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Case Law on American Indians: August 2014-August 2015

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Cover Page Footnote
Mr. Schlosser represents tribes in fisheries, timber, water, energy, cultural resources, contracting, tax, and federal breach of trust. He is a director of Morisset, Schlosser, Jozwiak & Somerville, where he specializes in federal litigation, natural resources, and Indian tribal property issues. He is also frequently involved in tribal economic development and environmental regulation. In the 1970s, Tom represented tribes in the Stevens' Treaty Puget Sound fishing rights proceedings. Tom has a B.A. from the University of Washington and a J.D. from the University of Virginia Law School. Tom is a founding member of the Indian Law Section of the Washington State Bar Association and also served on the WSBA Bar Examiners Committee. Tom is a frequent CLE speaker and moderates an American Indian Law discussion group for lawyers at http://forums.delphiforums.com/IndianLaw/messages. He is a part time lecturer at the University of Washington School of Law. He can be contacted at t.schlosser@msaj.com.

CASE LAW ON AMERICAN INDIANS: AUGUST 2014–AUGUST 2015[1]

Thomas P. Schlosser*

CONTENTS

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* Mr. Schlosser represents tribes in fisheries, timber, water, energy, cultural resources, contracting, tax, and federal breach of trust. He is a director of Morisset, Schlosser, Jozwiak & Somerville, where he specializes in federal litigation, natural resources, and Indian tribal property issues. He is also frequently involved in tribal economic development and environmental regulation. In the 1970s, Tom represented tribes in the Stevens' Treaty Puget Sound fishing rights proceedings. Tom has a B.A. from the University of Washington and a J.D. from the University of Virginia Law School. Tom is a founding member of the Indian Law Section of the Washington State Bar Association and also served on the WSBA Bar Examiners Committee. Tom is a frequent CLE speaker and moderates an American Indian Law discussion group for lawyers at http://forums.delphiforums.com/IndianLaw/messages. He is a part time lecturer at the University of Washington School of Law. He can be contacted at t.schlosser@msaj.com.

I. ADMINISTRATIVE LAW

A. 2014 Cases

1. *Haeker v. United States*

No. CV 14–20, 2014 WL 4388278 (D. Mont. Sept. 4, 2014). Plaintiff Kurt Haeker brought this action seeking to partition his undivided fee interest in land within the Crow Indian Reservation. The United States, which holds legal title to the remaining undivided legal interest in trust for the benefit of several Indian allottees, moved to dismiss Haeker's Second Amended Complaint.

The Magistrate Judge entered Findings and Recommendations in which she recommended that the Second Amended Complaint be dismissed for lack of jurisdiction. Haeker's motion presented a novel issue with a scant amount of relevant case law. Despite this, the Magistrate Judge's conclusion was well-reasoned and supported by the legal authorities cited therein.

After reviewing the Findings and Recommendations, the court did not find that Judge Ostby committed clear error.

Haeker's Second Amended Complaint was dismissed with prejudice.

2. *Chemehuevi Indian Tribe v. Jewell*

767 F.3d 900 (9th Cir. 2014). Indian tribe and its members brought action alleging that Interior Secretary, acting through Bureau of Indian Affairs (BIA), violated Administrative Procedure Act (APA) by determining that the Department of Interior was not authorized to approve tribe's assignments of land to certain of its members.

The district court entered summary judgment in the Secretary's favor, and plaintiffs appealed.

The appellate court held that: (1) tribe was prohibited by Indian Nonintercourse Act from approving land assignment deeds to tribal members in manner similar to fee simple ownership, and (2) Interior Secretary was not authorized to approve conveyances.

Affirmed.

3. *Confederated Tribes of Grand Ronde Cmty. of Or. v. Jewell*

75 F. Supp. 3d 387 (D.D.C. 2014). This consolidated action arose under the Administrative Procedure Act, the Indian Reorganization Act, the Indian Gaming Regulatory Act. and the National Environmental Policy Act. Plaintiffs challenged the Secretary of the Department of Interior's decision to acquire and hold in trust approximately 152 acres in Clark County, Washington for the Cowlitz Indian Tribe, the Intervenor–Defendant. Plaintiffs further challenged the Secretary's decision to allow gaming on that land, and disputed whether the Secretary had complied with NEPA's requirements. Before the court were the parties' cross-motions for summary judgment.

In 2002, the Department of Interior federally acknowledged the Cowlitz after finding that the tribe had existed as an Indian entity on a substantially continuous basis since at least 1878–80 and that it had satisfied the criteria set forth in 25 C.F.R. part 83. 67 Fed. Reg. 607 (Jan. 4, 2002); 65 Fed. Reg. 8,436 (Feb. 18, 2000). Immediately upon receiving federal acknowledgment, the Cowlitz submitted an application requesting that the Secretary take into trust 151.87 acres of land in Clark County, Washington (Parcel) and declare it the Tribe's "initial reservation" under the IRA. The Tribe claimed its purpose was to "create a federally-protected land base on which the Cowlitz Indian Tribe can establish and operate a tribal government headquarters to provide housing, health care, education and other governmental services to its members, and conduct the economic development necessary to fund these tribal government programs, provide employment opportunities for its members, and allow the Tribe to become economically self-sufficient."

In August 2005, the Cowlitz submitted its proposed tribal gaming ordinance for review, which the NIGC eventually approved. As part of the tribal gaming ordinance review process, the NIGC issued an opinion in November 2005 which found that the Parcel qualified for IGRA's "restored lands" exception to the general prohibition on gaming. The NIGC explicitly noted in its November 2005 opinion that if the Secretary accepted the Parcel into trust, the Department of Interior could proclaim the Parcel to be the tribe's initial reservation. According to the NIGC, "[a]n 'initial reservation proclamation would provide a second basis by

which the [P]arcel would qualify as Indian lands on which the Tribe could conduct gaming." The Tribe's application to take the Parcel into federal trust prompted the NEPA process. The Bureau of Indian Affairs issued a draft Environmental Impact Statement (EIS) concerning the proposed actions surrounding the Parcel. After a period of public comment, the final EIS was issued on May 30, 2008.

In April 2013, the Secretary of the Department of the Interior through her designee, the Assistant Secretary of Indian Affairs issued a Record of Decision (ROD) accepting the Parcel into trust and declaring that gaming would be allowed on the land.

Plaintiffs were entities and individuals who opposed the construction of the Cowlitz casino-resort complex. Plaintiffs challenged: (1) the decision to accept into federal trust the Parcel pursuant to Section 5 of the Indian Reorganization Act of 1934 (IRA); (2) the decision to allow the Cowlitz to conduct gaming activities on the Parcel once the Secretary has accepted the land into trust; and (3) the Secretary's compliance with the NEPA.

The court denied Plaintiffs' motions for summary judgment and granted Defendants' cross-motions for summary judgment.

4. *Walker River Paiute Tribe v. U.S. Dep't. of Hous. and Urban Dev.*

68 F. Supp. 3d 1202 (D. Nev. 2014). Before the court was plaintiff Walker River Paiute Tribe's (WRPT) motion for summary judgment. Defendants filed an opposition and cross-motion for summary judgment.

Plaintiff WRPT was a federally recognized Indian tribe located in Nevada. WRPT filed the underlying declaratory and injunctive relief action alleging that defendants improperly offset the amount of federal funding WRPT received in fiscal year 2009 in violation of the Native American Housing Assistance and Self–Determination Act (NAHASDA).

In early 2008, HUD conducted an audit of plaintiff WRPT's IHBG funding. In the audit, HUD determined that WRPT had been overfunded in fiscal year 2008 in the amount of $110,444 due to an inflated FCAS calculation. HUD then reduced WRPT's grant for fiscal year 2009 by $110,444 in order to recapture the overpaid funds.

WRPT initiated the action against HUD under the Administrative Procedures Act (APA), 5 U.S.C. § 706, seeking a determination that HUD's promulgation and interpretation of 24 C.F.R. § 1000.318 was arbitrary and capricious. WRPT filed an amended complaint seeking injunctive and declaratory relief. In its amended complaint, WRPT contended that the exclusion of dwelling units from the block grant formula is in violation of the specific pre-amendment statutory language of NAHASDA, particularly 25 U.S.C. § 4152 (1996). Further, WRPT alleged that HUD's recapture of funds was in violation of WRPT's due process rights because HUD did not comply with the notice and hearing requirements of 25 U.S.C. §§ 4161 and 4165 (2008).

The court granted in part and denied in part plaintiff's motion for summary judgment. The court also granted in part and denied in part defendant's counter motion for summary judgment.

B. January–March Cases

1. *Hous. Auth. of Te-Moak Tribe of Western Shoshone Indians v. U.S. Dep't. of Hous. and Urban Dev.*

85 F. Supp. 3d 1213 (D. Nev. 2015). Housing authority for Indian tribe commenced action alleging that Department of Housing and Urban Development (HUD) promulgated funding regulations that violated Native American Housing Assistance and Self–Determination Act (NAHASDA). Parties moved for summary judgment.

The district court held that: (1) funding regulations under NAHASDA did not have to be interpreted in manner that favored plaintiff; (2) NAHASDA's block-grant formula was required to be related to the need of all tribal housing entities; (3) HUD regulation, which disqualified funding for housing units which were no longer owned or operated by a tribal housing entity, was consistent with the mandate of NAHASDA, and was not arbitrary nor capricious; (4) post-audit interpretation of regulation was arbitrary and capricious as applied to tribe; and (5) HUD had authority pursuant to payment by mistake doctrine to recoup funds paid to Indian tribe to operate its housing program without complying with statute's notice and opportunity for hearing requirements.

Motions granted in part and denied in part.

2. *Mishewal Wappo Tribe of Alexander Valley v. Jewell*

84 F. Supp. 3d 930 (N.D. Cal. 2015). In the earlier part of the twentieth century, the United States government passed a series of laws affecting its relationship with the indigenous inhabitants of California and their descendants. One of those laws, the Indian Appropriations Act of 1906, permitted the Secretary of the Interior (Secretary) to purchase parcels of land, or "rancherias," throughout the state for use by California Indians. Fifty years later, Congress enacted another law, the California Rancheria Act of 1958 (CRA), which authorized the Secretary to dissolve the same rancherias it had previously authorized.

At issue in this action was the termination and distribution of one of those rancherias, the Alexander Valley Rancheria (Rancheria), which, when it existed, was located in Sonoma County. Plaintiff, the Mishewal Wappo Tribe of Alexander Valley, alleged in this action that the process utilized by the Secretary to terminate the Rancheria between 1959 and 1961 was inconsistent with the CRA and therefore unlawful. The Federal Defendants disagreed. Federal jurisdiction arose pursuant to 28 U.S.C. § 1331.

The court found that Plaintiff's claims were barred by the applicable statute of limitations.

The Federal Defendants' motion was therefore granted and Plaintiff's motion denied.

3. *Crow Tribal Hous. Auth. v. U.S. Dep't. of Hous. and Urban Dev.*

781 F.3d 1095 (9th Cir. 2015). Tribal housing authority brought action to challenge action by Department of Housing and Urban Development (HUD) to recoup alleged overpayments of grant funds to housing authority under Native American Housing Assistance and Self-Determination Act (NAHASDA). The District court, 924 F. Supp. 2d 1217, ruled that HUD violated Tribe's right to NAHASDA's notice and hearing and remanded case to HUD for hearing. HUD appealed.

The appellate court held that: (1) on-site review triggered opportunity for hearing; and (2) HUD was not required to hold hearing.

Vacated, reversed, and remanded.

4. *Verona v. Jewell*

No. 6:08–cv–0647, 2015 WL 1400291 (N.D.N.Y. Mar. 26, 2015). Plaintiffs, the Town of Verona, the Town of Vernon, Abraham Acee, and Arthur Strife (collectively, "Plaintiffs"), commenced this action to challenge a Record of Decision issued by the Department of the Interior (DOI) acquiring over 13,000 acres of land in Central New York into trust for the benefit of the Oneida Indian Nation of New York (OIN). Plaintiffs commenced this action under the Administrative Procedure Act (APA), 5 U.S.C. § 551, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202.3.

Plaintiffs' Complaint raised the following claims: (1) § 5 of the IRA, as applied to the State of New York, violates the Tenth Amendment; (2) the IRA does not apply to the lands for which OIN requested trust status because the lands were never the subject of allotment under the GAA, OIN was neither federally recognized nor under federal jurisdiction in 1934, and OIN voted not to have the IRA apply to it; and (3) DOI's determination was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law because it was based on the erroneous assumption that Turning Stone was legally operated under the IGRA and failed to consider various factors under the applicable regulations.

OIN submitted a request to DOI under § 5 of the IRA requesting that the Secretary acquire approximately 17,370 acres in Madison County and Oneida County, New York in trust status for OIN. The request comprised properties that were reacquired by OIN in open-market transactions, two centuries after they had last been possessed by the Oneidas. The land was the location of OIN's Turning Stone Resort & Casino, a Class III casino under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701; various other commercial enterprises, such as gas stations and golf courses; and OIN's government and cultural facilities. OIN intended to continue existing uses of the land.

In the final EIS, DOI analyzed the environmental and socioeconomic impacts of the proposed action—acquiring the full 17,370 acres requested in trust—and eight reasonable alternatives. DOI issued its decision to accept approximately 13,003.89 acres in

trust for the Nation. Under the selected alternative, 4,284 of the requested acres would not be placed into trust. The selected lands were centered around Turning Stone in Oneida County and OIN's 32-acre territory in Madison County. The decision included lands in the Towns of Verona and Vernon, both located in Oneida County.

The court found that Plaintiffs failed to meet their burden under the APA. The Record demonstrates that Defendants reached a reasonable decision that took account of the applicable regulatory factors. Moreover, Defendants considered and responded to the objections raised by Plaintiffs. Accordingly, the Court found Defendants' decision to acquire the land in trust was not arbitrary and capricious, and that summary judgment is warranted in favor of Defendants on Plaintiffs' arbitrary and capricious claims.

The court granted Defendants' Motion for Summary Judgment on all remaining claims.

5. *Upstate Citizens for Equality, Inc. v. Jewell*

No. 5:08–cv–0633, 2015 WL 1399366 (N.D.N.Y. Mar. 26, 2015). Plaintiffs Upstate Citizens for Equality, Inc. (UCE), a non-profit corporation; and a number of UCE's officers, Richard Tallcot, Daniel T. Warren, Scott Peterman, and David Vickers (collectively, "Plaintiffs"), commenced this action to challenge a Record of Decision issued by Department of the Interior (DOI) taking over 13,000 acres of land in Central New York into trust for the benefit of the Oneida Indian Nation of New York (OIN).[2]

Plaintiffs subsequently submitted an Amended Complaint, which challenged a separate decision by the General Services Administration to transfer 18 acres. Defendants filed a Motion for partial dismissal of Plaintiffs' claims and a Motion to Dismiss Plaintiffs' supplementary claim.

The court granted Defendants' Motions in their entirety. Defendants moved for summary judgment on the remaining claims in Plaintiffs' Complaint and Plaintiffs filed a letter motion for summary judgment.

A newly central issue raised in Plaintiffs' challenge to the ROD was whether OIN was eligible to have land taken into trust under

[2] *See supra* Part I.B(4) (detailing factual background).

the IRA in light of the Supreme Court's recent decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009). In *Carcieri*, the Supreme Court determined that the word "now" in the definition of "Indian" in the IRA – "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction" – meant the date of the IRA's enactment in 1934. *Carcieri*, 555 U.S. at 381. Thus, to be eligible to have land taken into trust under the IRA, a tribe must have been under federal jurisdiction in 1934.

Since *Carcieri* had not been addressed in the ROD, the court issued a Memorandum–Decision and Order denying all motions for summary judgment across the related cases, and remanding to DOI to establish a record and determine in the first instance whether OIN was under federal jurisdiction in 1934.

DOI filed an Amendment to the ROD applying *Carcieri* to OIN, consistent with the Court's remand. The opinion concluded that OIN "was under federal jurisdiction in 1934 because the Oneidas voted in an election called and conducted by the Secretary of the Department of the Interior pursuant to Section 18 of the IRA on June 18, 1936." The Opinion determined that while the vote alone was sufficient, there were a number of other federal actions which, "either in themselves or taken together," establish that OIN was under federal jurisdiction in 1934.

The court granted Defendants' Motion for Summary Judgment on all remaining claims.

C. April–June Cases

1. *Patchak v. Jewell*

109 F. Supp. 3d 152 (D.D.C. 2015). This case was before the court on remand from the United States Court of Appeals for the District of Columbia and the Supreme Court of the United States. Plaintiff, David Patchak, challenged the Secretary of the Interior's (Secretary) decision to take into trust two parcels of land in Allegan County, Michigan, on behalf of the Intervenor–Defendant Match–E–Be–Nash–She–Wish Band of Pottawatomi Indians (the "Tribe") pursuant to the Indian Reorganization Act (IRA), 25 U.S.C. § 465.

Since this case was remanded, two events have altered the legal landscape. First, on September 3, 2014, the Secretary issued an Amended Notice of Decision concerning the Tribe's fee-to-trust application for two other parcels of land it sought to acquire. In so doing, the Secretary expressly considered, and confirmed, its authority under the IRA to take land into trust on behalf of the Tribe. Second, on September 26, 2014, President Obama signed into law the Gun Lake Trust Land Reaffirmation Act (Act). The Act declares as follows: "The land taken into trust by the United States for the benefit of the Match–E–Be–Nash–She–Wish Band of Pottawatomi Indians . . . is reaffirmed as trust land, and the actions of the Secretary of the Interior in taking that land into trust are ratified and confirmed. . . . Notwithstanding any other provision of law, an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the land . . . shall not be filed or maintained in a Federal court and shall be promptly dismissed."

This action was therefore dismissed.

II. CHILD WELFARE LAW AND ICWA

A. 2014 Cases

1. *In re Alexandria P.*

176 Cal. Rptr. 3d 468 (Cal. Ct. App. 2014). County Department of Children and Family Services (DCFS) filed dependency petition. The superior court, No. CK58667, sustained jurisdictional allegations, terminated father's reunification services, and scheduled a hearing for termination of parental rights, granted de facto parent status to foster parents, found that foster parents had not demonstrated good cause to depart from Indian Child Welfare Act (ICWA) placement preferences, and ordered a gradual transition for the child to move from the foster parents' home to pre-adoptive placement in child's paternal step-grandfather's niece's home. Foster parents appealed.

The appellate court held that: (1) foster parents lacked standing to challenge constitutionality of ICWA placement preferences; (2) child's tribe's consent to foster care placement with a family outside of foster care placement preferences identified in ICWA

did not waive ICWA adoption placement preferences; (3) clear and convincing standard of proof applied to determinations of good cause to depart from ICWA placement preferences; (4) departure from ICWA placement preferences required significant risk of serious harm to child, not certainty of serious harm; (5) trial court was required to consider the bond between child and her foster family in determining whether to depart from ICWA placement preferences; and (6) trial court was required to consider best interest of child in determining whether to depart from ICWA placement preferences.

Reversed and remanded with directions.

2. *In re Candace A.*

332 P.3d 578 (Alaska 2014). The Office of Children's Services (OCS) filed a petition to adjudicate Indian child as a child in need of aid. The superior court adjudicated child as a child in need of aid and ordered her to be returned to her parents' home. The OCS appealed.

The Supreme Court of Alaska held that the Indian Child Welfare Act's (ICWA) requirement that any decision to place an Indian child with someone other than the child's parent or Indian custodian must be "supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child" did not require the expert to have expertise in Alaskan Native culture, and thus social workers could qualify as experts.

Reversed and remanded.

3. *In re J.S.*

E060554, 2014 WL 4467529 (Cal. Ct. App. Sept. 11, 2014). County department of public social services filed dependency petition. The superior court, No. INJ1200541, terminated both parents' parental rights. Both parents appealed.

The appellate court held that: (1) tribe's letter established that child, who was merely eligible for enrollment, was not a member; (2) court rule requiring dependency court to direct the department to make active efforts to obtain tribal enrollment for an eligible child was invalid; and (3) substantial evidence reflected that

department fulfilled any obligation it might have had to assist with tribal membership application.

Affirmed.

4. *In re M.S.*

2014 MT 265, 376 Mont. 394, 336 P.3d 930. Department of Public Health and Human Services filed petition to terminate parental rights of mother and Indian father to Indian child. Notice was given to father's tribe, and tribe intervened. The petition was dismissed and then refiled. Mother voluntarily relinquished her parental rights. The Eighth Judicial District court entered order terminating father's parental rights, and he appealed.

The Supreme Court of Montana held that: (1) evidence did not show that Department strictly complied with requirements for notice to tribe under Indian Child Welfare Act; (2) Department's failure to strictly comply with notice requirements was harmless error; (3) Department made active efforts to provide remedial services and rehabilitative programs designed to prevent breakup of Indian family, as prerequisite to termination of father's parental rights; (4) district court adequately found that continued custody of child by father was likely to result in serious emotional or physical damage to child; and (5) termination of parental rights was not by summary judgment.

Affirmed.

5. *Dep't of Human Serv. v. J.M.*

338 P.3d 191 (Or. Ct. App. 2014). In child dependency proceedings, parents appealed judgment of the circuit court changing the permanency plan for their child from reunification to adoption.

The appellate court held that: (1) permanency hearing was not a key juncture in which due process prohibited admission of exhibits under relaxed standards for competency of evidence; (2) agency provided active efforts to parents under Indian Child Welfare Act (ICWA); (3) father and mother failed to make sufficient progress to allow child to return home safely; and (4) change in plan from reunification to adoption was not a "foster care placement" under ICWA.

Affirmed.

6. *In re L.S.*

179 Cal. Rptr. 3d 316 (Cal. Ct. App. 2014). County Health and Human Services Agency filed dependency petition alleging children were at risk. Following contested dispositional hearing, parents filed motion to modify bypass order and sought reunification services. The superior court denied the motion, terminated parental rights, and selected adoption as the children's permanent plan. Parents appealed.

The appellate court held that: (1) preponderance of the evidence burden of proof applied to parents' petitions for modification; (2) error in applying heightened clear and convincing evidence standard of proof was not harmless; (3) court was required to consider whether Indian Child Welfare Act applied; and (4) beneficial parental relationship exception did not apply.

Reversed and remanded.

7. *In re Interest of Shayla H.*

855 N.W.2d 774 (Neb. 2014). The Department of Health and Human Services (DHHS) initiated dependency proceedings concerning father's three Native American children. The Juvenile Court adjudicated children as dependent, and subsequently entered dispositional order that the DHHS had made reasonable efforts at reunification, but that it was in best interests of children that father have only physical custody of children and that DHHS retain legal custody. Father appealed.

The appellate court, 22 Neb. App. 1, 846 N.W. 2d 668, affirmed in part, reversed in part, and remanded. DHHS petitioned for review.

The Supreme Court of Nebraska held that in dependency proceedings involving Native American children, DHHS had to make active efforts at reunification, not merely reasonable efforts, pursuant to Indian Child Welfare Act and Nebraska Indian Child Welfare Act.

Affirmed.

8. *Asa'carsarmuit Tribal Council v. Wheeler III*

337 P.3d 1182 (Alaska 2014) Father filed emergency motion to modify custody after State initiated Child In Need of Aid (CINA) action against mother. Tribal council which had issued original custody order was permitted to intervene. The superior court awarded father primary physical custody. Council appealed.

The Supreme Court of Alaska held that council lacked standing to appeal order modifying custody from which neither father nor mother appealed.

Appeal dismissed.

9. *Ebert v. Bruce L.*

340 P.3d 1048 (Alaska 2014). Sometime in early 2007, "Connie" approached Holly and William Ebert, a married couple she knew from church, about adopting her child. The Eberts agreed to the adoption. "Bruce" and Connie began a relationship in August 2006. At some point, Connie told Bruce that she was pregnant and was considering giving up the child for adoption. Bruce objected to the adoption.

In late December 2007, Bruce filed a complaint for custody of the child, "Timothy." In July 2008 the Eberts filed an adoption petition and intervened in Bruce's custody case. The court granted physical custody to the Eberts and semiweekly visitation to Bruce. The court also ordered Bruce to pay $50 per month in child support, retroactive to 2007; over the next four months, Bruce paid a total of $200 in support.

In May 2009 the superior court held a trial on the adoption petition and the custody dispute. In post-trial briefing, Bruce argued that the Indian Child Welfare Act (ICWA) compelled the court to grant Bruce custody of Timothy and prevented the Eberts from adopting Timothy without Bruce's consent. The Eberts argued that Bruce could not invoke ICWA to prevent the adoption because he was not a "parent" for purposes of the statute until he established paternity in late 2008. They also argued that ICWA § 1912(d)'s "active efforts" provision did not apply in a private adoption, particularly when the parent seeking to invoke ICWA had no meaningful connection to any tribe.

The Supreme Court of Alaska found that under AS 25.23.050(a)(2)(B), the consent of a noncustodial parent was

not required for adoption if that parent unjustifiably fails to support the child. But the superior court did not clearly err by concluding that Bruce had justifiable cause for his failure to support the child.

10. *In re S.B.C.*

2014 MT 345, 377 Mont. 400, 340 P.3d 534. The Department of Public Health and Human Services, Child and Family Services Division ("Department"), sought permanent legal custody of Indian child with right to consent to adoption. The district court terminated both parents' rights to the child, and granted the Department permanent legal custody with right to consent to adoption. Mother and father appealed.

The Supreme Court of Montana held that: (1) good cause existed to deny transfer of jurisdiction over custody matter involving Indian child to the tribal court; (2) the proceeding had not advanced to a stage that rendered the Tribe's motion for transfer of jurisdiction to the tribal court untimely as a matter of law; (3) Indian Child Welfare Act section, providing that "no termination of parental rights may be ordered in the absence of testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child," did not apply where father never had custody of the child; and (4) the District court did not abuse its discretion in terminating mother's parental rights.

Affirmed.

B. January–March Cases

1. *In re H.G.*

234 184 Cal. Rptr. 3d 323 (Cal. Ct. App. 2015). At the start of the dependency proceedings, the juvenile court and Ventura County Human Services Agency believed the Indian Child Welfare Act (ICWA), 25 U.S.C. 1901, did not apply to Eskimo families. Father and mother appealed from the order terminating parental rights to their two minor children and selecting adoption as the permanent plan. Welf. & Inst. Code 366.26.

The court of appeal reversed.

Evidence submitted for the first time on appeal established that the children are Indian children under ICWA. The federal definition of "Indian" includes "Eskimos and other aboriginal peoples of Alaska." The Noorvik Native Community, a federally recognized Alaskan Indian tribe confirmed that the minors are tribe members.

Before terminating parental rights to an Indian child, the juvenile court must satisfy ICWA requirements, including finding that "active efforts" were made to provide services designed to prevent the breakup of the Indian family, and that parents' continued custody of minors "is likely to result in serious emotional or physical damage."

Having found ICWA inapplicable, the juvenile court did not consider these requirements before terminating parental rights; NNC was not afforded an opportunity to intervene.

C. April–June Cases

1. *J.N.T. v. Cullman Cnty. Dep't. of Human Res.*

181 So. 3d 353 (Ala. Civ. App. 2015). Department of Human Resources (DHR) filed petition seeking to terminate the parental rights of mother and father. The Cullman Juvenile Court, No. JU–13–46.03, terminated parents' parental rights, and mother appealed.

The appellate court held that juvenile court failed to comply with the notice requirements of the Indian Child Welfare Act when it conducted termination of parental rights hearing less than 10 days after the tribe received notice of termination action.

Reversed and remanded.

D. July–August Cases

1. *In re Natalie P.*

No. D067689, 2015 WL 4072120 (Cal. Ct. App. Jul. 6, 2015). Erika P. appealed following the jurisdictional and dispositional hearing in the juvenile dependency case of her daughter, Natalie P. Erika contended the juvenile court erred by finding the San Diego County Health and Human Services Agency (the Agency)

substantially complied with the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901) and ICWA did not apply.

The Agency conceded ICWA notice should have been sent to the Cherokee tribe, the ICWA–030 form was incomplete, and contained typographical errors, and a reversal and a limited remand was necessary to effect and document proper ICWA notice.

The appellate court reversed the judgment and remanded the case to juvenile court with directions to order the Agency to: (1) conduct an ICWA inquiry; (2) provide ICWA notice to any tribes the inquiry identifies; and (3) file all required documentation with the court. If, after proper notice, a tribe claims Natalie was an Indian child, the court shall proceed in conformity with ICWA. If, on the other hand, no tribe makes such a claim, the court shall reinstate the judgment.

2. *In re Adoption of T.A.W.*

188 Wash. App. 799 (Jul. 7, 2015). Indian mother and her husband petitioned to terminate non-Indian biological father's parental rights to Indian son and to allow husband to adopt son. The superior court granted petition. Father appealed.

The appellate court held that: (1) father could raise the "active efforts" requirement of Indian Child Welfare Act (ICWA) for the first time on appeal; (2) termination provisions of ICWA applied to non-Indian father; and (3) under Washington law, "active efforts" requirement applies to a parent who has had custody of an Indian child and has not expressly relinquished parental rights even if that parent at some point in time has abandoned the child.

Reversed and remanded.

3. *D.B. v. M.H.*

No. E062459, 2015 WL 4629292 (Cal. Ct. App. Aug. 4, 2015). M.H., the mother of J., D. and E., and E.F., the father of E., appealed from an order terminating their parental rights to D. and E. The court rejected their contentions concerning the denial of their petitions to modify the order terminating reunification services and the court's finding that neither the beneficial parental relationship exception to the statutory preference for adoption nor the sibling relationship exception applied. However, the court

agreed that conditional reversal was required in order for the Riverside County Department of Public Social Services to comply with its obligations under the Indian Child Welfare Act of 1978 (ICWA) (25 U.S.C. § 1901).

The judgment terminating parental rights as to E. and D. was reversed, and the case was remanded to the juvenile court with directions to order the Riverside County Department of Public Social Services to comply with the inquiry and notice requirements of ICWA. If, after proper notice, the juvenile court finds that either child is an Indian child as defined by ICWA, the court will proceed in conformity with all provisions of ICWA. If, on the other hand, the court finds after proper notice that either E. or D. is not an Indian child, the judgment terminating parental rights shall be reinstated as to that child.

The judgment is otherwise affirmed.

III. CONTRACTING

A. 2014 Cases

1. *Gatzaros v. Sault Ste. Marie Tribe of Chippewa Indians*

575 F. App'x 549 (6th Cir. 2014). Ted and Maria Gatzaros (Plaintiffs) appealed the dismissal of their suit against the Sault Ste. Marie Tribe of Chippewa Indians (the Tribe) and the Kewadin Casinos Gaming Authority (the Authority). They sought to recover approximately $74 million under a guaranty agreement that was signed by the Tribe and the Authority. In the subscription agreement, Kewadin Greektown Casino, LLC agreed to pay Monroe Partners, LLC the amounts owed to Plaintiffs under the redemption agreement as those payments came due.

The subscription agreement required Kewadin Greektown Casino LLC to obtain a limited guaranty agreement from the Tribe and the Authority binding them to pay the subscription amount in the event that Kewadin Greektown Casino, LLC defaulted on its obligations under the subscription agreement. On the same day the redemption and subscription agreements were executed, the Tribe and the Authority executed the guaranty agreement.

Kewadin Greektown Casino, LLC and Monroe Partners, LLC filed for Chapter 11 bankruptcy protection in the Eastern District

of Michigan. In 2012, Plaintiffs undertook efforts to recover nearly $74 million in principal and interest still owed to them under the redemption agreement. Plaintiffs' counsel notified the Tribe and the Authority by letter that Plaintiffs, standing in the shoes of Monroe Partners, LLC as third-party beneficiaries to the guaranty agreement, were modifying and accelerating the Funding Obligations.

By unilateral action, Plaintiffs eliminated the limitations that had set the necessary conditions precedent on the obligation of the Tribe and the Authority to pay under the guaranty agreement if Kewadin defaulted on the subscription agreement.

The court found that because the guaranty agreement was unambiguous and the applicable law is clear, it had no basis on which to remand the matter to the district court for the taking of extrinsic evidence. One party to a contract may not unilaterally rewrite the agreement to obtain more favorable terms. Contract modification requires mutuality of consent, and that element was missing.

The appellate court affirmed the judgment of the district court.

2. *Menominee Indian Tribe of Wis. v. United States*

764 F.3d 51 (D.C. Cir. 2014). Indian tribe that operated health care system for tribal members pursuant to self-determination contract with Secretary of Health and Human Services (HHS) brought action against HHS, alleging breach of that contract. The district court, 539 F. Supp. 2d 152, dismissed tribe's claims in part, and, 2008 WL 3919158, denied tribe's motion to reconsider.

The appellate court, 614 F.3d 519, reversed and remanded. On remand, the District court, 841 F. Supp. 2d 99, granted summary judgment in favor of government. Tribe appealed. The appellate court held that: (1) tribe's miscalculation that it would be eligible to participate in class action was not an extraordinary circumstance warranting equitable tolling of applicable limitations period; (2) alleged certainty of failure tribe faced in bringing its claims was not an extraordinary circumstance that warranted equitable tolling; and (3) series of events that tribe faced in bringing its claims did not jointly amount to an extraordinary circumstance.

Ordered accordingly.

3. *Pyramid Lake Paiute Tribe v. Burwell*

70 F. Supp. 3d 534 (D.D.C. 2014). The Pyramid Lake Paiute Tribe submitted a contract proposal to the Secretary of Health and Human Services under the Act for funding to operate an emergency medical services (EMS) program that the Indian Health Service (IHS), a component of Health and Human Services, had been funding directly since 1993. After receiving the Tribe's proposal, the Secretary discontinued the EMS program, which IHS viewed as financially untenable, and denied the Tribe's request on the ground that the agency would not have funded the program going forward. The tribe brought suit and moved for summary judgment, arguing that the Secretary lacked authority to deny the proposal.

The Court granted summary judgment in favor of the tribe because the Secretary did not rest her decision on any of the enumerated declination criteria available under the Indian Self Determination and Education Assistance Act.

4. *Farmer v. United States*

No. CV–13–0251, 2014 WL 5419637 (E.D. Wash. Oct. 22, 2014). Before the court was the Motion To Dismiss filed by Defendant United States. Plaintiff seeks to recover damages for injuries sustained as a result of alleged negligence by Defendant, Ron Shaffer. According to Plaintiff's First Amended Complaint, he was working for Jones Brothers Construction in Inchelium, Washington on October 25, 2011. Plaintiff was part of a construction crew that was building a pole-style structure for the local Fire Hall/EMT Unit. The structure was being constructed pursuant to a contract between Confederated Tribes of The Colville Indian Reservation and Jones Brothers Construction. Plaintiff alleges that on that day, "[a]n EMT on duty for the Colville Confederated Tribes EMT Unit, Ronald L. Shaffer, took it upon himself to help the construction crew." According to the First Amended Complaint, while Plaintiff was on a ladder setting girder trusses, "Mr. Shaffer negligently swung a sledge hammer and struck [Plaintiff's] left hand with the sledge hammer causing [a] fracture to his long finger and other injuries."

Plaintiff sued the United States under the Federal Tort Claims Act (FTCA), 26 U.S.C. § 2674. He sued Mr. Shaffer and his wife,

presumably, for common law negligence under the court's supplemental jurisdiction, 28 U.S.C. § 1367(a). Pursuant to Fed.R.Civ.P. 12(b)(1), the United States moved to dismiss the FTCA claim against it, asserting there was no subject matter jurisdiction because Mr. Shaffer was not acting pursuant to the contract between the U.S. Department of Health and Human Services (HHS) and the Colville Confederated Tribes, and furthermore, was not acting within the scope of his employment with the Tribes.

The Motion to Dismiss filed by Defendant United States of America was denied. The FTCA claim against the United States may proceed. Pursuant to 28 U.S.C. § 2679(b)(1), this was the exclusive remedy and no claims may be maintained against Mr. Shaffer individually. Accordingly, named Defendants Ron and Rebecca Shaffer were dismissed with prejudice as were any claims asserted against them under the FTCA or common law.

5. *California v. Picayune Rancheria of Chukchansi Indians of Cal*

No. 114–CV–01593, 2014 WL 5485940 (E.D. Cal. Oct. 29, 2014). The Picayune Rancheria of Chukchansi Indians of California (Tribe) operates the Chukchansi Gold Resort and Casino (Casino), in Madera County, California pursuant to a class III gaming compact with the State of California (State). An intra-tribal dispute exists among various Tribal members, which led to three or more separate groups claiming leadership rights over the Tribe and rights to control the Casino.

On October 9, 2014, this intra-tribal dispute led to an armed conflict on the grounds of the Casino. As a result, on October 10, 2014, the State petitioned for, and this court issued, a temporary restraining order, restraining and enjoining, among other things, the operation of the Casino, any further attempts to repossess or take control of the Casino, or the deployment of armed personnel of any nature (other than State, County, or federal law enforcement) within 1000 yards of the Casino and nearby properties.

The State filed a lawsuit on October 10, 2014, alleging that the actions taken by the various factions resulted in a breach of the Compact's public health, safety, and welfare provisions. Also on October 10, 2014, the National Indian Gaming Commission issued

a Notice of Violation and Temporary Closure Order. The vying factions have presented competing evidence of their own right to govern the Tribe. The Lewis/Ayala Faction presented correspondence from the Bureau of Indian Affairs (BIA) reflecting the BIA's determination to conduct business with the "last uncontested Tribal Council" elected in December 2010, which the Lewis/Ayala Faction claimed to represent.

The McDonald Faction likewise presented evidence purporting to establish that it was the duly elected governing body of the tribe. All parties and the court itself agreed that the court did not have jurisdiction to adjudicate this governance dispute.

The court grants the State's request for a preliminary injunction.

6. *Maniilaq Association v. Burwell*

72 F. Supp. 3d 227 (D.D.C. 2014). Indian tribe administering healthcare systems through a self-determination compact and annual funding agreements under the Indian Self–Determination and Education Assistance Act (ISDEAA) filed suit against Indian Health Service (IHS) seeking a declaration that a lease for one of the clinics the tribe operated under its compact was incorporated into its funding agreement as a matter of law. Both sides moved for summary judgment.

The court held that: (1) letter sent to IHS by Indian tribe constituted "final offer" for purposes of triggering 45-day time period for agency to respond under ISDEAA; (2) clinic lease was properly included in funding agreement pursuant to ISDEAA; and (3) final offer concerning lease was deemed accepted when IHS failed to respond to proposal within 45 days.

Plaintiff's motion for summary judgment was granted and defendant's motion was denied.

7. *Cloverdale Rancheria of Pomo Indians of Cal. v. Jewell*

593 F. App'x 606 (9th Cir. 2014). Plaintiffs–Appellants are five members of the Cloverdale Rancheria of Pomo Indians of California (Tribe) who seek to compel Defendants–Appellees, the Department of Interior and its officials (Department), to recognize them as the Tribe's leadership and negotiate self-determination contracts with them. The district court dismissed both of Plaintiffs–

Appellants' complaints for lack of subject matter jurisdiction and lack of standing.

This case came after years of dispute about the governance of the Tribe following its restoration to federally recognized status. This history was known to the parties. Suffice it to say that over the years various factions of the Tribe had asked the Department to recognize them as the Tribe's duly-elected government. Plaintiffs–Appellants failed to show why the federal courts could now compel the Department to intervene in this long-running intra-tribal dispute.

The asserted duty was an obligation of the Department to accept or reject Plaintiffs–Appellants' contract proposals in conformity with the criteria set out in ISDA § 450f(a) and a series of related regulations. This purported duty furnished subject matter jurisdiction under the APA only if it was owed to Plaintiffs–Appellants. It was not. Only an "Indian tribe" or a "tribal organization" is authorized to submit a contract proposal. *See* 25 U.S.C. § 450f(a)(1)–(2).

Plaintiffs–Appellants are not entitled to act on behalf of a federally recognized "Indian tribe," however, because they are not the Tribe's recognized governing body. For the same reason, even if Plaintiffs–Appellants constituted a "tribal organization," 25 U.S.C. § 450b(l), they were not entitled to submit a contract proposal because they were not "authorized" to do so by the Tribe's governing body, as § 450f(a)(2) requires.

For these reasons, Plaintiffs–Appellants lack statutory standing to sue, even if ISDA, rather than the APA, supplied the necessary subject matter jurisdiction, as the district court assumed it did.

Therefore, the district court did not err in dismissing Plaintiffs–Appellants' fourth, fifth, and sixth claims. Finally, the district court lacked subject matter jurisdiction under APA § 706(2) to hear Plaintiffs–Appellants' sixth claim, that the Department acted arbitrarily and capriciously, in abuse of its discretion, or otherwise unlawfully when it returned Plaintiffs–Appellants' proposed ISDA contracts and when it modified and renewed existing ISDA contracts at the request of the Tribe's recognized governing body. The Department's return of Plaintiffs–Appellants' contract

proposals ddid not constitute "action"; rather, it was the equivalent of a "return to sender" notification.

Even if it were action, Plaintiffs–Appellants did not exhaust their administrative appeals. *See White Mountain Apache Tribe v. Hodel*, 840 F.2d 675, 677 (9th Cir. 1988). The same is true of Plaintiffs–Appellants' complaints about the Department's contract negotiations with their rivals.

For the foregoing reasons, the court affirmed the district court's dismissal of both of Plaintiffs–Appellants' complaints.

Affirmed.

8. *Shirk v. United States*

773 F.3d 999 (9th Cir. 2014). Motorcyclist injured as a driver attempted to flee tribal police brought Federal Tort Claims Act (FTCA) claims against the United States, claiming the two tribal police officers acted negligently when they encountered the driver off-reservation and that such negligence caused the motorcyclist's injuries. The district court, 2010 WL 3419757, dismissed for lack of subject matter jurisdiction. The motorcyclist appealed.

As a matter of first impression, the appellate court held that in order for an Indian tribe, tribal organization, or Indian contractor to be deemed part of the Bureau of Indian Affairs, a court must determine whether the allegedly tortious activity is encompassed by the relevant federal contract or agreement with an Indian tribe, and decide whether the allegedly tortious action falls within the scope of the tortfeasor's employment under state law.

Vacated and remanded.

B. April–June Cases

1. *Colbert v. United States*

785 F.3d 1384 (11th Cir. 2015). The United States challenged subject matter jurisdiction, namely, the district court's partial summary judgment ruling that, under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346, and pursuant to the self-determination contract entered into between the United States Department of Interior, Bureau of Indian Affairs (BIA), and the Navajo Nation Tribe, 25 U.S.C. § 450f1, Navajo Nation Department of Justice

Attorney Kandis Martine was "deemed" an employee of the BIA and afforded the full protection and coverage of the FTCA.

The district court determined that given Martine's role in connection with the Navajo Nation Child & Family Services Program, and its efforts to oppose the adoption of a Navajo child by a non-Navajo family in Florida state court, Martine was entitled to protection under the FTCA. As a result, the district court dismissed Martine from the lawsuit and held that the United States was the proper party-defendant, 28 U.S.C. § 2679(d)(3). On appeal, the United States contends the district court erred in finding as a factual matter that Martine was "carrying out" work under the self-determination contract.

The court of appeals held that the provision of FTCA coverage to Martine did not constitute an improper extension of the waiver of sovereign immunity. § 314 of the Indian Self-Determination Act plainly extended the United States' waiver of sovereign immunity to Indian tribes, tribal organizations, Indian contractors and their employees that are engaged in functions authorized under a self-determination contract. Because Martine's work fell within the identifiable functions of the Navajo self-determination contract, the district court's application of the law to these facts comports with sovereign immunity principles.

Affirmed.

2. *Yurok Tribe v. Dep't of the Interior*

785 F.3d 1405 (Fed. Cir. 2015). The Yurok Tribe petitioned for review of the Civilian Board of Contracting Appeals' dismissal of its action for approval of a self-determination contract. 2014 WL 718420. The tribe requested a contract for its Department of Public Safety and Tribal Court. The Office of Self-Governance responded timely directing the tribe to the Bureau's Office of Justice Services ("Bureau"). It is undisputed that the Bureau did not decline the proposal within 90 days of receiving it. The Tribe appealed to both the Board of Contract Appeals and the Interior Board of Indian Appeals (IBIA) because of uncertainty whether the deemed contract had arisen by operation of law or the appeal presented a pre-award dispute. The IBIA action was stayed. The Board of Contract Appeals granted the government's Motion to Dismiss.

The Federal Circuit could not affirm on either of the Board's grounds for dismissal, but found that other grounds to affirm dismissal because the case presented a pre-award dispute. 25 U.S.C. § 450f(a)(2) provided that "the Secretary shall, within 90 days after receipt of the proposal, approve the proposal and award the contract." Both the statute and the regulations distinguish between approval and award of the contract.

C. July–August Cases

1. *Guidiville Rancheria of Cal. v. United States*

No. 12-cv-1326, 2015 WL 4934408 (N.D. Cal. Aug. 18, 2015). Defendant City of Richmond (City) filed a Motion for Attorneys' Fees and Costs, seeking an award of attorneys' fees in the amount of $2,149,370.002 jointly and severally against Upstream Point Molate, LLC (Upstream) and the Guidiville Rancheria of California (Tribe).

The City's claim for attorneys' fees was based on the contract Plaintiffs alleged in their complaint, the Land Disposition Agreement (LDA). The LDA underlid the claims between the parties and was the basis upon which Plaintiffs alleged entitlement to attorneys' fees in the complaint.

The Tribe argued vigorously that: (1) seeking fees under the LDA did not constitute a waiver of its tribal sovereign immunity; and (2) even if the filing of the instant lawsuit constituted a waiver, the LDA still does not establish a basis for the City's fee request since it was neither a party to the LDA nor had it been determined to be a third party beneficiary of the LDA. To be sure, the LDA was an agreement between the City and Upstream. However, the allegations of the TAC convincingly stated the Tribe's position that it was a third party beneficiary of the LDA, including the attorneys' fees provision. The Tribe "d[id] not dispute that bringing the lawsuit against the City binds it to the Court's determination . . . that the [LDA] was not breached" and that, if the Tribe had prevailed in a claim for money damages, the City could make an offset claim against the Tribe for any monies the Tribe might have owed the City.

The question was whether including a claim for attorneys' fees under § 8.8 of the LDA and Civil Code § 1717 effected an express

waiver for a reciprocal claim for attorneys' fees by the City if it were to prevail in the litigation.

The court found, based upon these provisions of the LDA, and upon the Tribe's affirmative assertion of rights under the attorneys' fees provision in the LDA specifically, that the motion for attorneys' fees was within the scope of waiver of immunity worked by the filing of the lawsuit. The prevailing party's right to attorneys' fees was the inevitable consequence of the Tribe's conduct. By asserting the claim for attorneys' fees under Section 8.8 of the LDA, the Tribe took the risk that it would not prevail on its claims under the agreement, and that liability for the prevailing party attorneys' fees would be the result.

Therefore, the Tribe was jointly liable with Upstream for the award of reasonable attorneys' fees. Based upon the foregoing, the Court found that the City was entitled to attorneys' fees in the amount of $1,927,317.50 as against Plaintiffs Upstream and Guidiville Rancheria.

IV. EMPLOYMENT

A. 2014 Cases

1. *EEOC v. Peabody Western Coal Co.*

No. 12–17780, 2014 WL 4783087 (9th Cir. Sept. 26, 2014). Equal Employment Opportunity Commission (EEOC) brought action against company that mined coal on Hopi and Navajo reservations under leases with the tribes, and against tribe, alleging lease requirements that company gave preference in employment to Navajo Indians was national origin discrimination in violation of Title VII. Company impleaded the Secretary of the Interior and counterclaimed against the EEOC for declaratory relief.

The district court denied EEOC's motion to supplement the record and, 2012 WL 5034276, granted summary judgment for the Secretary and tribe on the ground that the tribal hiring preferences in the leases were permissible under Title VII. EEOC appealed.

The appellate court held that: (1) on question of first impression, Title VII's prohibition against national origin discrimination did not prohibit the leases' tribal hiring preferences; (2) district court did not abuse its discretion by denying, as

untimely, EEOC's request to supplement the record; and (3) EEOC waived on appeal its claim that company violated Title VII's record-keeping requirements.

Affirmed.

B. January–March Cases

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

No. 14–2598, 2015 WL 1137733 (D. Kan. Mar. 13, 2015). Before the court was a motion brought by defendant Sac & Fox Casino Healthcare Plan to dismiss or stay for failure to exhaust tribal remedies. The motion asked the court to rule as a matter of comity that before bringing a claim in federal court, plaintiff must bring an ERISA action for recovery of insurance benefits under the casino's nongovernmental plan in tribal court.

The court assumed for purposes of the order that plaintiff was not a member of the Sac & Fox Tribe and that the Plan was not a "governmental plan" as defined in ERISA.

The amended complaint in this case alleged: Plaintiff was an employee of the Sac & Fox Casino. In the summer of 2011, plaintiff, while still an employee of the casino, incurred substantial medical expenses in relation to a pregnancy and the birth of a premature baby. Plaintiff asserted that some or all of these expenses charged to her are the responsibility of defendant Sac & Fox Casino Healthcare Plan, which, she alleged, is an employee welfare benefit plan governed by ERISA.

Defendants refused to pay what plaintiff asserted is owed pursuant to the provisions of the Plan. Plaintiff asserted that she had exhausted her administrative remedies under the Plan and, specifically, that defendants Benefit Management, Inc. and the Plan had denied plaintiff's claims for payment. Plaintiff further alleged in response to the motion to dismiss that the Plan stated that a Plan member may file a claim for benefits "in a state or federal court" and that there was no reference to tribal courts in the Plan.

This allegation was not disputed in defendant Plan's reply brief. The Sac & Fox Casino is a non-corporate operating arm of the tribe. The casino maintained a self-funded plan of healthcare benefits. Money to fund the plan came from the casino's general

operating expenses. A judgment against the plan would likely come directly from the tribal treasury or the casino's general operating fund.

The court held that Congress preempted the tribe's adjudicatory authority over ERISA claims and, therefore, exhaustion of tribal remedies was not required.

The court denied defendant Plan's motion to dismiss.

2. *Unite Here Local 19 v. Picayune Rancheria of Chukchansi Indians*

101 F. Supp. 3d 929 (E.D. Cal. 2015). Through this action, Petitioner Unite Here Local 19 (Petitioner) sought confirmation and enforcement of a labor arbitration award against Respondents Picayune Rancheria of Chukchansi Indians and Chukchansi Economic Development Authority (collectively, "Respondents").

The parties agreed to submit grievances over the terminations of Casino employees Jarrod Woodcock and Mae Pitman to arbitration. Arbitrator Patrick Halter issued a decision on February 24, 2014, which he served on counsel for the parties by email on the same day.

The arbitrator's decision concluded: "In sum, grievants Woodcock and Pitman were suspended and discharged without just cause. The remedy to cure the numerous violations of the CBA is reinstatement with a make whole remedy that includes backpay with interest, tips for Woodcock, restoration of seniority, contributions to retirement, reimbursement of health insurance premiums and expenses, and any other employment benefits unjustly denied due to their wrongful suspensions and discharges.

Although the Court had issued a preliminary injunction order that restrains operation of the Casino, the order made an exception for "[p]ayments in the ordinary course of business." Respondents' compliance with the arbitration award fell within that explicit exception.

The court granted Petitioner's Motion for Judgment on the Pleadings.

The arbitration award was confirmed and enforced.

C. April–June Cases

1. *Harris v. San Manuel Band of Mission Indians*

EDCV 14-02365 SJO, 2015 U.S. Dist. LEXIS 86944 (C.D. Cal. Apr. 29, 2015). Plaintiff Harris was employed by Defendants as a casino security guard. He was terminated on February 16, 2013. Plaintiff reported instances of sexual harassment and suspected drug use in the workplace to supervisors and alleged that he was wrongfully terminated for the complaints. Plaintiff brought a single state law cause of action for wrongful termination in violation of public police.

Before the Court was Defendants' Motion to Dismiss under Fed. R. Civ. P. 12(b)(1) and 12(b)(7). Plaintiff argued that the Court had subject matter jurisdiction because Defendants were subject to the Indian Gaming Regulatory Act of 1988 and because of the Compact where Defendants waived sovereign immunity and agreed to "comply with standards no less stringent than federal workplace and occupational health and safety standards." Am. Compact §§ 10.2(d), (e).

The court found that the employment law action is not a claim to enforce the Compact, but rather one such ancillary issue over which federal courts lack jurisdiction and that plaintiff failed to allege how a state law claim for wrongful termination constituted a breach of the Compact. The Compact references only federal workplace and occupational health and safety standards, and Plaintiff had not alleged violations of any federal law or standard.

The Court found that it lacked subject matter jurisdiction and granted Defendants Motion to Dismiss and dismissed Plaintiff's Complaint without leave to amend.

2. *Longo v. Seminole Indian Casino-Immokalee*

110 F. Supp. 3d 1252 (M.D. Fla. 2015). This matter was before the court on Defendant Seminole Indian Casino–Immokalee's Motion to Dismiss. Plaintiff Stanley Longo is a former employee of Defendant. Defendant Seminole Indian Casino-Immokalee is a business wholly owned and operated by the Seminole Tribe of Florida.

In October 2008, Defendant hired Plaintiff to serve as a security guard at its casino. Plaintiff enjoyed success in this position until January 2013, when a patron of the casino started to sexually harass, stalk, and physically touch him on a continual basis. Because these actions created a hostile work environment, Plaintiff sought to remedy this situation by reporting the incidents to Defendant. But Defendant failed to take any corrective action. Instead, Defendant terminated Plaintiff's employment one month later, stating that Plaintiff "was 'discourteous to team members."

Based on these facts, Plaintiff brought the instant action against Defendant, asserting four counts: (Count 1) Violation of Title VII of the Civil Rights Act of 1964; (Count 2) Violation of the Florida Civil Rights Act of 1992; (Count 3) Violation of Title II of the Civil Rights Act of 1964; and (Count 4) Violation of the Florida Civil Rights Act of 1992.

Defendant argued that tribal immunity divested the court of subject matter jurisdiction because the Seminole Tribe of Florida was a federally recognized tribe immune from Plaintiff's statutory claims under Title VII and the Florida Civil Rights Act of 1992.

The court held that the Seminole Tribe of Florida was a federally recognized Indian tribe that enjoyed sovereign immunity from this action and granted Defendant Seminole Indian Casino–Immokalee's Motion to Dismiss.

3. *Boricchio v. Casino*

Nos. 14–818, 14–819, 14–820, 14–821, 14–822, 2015 WL 3648698 (E.D. Cal. June 10, 2015). These separate but related cases involved an employment discrimination dispute between Plaintiffs and their former employer, the Defendant Chicken Ranch Casino (Casino).

In each complaint, Plaintiffs alleged three causes of action for violation of 29 U.S.C. § 621. (Age Discrimination in Employment Act (ADEA)) against the Casino and the Chicken Ranch Rancheria of Me–Wuk Indians of California (Tribe), Lloyd Mathiesen (Mathiesen), and James Smith (Smith) (collectively "Defendants"). Defendants moved to dismiss each complaint under Rule 12(b)(1) for lack of subject matter jurisdiction, and alternatively under Rule 12(b)(6) for failure to state a claim. Each Plaintiff was employed at

the Casino, but none of the Plaintiffs were members of the Tribe. Each Plaintiff was over the age of 50.

The court found that Defendants established that they may invoke tribal immunity, and Plaintiffs failed to show either a waiver or abrogation of tribal sovereign immunity. Therefore, Defendants were entitled to tribal sovereign immunity. The Court found it was deprived of subject matter jurisdiction, and dismissed the case.

The motions to dismiss were granted and the complaint of each Plaintiff was dismissed without leave to amend.

D. July–August Cases

1. *Williams v. Poarch Band of Creek Indians*

No. 14–594, 2015 WL 4104611 (S.D. Ala. July 8, 2015). This action was before the court on Plaintiff's Complaint and Defendant's Motion to Dismiss. Plaintiff Williams is a former employee of the Poarch Band of Creek Indians (PBCI). Her Complaint asserted claims of "violations of civil rights (age discrimination) and year of service disparate treatment."

Defendant contended that absent congressional authorization or waiver, PBCI is entitled to tribal sovereign immunity. Defendant further contended that because the Age Discrimination Employment Act (ADEA) did not abrogate the doctrine of tribal sovereign immunity, PBCI maintained its immunity rendering the court powerless to hear Plaintiff's Complaint.

Additionally, Defendant contended that not only was congressional authorization or waiver lacking, but the ADEA was silent with respect to allegations addressing congressional authorization of private lawsuits under the ADEA, which silence must be construed in PBCI's favor.

The Recommendation of the Magistrate Judge made under 28 U.S.C. § 636(b)(1)(B) was adopted as the opinion of the court.

The court granted Defendant Poarch Band of Creek Indians' Motion to Dismiss for lack of subject matter jurisdiction and dismissed the Complaint.

V. ENVIRONMENTAL REGULATIONS

A. 2014 Cases

1. *Yount v. Salazar*

Nos. CV11–8171, CV12–8038, CV12–8042, CV12–8075, 2014 WL 4904423 (D. Ariz. Sept. 30, 2014). This case concerned a withdrawal by the Secretary of the Interior of more than one million acres of federal land from uranium mining.

The withdrawn land surrounded Grand Canyon National Park and included a North Parcel of approximately 550,000 acres, an East Parcel of approximately 135,000 acres, and a South Parcel of some 322,000 acres. The withdrawal would close these lands to the exploration and development of uranium mining claims for 20 years, although mining of a few existing claims would be permitted.

Plaintiffs in this case included counties, associations, companies, and an individual with interests in uranium mining. They asked the court to set aside the withdrawal as illegal under several federal statutes.

Plaintiffs' claims under the FLPMA and the Administrative Procedures Act remained. Plaintiff Yount also alleged that the Withdrawal's stated purpose of protecting the cultural and religious heritage of Native American tribes violated the Establishment Clause of the United States Constitution.

Ultimately, the question in this case was whether DOI, when faced with uncertainty due to a lack of definitive information, and a low risk of significant environmental harm, could proceed cautiously by withdrawing land for a period of time under the FLPMA.

The court could find no legal principle that prevented DOI from acting in the face of uncertainty. Nor could the court conclude that the Secretary abused his discretion or acted arbitrarily, capriciously, or in violation of law when he chose to err on the side of caution in protecting a national treasure—Grand Canyon National Park.

It was ordered that Defendants' motions for summary judgment are granted. Plaintiffs' motions for summary judgment was denied.

B. July–August Cases

1. *Pit River Tribe v. Bureau of Land Management*

793 F.3d 1147 (9th Cir. 2015). Indian tribe and environmental organizations brought actions alleging that Bureau of Land Management's (BLM) continuation of geothermal leases violated Geothermal Steam Act, National Environmental Policy Act, National Historic Preservation Act, and federal government's fiduciary trust obligation to Indian tribes.

After cases were consolidated, the district court entered judgment on pleadings in BLM's favor, and plaintiffs appealed.

The appellate court held that: (1) tribe had standing to bring private cause of action under Geothermal Steam Act, and (2) fact issues remained as to whether BLM used improper legal standard in continuing leases.

2. *Organized Village of Kake v. U.S. Dept. of Agric.*

795 F.3d 956 (9th Cir. 2015). Village and others brought action against Department of Agriculture, alleging that exemption of national forest from roadless rule violated the National Environmental Policy Act and the Administrative Procedure Act, and the state of Alaska intervened as a defendant.

The district court, 776 F. Supp. 2d 960, granted summary judgment to village. Alaska appealed. The appellate court, 746 F.3d 970, reversed and remanded.

On rehearing en banc, the appellate court held that: (l) Alaska demonstrated that it would suffer an injury in fact if roadless rule was implemented; (2) Department did not provide substantial justification or a reasoned explanation for its change in policy; and (3) roadless rule would remain in effect.

Affirmed.

VI. FISHERIES, WATER, FERC, BOR

A. 2014 Cases

1. *San Luis & Delta-Mendota Water Auth. v. Jewell*

52 F. Supp. 3d 1020 (E.D. Cal. 2014) (from the opinion). This case concerned the U.S. Bureau of Reclamation's (Reclamation)

decision to make certain "Flow Augmentation" releases (FARs) of water beginning on August 13, 2013 from Lewiston Dam, a feature of the Trinity River Division (TRD) of the Central Valley Project (CVP). The stated purpose of the releases was to "reduce the likelihood, and potentially reduce the severity, of any Ich epizootic event that could lead to associated fish die off in 2013" in the lower Klamath River.

Plaintiffs, the San Luis & Delta Mendota Water Authority (Authority) and Westlands Water District (Westlands), alleged that by approving and implementing the 2013 FARs, Reclamation and its parent agency, the U.S. Department of the Interior (Interior) (collectively, "Federal Defendants"), violated various provisions of the Central Valley Project Improvement Act, Pub. L. No. 102–575, 106 Stat. 4700 (1992), and the Reclamation Act of 1902, 43 U.S.C. § 383. Federal Defendants offered only one independent legal authority for the 2013 FARs: the 1955 Act.

The court found that the 1955 Act was likewise limited in scope to the Trinity River basin, so did not provide authorization for Federal Defendants to implement the 2013 FARs to benefit fish in the lower Klamath.

Therefore, Plaintiffs' motion for summary judgment was granted as to the distinct issue of whether the 1955 Act provided authorization to implement the 2013 FARs.

2. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wis. v. Wisconsin*

769 F.3d 543 (7th Cir. 2014). Indian tribe brought action alleging that state statute prohibiting members of tribes from hunting deer at night on ceded territory outside tribes' reservations violated its treaty rights. After entry of judgment in state's favor, 775 F. Supp. 321, the district court denied tribe's motion for relief from judgment, and tribe appealed.

The appellate court held that: (1) tribe's delay in filing motion was not reason to deny relief; and (2) reconsideration of tribe's motion was warranted.

Reversed and remanded.

3. *San Luis & Delta-Mendota Water Auth.. v. Locke*

776 F.3d 971 (9th Cir. 2014). State water districts brought actions challenging National Marine Fisheries Service's (NMFS) biological opinion under the Endangered Species Act (ESA), concerning effect of two California water projects on endangered fish species.

After actions were consolidated, the district court, 791 F. Supp. 2d 802, granted summary judgment in part for plaintiffs and defendants, and remanded action. All parties appealed.

The appellate court held that: (1) district court abused its discretion by improperly admitting extra-record declarations when reviewing opinion; (2) NMFS acted within its discretion, in issuing opinion, by using non-scaled data model to set river flows; (3) NMFS did not act arbitrarily nor capriciously by determining projects' continued operations were likely to jeopardize viability and essential habitat of species; and (4) various recommendations and requirements of NMFS in its opinion were not arbitrary or capricious, in violation of Administrative Procedure Act.

Reversed in part, affirmed in part, and remanded.

B. January–March Cases

1. *United States v. Brown*

777 F.3d 1025 (8th Cir. 2015). Members of Chippewa Indian tribe were indicted under the Lacey Act, which makes it unlawful to sell any fish taken, possessed, transported, or sold in violation of any Indian tribal law. Tribal members moved to dismiss indictments on the ground that their prosecution violated fishing rights reserved under the 1837 Treaty between the United States and the Chippewa.

The district court, 2013 WL 6175202, granted motion. United States appealed.

The appellate court held that: (1) tribal members had usufructuary rights protecting their right to fish and sell fish, and (2) Lacey Act did not abrogate tribal members' usufructuary rights to sell fish caught on Indian reservation.

Affirmed.

2. *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*

223 F.3d 1041 (C.D. Cal. 2015). The Agua Caliente sued the Coachella Valley Water District (CVWD) and the Desert Water Agency (DWA), seeking, among other things, a declaration that their federal reserved water rights, which arose under the doctrine of *Winters v. United States*, 207 U.S. 564, 28 S. Ct. 207, 52 L. Ed. 340 (1908), extended to groundwater. The parties, plus the United States as Plaintiff-intervenor, all filed motions for partial summary judgment.

The CVWD was a county water district and was responsible for developing groundwater wells in the Coachella valley and extracting groundwater.

The court concluded the Tribe's federal reserved water rights may have included groundwater, but the Tribe's aboriginal right of occupancy was extinguished long ago, so the Tribe has no derivative right to groundwater on that basis.

The court (1) granted partial summary judgment to the Agua Caliente and the United States on the claim that the government impliedly reserved appurtenant water sources—including underlying groundwater—when it created the Tribe's reservation; and (2) granted partial summary judgment to Defendants regarding the Tribe's aboriginal title claims because the Land Claims Act of 1851, as interpreted by the Supreme Court, effectively extinguished any such right.

C. April–June Cases

1. *Hopi Tribe v. United States*

782 F.3d 662 (Fed. Cir. 2015). Indian tribe brought action against federal government, alleging that Bureau of Indian Affairs failed to ensure that water supply on tribe's reservation contained safe levels of arsenic, and sought to recover damages for breach of trust. The Court of Federal Claims, 113 Fed. Cl. 43, dismissed the action. Tribe appealed.

The appellate court held that: (1) neither Executive Order of 1882 nor Act of 1958 established any enforceable substantive right; (2) by holding reserved water rights in trust under Act of

1958, fiduciary duty could not be inferred under the *Winters* doctrine that Congress intended the United States to be responsible for providing water infrastructure and treatment needed to eliminate naturally occurring contaminants such as arsenic on Indian reservation; and (3) Congress did not expressly accept common-law fiduciary duty to manage water resources of Indian reservation through statutes that only required the United States to assist in provision of safe drinking water, but did not restrict tribe from managing resource itself.

Affirmed.

2. *United States v. Washington*

No. C70–9213, 2015 WL 3451316 (W.D. Wash. May 29, 2015). Pursuant to Section 9 of the Shellfish Implementation Plan (SIP), the Squaxin Island Tribe filed a request for dispute resolution regarding the Tribe's right to take shellfish and alleged interference with that right by Russell Norris d/b/a Russ' Shellfish.

The court found that Russell Norris violated the notice requirement of § 6.3 of the SIP as well as applicable Harvest Plans. He was not, however, liable as a matter of law, for the actions or inactions of Great Northwest. The Squaxin Island Tribe was entitled to an equitable remedy which would establish the pounds of Manila clams it was entitled, in the future, to recover from Russ Norris.

3. *United States v. Washington*

No. C70–9213, 2015 WL 3504872 (W.D. Wash. June 3, 2015). This matter was before the court on Cross–Motions for Summary Judgment by the Suquamish Indian Tribe (the "Suquamish") and the Upper Skagit Indian Tribe ("Upper Skagit"), as well as the Upper Skagit's Motion to Strike Exhibits. The Upper Skagit initiated this subproceeding by filing a Request for Determination on January 16, 2015, seeking a determination that the usual and accustomed fishing grounds (U&A) for the Suquamish Tribe did not include Samish Bay, Chuckanut Bay, and a portion of Padilla Bay (Disputed Areas), where the Upper Skagit had its own court-approved U&A.

The court found and ordered as follows: (1) The Suquamish Indian Tribe's Motion for Summary Judgment was denied. (2) The

Upper Skagit Indian Tribe's Motion for Summary Judgment was granted. (3) The Upper Skagit's Motion to Strike Exhibits was denied. (4) As the Suquamish Indian Tribe's U&A fishing grounds and stations did not include the Disputed Areas at issue here, the Suquamish Indian Tribe was permanently enjoined from issuing regulations for and/or fishing in the waters of the Disputed Areas.

D. July–August Cases

1. *United States v. Washington*

No. C70–9213, 2015 WL 4405591 (W.D. Wash. July 17, 2015) (From the Order). This matter comes before the court after remand from the Ninth Circuit Court of Appeals and upon the Jamestown S'Klallam Tribe's, Port Gamble S'Klallam Tribe's, and Lower Elwha Klallam Indian Tribe's (collectively S'Klallam), and Lummi Nation's (the Lummi) Motions for Summary Judgment. The S'Klallam requested that the court grant summary judgment on the issues presented in their Request for Determination (RFD) filed November 8, 2011.

The RFD asked the court to find that the actions of the Lummi in fishing in the "case area" was not in conformity with Final Decision I.

The matter having been fully briefed, the court granted S'Klallam's motions for summary judgment and denied Lummi's motion for summary judgment.

2. *Tulalip Tribes v. Suquamish Indian Tribe*

794 F.3d 1129 (9th Cir. 2015). Tulalip Indian Tribes filed request for determination that the inland marine waters east of Admiralty Inlet but west of Whidbey Island, as well as Saratoga Passage, Penn Cove, Holmes Harbor, Possession Sound, Port Susan, Tulalip Bay, and Port Gardner, were not within Suquamish Indian Tribe's "usual and accustomed fishing grounds," as established by treaty between United States and Indian tribes in Western Washington under which tribes reserved the right to fish at all usual and accustomed grounds.

The district court, 2015 WL 3504872, 2013 WL 3897783, granted Tulalip's summary judgment motion in part. Tulalip appealed.

The appellate court held that: (1) Suquamish Indian Tribe's treaty right of taking fish at "usual and accustomed fishing grounds and stations" was not intended to exclude waters east of Whidbey Island, and (2) Suquamish Indian Tribe's treaty right was not intended to exclude waters west of Whidbey Island.

Affirmed.

3. *Flathead Irrigation Dist. v. Jewell*

121 F. Supp. 3d 1008 (D. Mont. 2015). Plaintiffs Flathead Irrigation District ("FID") and Flathead Joint Board of Control, filed this action seeking declaratory and injunctive relief against Defendants, collectively "the United States," for claims arising out of the United States' recent and historical actions with respect to the Flathead Irrigation Project.

The United States moved to dismiss all of the claims. After briefing on the United States' motion to dismiss was completed, Plaintiffs' moved the court for leave to file their Second Amended Complaint.

The court granted the motion to dismiss and denied the motion for leave to file the Second Amended Complaint.

VII. GAMING

A. 2014 Cases

1. *Bettor Racing, Inc. v. Nat'l Indian Gaming Comm'n*

47 F. Supp. 3d 912 (D.S.D. 2014). A parimutuel betting business and its president brought action against the National Indian Gaming Commission (NIGC), claiming that the NIGC's imposition of a $5 million fine for violations of the Indian Gaming Regulatory Act (IGRA) violated the Administrative Procedure Act (APA), the Eighth Amendment, and the procedural due process protections. An Indian Tribe intervened. All parties moved for summary judgment.

The district court held that: (1) the NIGC did not act arbitrarily nor capriciously in finding that the business violated the IGRA by operating without an approved management contract; (2) the NIGC did not act arbitrarily nor capriciously in finding that the business violated the IGRA by operating under two unapproved

amendments to a management contract; (3) the NIGC did not act arbitrarily nor capriciously in finding that the business violated the IGRA by having a propriety interest in an Indian casino; (4) the NIGC did not act arbitrarily nor capriciously in imposing a $5 million fine; (5) the business's procedural due process rights were not violated; (6) the court had subject matter jurisdiction to address the Eighth Amendment claim; and (7) the business failed to make a prima facie showing that the $5 million fine was grossly disproportionate.

NIGC's and Tribe's motions granted, and business's motion denied.

2. *Picayune Rancheria of Chukchansi Indians v. Brown*

178 Cal. Rptr. 3d 563 (Cal. Ct. App. 2014) (From the opinion). Plaintiff Picayune Rancheria of Chukchansi Indians (the Picayune Tribe) owns and operates a resort and casino on its rancheria lands in Madera County.

In 2005, another tribe—the North Fork Rancheria of Mono Indians (the North Fork Tribe)—submitted a request to the United States Department of the Interior asking the department to acquire approximately 305 acres of land in Madera County adjacent to State Route 99 so the North Fork Tribe could develop its own resort and casino there. The land on which the North Fork Tribe wanted to build its casino is approximately 40 miles away from the North Fork Tribe's rancheria lands and approximately 30 miles away from the Picayune Tribe's casino.

Under the Indian Gaming Regulatory Act, casino gaming on lands acquired for a tribe by the Secretary of the Interior after October 17, 1988, is generally prohibited, subject to certain exceptions.

One of those exceptions is if "the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination." It is the Governor's concurrence that was at the heart of this case.

The Department of the Interior conducted an environmental review of the casino project proposed by the North Fork Tribe under federal law and issued a final environmental impact statement in 2009.

In September 2011, the Secretary of the Interior's delegate asked Governor Brown to concur in that determination. Despite requests by the Picayune Tribe and others that he prepare an environmental impact report (EIR) under CEQA before acting, Governor Brown issued his concurrence in the two-part determination without preparing or considering the preparation of an EIR. The following day, the Governor executed a tribal-state gaming compact with the North Fork Tribe. The Secretary's representative took the land into trust for the tribe in February 2013.

Later that year, the Legislature ratified the compact. The Picayune Tribe asserted that Governor Brown's concurrence in the two-part determination constituted an "approval" of a "project" under CEQA that "must be the subject of the CEQA environmental review process." Among other things, the Governor and the real party in interest argued that as a matter of law the Governor was not a "public agency" for CEQA purposes and therefore his concurrence in the two-part determination was not subject to CEQA. The trial court agreed.

Accordingly, the court sustained the demurrers without leave to amend and entered a judgment of dismissal. The Picayune Tribe timely appealed.

The appellate court affirmed the judgment.

3. *Cal. Valley Miwok Tribe v. Cal. Gambling Control Comm'n*

180 Cal. Rptr. 3d 499 (Cal. Ct. App. 2014). Tribe brought action against Gambling Control Commission for declaratory, injunctive, and writ relief to require the Commission to pay over the Revenue Sharing Trust Fund (RSTF) funds to the tribe's purported chairperson. A rival purported chairperson intervened. The superior court, No. 37–2008–00075326, stayed the proceedings. Tribe petitioned for writ of mandate. The appellate court granted the petition, 2012 WL 6584030. The Superior Court granted summary judgment for the Commission. Tribe appealed.

The appellate court held that the Commission properly held RSTF funds in trust for tribe pending resolution of federal court lawsuit to recognize a tribal leader.

Affirmed.

4. *Oklahoma v. Hobia*

775 F.3d 1204 (10th Cir. 2014). These matters were before the court on the State of Oklahoma's Petition for Rehearing or Rehearing En Banc. The court granted panel rehearing to the extent of the amendments made to the revised Opinion attached to the order. The clerk of court was directed to vacate the decision issued originally on November 10, 2014 and to reissue the attached version. The court once again addressed the subject of Indian gaming and, following the lead of the Supreme Court's recent decision in *Michigan v. Bay Mills Indian Cmty*., 134 S. Ct. 2024 (2014), emphasize that any federal cause of action brought pursuant to 25 U.S.C. § 2710(d)(7)(A)(ii) of the Indian Gaming Regulatory Act (IGRA) to enjoin class III gaming activity must allege and ultimately establish that the gaming "[wa]s located on Indian lands." 25 U.S.C. § 2710(d)(7)(A)(ii). If, as here, the complaint alleges that the challenged class III gaming activity was occurring somewhere other than on "Indian lands" as defined in IGRA, the action fails to state a valid claim for relief under § 2710(d)(7)(A)(ii) and must be dismissed.

The State of Oklahoma filed this action against officials of the Kialegee Tribal Town, a federally recognized Indian tribe in Oklahoma, claiming that they, along with a federally-chartered corporation related to the tribe and a related Oklahoma limited liability company, were attempting to construct and ultimately operate a class III gaming facility on a parcel of land in Broken Arrow, Oklahoma, that was neither owned nor governed by the Tribal Town, in violation of both IGRA and a state-tribal gaming compact. Defendants moved to dismiss the complaint, but the district court denied their motion.

The district court subsequently granted a preliminary injunction in favor of the State that prohibited defendants from constructing or operating a class III gaming facility on the property at issue.

Defendants appealed. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, the court concluded that, in light of *Bay Mills*, the State has failed to state a valid claim for relief.

The court therefore reversed and remanded to the district court with instructions to vacate its preliminary injunction and to dismiss the State's complaint.

B. January–March Cases

1. *Redding Rancheria v. Jewell*

776 F.3d 706 (9th Cir. 2015). Indian tribe sued Department of Interior (DOI), challenging decision that, pursuant to DOI's regulations, tribe's parcels of undeveloped riverfront lands, located several miles outside tribe's reservation, were ineligible for gaming if DOI took parcels into trust by which parcels would become Indian lands under restored lands exception to general prohibition in Indian Gaming Regulatory Act (IGRA) against gaming on Indian lands taken into trust after date of IGRA's passage. The district court granted summary judgment for DOI. Tribe appealed.

The appellate court held that: (1) Secretary reasonably implemented restored lands exception; (2) canon did not apply that statute had to be interpreted liberally in favor of Indians to extent that it was not clear; (3) Secretary provided sufficient explanation for its alleged change of policy; and (4) remand was warranted.

Affirmed in part, reversed in part, and remanded.

C. April–June Cases

1. *Tulalip Tribes of Wash. v. Washington*

783 F.3d 1151 (9th Cir. 2015). Indian tribe brought action against the State of Washington, seeking a declaration that the State had breached the "most-favored tribe" clause of a Tribal-State Indian gaming compact. The District court, 2013 WL 2253668, granted summary judgment to the State. The Indian Tribe appealed.

The appellate court held that the State was not required to amend its Tribal-State Indian gaming compact to provide an

alternative mechanism for a Tribe to obtain additional video player terminals.

Affirmed.

2. *Wisconsin v. Ho-Chunk Nation*,

784 F.3d 1076 (7th Cir. 2015). Wisconsin brought action against Indian tribe to stop the tribe from offering electronic poker at its gaming facility. Parties cross-moved for summary judgment. The District court granted state's motion. Tribe appealed.

The appellate court held that Wisconsin could not interfere with tribe's decision to conduct nonbanked poker on tribal lands.

Reversed.

3. *Duluth v. Fond Du Lac Band of Lake Superior Chippewa*

785 F.3d 1207 (8th Cir. 2015). City sued band of Native American tribe, alleging breach of contractual obligations created when city and band agreed to establish casino in city's downtown, and also seeking declaratory and injunctive relief. After it was compelled to arbitrate amount of withheld taxes owed to city, tribe moved for relief from final order.

The district court entered summary judgment barring tribe from challenging agreement's validity, 708 F. Supp. 2d 890, entered order compelling tribe to arbitrate amount of rent to be paid to city for extension term, 2011 WL 1832786, and granted in part and denied in part tribe's motion for relief, 830 F. Supp. 2d 712. Tribe appealed.

The appellate court, 702 F.3d 1147, affirmed in part, reversed in part, and remanded. On remand, tribe moved for relief from judgment. The district court, 977 F. Supp. 2d 944, denied motion. Tribe appealed.

The appellate court held that district court was required to consider intent of Congress in Indian Gaming Regulatory Act to ensure that primary beneficiaries of Indian gaming operations were to be tribes.

4. *Fort Sill Apache Tribe v. Nat'l Indian Gaming Comm'n*

103 F. Supp. 3d 113 (D.D.C. 2015). Tribe brought action under Administrative Procedure Act to compel National Indian Gaming Commission (NIGC) to issue decision on tribe's appeal of notice

of violation issued by NISC's chairman alleging that tribe had violated Indian Gaming Regulatory Act by gaming on Indian lands ineligible for gaming. NIGC moved to dismiss.

The district court held that: (1) action fell within scope of Administrative Procedure Act's waiver of sovereign immunity; (2) court had subject matter jurisdiction over action; and (3) notice of violation was not final agency action.

Motion granted in part and denied in part.

5. *Cayuga Nation v. Tanner*

No. 5:14–CV–1317, 2015 WL 2381301 (N.D.N.Y May 19, 2015). On October 28, 2014, plaintiffs, Cayuga Nation and John Does 1–20 (plaintiffs), filed this action against defendants Howard Tanner, Code Enforcement Officer for the Village of Union Springs, New York (Village) and the Village itself (collectively "defendants"). Also on that date, plaintiffs filed a motion for preliminary injunction and requested a temporary restraining order. Generally, plaintiffs claimed the federal Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (IGRA), preempted the Village's efforts to enforce local anti-gaming laws.

In 2004, the Cayuga Nation opened Lakeside Entertainment on land it claimed to be within the limits of its reservation. The facility closed in October 2005. Three Cayuga Nation members began orchestrating the reopening of the facility in 2010. They obtained an architect's report stating that the use of Lakeside Entertainment for Class II gaming complied with state and local zoning, land use, and building codes.

Defendants argued that the complaint must be dismissed because: (1) Plaintiffs lacked standing to bring this action; and (2) the action was barred by the doctrine of res judicata.

As a threshold issue of subject matter jurisdiction, plaintiffs must have establish standing under Article III of the Constitution. They failed to meet that burden. Whether the Nation 2006 Council—which was the recognized leadership entity of the Cayuga Nation—properly authorized this lawsuit was an issue that necessarily required the interpretation and application of internal Nation law. Therefore, this Court lacks subject matter jurisdiction.

Therefore, it was ordered that (1) defendants' cross-motion to dismiss was granted; (2) plaintiffs' motion for a preliminary injunction was denied as moot; (3) the complaint was dismissed in its entirety; and (4) the temporary restraining order was vacated.

6. *Big Lagoon Rancheria v. California*

789 F.3d 947 (9th Cir. 2015). Indian tribe brought action alleging that state violated the Indian Gaming Regulatory Act (IGRA) by failing to negotiate in good faith for a casino on tribal trust land. The district court granted summary judgment for tribe, 759 F. Supp. 2d 1149, but, subsequently, granted state's motion for stay pending appeal, 2012 WL 298464. Both parties appealed. The appellate court, 741 F.3d 1032, reversed and remanded.

On petition for rehearing en banc, the appellate court affirmed. Unlike *Carcieri*, this was a belated collateral attack on the Secretary's decision to take land into trust. The State did not bring an APA action to challenge the 1994 acquisition within the six-year statute of limitations. Nor did the State timely challenge the Rancheria's federal recognition.

Affirmed.

D. July–August Cases

1. *Idaho v. Coeur D'Alene Tribe*

794 F.3d 1039 (9th Cir. 2015). State brought action to prevent Indian tribe from offering poker at its casino. The district court, 49 F. Supp. 3d 751, denied tribe's motion to dismiss and granted state's motion for preliminary injunction. Tribe appealed.

The appellate court held that: (1) tribe's sovereign immunity was abrogated by Indian Gaming Regulatory Act; (2) compact between state and tribe did not require that dispute be submitted to arbitration; and (3) preliminary injunction was warranted.

VIII. JURISDICTION, FEDERAL

A. 2014 Cases

1. *United States v. Webb*

No. CR–10–01071–001, 2014 WL 4371276 (D. Ariz. Sept. 4, 2014). Before the Court was the Defendant's Motion for Termination of Garnishment. The court previously entered an Amended Judgment against Defendant, ordering Defendant to immediately pay $2,200 in restitution jointly and severally with two other liable parties, and a special assessment of $100. Based on Defendant's ability to pay, the court imposed a payment schedule consisting of quarterly payments of $25.00 over a period of 96 months commencing 30 days after Defendant's release from prison.

While Defendant was incarcerated, the court imposed a payment schedule through the Prisons' Inmate Financial Responsibility Program, through which Defendant would make quarterly payments of at least $25.00. As of June 9, 2014, Defendant remains liable for $2,225 under the Judgment. Defendant is a member of the Gila River Indian Community, and receives quarterly payments from the Gila River Indian Community's net gaming revenues.

The United States filed an Application for Writ of Garnishment pursuant to 28 U.S.C. § 3205(c) to direct the payments received from the Gila River Indian Community to Plaintiff. Defendant requested a hearing and presented arguments opposing the Writ of Garnishment. The court rejected Defendant's arguments and denied his hearing request in the Garnishment Disposition Order.

Defendant filed a Motion for Termination of Garnishment arguing: (1) that the Judgment had priority over the Garnishment Disposition Order pursuant to 28 U.S.C. § 3205(c)(8), and therefore, payment on the restitution balance should not begin until after his release from prison; and (2) that he should have only had to pay one-third of the restitution because there were two additional liable parties.

The court denied Defendant's Motion for Termination of Garnishment.

2. *Lewis v. White Mountain Apache Tribe*

584 F. App'x 80 (9th Cir. 2014). Kay Lewis appealed the district court's dismissal of his petition for a writ of habeas corpus under 25 U.S.C. § 1303, the Indian Civil Rights Act. The district court could not grant Lewis habeas relief unless he was in "detention," § 1303, or its functional equivalent, "custody," *Jeffredo v. Macarro*, 599 F.3d 913, 918 (9th Cir. 2010). Custody involves "severe restraints on [a person's] individual liberty," *Hensley v. San Jose Dist. Mun. Ct*., 411 U.S. 345, 351 (1973), including restraints that fall "outside conventional notions of physical custody," *Edmunds v. Won Bae Chang*, 509 F.2d 39, 40 (9th Cir. 1975).

The district court correctly held that the White Mountain Apache Tribe's refusal to permit Lewis to run for election to the Tribal Council was not a sufficiently severe restraint on his liberty to constitute custody. The restriction of Lewis' candidacy does not create a deprivation of liberty similar to the types of infringement on personal movement previously recognized as establishing federal habeas corpus jurisdiction. *See Hensley*, 411 U.S. at 351 (release on own recognizance with restrictions on movement); *Jones v. Cunningham*, 371 U.S. 236, 237, 241–42 (1963) (parole restrictions); *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 879, 893–95 (2d Cir. 1996) (banishment).

The judgment of the district court was affirmed.

3. *United States v. Bryant*

769 F.3d 671 (9th Cir. 2014). In prosecution for domestic assault within Indian country by habitual offender, the district court denied defendant's motion to dismiss indictment, and he appealed.

The appellate court held that defendant's prior uncounseled tribal court domestic abuse convictions could not be used as predicate offenses.

Reversed.

4. *Otoe-Missouria Tribe of Indians v. N.Y. Dep't of Fin. Serv.*

769 F.3d 105 (2nd Cir. 2014). Federally recognized Indian tribes, limited liability companies owned by tribes, and tribes' internal regulatory bodies brought action alleging that New York's

ban on high-interest, short-term consumer loans they offered over internet violated Indian Commerce Clause. The district court, 974 F. Supp. 2d 353, denied plaintiffs' motion for preliminary injunction, and they appealed.

The appellate court held that district court did not abuse its discretion in determining that plaintiffs failed to demonstrate likelihood of success on merits.

Affirmed.

5. *Inetianbor v. Cashcall*, *Inc.*

768 F.3d 1346 (11th Cir. 2014). Borrower brought action against loan servicer, alleging defamation, usury, and violation of the Fair Credit Reporting Act. The district court, 962 F. Supp. 2d 1303, denied servicer's motion to compel arbitration. Servicer appealed.

The appellate court held that: (1) forum selection clause was central and integral part of arbitration agreement; (2) arbitration by Native American tribe was required by the agreement; and (3) tribal forum was unavailable, precluding arbitration.

Affirmed.

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

770 F.3d 944 (10th Cir. Oct. 21, 2014). In action alleging breach of contract, breach of covenant of good faith and fair dealing, and accounting claims against Indian tribe, tribe moved to dismiss for lack of subject matter jurisdiction. The district court, 2013 WL 5954391, granted motion. Plaintiff appealed.

The appellate court held that federal courts lacked federal question jurisdiction over state claims.

Affirmed.

7. *In re McDonald*

519 B.R. 324 (Bankr. D. Kan. 2014). Chapter 13 trustee objected to exemption claimed by debtors in per capita payments from Indian tribe, and also asserted that such payments had to be considered in applying "best interests of creditors" test for confirmation of plan.

The Bankruptcy Court held that: (1) per capita payments to which Chapter 13 debtor was automatically entitled, regardless of

need, as her share of gaming revenues earned by Indian tribe of which she was member, were not excluded from property of estate as beneficial interest in trust; (2) contingent interest that debtor had in receiving these tribal payments was included in property of the estate, and had to be considered in assessing whether proposed Chapter 13 plan satisfied "best interests of creditors" test; (3) even assuming that Tribal Code qualified as "local law," it was not "local law that [wa]s applicable on the [petition date] to the place in which the debtor's domicile [was] located"; and (4) per capita payments made to debtor, without regard to need, as her share of gaming revenues earned by Indian tribe, were not an exempt "local public assistance benefit."

Objections sustained.

8. *Smith v. Parker*

774 F.3d 1166 (8th Cir. 2014). Owners of businesses and clubs that sold alcoholic beverages brought action against Omaha Tribal Council members in their official capacities for prospective injunctive and declaratory relief from tribe's attempt to enforce its liquor-license and tax scheme on owners. State of Nebraska and United States intervened. Parties cross-moved for summary judgment. The district court, 996 F. Supp. 2d 815, denied plaintiffs' motion and granted defendants' motion. Plaintiffs appealed.

The appellate court held that Omaha Reservation was not diminished by 1882 Act ratifying agreement for sale of tribal lands to non-Indian settlers.

Affirmed.

B. January–March Cases

1. *Ducheneaux v. Ducheneaux*

2015 SD 11, 861 N.W.2d 519. Before he died, the Decedent transferred two quarter sections of Indian trust land located in Tripp County, South Dakota, to his son. The Decedent's estate (the Estate) filed this action arguing that the Decedent lacked the requisite mental capacity or was unduly influenced by his son when he transferred the land. Specifically, the Estate requested that

the court compel the Decedent's son to make application to the Secretary of the Interior for the transfer of the Indian trust property to the Estate.

The circuit court denied the Estate's request and dismissed the action, determining that it lacked subject matter jurisdiction over the parcels held in trust by the United States.

The Supreme Court affirmed, holding that the circuit court did not have jurisdiction over the subject matter of this case.

2. *Washington v. Shale*

345 P.3d 776 (Wash. 2015). Defendant was convicted in the Superior Court, Jefferson County, of failure to register with the county sheriff as a sex offender. Defendant appealed.

The Supreme Court of Washington held that state had jurisdiction to prosecute defendant who was a member of an Indian tribe living on another tribe's lands. The Quinault Indian Nation cooperated with the investigation, but chose not to prosecute Shale. The Supreme Court chose to rely on U.S. Supreme Court's decision in *Washington v. Colville Confederated Tribes* (1980) to uphold State jurisdiction over non-member Indians.

Affirmed.

C. April–June

1. *United States v. Billie*

611 F. App'x 608 (11th Cir. 2015). The United States filed a petition to enforce an IRS administrative summons against Colley Billie as Chairman of the General Council of the Miccosukee Tribe of Indians of Florida. The district court entered an order enforcing the summons, and Chairman Billie appealed, arguing enforcement infringes upon the sovereign status of the tribe, required him to release documents; tribal law prohibited him from releasing, and required him to release documents he does not possess.

The appellate court concluded enforcement of the summons did not implicate tribal sovereign immunity concerns and Chairman Billie had not demonstrated a lack of possession. It also concluded the issue regarding suspension of the examination was not properly before the court.

The appellate court affirmed the judgment of the district court.

2. *NLRB v. Little River Band of Ottawa Indians Tribal Gov't*

788 F.3d 537 (6th Cir. 2015). The National Labor Relations Board, 361 NLRB No. 45, 200 L.R.R.M. 2005, 2014 WL 4626007, filed application for enforcement of order for Indian tribe to cease and desist from enforcing provisions of ordinance regulating employment and labor-organizing activities of its employees that conflicted with National Labor Relations Act (NLRA).

The appellate court held that: (1) Board's determination that NLRA's definition of "employers" extended to Indian tribes was not entitled to Chevron deference; and (2) NLRA applied to tribe's operation of casino.

Application granted.

3. *Washington v. DePoe*

188 Wash. App. 1012 (2015). A jury returned guilty verdicts in Pierce County Superior Court against Dennis Darrel DePoe for felony driving under the influence of intoxicating liquor (DUI), making a false or misleading statement to a public servant, first degree driving with a suspended license, and operating a motor vehicle without an ignition interlock device, all based on conduct that occurred on land held in trust for the Puyallup Tribe of Indians.

DePoe, an enrolled member of the federally recognized Sauk–Suiattle Indian Tribe, appealed from the convictions entered on the jury's verdicts, arguing that: (1) the trial court lacked jurisdiction over the charged crimes, (2) the State presented insufficient evidence to support a conviction on the DUI charge, (3) DePoe's attorney rendered ineffective assistance of counsel, and (4) the statute extending state jurisdiction over certain crimes in Indian country and the DUI statute are unconstitutional as applied to DePoe.

The appellate court affirmed, holding that the trial court had jurisdiction over all the charged crimes and that DePoe's substantive arguments were not well founded.

4. *Howard ex rel. United States v. Shoshone-Paiute Tribes of the Duck Valley Indian Reservation*

608 F. App'x 468 (9th Cir. June 15, 2015) (mem.). Appellants Thomas Howard and Robert Weldy (Relators) appealed from the district court's dismissal of their False Claims Act (FCA) complaint against the Shoshone Paiute Tribes of the Duck Valley Indian Reservation (Tribe).

The district court correctly concluded that the Tribe, like a state, was a sovereign that did not fall within the definition of a "person" under the FCA. *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 778–87 (2000) (applying the "longstanding interpretive presumption that 'person' does not include the sovereign," to be "disregarded only upon some affirmative showing of statutory intent to the contrary"). As the district court explained, "the same historical evidence and features of the FCA's statutory scheme that failed to rebut the presumption for the states in *Stevens*, here similarly fail[ed] to rebut the presumption for sovereign Indian tribes."

Therefore, Relators have failed to state a claim under the FCA, and the action was properly dismissed for lack of subject matter jurisdiction. Nor did the district court abuse its discretion in denying Relators' Rule 59 motion to alter or amend the judgment. "A motion for reconsideration may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation." *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co*., 571 F.3d 873, 880 (9th Cir. 2009). In addition, the Tribe's charter had been a public document since 1936 and was not "newly discovered" evidence. *See Coastal Transfer Co. v. Toyota Motor Sales*, 833 F.2d 208, 212 (9th Cir. 1987).

Affirmed.

5. *Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah*

790 F.3d 1000 (10th Cir. 2015). Indian tribe brought action alleging that state and local governments were unlawfully trying to displace tribal authority on tribal lands. State and counties filed counterclaims alleging that tribe infringed their sovereignty. The district court denied tribe's motion for preliminary injunction to halt tribal member's prosecution for alleged traffic offenses on

tribal land, tribe's claim of immunity from counterclaims, and county's claim of immunity from tribe's suit.

The appellate court held that: (1) county's prosecution of tribal member constituted irreparable injury to tribal sovereignty; (2) Anti–Injunction Act did not bar federal court from issuing preliminary injunction; (3) Younger abstention was not warranted; (4) mutual assistance agreement between state and tribe did not waive tribe's sovereign immunity from suit in state court; (5) doctrine of equitable recoupment did not apply to permit state and county to assert counterclaims; and (6) county attorneys were not entitled to sovereign immunity.

Affirmed in part, reversed in part, and remanded.

D. July–August Cases

1. *Soaring Eagle Casino and Resort v. NLRB*

791 F.3d 648 (6th Cir. 2015). Casino operated by Indian tribe on reservation land petitioned for review of National Labor Relations Board (NLRB) order, 2014 WL 5426873, finding that casino's no-solicitation policy was unfair labor practice and ordering casino to cease and desist from maintaining no-solicitation rule and to reinstate employee discharged for violating that rule through union solicitation to her former position with back pay and benefits. NLRB cross-applied for enforcement of its order.

The appellate court held that: (1) neither 1855 and 1864 treaties nor federal Indian law and policies prevented application of the National Labor Relations Act (NLRA) to tribal-owned casino operated on trust land within a reservation, and (2) casino fell within scope of the NLRA, and NLRB had jurisdiction to regulate casino's employment practices.

Petition denied and cross-application granted.

2. *United States v. Bryant*

792 F.3d 1042 (9th Cir. 2015) (mem.). The conflict that presents itself again and again in this case was how to apply *Nichols v. United States*, 511 U.S. 738, 114 S. Ct. 1921, 128 L. Ed. 2d 745 (1994), to cases like *Bryant*, where the government seeks to use uncounseled tribal court misdemeanor convictions as an

essential element of a felony prosecution under 18 U.S.C. § 117(a). The dissents from denial of rehearing en banc, along with two other circuits, urge a bright-line reading of *Nichols* that permits the use of these convictions as long as they do not violate the Sixth Amendment (which tribal court convictions, by definition, never do). The court wrote to explain why *Bryant* did not apply this bright-line rule, while recognizing that only the Supreme Court can clarify the meaning and scope of its decision in *Nichols*.

3. *United States v. Zepeda*

792 F.3d 1103 (9th Cir. 2015). Defendant was convicted in the district court of conspiracy to commit assault with dangerous weapon and to commit assault resulting in serious bodily injury, assault resulting in serious bodily injury, assault with dangerous weapon, and use of firearm during crime of violence. Defendant appealed. The appellate court, 738 F.3d 201, reversed and remanded, but subsequently granted rehearing en banc.

On rehearing en banc, the appellate court held that: (1) under the Indian Major Crimes Act (IMCA), government had to prove only that the defendant has some quantum of Indian blood, whether or not traceable to a federally recognized tribe, overruling *United States v. Maggi*, 598 F.3d 1073; (2) a defendant must have been an Indian at the time of the charged conduct under ICMA; (3) a tribe's federally recognized status was a question of law to be determined by the trial judge; (4) evidence at trial was sufficient to support the finding that defendant was an Indian within the meaning of the IMCA at the time of his crimes; and (5) Defendant's prison term of 90 years and three months was reasonable.

4. *California v. Riley*

189 Cal. Rptr. 3d 870 (Cal. Ct. App. 2015). Defendants were convicted in the superior court of three counts of commercial bribery arising out of insurance premiums charged to Native American casino. Defendants appealed.

The appellate court held that: (1) defendant who had left casino job and had become chief financial officer for tribal government was not an employee of casino, as specified in indictment, at time

of two alleged acts of commercial bribery; (2) evidence was sufficient to support conviction even if no specific gratuity could be tied to any specific instance of overcharging; and (3) evidence was sufficient to support finding that defendants acted with the specific intent to harm casino.

IX. RELIGIOUS FREEDOM

A. 2014 Cases

1. *Thorpe v. Borough of Thorpe*

770 F.3d 255 (3rd Cir. 2014). Native American brought action under § 1983 and Native American Graves Protection and Repatriation Act (NAGPRA) to require borough to return his father's remains to tribe. The district court dismissed plaintiff's § 1983 claim, 2011 WL 5878377, and entered summary judgment in plaintiff's favor on NAGPRA claim, 2013 WL 1703572. Borough appealed.

The appellate court held that borough was not "museum" under NAGPRA.

Affirmed in part, reversed in part, and remanded.

B. January–March Cases

1. *Confederated Tribes and Bands of the Yakama Nation v. U.S. Fish and Wildlife Serv.*

No. 1:14–CV–3052, 2015 WL 1276811 (E.D. Wash. Mar. 20, 2015). Plaintiff, Confederated Tribes and Bands of the Yakama Nation ("Yakama Nation"), and Intervenor–Plaintiff, Confederated Tribes of the Umatilla Indian Reservation ("Umatilla Tribes"), sought judicial review of the U.S. Fish and Wildlife Service ("Service") decision approving public wildflower tours within the Lalíik Traditional Cultural Property (TCP).

Specifically, Plaintiffs alleged that (1) the Service violated the consultation provisions of the National Historic Preservation Act (NHPA), and (2) the Service's "no adverse effect" finding was arbitrary and capricious under the Administrative Procedure Act (APA).

Lalíik, also known as Rattlesnake Mountain, sits within the Hanford Reach National Monument (HRNM) in Benton County, Washington. Associated with practices and beliefs of the Washani, Lalíik is a sacred mountain with traditional cultural and religious significance to the local Hanford area tribes: Yakama Nation, Umatilla Tribes, Nez Perce, and Wanapum Band. Lalíik is located within lands ceded to the United States under the Treaty of 1855 and has maintained varying land use designations throughout the past several decades.

In 2007, the U.S. Department of Energy designated Lalíik a Traditional Cultural Property (TCP) pursuant to the National Historic Preservation Act, making the area eligible for listing on the National Register of Historic Places. The designation relied upon the status of Lalíik as a "spiritual location of primary importance to groups of American Indians within the region."

In 2010 and again in 2011 the Service consulted with the Hanford area tribes about organizing limited public access tours of Laliik TCP. In both instances, the tribes voiced their opposition and the tours were abandoned.

In February 2012, the Service proposed a third undertaking in a meeting with the Tribes and via e-mail the Service proposed public wildflower tours within the Lalíik TCP and invited the Tribes' review. Yakama Nation voiced its opposition to the undertaking, stating that "the nature of [Lalíik's] cultural significance is not conducive to tourism and recreation and will adversely affect the TCP." Similarly, Umatilla Tribes opposed the proposal due to the potential adverse effect the tour would have on the Lalíik TCP. The Service indicating that it "w [ould] go no adverse effect."

The court granted in part Umatilla Tribes' Motion for Summary Judgment and Yakama Nation's Cross–Motion for Summary Judgment on the Record. The Service's Section 106 finding of "no adverse effect" was set aside as arbitrary and capricious or otherwise without observance of procedures required by law and this matter was remanded to the Agency.

C. April–June Cases

1. *Schlemm v. Wall*

784 F.3d 362 (7th Cir. 2015). Prisoner, a Navajo Tribe member, brought action under Religious Land Use and Institutionalized Persons Act (RLUIPA) against Wisconsin Department of Corrections, seeking an order requiring the state prison system to accommodate some of his religious practices. The district court, 2014 WL 2591879, granted prison's summary judgment motion. Prisoner appealed.

The appellate court held that: (1) genuine issues of material fact existed as to whether prisoner's inability to eat game meat for a religious feast substantially burdened his religious exercise, precluding summary judgment on prisoner's RLUIPA claim, and (2) genuine issues of material fact existed as to whether prisoner's inability to wear a multicolored headband while praying in his cell and during group religious ceremonies substantially burdened his religious exercise, precluding summary judgment on prisoner's RLUIPA claim.

Affirmed in part and reversed in part.

X. SOVEREIGN IMMUNITY

A. 2014 Cases

1. *Johnson v. Wyandotte Tribe of Okla.*

No. 14–2117, 2014 WL 5025901 (D. Kan. Oct. 8, 2014). Plaintiff brought this personal injury action against the Wyandotte Nation for injuries she sustained when she fell down a flight of stairs at the 7th Street Casino, which was located on land held in trust by the United States for the benefit of the Wyandotte Nation. Defendant's Motion to Dismiss was before the court.

Defendant argued that the court must dismiss plaintiff's lawsuit because defendant, a federally recognized Indian tribe, was immune from unconsented suit and, therefore, the court lacked subject matter jurisdiction under Fed.R.Civ.P. 12(b)(1).

Plaintiff visited the 7th Street Casino to play electronic gaming machines. As plaintiff was leaving the casino, her heel became

lodged in a strip of carpet causing her to fall headlong down a flight of stairs. As a result of the fall, plaintiff sustained injuries to her head and foot and experienced an onset of pain. Thereafter, plaintiff filed a lawsuit against the Wyandotte Tribe of Oklahoma in the District court of Wyandotte County, Kansas, asserting a single claim of negligence under Kansas law.

Defendant timely filed a Notice of Removal asserting federal question jurisdiction under 28 U.S.C. § 1331, thereby removing the case from state court to the federal court. Absent an unequivocal waiver by the Wyandotte Nation or any contrary legislative intent, the court concluded that the doctrine of sovereign immunity barred plaintiff's suit.

Therefore, the court granted the Wyandotte Nation's motion and dismissed the lawsuit.

2. *Sue/perior Concrete & Paving, Inc,. v. Lewiston Golf Course Corp.*

25 N.E.3d 928 (N.Y. 2014). Concrete and paving contractor brought action against, inter alia, corporation that was formed under laws of Seneca Nation of Indians, asserting causes of action for foreclosure of mechanic's lien, breach of contract, breach of implied covenant of good faith and fair dealing, quantum meruit, promissory estoppel, and fraud, in relation to contract to build golf course with associated driving range, club house, and pro shop.

The supreme court, denied corporation's motion to dismiss on sovereign immunity grounds. Corporation appealed.

The Supreme Court, Appellate Division, 109 A.D. 3d 80, 968 N.Y.S. 2d 271, determined that corporation was not arm of tribe, and thus was not entitled to share tribe's immunity from suit. Corporation was granted leave to appeal, and question was certified.

The Court of Appeals of New York held that corporation was not entitled to tribal sovereign immunity.

Affirmed.

B. January–March Cases

1. *Comenout v. Whitener*

No. C15–5054, 2015 WL 917631 (W.D. Wash. Mar. 3, 2015). Comenout sought injunctive relief preventing Whitener from removing Comenout's business property and from taking over Comenout's business. Comenout resided on a parcel of land located in Puyallup, Washington. The United States held the land in trust for the thirteen owners of the allotment, one of whom was Comenout. Comenout had operated a convenience store on the property for many years.

On November 1, 2014, some of the landowners entered into a business lease for the property with the Quinault Indian Nation (Nation). Pursuant to the lease, the owners were the lessors and the Nation the lessee. Comenout did not consent to the lease. Under the terms of the lease, the Nation "shall use the Premises for the following specific purposes: retail sales of cigarettes and retail sales of other convenience store products, but specifically excluding the sale of marijuana and the sale of fireworks."

On November 20, 2014, the Bureau of Indian Affairs (BIA) approved the lease, thereby making it legally effective. On December 23, 2014, Comenout appealed the lease to the Regional Director of the BIA. On January 9, 2015, Whitener posted a sign on the property, directing Comenout to remove his personal and commercial property from the allotment.

Whitener moved to dismiss Comenout's suit under FRCP 12(b)(7) for failure to join the Nation as an indispensable party. Whitener contended that Comenout's claims implicated the interests of the Nation, but the Nation could not be joined because of its sovereign immunity.

The Court found that the Nation was a necessary party under Rule 19(a). Because the Nation had not waived its sovereign immunity to be sued by Comenout in federal court, the court concludes that the Nation could not be joined in the action. The court found that the Nation was an indispensable party under Rule 19(b). A judgment in Comenout's favor would prejudice the Nation's contractual rights under the lease. Comenout also could not be accorded complete relief in the Nation's absence because any injunction would not be binding on the Nation. Further, the

relief sought by Comenout could not be shaped to lessen the potential prejudice to either Comenout or the Nation. Partial relief was also inadequate, because the Nation could still attempt to enforce its rights to use the property for commercial purposes as the lessee.

The court concluded that the Nation was an indispensable party and granted Whitener's motion to dismiss.

2. *Allen v. Smith*

No. 13–55552, 2015 WL 1138391 (9th Cir. Mar. 16, 2015). Ronald D. Allen and twenty-six other former members of the Pala Band of Mission Indians (Appellants) appealed the district court's order dismissing the case for want for subject matter jurisdiction. Appellants did not challenge the Pala Band of Mission Indians' (Tribe's) disenrollment decision directly, but instead filed suit against present and former members of the Tribe's Executive Committee (Appellees) in their individual capacities, asserting violations of various federal statutes and common law principles.

Appellants' prayer for relief included (1) "a declaratory judgment that the [Appellees'] improper disenrollment of [Appellants] constituted violations of their civil rights"; (2) "a permanent injunction to invalidate [Appellees'] wrongful disenrollment actions"; (3) "an order declaring the wrongful disenrollment of [Appellants] by [Appellees] to be null and void;" (4) "an order requiring [Appellees] to pay back the money and lost benefits that were withheld and/or taken away from [Appellants] while they were wrongfully disenrolled"; (5) "an order for compensatory damages against the [Appellees] for violations of [Appellants'] rights in the amount appropriate to the proof adduced at trial"; and (6) "an order for punitive damages against [Appellees] for causing, approving and/or ratifying the disenrollment of the [Appellants], and for consequential loss of money, property, and heritage."

This relief sought by the Appellants clearly operated against the Tribe. The requested relief would prevent the Tribe from disenrolling the Appellants and compel it to reinstate their membership and tribal benefits. Even the request for compensatory and punitive damages (to be paid by the Appellees, not the Tribe) would interfere with the Tribe's public administration, because the

monetary damages are predicated on this court's determination that the disenrollment of the Appellants was improper.

Thus, the court concluded that Appellants' suit should be construed as a suit against the Tribe itself. Appellants concede that the Tribe is protected from suit by its sovereign immunity. The Tribe's sovereign immunity also protects the named Appellees, because they were acting in their official capacity when they disenrolled the Appellants.

On appeal, Appellants argued a violation of federal law only on the basis that Appellees were collaterally estopped from making a membership decision that runs contrary to the Department of Interior's 1989 administrative decision. Even assuming that the preclusive effect of an agency decision qualifies as federal law under *Ex parte Young*, Appellants' briefing did not demonstrate why the 1989 decision had preclusive effect against the Appellees. Even if the court allowed Appellants to drop the request for injunctive relief from their Complaint, the pleading would still require a federal court to evaluate whether the Tribe's disenrollment was proper. Thus, "it is clear, upon de novo review, that the complaint could not be saved by any amendment."

Affirmed.

C. April–June Cases

1. *North Quinault Properties, LLC v. Quinault Indian Nation*

No. 3:14-cv-06025-RBL (W.D. Wash. May 4, 2015). Plaintiffs alleged in its Complaint that Lake Quinault, a navigable waterway abutting the Quinault Indian Reservation and located in Washington State, should have been open to the public for its use and recreation as well as to those non-tribal property owners with real property abutting the Lake shore such as the Plaintiffs. However for more than a decade the Quinault Indian Tribe had asserted jurisdiction and control over this navigable waterway. Most recently, the Quinault Indian Tribe had restricted all use of the Lake for non-tribal members.

Through this civil action, the Plaintiffs sought court determination as to the status of Lake Quinault and the property rights of non-tribal property owners abutting the Lake and court

determination as to the public's right to access of the Lake, its shore and lakebed."

Defendants Quinault Indian Tribe, State of Washington, and the Department of Natural Resources (State Defendants) filed Motions to Dismiss.

The court found that the Complaint against the Quinault Indian Nation is barred by the doctrine of tribal sovereign immunity and granted the Motion to Dismiss.

As to the State Defendants, the court found that Plaintiffs failed to state a claim upon which the court could grant relief because State Defendants were immune from suit under the Eleventh Amendment of the U.S. Constitution.

The Complaint was dismissed without prejudice with leave to amend.

2. *Blue Lake Rancheria v. Lanier*

106 F. Supp. 3d 1134 (E.D. Cal. 2015). Blue Lake Rancheria (Plaintiff) alleged that the California Employment Development Department (EDD) violated its tribal sovereign immunity by attaching liens on tribal assets. Plaintiff moved for summary judgment. Plaintiff is a federally recognized tribe.

For several years, a division of the Tribe's federally-chartered corporation called Mainstay Business Solutions (Mainstay) operated a "temporary staffing and employee leasing business." In 2003, Mainstay elected to participate in a joint federal-state unemployment insurance program. Mainstay became a "reimbursable employer." As such, the state would pay former employees and Mainstay would later reimburse the state for those costs.

In 2008, a dispute arose as to the amount Mainstay owed in reimbursement. When the parties were unable to resolve their dispute, EDD attached liens to the Tribe's property under California Government Code § 7171 in several counties. EDD also issued subpoenas to Plaintiff's banks seeking information about the Tribe's assets.

The Tribe filed suit against officers of EDD seeking to enjoin their collection actions and cancel the liens, and for a declaratory judgment that Defendants' actions violated Plaintiff's sovereign immunity.

The Tribe brought a motion for summary judgment to dispose of all its claims. Defendants opposed the motion and, in the alternative, requested that the Court defer adjudication until later in discovery, which is set to close in November.

The Court denied Defendants' request to defer adjudication and granted Plaintiff's motion for summary judgment.

3. *Cosentino v. Fuller*

189 Cal. Rptr. 3d 15 (Cal. Ct. App. 2015). Former table games dealer at Indian tribal casino brought action against five members of the tribe's gaming commission for intentional and negligent interference with prospective economic advantage, intentional interference with the right to pursue a lawful occupation, a civil rights violation under state law, and intentional and negligent infliction of emotional distress, alleging the members revoked his gaming license in retaliation for his work as confidential informant for the California Department of Justice.

The superior court granted members' motion to quash service of summons and dismiss the complaint. Dealer appealed.

The appellate court held that: (1) tribal sovereign immunity did not support members' motion to quash service of process, and (2) members could not raise affirmative defense by motion to quash service of process.

Reversed.

4. *In re Greektown Holdings, LLC*

532 B.R. 680 (E.D. Mich. 2015). This matter was before the Court on Appellants Sault St. Marie Tribe of Chippewa Indians and Kewadin Casinos Gaming Authority's (Appellants or collectively "the Tribe") appeal of United States Bankruptcy Judge Walter J. Shapero's August 13, 2014 Opinion and Order denying Appellants' motion to dismiss based on sovereign immunity. The Tribe challenged the Bankruptcy Court's ruling in the underlying Adversary Proceeding that Congress intended to abrogate tribal sovereign immunity from suit in section 106(a) of the Bankruptcy Code when it abrogated the sovereign immunity of "governmental unit[s]," and further defined a "governmental unit" in § 101(27) of the Bankruptcy Code to include "other . . . domestic government[s]."

The Tribe appealed the Bankruptcy Court's Order denying its motion to dismiss based on sovereign immunity, arguing that the failure of the Legislature to clearly and unequivocally manifest an intent to abrogate tribal sovereign immunity when describing the entities whose sovereign immunity was abrogated under the Bankruptcy Code required dismissal of the claims against it in the Bankruptcy Court Adversary Proceeding.

The Litigation Trustee responded that the Legislature need not invoke the magic words "Indian tribes" when intending to remove the cloak of sovereign immunity that otherwise shields Indian tribes from suits against them and argued that the Legislature clearly and equivocally intended just that when it included the catchall phrase "or other . . . domestic government" in § 101(27) of the Bankruptcy Code when defining the term "governmental unit."

The court reversed the decision of the Bankruptcy Court, found that Congress did not clearly and unequivocally express an intent to abrogate the sovereign immunity of Indian tribes in § 106(a) of the Bankruptcy Code, and remanded the matter to the Bankruptcy Court for further proceedings on the issue of whether the Tribe waived its sovereign immunity from suit in the underlying bankruptcy proceedings.

5. *Pistor v. Garcia*

791 F.3d 1104 (9th Cir. 2015). "Advantage gamblers" brought § 1983 action against tribal police chief, tribal gaming office inspector, and general manager of casino, which was owned and operated by tribe on tribal land, for detaining gamblers and seizing their property in violation of gamblers' Fourth and Fourteenth Amendment rights. The district court, 2012 WL 3848453, denied defendants' motion to dismiss. Gamblers appealed.

The appellate court held that tribal police chief, tribal gaming office inspector, and general manager of casino were not entitled to invoke the tribe's sovereign immunity from liability in their individual capacities.

D. July–August Cases

1. *South Fork Livestock Partnership v. United States*

No. 3:15–CV–0066, 2015 WL 4232687 (D. Nev. Jul. 13, 2015). Before the court were defendants', the Te–Moak Tribe of Western Shoshone Indians of Nevada (Tribe), the South Fork Band (South Fork), Davis Gonzalez, Alice Tybo, and Virgil Townsend's (collectively "tribal defendants"), motion to dismiss for lack of subject matter jurisdiction. This was a civil rights action involving the use of federal grazing permits on federal land. Plaintiff SF Livestock was a partnership made up of several tribal members who were granted federal grazing permits for various areas located in the State of Nevada. SF Livestock alleged that tribal defendants prevented it from exercising its rights under the federal grazing permits by restricting their access to the land designated in the federal grazing permits.

In its complaint, SF Livestock alleged four causes of action including: (1) civil rights violation under 42 U.S.C. § 1983 and *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971); (2) property rights violations; (3) access to water violations; and (4) injunctive and monetary relief. In response, tribal defendants filed a motion to dismiss for lack of subject matter jurisdiction. Tribal defendants argued that they should be dismissed as defendants because neither defendant Te–Moak Tribe nor defendant South Fork had waived their sovereign immunity from suit.

The court noted that there was no congressional act authorizing a suit against a tribe for alleged violations of federal grazing permits. Further, the court found that there was no express waiver of sovereign immunity by either defendant Te–Moak Tribe or defendant South Fork for the present action. In general, the umbrella of tribal sovereign immunity from suit also extended to tribal officials.

The court granted defendants' motion to dismiss; dismissed as defendants Te–Moak Tribe of Western Shoshone Indians of Nevada and the South Fork Band; and dismissed without prejudice defendants Davis Gonzalez, Alice Tybo, and Virgil Townsend.

XI. SOVEREIGNTY, TRIBAL INHERENT

A. 2014 Cases

1. *New Mexico v. Sanchez*

2014-NMCA-095, 335 P.3d 253 (N.M. Ct. App. 2014). Defendant, a non-Indian, was convicted in a bench trial in the Magistrate Court, Santa Fe County, of aggravated driving while under the influence of intoxicating liquor or drugs (DWI) following his arrest on tribal property by a tribal police officer who was cross-commissioned as a county special deputy sheriff. Defendant appealed. The district court again convicted him of DWI. Defendant appealed.

The appellate court held that: (1) as a matter of first impression, tribal officer was properly cross-commissioned as a special deputy; (2) as a matter of first impression, officer was authorized to investigate and arrest defendant for DWI; (3) officer was authorized to carry a concealed weapon; and (4) officer's increased pay as part of grant program with Bureau of Indian Affairs concerning dedicated DWI officers did not provide defendant with a statutory defense concerning an officer's receipt of prohibited compensation.

Affirmed.

2. *Koniag, Inc. v. Andrew Airways, Inc.*

No. 3:13–cv–00051, 2014 WL 4926344 (D. Alaska Sept. 30, 2014). Defendant Alicia L. Reft (Reft) filed a Motion and Memorandum to Dismiss Complaint against Alicia Reft in her Capacity as President of Karluk Tribal Council and Individual Capacity. The relevant facts for purposes of the motion to dismiss, as alleged in Koniag's Complaint, are as follows.: Koniag is an Alaska Native Regional Corporation established pursuant to Section 7 of the Alaska Native Claims Settlement Act of 1971. Koniag merged with the Karluk Native Corporation in 1980 (Merger), pursuant to 43 U.S.C. § 1627. As a result of the Merger, Koniag now owns the land that had previously been patented to the Karluk Native Corporation.

Koniag's Complaint alleged that Andrew Airways Inc. and its principal owner and operator, Dean T. Andrew (together, the

"Andrew Defendants"), at the direction and license, lease, authorization, or permission of Reft, built a cabin known as Mary's Creek Cabin (the "Cabin") on Koniag's land without Koniag's authorization or consent. Koniag's Complaint also alleged, upon information and belief, that the Andrew Defendants operated the Cabin as a rental property.

The parties in this case, or parties related to them, have been involved in other actions in the recent past, including a lawsuit in the Karluk Tribal Court filed in 2012 by the Native Village of Karluk against Koniag concerning, among other things, the Merger and the rights to the land Koniag owns as a result of the Merger. In an action filed in this Court by Koniag, also in 2012, the court held that the Karluk Tribal Court had no basis for exercising jurisdiction over Koniag in that tribal court action. Koniag brought the present action for intentional trespass, ejectment, and to quiet title in connection with the Cabin. The federal law implications that may arise in this hypothetical cause of action were too attenuated to find federal question jurisdiction here based on a complete preemption theory.

For the foregoing reasons, it was ordered that Defendant Alicia Reft's Motion to Dismiss at Docket 36 was granted.

B. April–June Cases

1. *Belcourt Pub. Sch. Dist. v. Davis*

786 F.3d 653 (8th Cir. 2015). School district and its employees brought action seeking a declaration that Indian tribal court lacked jurisdiction over tribe members' claims against district and employees for defamation, excessive use of force, and various employment related-claims. District moved for default judgment against one tribe member. The district court, 997 F. Supp. 2d 1017, denied motion and held that tribal court had jurisdiction. District and employees appealed.

The appellate court held that: (1) even if district could agree to expand tribal court jurisdiction under North Dakota law, agreement between district and tribe was not a "consensual relationship" within meaning of exception to general rule that a tribe may not regulate activities of nonmembers, and thus tribal court lacked

jurisdiction over tribe members' action; (2) tribe members' claims did not involve conduct that threatened or directly affected the political integrity, economic safety, or health or welfare of the tribe, and thus tribal court lacked jurisdiction over claims; and (3) district court did not abuse its discretion in denying school district's motion for default judgment.

2. *Fort Yates Pub. Sch. Dist. # 4 v. Murphy ex rel. C.M.B.*

786 F.3d 662 (8th Cir. 2015). After parent of student who was a tribe member filed tribal-court complaint alleging tort claims against nonmember public school district, school district filed federal-court complaint seeking declaration that tribal court lacked jurisdiction. The district court, 997 F. Supp. 2d 1009, granted parent's motion to dismiss. School district appealed.

The appellate court held that: (1) agreement between tribe and school district was not a "consensual relationship" that conferred jurisdiction on tribal court over parent's suit; (2) parent's suit did not involve conduct that threatened or had some direct effect on political integrity, economic security, or health or welfare of the tribe, as would have given tribal court jurisdiction; (3) sovereign immunity barred school district's suit against tribal court; and (4) school district was not required to exhaust its tribal remedies before commencing suit.

Affirmed in part, reversed in part, and remanded.

C. July–August Cases

1. *Sprint Communications Co. L.P. v. Wynne*

121 F. Supp. 3d 893 (D.S.D. 2015). A motion for preliminary injunction filed by Sprint Communications Company, L.P., and Sprint Communications, Inc. (collectively, Sprint) was before the court. Defendants opposed the motion. Sprint Communications, Inc. (Sprint Inc.) was the parent company of Sprint Communications Company (Sprint Communications). The Oglala Sioux Tribal Utilities Commission (OSTUC) was formally established in 2013 as a subdivision of the Oglala Sioux Tribe. The OSTUC was responsible for the exercise of tribal regulatory authority over all utility systems on the Pine Ridge Indian Reservation.

As an interexchange carrier (IXC), Sprint Communications delivered long-distance calls from one local area to another. When an individual made a long-distance telephone call, the call originated with the local exchange carrier (LEC) serving the individual making the call and was transported by the IXC selected by the calling individual to the LEC serving the individual receiving the call. IXCs paid "originating" and "terminating" access charges to the LECs that served individuals who initiated and received long-distance calls, respectively.

In 2014, the OSTUC initiated seven rulemaking proceedings involving utility providers on Pine Ridge and adopted 12 orders. In one of those orders, U-1-2014, the OSTUC created: a registration requirement for all utilities. Sprint did not participate in the development or implementation of U-1-2014. Sprint Communications had not registered with or obtained a business license from the OSTUC. Several telecommunications companies, including Sprint Communications, had refused to comply with the requirements imposed by the OSTUC.

As a result of that noncompliance, the OSTUC filed a complaint against those carriers, including Sprint. Subsequently, Sprint filed its complaint in this matter. Sprint argued that the tribal regulatory process is a disguised effort to compel IXCs to pay Native American Telecom-Pine Ridge (NAT-PR), a tribal LEC, for terminating access charges associated with an access stimulation run on Pine Ridge.

Sprint sought a declaratory judgment that neither Sprint Inc. nor Sprint Communications was subject to regulation by the OSTUC, and an order permanently enjoining the OSTUC from proceeding against Sprint. Sprint requested a preliminary injunction. In support, Sprint asserted that it did not have to exhaust its tribal court remedies because it was plain that the tribal court did not have jurisdiction over either Sprint entity. As the FCC had recognized, tribes have a role to play in the regulation of telecommunications services.

This court respected the tribal court's prerogative to settle questions of its jurisdiction and to explain the basis for its acceptance or rejection thereof. Sprint had not demonstrated that tribal jurisdiction in this matter violated an express jurisdictional

prohibition or that tribal jurisdiction plainly did not exist and would only serve to delay these proceedings. Because exhaustion of tribal remedies was required as a matter of comity, the court denied Sprint's motion for a preliminary injunction. In doing so, the court did not hold that tribal jurisdiction over Sprint was ultimately proper under *Montana,* only that the tribal court should have been given the first opportunity to resolve that question. Under these facts, it was proper to stay this action pending Sprint's exhaustion of its tribal remedies.

Accordingly, it was ordered that Sprint's motion to supplement the record be granted.

It was further ordered that Sprint's motion for a preliminary injunction was denied.

It is further ordered that this action be stayed until further order of the court.

2. *Harvey v. Ute Indian Tribe of the Uintah & Ouray Reservation*

797 F.3d 800 (10th Cir. 2015). In April 2013, plaintiffs filed a complaint in Utah state court seeking declaratory and injunctive relief as to the authority of the Ute Indian Tribe of the Uintah and Ouray Reservation (the "Tribe") over non-Indian businesses operating on certain categories of land. It also alleged that Dino Cesspooch, Jackie LaRose, and Sheila Wopsock, individuals affiliated with the Ute Tribal Employment Rights Office, had harassed and extorted plaintiffs in violation of state law.

Defendants filed a motion to dismiss in state court, that the state court lacked subject matter jurisdiction in the absence of a valid waiver of tribal sovereign immunity, that the Tribe and its officers were immune from suit but were necessary and indispensable parties, and that plaintiffs failed to exhaust administrative remedies in tribal court.

The Tribe filed a notice of removal in the U.S. District court for the District of Utah on September 20, 2013. Plaintiffs filed a motion to remand, arguing that the initial defendants waived their right to removal—or to consent to removal—by litigating in state court, that removal was untimely, that the defendants had not unanimously consented to removal, and that the federal court lacked subject matter jurisdiction.

The district court granted the motion to remand. It concluded that because the initial defendants' conduct manifested an intent to litigate in state court, they waived their right to removal and their right to consent to removal.

On appeal, the court held that the district court order remanding because of lack of unanimity is not reviewable under 28 U.S.C.S. § 1447(d). The order specifically stated that the unanimity requirement could not be met because some defendants waived their right to consent to removal.

Because § 1447(d) precluded review of the remand order issued by the district court, the appeal was dismissed.

XII. TAX

A. 2014 Cases

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

49 F. Supp. 3d 1095 (S.D. Fla. 2014). Before the court were Cross Motions for Summary Judgment. The Seminole Tribe of Florida filed this lawsuit challenging the imposition of two Florida taxes: the Rental Tax and the Utility Tax. The Seminole Tribe of Florida was a federally recognized Indian tribe, with reservations throughout Florida. The Florida Department of Revenue was the agency responsible for collecting tax revenues and enforcing Florida's tax laws. Marshall Stranburg was the executive director of the Department of Revenue.

The Seminole Tribe owns and operates entertainment and gaming facilities, including the Seminole Hard Rock Hotel and Casinos, at its Hollywood Reservation and its Tampa Reservation. As part of these operations, the Tribe leased a portion of the space at the Seminole Hollywood Casino to Ark Hollywood, LLC, and a portion of the space at the Seminole Tampa Casino to Ark Tampa, LLC. Florida assessed a tax on the rent paid to the Seminole Tribe by Ark Hollywood and Ark Tampa for the leases on the Tribe's Reservations.

The Seminole Tribe asserted that Federal law prohibited the Rental Tax. Florida also imposed a Utility Tax on electricity that was delivered to the Seminole Tribe on tribal reservations. The Tribe argued that Federal law prohibited Florida from imposing

this tax. Previously, the court determined that the State of Florida was immune from suit under the Eleventh Amendment, but that Stranburg, as executive director of the Florida Department of Revenue, was a proper defendant in this lawsuit.

The court found that federal law prohibited Florida from collecting the Rental Tax from the Ark entities for their leases of reservation land. The court further found that federal law preempted the application of the Rental Tax to the Tribe's leases with the Ark entities. The court also found that federal law prohibited Florida from collecting the Utility Tax from the Tribe since the legal incidence of the Utility Tax falls on the Seminole Tribe.

The court granted the Seminole Tribe's Motion for Summary Judgment and denied Stranburg's Motion for Summary Judgment.

2. *King Mountain Tobacco Co., Inc. v. McKenna*

768 F.3d 989 (9th Cir. 2014). Tobacco and cigarette manufacturing company owned by Yakama tribal member, and Confederated Tribes and Bands of the Yakama Indian Nation brought action against Washington's Attorney General, for declaratory and injunctive relief from Washington's escrow statute. The district court, 2013 WL 1403342, granted summary judgment in favor of state. Plaintiffs appealed.

The appellate court held that: (1) escrow statute was a nondiscriminatory law; (2) district court properly determined whether manufacturer's products were principally generated from reservation land; and (3) Yakama Treaty was not an express federal law that exempted manufacturer from Washington's escrow statute.

Affirmed.

B. July–August Cases

1. *Seminole Tribe of Fla. v. Stranburg*

799 F.3d 1324 (11th Cir. 2015). Tribe filed suit against the State of Florida and the director of the Florida Department of Revenue seeking injunctive relief against state Rental Tax and Utility Tax imposed on two non-Indian corporations with 25-year leases to provide food-court operations at two tribal casinos. The

district court summary judgment in favor of the Tribe and the State appealed.

The Court of Appeals affirmed as to the Rental Tax, holding that 25 U.S.C. 465 barred the tax in light of *Mescalero Apache Tribe v. Jones,* 411 U.S. 145 (1973). The court also affirmed on an issue of first impression—the effect of BIA regulations providing that "activities under a lease conducted on leased premises" were not subject to state taxation. 25 C.F.R. 162.017(c).

While the court did not defer to the Secretary's determination of federal preemption, it agreed that the Rental Tax was preempted by federal law under *Bracker*. However, the court rejected the district court's determination that the incidence of the Utility Tax fell on the Tribe and ruled that the Tribe had not established that the Utility Tax was generally preempted as a matter of law.

2. *Auto United Trades Org. v. Washington*

357 P.3d 615 (Wash. 2015). Trade association of Washington gasoline and automotive service retailers brought action against the State alleging that fuel tax compacts entered into with various Indian tribes which provided for refunds of gas tax paid were unconstitutional. The Superior Court, Grays Harbor County, dismissed for non-joinder of parties. Trade association appealed.

The Supreme Court of Washington reversed and held that while Indian tribes were necessary parties, they were not indispensable so as to warrant dismissal. 175 Wash.2d 214, 285 P.3d 52 (2012).

On remand, the court dismissed on the merits and trade association appealed again.

The Supreme Court, Justice Gonzales for a unanimous court, affirmed. Art. II, Sec. 40 of the Constitution expressly allowing for refunds authorized by law for taxes paid on motor vehicle fuels. The then-applicable statutes (since repealed) authorized compacts that provide for refunds.

XIII. TRUST BREACH AND CLAIMS

A. 2014 Cases

1. *Schaghticoke Indian Tribe v. Kent Sch. Corp. Inc.*

595 F. App'x 32 (2d Cir. 2014). These appeals arose from three consolidated actions. The common claim made by the Schaghticoke Tribal Nation (STN) in each case was that it was an Indian tribe that had been dispossessed of Indian land without the approval of Congress in violation of the Indian Nonintercourse Act, 25 U.S.C. § 177. That statute provided, in relevant part, that "[n]o purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."

The consolidated cases were stayed in 1999 to allow STN to complete the Department of the Interior's (DOI) federal acknowledgment process – a formal regulatory process by which DOI would decide whether a petitioning group was entitled to certain privileges and benefits provided to officially recognized tribes. *See* 25 C.F.R. § 83.2.

In 2005, DOI concluded that STN did not meet all of the criteria for federal acknowledgement and its determination was upheld on appeal. *Schaghticoke Tribal Nation v. Kempthorne*, 587 F.3d 132, 134 (2d Cir. 2009). Following that determination, the Defendants–Appellees moved for judgment on the pleadings in district court, which the court granted. STN appealed from the district court's ruling.

To establish a prima facie case of a violation of the Nonintercourse Act, a plaintiff must show that "(1) it is an Indian tribe, (2) the land is tribal land, (3) the United States has never consented to or approved the alienation of this tribal land, and (4) the trust relationship between the United States and the tribe has not been terminated or abandoned." *Golden Hill Paugussett Tribe of Indians v. Weicker,* 39 F.3d 51, 56 (2d Cir. 1994).

To constitute an Indian tribe within the meaning of the Nonintercourse Act, an Indian group must show that it was "a body of Indians of the same or a similar race, united in a community

under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." *United States v. Candelaria,* 271 U.S. 432, 442 (1926) (quoting *Montoya v. United States*, 180 U.S. 261, 266 (1901)) (emphasis added). In *Golden Hill*, the court concluded that "[t]he Department of the Interior's creation of a structured administrative process to acknowledge 'nonrecognized' Indian tribes using uniform criteria, and its experience and expertise in applying these standards, had made deference to the primary jurisdiction of the agency appropriate." *Id*. at 60.

Thus, while the "federal court, of course, retains final authority to rule on a federal statute," it should nonetheless "avail itself of the agency's aid in gathering facts and marshaling them into a meaningful pattern." *Id*. That is precisely what occurred in the case. The district court deferred to the factual findings of the DOI, but "agree[d] that it must independently apply applicable law to the factual findings." *United States v. 43.47 Acres of Land*, 896 F. Supp. 2d 151, 157 (D. Conn. 2012). And it did.

Ultimately, the district court concluded that the evidence submitted by STN was insufficient to satisfy the *Montoya* standard requiring that the group be "united in a community under one leadership or government." *Montoya*, 180 U.S. at 266. In so deciding, it relied on DOI's conclusions that STN had presented insufficient direct evidence of a distinct tribal community from 1920 to 1967 and after 1996, and of political authority over tribal members from 1801 to 1875 and after 1996.

It was appropriate for the district court to rely on the DOI's factual findings. To hold to the contrary would require the district court to conduct the independent, complex evidentiary hearing that this court sought to avoid in *Golden Hill*.

Finally, because the court found that the district court appropriately deferred under the doctrine of primary jurisdiction to DOI's factual findings in concluding that STN did not satisfy the *Montoya* criteria, the court did not address whether the doctrine of collateral estoppel applies in this case.

For the reasons stated above, the judgment of the district court was affirmed.

B. January–March Cases

1. *Rusty Coal Blackwater v. Sec'y of Interior*

No. 3:14–cv–00244, 2015 WL 506475 (D. Nev. Feb. 5, 2015). Before the court was Defendants', Secretary of the Interior and Bureau of Indian Affairs' (Defendants), Motion to Voluntarily Remand Matter to Secretary of the Interior. Plaintiffs, Rusty Coal Blackwater and Trent Lane Blackwater (Plaintiffs), filed an Opposition.

In 2004, Congress passed the Western Shoshone Claims Distribution Act (Act) to resolve the United States' failure to pay the Western Shoshone Nation amounts that the United States had promised pursuant to a 1863 treaty between the United States and Western Shoshone. The Bureau of Indian Affairs (BIA) determined that people with twenty-five percent Western Shoshone blood would be eligible for the distribution of funds.

Plaintiffs submitted documentation to prove that they are twenty-five percent Western Shoshone, and received notification from the BIA that they had met the qualifications and would receive funds pursuant to the Act. In March of 2011, Plaintiffs each received partial payment in the amount of $22,013.00. Other individuals who were eligible under the Act received a second payment of $13,124.93, for a total $35,137.93.

The BIA subsequently rejected Plaintiffs' claims to the payments, believing that their grandmother was a woman named Betty Davis and that they were not twenty-five percent Western Shoshone. Plaintiffs responded with additional documentation showing that their grandmother was Betty Ann Thomas Williams, along with her birth certificate confirming that Williams was the daughter of a "Full Blood Shoshone."

The BIA maintained that evidence indicated that Plaintiffs' grandmother was Betty Davis, and that they were not eligible for the payments. In response, Plaintiffs filed additional documents describing their heritage and bloodline.

The Assistant Secretary for the Department of the Interior affirmed that Plaintiffs were not eligible for payments under the Act. Plaintiffs filed an appeal to the Interior Board of Indian Appeals, and the appeal was effectively denied. Plaintiffs filed a Complaint, requesting that the Court declare that the BIA and

Secretary of the Interior deprived Plaintiffs of due process by rejecting their claim for benefits under the Act, and that the decision was arbitrary and capricious.

The court granted Defendants' Motion for Voluntary Remand.

2. *Liberty v. Jewell*

No. CV 14–77, 2015 WL 1467107 (D. Mont. Mar. 30, 2015) (mem.). The court granted the motion to dismiss for lack of jurisdiction and denied as moot Defendants' motions in the alternative.

Plaintiff Ramona Liberty (Plaintiff), an enrolled member of the Confederated Salish and Kootenai Tribes (Tribe), owned a fractional interest in allotment land situated on the Flathead Indian Reservation in Montana. The allotment was originally held in trust for Plaintiff's mother Julia Matt Hawkins, an enrolled member of the Tribe, pursuant to the Allotment Act.

Plaintiff filed this action against Defendant Sally Jewel, in her official capacity as the Secretary of the United States Department of the Interior, and Defendant Kevin Washburn, in his official capacity as the Assistant Secretary of the Interior–Indian Affairs, (Defendants) for Defendants' alleged actions with respect to her allotment interest.

Count One of the Amended Complaint alleged various generalized breaches of trust obligations by Defendants with respect to Plaintiff's interest in the allotment land. Count Two alleges violations of the Indian Land Consolidation Act, 25 U.S.C. §§ 2201-2221 (ILCA) and the Indian Self–Determination and Education Assistance Act, 25 U.S.C. §§ 450–458hh, (ISDEAA), based on Defendants' actions with respect to Plaintiff's interest in the allotment land.

Defendants contended that the court lacks jurisdiction because Plaintiff failed to demonstrate a waiver of the United States' sovereign immunity with respect to her claims.

This suit was properly dismissed for lack of jurisdiction.

C. April–June Cases

1. *Quechan Tribe of Ft. Yuma Indian Reservation v. United States*

599 F. App'x 698 (9th Cir. 2015) (mem.). Plaintiff Quechan Tribe alleged that the United States violated statutory, common law, and constitutional duties that it owed the Tribe when it provided inadequate medical care at the Fort Yuma Service Unit of the Indian Health Service (IHS).

According to the complaint, the Unit's facilities were the oldest in the IHS system, were in a condition of disrepair, and created unsafe conditions for tribal members seeking care. The district court granted the government's motion to dismiss.

Plaintiff alleged that the United States had a duty to meet a specific standard of adequate medical care based on: (1) the federal-tribal trust relationship; and (2) two federal statutes, the Snyder Act and the Indian Health Care Improvement Act. However, the federal-tribal trust relationship did not, in itself, create a judicially enforceable duty. Rather, "trust obligations of the United States to the Indian tribes are established and governed by statute rather than the common law, and in fulfilling its statutory duties, the Government acted not as a private trustee but pursuant to its sovereign interest in the execution of federal law." *United States v. Jicarilla Apache Nation,* 131 S. Ct. 2313, 2318 (2011).

Neither the Snyder Act nor the Indian Health Care Improvement Act contained sufficient trust-creating language on which to base a judicially enforceable duty. Both statutes "speak about Indian health only in general terms," *Lincoln v. Vigil*, 508 U.S. 182, 194 (1993), and neither required the United States to provide a specific standard of medical care. *See* 25 U.S.C. § 13; 25 U.S.C. § 1601.

This court also could not compel IHS to allocate greater funding to the Unit, because IHS's allocation of the lump-sum appropriation for Indian health care was committed to its discretion. *Lincoln*, 508 U.S. at 190–92.

Finally, Plaintiff had no judicially cognizable due process or equal protection claims. State actors were not liable for failures to protect individuals' due process rights to safe conditions in the absence of a special, custodial relationship. *Campbell v. Wash.*

Dep't of Soc. & Health Servs., 671 F.3d 837, 842–43 (9th Cir. 2011). The solution lied in Congress and the executive branch, not the courts.

Affirmed.

2. *Shinnecock Indian Nation v. United States*

782 F.3d 1345 (Fed. Cir. 2015). Indian tribe brought action against federal government, alleging that government, acting through federal court system, denied any and all judicial means of effective redress for unlawful taking of lands currently comprising New York town from tribe and its members. Government moved to dismiss tribe's claims as unripe and outside court's jurisdiction. The Court of Federal Claims, 112 Fed. Cl. 369, granted motion. Tribe appealed.

The appellate court held that: (1) tribe's breach of trust claims against United States were not ripe for adjudication; and (2) Court of Federal Claims lacked jurisdiction over tribe's judicial takings claim.

Affirmed in part, vacated in part, and remanded.

3. *Wolfchild v. Redwood Cnty.*

112 F. Supp. 3d 866 (D. Minn. 2015). In this case, Plaintiffs sought possessory rights and damages concerning a twelve square mile area of land in southwestern Minnesota. In order to obtain such relief, Plaintiffs sought to eject an Indian Tribe from reservation lands and seventy-five private landowners who, together with their ancestors, had possessed the land at issue for over one hundred and fifty years.

Prior to bringing this action, Plaintiffs litigated related claims against the United States before the Court of Federal Claims for over eleven years, which resulted in nine published opinions.

A review of those nine opinions demonstrated the breadth and depth of the issues that were actually litigated. Those nine opinions also assisted in demonstrating that the claims asserted in this case were so completely frivolous and without a factual or legal basis that they had to have been brought in bad faith.

The court found that such conduct warranted severe sanctions against both Plaintiffs and their counsel and granted Defendants' motions for sanctions and ordered Plaintiffs and their counsel to

pay Defendants their reasonable attorney's fees and costs, in addition, Plaintiffs were required to post an appeal bond in the amount of $200,000.

4. *Shields v. Wilkinson*

790 F.3d 791 (8th Cir. 2015). Appellants, Shields and Wilson, were Indians with interests on the Bakken Oil Shale Formation in the Fort Berthold Reservation in North Dakota, allotted to them under the Dawes Act of 1887. Such land was held in trust by the government, but could have been leased by allottees. Shields and Wilson leased oil and gas mining rights on their allotments to companies and affiliated individuals who won a sealed bid auction conducted by the Board of Indian Affairs in 2007. After the auction, the women agreed to terms with the winning bidders, the BIA approved the leases, and the winning bidders sold them for a large profit. Shields and Wilson filed a putative class action, claiming that the government had breached its fiduciary duty by approving the leases for the oil and gas mining rights, and that the bidders aided, abetted, and induced the government to breach that duty.

The district court concluded that the United States was a required party which could not be joined, but without which the action could not proceed in equity and good conscience, and dismissed.

The Eighth Circuit affirmed. The United States enjoyed sovereign immunity for the claims and could decide itself when and where it wanted to intervene.

5. *Robinson v. Jewell*

790 F.3d 910 (9th Cir. 2015). Non-federally recognized Native American tribe and its elected chairperson sued Secretary of Department of Interior (DOI), county, and ranch owners asserting title to ranch. The district court, 885 F. Supp. 2d 1002, dismissed complaint, and plaintiffs appealed.

The appellate court held that: (1) tribe's failure to present claim pursuant to California Land Claims Act of 1851 extinguished its title to property; (2) Congress' ratification of 1849 Treaty with Utah did not give tribe any enforceable rights to property;

(3) treaty that was never ratified by Senate carried no legal effect; (4) reservation for tribe was not created pursuant to Act of Congress of 1853; and (5) any rights to property that tribe possessed as result of Acts of 1853 and 1855 were extinguished by Act of 1864.

6. *Pueblo of Jemez v. United States*

790 F.3d 1143 (10th Cir. 2015). Indian tribe brought action against the United States seeking to quiet its allegedly unextinguished and continuing aboriginal title to lands under the federal common law and the Quiet Title Act. The district court dismissed for lack of subject matter jurisdiction. Tribe appealed.

The appellate court held that: (1) United States' grant of land to private landowners did not extinguish a tribe's aboriginal right of occupancy; (2) there was no evidence that private landowners' use of the land was inconsistent with tribe's occupancy of the land; (3) tribe sufficiently put the United States on notice of its claim to aboriginal title; and (4) the Preservation Act did not extinguish the tribe's aboriginal title.

D. July–August Cases

1. *Bruette v. Jewell*

No. 14-CV-876, 2015 WL 111624 (E.D. Wis. Aug. 24, 2015). Plaintiff Felix J. Bruette, Jr., brought this pro se civil action against Sally Jewell, the Secretary of the United States Department of Interior (DOI). Bruette stated that he was "the great great Grandson and direct lineal descendant of Stephen Gardner," who was "a signatory under Article V of the Treaty of February 5th, 1856 and declared to be an 'actual' member of the Stockbridge and Munsee Tribe by the United States Congress on March 3rd, 1893." As a linear descendent of Stephen Gardner, Bruette claimed he was entitled to certain rights and privileges, including a pro rata share of tribal funds and the right to occupy tribal lands. Bruette brought this action in an attempt to vindicate those rights.

The court concluded that the court lacked jurisdiction over his claims and that his action be dismissed.

XIV. INDEX OF CASES