JUDICIAL UPDATE
1999-2000 FEDERAL CASE LAW
ON AMERICAN INDIANS

by Thomas P. Schlosser

Morisset, Schlosser, Ayer & Jozwiak
1115 Norton Building
801 Second Avenue
Seattle, WA 98104-1509
(206) 386-5200
t.schlosser@msaj.com

THOMAS P. SCHLOSSER. Mr. Schlosser has a B.A. from the University of Washington and a J.D. from the University of Virginia Law School. He is a director in the Seattle office of Morisset, Schlosser, Ayer & Jozwiak, where he specializes in federal litigation, natural resource and Indian tribal property issues. In 1975-79, Tom represented tribes in treaty fishing rights litigation in Western Washington. Since 1979, Tom has litigated cases concerning timber, water, energy and federal breach of trust. He is also frequently involved in tribal economic development and environmental regulation. Tom is an officer and founding member of the Indian Law Section of the Washington State Bar Association and is a frequent CLE speaker in federal Indian law topics. Tom moderates an American Indian Law discussion group for lawyers.

September 2000

UNITED STATES SUPREME COURT

1. ***Arizona v. California***, No. 8 Orig, 120 S. Ct. 2304 (2000). State of Arizona brought original action against State of California to determine States' and other parties' rights to waters of Colorado River. United States intervened, seeking water rights on behalf of five Indian reservations. Following determination that United States had reserved water rights for such reservations, grant of tribes' motions to intervene, and grant of States' motion to reopen decree, the Supreme Court held that: (1) claims of Quechan Tribe for increased rights to water for disputed boundary lands of Fort Yuma Reservation were not precluded by Supreme Court decision finding, inter alia, that United States had reserved water rights for reservations; (2) such claims were not precluded by consent judgment entered in prior Court of Claims proceeding in which Tribe had challenged 1893 Agreement providing for Tribe's cession of such disputed lands; and (3) settlements of claim for additional water for Fort Mojave Reservation and Colorado River Indian Reservation would be approved. Order accordingly. Chief Justice Rehnquist concurred in part, dissented in part, and filed opinion in which Justices O'Connor and Thomas joined.

2. ***Rice v. Cayetano***, No. 98-818, 120 S. Ct. 1044 (2000). Citizen of Hawaii brought § 1983 action against state officials, challenging eligibility requirement for voting for trustees for Office of Hawaiian Affairs (OHA). The district court upheld voter qualification. Citizen appealed. The Court of Appeals for the Ninth Circuit affirmed. Certiorari was granted. The Supreme Court, Justice Kennedy, held that: (1) limiting voters to those persons whose ancestry qualified them as either a "Hawaiian" or "native Hawaiian," as defined by statute, violated Fifteenth Amendment by using ancestry as proxy for race, and thereby enacting a race-based voting qualification; (2) exclusion of non-Hawaiians from voting for OHA trustees was not permissible under cases allowing differential treatment of certain members of Indian tribes; (3) voting qualification was not permissible under cases holding that one-person, one-vote rule did not pertain to certain special purpose districts; and (4) voting qualification was not saved from unconstitutionality on theory that voting restriction merely ensured an alignment of interests between fiduciaries and beneficiaries of a trust. Reversed. Justice Breyer filed an opinion concurring in the result, in which Justice Souter joined. Justice Stevens filed a dissenting opinion, in which Justice Ginsburg joined in part. Justice Ginsburg filed a dissenting opinion.

OTHER FEDERAL COURTS

A. Administrative Law

1. ***Klamath Water Users Protective Assoc. v. United States Dept. of Interior***, No. 97-36208, 189 F.3d 1034 (9th Cir., Aug. 31, 1999). Nonprofit association of water users brought action against Department of the Interior under FOIA, seeking documents submitted by Indian tribes at request of Department in course of administrative and adjudicative proceedings involving water rights and allocation. The district court granted Department's motion for summary judgment, and association appealed. The Court of Appeals held that: (1) documents were not exempt from disclosure as inter-agency or intra-agency memorandums or letters, and (2) Department did not violate its fiduciary duty to tribes by releasing documents. Reversed. Judge Hawkins dissented. Petition for *certiorari* pending in No. 99-1871.

2. ***Miami Nation of Indians of Indiana v. Babbitt***, No. 3:92-CV-586RM, 55 F. Supp. 2d 921 (N.D. Ind., March 29, 1999). Indian tribe, seeking judicial review of denial of federal acknowledgment, moved to supplement administrative record. The district court held that supplementation of record was unwarranted. Motion denied.

3. ***Ransom v. Babbitt,*** No. 98-1422(CKK), 69 F. Supp. 2d 141 (D.D.C., Sept. 30, 1999). Indian tribal leaders sued United States under Administrative Procedures Act, alleging wrongful refusal to recognize leaders as tribe's legitimate government. On cross-motions for summary judgment, the district court held that Bureau of Indian Affairs and Interior Board of Indian Appeals acted arbitrarily and capriciously in determining that tribe had validly adopted constitution, and thus that only legitimate representatives of tribe in relations with federal government were holders of offices named in constitution. Plaintiffs' motion granted; defendant's motion denied.

4. ***Rosebud Sioux Tribe v. Gover,*** No. 99-3003, 104 F. Supp. 2d 1194 (D.S.D., Feb. 1, 2000). Plaintiff developed plans to build and operate hog-production facility on tribal trust lands. Local Bureau of Indian Affairs officials approved the lease but other officials in the Department of the Interior voided it based on alleged violations of the National Environmental Policy Act and the National Historic Preservation Act. The district court found that decision to void the lease was arbitrary and capricious and granted plaintiff's motion for a preliminary injunction enjoining the Department of Interior from interfering with the project because the Department of Interior did not demonstrate that (1) the environmental assessment required by the National Environmental Policy Act failed to raise a "substantial

environmental issue," or (2) the local Bureau of Indian Affairs officials failed to take a "hard look" at the project. Plaintiffs are expected to ensure that the project is operated and maintained "exactly as was represented to the court by plaintiffs."

5. ***Thomas v. United States***, No. 98-2329, 189 F.3d 662 (7th Cir., Sept. 7, 1999). Supporters of amendments to Indian tribe's constitution brought action under IRA and APA against United States, challenging decision of federal officials to overturn results of election in which amendments had been approved. The district court dismissed action. Supporters appealed. The Court of Appeals held that tribal governing board was not necessary party, since, inter alia, Congress had refused to reflect tribal interest in legal structure of tribal constitutional elections. Reversed and remanded.

6. ***United Nat'l Bank v. United States Dep't of the Interior***, No. 97-1912-Civ., 54 F. Supp. 2d 1309 (S.D. Fla., Jan. 30, 1998). Lender brought action seeking review of Board of Indian Appeals' decision voiding Department of Interior's guaranty of loan under Indian Financing Act. On cross-motions for summary judgment, the district court held that Department's guaranty of loan could be voided due to lender's negligence in loan application and verification process. Defendant's motion granted.

7. ***United Tribe of Shawnee Indians v. United States***, No. CIV. A. 99-2063-GTV, 55 F. Supp. 2d 1238 (D. Kan., June 29, 1999). Alleged Indian tribe brought declaratory and mandamus action, seeking to prevent federal government's proposed disposal of excess property. On plaintiff's motion for preliminary injunction, and government's motion to dismiss, the district court held that: (1) only waiver of sovereign immunity was for review of final agency actions under Administrative Procedures Act and (2) neither alleged tribe's claim that it was previously recognized tribe, its claim that it was entitled to property, nor its challenge to issuance of draft finding of no significant impact were ripe for adjudication. Plaintiff's motion denied; defendant's motion granted.

8. ***Utah v. United States Department of The Interior***, No. 99-4104, 210 F.3d 1193 (10th Cir. 2000). State of Utah brought action against Bureau of Indian Affairs challenging BIA's refusal to permit State to participate in process between Indian tribe and storage corporation for approving lease of tribal land for storage of nuclear waste. Storage corporation intervened. The Utah District Court concluded that State lacked standing and granted BIA's motion for summary judgment. State appealed. The Court of Appeals held that action was not ripe for review since, inter alia, State would have opportunity to raise its environmental concerns during review and licensing process conducted by Nuclear Regulatory Commission. Affirmed.

B. Alaskan Native Claims Settlement Act

9. ***Bay View, Inc. v. United States***, No. 99-456L, 46 Fed. Cl. 494 (2000). Alaska native village corporation brought suit alleging that an amendment of a section of the Alaska Native Claims Settlement Act constituted a taking of plaintiff's property, a breach of trust, and a breach of contract. On defendant's motion to dismiss, the Court of Federal Claims held that: (1) amendment to the Alaska Native Claims Settlement Act which exempted net operating loss revenues from the Act's sharing requirement did not constitute a taking of village corporation's property, as corporation had no property interest in NOL revenues; (2) any breach of trust claim based on ANCSA was not within jurisdiction of the Court of Federal Claims, as ANCSA is not a money-mandating statute; and (3) allegations that amendment constituted a breach of contract or amendment failed to state a claim. Motion granted.

10. ***Doyon, Ltd. v. United States***, No. 97-5049, 214 F.3d 1309 (Fed. Cir. 2000). ANCSA Regional Corporation challenged imposition of alternative minimum tax on income realized by affiliating with other profitable corporations and using net operating losses to shelter profits of the other corporation. The Court of Federal Claims upheld the tax but the Court of Appeals reversed holding that the special tax provision at issue prohibits the IRS from using any statute or principal of law to deny the benefit or use of losses incurred. The money received by the Regional Corporation was a congressionally recognized benefit.

11. ***Oliver v. Sealaska Corp.***, No. 97-36091, 192 F.3d 1220 (9th Cir., Sept. 3, 1999). At-large shareholder in two Regional Corporations created pursuant to ANCSA brought purported class action in state court challenging settlement by all twelve Regional Corporations of ANCSA revenue sharing claims. Action was removed to federal court. The district court dismissed action. Shareholder appealed. The Court of Appeals held that: (1) revenue sharing provisions of ANCSA did not create private right of action; (2) shareholder could not bring direct action against the two Corporations in which he owned stock under Alaska law; and (3) shareholder could not bring direct action against the other ten Corporations challenging settlement. Affirmed.

C. Child Welfare Act (ICWA)

12. ***Navajo Nation v. Superior Ct. Yakima County***, No. CY-98-3001-EFS, 47 F. Supp. 2d 1233 (E.D. Wash., March 31, 1999). Indian tribe challenged adoption of Indian child. On adoptive parents' motion for summary judgment, and second tribe's motion to intervene, the district court held that: (1) ICWA did not provide tribe with right to notice of private, voluntary adoption proceeding; (2) tribe lacked standing, under doctrine of parens patriae, to assert rights of

biological grandparents; (3) Washington statute of limitations for challenging adoption decrees was applicable to tribe; and (4) second tribe was entitled to intervene as of right. Motions granted.

D. Contracting

13. ***Babbitt v. Oglala Sioux Tribal Public Safety Dept.***, No. 99-1033, 194 F.3d 1374 (Fed. Cir., Oct. 27, 1999). Secretary of Interior denied self-determination contractor's request for all of its indirect costs on its self-determination contracts under Indian Self-Determination and Education Assistance Act (ISDEAA), and contractor appealed. The Interior Board of Contract Appeals granted summary judgment for contractor. Secretary appealed. The Court of Appeals held that: (1) any funds provided under ISDEAA contract are subject to availability of appropriations, and (2) Secretary was not collaterally estopped from providing contractor with less than full funding of its indirect costs Reversed and remanded. Gajarsa, Circuit Judge, issued separate opinion.

14. ***Babbitt v. Miccosukee***, unreported, 1999 WL 989060 (Fed. Cir., Oct. 29, 1999). For the reasons cited in *Babbitt v. Ogalala Sioux Tribal Safety Department*, 194 F.3d 1374 (Fed. Cir., Oct. 29, 1999), the U.S. Court of Appeals for the Federal Circuit reverses the decision by the U.S. Department of Interior Board of Contract Review that granted summary judgement to the Miccosukee Corporation and denied the United States' motion for summary judgement.

15. ***Ramah Navajo Chapter v. Babbitt***, No. Civ 90-0957 LHWWD, 50 F. Supp. 2d 1091 (D.N.M., May 25, 1999). Upon motion for approval of partial settlement agreement in class action brought on behalf of members of Indian tribe seeking reimbursement for unpaid indirect costs incurred while providing services under Indian Self-Determination Act contracts and application of class counsel for an award of attorney fees and costs, the district court held that: (1) partial settlement agreement was fair, reasonable, and adequate and would be approved; (2) attorney fees would be calculated according to the percentage-of-the-fund method; and (3) attorney fee of 11% of the gross common fund of $75,800,000 plus post-judgment interest and an award of New Mexico gross receipts tax on those fees, was reasonable award. Motion for approval of partial settlement agreement granted; motion for attorney fees granted in part and denied in part.

16. ***Shoshone-Bannock Tribes v. Shalala***, No. CV-96-459-ST, 58 F. Supp. 2d 1191 (D. Or., July 22, 1999). Tribe brought action against the Secretary of Health and Human Services, the Director of IHS, and others for violations of various provisions of ISDEAA in connection with funding of the tribe's operation of health care services pursuant to self-determination contracts. On government's motion for

reconsideration of judgment for tribe, 999 F. Supp. 1395, the district court held that congressional appropriations act section limiting amount of funding available for tribal contract support costs (CSC) under ISDEAA to amounts earmarked for that purpose in prior appropriations acts did not retroactively relieve IHS of its obligation to fully fund CSC for programs already undertaken and completed during fiscal years in question. Motion denied.

17. ***United States v. Smith***, No. 99-5086, unreported, 1999 WL 770217 (10th Cir., Sept. 29, 1999). Defendant appealed conviction of assault on a federal law enforcement officer. Only issue on appeal was whether the district court erred in finding Ronald Teel, Chief of Police for the Osage Nation Police Department, was a federal officer under 18 U.S.C. § 111. The Tenth Circuit held that Teel was acting under the authority granted in 25 U.S.C. § 2804(a), and thus was considered a federal officer for purposes of 18 U.S.C. § 111. Affirmed.

E. Employment

18. ***Boudman v. Aroostook Band of Micmac Indians***, No. Civ. 98-174-B, 54 F. Supp. 2d 44 (D. Me., June 16, 1999). Terminated employee sued Aroostook Band of Micmac Indians, alleging violation of Maine Human Rights Act and S 1983. On tribe's motion to dismiss, and employee's motion to amend complaint, the district court held that: (1) tribe was subject to Maine Human Rights Act; (2) Title VII exemption of Indian tribes from its definition of "employer" was applicable; and (3) neither Fifth nor Fourteenth Amendment of United States Constitution could be invoked against tribe. Plaintiff's motion granted in part and denied in part; defendant's motion denied.

19. ***Brooks v. Pedro Bay Village Council***, unreported, 1999 WL 1044292 (9th Cir., Nov. 17, 1999). Employee sued the village council and its president for breach of contract and related claims. The district court dismissed, holding that the council could not be sued because of sovereign immunity. The Ninth Circuit affirmed.

20. ***Dionne v. Shalala***, No. 98-3510, 209 F.3d 705 (8th Cir., Apr. 5, 2000). Plaintiff, a public health nurse with the Indian Health Service and a member of the Turtle Mountain Band of Chippewa, alleged Title VII race and national origin discrimination in the assignment of her classification grade. The district court granted summary judgement for the Secretary, finding that: (1) plaintiff presented a prima facie case of disparate treatment, but (2) the Secretary articulated a nondiscriminatory reason for the grading assignment. The Eighth Circuit affirmed.

21. ***Duke v. Absentee Shawnee Tribe of Oklahoma Housing Authority***, No. 99-6054, 199 F.3d 1123 (10th Cir. 1999), *cert. denied*, 120 S. Ct. 2014. Employee brought Title VII claims against the Absentee Shawnee Housing

Authority (ASHA). The district court dismissed action. Employee appealed. The Court of Appeals held that ASHA was Indian tribe exempt from Title VII even though it was state agency. Affirmed.

22. ***Fillion v. Houlton Band of Maliseet Indians***, No. Civ. 99-23-B, 54 F. Supp. 2d 50 (D. Me., June 16, 1999). Terminated employee brought § 1983 claim against Indian tribe. On tribe's motion to dismiss, and employer's motion to amend complaint, the district court held that: (1) Title VII exemption of Indian tribes from its definition of "employer" was applicable to Houlton Band of Maliseet Indians, and (2) court lacked jurisdiction over employee's Indian Civil Rights Act (ICRA) claim. Plaintiff's motion denied; defendant's motion granted.

23. ***Shannon v. Houlton Band of Maliseet Indians***, No. Civ. 99-25-B, 54 F. Supp. 2d 35 (D. Me., June 23, 1999). Terminated employee brought § 1983 claim against Indian tribe. On tribe's motion to dismiss, and employer's motion to amend complaint, the district court held that: (1) Title VII exemption of Indian tribes from its definition of "employer" was applicable to Houlton Band of Maliseet Indians, and (2) court lacked jurisdiction over employee's Indian Civil Rights Act (ICRA) claim. Plaintiff's motion denied; defendant's motion granted.

F. Environmental Regulation

24. ***Arizona Public Service Co. v. Environmental Protection Agency***, Nos. 98-1196, 98-1203, 98-1206, 98-1207 and 98-1208, 211 F.3d 1280 (D.C. Cir. 2000). On Petitions for Review of an Order of the Environmental Protection Agency. In 1990, Congress passed a compendium of amendments to the Clean Air Act. This case concerns amendments that specifically address the power of tribes to implement air quality regulations under the Act. Petitioners challenge the Environmental Protection Agency's regulations, promulgated in 1998, implementing the 1990 Amendments. *See* Indian Tribes: Air Quality Planning and Management, 63 Fed. Reg. 7254 (1998) (to be codified at 40 C.F.R. pts. 9, 35, 49, 50, and 81). EPA appropriately construed the CAA; petitioners dismissed.

25. ***HRI, Inc. v. EPA***, Nos. 97-9556, 97-9557, 198 F.3d 1224 (10th Cir. 2000). Mining company and New Mexico Environment Department petitioned for judicial review of Environmental Protection Agency's decision to implement, pursuant to Safe Drinking Water Act, direct federal underground injection control program on certain New Mexico lands. Department also challenged EPA's decision to implement direct federal UIC program on adjoining lands considered by EPA to be Indian country. The Court of Appeals, held that: (1) EPA's decision to treat lands' jurisdictional status as "in dispute" was ripe for review; (2) EPA's reconsideration of prior determination that certain lands were Indian country for SDWA purposes was new decision triggering new limitations period; (3) EPA acted reasonably in

asserting jurisdiction over disputed lands under regulations providing for non substantial UIC program revisions; (4) EPA could find that Indian country status of lands was disputed despite prior state adjudications to the contrary; and (5) one land parcel at issue qualified as Indian country. Petitions for review dismissed; issue remanded.

26. ***Metcalf v. Daley***, No. 98-36135, 214 F.3d 1135 (9th Cir. 2000) 2000 WL 732909. Appellants appeal the district court's grant of summary judgment in favor of appellees and the Makah Indian Tribe. Appellants argue that in granting the Makah authorization to resume whaling, the Federal Defendants violated the National Environmental Policy Act by (1) preparing an Environmental Assessment that was both untimely and inadequate, and (2) declining to prepare an Environmental Impact Statement. In addition, appellants challenge the district court's denial of their motion to compel production of administrative record material, as well as their motion to supplement the administrative record. Reversed and remanded.

G. Exhaustion of Tribal Court Remedies

27. ***Allstate Indemnity Co. v. Stump***, No. 97-35822, 191 F.3d 1071 (9th Cir. Aug. 19, 1999; as amended November 15, 1999). Automobile insurer sued to enjoin tribal court from exercising jurisdiction in bad-faith insurance claim brought by estates of tribal members who died in motor vehicle accident on Indian reservation. The district court, 994 F. Supp. 1217, entered judgment for estates, and insurer appealed. The Court of Appeals held that insurer was required to exhaust remedies in tribal court before challenging its jurisdiction because it was at least plausible that tribal court had jurisdiction. Vacated and remanded.

28. ***Auto Owners Ins. Co. v. Saunooke***, No. 2:99CV79, 54 F. Supp. 2d 585 (W.D.N.C., May 27, 1999). Insurer of property on Indian land brought action to enjoin further proceedings in tribal court. The district court held that insurer was not excepted from requirement that it exhaust tribal remedies. Complaint dismissed.

29. ***Cherokee Nation v. Nations Bank, N.A.***, No. 99-308-S, 67 F. Supp. 2d 1303 (E.D. Okla. July 15, 1999). Cherokee Nation brought action contesting garnishment proceedings pending in tribal and state court. The district court held that: (1) court would abstain from exercising jurisdiction over proceedings pending in tribal court, and (2) plaintiff was not immune from state court garnishment proceedings. Complaint dismissed.

30. ***Davis v. Mille Lacs Band of Chippewa Indians***, No. 99-1469, 193 F.3d 990 (8th Cir. Oct. 22, 1999). Member of Indian tribe employed as tribal police officer

brought action against tribe alleging employment- related violations of federal and state laws. The district court, 26 F. Supp. 2d 1175, granted tribe's motion to dismiss. Member appealed. The Court of Appeals held that: (1) any waiver by tribe of sovereign immunity over member's claims did not eliminate exhaustion requirement, and (2) member failed to exhaust her tribal remedies prior to bringing federal claim.

31. ***Landmark Golf Ltd. Partnership v. Las Vegas Paiute Tribe,*** No. CV-S-98-602-PMPLRL, 49 F. Supp. 2d 1169 (D. Nev., March 26, 1999). Golf resort developer sued Indian tribe for breach of contract, and tribe moved to dismiss. Adopting the report and recommendation of Lawrence R. Leavitt, United States Magistrate Judge, the district court held that developer was required to exhaust tribal remedies before seeking relief in federal court. Motion granted.

32. ***Ninigret Development Corp. v. Narragansett Indian Wetuomuck Housing Authority***, No. 99-1828, 207 F.3d 21 (1st Cir. 2000). Non-Indian contractor brought contract, fraud, and conversion action against tribal housing authority arising from contract for work outside of reservation. The district court dismissed action. Contractor appealed. The Court of Appeals held that: (1) district court did not have diversity jurisdiction over action; (2) District Court had federal question jurisdiction to determine extent of tribal court's jurisdiction over contractor's claims; (3) defense predicated on tribal sovereign immunity was susceptible to direct adjudication in federal courts, without reference to the tribal exhaustion doctrine; (4) tribe waived sovereign immunity with respect to contractor's claims; and (5) contractor would be required to exhaust tribal remedies. Vacated and remanded.

33. ***Petrogulf Corporation v. ARCO Oil & Gas Company***, No. CIV.A. 00-B-34, 92 F. Supp. 2d 1111 (D. Col. 2000). Owner of working interest in gas field sued mineral lessee on adjoining Indian trust land for mineral trespass and misrepresentations to state commission. On defendant's motion to dismiss, the District Court held that plaintiff was required to exhaust tribal remedies before suing in federal court. Motion granted.

34. ***Tribal Smokeshop, Inc. v. Alabama-Coushatta Tribes of Texas***, No. 9:99-CV-26, 72 F. Supp. 2d 717 (E.D. Tex. 1999). Suit was brought against Indian tribe for breach of contract. On defendants' motion to dismiss, the district court held that: (1) sovereign immunity barred suit against both tribe and members of tribal counsel, and (2) in any event, exhaustion of tribal remedies was required. Motion granted.

H. Fisheries, Water, FERC, BOR

35. ***American Rivers v. FERC***, Nos. 98-70079, 98-70084, 187 F.3d 1007 (9th Cir., Aug. 11, 1999). Conservation and environmental organizations, along with Oregon Department of Fish and Wildlife, sought review of FERC decision reissuing a hydropower license to the incumbent licensee. The Court of Appeals held that: (1) FERC could use existing environmental conditions as baseline for comparing proposed alternatives; (2) FERC's consideration of alternatives satisfied procedural requirements of National Environmental Policy Act; (3) FERC has discretion to reclassify, reject, or modify recommendations made by federal and state fish and wildlife agencies; (4) organizations and Department had standing to challenge FERC's rejection of fishways prescribed by Secretaries of Interior or Commerce; (5) challenge to FERC's authority to reject fishways was ripe for review; and (6) FERC lacked authority to reject fishway prescriptions proposed by Secretaries of Commerce or Interior. Granted in part and denied in part.

36. ***Conservation Law Foundation v. Federal Energy Regulatory Commission***, Nos. 99-1035, 99-1159, 99-1161 & 99-1162, 216 F.3d 41 (D.C. Cir. 2000). The Department of the Interior and the Environmental Protection Agency, conservation groups, and the Penobscot Indian Nation petition for review of the Federal Energy Regulatory Commission's relicensing of a hydroelectric project in north-central Maine. The issues presented go mainly to the adequacy of the Commission's consideration of the various factors governing license renewals. The Commission gave sufficient attention to these factors and carefully explained its conclusions. Petitions are denied.

37. ***Klamath Water Users Protective Assoc. v. Patterson***, No. 98-35708, 191 F.3d 1115 (9th Cir. 2000). Water users association and other irrigators sued United States Bureau of Reclamation and dam operator's successor based on contract between Bureau and operator governing dam's management. Successor filed counterclaim, seeking declaration of rights with respect to irrigators' standing under contract. Parties cross-moved for summary judgment. The district court, 15 F. Supp. 2d 990, granted declaratory judgment to Bureau and successor. Irrigators appealed. On petition for rehearing and rehearing en banc, the Court of Appeals held that: (1) irrigators were not third-party beneficiaries to contract; (2) government retained overall control over dam; (3) Bureau had authority to direct dam operations to comply with Endangered Species Act; and (4) Bureau had authority to direct dam operations to comply with Tribal rights. Affirmed; petitions for panel rehearing and for rehearing *en banc* denied.

38. ***State Engineer, Nevada v. South Fork Band of the Te-moak Tribe of Western Shoshone Indians of Nevada***, No. CV-N-00679-ECR (RAM), 66 F. Supp. 2d 1163 (D. Nev., Aug. 20, 1999). State sued Indian tribe to enforce

state court water rights decree. Suit was removed to federal court. On state's motion to remand, and tribe's motion to abstain, the district court held that: (1) suit was properly removed; (2) court had subject matter jurisdiction; and (3) abstention was not warranted. Motions denied.

I. Gaming

39. ***Kansas, ex rel. v. United States***, No. Civ.A. 99-2341-GTV, 86 F. Supp. 2d 1094 (D. Kan. 2000). State sought judicial review of determination by Department of the Interior that certain parcel was Indian land. On plaintiff's motion for preliminary injunction and defendant's motion to dismiss, the district court held that: (1) Quiet Title Act did not apply, and (2) finding that parcel was Indian land, within meaning of Indian Gaming Regulation Act, was arbitrary and capricious. Plaintiff's motion granted; defendant's motion denied.

40. ***Melius v. National Indian Gaming Commission***, 2000 WL 1174994 (D.D.C., July 21, 2000). Plaintiff sued the National Indian Gaming Commission under the Freedom of Information Act, the Privacy Act, the Administrative Procedure Act, and the Fifth Amendment to the U.S. Constitution. Plaintiff moved for disclosure of certain documents, damages, a review of the National Indian Gaming Commission determination that he was an unsuitable candidate for a management contract, and declaratory and monetary relief. Defendant moved for summary judgement. The district court granted the motion for summary judgment on some counts and denied it on others.

41. ***New York v. Oneida Indian Nation of New York***, No. 95-CV-554 (TJM), 78 F. Supp. 2d 49 (N.D. N.Y. 1999). State sued Indian Tribe for violation of tribal-state gaming compact. On defendant's motion to dismiss, the district court held that: (1) defendant expressly waived its sovereign immunity; (2) Supreme Court's holding in *Seminole Tribe of Florida v. Florida*, invalidating Indian Gaming Regulatory Act (IGRA) provision abrogating states' sovereign immunity, did not invalidate IGRA as a whole; (3) court would not defer, under doctrine of primary jurisdiction, to National Indian Gaming Commission; (4) complaint adequately alleged violation of compact, as required by compact's jurisdictional provision; and (5) fact issue existed as to whether New York Racing and Wagering Board had authority to approve defendant's offering of new gaming activity. Motion denied.

42. ***Pueblo of Sandia v. Babbitt***, No. 98-1004(RCL), 47 F. Supp. 2d 49 (D.D.C., April 28, 1999). Indian tribes sought declaration that Secretary of Interior's failure to act when asked to approve tribal-state gaming compact resulted in approval of compact to extent it was consistent with IGRA. On Secretary's motion to dismiss, the district court held that State was indispensable party. Motion granted.

43. ***Sault Ste. Marie Tribe of Chippewa Indians v. Engler***, No. 1:90-CV-611, 93 F. Supp. 2d 850 (W.D. Mich. 2000). State moved to compel compliance with consent judgment which had settled dispute between State and Indian tribes. The District Court held that tribes' exclusive right to operate electronic games of chance ended, and hence their obligation under consent decree to pay portion of net proceeds to State terminated, when compacts allowing non-party tribes to operate games in State became effective. Motion denied.

44. ***Sault Ste. Marie Tribe of Lake Superior Chippewa Indians v. United States***, No. 1:99-CV-799, 78 F. Supp. 2d 699 (W.D. Mich. 1999). Indian Tribe sought judicial review of decision by Secretary of the Interior, accepting property owned by another tribe into trust as "restored lands." On defendants' motions for summary judgment, the district court held that: (1) Secretary's determination that acceptance of property into trust was mandatory was not arbitrary or capricious, and (2) property met "restored lands" exception to prohibition of gaming on lands acquired in trust after certain date. Motions granted.

45. ***Sokaogon Chippewa Community v. Babbitt***, No. 00-1137, 214 F.3d 941 (7th Cir. 2000). Appeal of St. Croix Chippewa Indians of Wisconsin, Proposed Intervenor-Appellant. This case pits one group of Indian tribes who hope to open a new gambling facility against another tribe that currently runs another gambling facility nearby. The narrow question is whether the district court erred when it refused to permit the St. Croix Chippewa Indians of Wisconsin to intervene, either of right or by permission, in litigation between the Sokaogon Chippewa Community Mole Lake Band of Lake Superior Chippewa, the Lac Courte Oreilles Band of Lake Superior Chippewa Indians, and the Red Cliff Band of Lake Superior Chippewa Indians, and the U.S. Department of the Interior. Affirmed.

46. ***Texas v. Ysleta Del Sur Pueblo***, No. EP-99-CA-320-H, 79 F. Supp. 2d 708 (W.D. Tex. 1999). State of Texas sued to enjoin allegedly illegal gambling activities on Ysleta del Sur Pueblo Tribe reservation. On defendants' motion to dismiss, the district court held that: (1) federal statute was unequivocal waiver of tribal immunity; (2) United States was not indispensable party plaintiff; and (3) Texas Attorney General lacked capacity to seek injunction unless he could show state statute expressly empowering him to sue Tribe on behalf of State. Ordered accordingly.

47. ***United States v. Confederated Tribes of the Colville Reservation,*** Nos. 99-35153, 99-35154, D.C. Nos. CV-98-00264-FVS, CV-98-00346-FVS, (9th Cir. 1999). Appellant Confederated Tribes of the Colville Reservation appeals the district court's entry of judgment of forfeiture of the 794 seized gambling machines and grant of summary judgment on the Tribes' declaratory

205 F.3d 1352

judgment action. Confederated Tribes argues that under these circumstances enforcement of the Johnson Act, 15 U.S.C. §§ 1175, 1177, undermines Congress's intent and purpose in passing the Indian Gaming Regulatory Act, 25 U.S.C. § 2710, and disregards the spirit of *United States v. Spokane Tribe of Indians*, 139 F.3d 1297 (9th Cir. 1998). Confederated Tribes also requests an order requiring the government to bring suit against the State of Washington on the Tribes' behalf to force negotiation of a Tribal-State compact. Confederated Tribes further urges a stay or remand of these proceedings pending completion of administrative procedures pursuant to regulations recently promulgated by the Department of the Interior that operate in lieu of a Tribal-State compact when a state invokes its Eleventh Amendment immunity under *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 55 (1996). These arguments raise federal statutory and constitutional issues that we need not reach, however, if the seized games are not permitted in Washington, an issue the district court has not yet addressed. To avoid premature adjudication of constitutional issues, *see, Clinton v.. Jones*, 520 U.S. 681, 690 (1997) (citing *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997)), we remand these cases to the district court to determine whether Washington permits operation of the seized machines. *See*, 25 U.S.C. § 2710(d). We express no opinion on the legality of these gambling devices under Washington law. Remanded.

48. ***United States v. Shoalwater Bay Indian Tribe***, No. 99-35025, 205 F.3d 1353 D.C. No. CV-98-05321-BJR (9th Cir. 1999). Shoalwater Bay Indian Tribe appeals the district court's judgment of forfeiture of the 108 defendant gambling machines. After a trial, the district court considered the particular features of the 108 seized machines, and correctly applied Washington's gambling statutes and regulations to discern whether "any person, organization, or entity" could lawfully operate them. The district court did not apply an erroneous legal standard in construing Washington gaming law. *See, Rumsey*, 64 F.3d at 1258. The Tribe also contends that the district court erred in excluding as irrelevant gaming machines that the Tribe conceded were not expressly authorized under Washington law but argued "could" be authorized by either the State Lottery or the State Gambling Commission. The district court did not abuse its discretion by excluding such machines. Affirmed. REINHARDT, J. I concur. Our decision is dictated by *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250 (9th Cir. 1995). While I continue to believe *Rumsey* is wrongly decided, we are bound to follow it.

49. ***Wisconsin v. Stockbridge-Munsee Community***, No. 98-C-0871, 67 F. Supp. 2d 990 (E.D. Wisc. Sept. 30, 1999). State brought action seeking to prevent Indian tribe from operating Class III electronic games of chance at a casino located outside boundaries on Indian reservation. Upon state's motion for preliminary injunction, the district court held that: (1) state demonstrated a

reasonable likelihood of success on their claim that Act of 1871 resulted in diminishment of tribe's reservation, and (2) other factors warranted granting preliminary injunction. Motion granted.

J. Land Claims

50. ***Alaska v. United States***, 213 F.3d 1092 (9th Cir., Jan. 28, 2000). State of Alaska brought quiet title action against United States, claiming title to riverbed of three remote wilderness rivers: The Kandik, the Nation, and the Black Under the "equal footing doctrine" of the Submerged Lands Act of 1959, the riverbeds belong to the State if the rivers were navigable at statehood but to the United States if the rivers were unnavigable at statehood. District Court held: (1) The U.S. asserted a claim to the navigability of the Kandik River and the Nation River but not the Black River, and (2) Native lands are excluded from this claim. The Ninth Circuit affirms that the U.S. asserted a claim to the Kandik and the Nation but reverses the district court with respect to the Black on the grounds that it has no jurisdiction to hear the claim. Affirmed in part and reversed and remanded in part.

51. ***Bay Mills Indian Community v. Western United Life Assurance Co.***, No. 99-1036, (6th Cir. 2000). Plaintiff Bay Mills Indian Community filed a complaint asserting an interest in a parcel of property within the county. Bay Mills alleged various federal constitutional and statutory violations in connection with the 1884 ouster from the property of its predecessors in interest, two aboriginal Chippewa bands, and sought either equitable title to the property or damages equal to its value and damages for the loss of the use and enjoyment of the land since 1884. The defendants, individuals and entities currently possessing various interests in the property, moved to dismiss the action under Federal Rules of Civil Procedure 12(b)(7) and 19 for failure to join an indispensable party, the Sault Ste. Marie Tribe of Chippewa Indians. The district court granted the defendants' motion and dismissed the plaintiff's complaint. Affirmed.

52. ***Cayuga Indian Nation of New York v. Pataki***, Nos. 80-CV-930, 80-CV-960, 83 F. Supp. 2d 318 (N.D.N.Y. May 17, 2000). Indian tribe sought compensation for the fact that, through two separate transactions with the State, they were dispossessed of their ancestral land in violation of the Indian Trade and Intercourse Act, and had remained out of possession of that land for the past 204 years. Upon parties' motions to exclude expert testimony on damages issue, the district court held that: (1) expert testimony of real estate appraiser proffered by tribal plaintiffs was not admissible since his proffered testimony did not satisfy the reliability and relevancy considerations identified in Daubert, and (2) although real estate appraisers proffered by state and federal governments admitted to developing their respective valuation methodologies for first-time use in the case, their expert

testimony satisfied the reliability and relevancy considerations of Daubert, and thus, was admissible. Order in accordance with opinion.

53. ***Cayuga Indian Nation of New York v. Pataki***, Nos. 80-CV-930, 80-CV-960, 79 F. Supp. 2d 78 (N.D.N.Y. Dec. 23, 1999). Indian Tribe sought damages from State for illegal purchase of land. On parties' motions in limine, the district court held that: (1) evidence of additional consideration paid to Tribe by State was admissible; (2) State was not precluded from seeking offset for benefit of its infrastructure improvements; (3) anthropologist's testimony was not admissible on issue of land valuation, but was admissible on issue of State's status as good faith occupier of land in years subsequent to initial conveyance; (4) both State and Tribe were precluded from presenting evidence to jury regarding equitable issues such as laches; (5) Tribe's claims were not barred by Eleventh Amendment; and (6) Tribe was precluded from presenting evidence of individual tribal members' emotional, psychological and cultural damages due to loss of their ancestral homeland. Ordered accordingly.

54. ***Cayuga Indian Nation of New York v. Pataki***, Nos. 80-CV-930, 80-CV-960, 79 F. Supp. 2d 66 (N.D.N.Y. Oct. 8, 1999). Indian tribes sued state, counties, and individual landowners for wrongful possession of property. United States intervened as plaintiff. On United States' motions to hold state jointly and severally liable and for separate trials, the district court held that: (1) finding of joint and several liability would be inequitable, and (2) separate trials were warranted. Motions granted in part and denied in part.

55. ***Karuk Tribe of California v. United States***, Nos. 99-5002, 99-5003, 99-5006, 209 F.3d 1366 (Fed. Cir. 2000). Karuk Tribe of California, Yurok Indian Tribe, and individual Indians brought actions against United States, claiming that 1988 Hoopa-Yurok Settlement Act which partitioned Hoopa Valley Reservation effected Fifth Amendment taking of their property interests. Hoopa Valley Tribe was permitted to intervene on side of United States. The Court of Federal Claims entered summary judgment in favor of United States and Hoopa Tribe, and plaintiffs appealed. The Court of Appeals held that plaintiffs did not possess compensable vested property interest in Reservation, and partition of Reservation thus was not unconstitutional taking. Affirmed. Pauline Newman, Circuit Judge, dissented and filed opinion.

56. ***United States v. Hess***, No. 98-1127, 194 F.3d 1164 (10th Cir. Nov. 5, 1999). United States brought action on behalf of Southern Ute Tribe seeking damages for trespass and seeking to quiet title to ownership of gravel located on land acquired by landowners through land exchange patent, which was issued pursuant to Indian Reorganization Act, and which reserved "all minerals" in trust for Tribe. Following trial, the district court entered judgment for United States. Landowners appealed.

The Court of Appeals held that: (1) district court erred in determining, as a matter of law, that "minerals" included gravel; (2) federal law applicable to action would be determined by reference to Colorado law; (3) in interpreting reservation of mineral rights, it was appropriate to consider parties' intent and to examine extrinsic evidence; and (4) assuming that gravel was titled to United States, landowner's gravel extractions constituted continuing trespass, such that limitations period would be calculated back from date of complaint. Vacated and remanded.

57. ***United States v. Idaho***, Nos. 98-35831, 98-35847, 210 F.3d 1067 (9th Cir. 2000). United States, in its own capacity and as trustee for Coeur d'Alene Indian Tribe, brought action against State of Idaho seeking to quiet title to lands submerged by Coeur d'Alene Lake and St. Joe River within exterior boundaries of Coeur d'Alene Indian Reservation. Tribe intervened as plaintiff. The Idaho District Court quieted title in favor of United States, as trustee, and Tribe, as beneficially interested party, but refused to adjudicate ownership of submerged lands within Heyburn State Park. State and Tribe appealed. The Court of Appeals held that: (1) Congress intended to defeat State's title to lands submerged by Coeur d'Alene Lake and St. Joe River, and (2) District Court properly declined to adjudicate ownership of submerged lands within Heyburn State Park. Affirmed.

58. ***Virgin v. County of San Luis Obispo***, No. 98-55557, 201 F.3d 1141 (9th Cir. 2000). Landowners challenged county's denial of their application for a lot line adjustment. The district court dismissed for lack of jurisdiction, and landowners appealed. The Circuit Court held that mere fact that landowners' predecessors had received title via federal land patents did not create federal-question jurisdiction. Affirmed.

59. ***Yankton Sioux Tribe v. Gaffey***, Nos. 98-3893, 98-3894, 98-3896, 98-3900, 188 F.3d 1010 (8th Cir., Aug. 31, 1999). Yankton Sioux Tribe brought actions against State of South Dakota, waste management district, and others seeking declaratory judgement that certain lands, including land on which district planned to build landfill, were part of Yankton Sioux Reservation. Following remand, 522 U.S. 329, action was consolidated with separate action brought by Tribe to challenge state criminal jurisdiction over acts of tribal members on nonceded land within original Reservation boundaries. The district court, 14 F. Supp. 2d 1135, entered judgment for Tribe, holding that Reservation had not been disestablished and included all land within original exterior Reservation boundaries not ceded to United States. State and other defendants appealed. The Court of Appeals held that Reservation has not been disestablished, but it has been diminished by loss of those lands originally allotted to tribal members which have passed out of Indian hands. Affirmed in part, reversed in part, and remanded.

60. ***Ysleta Del Sur Pueblo v. Laney***, No. 98-50575, 199 F.3d 281 (5th Cir. 2000). Federally recognized Indian tribe filed suit seeking to eject officials of State of Texas from a piece of real property. Motion to dismiss the suit as barred by the Eleventh Amendment was denied by the district court and defendants appealed. The Court of Appeals held that: (1) State was the true party in interest for purposes of Eleventh Amendment immunity, though state officials were named in their individual capacities; (2) the NIA does not abrogate states' sovereign immunity under the Eleventh Amendment; and (3) suit could not proceed under the *ex parte* Young doctrine. Reversed.

K. Misappropriation

61. ***Hall v. Babbitt***, No. 99-3806ND, (8th Cir. 2000). Alva Rose Hall appeals from the district court's order dismissing, without prejudice, her action against Interior Secretary Bruce Babbitt, Three Affiliated Tribes Chairman Tex Hall, and the Tribes' Business Council (TBC). Hall, an enrolled member of the Tribes, filed this *pro se* suit alleging that Chairman Hall and the TBC (tribal defendants), with the assistance of the Bureau of Indian Affairs, misappropriated and spent for improper purposes over $10 million in funds--set aside by federal statute to compensate the Tribes for the taking of their land (ERF funds)--which were to be used only in accordance with a plan approved by the "people" and the Secretary. Hall alleged that TBC officers had removed financial records and TBC meeting minutes from the tribal building, and that the Secretary never approved a plan authorizing expenditure of ERF funds as he was required to do, and illegally disbursed ERF funds to the TBC. The tribal defendants and the Secretary moved to dismiss the case. The district court granted the motions to dismiss "without prejudice to the merits of the plaintiff's claim if an action is filed in Tribal Court." Disposition was appropriate. Affirmed.

62. ***United States v. Dakota***, Nos. 97-2256, 97-2257, 188 F.3d 663 (6th Cir., Aug. 26, 1999). Defendant was convicted in the district court of paying kickbacks to an agent of an Indian tribal organization and conspiracy to pay kickbacks, and second defendant was convicted of receiving kickbacks and income tax fraud. Defendants appealed. The Court of Appeals held that: (1) defendant's conversation with tribal attorney regarding sharing in profits from video lottery devices installed tribal casino was not protected by attorney- client privilege; (2) tax fraud instructions were a correct statement of the law and substantially covered defense theory that unreported amounts were advances with duty for repayment; (3) double jeopardy clause did not bar district court from reinstating substantive charge under statute prohibiting bribery concerning federally funded programs; (4) district court did not abuse its discretion in transferring venue; (5) district court's error in admitting documents seized from home office of

defendant's son was harmless; and (6) alleged prosecutorial misconduct was not flagrant. Affirmed.

63. ***United States v. Nomee***, No. 99-30075, (9th Cir. 2000). Crow Chairwoman Clara Nomee was convicted of theft by the District Court for using her influence to purchase 80 acres of tribal land, worth $26,000 for $8,000. The sale was approved by the Tribe's Land Resources Committee which includes some members appointed by Nomee and other elected by the Tribe. Defendant appealed. The Court of Appeals affirmed but held that the District Court wrongly denied a request to inspect records of the jury selection process. Judge Barry Silverman dissented from the affirmance.

L. Religious Freedom

64. ***Gibson v. Babbitt***, No. 95-8049CIV, ____ F. Supp. 2d _____ (S.D. Fla. 1999), 2000 WL 1179787. Indian who did not belong to a federally recognized Indian tribe sought review under Religious Freedom Restoration Act of federal agency's decision that denied his application for five bald or golden eagle feathers. Following non jury trial, the district court held that regulation which limited the religious purposes exemption of the Bald and Golden Eagle Protection Act to members of federally recognized Indian tribes did not violate RFRA as applied to applicant. Judgment accordingly.

65. ***McBride v. Shawnee County***, No. 98-3178-DES, 71 F. Supp. 2d 1098 (D. Kan. 1999). Defendants, Rastafarian Church members, were convicted in the Shawnee District Court of cultivation of marijuana and failure to pay drug tax. Defendants appealed on grounds that Kansas statute allowing Native American Church members to use peyote in religious ceremonies violated Equal Protection and Establishment Clauses. The Court of Appeals, 24 Kan. App. 2d 909, 955 P.2d 133, *affirmed.* Defendants sought federal habeas review. The district court held that defendants were not similarly situated to NAC members, and therefore, convictions were not unconstitutional. Petition denied.

66. ***McElhaney v. Elo***, unreported, No. 98-1832, 2000 WL 32036 (6th Cir., Jan. 6, 2000). Plaintiff is an inmate in the prison system of the state of Michigan who practices an Indian religion. He alleges that the Michigan Department of Corrections violated his first amendment rights to practice his religion by denying him (1) access to a sweat lodge, (2) access to a ceremonial pipe, (3) an ash tray for ceremonial in-cell smudging, (4) denial of materials to make a medicine bage, and (5) participation in communal worship while on detention sanctions. The district court granted summary judgement for the defendants because the prison officials articulated reasons for limiting the expression of his first amendment rights that were "reasonably related to legitimate penological interests" and there was no

genuine issue of material fact that needed to be resolved at trial. The Sixth Circuit affirms.

67. ***Mitchell v. Angelone***, No. 3:97CV492, 82 F. Supp. 2d 485 (E.D. Va, Nov. 18, 1999). Plaintiff is an inmate in the prison system of the Commonwealth of Virginia who practices an Indian religion. He alleges that the Virginia Department of Corrections violated his constitutional right to practice his religion when it denied him the right to purchase ceremonial herbs and an abalone shell. The magistrate judge ruled, *inter alia*, that inmates who prove their Indian heritage are automatically exempt from regulations on personal property that proscribe possession and use of herbs and abalone shells. The district court reverses, finding that herbs and abalone shells are a security risk. The district court also ruled that "race is not a litmus test for whether an inmate sincerely believes in Native American religious beliefs." Defendant's motion for summary judgement denied. Defendants are enjoined from refusing plaintiff an exemption from the restrictions on personal property solely on the basis that he is not Native American.

68. ***United States v. Eagleboy***, No. 99-2575, 200 F.3d 1197 (8th Cir. 1999). In prosecution for possessing hawk parts in violation of Migratory Bird Treaty Act (MBTA), defendant, who was not member of federally-recognized Indian tribe, moved to dismiss. The district court granted motion. United States appealed. The Court of Appeals held that: (1) defendant was not subjected to selective prosecution based on race; (2) United States' policy of not enforcing MBTA against members of federally-recognized Indian tribes did not amount to race discrimination merely because it was adopted as informal policy; and (3) policy statements of Department of Interior could be considered on appeal. Reversed and remanded.

69. ***United States v. Gotchnik***, No. 99-4288, ___ F.3d ___ (8th Cir. 2000), 2000 WL 1175602, *affirming* 57 F. Supp. 2d 798 (D. Minn., May 28, 1999). Indians filed motions for acquittal following their convictions for use of motorized equipment in federally held wilderness area. The District Court, Montgomery, J., held that: (1) treaty did not give Indian band right of unrestricted travel to fishing grounds; (2) regulations prohibiting use of motorized vehicles in area preempted conflicting treaty rights; and (3) use of power ice auger was not prohibited. Motions granted in part, and denied in part. Affirmed.

70. ***United States v. Sandia***, No. 98-2248, 188 F.3d 1215 (10th Cir., Aug. 23, 1999). Defendant was convicted in the district court, on his plea of guilty, of violating the Lacey Act by illegally selling a golden eagle taken in violation of the Migratory Bird Treaty Act. Defendant appealed. The Court of Appeals held that: (1) defendant who sells a protected bird may not claim the protection of the

Religious Freedom Restoration Act, and (2) undercover agent's actions did not constitute "outrageous" government conduct. Affirmed.

71. ***United States v. Tidwell***, No. 98-10164, 191 F.3d 976 (9th Cir., Aug. 20, 1999). Defendant was convicted in the district court of conspiracy, illegal trafficking in Native American cultural items under the Native American Graves Protection and Repatriation Act (NAGPRA), theft of tribal property, and trafficking in unlawfully removed archaeological resources, and he appealed. The Court of Appeals held that: (1) NAGPRA was not unconstitutionally vague as applied to defendant; (2) any error in excluding evidence purporting to show that defendant had constructed one or more of the masks involved was harmless; and (3) evidence was sufficient. Affirmed.

72. ***Western Mohegan Tribe and Nation of New York v. New York***, No. 99-CV-2140 LEK/DRH, 100 F. Supp. 2d 122 (N.D.N.Y. 2000). Presently before the Court is Plaintiffs' motion for a preliminary injunction. That motion is denied and the case dismissed sua sponte. Plaintiff commenced this action on August 9, 1999, seeking a preliminary injunction and alleging violations of the Native American Graves Protection and Repatriation Act and their Free Exercise rights under the First Amendment. This Court held that it lacked jurisdiction under NAGPRA and found the Free Exercise claim too vague to meet the demanding standard required for a preliminary injunction. Plaintiffs commenced a second suit. Plaintiffs now allege claims under NAGPRA, the National Historic Preservation Act, the Free Exercise Clause of the First Amendment to the United States Constitution, and seeking an order that (i) enjoins construction of the bridge connecting the mainland to the Island and (ii) orders the OPRHP to conduct a new archeological survey.

73. ***Yankton Sioux Tribe v. United States Army Corps of Engineers***, No. Civ. 99-4228, 83 F. Supp. 2d 1047 (D.S.D. 2000). Indian tribe sought preliminary injunction protecting inadvertently discovered grave sites. The district court held that tribe was entitled to preliminary injunction preventing Corps of Engineers from raising water level until expiration of statutory thirty-day period following inadvertent discovery of lakeshore grave sites, during which time exposed remains would be removed. Ordered accordingly.

M. Sovereign Immunity and Federal Jurisdiction

74. ***Alire v. Jackson***, No. CIV 99-357-JO, 65 F. Supp. 2d 1124 (D. Or. Sept. 9, 1999). Plaintiff petitioned for writ of habeas corpus, seeking relief from an order excluding her from Indian reservation. On cross-motions for summary judgment, the district court held that exclusion of nonresident nonmember was civil

proceeding, for which habeas relief was not available. Plaintiff's motion denied; defendant's motion granted.

75. ***Barker-Hatch v. Viejas Group Baron Long Capitan Grande Band of Digueno Mission Indians of the Viejas Group Reservation, California***, No. 99 CV 1730BTM(LSP), 83 F. Supp. 2d 1155 (S.D. Cal. 2000). Action was brought against Indian tribe to recover for injuries suffered in slip and fall. On defendant's motion to dismiss, the district court held that court lacked diversity jurisdiction. Motion granted.

76. ***Bassett v. Mashantucket Pequot Tribe***, Docket No. 98-9162, 204 F.3d 343 (2nd Cir. 2000). Film producer sued Indian tribe, museum, and related defendants, alleging copyright infringement, breach of contract, and various state-law torts. The district court dismissed claims, and producer appealed. The Court of Appeals held that: (1) whether a complaint asserting claims of copyright infringement arising from, or in the context of, an alleged contractual breach "arises under" the federal copyright laws for the purposes of jurisdiction of federal district court is determined under the T.B. Harms test, abrogating Schoenberg; (2) producer's copyright claims "arose under" the Copyright Act; (3) tribe was immune from suit on copyright claims; and (4) tribe was not an "indispensable party" in action to enjoin museum from further infringing copyrights. Affirmed in part, vacated in part, and remanded.

77. ***Bear Medicine v. United States***, No. CV-95-100-GF-PGH, 47 F. Supp. 2d 1172 (D. Mont., April 21, 1999). Estate of Indian killed in logging accident sued United States for monetary damages under FTCA. On cross-motions for summary judgment, the district court held that: (1) no FTCA liability can be premised on breach of duty arising from trust relationship between Indian tribe and United States, and (2) government's decisions to entrust timber cutting to logger, to not manage or supervise safety aspects of logger's operation, and to not require that logger purchase liability insurance and/or workers compensation insurance came within discretionary function exception to FTCA's waiver of sovereign immunity. Defendant's motion granted.

78. ***Belgarde v. Chippewa Cree Bus. Comm.***, No. 98-35997, unreported, 1999 WL 970898 (9th Cir., Oct. 22, 1999). Plaintiff filed suit in district court, alleging that Tribe's Business Committee violated his rights by removing him from his position as tribal judge. District court dismissed for lack of subject matter jurisdiction, and plaintiff appealed. Reviewing de novo decisions to dismiss for lack of subject matter jurisdiction, the Ninth Circuit held (1) district court correctly determined that the Indian Civil Rights Act did not confer jurisdiction over Belgarde's complaint; (2) district court properly determined that Belgarde's allegations of constitutional violations did not create jurisdiction; (3) district court

correctly determined that it lacked jurisdiction over Belgarde's §§ 1983, 1985 civil rights claims. Affirmed.

79. ***Charland v. Little Six, Inc.***, No. 99-1989 (8th Cir. 1999). Karen C. Charland, a former employee with Mystic Lake Casino, appeals the district court's dismissal of her action against the Shakopee Mdewakanton Sioux Community and Little Six, Inc., alleging various state and common law claims as well as disability discrimination under Title VII and the ADA. The district court, adopting the magistrate judge's report and recommendation, dismissed the action for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). The court also noted that even if it had subject matter jurisdiction over the action, dismissal would still be warranted in light of Charland's failure to exhaust tribal court remedies. On appeal, Charland argues that: (1) the district court erred in deciding it lacked subject matter jurisdiction over the case pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343; (2) the district court should have stayed the federal court proceedings pending exhaustion of her tribal court remedies instead of dismissing the action; and (3) tribal sovereign immunity should not be recognized as a valid defense to tort claims. The district court's dismissal for lack of subject matter jurisdiction is affirmed. Plaintiff's remaining arguments are rejected. Motion for damages, double costs, attorneys' fees, and excess expenses is denied.

80. ***Cheromiah v. United States***, No. CIV 97-1418 MV/RLP, 55 F. Supp. 2d 1295 (D. N.M., June 29, 1999). Tribal members brought action against United States for medical malpractice and violation of Emergency Medical Treatment and Active Labor Act (EMTALA). On various motions, the district court held that: (1) United States did not waive sovereign immunity by enacting EMTALA; (2) tribe had civil authority under Federal Tort Claims Act in medical malpractice action; and (3) New Mexico medical malpractice cap did not apply. Ordered accordingly.

81. ***Clinton v. Babbitt***, No. 98-15306, 180 F.3d 1081 (9th Cir., June 17, 1999). Members of the Navajo Nation who lived on Hopi Partitioned Lands brought action against Secretary of the Interior, alleging that terms of proposed leases with Hopi Tribe, which were approved under Navajo-Hopi Land Dispute Settlement Act of 1996, violated equal protection principles. The District of Arizona dismissed action and members appealed. The Court of Appeals held that: (1) district court had subject matter jurisdiction over claim; (2) action was not barred by sovereign immunity; but (3) Hopi Tribe was necessary and indispensable party. Affirmed.

82. ***Comstock Oil & Gas, Inc. v. Alabama and Coushatta Indian Tribes of Texas***, No. 9:99CV31, 78 F. Supp. 2d 589 (E.D. Tex. 1999). Oil companies brought action against Indian tribe, Secretary of the Interior and members of the tribal

council seeking declaratory relief stating that oil and gas leases on Indian lands were in full effect. Upon defendants' motion to dismiss, the district court held that: (1) Congress did not abrogate the traditional sovereign immunity of tribes in the context of oil, gas, and mineral leases; (2) tribal immunity did not preclude declaratory relief against tribal council members; (3) exhaustion of tribal remedies was futile and not required since tribal court was not duly created; and (4) tribe was not an indispensable party. Motion granted in part and denied in part.

83. ***Corrigan v. Bargala***, No. 98-35954, unreported, 1999 WL 1217935 (9th Cir., Dec. 17, 1999). Plaintiff appealed pro se district court judgment dismissing on sovereign immunity grounds his 42 U.S.C. § 1983 action alleging that officials of the Muckleshoot Indian Tribe and Washington State Gambling Commission violated his due process rights by not processing his application for a tribal gaming license. Ninth Circuit found that plaintiff failed to raise any issues on appeal regarding the merits of his § 1983 action, thus any such arguments were waived.; plaintiff waived his contention that removal of the action was improper; and that plaintiff failed to file a motion with the district court within the 30-day limit. Affirmed.

84. ***Davis v. United States***, No. 99-6161, 192 F.3d 951 (10th Cir., Sept. 21, 1999). Dosar Barkus and Bruner Bands of the Seminole Nation of Oklahoma, made up exclusively of Estelusti Seminoles descended from escaped African slaves who had resided among Seminoles, brought action against United States challenging Estelusti Seminoles' exclusion from certain Judgment Fund Programs established with funds obtained from land claims judgment, and challenging government's refusal to issue Certificates of Degree of Indian Blood (CDIBs) to Estelusti Seminoles. The district court dismissed claim for failure to join Seminole Nation of Oklahoma as indispensable party. Bands appealed. The Court of Appeals held that: (1) Nation was necessary party with regard to Judgment Fund Programs claim; (2) fact that tribal sovereign immunity prevents Indian tribe that is necessary to suit from being joined in suit does not compel finding that tribe is indispensable; and (3) district Court abused its discretion in determining that Nation was indispensable party with respect to CDIB claim. Reversed and remanded.

85. ***Florida v. Seminole Tribe of Florida***, No. 97-5361, 181 F.3d 1237 (11th Cir., July 20, 1999). State of Florida brought action against Seminole Tribe of Florida and its Chairman, seeking declaration that Tribe was conducting Class III gaming operations, consisting of electronic or electromechanical facsimiles of games of chance, not authorized by IGRA, and seeking injunction to prevent such operations in absence of Tribal-State compact. The district court granted Tribe's and Chairman's motions to dismiss. State appealed. The Court of Appeals held that: (1) IGRA did not abrogate Tribe's immunity from State's action; (2) Tribe did not waive immunity in allegedly engaged in gaming subject to regulation under

IGRA; (3) Tribe's sovereign immunity extended to actions for prospective equitable relief; and (4) State had no implied right of action under IGRA for declaratory or injunctive relief against Class III tribal gaming allegedly being unlawfully conducted without Tribal-State compact. Affirmed.

86. ***Hagen v. Sisseton-Wahpeton Community College***, No. 99-2124, 205 F.3d 1040 (8th Cir. 2000). Former employees filed race discrimination actions against community college chartered by Indian tribe. Following entry of default judgment in favor of former employees, college moved to set aside default on grounds of lack of subject matter jurisdiction and sovereign immunity. The district court denied motion. College appealed. The Court of Appeals held that: (1) college was arm of tribe entitled to sovereign immunity; (2) college did not waive its immunity by failing to answer employees' discrimination complaints; and (3) college's charter did not waive its immunity. Reversed and remanded.

87. ***Hein v. Capitan Grande Band of Diegueno Mission Indians***, No. 98-56182, 201 F.3d 1256 (9th Cir. 2000). Members of splinter group of Capitan Grande Band of Diegueno Mission Indians brought action against Barona Group of same Band, and against Secretary of the Interior, asserting rights to portion of Barona Group's gaming revenues. The district court dismissed on basis of lack of subject matter jurisdiction and tribal sovereign immunity. Members appealed. The Court of Appeals held that: (1) members did not have cause of action under Indian Civil Rights Act; (2) Indian Gaming Regulatory Act did not provide members with direct cause of action; (3) Administrative Procedure Act provided district court with subject matter jurisdiction over members' claims against Secretary; and (4) Barona Group was not indispensable party with respect to claims against Secretary. Affirmed in part, reversed in part, and remanded.

88. ***Iowa Management & Consultants, Inc. v. Sac & Fox Tribe of the Mississippi in Iowa***, No. 99-2538, 207 F.3d 488 (8th Cir. 2000). Corporation brought action against Indian tribe alleging breach of contract for provision of gaming-related services and seeking order compelling arbitration. The district court dismissed complaint. Corporation appealed. The Court of Appeals held that: (1) District Court did not have federal question jurisdiction over claim for breach of contract, and (2) corporation's claim that it was entitled to arbitration under Federal Arbitration Act did not confer federal question jurisdiction on District Court. Affirmed. Bright, Circuit Judge, dissented and filed opinion.

89. ***Kerr-McGee Corp. v. Farley***, No. Civ. 95-0438MVRLP, 88 F. Supp. 2d 1219 (D. N.M. 2000). Tribal members brought suit in Navajo tribal court seeking damages for alleged negligence and wrongful death arising out of corporations' operation of uranium processing mill located on leased tribal land within reservation. Defendants moved to enjoin tribal court proceedings. The district

court stayed proceedings under tribal exhaustion rule to allow tribal court opportunity to determine its jurisdiction, and defendants appealed. The Court of Appeals affirmed. On renewal of corporations' motion following new United States Supreme Court opinion on issue, the district court held that Price-Anderson Act established exclusive federal adjudicatory framework covering tribal members' claims. Motion granted.

90. ***Longie v. Pearson***, No. 99-4142 ND, unpublished, 2000 WL 427630 (8th Cir. 2000). On appeal from the district court. Longie appeals the district court's order dismissing his action against certain Spirit Lake Sioux Tribe Council members. Affirmed. Longie, an enrolled member of the Tribe, is the former Chief Judge of the Spirit Lake Sioux Tribal Court. He filed this pro se "Petition for an Order of Writ of Habeas Corpus" complaining that, pursuant to a Council resolution, he was illegally removed from his position as Chief Judge in violation of tribal law, the Tribe's constitution, and federal law. After defendants moved to dismiss, the district court granted their motion.

91. ***Louis v. United States***, Nos. Civ. 96-1161 BB/DJS, Civ. 97-298 M/JHG, 54 F. Supp. 2d 1207 (D. N.M., Jan. 29, 1999). Indian sued United States for medical malpractice. On defendant's motion for partial summary judgment on issue of damages, the district court held that: (1) state law was applicable "law of the place"; (2) under New Mexico choice of law principles, New Mexico rather than Indian law applied; and (3) New Mexico's statutory cap on medical malpractice liability applied. Motion granted.

92. ***Manybeads v. United States of America***, No. 90-15003, 209 F.3d 1164 (9th Cir. 2000). Members of Navajo Nation residing on land belonging to Hopi Tribe brought action against United States alleging that Navajo and Hopi Indian Land Settlement Act of 1974 violated their First Amendment right to freely exercise their religion. The Arizona District Court dismissed action, and members appealed. After Hopi Tribe and United States reached Settlement Agreement entitling Hopi Tribe to compensation, and after Hopi Tribe, Navajo Nation, and representatives of individual Navajos reached Accommodation Agreement limiting rights of Navajos residing on Hopi land, the Court of Appeals held that: (1) Tribe was necessary party, and (2) Tribe was indispensable party. Affirmed.

93. ***Moore v. Nelson***, No. C 98-3736 MJJ, unreported, 1999 WL 1244146 (N.D. Cal. 1999). Order granting defendants' motion to dismiss. 25 U.S.C. § 1303 does not create jurisdiction over claims arising from award of damages for timber trespass.

94. ***Osage Tribal Council v. United States Dept. of Labor***, No. 97-9564, 187 F.3d 1174 (10th Cir., Aug. 4, 1999). The Osage Tribal Council petitioned for review of order by the Administrative Review Board of the Department of Labor

finding that Council was not entitled to tribal sovereign immunity from claim under whistle blower provision of Safe Drinking Water Act (SDWA) and remanding for determination of damages. The Court of Appeals held that: (1) order was reviewable under collateral order doctrine; (2) Congress waived tribal sovereign immunity from suit under whistle blower provision; (3) amendment to SDWA enacted in 1977 stating that 1977 amendments did not waive sovereignty over Indian lands did not affect waiver of tribal sovereignty contained in original SDWA; (4) any derogation of Tribe's treaty right to exclude persons from land reserved to it caused by whistle blower provision did not preclude application of provision to Tribe; and (5) Secretary of Labor did not violate federal government's trust responsibility toward Tribe. Affirmed; remanded.

95. ***Owens Valley Indian Hous. Auth. v. Turner***, No. 96-16021, 185 F.3d 1029 (9th Cir., Aug. 2, 1999). Indian housing authority brought unlawful detainer suit against tenant. The district court dismissed action for lack of subject-matter jurisdiction. Authority appealed. The Court of Appeals held that: (1) district court lacked subject-matter jurisdiction over suit since it did not arise under federal law, and (2) federal courts did not have subject-matter jurisdiction over suit against tenant by virtue of facts that tribe lacked tribal courts competent to hear suit and that state courts were statutorily barred from hearing suit. Affirmed.

96. ***Sac And Fox Nation of Missouri v. Babbitt***, Nos. 96-4129-RDR, 964130-RDR, 92 F. Supp. 2d 1124 (D. Kan. 2000). Action was brought challenging decision of Interior Secretary to take land into trust on behalf of Indian tribe. The District Court held that tribe was indispensable party, and thus its refusal to waive sovereign immunity necessitated dismissal of action. Dismissed.

97. ***Sac & Fox Nation of Oklahoma v. Cuomo***, Nos. 97-6317, 98-6212, 193 F.3d 1162 (10th Cir., Oct. 12, 1999). Three Indian tribes sued the housing authority of a fourth tribe and HUD officials, alleging that HUD had been funding housing authority's housing projects that were outside its proper area of operation. Following denial of motions for preliminary injunction and to recuse, the district court dismissed the complaint on the alternative grounds of lack of federal-question jurisdiction and inability to join an indispensable party, and appeals were consolidated. The Court of Appeals held that: (1) complaint failed to allege federal question jurisdiction; (2) Court of Appeals would decline to construe plaintiffs' appellate brief as an amendment of their complaint to cure that failure; and (3) no basis was shown for disqualification of judge. Affirmed in part, vacated in part, and dismissed in part.

98. ***United States v. Prentiss***, No. 98-2040, 206 F.3d 960 (10th Cir. 2000). Defendant was convicted in the district court of arson in Indian country, and he appealed. The Court of Appeals held that: (1) the Indian status of the defendant

and victim are essential elements under the Indian Country Crimes Act, which must be alleged in the indictment and established by the government at trial, (2) indictment lacking these allegations deprived defendant of his Fifth Amendment right to be tried only on charges presented in an indictment returned by a grand jury, and (3) such defect was not subject to harmless error analysis. Vacated and remanded. Baldock, Circuit Judge, filed a dissenting opinion.

99. ***United States v. Roberts***, No. 98-7057, 185 F.3d 1125 (10th Cir., Aug. 3, 1999). Following denial of his motion to dismiss indictment, 904 F. Supp. 1262, defendant, who was tribal official, was convicted by jury in the district court of abusive sexual contact and aggravated sexual abuse. Defendant appealed. The Court of Appeals held that: (1) tribal complex owned by United States in trust for Indian nation was "Indian Country" for purposes of Major Crimes Act; (2) jury instructions did not impermissibly diminish government's burden of proof or relieve jury of its responsibility to find all essential elements of offenses; (3) evidence supported conclusion that offenses of conviction occurred at tribal complex; (4) testimony of women who alleged they were sexually abused by defendant was admissible under other acts rule; (5) opening and closing argument statements in which prosecutor allegedly improperly vouched for witness credibility and referred to evidence not in the record at most were harmless error; and (6) two-level enhancement under Sentencing Guidelines for abuse of public position of trust was warranted. Affirmed.

100. ***Wampanoag Tribe of Gay Head (Aquinnah) v. Massachusetts Comm'n Against Discrimination***, No. Civ.A. 98-12413-RCL, 63 F. Supp. 2d 119 (D. Mass. Sept. 7, 1999). Indian tribe sued to enjoin employment discrimination proceeding pending before Massachusetts Commission Against Discrimination. The district court held that tribe was immune from suit for violation of Massachusetts employment discrimination law. Judgment for plaintiff.

N. Sovereignty, Tribal Inherent

101. ***Atkinson Trading Company, Inc. v. Shirley***, No. 98-2247, 210 F.3d 1247 (10th Cir. 2000). Non-Indian hotel proprietor brought action against members of Navajo Tax Commission seeking declaratory judgment that Navajo Nation had no jurisdiction to impose hotel occupancy tax on proprietor's guests. The New Mexico District Court denied proprietor's motions for summary judgment and for trial de novo and entered summary judgment in favor of Commission members. Proprietor appealed. The Court of Appeals held that: (1) district courts in reviewing tribal court decisions on jurisdictional issues should review findings of fact for clear error and conclusions of law de novo; (2) District Court did not abuse its discretion in finding that Navajo tribal courts were not fundamentally unfair or biased, and that clear error discretion thus should be given to tribal

courts' findings of fact; (3) fact that hotel was situated on fee land did not compel finding that Nation lacked jurisdiction over proprietor's nonmember guests; (4) District Court applied appropriate test for determining whether proprietor entered into consensual relationship with Navajo Nation; and (5) consensual relationship existed between Nation and guests, such that Nation had jurisdiction to impose tax. Affirmed. Briscoe, Circuit Judge, dissented and filed opinion.

102. ***Big Horn County Elec. Coop. v. Adams***, No. 99-35799, 2000 WL 977674 (9th Cir., July 14, 2000), *affirming*, No. CV 98-43-BLG-JDS, 53 F. Supp. 2d 1047 (D. Mont., April 2, 1999). Electric company sued officials of Crow Tribe, seeking injunctive and declaratory relief against tribe utility tax on company's property on rights-of-way across tribal land and refund of taxes paid under protest. Parties filed cross-motions for summary judgment. The district court held that: (1) company's rights-of-way were equivalent to nonmember fee land; (2) company's delivery of electricity to tribe and its members constituted consensual relationship, so that tribe had civil jurisdiction over company's conduct; and (3) tribe's utility tax on company's property exceeded tribe's inherent sovereign authority. Motions granted in part; injunction granted. Affirmed

103. ***Burlington Northern RR Co. v. Red Wolf,*** Nos. 98-35502, 98-35539 and 98-35541, 196 F.3d 1059 (9th Cir., Nov. 17, 1999). Railway sought to enjoin execution or enforcement of judgment awarded in personal injury action by the Crow Tribal Court to heirs of two tribal members killed when their automobile was struck by train on reservation. Following reversal of grant of preliminary injunction, 106 F.3d 868, and vacated by the Supreme Court, 118 S. Ct. 37, the district court permanently enjoined any further proceedings in Tribal Court. Heirs and Tribal Court appealed. The Court of Appeals held that Tribal Court lacked jurisdiction over personal injury action, inasmuch as right-of-way granted to railway's predecessor would be deemed alienated to non-Indians, and neither exception to *Montana v. United States* was applicable. Affirmed.

104. ***In Re Haines***, No. CV 99-67-BLG-JDS, 245 B.R. 401 (D. Mont. 2000). Chapter 13 debtor, a non-Indian who owned and operated a restaurant/guest room business located on fee land within the exterior boundaries of an Indian reservation, objected to proofs of claim filed by creditor-Indian tribe for unpaid tribal resort tax, penalties, and interest. The bankruptcy court, 233 B.R. 480, denied the proofs of claim, and creditor appealed. The district court held that absent a nexus between tribe and debtor, whose business was conducted on nonmember fee land and did not significantly involve tribe, debtor was not subject to tribe's jurisdiction, including its ability to tax. Affirmed.

105. ***Montana Dept. of Transp. v. King***, No. 98-35002, 191 F.3d 1108 (9th Cir. Sept. 9, 1999). State of Montana filed complaint against officials of Fort Belknap

Indian Community seeking restraining order, injunction, and declaration that State was not required to comply with Tribal Employment Rights Ordinance (TERO) when repairing State highway crossing reservation. The district court issued temporary restraining order and preliminary injunction, and entered summary judgment in favor of State. Officials appealed. The Court of Appeals held that: (1) Community lacked jurisdiction to enforce ordinance against state for maintenance work on highway, and (2) State was not required to exhaust tribal remedies before bringing suit. Affirmed.

106. ***Nevada v. Hicks***, No. 96-17315, 196 F.3d 1020 (9th Cir., Nov. 9, 1999). State of Nevada and State officials brought action against member of Fallon Paiute-Shoshone Tribe and Fallon Tribal Court, seeking declaratory judgment that Tribal Court lacked jurisdiction over Tribe member's civil rights and tort action filed against State officials arising from seizure of big horn sheep head trophies on allotted land within reservation. The district court, 944 F. Supp. 1455, entered summary judgment for Tribe member and Tribal Court. State and officials appealed. The Court of Appeals held that: (1) Tribal Court had civil jurisdiction over Tribe member's claims, and (2) State officials failed to exhaust their remedies in tribal court with respect to sovereign and qualified immunity. Affirmed. Rymer, Circuit Judge, dissented and filed opinion.

107. ***Prairie Band of Potawatomi Indians v. Pierce***. No. 99-4136-DES, 64 F. Supp. 2d 1113 (D. Kan., Sept. 23, 1999). Indian tribe sought temporary restraining order prohibiting state of Kansas from enforcing or applying Kansas motor vehicle registration and titling laws against tribe or any person who owned or operated vehicle registered and licensed under tribal laws. The district court held that tribe was entitled to temporary restraining order. So ordered.

108. ***TTEA v. Ysleta Del Sur Pueblo***, No. 98-50582, 181 F.3d 676 (5th Cir., July 19, 1999). After tribal court decided that contract between tribe and non-Indian corporation was void due to violation of statute requiring approval by Secretary of Interior of contracts with Indian tribes, corporation brought action against tribal court and tribal officials seeking injunctive relief and declaration that such statute was inapplicable. The district court dismissed action. Corporation appealed. The Court of Appeals held that: (1) tribal sovereign immunity did not preclude declaratory or injunctive relief in federal court; (2) statute requiring approval by Secretary of Interior of contracts with Indian tribes did not provide federal court jurisdiction; (3) corporation did not fail to exhaust tribal remedies, such that district court would be required to abstain from evaluating tribal court's jurisdiction; and (4) tribal court had jurisdiction to determine whether contract was void. Affirmed.

109. ***United States v. Enas***, No. 99-10049, 219 F.3d 1138 (9th Cir., July 28, 2000). After tribal court convicted defendant, a non-member Indian, on two charges of assault, he was charged with the same crimes in federal court. The district court dismissed indictment on double jeopardy grounds. Government appealed. The Court of Appeals held that tribe proceeded under its inherent authority when it prosecuted defendant, and, thus, his prosecution by federal government for same crimes did not violate Double Jeopardy Clause. Reversed and remanded. Rehearing in Banc Granted (July 28, 2000).

O. Tax

110. ***Atkinson Trading Company, Inc. v. Shirley***, No. 98-2247, 210 F.3d 1247 (10th Cir. 2000). Non-Indian hotel proprietor brought action against members of Navajo Tax Commission seeking declaratory judgment that Navajo Nation had no jurisdiction to impose hotel occupancy tax on proprietor's guests. The New Mexico District Court denied proprietor's motions for summary judgment and for trial de novo and entered summary judgment in favor of Commission members. Proprietor appealed. The Court of Appeals held that: (1) district courts in reviewing tribal court decisions on jurisdictional issues should review findings of fact for clear error and conclusions of law de novo; (2) District Court did not abuse its discretion in finding that Navajo tribal courts were not fundamentally unfair or biased, and that clear error discretion thus should be given to tribal courts' findings of fact; (3) fact that hotel was situated on fee land did not compel finding that Nation lacked jurisdiction over proprietor's nonmember guests; (4) District Court applied appropriate test for determining whether proprietor entered into consensual relationship with Navajo Nation; and (5) consensual relationship existed between Nation and guests, such that Nation had jurisdiction to impose tax. Affirmed. Briscoe, Circuit Judge, dissented and filed opinion.

111. ***Big Horn County Elec. Coop. v. Adams***, No. 99-35799, 2000 WL 977674 (9th Cir., July 14, 2000), *affirming* No. CV 98-43-BLG-JDS, 53 F. Supp. 2d 1047 (D. Mont., April 2, 1999). Electric company sued officials of Crow Tribe, seeking injunctive and declaratory relief against tribe utility tax on company's property on rights- of-way across tribal land and refund of taxes paid under protest. Parties filed cross-motions for summary judgment. The district court held that: (1) company's rights-of-way were equivalent to nonmember fee land; (2) company's delivery of electricity to tribe and its members constituted consensual relationship, so that tribe had civil jurisdiction over company's conduct; and (3) tribe's utility tax on company's property exceeded tribe's inherent sovereign authority. Motions granted in part; injunction granted. Affirmed.

112. ***Choctaw Nation of Oklahoma v. United States***, No. 99-7072, unpublished, 2000 WL 350241 (10th Cir. 2000). In this companion appeal to *Chickasaw*

208 F.3d 871

Nation v. United States, Case No. 99-7042, plaintiff Choctaw Nation of Oklahoma appeals from the district court's entry of judgment in favor of defendant United States on its claim for a refund of federal wagering and occupational excise taxes which it alleges were unlawfully assessed against its pull-tab gaming activities pursuant to 26 U.S.C. §§ 4401 and 4411. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and affirm. We conclude the district court properly granted summary judgment in favor of the United States. In particular, we agree with the district court that: (1) pull-tabs involve a taxable wager, as defined in 26 U.S.C. § 4421, (2) the Choctaw Nation is a "person" subject to federal wagering excise taxes (and the accompanying federal occupational taxes), (3) the Indian Gaming Regulatory Act does not preclude the gaming activities at issue from being subject to federal wagering excise taxes, and (4) the self-government guarantee of the 1855 treaty between the United States and the Choctaw Nation cannot reasonably be interpreted as providing the Choctaw Nation with an exemption from federal wagering excise taxes. Affirmed.

113. ***Colville Confederated Tribes v. Somday***, No. CS-98-350-AAM, 96 F. Supp. 2d 1120, 2000 WL 652563 (E.D. Wash. 2000). Tribal government brought action against Tribe members seeking declaration that amendment to its retirement plan was valid. On cross-motions for summary judgment, the District Court held that: (1) action involved justiciable controversy; (2) plan was "governmental plan" under ERISA; and (3) tribal business council ratified amendment. Plaintiff's motion granted.

114. ***Flandreau Santee Sioux Tribe v. United States***, No. 99-1670, 199 F.3d 1123 (8th Cir. 1999). Indian tribe brought action against United States challenging imposition of penalty for filing excessive claim for refund of excise tax on gasoline. The district court entered summary judgment in favor of tribe. United States appealed. The Court of Appeals held an Indian tribe is a "person" subject to an Internal Revenue Code section providing for the imposition of a penalty for seeking an excessive refund of the excise tax on gasoline. Reversed and remanded.

115. ***Little Six, Inc. v. United States***, No. 99-5083, 210 F.3d 1361 (Fed. Cir. 2000). Indian tribe brought suit seeking refund of federal excise taxes paid on wagers placed on "pull-tab" games operated on its reservation. The Court of Federal Claims granted summary judgment for government, and taxpayer appealed. The Court of Appeals held that Indian pull-tab games are exempt from federal wagering taxes. Reversed. Pet. for rehearing pending

116. ***Sac and Fox Nation of Missouri v. Pierce***, No. 99-3019, 213 F.3d 566 (10th Cir. 2000). Indian tribes brought suit to enjoin State of Kansas from collecting tax on motor fuel distributed to tribes' retail stations. The Kansas District Court enjoined enforcement of the tax, and denied motion to alter judgment. Kansas appealed.

The Court of Appeals held that: (1) neither Tax Injunction Act nor Eleventh Amendment barred suit; (2) tribes had standing; (3) legal incidence of tax fell upon distributors and tax imposed only indirect burden on tribes; (4) tax law was not preempted; and (5) there was insufficient evidence to allow balancing of federal, tribal and state interests. Reversed and remanded.

117. ***In re Tillman v. United States Treasury***, No. 99-71075, 2000 WL 641671 (Bankr. E.D. Okla. 2000). The United States submitted evidence indicating that debtor failed to file income tax returns for the years 1991, 1992, and 1993, that debtor earned well over the exemption equivalent in each of those years. The government has also shown that income was earned by the debtor individually, not by her former husband. The IRS determined that debtor owed taxes individually for these years, but the debtor filed bankruptcy before those tax deficiencies could be assessed. The IRS filed a Proof of Claim for these deficiencies. The debtor has admitted in her response to the United States' amended motion for summary judgment that she did not file any tax returns, either individual or joint, for the tax years in question. She presented no authority nor evidence in support of her position that she was not required to file a return because she is a member of the Otoe-Missouria tribe and had a smokeshop on tribal land. She presented no specific facts or evidence in support of her claim that she is an innocent spouse and that the tax deficiencies are owed by her former husband. The United States' motion for summary judgment is granted, and the debtor's tax liabilities are not dischargeable.

P. Trust Breach and Claims

118. ***Brown v. United States***, No. 99-5049, 195 F.3d 1334 (Fed. Cir., Nov. 3, 1999). Indian land lessors brought action against United States for breach of fiduciary duty in connection with administration of leases. Following remand, 86 F.3d 1554, the Court of Federal Claims, 42 Fed. Cl. 538, dismissed four of five claims as time-barred. Lessors appealed. The Court of Appeals held that: (1) lessors were not excusably ignorant of United States' alleged failure to determine that lessee was substantially under reporting gross receipts; (2) lessors were not excusably ignorant of United States' alleged improper authorization of 25-year lease term; and (3) lessors were not excusably ignorant of United States' alleged failure to increase rental rates to account for increasing economic value of land. Affirmed.

119. ***Cobell v. Babbitt***, No. Civ. 96-1285 RCL, 52 F. Supp. 2d 11 (D.D.C., June 7, 1999). Indian beneficiaries of Individual Indian Money trust sued Secretary of Interior, Secretary of Treasury, and Assistant Secretary of Interior, seeking declaratory and injunctive relief requiring defendants to meet their statutory obligations concomitant to their trust duty of providing accounting. Defendants moved for summary judgment. The district court held that: (1) sovereign immunity

was waived; (2) beneficiaries could seek common-law remedies of injunctive and declaratory relief; (3) genuine issues existed as to whether Secretary of Interior improperly obstructed Office of Special Trustee (OST) from discharging certain duties; and (4) genuine issues existed as to whether Secretary of Treasury discharged his duties under implementation of limited payability statutes, and as to whether he contravened trust duty by "inadvertently" destroying IIM-trust-related documents. Motions denied. *See also* 30 F. Supp. 2d 24, 37 F. Supp. 2d 6.

120. ***Cobell v. Babbitt***, No. CIV 96-1285(RCL), 188 F.R.D. 122 (D.D.C., Aug. 10, 1999). Beneficiaries of individual Indian money (IIM) trust accounts brought class action against Secretary of the Interior and other trustees, seeking declaratory and injunctive relief for alleged breach of trust and interference with duties of Special Trustee under Indian Trust Fund Management Reform Act. On plaintiffs' motion for sanctions, following finding that defendants were in contempt for failing to comply with document production order, 37 F. Supp. 2d 6, the district court held that attorney fees and expense would be awarded to extent that they were causally related to defendant's violation of discovery order. Sanctions awarded.

121. ***Cobell v. Babbitt***, No. 96-1285, 91 F. Supp. 2d 1 (D.D.C., Dec. 21, 1999). Beneficiaries of individual Indian money trust accounts brought action against Secretary of Interior, Secretary of Treasury and other trustees seeking declaratory and injunctive relief for alleged breach of trust under Indian Trust Fund Management Reform Act. Following bench trial, the district court held that: (1) court had jurisdiction; (2) sovereign immunity was waived pursuant to Administrative Procedures Act; (3) as matter of first impression, beneficiaries could not assert common-law claims for breach of trust against federal officials for financial mismanagement of IIM trust; (4) Secretary of the Interior had duty to render accurate accounting of all funds held in IIM trust; (5) Secretary had duty to create written plans for collection and retention of IIM-related trust documents, computer and business systems architecture, and staffing of trust management functions that were necessary to lead to accurate accounting of IIM trust funds; (6) Secretary's lengthy delay in discharging his duties was unreasonable and amounted to breach of his fiduciary duties; (7) Secretary of Treasury had fiduciary duty to retain IIM related trust documents; (8) Secretary of Treasury's policy of destroying documents breached his fiduciary duty; and (9) court would assert continuing jurisdiction over case. Ordered accordingly.

122. ***Del-Rio Drilling Programs, Inc. v. United States***, No. 569-86L, 46 Fed. Cl. 683 (2000). Oil and gas lessees brought action for breach of contract or, in the alternative, for a Fifth Amendment taking, alleging that the United States, acting through the Bureau of Indian Affairs and Bureau of Land Management, violated the terms of leases by improperly permitting the Ute Indian Tribe to control physical access necessary to develop the leases which were located on Indian

reservation. The Court of Federal Claims held that evidence supported find that the government effectively gave Indian tribe a veto over access, and thus bore responsibility for tribe's interference with access. So ordered.

123. ***Navajo Nation v. United States***, No. 93-763L, 46 Fed. Cl. 217 (2000). The Navajo Nation brought suit alleging that the Secretary of the Interior breached fiduciary duties owed it under the Indian Mineral Leasing Act and related treaties and regulations, and breached contractual obligations under a coal lease. On cross-motions for summary judgment on the issue of liability, the Court of Federal Claims held that: (1) level of management and control that the government has assumed over Indian coal leases under the Indian Mineral Leasing Act does not give rise to the type of fiduciary duty that can be enforced through a money remedy in the Court of Federal Claims for breach of fiduciary duty; (2) coal mining lease executed by Indian tribe as lessor did not create a contractual relationship between the tribe and the Secretary of the Interior; and (3) lease did not give rise to a contract implied-in-fact with the government pursuant to which the Secretary was bound by covenant of good faith and fair dealing in adjusting royalty provisions of the lease. Defendant's motion granted; plaintiff's motion denied.

124. ***Pueblo of Santa Ana v. United States***, No. 99-5105, 214 F.3d 1338 (Fed. Cir. 2000). Indian tribe brought suit against United States, seeking just compensation for rock and fill taken from tribal lands in course of dam modification project. The Federal Claims Court granted partial summary judgment in favor of the United States on issue of liability. Tribe appealed. The Court of Appeals held that land grant to Indian tribe did not reserve to United States the right to use minerals on and under the land for dam modification project. Reversed and remanded.

125. ***Warr v. United States***, No. 99-288 C, 46 Fed. Cl. 343 (2000). Tenant of Indian allottees brought suit against the government for monetary damages arising out of crop losses on the rented land due to inadequate water supplies from the Wapato Irrigation Project. On government's motion to dismiss, or for summary judgment, the Court of Federal Claims held that: (1) government's role in granting approval to lease agreement between tenant and Indian allottees did not put the United States in privity of contract with the tenant so as to render it liable for breach of the lease; (2) statutes and regulations governing the Wapato Irrigation Project do not mandate compensation by the federal government for failure to deliver adequate irrigation water to land on the Yakima Indian Reservation, and thus do not support a Tucker Act claim for damages; and (3) failure of tenant to pay timely pay annual irrigation assessments precluded formation of a contract based upon oral representations made by Administrator of the Wapato Irrigation Project that tenant would receive his share of irrigation water on a continuous basis. Motion granted.

126. ***White Mountain Apache Tribe v. United States***, No. 99-148L, 46 Fed. Cl. 20 (Nov. 19, 1999). The White Mountain Apache Tribe brought suit alleging that the government breached its trust with respect to certain property, and improvements thereon, held by the government in trust for the tribe. On government's motion to dismiss for failure to state a claim and for lack of subject matter jurisdiction, the Court of Federal Claims held that: (1) controlling legislation did not impose a fiduciary obligation on the government to maintain, protect, repair, and preserve Fort Apache for the benefit of the tribe, and (2) jurisdiction was lacking over tribe's claim against the government for permissive waste, absent statutory authority for injunctive relief. Motion granted.

T:\WPDOCS\0099\00000\WLCases.004
ajd:09/01/00