make factual findings and legal conclusions on subject matter jurisdiction.” ECF No. 2-3 at 5 (citing *Clark v. Allen*, 7 Nav. R. 422 (Nav. Supr. Ct. 1999)). The Navajo Nation Supreme Court concluded that “there are not sufficient facts to determine that the [Navajo Nation] District Court clearly lacks the jurisdiction to hear and decide the case.” To issue the writ prior to discovery, without facts is to surrender sovereignty of the Navajo Nation. The Navajo Supreme Court’s Opinion did not include any discussion of Plaintiffs’ factual challenge to the location of placement decisions. Nor did the Navajo Supreme Court’s Opinion address the fact that the Navajo District Court’s order did not “analyze this factual challenge, nor make an explicit finding regarding [where] the location placement decisions were made.” ECF No. 29-3 at 7. Nor did the Navajo Supreme Court’s opinion mention that jurisdictional discovery had occurred. Regarding Plaintiffs’ first argument, the question for this court is whether the Navajo Nation Supreme Court has been given a “full opportunity to determine its own jurisdiction.” As explained below, the court holds that it has not, and for that reason, Plaintiffs have not yet exhausted their tribal court remedies. In *Iowa Mutual*, the Supreme Court considered whether “a federal court” may exercise jurisdiction “before the tribal court system ha[d] been given an opportunity to determine its own jurisdiction.” *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 11 (1987). In that case, a tribal district court “addressed the issue of subject-matter jurisdiction” and “concluded that it would have jurisdiction over the suit.” *Id.* at 12. Although the tribal code “established a Court of Appeals,” it did not “allow interlocutory appeals from jurisdictional rulings,” meaning “appellate review of the Tribal Court’s jurisdiction c[ould] occur only after a decision on the merits.” *Id.* The Supreme Court held that “[u]ntil appellate review is complete,” the tribal court did not have “a full opportunity to evaluate the claim and federal courts should not intervene.” *Id.* at 17. The Supreme Court further provided that if the tribal appellate court were to “uphold[] the lower court’s determination that the tribal courts have jurisdiction, petitioner may challenge that ruling in the [federal] District Court.” *Id.* at 19. In reaching its holding in *Iowa Mutual*, the Supreme Court relied on *National Farmers*, a decision it had reached just two years prior. In *National Farmers* the Supreme Court provided that the “policy of supporting tribal self-government and self-determination” “favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge.” *National Farmers Union Ins. Cos. V. Crow Tribe*, 471 U.S. 845, 856 (1985). In other words, “the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed.” The issue is not whether Plaintiffs are required to raise an affirmative defense in this case related to the state court judgment. The issue is whether the tribal court should be allowed to determine for itself what effect to give the state court judgment. Because the state court judgment relates to an issue of preclusion—and not a lack of subject matter jurisdiction by virtue of

mootness—this court concludes that relief related to the state court judgment must be made either in the state court or in the tribal court. The court has good reason to believe that this conclusion comports with Congress’s “strong interest in promoting tribal sovereignty, including the development of tribal courts.” *Smith v. Moffett*, 947 F.2d 442, 444 (10th Cir. 1991). As the Supreme Court has recognized, “[t]ribal courts play a vital role in tribal self- government ... and the Federal Government has consistently encouraged their development.” *Iowa Mutual*, 480 U.S. at 14–15. As discussed above, Plaintiffs concede that the Navajo District Court is not required to give full faith and credit to the Fourth District Court’s judgment. If this court were to grant Plaintiffs the relief they seek—and enjoin BN from proceeding in tribal court—the tribal court would be deprived of an opportunity to determine for itself what effect to give the state court judgment. This outcome would conflict with “the Federal Government’s longstanding policy of encouraging tribal self-government.” *Iowa Mutual*, 480 U.S. at 14. The court declines to enjoin BN from proceeding in the Navajo District Court. As discussed above, the court holds that Plaintiffs have not exhausted their tribal remedies. “When a court finds, as here, that tribal exhaustion is required, the court can stay or dismiss the action.” *Jaramillo v. Harrah’s Entm’t, Inc.*, No. 09CV2559 JM (POR), 2010 WL 653733, at *2 (S.D. Cal. Feb. 16, 2010). The court stays rather than dismisses the case.

125. Cayuga Nation v. Campbell

34 N.Y.3d 282, 140 N.E.3d 479 (N.Y. Oct. 29, 2019). New York courts lacked subject matter jurisdiction over action involving internal tribal governance dispute. Members of Indian tribe brought action, purportedly on behalf of tribe, against their rivals in leadership dispute, asserting tort claims premised on rivals' alleged lack of authority to act on behalf of tribe and possession and control of tribal property. The Supreme Court, Seneca County, Dennis F. Bender, Acting Judge, 2017 WL 4079004, denied rivals' motion to dismiss for lack of subject matter jurisdiction. Rivals appealed. The Supreme Court, Appellate Division, 163 A.D.3d 1500, 83 N.Y.S.3d 760, affirmed and, 164 A.D.3d 1673, 83 N.Y.S.3d 925, granted rivals leave to appeal. The Court of Appeals, Feinman, J., held that: 1) the action involved internal tribal governance dispute over which New York courts lacked subject matter jurisdiction, and 2) prior decision of Bureau of Indian Affairs (BIA) recognizing members as governing leadership for limited purpose of receiving federal funds on behalf of tribe did not authorize New York courts to resolve the action. Reversed and certified question answered in the negative. Garcia, J., filed dissenting opinion. Wilson, J., filed dissenting opinion.

126. Drake v. Salt River Pima-Maricopa Indian Community

411 F. Supp. 3d 513, 2019 WL 5653447 (D. Ariz. Oct. 31, 2019). Salt River Pima-Maricopa Indian Community (Community) retained sovereign immunity with respect to private claims under Title III of the ADA. Patron of casino operated by Salt River Pima-Maricopa Indian Community,

who suffered from severe anxiety, Post Traumatic Stress Disorder, and panic attacks, brought action against Community, asserting claims for violation of the Americans with Disabilities Act (ADA), as well as for intentional and negligent infliction of emotional distress, after she was told her service dog could not remain in casino. After default was entered against Community, Community moved to set aside default judgment and to dismiss. The District Court, Michael T. Liburdi, J., held that: 1) entry of default would be set aside; 2) Title of the ADA prohibiting discrimination on the basis of disability in places of public accommodation applied to casino; 3) Community retained sovereign immunity with respect to ADA claim; and 4) tribal sovereign immunity precluded patron's state law intentional and negligent infliction of emotional distress claims. Motions granted.

127. FMC Corporation v. Shoshone-Bannock Tribes

942 F.3d 916, 2019 WL 6042469 (9th Cir. Nov. 15, 2019). Jurisdiction. Elemental phosphorus plant operator's storage of hazardous waste on reservation threatened or had some direct effect on tribes' health or welfare. Operator of elemental phosphorus plant on fee land within Indian reservation brought action challenging tribal court's jurisdiction to order it to pay use permit fees for hazardous waste storage on reservation. Tribe filed counterclaim seeking order recognizing and enforcing tribal court's judgment. The United States District Court for the District of Idaho, No. 4:14-cv-00489- BLW, B. Lynn Winmill, Chief Judge, 2017 WL 4322393, entered judgment in tribe's favor, and operator appealed. The Court of Appeals, William A. Fletcher, Circuit Judge, held that: 1) operator had consensual relationship with tribes; 2) operators storage of hazardous waste on reservation threatened or had some direct effect on tribes' political integrity, economic security, or health or welfare; 3) there was sufficient nexus between operators agreement to pay fee and threat posed by hazardous waste to justify federal court's recognition of tribal court's order; and 4) tribal court did not deny operator due process. Affirmed.

128. State v. Thompson

937 N.W.2d 418, 2020 WL 218405 (Minn. Jan. 15, 2020). Reservations. Tribal police officer was authorized to detain and remove non-Indian motorist from reservation. Defendant was convicted in the District Court, Beltrami County, John G. Melbye, J., of first-degree driving while impaired (DWI), which allegedly occurred on Indian reservation. Defendant appealed. The Court of Appeals, 929 N.W.2d 21, affirmed. Defendant petitioned for review, which was granted. The Supreme Court, Thissen, J., held that tribal police officer was authorized to detain and remove defendant from reservation. Affirmed.

129. Robbins v. Mason County Title Insurance Company

462 P.3d 430, 2020 WL 2212437 (Wash. May 07, 2020). Title insurer breached duty to defend

when Indian tribe asserted treaty right, via a demand letter, to harvest shellfish from insureds' tidelands. Insureds brought action against title insurer alleging breach of duty to defend when Indian tribe asserted its treaty right to harvest shellfish from insureds' tidelands. The Superior Court, Mason County No. 16-2-00686-1, Toni A Sheldon, J., granted summary judgment in favor of insurer. Insureds appealed. The Court of Appeals, 5 Wash.App.2d 68, 425 P.3d 885, reversed and remanded. Insurer petitioned for review, which was granted. The Supreme Court, en banc, Wiggins, J., held that: 1) tribe's letter to insureds asserting its right to harvest shellfish was a demand letter triggering insurer's duty to defend; 2) tribe's asserted right to harvest shellfish fell within definition of a profit; 3) insurer had a duty to defend; 4) insurer breached its duty to defend in bad faith; and 5) insureds' request for attorney fees before resolution of insurer's affirmative defenses on remand was premature. Judgment of Court of Appeals affirmed and remanded. Madsen, J., filed dissenting opinion. McCloud, J., filed opinion concurring in dissent, Johnson, Associate C.J., joined.

130. Magee v. Shoshone Paiute Tribes of Duck Valley Reservation

460 F. Supp. 3d 1073, 2020 WL 2468774 (D. Nev. May 11, 2020). Defendants have filed a motion to dismiss the complaint of plaintiffs. For the reasons stated below, the Court will grant defendants' motion to dismiss and dismiss Magee's complaint with prejudice. For the purposes of defendants' motion to dismiss, the facts within Magee's complaint are presumed to be true. Magee, a certified public accountant, has been working with the Paiute Shoshone Tribes of the Duck Valley Indian Reservation (the "tribes") for more than a decade as the tribes' CFO. Magee is not a tribal member, instead working for the tribes on a contractual basis. On September 12, 2017, the tribes informed Magee that he was being placed on administrative leave following the alleged discovery of irregularities in the tribes' financial accounts. ECF No. 1 at 7. In the same correspondence, the tribes requested that Magee return as CFO and assist with preparations for the 2018 fiscal year. Magee refused to return. On March 14, 2019, the tribes filed a complaint in the Owyhee tribal court against Magee and his affiliated entities. The complaint alleged four claims: (1) Magee received improper payments that were in excess of what he was entitled to under contract; (2) Magee negligently paid \$49,000 in bonuses to his entities that he had no authority to make; (3) Magee transferred funds from the tribes' account to pay for a tribal vehicle that was never delivered to the tribes, and (4) Magee allegedly "interfered" with a Department of Justice investigation. *Id.* As part of their request for monetary damages, the tribes cited to tribal criminal code § 6-9 105, which is entitled "Official Misconduct." On April 5, Magee moved to dismiss the complaint for lack of subject matter jurisdiction, centering his argument on the premise that because he was the tribes' CFO, he was entitled to tribal sovereign immunity as a tribal officer. Magee and the tribes would argue and brief the issue of sovereign immunity over the course of the summer, and on September 17, 2019, the tribal court issued a ruling denying Magee's motion to dismiss. Although unstated in Magee's complaint, Magee appealed the tribal court's decision to the tribal appellate court. The appellate court rejected Magee's appeal because the tribal court's order

was interlocutory and not final, meaning that Magee did not have a right to appeal the exercise of jurisdiction at that time. The applicable tribal rules do not allow for appeals of interlocutory orders. On October 21, 2019, Magee filed the instant complaint in federal court requesting declaratory and injunctive relief. Because Magee has not exhausted the available tribal remedies, the Court does not reach the merits of defendants' tribal sovereignty argument. Defendants' motion to dismiss will be granted. It Is Therefore Ordered that defendants' motion to dismiss (ECF No. 10) is Granted. Magee's complaint is Dismissed due to a lack of jurisdiction arising from Magee's failure to exhaust his tribal remedies. It Is So Ordered.

131. Hanson v. Parisien

2020 WL 4117997 (D.N.D. July 20, 2020). Before the Court is the Defendants' motion to dismiss. The Plaintiffs' complaint requests declaratory and injunctive relief barring the Defendants from enforcing a fee levied against them under the Turtle Mountain Band of Chippewa Indians Tribal Employment Rights Ordinance (“TERO” or “ordinance”). Defendants seek to dismiss the complaint for lack of jurisdiction. For the reasons below, the motion is granted. This dispute emanates from a construction project for a pre-kindergarten and wrestling facility for Belcourt Public School District # 7 (“School District”). The facility is located on trust land within the exterior boundaries of the Turtle Mountain Indian Reservation (“Reservation”). *Id.* The Plaintiffs contracted to perform metal work for the project and now challenge the imposition of TERO fees on the contract. To be sure, sovereign immunity “extends to tribal officials who act within the scope of the tribe's lawful authority.” *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 1131 (8th Cir. 2019). Like their federal and state counterparts, though, tribal officials remain subject to suit under the longstanding sovereign immunity exception articulated in *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). *See Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 796 (2014). That exception authorizes “a private party [to] sue a [tribal] officer in his official capacity to enjoin a prospective action that would violate federal law.” *281 Care Comm. v. Arneson*, 638 F.3d 621, 632 (8th Cir. 2011). Determining if the *Ex Parte Young* exception applies calls for a “straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.” *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645, 122 S.Ct. 1753, 152 L.Ed.2d 871 (2002) (cleaned up). The sued official must also possess “some connection to the enforcement of the challenged laws.” *Calzone v. Hawley*, 866 F.3d 866, 869 (8th Cir. 2019). Thus, sovereign immunity does not preclude the claims for declaratory and injunctive relief against Parisien. With that established, the inquiry now becomes whether the Plaintiffs adequately exhausted available tribal remedies before turning to federal court for relief. The Defendants advance a failure-to-exhaust theory on two fronts. Without addressing whether the reviewing tribal courts had an adequate opportunity to determine their own jurisdiction, the Court concludes that the failure to pursue TERO-specific administrative remedies renders the Plaintiffs' claims in federal court fatally premature. Tribal exhaustion jurisprudence applies equally to judicial and administrative remedies. In this instance, the Plaintiffs

indisputably failed to pursue TERO's administrative remedy process. What is more, by filing this lawsuit, they wholly ignored an order from the Turtle Mountain Court of Appeals mandating that they avail themselves of that process. For the reasons above, the Defendants' motion to dismiss is Granted. The complaint is hereby Dismissed Without Prejudice.

L. Tax

132. Flandreau Santee Sioux Tribe v. Haeder

938 F.3d 941, 2019 WL 4231360 (8th Cir. Sept. 06, 2019). Indian Gaming Regulatory Act (“IGRA”) did not preempt state tax on nonmember contractor's gross receipts for services performed in renovating gaming casino located on reservation. Indian tribe brought action against Governor, State Treasurer, and State Secretary of Revenue, seeking declaration that federal law preempted imposition of statewide excise tax on gross receipts of nonmember contractor for services performed in renovating and expanding tribe's gaming casino located on reservation. The United States District Court for the District of South Dakota, Karen E. Schreier, J., 325 F.Supp.3d 995, entered summary judgment in tribe's favor, and state appealed. The Court of Appeals, Loken, Circuit Judge, held that IGRA did not preempt tax on contractor's gross receipts. Reversed and remanded. Colloton, Circuit Judge, concurred in judgment and filed opinion. Kelly, Circuit Judge, dissented and filed an opinion.

133. Flandreau Santee Sioux Tribe v. Noem

938 F.3d 928, 2019 WL 4229068 (8th Cir. Sept. 06, 2019). Imposition of South Dakota's use tax on nonmember purchases of amenities at casino, hotel, and gift shop was preempted by federal law. Federally recognized Indian tribe that owned and operated casino, hotel, and store on reservation land brought action against Governor of State of South Dakota and state officials, alleging that state was not entitled to collect use tax on non-gaming purchases by individuals who were not tribe members, and was not entitled to deny tribe's renewals for alcoholic beverage licenses issued to the casino and the store. The United States District Court for the District of South Dakota, Lawrence L. Piersol, Senior District Judge, 269 F.Supp.3d 910, granted in part and denied in part parties' cross-motions for summary judgment. State appealed. The Court of Appeals, Loken, Circuit Judge, held that: 1) imposition of South Dakota's use tax on nonmember purchases of amenities at casino, hotel, and gift shop was preempted by federal law, and 2) tribe failed to meet its burden to demonstrate that the South Dakota's alcohol license requirement was not reasonably necessary to further its interest in collecting valid state taxes. Affirmed in part, reversed in part, and remanded. Colloton, Circuit Judge, filed opinion concurring in part and dissenting in part.

134. New York v. Mountain Tobacco Company

942 F.3d 536, 2019 WL 5792487 (2nd Cir. Nov. 07, 2019). Prevent All Cigarette Trafficking Act (“PACT”) applied to sales of cigarettes that originated and ended on Indian reservations located within borders of different states. State of New York brought action against cigarette seller who shipped unstamped and untaxed cigarettes from Indian reservation in Washington State to Indian reservations in New York, alleging violations of state laws on cigarette sales, violations of the Contraband Cigarette Trafficking Act (“CCTA”) and the PACT. The United States District Court for the Eastern District of New York, Joanna Seybert, Senior District Judge, 2016 WL 3962992, granted summary judgment, in part, in favor of seller, and granted summary judgment, in part, in favor of state. Parties cross-appealed. The Court of Appeals, Jacobs, Circuit Judge, held that: 1) New York State's failure to universally enforce its tax laws did not violate the Dormant Commerce Clause; 2) action was not barred by res judicata; 3) cigarette seller violated New York tax law; 4) PACT applied to sales of cigarettes that originated and ended on Indian reservations located within the borders of different states; and 5) seller was exempt as Indian in Indian Country under CCTA. Affirmed in part, reversed in part, and remanded.

135. Unkechaug Indian Nation v. Paterson

2020 WL 553576 (W.D.N.Y Feb. 04, 2020). In these two companion cases, Plaintiffs Unkechaug Indian Nation and St. Regis Mohawk Tribe challenge New York’s laws relating to the taxation of cigarettes sold by reservation retailers to nonmembers. They raise several theories to challenge the validity of those laws, including, inter alia, that the laws violate tribal sovereignty and tax immunity, impose excessive burdens on Indian retailers, and violate the Indian Commerce Clause. Currently, before the Court are two motions for summary judgment filed by Defendants against Plaintiffs, before addressing the motions, some background may be helpful. Plaintiffs brought these cases in August 2010. In November 2010, District Judge Richard J. Arcara denied Plaintiffs’ motion for a preliminary injunction to bar the implementation of the laws. *See Unkechaug Indian Nation v. Paterson*, No. 10-CV-711, ECF No. 49 (dated Nov. 9, 2010) [hereinafter *Unkechaug Litigation*]. He noted that, as a general matter, “a Nation’s right to tribal self- government does not oust a State of its authority to impose excise taxes for sales to nonmembers.” *Seneca Nation of Indians v. Paterson*, No. 10-CV-687A, 2010 WL 4027796, at *7 (W.D.N.Y. Oct. 14, 2010); see also *Unkechaug Litigation*, ECF No. 49 at 7 (citing *Seneca Nation*). Furthermore, Judge Arcara concluded that the manner in which New York collected cigarettes taxes on sales to nonmembers did not impermissibly burden tribal retailers or the tribes’ sovereignty. *Seneca Nation*, 2010 WL 4027796, at *9-17. On appeal, the Second Circuit affirmed Judge Arcara’s decision to deny preliminary injunctive relief. *See Oneida Nation of New York v. Cuomo*, 645 F.3d 154, 175 (2d Cir. 2011). It agreed that Plaintiffs “failed to demonstrate a likelihood of success on the merits of their claims” that New York’s scheme unnecessarily burdens tribal retailers or interferes with tribal rights. *Id.* The Second Circuit reasoned that the system was “valid as written” and, because it had

yet to be implemented, the tribes' concerns were speculative and "by no means certain to occur." *Id.* at 173 n.20. After the appeal, Defendants moved for summary judgment in both cases. They argued that this could be readily disposed of in light of Plaintiffs' loss at the preliminary injunction stage: In this litigation, [several Indian tribes] filed pre- enforcement challenges to recent amendments to the New York Tax Law governing the collection of cigarette taxes from sales to non-tribal members on Indian reservations. [Judge Arcara] previously found that all of the Plaintiffs' claims were meritless. The U.S. Court of Appeals for the Second Circuit agreed. Thus, the present posture is as follows: based on the vindication of their legal position at the preliminary injunction stage, Defendants move for summary judgment on all of Plaintiffs' claims. Plaintiffs essentially move to voluntarily dismiss their claims to avoid the preclusive effect of a judgment on any later claims they may wish to bring. The Court agrees with Defendants that Plaintiffs' claims can be dismissed on summary judgment largely based on the decisions already rendered. For the reasons discussed above, Defendants' motions for summary judgment are Granted.

136. Herpel v. County of Riverside

45 Cal. App. 5th 96, 258 Cal. Rptr. 3d 444 (Cal. Ct. App. Feb. 10, 2020). Application of possessory interest tax to leases in land owned in trust for Indian Tribe or its members did not violate federal law. Holders of leases or other possessory interests in land owned in trust by the federal government for Indian Tribe or its members brought putative class action against county defendants, alleging that county's possessory interest tax was preempted by federal law as applied to them. The Superior Court, Riverside County, No. PSC1404764, Craig G. Riemer, J., entered judgment on stipulated facts for county defendants, and interest holders appealed. The Court of Appeal, Raphael, J., held that: 1) application of possessory interest tax did not violate federal law; 2) leasing regulation providing that "[s]ubject only to applicable Federal law, the leasehold or possessory interest is not subject to any fee, tax, assessment, levy, or other charge imposed by any State or political subdivision of a State" did not preempt possessory interest tax; and 3) Indian Reorganization Act of 1934 section providing that "any lands or rights acquired pursuant to this Act" were to be exempt from state and local taxation did not apply. Affirmed.

137. Perkins v. Commissioner of Internal Revenue

970 F.3d 148, 2020 WL 4644984 (2nd Cir. Aug. 12, 2020). 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. The Tax Court, Holmes, J., 150 T.C. 119, entered summary judgment in part for government, determining two treaties between United States and Seneca Nation did not create exemption from federal income taxes. Taxpayers appealed. The Court of Appeals, Wesley, Senior Circuit Judge, held that: 1) in a matter of first impression, the Canandaigua Treaty did not exempt taxpayers' income from taxation, and 2) in a matter of first impression, the 1842 Treaty with the

Seneca did not exempt taxpayer's income from federal taxation. Affirmed.

M. Trust Breach & Claims

138. *Beam v. Naha*

783 Fed. Appx. 715, 2019 WL 3937390 (9th Cir. Aug. 20, 2019). Officials at tribally controlled high school were not federal actors for purposes of teacher's civil rights claims against them under Bivens. Teacher at tribal high school brought action against school's superintendent and principal for federal civil rights violations under Bivens, alleging that superintendent and principal, as tribal school officials, acted under the color of federal law. The United States District Court for the District of Arizona, John W. Sedwick, Senior District Judge, granted summary judgment in favor of tribal school officials. Teacher appealed. The Court of Appeals held that tribal school officials were not federal actors for purposes of teacher's claim under Bivens. Affirmed.

139. *Pueblo of Jemez v. United States*

430 F. Supp. 3d 943, 2019 WL 4740604 (D.N.M. Sept. 27, 2019). Pueblo of Jemez Native American Tribe did not establish aboriginal title to Valles Caldera National Preserve. Pueblo of Jemez Native American Tribe brought action under federal common law and the Quiet Title Act (QTA), seeking a judgment that the Tribe had exclusive right to use, occupy, and possess the lands of the Valles Caldera National Preserve pursuant to its continuing aboriginal title to such lands. The District Court, Robert C. Strack, J., 2013 WL 11325229, dismissed action for lack of subject matter jurisdiction. Tribe appealed. The Court of Appeals, Seymour, Circuit Judge, 790 F.3d 1143, reversed and remanded. After bench trial, the District Court, James O. Browning, J., held that: 1) Pueblos of Cochiti, San Ildefonso, Santa Clara, Zia, and the Jicarilla Apache Nation were neither necessary nor indispensable parties to action; 2) Indians Claims Commission Act's (ICCA) five-year limitations period did not bar Tribe's action; 3) doctrine of laches did not bar action; 4) United States was not judicially estopped from arguing that Pueblo did not possess aboriginal title to Preserve; 5) Pueblo actually and continually used Preserve, as required for Pueblo to establish aboriginal title to Preserve; but 6) Pueblo did not exclusively use Preserve and, thus, did not establish aboriginal title to Preserve. Judgment for United States.

140. *Lummi Tribe of Lummi Reservation, Washington v. United States*

788 Fed. Appx. 717, 2019 WL 5061386 (Fed. Cir. Oct. 09, 2019). Claims Court was required to consider whether justice required transfer of Indian Tribe's dismissed claim under Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA). Indian tribe and three tribal housing entities that qualified for and received NAHASDA blocked 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 United States 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-cv-00848-EGB, subsequently reaffirmed its prior ruling that NAHASDA was money mandating, giving Claims Court jurisdiction over claims. Government filed interlocutory appeal. The Court of Appeals, 870 F.3d 1313, vacated and ordered Court of Claims to dismiss NAHASDA and illegal extraction claims. The Court of Federal Claims, Robert H. Hodges, Senior Judge, dismissed case. Tribe appealed. The Court of Appeals, Reyna, Circuit Judge, held that: 1) tribe's breach claims were not within scope of prior mandate, and thus appeal from dismissal of breach claims was not barred by mandate rule; 2) tribe's failure in prior appeal to raise arguments on its breach claims did not result in waiver of such claims; 3) denial of tribe's petition for rehearing on prior appeal did not resolve merits of breach claims, and thus breach claims were not barred by mandate rule; 4) as a matter of first impression, Claims Court was required to consider whether transfer of NAHASDA claim was in the interests of justice; and 5) District Court would decline to apply judicial estoppel to prevent government from challenging Claims Court's jurisdiction over NAHASDA claim. Reversed and remanded.

141. Lumas v. United States

2019 WL 5086576 (S.D. Cal. Oct. 10, 2019). Pending before the Court is Defendant United States of America's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1). Mot. [Doc. 7.]; see also Reply [16]. Plaintiff opposes. The Court decides the matter on the papers submitted and without oral argument. See Civ. L.R. 7.1(d.1). For the reasons that follow, the Court Grants the motion [Doc. 7]. On May 25, 2017, Plaintiff Patricia Lumas ("Lumas") was injured while riding in a vehicle driven by Defendant Barbara Antone-Levy ("Antone"). Compl. [Doc. 1] ¶¶ 14–20). Lumas alleges that Antone was working within the scope of her responsibilities as the Quechan Indian Tribe Language Preservation Coordinator when the accident occurred. Lumas submitted a claim against the Fort Yuma Quechan Indian Tribe, to which Hudson Insurance Company replied: [Lumas] should immediately submit this matter to the federal government, on the grounds that it may be a claim against a tribal contractor and its employees, arising out of tribal activities funded by a Self-Determination Contract.... In the meantime, Hudson is taking no further action concerning this matter while it awaits the decision from the federal government. See Hudson Insurance Correspondence [Doc. 11-1, Ex. 1]. In February of 2019, Lumas brought this action. In its motion to dismiss, the United States argues that the FTCA does not apply here to grant subject matter jurisdiction because Lumas was not a government employee. Motion [Doc. 7] p. 2. However, Lumas contends that the Indian Self-Determination and Education Assistance Act ("ISDEAA") extends FTCA coverage to torts of tribal employees acting pursuant to federal contracts granted under the ISDEAA. An ISDEAA contract provides funding to a tribe to plan,

conduct, and administer programs that the federal government would have otherwise provided, thereby furthering Indian self-determination. See 25 U.S.C. § 5321. A “self-determination contract” under the ISDEAA is one between a tribal organization and either the Secretary of Health and Human Services (“DHHS”) or the Secretary of the Interior. 25 U.S.C. § 5304(i), (j). Congress amended the ISDEAA to allow FTCA recovery when death or injury results from the performance of a self-determination contract. 25 U.S.C. § 5321(d). While tribal members are not federal employees, they are deemed “covered employees” when operating under ISDEAA self-determination contracts and treated as federal employees for FTCA purposes. *Id.* Thus, the controlling question for purposes of the current motion is whether Antone was working under a self-determination contract when the alleged tortious conduct occurred. According to the official responsible for administering self-determination contracts between the DHHS and the Quechan Indian Tribe, the position of Tribal language Preservation Coordinator was not funded by either the Alcohol/Drug Abuse Prevention Program or the Community Health Representatives Program—the only two programs funded by DHHS pursuant to the ISDEAA at the time of the accident. Likewise, the Department of Interior did not identify Antone’s position in its respective ISDEAA contracts. Shields Decl. [Doc. 16-6] ¶¶ 1–3; Johnson O’Malley Program [16-7, Ex. A]; Higher Ed. Adult Vocational Training [16-8, Ex. B]. In fact, Antone’s position is funded by the Native Language Preservation and Maintenance Program, which was authorized under the Native American Programs Act. Nevertheless, Lumas argues the Language Preservation Program agreement for which Antone was the Program Coordinator falls under the ISDEAA because it is “for the benefit of Indians.” Plaintiff’s Supplemental Brief [Doc. 18] 4:22–5:19. However, the ISDEAA does not say that all grants for the benefit of Indians must necessarily be a self-determination contract; it specifically provides that a “‘self-determination contract’ means a contract ... entered into under subchapter I of this chapter between a tribal organization and the appropriate Secretary.” 25 U.S.C. § 5304(j). Lumas has failed to show that an ISDEAA contract underwrote Antone’s position with the Quechan Indian Tribe. Accordingly, sovereign immunity has not been waived and Lumas’s complaint is dismissed for lack of subject matter jurisdiction.

142. Ute Indian Tribe of Uintah and Ouray Indian Reservation v. United States

145 Fed. Cl. 609, 2019 WL 5688826 (Fed. Cl. Nov. 04, 2019). The continuing claims doctrine did not toll the statutory period for Tribe's breach of trust claims against the United States. Ute Indian Tribe of the Uintah and Ouray Indian Reservation brought action alleging that the United States breached its trust and fiduciary duties, violated several congressional acts, took its property in violation of the Fifth Amendment, and failed to account for all land and for all revenue derived from land and resources on its reservation. United States moved to dismiss, or in the alternative, for summary judgment. The Court of Federal Claims, Robert H. Hodges, Senior Judge, held that: 1) Tribe failed to meet its burden of demonstrating that the Government had full responsibility to manage the lands, resources, or proceeds at issue for their benefit, as could give rise to a money-mandating duty; 2) continuing claims doctrine did not toll the statutory period for Tribe's breach

of trust claims; 3) the Indian Trust Accounting Statute (ITAS) did not suspend statute of limitations on Tribe's breach of trust claims; 4) to the extent Tribe raised Takings Clause claims based on lands disposed of after date identified in settlement agreement, those claims were not waived in the settlement; 5) settlement agreement in which Tribe waived all claims, regardless of legal theory, that related to the Government's management of the trust funds or non- monetary trust assets or resources, did not bar Tribe's takings claims, at motion to dismiss stage; and 6) Government failed to establish that Tribe's takings claims were barred under the Tucker Act's limitations period. Ordered accordingly.

143. Thomas Charles Bear, et al., v. United States

No. 13-51X, 147 Fed. Cl. 54 (Fed. Cl. Dec. 3, 2019). Congressman Tom Cole of Oklahoma submitted to the United States House of Representatives H.R. 5862, entitled “A Bill Relating to members of the Quapaw Tribe of Oklahoma (O-Gah-Pah).” The bill provided that: Pursuant to the findings and conclusions contained in the Report issued by the chief judge of the U.S. Court of Federal Claims, the Secretary of the Treasury shall pay, out of money not otherwise appropriated, to members of the Quapaw Tribe of Oklahoma (O-Gah-Pah), the sum of \$_____, and to the Quapaw Tribe of Oklahoma (O-Gah-Pah), the sum of \$_____. *Id.* On December 19, 2013, the United States House of Representatives passed House Resolution 668, referring to the Chief Judge of this Court a bill, H.R. 5862, entitled “A Bill relating to members of the Quapaw Tribe of Oklahoma (O-Gah-Pah).” H.R. Res. 668, 112th Cong. § 1 (2012). Proceedings were had. As in this congressional reference case, the Government did not concede liability in two related cases. However, the Government did agree to settle Claimants’ claims in those cases for a total of \$82,965,000.00. The Hearing Officer reports the following conclusions of law: 1) 28 U.S.C. §§ 1492 and 2509 define the Court’s jurisdiction in congressional reference cases. They require the Hearing Officer to make findings of fact and conclusions of law sufficient to inform Congress whether the Claimants’ demands constitute legal claims, equitable claims, or gratuities. As this Court noted in *Bear Claw Tribe, Inc. v. United States*, an equitable claim is one that does not have an enforceable legal remedy: The term “equitable claim”... has a particular meaning when used in congressional reference cases. 36 Fed. Cl. 181 (1996), *aff’d*, 37 Fed. Cl. 633 (1997). In general, an equitable claim involves an injury, caused by the Government, for which there is no enforceable legal remedy—due, for example, to the sovereign immunity bar or the running of the statute of limitations period. To establish an equitable claim, a claimant must demonstrate that “the Government committed a negligent or wrongful act” and that the “act caused damage to the claimant.” *Id.* To state a legally cognizable claim, “a Tribe must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties.” *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003) (“*Navajo I*”). This analysis “must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions.” *U.S. v. Mitchell*, 463 U.S. 206, 219 (1983). Claimants argue that their claims stem from the BIA’s legal obligations arising under statutes and other provisions of federal

law that Claimants contend are rights-creating, and that the BIA's failure to satisfy its legal obligations warrants money damages. Conversely, the United States asserts that the Claimants' claims do not stem from specific, rights-creating legal obligations. Despite their different positions, the Parties nevertheless agree that these claims are appropriate for inclusion in an overall proposed compromise and settlement of all congressional reference claims. Under general trust law, "a beneficiary is entitled to recover damages for the improper management of the trust's investment assets." *Confederated Tribes of Warm Springs Reservation of Oregon v. United States*, 248 F.3d 1365, 1371 (Fed. Cir. 2001). Courts determine the amount of damages for such a breach by attempting to put the beneficiary in the position in which it would have been absent the breach. *Id.* "It is a principle of long standing in trust law that once the beneficiary has shown a breach of the trustee's duty and a resulting loss, the risk of uncertainty as to the amount of the loss falls on the trustee." *Id.* Investment income is a component of tribal damages in Indian trust cases. In *Jicarilla Apache Nation v. United States*, this Court accepted an investment model proffered by the tribal plaintiff in that case to determine the investment value of damages because the tribal plaintiff's model "represented a reasonable proxy for how the trust funds in question should have been invested" and provided "a reasonable and appropriate basis for calculating the damages owed." 112 Fed. Cl. 274, 309 (2013). Claimants in this case allege that the same model should apply to their claims to bring their damages to present value and as a measure of overall damages. In ruling on three of the Quapaw Tribe's claims in 2015, in *Quapaw Tribe of Oklahoma v. United States*, 123 Fed. Cl. 673, 678 (2015), the Hearing Officer ruled that the Quapaw Tribe was entitled to "investment income that would have been earned if these amounts had been timely credited to the Quapaw Tribe's account." 9) The United States disputes that Claimants are entitled to damages, contending that Claimants' claims do not stem from specific, money-mandating legal obligations and that further, Claimants' investment model is not the correct, proper, and appropriate methodology for determining damages. The Hearing Officer agrees with the Parties that their proposed compromise and settlement set forth in their Joint Agreement, Stipulation, and Recommendation and embodied in this Report is proper and fully informed. The Hearing Officer therefore recommends the following disposition of this case: 1) It would be fair, just, and equitable to pay Claimants a total sum of \$137,500,000 for the extinguishment of all claims that Claimants have asserted or could have asserted under the terms of H.R. 5862. 2) The parties should bear their own attorneys' fees, costs, interest, and other expenses.

144. Kirk v. Office of Navajo and Hopi Indian Relocation

426 F. Supp. 3d 623, 2019 WL 7049260 (D. Ariz. Dec. 10, 2019). Applicant was not a head of household and thus not entitled to relocation benefits under Navajo-Hopi Land Settlement Act. Applicant for relocation benefits, a member of the Navajo Nation who relocated from Hopi Partition Land to Navajo Partition Land, brought action against Office of Navajo and Hopi Indian Relocation (ONHIR), challenging ONHIR's decision to deny relocation benefits under the Navajo-

Hopi Land Settlement Act on the basis that ONHIR breached its fiduciary obligation to member by failing to inform applicant of relocation benefits and delaying its decision. Parties cross-moved for summary judgment. The District Court, Susan M. Brnovich, J., held that substantial evidence supported decision of independent hearing officer (IHO) that applicant was not a head of household and thus not entitled to relocation benefits under the Act. Plaintiff's motion denied and defendant's motion granted.

145. Bear v. United States

2020 WL 253023, 147 Fed. Cl. 54 (Fed. Cl. Jan. 09, 2020). Trusts. In congressional reference case, settlement of Indian tribe's trust-related claims against United States was fair, just, and equitable. After United States House of Representatives passed resolution referring bill relating to members of Quapaw Tribe of Oklahoma to Court of Federal Claims to report back to House of Representatives findings of fact and conclusions of law to inform Congress of nature, extent, and character of Indian trust-related claims against United States based on government's historical management of tribe's trust, the Court of Federal Claims, Thomas C. Wheeler, J., as hearing officer, 2019 WL 7831257, issued report and recommendations to approve parties' proposed settlement agreement awarding tribe \$137,500,000 in compensation. The Court of Federal Claims held that settlement agreement was fair, just, and equitable. Ordered accordingly.

146. Landreth v. United States

797 Fed. Appx. 521, 2020 WL 114521 (Fed. Cir. Jan. 10, 2020). Property owner proceeding pro se failed to allege Fifth Amendment taking by government based on conduct of tribe for which government was trustee. Property owner brought action pro se against government based on alleged wrongful acts of tribe related to property. The Court of Federal Claims, Patricia Elaine Campbell-Smith, J., 144 Fed.Cl. 52, dismissed action for lack of subject-matter jurisdiction. Property owner appealed, and after briefing, filed motion to supplement record. The Court of Appeals held that: 1) property owner failed to state Fifth Amendment takings claim based on tribe's conduct; 2) theory that government had taken unlawful action did not support takings claim; 3) treaty between government and tribe did not support Court of Federal Claims jurisdiction; 4) Indian Civil Rights Act did not support Court of Federal Claims jurisdiction; 5) act providing for adjudication and payment of claims arising from Indian deprivations did not permit claims postdating act; and 6) the Court of Appeals would not consider late motion to supplement. Affirmed.

147. Chinook Indian Nation v. United States. Depar't of Interior

435 F. Supp. 3d 1130, 2020 WL 363410 (W.D. Wash. Jan. 22, 2020). This matter is before the Court on Plaintiff Chinook Indian Nation's (CIN) Motion for Summary Judgment. In 1971, the

Indian Claims Commission (ICC) awarded \$48,692.05 to “the Lower Band of Chinook and Clatsop Indians” for land they lost in the 1800’s. That money was then held in trust by DOI for several decades, with statements and other communications about the account periodically being sent to the tribe at a P.O. box in Chinook, WA. When these statements ceased, CIN’s chairman inquired to the agency and was informed that the tribe was not receiving statements because it was not federally recognized and thus could not benefit from the funds. CIN claims that this change in policy violated the APA and the Due Process Clause of the Fifth Amendment. As relief, CIN asks the Court to issue a declaratory judgment naming CIN as a beneficiary of the funds. For the following reasons, the Court grants CIN’s Motion in part and denied it in part. Enacted on October 19, 1973, the Indian Tribal Fund Use or Distribution Act, 25 U.S.C. §§ 1401-08, provides: Notwithstanding any other law, all use or distribution of funds appropriated in satisfaction of a judgment of the Indian Claims Commission or the United States Court of Federal Claims in favor of any Indian tribe, band, group, pueblo, or community (hereinafter referred to as “Indian tribe”), together with any investment income earned thereon, after payment of attorney fees and litigation expenses, shall be made pursuant to the provisions of this chapter. 25 U.S.C. § 1401(a). The Distribution Act requires DOI to come up with a “plan for the use and distribution of the funds” that must include “identification of the present-day beneficiaries, a formula for the division of the funds among two or more beneficiary entities if such is warranted, and a proposal for the use and distribution of the funds.” § 1402(a). BIA’s Part 87 regulations define “Indian tribe or group” as “any Indian tribe, nation, band, pueblo, community or identifiable group of Indians, or Alaska Native entity.” § 87.1(g). “Use or distribution” is defined to include “programming, per capita payments, or a combination thereof.” § 87.1(m). “Program means that aspect of a plan which pertains to using part or all of the judgment funds for tribal social and economic development projects,” § 87.1(k), while “[p]er capita payment means that aspect of a plan which pertains to the individualization of the judgment funds in the form of shares to tribal members or to individual descendants,” § 87.1(l). Separate from the use and distribution of trust funds, the management of tribal trust funds is governed by the American Indian Trust Fund Management Reform Act of 1994, 25 U.S.C. §§ 4001-61, and DOI’s accompanying regulations, 25 C.F.R. § 115 et seq. DOI must provide a “periodic statement of performance” to tribes, 25 U.S.C. § 4011(b); 25 C.F.R. § 801, and a tribe may withdraw funds upon submission of a written request, 25 U.S.C. § 4022(a); 25 C.F.R. § 115.815. Both the statute and its implementing BIA regulations define “Indian tribe” as “any Indian tribe, band, nation, or other organized group or community ... which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.” § 4001(2); see also 25 CFR § 115.002. DOI’s Office of Special Trustee for American Indians (OST) has its own set of regulations providing for withdrawal of tribal funds, *see* 25 C.F.R. § 1200 et seq., but they also define “tribe” in terms of federal recognition. *See* § 1200.2. In 1970, the ICC recognized that a 1912 payment for land was unconscionably low and awarded an additional \$48,692.05 to compensate “the Lower Band of Chinook and Clatsop Indians.” DN-000363. Whether this new payment was adequate or merely another injustice is a legitimate question but not the one before this Court. After the judgment was

entered, funds to satisfy the award were appropriated to DOI in 1972, 86 Stat. 1498, but BIA delayed distribution of the funds and continued to hold them in trust. DN-001414. While the Tribe's federal recognition petitioning process dragged on, the record contains no further mention of the Chinook's funds until 1997, when a series of internal DOI emails discussed how OST should "handle" communication with non-recognized tribes. DN- 001462. The agency apparently had a list of contact information it used to "talk to [non-recognized] tribes" but needed to "verify that these are the tribe's representatives that govern their tribe's business." *Id.* In 2001, BIA formally recognized the Chinook, DN-001480-91, but the decision was appealed, DN-001492. Meanwhile, BIA still had no official plan to distribute the funds. *Id.* In August of 2001, OST representatives took a trip to the Northwest and met with the Chinook (it seems that Penny Harris, a "Tribal Council Member," was the only attendee). DN-001512. The representatives apparently explained how the funds were currently invested and OST's "objectives" and "recommendations" with respect to the funds. *Id.* The notes from the trip stated that the original award was to be distributed based on the McChesney roll and that OST and the tribe would work together on a use and distribution plan once the Chinook gained recognition. *Id.* Unfortunately, the Chinook's brief success in 2001 was reversed in 2002 when their federal recognition was rescinded. 67 Fed. Reg. 46204, 46206 (July 12, 2002). The tribe did not appeal. Despite this, in 2006, OST sent a letter addressed to the "Chinook Tribe" stating the current balance of the trust account and requesting "assistance to determine whether the tribe's assets, currently invested in the U.S. Treasury 'Overnighter,' should remain as invested or be allocated to longer- term investments. In the prior Order on DOI's Motion to Dismiss, the Court held that the letter from Catherine Rugen was not a final agency action but that it was nonetheless reviewable because forcing CIN to formally request access to the funds would be futile. Defendants now request that the Court reconsider that holding because the Court erred by applying the futility exception—which normally applies to administrative exhaustion—to the finality analysis. Considering the relevant factors, the decision described in Rugen's letter is unpersuasive and must be set aside for multiple reasons. First, OST's interpretation of 25 C.F.R. § 83.2 as barring CIN from benefitting from the funds because of its non-recognized status conflicts with the Indian Judgment Distribution Act, which states that funds can be held for "any Indian tribe, band, group, pueblo, or community," 25 U.S.C.A. § 1401 (emphasis added), and its implementing regulations, which define "Indian tribe or group" as "any Indian tribe, nation, band, pueblo, community or identifiable group of Indians, or Alaska Native entity," 25 C.F.R. § 87.1(g) (emphasis added). The use of the word "any" means that both recognized and non-recognized tribal entities can be beneficiaries of funds held in trust if BIA's research so indicates. See 25 C.F.R. § 87.3. This reading is bolstered by the purpose of the Distribution Act. As explained in *Wolfchild v. U.S.*, the Distribution Act was intended to cover judgments issued by the ICC, which had jurisdiction over claims by "any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska." 101 Fed. Cl. 54 (2011) (reversed in part on other grounds) (quoting Indian Claims Commission Act, Act of Aug. 13, 1946, § 2, 60 Stat. 1049, 1050). In any case, the Court lacks authority under the APA to issue the declaratory judgment requested by CIN. See *Nat'l Ass'n*

of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 657 (2007) (If an agency’s action is arbitrary and capricious, “the proper course would [be] to remand to the Agency for clarification of its reasons.”). But this does not change the fact that DOI’s decision to stop sending CIN account statements for the reasons set forth in Rugen’s letter was in error. That decision is remanded to the agency for further consideration and clarification consistent with this Order.

148. Bollenbach v. United States

2020 WL 1550196 (W.D. Okla. Mar. 31, 2020). Now before the Court is Defendant United States of America’s Motion to Dismiss. Plaintiff brings this suit to recover damages for injuries allegedly suffered as a result of a motor-vehicle collision that occurred on October 12, 2017, involving herself and an individual identified as “Robinson.” Compl. ¶¶ 2, 7 (Doc. No. 1). The Complaint states that at the time of the collision, Robinson was an employee of the Tribal Health and Welfare Department and was acting within the scope of her employment. See *Id.* ¶ 3. The Tribal Health and Welfare Department is an Indian Contractor pursuant to the Indian Self-Determination and Education Assistance Act (“ISDEAA”), Public Law 93-638, and therefore an entity under the administration of the United States Department of Health and Human Services (“USDHHS”). *Id.* ¶ 3, 4, 13. Plaintiff contends that, as a result of the Tribal Health and Welfare Department’s status as an Indian Contractor, her exclusive remedy against Defendant is pursuant to the Federal Tort Claims Act (“FTCA”), 28 U.S.C. § 2401. Defendant asserts that because Plaintiff has not adequately pled facts from which it may be inferred that Robinson was an employee of the federal government and was acting within the scope of her employment, the United States’ limited waiver of sovereign immunity in the FTCA does not extend to Plaintiff’s claims. For the foregoing reasons, Defendants’ Motion to Dismiss (Doc. No. 9) is Granted. Plaintiff, however, may file an amended complaint within 21 days of this Order. It Is So Ordered this 31st day of March, 2020.

149. Inter-Tribal Council of Arizona, Inc. v. United States

956 F.3d 1328, 2020 WL 1897240 (Fed. Cir. Apr. 17, 2020). Trusts. Inter-tribal council sufficiently alleged government’s breach of fiduciary duty to preserve property held in trust to support Indian Tucker Act jurisdiction. Inter-tribal council representing Arizona Indian tribes sued United States, alleging claims including breach of tribal trust obligations under Arizona-Florida Land Exchange Act (AFLEA) by failing to ensure sufficient security for full payments to be made by landowner for land exchange involving sale of land that was former site of off-reservation Indian boarding school, and by failing to collect and deposit or make up trust payments on which landowner defaulted. Government moved to dismiss for lack of subject matter jurisdiction and for failure to state claim. The Court of Federal Claims, Nancy B. Firestone, Senior Judge, 140 Fed.Cl. 447, granted motion in part and denied motion in part. Inter-tribal council appealed. The Court of Appeals, Wallach, Circuit Judge, held that: 1) AFLEA established a specific fiduciary duty owed

by the government, as would support Indian Tucker Act jurisdiction; 2) council sufficiently alleged government's breach of fiduciary duty to support Indian Tucker Act jurisdiction; 3) AFLEA can be fairly interpreted as mandating compensation for the governments fiduciary wrongs, as would support Indian Tucker Act jurisdiction; 4) failure-to-maintain-sufficient-security breach of fiduciary duty claims accrued, and six-year limitations period for bringing claims in Court of Federal Claims began to run, when government disclosed deficit of trust, that obligor and had defaulted, and that obligations were under collateralized; 5) claim alleging failure to ensure adequate security when government negotiated trust fund payment agreement accrued, and six-year limitation period for bringing action in Court of Federal Claims began to run, when agreement was executed and council was made aware of agreement's terms; and 6) government did not have duty under AFLEA to collect and pay all of the AFLEAs required remaining annual payments and full final payment after default. Affirmed in part and reversed in part.

150. Sisto v. United States

2020 WL 4049941 (D. Ariz. July 20, 2020). This is a medical negligence action brought pursuant to the Federal Tort Claims Act (“FTCA”). Doc. 1. It arises from the death of San Carlos Apache tribal member, Tyrone Sisto, following treatment at a hospital operated by the San Carlos Apache Healthcare Corporation, Inc. (“SCAHC”). Mr. Sisto’s mother and children (“Plaintiffs”) allege that the attending emergency room physician, Dr. Rickey Gross, provided negligent care that resulted in Mr. Sisto’s death. Plaintiffs sue the United States of America (the “Government”), asserting that Dr. Gross was acting within the course and scope of his employment with the SCAHC and the Government. Pending before the Court is the Government’s “Motion to Dismiss for Lack of Subject Matter Jurisdiction.” Doc. 17. For the reasons explained herein, the Motion (Doc. 17) will be granted. Under the FTCA, the United States can be held liable for “personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” 28 U.S.C. § 1346(b)(1). “The [FTCA] is a limited waiver of sovereign immunity, making the Federal Government liable to the same extent as a private party for certain torts of federal employees acting within the scope of their employment.” *United States v. Orleans*, 425 U.S. 807, 813 (1976). Although “employees” of the government include officers and employees of federal agencies, “independent contractors” are not “employees.” 28 U.S.C. § 2671. Therefore, the FTCA does not authorize suits based on the acts of independent contractors or their employees. *Orleans*, 425 U.S. at 814. It is undisputed that the SCAHC is a tribally operated entity under Title I of the Indian Self-Determination and Education Assistance Act and subject to a self-determination compact with the Indian Health Service, an agency within the United States Department of Health and Human Services. (Doc. 17 at 2, ¶ 8; Doc. 20 at 3). The parties agree that this means that the SCAHC is part of the United States Public Health Service for purposes of the FTCA. (Id.). The parties dispute whether Dr. Gross is a federal

employee or an independent contractor with respect to the care he provided at the SCAHC emergency department. In 2016, SCAHC entered into an Emergency Department Services Agreement (the “Agreement”) with Tribal EM, PLLC (“T-EM”). Doc. 17-1. The Agreement requires T-EM to “employ, contract with, or otherwise engage T- EM Providers to provide the Services under this Agreement.” *Id.* at 6, ¶ 2.5(a). The Agreement further provides that T-EM is and shall at all times be an independent contractor with respect to SCAHC in the performance of its obligations under this Agreement. Here, to support their argument that Dr. Gross entered into a “personal services contract” with SCAHC, Plaintiffs rely on the Letter of Acknowledgment that Dr. Gross signed on January 27, 2016. Doc. 17-1 at 35. However, the Letter of Acknowledgment expressly states that Dr. Gross acknowledges that: “I have no employment, independent contractor or other contractual relationship with SCAHC, that my right to practice at SCAHC as a T-EM Provider is derived solely through my employment or contractual relationship with T-EM.” *Id.* The Court does not find that there was a “personal services contract” between Dr. Gross and SCAHC. As Dr. Gross was not working under a personal services contract with SCAHC, the Government correctly asserts that 25 U.S.C. § 5321(d), 25 C.F.R. § 900.193, and 42 U.S.C. § 233(a) do not apply. Accordingly, It Is Ordered granting the Government’s “Motion to Dismiss for Lack of Subject Matter Jurisdiction.” It Is Further Ordered dismissing this action without prejudice.

N. Miscellaneous

151. Ysleta Del Sur Pueblo v. City of El Paso

433 F. Supp. 3d 1020, 2020 WL 230888 (W.D. Tex Jan. 15, 2020). Lands. Indian tribe's asserted right to real property title based on land grant preserved by Treaty of Guadalupe Hidalgo was not federally derived right. Indian tribe brought declaratory judgment action against city seeking judicial confirmation of the tribe's title to real property alleging tribe was the owner of the property under land grant preserved by Treaty of Guadalupe Hidalgo, and seeking to enjoin the city from claiming any estate, right, title, or interest in or to the property. City filed motion for summary judgment. The District Court, David C. Guaderrama, J., held that: 1) predicate cause of action for declaratory relief was state-law claim to quiet title, and 2) asserted right to title was not a federally derived property right. Motion granted in part and denied in part.

INDEX OF CASES

Acres Bonusing, Inc. v. Marston
 No. 19-CV-05418-WHO, 2020 WL 1877711 (N.D. Cal. Apr. 15, 2020) 505

Agua Caliente Band of Cahuilla Indians v. Mnuchin
 2020 WL 3250701 (D.D.C. June 15, 2020)..... 440

Alegre v. United States
 2020 WL 4673099 (S.D. Cal. Aug. 12, 2020) 444

Allen v. United States
 797 Fed. Appx. 302, 2019 WL 7369426 (9th Cir. Dec. 31, 2019) 438

Applied Sciences & Information Systems, Inc. v. DDC Construction Service, LLC
 2020 WL 2738243 (E.D. Va. Mar. 30, 2020) 464

Baley v. United States
 942 F.3d 1312, 2019 WL 5995861 (Fed. Cir. Nov. 14, 2019) 473

Beam v. Naha
 783 Fed. Appx. 715, 2019 WL 3937390 (9th Cir. Aug. 20, 2019)..... 525

Bear v. United States
 2020 WL 253023, 147 Fed. Cl. 54 (Fed. Cl. Jan. 09, 2020)..... 530

Bollenbach v. United States
 2020 WL 1550196 (W.D. Okla. Mar. 31, 2020)..... 533

Burt Lake Band of Ottawa and Chippewa Indians v. Bernhardt
 2020 WL 1451566 (D.D.C. Mar. 25, 2020)..... 442

Caddo Nation of Oklahoma v. Wichita and Affiliated Tribes
 786 Fed. Appx. 837, 2019 WL 4898669 (10th Cir. Oct. 04, 2019)..... 515

Cadet v. Snoqualmie Casino
 2020 WL 3469222 (W.D. Wash. June 25, 2020)..... 510

Campbell v. Honor the Earth
 No. A19-1232, 2020 WL 1909717 (Minn. Ct. App. Apr. 20, 2020) 494

Cayuga Nation v. Campbell
 34 N.Y.3d 282, 140 N.E.3d 479 (N.Y. Oct. 29, 2019)\ 518

Cayuga Nation v. Tanner
 448 F. Supp. 3d 217, 2020 WL 1434157 (N.D.N.Y. Mar. 24, 2020) 485

Chegup v. Ute Indian Tribe of the Uintah and Ouray Reservation
 No. 2: 19-CV-00286-DAK, 2019 WL 6498177 (D. Utah Dec. 3, 2019) 491

Chemehuevi Indian Tribe v. McMahon
 934 F.3d 1076 (9th Cir. Aug. 19, 2019) 489

Cherokee Nation v. Bernhardt
 2020 WL 1429946 (N.D. Okla. Mar. 24, 2020) 441
 936 F.3d 1142, 2019 WL 4197483 (10th Cir. Sept. 05, 2019) 437

Chinook Indian Nation v. Bernhardt
 2020 WL 128563 (W.D. Wash. Jan. 10, 2020)..... 439

Chinook Indian Nation v. United States. Depar’t of Interior
 435 F. Supp. 3d 1130, 2020 WL 363410 (W.D. Wash. Jan. 22, 2020) 530

Clements v. Confederated Tribes of Colville Reservation
 2019 WL 6051104 (E.D. Wash. Nov. 15, 2019) 459

<i>Club One Casino, Inc. v. Bernhardt</i>	
959 F.3d 1142, 2020 WL 2745319 (9th Cir. May 27, 2020)	436
<i>Coalition to Protect Puget Sound Habitat v. U.S. Army Corps of Engineers</i>	
466 F. Supp. 3d 1217, 2020 WL 3100829 (W.D. Wash. June 11, 2020)	470
<i>Confederated Salish and Kootenai Tribes v. Lake County Board of Commissioners</i>	
454 F. Supp. 3d 957, 2020 WL 1891263 (D. Mont. Apr. 16, 2020)	469
<i>Confederated Tribes and Bands of Yakama Nation v. Yakima County</i>	
963 F.3d 982, 2020 WL 3495307 (9th Cir. June 29, 2020)	495
<i>Confederated Tribes of Chehalis Reservation v. Mnuchin</i>	
471 F. Supp. 3d 1, 2020 WL 3489479 (D.D.C. June 26, 2020)	441
<i>Confederated Tribes of Warm Springs Reservation of Oregon v. Vanport International, Inc.</i>	
428 F. Supp. 3d 384, 2019 WL 6879736 (D. Or. Dec. 16, 2019)	460
<i>Cora G. v. Department of Health & Social Services, Office of Children’s Services</i>	
461 P.3d 1265, 2020 WL 1969400 (Alaska Apr. 24, 2020)	454
<i>Corporation of President of Church of Jesus Christ of Latter- Day Saints v. BN</i>	
2019 WL 5423937 (D. Utah Oct. 23, 2019)	516
<i>Daphne O. v. Department of Health & Social Services</i>	
2020 WL 1933651 (Alaska Apr. 22, 2020)	453
<i>Dotson v. Tunica Biloxi Gaming Commission</i>	
2020 WL 1493028 (L.A. Feb. 27, 2020)	462
<i>Drake v. Salt River Pima-Maricopa Indian Community</i>	
411 F. Supp. 3d 513, 2019 WL 5653447 (D. Ariz. Oct. 31, 2019)	518
<i>Eglise Baptiste Bethanie De Ft. Lauderdale v. Seminole Tribe of Florida</i>	
824 Fed. Appx. 680, 2020 WL 4581439 (11th Cir. Aug. 10, 2020)	512
<i>Eglise Baptiste Bethanie De Ft. Lauderdale, Inc. v. Seminole Tribe of Florida</i>	
No. 19-CV-62591, 2020 WL 43221 (S.D. Fla. Jan. 03, 2020)	502
<i>Eyck v. United States</i>	
463 F. Supp. 3d 969, 2020 WL 2770436 (D.S.D. May, 28, 2020)	506
<i>Flandreau Santee Sioux Tribe v. Haeder</i>	
938 F.3d 941, 2019 WL 4231360 (8th Cir. Sept. 06, 2019)	522
<i>Flandreau Santee Sioux Tribe v. Noem</i>	
938 F.3d 928, 2019 WL 4229068 (8th Cir. Sept. 06, 2019)	522
<i>FMC Corporation v. Shoshone-Bannock Tribes</i>	
942 F.3d 916, 2019 WL 6042469 (9th Cir. Nov. 15, 2019)	519
<i>Fort McDermitt Paiute and Shoshone Tribe v. Azar</i>	
2019 WL 4711401 (D.D.C. Sep. 26, 2019)	458
<i>Genskow v. Prevost</i>	
2020 WL 1676960 (E.D. Wis. Apr. 06, 2020)	504
<i>George v. Office of Navajo and Hopi Indian Relocation</i>	
2019 WL 4081144 (D. Aiz. Aug. 29, 2019)	436
<i>Gibbs v. Haynes Investments, LLC</i>	
967 F.3d 332, 2020 WL 4118239 (4th Cir. July, 2020)	465
<i>Gibbs v. Sequoia Capital Operations, LLC</i>	
966 F.3d 286, 2020 WL 4118283 (4th Cir. July 21, 2020)	466

<i>Gibbs v. Stinson</i>	
421 F. Supp. 3d 267 (E.D. Va. Sept. 30, 2019)	501
<i>Gila River Indian Community v. Cranford</i>	
459 F. Supp. 3d 1246, 2020 WL 2537435 (D. Ariz. May 12, 2020)	482
<i>Gilbert v. Weahkee</i>	
2020 WL 779460 (S.D. Feb. 18, 2020).....	461
<i>Gronidal v. Mill Bay Members Association, Inc.</i>	
471 F. Supp. 3d 1095, 2020 WL 3892462 (E.D. Wash. July 09, 2020)	443
<i>Hanson v. Parisien</i>	
2020 WL 4117997 (D.N.D. July 20, 2020)	521
<i>Hawkins v. Bernhardt</i>	
436 F. Supp. 3d 241, 2020 WL 516036 (D.D.C. Jan. 31, 2020)	476
<i>Herpel v. County of Riverside</i>	
45 Cal. App. 5th 96, 258 Cal. Rptr. 3d 444 (Cal. Ct. App. Feb. 10, 2020)	524
<i>Holy v. United States Department of Interior</i>	
2020 WL 3542251 (D.S.D. June 30, 2020)	442
<i>Hopi Tribe v. Arizona Snowbowl Resort Limited Partnership</i>	
No.1 CA-CV 16-0521, 2020 WL 3526664 (Ariz. Ct. App. June 30, 2020).....	499
<i>Howard v. MMMG, LLC</i>	
299 So. 3d 40, 2020 WL 3443832 (Fla. Dist. Ct. App. June 24, 2020).....	509
<i>Hudson v. Zinke</i>	
453 F. Supp. 3d 431, 2020 WL 1821120 (D.D.C. Apr. 10, 2020).....	435
<i>In re A.M.</i>	
47 Cal.App.5th 303, 260 Cal.Rptr.3d 412 (Cal. Ct. App. Mar. 05, 2020).....	450
<i>In re A.M.G.</i>	
2020 WL 1488345 (Minn. Ct. App. Mar. 23, 2020).....	451
<i>In re CSRBA Case No. 49576 Subcase No. 91-7755</i>	
165 Idaho 517, 448 P.3d 322 (Idaho Sept. 05, 2019)	471
<i>In re Guardianship of Retz</i>	
2020 WL 1488346 (Minn. Ct. App. Mar. 23, 2020).....	452
<i>In re Internet Lending Cases</i>	
53 Cal. App. 5th 613, 267 Cal. Rptr. 3d 783, 2020 WL 4745994 (Cal. Ct. App. Aug. 17, 2020)	513
<i>In re M.R.</i>	
48 Cal. App. 5th 412, 261 Cal. Rptr. 3d 786 (Cal. Ct. App. Apr. 29, 2020)	454
<i>In re N.D.</i>	
46 Cal. App. 5th 620, 259 Cal. Rptr. 3d 826 (Cal. Ct. App. Mar. 16, 2020).....	450
<i>Inter-Tribal Council of Arizona, Inc. v. United States</i>	
956 F.3d 1328, 2020 WL 1897240 (Fed. Cir. Apr. 17, 2020)	533
<i>John v. Secretary of Interior through Acting Assisting Secretary Bureau of Indian Affairs</i>	
808 Fed. Appx 541, 2020 WL 3074202 (9th Cir. June 10, 2020)	438
<i>JW Gaming Development, LLC v. James</i>	
2020 WL 353536 (N.D. Cal. Jan. 21, 2020).....	461
778 F. Appx. 545 (9th Cir. Oct. 02, 2019).....	501

<i>Kiamichi River Legacy Alliance, Inc. v. Bernhardt</i>	
439 F. Supp. 3d 1258, 2020 WL 1465885 (E.D. Okla. Feb. 11, 2020)	479
<i>Kirk v. Office of Navajo and Hopi Indian Relocation</i>	
426 F. Supp. 3d 623, 2019 WL 7049260 (D. Ariz. Dec. 10, 2019).....	529
<i>Landreth v. United States</i>	
797 Fed. Appx. 521, 2020 WL 114521 (Fed. Cir. Jan. 10, 2020)	530
<i>Leachmand v. United States [sic]</i>	
No. CV-19-82-GF-BMM, 2020 WL 1511262 (D. Mont. Mar. 30, 2020).....	492
<i>Lezmond Charles Mitchell v. United States of America</i>	
971 F.3d 1081 (9th Cir. Aug. 23, 2020)	498
<i>Littlefield v. Mashpee Wampanoag Indian Tribe</i>	
951 F.3d 30, 2020 WL 948895 (1st Cir. Feb. 27, 2020).....	440
<i>Lozeau v. Anciaux</i>	
2019 MT 235, 397 Mont. 312, 449 P.3d 830 (Mont. Oct. 1, 2019)	490
<i>Lumas v. United States</i>	
2019 WL 5086576 (S.D. Cal. Oct. 10, 2019)	526
<i>Lummi Tribe of Lummi Reservation, Washington v. United States</i>	
788 Fed. Appx. 717, 2019 WL 5061386 (Fed. Cir. Oct. 09, 2019).....	525
<i>Magee v. Shoshone Paiute Tribes of Duck Valley Reservation</i>	
460 F. Supp. 3d 1073, 2020 WL 2468774 (D. Nev. May 11, 2020)	520
<i>Mashpee Wampanoag Tribe v. Bernhardt</i>	
466 F.Supp.3d 199, 2020 WL 3037245 (D.D.C. June 05, 2020)	437
<i>Matter of Adoption of B.B.</i>	
469 P.3d 1093, 2020 WL 4345817, 2020 UT 53 (Utah July 28, 2020).....	456
<i>Matter of Adoption of T.A.W.</i>	
11 Wash. App. 2d 1031, 2019 WL 6318163 (Wash. Ct. App. Nov. 22, 2019).....	447
<i>Matter of D.J.S.</i>	
12 Wash. App. 2d 1, 456 P.3d 820 (Wash. Ct. App. Jan. 28, 2020).....	448
<i>Matter of Dependency of F.Y.O.</i>	
12 Wash. App. 2d 1037, 2020 WL 1024912 (Wash. Ct. App. Mar. 02, 2020)	449
<i>Matter of E.J.B.</i>	
375 N.C. 95, 846 S.E.2d 472, 2020 WL 4726567 (N.C. Aug. 14, 2020).....	456
<i>Matter of J. M. N.</i>	
303 Or. App. 600, 464 P.3d 506 (Or. Ct. App. Apr. 15, 2020)	453
<i>Matter of K.G.</i>	
840 S.E.2d 914, 2020 WL 1264004 (N.C. Ct. App. Mar. 17, 2020)	451
<i>Matter of T.J.</i>	
302 Or. App. 531, 462 P.3d 315 (Or. Ct. App. Mar. 04, 2020)	450
<i>McGirt v. Oklahoma</i>	
140 S. Ct. 2452, 2020 WL 3848063 (U.S. July 09, 2020).....	436
<i>Mdewakanton Band of Sioux in Minnesota v. Bernhardt</i>	
464 F. Supp. 3d 316, 2020 WL 2800615 (D.D.C. May 30, 2020)	436
<i>Menominee Indian Tribe of Wisconsin v. Environmental Protection Agency</i>	
947 F.3d 1065 (7th Cir. Jan. 27, 2020)	469

<i>Muckleshoot Indian Tribe v. Tulalip Tribes</i>	
944 F.3d 1179, 2019 WL 6885507 (9th Cir. Dec. 18, 2019).....	475
<i>Narragansett Indian Tribal Historic Preservation Office v. Federal Energy Regulatory Commission</i>	
949 F.3d 8 (D.C. Cir. Feb. 07, 2020).....	479
<i>Nathan Samuel Collett, et al., v. State of Utah</i>	
No. 2:14-CV-871, 2020 WL 3496960 (D. Utah June 29, 2020)	497
<i>New York v. Mountain Tobacco Company</i>	
942 F.3d 536, 2019 WL 5792487 (2nd Cir. Nov. 07, 2019)	523
<i>Oertwich v. Traditional Village of Togiak</i>	
413 F. Supp. 3d 963 (D. Alaska Sept. 12, 2019)	500
<i>Oneida Indian Nation v. United States Department of the Interior</i>	
789 Fed. Appx. 271, 2019 WL 5302822 (2nd Cir. Oct. 21, 2019).....	438
<i>Oneida Nation v. Village of Hobart</i>	
968 F.3d 664 (7th Cir. July 30, 2020).....	498
<i>Osceola Blackwood Ivory Gaming Group LLC v. Picayune Rancheria of Chukchansi Indians et al.</i>	
2020 WL 1919583 (5th Cir. Apr. 21, 2020)	486
<i>Peidlow v. Williams</i>	
459 P.3d 1136, 2020 WL 1316358 (Alaska Mar. 20, 2020).....	451
<i>People In Interest of K.C.</i>	
2020 WL 2759686 (Colo. App. May 28, 2020).....	455
<i>Peoria Tribe of Indians of Oklahoma v. Campbell</i>	
2020 WL 4334907 (N.D. Okla. July 28, 2020)	487
<i>Perkins v. Commissioner of Internal Revenue</i>	
970 F.3d 148, 2020 WL 4644984 (2nd Cir. Aug. 12, 2020)	524
<i>Philbert P. v. Douglas P.</i>	
2020 WL 605171 (N.M. Ct. App. Jan. 13, 2020)	448
<i>Pierson v. Hudson Insurance Company</i>	
No. C19-0289-JCC, 2020 WL 583825 (W.D. Wash. Feb. 06, 2020).....	503
<i>Pit River Tribe v. Bureau of Land Management</i>	
939 F.3d 962, 2019 WL 4508340 (9th Cir. Sept. 19, 2019)	467
<i>Prairie Band Potawatomi Nation v. Mnuchin</i>	
2020 WL 3402298 (D.D.C. June 11, 2020).....	439
<i>Protect Our Communities Foundation v. LaCounte</i>	
939 F.3d 1029, 2019 WL 4582841 (9th Cir. Sept. 23, 2019).....	468
<i>Pueblo of Jemez v. United States</i>	
430 F. Supp. 3d 943, 2019 WL 4740604 (D.N.M. Sept. 27, 2019).....	525
<i>Red Cliff Band of Lake Superior Chippewa Indians v. Bayfield County</i>	
432 F. Supp. 3d, 2020 WL 108672 (W.D. Wis. Jan. 09, 2020).....	492
<i>Robbins v. Mason County Title Insurance Company</i>	
462 P.3d 430, 2020 WL 2212437 (Wash. May 07, 2020)	519
<i>Rosebud Sioux Tribe v. Trump</i>	
428 F. Supp. 3d 282, 2019 WL 7421956 (D. Mont. Dec. 20, 2019)	468

<i>Rosebud Sioux Tribe v. United States</i>	
450 F. Supp. 3d 986, 2020 WL 1516184 (D.S.D. Mar. 30, 2020).....	463
<i>Saginaw Chippewa Indian Tribe of Michigan v. Blue Cross Blue Shield of Michigan</i>	
2020 WL 4569558 (E.D. Mich. Aug. 07, 2020).....	466
<i>Sault Ste. Marie Tribe of Chippewa Indians v. Bernhardt</i>	
442 F. Supp. 3d 53, 2020 WL 1065406 (D.D.C. Mar. 05, 2020).....	440
<i>Scott v. Paisley</i>	
No. CV 19-63-GF-DLC-JTJ, 2020 WL 1527896 (D. Mont. Mar. 31, 2020).....	493
<i>Seneca Nation of Indians v. New York</i>	
420 F.Supp.3d 89, 2019 WL 5865450 (W.D.N.Y. Nov. 08, 2019).....	484
<i>Singer v. Office of Navajo and Hopi Indian Reservation</i>	
2020 WL 4530477 (D. Ariz. Aug 06, 2020).....	444
<i>Sisto v. United States</i>	
2020 WL 4049941 (D. Ariz. July 20, 2020).....	534
<i>Slaughter v. National Park Service</i>	
2019 WL 6465093 (D. Mont. Dec. 02, 2019).....	474
<i>Snoqualmie Indian Tribe v. Washington</i>	
2020 WL 1286010 (W.D. Wash. Mar. 18, 2020).....	479
<i>Solenex LLC v. Bernhardt</i>	
962 F.3d 520, 2020 WL 3244004 (D.C. Cir. June 16, 2020).....	440
<i>Spurr v. Pope</i>	
936 F.3d 478, 2019 WL 4009131 (6th Cir. Aug. 26, 2019).....	514
<i>Stand up for California v. U.S. Department of Interior</i>	
410 F. Supp. 3d 39, 2019 WL 4992183 (D.D.C. Oct. 07, 2019).....	437
<i>Stand Up for California! v. U.S. Department of the Interior</i>	
959 F.3d 1154, 2020 WL 2745320 (9th Cir. May 27, 2020).....	486
<i>Standing Rock Sioux Tribe and Cheyenne River Sioux Tribe v.</i>	
471 F. Supp. 3d 71, 2020 WL 3634426 (D.D.C. July 06, 2020).....	471
<i>Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers</i>	
440 F. Supp. 3d 1, 2020 WL 1441923 (D.D.C. Mar. 25, 2020).....	469
<i>State v. Bellcourt</i>	
937 N.W.2d 160 (D. Minn. Dec. 16, 2019).....	502
<i>State v. Thompson</i>	
937 N.W.2d 418, 2020 WL 218405 (Minn. Jan. 13, 2020).....	519
<i>State v. Ysleta Del Sur Pueblo</i>	
955 F.3d 408, 2020 WL 1638408 (5th Cir. Apr. 02, 2020).....	485
<i>State v. Ziegler</i>	
2019 WL 4164893 (Minn. Ct. App. Sept. 03, 2019).....	515
<i>Swinomish Indian Tribal Community v. Azar</i>	
406 F. Supp. 3d 18, 2019 WL 4261368 (D.D.C. Sept. 09, 2019).....	457
<i>Swinomish Indian Tribal Community v. BNSF Railway Company</i>	
951 F.3d 1142, 2020 WL 1038679 (9th Cir. Mar. 04, 2020).....	463
<i>The Shawnee Tribe v. Steven T. Mnuchin</i>	
2020 WL 4816461 (D.D.C. Aug. 19, 2020).....	446

<i>Thomas Charles Bear, et al., v. United States</i>	
No. 13-51X, 147 Fed. Cl. 54 (Fed. Cl. Dec. 3, 2019).....	528
<i>Thomas G. Landreth v. United States of America</i>	
2020 WL 4347377 (W.D. Wash. July 29, 2020)	511
<i>Treat v. Stitt</i>	
473 P.3d 43, 2020 WL 4185827 (Okla. July 21, 2020)	487
<i>Tsi Akim Maidu of Taylorsville Rancheria v. United States Department of the Interior</i>	
2020 WL 1974213 (E.D. Cal. Apr. 24, 2020).....	435
<i>United States ex rel. Dahlstrom v. Sauk-Suiattle Indian Tribe of Washington</i>	
No. C16-0052JLR, 2019 WL 4082944 (W.D. Wash. Aug. 29, 2019)	490
<i>United States v. Begay</i>	
934 F.3d 1033 (9th Cir. Aug. 19, 2019)	489
<i>United States v. Uintah Valley Shoshone Tribe</i>	
946 F.3d 1216 (10th Cir. Jan. 09, 2020)	475
<i>United States v. Unzueta</i>	
No. 20-20121, 2020 WL 2733890 (E.D. Mich. May 26, 2020)	495
<i>United States v. Walker River Irrigation District</i>	
2020 WL 4059689 (D. Nev. July 20, 2020)	483
<i>United States v. Washington</i>	
2019 WL 5963052 (W.D. Wash. Nov. 13, 2019)	472
2020 WL 1917037 (W.D. Wash. Apr. 20, 2020).....	481
<i>Unkechaug Indian Nation v. Paterson</i>	
2020 WL 553576 (W.D.N.Y. Feb. 04, 2020)	523
<i>Upper Lake Pomo Association v. United States</i>	
804 Fed. Appx. 638, 2020 WL 1243736 (9th Cir. Mar. 16, 2020).....	440
<i>Ute Indian Tribe of Uintah and Ouray Indian Reservation v. United States</i>	
145 Fed. Cl. 609, 2019 WL 5688826 (Fed. Cl. Nov. 04, 2019)	527
<i>Video Gaming Tech, Inc. v. Rogers County Board of Tax Roll Corrections</i>	
475 P.3d 824, 2019 WL 6877909 (Okla. Dec. 17, 2019)	485
<i>Western Refining Southwest, Inc. v. U.S. Department of the Interior</i>	
450 F. Supp. 3d 1214, 2020 WL 1536149 (D.N.M. Mar. 31, 2020)	434
<i>Williams v. Medley Opportunity Fund II, LP</i>	
965 F.3d 229, 2020 WL 3968078 (3rd Cir. July 14, 2020)	465
<i>Winnemucca Indian Colony v. United States ex rel. Department of the Interior</i>	
819 Fed. Appx 480, 2020 WL 3170850 (9th Cir. June 15, 2020)	439
<i>Ysleta Del Sur Pueblo v. City of El Paso</i>	
433 F. Supp. 3d 1020, 2020 WL 230888 (W.D. Tex. Jan. 15, 2020).....	535
<i>Yurok Tribe v. U.S. Bureau of Reclamation</i>	
2020 WL 2793945 (N.D. Cal. May 29, 2020)	483