JUDICIAL UPDATE
2001 - 2002 FEDERAL CASE LAW
ON AMERICAN INDIANS

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September 2002

Judicial Update

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Research Methodology

- www.uscourts.gov/links.html
- www.findlaw.com/casecode/index.html
- Indian Law Reporter
- forums.delphiforums.com/IndianLaw/messages

UNITED STATES SUPREME COURT

1. ***Chickasaw Nation v. United States; Chocktaw Nation of Oklahoma v. United States***, No. 00-507, 534 U.S. 84 (Nov. 27, 2001). Chickasaw Nation sued the U.S. seeking refund of federal wagering and occupational excise taxes assessed against pull-tab gaming activities. Choctaw Nation also sued asserting similar claims. The district courts entered judgments for the U.S. in both cases. Both tribes appealed; the appeals courts affirmed in both cases. Certiorari was granted. The Supreme Court held that the Indian Gaming Regulatory Act (IGRA) did not exempt tribes from paying those gambling-related excise and occupational taxes that states were not required to pay under Internal Revenue Code chapter 35. AFFIRMED. Justices Scalia and Thomas joined all but Part II-B of opinion. Justice O'Connor filed dissenting opinion in which Justice Souter joined.

OTHER FEDERAL COURTS

A. Administrative Law

1. ***King v. Norton***, No. 00-CV-10006-BC., 160 F. Supp. 2d 755 (E.D. Mich., Aug 29, 2001). King is a spokesperson for a group of petitioners attempting to amend the constitution of the Saginaw Chippewa Indian Tribe of Michigan. The group sought review of a ruling by the Secretary of the Interior, Bureau of Indian Affairs (BIA) disallowing a petition to amend the Tribal Constitution because the requisite number of signatures was not affixed. BIA initially approved the petition calling for the election, but later reversed its ruling and determined that the petition was insufficient to require the Secretary to call the election. The parties filed cross motions for summary judgment. Because the court found that the manner in which the BIA calculated the requisite number of valid signatures was contrary to law and constituted an abuse of discretion, and that the petitioners in fact gathered the required signatures, the court granted plaintiff's motion for summary judgment and ordered the Agency to call and hold the election to determine if the constitution of the Saginaw Chippewa Indian Tribe of Michigan shall be amended.

2. ***State of Maine v. Department of Interior***, No. 01-1234, ___ F.3d ___ (1st Cir. Apr. 5, 2002). Under FOIA, the State of Maine requested information from the U.S. Fish and Wildlife Service regarding efforts by the Service to list Atlantic salmon under the protection of the Endangered Species Act. Interior withheld certain documents on the basis of attorney-client and work product privileges. The Court concluded that, while documents prepared to assist litigation are covered by the privilege, documents prepared because of expected litigation may not be. Memos from agency attorneys to the agency "client" that do not deal specifically with a piece of litigation are not protected.

3. ***Utah v. United States Department of the Interior***, No. 00-4018, 256 F.3d 967 (10th Cir., Jul. 10, 2001). The appeals court affirmed the district court's grant of summary judgment to defendants United States Department of the Interior, the Bureau of Indian Affairs (BIA), and defendant-intervenor Private Fuel Storage, L.L.C. (PFS) after an appeal by the State of Utah of the district court ruling upholding the BIA's decision to redact significant portions of a lease between PFS and the Skull Valley Band of Goshute Indians ("the Band") to store approximately 40,000 tons of spent nuclear fuel on land belonging to the Band. The State

submitted requests to the BIA for various documents including the lease between PFS and the Band, pursuant to the Freedom of Information Act (FOIA). The BIA Superintendent provided the State with a redacted copy of the lease stating that the redacted portions were exempt from disclosure under Exemption Four of FOIA. The question for resolution was whether the district court erred in holding that Exemption Four applied to the lease, and whether courts should apply a "balancing of interests" under that exemption. The appeals court agreed in principle that the public interest in disclosure of information regarding the handling, storage, and disposal of dangerous materials such as spent nuclear fuel is high. It found, however, that the competitive disadvantages faced by the parties to the lease were overwhelming, and that it need not reach the issue of whether a balancing test was appropriate under Exemption Four of FOIA. Affirmed.

B. Alaskan Native Claims Settlement Act

4. ***Akootchook v. United States***, No. 00-35325, 271 F.3d 1160 (9th Cir., Nov. 8, 2001). Five native Alaskans challenged the Department of Interior's decision denying their applications for land allotments under the Alaska Native Allotment Act. The Department concluded that the claims to allotments were not valid because, prior to withdrawal of the land from the public domain, the individuals did not use the land independent of their families. Appellants filed an action in district court, jointly challenging the denial of their applications. The district court ruled that the claims were barred by the res judicata effect of earlier class action suits and dismissed the claims with prejudice. The appeals court affirmed the dismissal of the action, but for different reasons. The appeals court reviewed the grant of summary judgment on res judicata grounds de novo. In reviewing decisions of the IBLA, the appeals court exercises a limited standard of review and will reverse only if the decision is arbitrary, capricious, not supported by substantial evidence, or contrary to law. The appeals court found that the Department's interpretation of its regulation is entitled to deference and that the record fully supported the decisions on the merits. The district court's judgment dismissing the case was affirmed.

5. ***Bay View, Inc. v. United States***, No. 00-5097, 278 F.3d 1259 (Fed. Cir., Dec. 3, 2001). Alaska native village corporation established pursuant to the Alaska Native Claims Settlement Act ("ANCSA") brought suit alleging that an amendment to ANCSA, which exempted revenues from sales of net operating losses ("NOL"s) from the general requirement under ANCSA that corporations must share revenues received from natural resources allotted to them, constituted a compensable taking, a breach of trust, and a breach of contract. The Court of Federal Claims granted a motion to dismiss and the corporation appealed. The appellate court held that: (1) the corporation did not have a property right to share in the proceeds of other corporations' sales of NOLs, so the amendment did not result in a compensable taking; (2) ANCSA did not create a trust relationship between United States and Alaska natives; and (3) ANCSA did not create a contract with United States enforceable under Tucker Act. Affirmed.

C. Child Welfare Act (ICWA)

6. ***Pounds v. Department of Interior***, No. 00-7113, 9 Fed. Appx. 820 (10th Cir., May 16, 2001). Unpublished Disposition. Plaintiff-Appellant Mary V. Pounds appealed the district court's order dismissing her action for lack of subject matter jurisdiction, for improper

venue, and for insufficient service of process. The court affirmed the lower court decision. Ms. Pounds brought this action alleging violations of her constitutional rights in connection with a decision of the C.F.R. court, granting custody of her three grandchildren to the Eastern Shawnee Tribe. Due to mental instability and substance abuse, Ms. Pounds' daughter, the children's natural mother, relinquished custody of the children to the tribe. The tribe placed the children in the temporary tribe-supervised custody of Ms. Pounds pending a home study. Subsequently, the tribe revoked Ms. Pounds' custody due to her refusal to cooperate with the tribe, adjudicated the children as in need of care, and placed legal physical custody with the tribe. In order to prevent the tribe from taking custody of the children, Ms. Pounds moved them to various states. The C.F.R. court issued and enforced an order requiring that the children be returned to the tribe and placed in sheltered care in Oklahoma. Although Ms. Pounds brought a number of actions in an attempt to regain custody of the children. the C.F.R. court approved the adoption of the children by a tribal family. Ms. Pounds then filed an action against the Department of the Interior and the C.F.R. court, alleging that: (1) the 1996 orders were illegal; (2) the orders were obtained through deceit and fraud; (3) the C.F.R. court ignored her pleadings and her amicus curiae briefs; (4) the C.F.R. court violated her constitutional rights under the Fourth, Fifth, Sixth, Eighth, Tenth, and Fourteenth Amendments; and (5) the C.F.R. court did not comply with the Indian Child Welfare Act. Defendants filed a motion to dismiss. The district court concluded that, pursuant to absolute immunity, the federal court lacked subject matter jurisdiction to entertain Ms. Pounds' claims, service on defendants was insufficient, and venue in the Eastern District of Oklahoma was improper.

7. ***Pounds v. Killion***, No. 01-7084, 2002 WL 1038774 (10th Cir., May 23, 2002). Unpublished Disposition. Plaintiff-appellant Richard Pounds appealed the district court's order granting summary judgment to defendant Dee Killion, an Indian Child Welfare Worker for the Eastern Shawnee Tribe of Oklahoma, on his claims brought against her under 42 U.S.C. § 1981 and § 1983. After de novo review, the appellate court affirmed.

D. Contracting

8. ***Navajo Nation v. Department of Health & Human Services***, No. 99-16129, __ F.3d __, 2002 WL 519625 (9th Cir., Apr. 8, 2002). Navajo Nation sued Department of Health and Human Services (HHS), seeking order requiring HHS Secretary to enter into self-determination contract with Nation for Temporary Assistance to Needy Families (TANF) funds. The district court dismissed the action for failure to state claim. The Nation appealed. The appellate court held that: (1) Chevron deference would be accorded to Secretary's determination that TANF program did not operate "for the benefit of Indians because of their status as Indians," and that Nation thus was not entitled to operate TANF program under self-determination contract; (2) fact that ISDEAA was enacted for benefit of Indian tribes did not preclude granting Chevron deference; (3) fact that Secretary's construction came in form of letter did not preclude granting Chevron deference; and (4) fact that ISDEAA was administered by two different agencies did not preclude granting Chevron deference. Affirmed.

9. ***Shoshone-Bannock Tribes of the Fort Hall Reservation v. Secretary, Department of Health and Human Services***, Nos. 98-36022, 99-35951, 269 F.3d 948 (9th Cir., Oct. 16, 2001). Tribe brought action against the Secretary of Health and Human Services (HHS),

the Director of the Indian Health Service (IHS), and others for violations of various provisions of the Indian Self-Determination and Education Assistance Act (ISDEA) in connection with funding of the tribe's operation of health care services pursuant to self-determination contracts. After granting government's motion for reconsideration of judgment, the district court denied the government's motion for relief from judgment. Government appealed. The court of appeals held that: (1) tribe's contract with IHS expressly precluded the tribe's claim of a contractual right to funding for contract support costs; (2) tribe had no entitlement to funding for contract support costs that existed independently of whether Congress appropriated money to cover such costs; and (3) only $7.5 million, rather than the entire $1.7 billion appropriated to IHS in 1996, was available for contract support costs. Reversed.

E. Employment

10. ***Bear Robe v. Parker***, No. 00-3998, 270 F.3d 1192 (8th Cir., Nov. 9, 2001). Bear Robe sued the Loneman School Corporation and Parker, in his official capacity as BIA administrator for Loneman School Corporation, alleging wrongful termination. The district court granted summary judgment to both defendants. Bear Robe appealed the grant of summary judgment to Parker. Bear Robe was convicted of voluntary manslaughter in 1975. Because he was 20 years old at the time, the conviction was set aside under the Federal Youth Corrections Act. In 1991, Bear Robe began working for Loneman School Corporation, a nonprofit corporation chartered by the Oglala Sioux Tribal Council and administered by the Loneman School Board under the supervision of a BIA oversight administrator. The Indian Child Protection and Family Violence Prevention Act (the "Act") requires Indian tribal organizations receiving funding under the Tribally Controlled Schools Act of 1988 to conduct investigations of individuals employed in positions that involve regular contact with, or control over, Indian children. A background investigation on Bear Robe uncovered his manslaughter conviction. He was suspended, given a hearing before the school board, and then terminated. In the district court case, Bear Robe argued that the BIA improperly ignored regulations adopted pursuant to the Act, which require the school board to consider factors other than the fact of his conviction when deciding whether to retain him. However, under the plain meaning of the Act and its implementing regulations, Bear Robe's conviction is an absolute bar to employment in a position that involves regular contact with Indian children. The appeals court concluded there is no exception in the statute for set-aside convictions. The judgment was affirmed.

F. Environmental Regulation

11. ***Michigan v. E.P.A.***, Nos. 99-1151 through 99-1155, 268 F.3d 1075 (D.C. Cir., Oct. 30, 2001). State petitioned for review of Environmental Protection Agency (EPA) rules governing application of Clean Air Act (CAA) operating permits program to Indian lands, contending that EPA had exceeded its authority by proposing to administer the program on land as to which "Indian country" status was in question, and by proposing to make state/tribe jurisdictional determinations on case-by-case basis rather than through notice-and-comment rule making. The court of appeals held that: (1) EPA lacked authority to administer the federal operating permit program on land as to which "Indian country" status was in question; and (2) Act's notice and hearing requirement applied to EPA's determinations of tribal jurisdiction. Petition for review granted.

12. ***Miccosukee Tribe of Indians of Florida v. South Florida Water Management District***, No. 00-15703, __ F.3d __, 2002 WL 130269 (11th Cir., Feb. 1, 2002). The Miccosukee Tribe of Indians and the Friends of the Everglades (together "Plaintiffs") brought a citizen suit under the Clean Water Act ("CWA") against the South Florida Water Management District ("the Water District") alleging that the Water District was violating the CWA by discharging pollutants from a pump station into Water Management District 3A without a national pollution discharge elimination system ("NPDES") permit. After the parties filed cross-motions for summary judgment, the district court denied the Water District's motion, granted Plaintiffs', and enjoined the Water District from operating the pump station without an NPDES permit. The Water District appealed from the district court order declaring unlawful the Water District's operation of the pump station without an NPDES permit and from the injunction prohibiting the same. The appellate court affirmed the district court judgment that the Water District violated the Clean Water Act, vacated the judgment awarding the injunction, and remanded for further proceedings.

13. ***Pronsolino v. U.S. Environmental Protection Agency***, No. 00-16026, ___ F.3d ___ (9th Cir., May 31, 2002). California's Garcia River is an impaired waterway for purposes of the Clean Water Act, so total maximum daily loads (TMDLs) are required. Pronsolino challenged EPA's authority under the Clean Water Act to set limits on non-point sources of pollution, such as sediment runoff from timber harvesting. Non-point sources pollution is the only source of pollution of the Garcia River. After a detailed analysis of Section 303(d) of the Clean Water Act, the Court concluded that failure to meet water quality standards justifies imposition of TMDLs whether or not the waters are covered by an effluent limitation applicable to point sources. In addition, to the extent the statute is ambiguous, EPA's interpretation is entitled to deference under *Chevron*.

14. ***Rosebud Sioux Tribe v. McDivitt***, No. 00-2468, 00-2471, __ F.3d __, 2002 WL 507962 (8th Cir., Apr. 5, 2002). This case arose from the Rosebud Sioux Tribe's lease of tribal trust land to Sun Prairie for construction of a pork production facility. Prior to Bureau of Indian Affairs (BIA) approval of the lease, the National Environmental Policy Act (NEPA) mandated preparation of an environmental impact statement (EIS) if the project would result in any significant environmental impact. Based on an Environmental Assessment (EA), BIA determined the project would cause no significant impact, issued a Finding of No Significant Impact (FONSI), and approved the lease which the Tribe and Sun Prairie executed. Almost five months later, the Assistant Secretary for Indian Affairs at the Department of Interior (Assistant Secretary) voided the lease saying the FONSI was issued in violation of NEPA. Sun Prairie and the Tribe filed suit against the Assistant Secretary and requested a preliminary and permanent injunction. Several environmental and public interest groups (collectively, the Intervenors) intervened as defendants. The district court granted a preliminary injunction and, after a hearing, a permanent injunction. Rosebud Sioux Tribe v. Gover, 104 F.Supp.2d 1194 (D.S.D.2000). The defendants and the Tribe appealed. (Subsequent to entry of the permanent injunction, the Tribe held general tribal elections and the composition of the tribal council changed. The reconstituted tribal council no longer favored the hog production project, and determined the Assistant Secretary's decision to void the lease should be upheld. The Tribe requested, and the appellate court granted, permission to realign itself as an appellant.) The appellate court found that Sun Prairie lacked standing to pursue its claims, vacated the district court order

granting a permanent injunction, and remanded with instructions to dismiss the complaint for lack of jurisdiction.

15. ***Wisconsin v. U.S. Environmental Protection Agency***, No. 99-2618, ___ F.3d ___, 2001 WL 1117281 (7th Cir. Sep. 21, 2001), cert denied, ___ U.S. ___ (Jun. 3, 2002). EPA approved the Sokaogon Chippewa Community's application for Treatment As a State under Section 518 of the Clean Water Act. Wisconsin argued that Rice Lake was not "within the borders" of the reservation, but had failed to assert that below. Wisconsin also argued that the Tribe's standards could not affect off-reservation activities. But the Court determined that once the Tribe was given TAS status it has the power to require upstream off-reservation dischargers to make sure that their activities do not result in contamination of the downstream on-reservation waters. The Court considered and rejected the contention that the Supreme Court's ruling in *Nevada v. Hicks* required a different result.

G. Exhaustion of Tribal Court Remedies

16. ***Bank One, N.A. v. Shumake***, Nos. 01-60228 to 01-60238, 281 F.3d 507 (5th Cir., Feb. 15, 2002). After members of the Mississippi Band of Choctaw Indians brought tribal court action against creditor arising from the financing of home satellite systems, the creditor brought federal court actions seeking to compel arbitration of members' claims pursuant to the Federal Arbitration Act (FAA). The district court dismissed the actions for failure to exhaust tribal remedies. The creditor appealed, and the actions were consolidated. The appellate court held that the tribal exhaustion doctrine applied to the suits to compel arbitration under the FAA. Affirmed.

17. ***Comstock Oil & Gas Inc., v. Alabama and Coushatta Indian Tribes of Texas***, No. 00-40088, 261 F.3d 567 (5th Cir., Aug. 27, 2001), cert denied, 2002 WL 171984 (Apr. 1, 2002). Oil companies brought action against Indian tribe and tribal council members, seeking declaration that oil and gas leases on Indian lands were in full effect. The district court, partially granted defendants' motion to dismiss, and cross-appeals were taken. The appeals court held that: (1) neither tribe nor council members were immune from suit for declaratory or injunctive relief; (2) exhaustion of tribal remedies was not required where tribal court did not properly exist; and (3) federal regulations and statutes governing tribal oil and gas leases were adequate to invoke court's federal question jurisdiction. Reversed in part, affirmed in part, and remanded.

H. Fisheries, Water, FERC, BOR

18. ***Midwater Trawlers Co-operative v. Department of Commerce***, No. 00-35717, 282 F.3d 710 (9th Cir., Mar. 5, 2002). States and fishing industry groups brought action challenging National Marine Fisheries Service ("NMFS") regulation allocating fish catches to tribe. The district court dismissed the suit, the appellate court reversed and remanded. Separate action brought by fishing industry groups and state of Oregon challenging regulation increasing fish allocation to tribe was consolidated with the remanded action. The district court, granted the federal government's motion for summary judgment. Fishing industry groups and the state of Oregon appealed. The appellate court held that: (1) fishing industry groups did not have standing to challenge the portion of the regulation merely identifying the usual and accustomed areas of fishing with respect to certain tribes but not

making any allocation of fishing rights; (2) fact that no express judicial adjudication of tribal treaty rights to the Pacific whiting species of fish had been made when federal regulation allocating Pacific whiting catch to tribe was promulgated did not preclude federal recognition of tribal treaty rights to Pacific whiting; (3) Pacific whiting were not subject to separate treaty proviso for shellfish; (4) federal recognition of the Makah tribe's usual and accustomed fishing areas beyond the three-mile territorial limit, extending into waters under United States jurisdiction, in promulgating federal regulation allocating Pacific whiting catch to the tribe, was appropriate; and (5) regulation making allocation of Pacific whiting fish to Makah tribe pursuant to political compromise, without any stated scientific rationale, did not meet requirement of the Magnuson-Stevens Act that the NMFS describe the nature and extent of the tribal fishing right based on the best scientific information available. Affirmed in part, reversed in part, and remanded.

19. ***Mountain Rhythm Resources v. Federal Energy Regulatory Commission***, No. 00-70357, ___ F.3d ___ (9th Cir. Aug. 23, 2002). FERC dismissed Mountain Rhythm Resources' applications for hydropower licenses because the applicant failed to obtain the State of Washington's certification that the projects were consistent with the State's coastal zone management program. Washington requires that the county where the project is located certify the project's consistency with the State coastal protections through issuance of a Shoreline Management Act permit. Washington's designation of the fifteen counties touching the coast of the Pacific Ocean and Puget Sound as its coastal zone is valid. Therefore, applicant's failure to obtain an approved Shoreline Management Act permit from Whatcom County is a fatal deficiency in its FERC applications for licenses.

20. ***United States v. Adair***, No. CV 75-914-PA, 187 F. Supp. 2d 1273 (D. Or., Feb. 27, 2002). The district court previously declared the existence, nature, scope, and priority of the reserved Indian water rights of the Klamath Tribes, but left the quantification of those rights to Oregon's Klamath Basin Adjudication ("KBA"). The district court retained continuing jurisdiction of the matter and in this current case determined two narrow issues: (1) whether the Klamath Tribes have a water right to support reserved gathering rights; and (2) whether and to what extent the "moderate living" standard applies in quantifying the Tribes' water rights. The primary dispute revolved around application of the "moderate living" doctrine and reconciliation of it with the quantification standard. The court ordered that: (1) the Klamath Tribes' water rights include a right to water to support resources the Tribes gather, in addition to the resources they hunt, fish, and trap; (2) Adair I (478 F. Supp. 336) announced the standard for quantifying the tribal water right; and (3) the "moderate living" standard has limited application in this case, but could be used to adjust the initial quantification of the tribal water right upon a proper showing by non-tribal opponents. In no event shall the adjudicator quantify or reduce the Tribal water right to a level below that which is necessary to support productive habitat.

21. ***United States v. Orr Water Ditch Co.***, Nos. 99-16812 and 99-16817, 256 F.3d 935 (9th Cir., Jul. 5, 2001). The town of Fernley, Nevada applied to the Nevada State Engineer to change the manner and place of use of rights to roughly 280 acre-feet of water from the federal Newlands Reclamation Project ("the Project"). The Pyramid Lake Paiute Tribe of Indians ("the Tribe") and the federal government opposed the proposed transfers, contending that the water rights at issue had been forfeited or abandoned under Nevada state law. The Tribe resides on a half-million acre reservation that surrounds Pyramid

Lake which once received the entire flow of the Truckee River, but now receives only what remains after the river has been tapped by the Newlands Project. The Tribe opposed Fernley's application because its economy, culture, and heritage are linked to the size of the flow of the Truckee River and to the health of Pyramid Lake and previous Project diversions had adversely affected the size and ecology of the lake. If Fernley's transfer application were granted, the flow of the Truckee River into Pyramid Lake would be diminished further. The initial decisions on the proposed transfers were made by the Nevada State Engineer who approved the transfer of all but a few of the water rights at issue. The federal district court affirmed the decision of the Nevada State Engineer that none of the water rights had been forfeited or abandoned and later denied a motion for reconsideration. The Tribe and the government appealed and the decision was reversed and remanded.

22. ***United States v. Alpine Land & Reservoir Co.***, Nos. 00-15688, 00-15690, 00-15692, 279 F.3d 1189 (9th Cir., Feb. 14, 2002). United States and Pyramid Lake Paiute Tribe of Indians appealed the decision of the Nevada State Engineer that largely granted applications of landowners in the Nevada Newlands Reclamation Project to transfer water rights between parcels of property. The district court affirmed the state Engineer's decision and the United States and Tribe appealed. The appellate court held that: (1) equitable exemptions for intrafarm transfers of water rights could be made; (2) landowners could not assert that they lacked requisite intent to abandon to prevent forfeiture; (3) equitable relief was not appropriate where remedy at law was available; and (4) any equitable consideration to be given to individual landowners had to be balanced against hardships to Indian tribe. Affirmed in part, reversed in part, and remanded.

23. ***Ute Distribution Corporation v. Norton***, No. 01-4020, 2002 WL 1722061 (10th Cir., July 25, 2002). Unpublished Disposition. Movant-Appellant Timpanogos Tribe, Snake Band of Shoshone Indians of Utah Territory asserted that, because it claims aboriginal title to the water rights at issue in the underlying litigation, the district court erred in denying its motion to intervene of right pursuant to Fed.R.Civ.P. 24(a)(2). The appellate court affirmed the district court order denying the Timpanogos Tribe's motion to intervene.

I. Gaming

24. ***American Greyhound Racing, Inc. v. Hull***, 146 F. Supp. 2d 1012 (D. Ariz., Jul. 3, 2001). At issue in this case was the kind and breadth of gaming that the Arizona Governor may include in compacts with Indian tribes. Plaintiffs sought to enjoin the governor from entering new, renewed, or modified gaming compacts that would allow Indian tribes in Arizona to conduct slot machine, keno, or blackjack gaming. The Plaintiffs are permittees of horse and dog racing facilities in Arizona. The Defendants included state authorities responsible for negotiating gaming compacts with Indian tribes and enforcing state laws prohibiting certain forms of gaming. Defendants asserted that Plaintiffs lacked standing and also that representatives of tribes in Arizona should participate in the case. The court held that Plaintiffs demonstrated a real and immediate problem and also found the tribes were not indispensable parties because the issues concerned the limits of the powers of the state and its officers and adjudication of the issues did not require the tribes' participation. Plaintiffs argued that the statute authorizing the governor to negotiate and enter compacts violates the non-delegation doctrine because it allows the governor to unilaterally create

gaming policy. The court held that decisions about what kinds of gaming should be legal and what kinds of gaming should be permitted within state boundaries pursuant to tribal-State compacts are legislative decisions. Ariz. Rev. Stat. § 5-601 delegates this lawmaking power to the governor without conveying a policy to guide the governor's discretion. The court found that Ariz. Rev. Stat. § 5-601 violates article III of the Arizona Constitution and is void; thus, the governor is not enabled to enter compacts. Assuming that the governor could enter compacts, the Plaintiffs argued those compacts could not include terms for slot machine, keno, or blackjack gaming. The court found that state law does not permit slot machine, keno, or blackjack gaming and that the only gambling permitted must be conducted as a raffle. Since federal law does not permit the state to enter compacts authorizing tribes to engage in gaming otherwise prohibited by state law, the governor could not properly enter compacts for games of chance other than raffles, even if Ariz. Rev. Stat. § 5-601 were valid. Finding Ariz. Rev. Stat. § 5-601 unconstitutional conveyed to Plaintiffs the principal relief they sought.

25. ***Artichoke Joe's v. Norton***, No. CIV-S-01-0248 DFL GGH, ___ F.Supp. 2d ___ (E.D. Cal. Jul. 29, 2002). Artichoke Joe's challenged the validity of compacts entered into between the tribes and the State of California claiming that the compacts violate IGRA and the Fifth and Fourteenth Amendments to the United States Constitution by creating a tribal monopoly on Las Vegas style gaming. Plaintiffs' theory was that because California Proposition 1A allowed casino gaming only by tribes, and not by non-Indian groups, the gaming is not authorized for "any person" as required by IGRA. Judge Levi ruled that IGRA does not require that a state have wide-open Class III gaming in order for tribes to negotiate Class III compacts. The Court also rejected the equal protection challenges on the basis of *Morton v. Mancari.*

26. ***AT&T Corp. v. Coeur d'Alene Tribe***, No. 99-35088, ___ F.3d ___ (9th Cir., March 19, 2002). The Tribe sued AT&T in Tribal Court seeking to require it to provide service for the National Indian Lottery. AT&T had declined to act in the face of threats from attorneys general of several states. After exhaustion of Tribal Court remedies, AT&T sued in federal District Court, which held that AT&T need not provide toll-free telephone service and that the lottery was illegal under IGRA. The Court of Appeals held that Sec. 207 of the Federal Communications Act establishes exclusive jurisdiction in the Federal Communications Commission and federal District Courts, thus, the Tribal Court lacked jurisdiction. However, the Court of Appeals vacated the ruling concerning IGRA, holding that the National Indian Gaming Commission approved the lottery through its approval of the Gaming Compact, Ordinance and Management Agreement. On July 17, 2002, the Court of Appeals amended its opinion, but did not change its holdings.

27. ***Baird v. Norton***, No. 99-1822, 266 F.3d 408 (6th Cir., Sept. 14, 2001). Members of Michigan state senate and house of representatives brought suit challenging approval by Secretary of the Interior of gaming compacts between Michigan and Indian tribes pursuant to Indian Gaming Regulatory Act (IGRA), alleging that concurrent resolutions under which House and Senate approved compacts were invalid. The district court granted defendant's motion to dismiss. Members appealed. The appeals court held that: (1) allegation that procedural safeguards required by Michigan constitution were not satisfied involved at most a generalized grievance that was insufficient to confer standing, and (2)

approval of compacts through concurrent resolutions did not confer a vote-nullification injury sufficient to confer standing on members. Affirmed.

28. ***Grand Traverse Band v. United States and State of Michigan***, No. 1:96-CV-466, ___ F.Supp 2d ___ (W.D. Mich. Apr. 22, 2002). The Grand Traverse Band of Ottawa and Chippewa Indians sued for declaratory judgment of the legality of Class III gaming at the Turtle Creek Casino, located on land that is not part of nor contiguous to lands held in trust for the Band as of the date IGRA was enacted. Class 3 gaming on lands taken into trust after 1988 generally must satisfy the exceptions of 25 U.S.C. §2719. After certain proceedings, the NIGC determined that the Turtle Creek site fell within the restored-lands exception of § 2719. The site is within the Band's ceded area, although outside the 1836 Treaty reservation. Although not compelled to employ *Chevron* analysis, the Court nevertheless concluded that the well-reasoned views of the NIGC are entitled to deference and that the Band is a restored tribe within the meaning of IGRA. Accordingly, the Turtle Creek site is within the restored-lands exception and State consent is not required.

29. **Lac Vieux Desert Bank of Lake Superior Chippewa Indians v. Michigan Gaming Control Board**, No. 00-1879, 276 F.3d 876 (6th Cir., Jan. 11, 2002). The Lac Vieux Tribe brought an action challenging the constitutionality of a Michigan statute and a Detroit ordinance governing the development and regulation of casino gambling in Detroit that incorporated an advantage for two companies that had been active in the movement to legalize the gambling. The Lac Vieux, which offers gambling on its Michigan reservation, sued because of the handicap it and all other prospective off-reservation operators faced in the Detroit licensing process. The tribe claimed that the ordinance's preference provisions discriminate against it for having not taken a particular political position in the casino legalization debate, thus violating the guarantees of the First Amendment as well as the Fourteenth Amendment's Equal Protection Clause. In granting Detroit summary judgment, the district court held that the Lac Vieux lacked standing to bring its claims and that, even if the Lac Vieux did have standing, the claims lacked merit. In the tribe's first appeal, the grant of summary judgment was reversed and the matter remanded by the appellate court. The district court again sustained the Detroit ordinance and the tribe appealed a second time. On the second appeal, the appellate court held that the ordinance governing issuance of licenses for operation of new casinos violated the First Amendment's free speech clause and reversed and remanded.

30. ***Little Six, Inc. v. United States***, No. 99-5083, 280 F.3d 1371 (Fed. Cir., Feb. 19, 2002). This case was remanded from the Supreme Court for further consideration in light of Chickasaw Nation v. United States, 122 S. Ct. 528 (2001). The appellate court found that the issue regarding whether wagers on Indian pull-tab games are subject to taxation under I.R.C. §§ 4401 and 4411, was not implicated in Chickasaw Nation and reiterated its earlier decision with regard to that aspect of the appeal. The court found that the issue regarding whether appellants are exempt from those taxes under 25 U.S.C. § 2719(d)(1), is directly governed by Chickasaw Nation and modified its initial disposition of that issue in accordance with the Supreme Court's decision, concluding that appellants were properly taxed under §§ 4401 and 4411 and, because 25 U.S.C. § 2719(d)(1) does not exempt them from those taxes under the controlling authority of Chickasaw Nation, it affirmed the decision of the Court of Federal Claims that wagers on Indian pull-tab games are properly subject to taxation under I.R.C. §§ 4401 and 4411, and that 25 U.S.C. § 2719(d)(1) does

not provide Little Six with an exemption from those taxes under Chickasaw Nation. Affirmed.

31. ***New Mexico v. Pueblo of Pojoaque***, No. 01-2019, 30 Fed. Appx. 768, 2002 WL 123699 (10th Cir., Jan. 31, 2002). This case involved the gaming compact and revenue sharing agreement entered into between the Pueblo of Pojoaque Tribe and New Mexico. The revenue sharing agreement ("RSA"), was by state statute a prerequisite for the state to enter into the compact with the Tribe and requires the tribe to pay to the state 16% of its total "net win" from gaming machines. In exchange, the state agreed to various restrictions on the expansion of non-Indian gaming. When the tribe began refusing to comply with the RSA requirement that it submit 16% of its net win to the state, the state brought an action seeking a declaration that: (1) the RSA requirements are part of the compact; (2) the RSA is legal under the IGRA; (3) the tribe was violating the IGRA by failing to remit the payment required under the RSA; and (4) all tribal gaming in violation of the IGRA be enjoined. The tribe filed a motion to dismiss claiming it had sovereign immunity from suit and that the district court lacked subject matter jurisdiction. The district court denied the motion to dismiss, holding "[t]he IGRA . . . provides a solid foundation for both federal question jurisdiction and a waiver of tribal immunity. Since the State has filed the case, the Court has jurisdiction over the subject matter and the parties." The appellate court affirmed the district court decision and remanded for further proceedings.

32. ***Sault Ste. Marie Tribe of Chippewa Indians v. Engler***, No. 00-1277, 271 F.3d 235 (6th Cir., Nov. 7, 2001). The plaintiffs in this case were seven Indian tribes with casinos on their Michigan reservations. Under an agreement, they are required to pay the state of Michigan a sum of money representing revenue lost by the state before other casinos obtained the right to operate. The question presented was when the Seven Tribes stopped having exclusive casino operating rights. Under slightly different circumstances, the appeals court confronted the same question before. See Sault Ste. Marie v. Engler, 146 F.3d 367 (6th Cir.1998) (Sault Ste. Marie I). Both disputes arose out of the Seven Tribes' earlier suit against Governor Engler for failing to negotiate gaming compacts with them "in good faith," as required by federal law. The 1990 settlement of that case provided that Michigan would enter into gaming compacts with the Seven Tribes. The appeals court in Sault Ste. Marie I held that the payments must continue until the state granted a license for a Detroit casino, regardless of when such a casino might ultimately open its doors. In the meantime, Michigan negotiated gaming compacts with four more Indian tribes. The Seven Tribes claim that the effective date of these compacts ended their payment obligation. Moving to compel the Seven Tribes' compliance with the consent judgment, the governor contended that the new compacts had no effect on what the Seven Tribes must pay. The district court denied the governor's motion. Once another entity possessed the right to operate games of chance, the Seven Tribes no longer owed Michigan the disputed payments and the district court correctly denied the governor's motion. Judgment was affirmed.

33. ***Sault Ste. Marie Tribe of Chippewa Indians v. United States***, No. 99-2444, __ F.3d __, 2002 WL 845202 (6th Cir., May 3, 2002). Sault Ste. Marie Tribe of Chippewa Indians brought action against United States, seeking review of determination by Department of the Interior allowing Little Traverse Bay Bands of Odawa Indians to operate casino. Bands intervened as party defendant. The district court entered summary judgment for

United States and Bands. Tribe appealed. The appellate court held that, to prevail on issue of constitutional standing at summary judgment stage, Tribe was required to show, not merely to allege, that operation of Bands' casino was having adverse effect on Tribe's casino. Vacated and remanded with instructions to dismiss.

34. ***United States v. Casino Magic Corp.***, No. 01-2024, __ F.3d __, 2002 WL 1250516 (8th Cir., June 7, 2002). The United States and its relator, Maynard Bernard, appealed an adverse grant of summary judgment in this qui tam action. The appellate court held that the district court erred as a matter of law in concluding there was no management agreement, and reversed and remanded for further action.

35. ***United States v. Santee Sioux Tribe of Nebraska***, No. 00-1399, 00-1542, 00-1764, 254 F.3d 728 (8th Cir., Jun. 21, 2001). "These consolidated cases involve our latest journey through this long-existing quagmire created by the parties. We affirm in part and reverse in part." Pursuant to the appeal court's decision in United States v. Santee Sioux Tribe of Nebraska, 135 F.3d 558 (8th Cir. 1998), the district court issued an injunction against the Santee Sioux Tribe ("the Tribe"), ordering it to close a tribal casino operating class III gaming devices. The Tribe failed to comply with the injunction, the court held it in contempt and began assessing a fine for every day it continued to operate the casino. The federal government ("government") then initiated garnishment proceedings against tribal bank accounts. The district court found that twenty-two of the tribal accounts were subject to garnishment. The government unsuccessfully sought to have the court hold members of the Tribal Council in contempt. The Tribe appealed the district court's findings that fifteen of the accounts were subject to garnishment, and the government cross-appealed the court's finding that one of the accounts was exempt. The government also appealed the court's refusal to hold individual members of the Tribal Council in contempt. The appeals court delivered the following decisions: affirmed the judgment of the district court in case no. 00-1542–the Tribe's appeal regarding the garnishment of accounts; reversed in case no. 00-1764–the government's cross-appeal regarding the Cedar Hill account; and reversed in case no. 00-1399–the government's appeal concerning the individual liability of Tribal Council members. Remanded.

36. ***United States v. Santee Sioux Tribe of Nebraska***, No. 8:96CV367, 174 F. Supp. 2d 1001 (D. Neb., Dec. 7, 2001). Memorandum and Order. This matter was before the district court following a hearing on the Santee Sioux Tribe's ("Tribe") request that the court lift sanctions of civil contempt imposing fines on the Tribe for failure to comply with two earlier court orders. The Tribe contended that because it had ceased operating all Class III gaming activities, it should no longer be held in contempt. The United States ("Government") opposed the motion, contending that the Tribe was still operating Class III gaming devices. The district court concluded that the Tribe's motion for relief, should be granted because the Tribe ceased operation of its previous Class III gaming devices, replacing them with "Lucky Tab II" and found the following: (1) the Tribe's motion for relief was granted; and (2) all fines against the Tribe were permanently suspended.

J. Land Claims

37. ***Canadian St. Regis Band of Mohawk Indians v. New York***, No. 82-CV-783, 82-CV-1114, 89-CV-829, 146 F. Supp. 2d 170 (D.N.Y., Jan. 16, 2002). Indian tribes and

intervenor-United States brought action against state and municipal defendants seeking a declaration of ownership and the right to possess approximately 12,000 acres of land in northern New York, plus damages for almost 200 years of dispossession. On the United States' motion to amend the complaint, the district court, held that: (1) tribe would not be prejudiced by amendment of United States' complaint to dismiss all non-state defendants, and (2) proposed amendment of United States' complaint did not constitute bad faith. The United States' proposed Amended Complaint would drop all claims and remedies against defendants other than New York and the New York Power Authority ("NYPA") based on the theory that the non-state defendants, including private landowners named in the United States' complaint-in-intervention, are unnecessary because the state as the initial trespasser of the claim area is liable for all damages the flowed from its tortious actions, including subsequent trespasses by private individuals. Only the Mohawk plaintiffs opposed the motion claiming that the United States' proposed amendment unduly prejudices them because it is based on the erroneous assumption that decisions in the Oneida and Cayuga land claim cases firmly establish that full recovery is available against the state. The court noted that the Mohawk plaintiffs failed to establish how they are prejudiced given that their claims against the non-state defendants are still fully intact, and those claims include the pursuit of any and all remedies, including ejectment, against the defendants. The Mohawks also contended that the United States is breaching its fiduciary duty and acting in bad faith because dismissing non-state defendants from the litigation is directly contrary to the Mohawks' interests in realizing full relief for the alleged violation of their possessory rights. The court granted the United States' motion for leave to file an Amended Complaint-in-Intervention.

38. ***United States v. Buck***, No. 01-7015, 281 F.3d 1336 (10th Cir., Mar. 8, 2002). Defendants claim descent from Nettie Tiger, a fullblood Creek who acquired property in 1903 from the Muscogee (Creek) Nation. After her death one of her six heirs conveyed her undivided 1/6 interest in the property to Oliphant, a non-Indian. Oliphant filed suit to partition the property, forcing its sale, and purchased the property at a sheriff's sale. But the Secretary of the Interior exercised his preference right under the Oklahoma Indian Welfare Act of June 26, 1936, to acquire the property in trust for the Thlopthlocco Tribal Town and eventually the U.S. title was confirmed by court order. Dispute over the title arose after Oliphant conveyed whatever interest he had in the property to Buck and Berryhill in 1992. The U.S. brought an action on its own behalf and in its capacity as trustee of lands of the Thlopthlocco Tribal Town seeking to quiet title to the property and to enjoin Buck and Berryhill from trespassing or asserting any claim to it. The district court entered judgment quieting title to the property in the United States and granting the requested injunctive relief. Later, the U.S. filed a motion for an order requiring Buck and Berryhill to show cause why they should not be held in contempt for violating the injunction in the quiet title judgment. A day before a scheduled hearing on the motion, Berryhill and other Non-party movants filed a motion for relief from the judgment "[p]ursuant to Rule 60(b)(4) and (6)." The district court ruled against them and the appellate court affirmed, holding: (1) appellants' claim of fraud upon the court was brought improperly under Rule 60(b)(6) but can be treated as a claim in an independent action or as a motion addressed to the inherent power of the court to set aside a judgment procured by fraud upon the court; (2) appellants failed to establish fraud upon the court; (3) the judgment is not void for lack of subject matter jurisdiction, appellants' claim to the contrary being founded merely on contentions that the district court had committed legal error in deciding the merits; and (4) failure to

give notice of the quiet title action to the non-party movants did not deprive them of due process or otherwise render the quiet title judgment void. Affirmed.

39. ***United States ex. rel. Fort Mojave Indian Tribe v. Byrne***, No. 00-16008, 279 F.3d 677 (9th Cir., Jan. 28, 2002). The United States brought action against private landowners on behalf of the Fort Mojave Indian Tribe for quiet title, ejectment, and trespass damages, on the ground that the lands at issue along the Colorado River attached by the natural process of accretion to land that the United States held in trust for the tribe. The district court held that it lacked jurisdiction, but found that the private landowners held title to the land. The United States appealed and asked the court to determine whether the district court had jurisdiction over the quiet title and ejectment action and, if so, whether it properly determined ownership of the property. The court of appeals concluded that the district court erred in dismissing the case for lack of jurisdiction and in fixing the title to the lands on the basis of river movements that occurred prior to 1905, when the United States patented the disputed lands to the State of California and reversed and remanded for further proceedings.

K. Religious Freedom

40. ***Bonnichson v. United States***, No. 96-1481-JE, ___ F.Supp. 2d ___ (D. Or. Aug. 30, 2002). Plaintiff archeologists and anthropologists sought judicial review of a final Interior Department decision that awarded the remains of the "Kennewick Man" to a coalition of Indian tribes and denied the plaintiffs' request to study those remains. The nearly complete skeletal remains of a man who died approximately 9,000 years ago were found in 1996 on federal property under the management of the U.S. Army Corps of Engineers. Pursuant to NAGPRA, the Corps published a notice of intent to repatriate human remains and plaintiffs brought suit to compel the Corps to permit their analysis of the remains. In January 2000, the Interior Department announced its determination that the Kennewick remains are "Native American" as defined by NAGPRA. Subsequently, the Interior Department announced its final decision to award the Kennewick remains to a coalition of Indian tribes. The Court rejected Interior's decision, concluding, *inter alia*, that NAGPRA defines "Native American" as "of, or relating to, a tribe, people, or culture that is indigenous to the United States." 25 U.S.C. § 3001(9). The "plain language" of the provision, using the words "is" and "relating" in the present tense, requires, the Court concluded, a relationship to a presently existing tribe, people or culture. Because the agency could not show the continuity of such a relationship over the 9,000-year period, NAGPRA is inapplicable.

41. ***United States v. Hardman***, No. 99-4210, ___ F.3d ___ (10th Cir. Aug. 5, 2002). On August 8, 2001, the 10th Circuit Court of Appeals granted rehearing *en banc* in three separate cases involving illegal possession of eagle feathers by Hardman, Wilgus and Saenz, none of whom is an enrolled member of a federally-recognized Indian tribe. Hardman is not of Indian ancestry, but was previously married to an enrolled member. Wilgus and Saenz claim informal tribal adoption or descendancy from a non-federally-recognized tribe. Wilgus and Hardman were convicted of illegally possessing eagle feathers. Saenz was charged, but his case was dropped by the government and he filed a motion for return of the seized feathers, which was granted. Under regulations of the Interior Department, eagle parts are sent to the National Eagle Repository. The Secretary

may grant permits to possess eagle parts to individuals who are members of federally recognized tribes. The United States argued that its interest in protecting eagles and in preserving Indian culture and religion protects these regulations from violating the Free Exercise Clause and the provisions of the Religious Freedom Restoration Act. The 10th Circuit concluded that United States had not provided sufficient evidence to conclude that the regulations were the least restrictive means of accomplishing statutory purposes. Accordingly, the Court remanded the Hardman and Wilgus cases for fact finding and affirmed the district court in Saenz. The factual showing of the government in Saenz did not show that limiting permits for eagle feathers only to members of federally-recognized tribes is the least restrictive means of advancing the government's interests in preserving eagle populations and protecting Indian culture. The Court avoided relying on constitutional grounds, instead concluding that the government failed to show how the permitting process advances its compelling interests under the eagle protection statutes.

42. ***United States v. Oliver Jr.***, No. 00-3526, 255 F.3d 588 (8th Cir., Jun. 14, 2001). This is an unpublished opinion. Gerald W. Oliver, Jr. appeals from the denial of his pretrial motion to dismiss the charge of knowingly taking an adult bald eagle and knowingly possessing the body of an immature bald eagle. Oliver entered a conditional plea of guilty, reserving the right to appeal. He was sentenced to two years probation and $5,000 restitution. Oliver is an enrolled member of the Rosebud Sioux Tribe and is a practitioner of traditional Sioux faith. He has held a permit from the Fish and Wildlife Service, pursuant to the Bald and Golden Eagle Protection Act (BGEPA), 16 U.S.C. § 668(a), to receive eagle parts since he was fifteen. Oliver claims he has experienced delays of up to three years waiting for parts. He argues these delays led to him illegally obtaining the eagle parts in question. The district court accepted the magistrate court's decision that the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb, was not violated by the prosecution of Oliver. In so holding, the district court found while Oliver's religious activities were frustrated by the slow process of the permit system, the government demonstrated a compelling governmental interest in preserving the bald eagle population and that the means employed to reach this end were the least restrictive means available for preserving and protecting the eagle population. Young v. Crystal Evangelical Free Church, 141 F.3d 854, 858 (8th Cir. 1998) (quoting the codified compelling state interest/least restrictive means test or RFRA). This Court finds that the magistrate and the district court correctly applied the test set forth in RFRA and reached the appropriate conclusion that the government had met its burden. It is clear that unrestricted access to bald eagles would destroy legitimate and conscientious eagle population conservation goal of the BGEPA. Oliver has argued a one-man exemption should be made, however, there is nothing so peculiar or special with Oliver's situation which warrants an exception. There are no safeguards to prevent similarly situated individuals from asserting the same privilege and leading to uncontrolled eagle harvesting. Lastly, Oliver has argued that the government's interest in protecting bald eagles is no longer compelling because the Fish and Wildlife Service proposed to remove bald eagles from the endangered and threatened species list. The bald eagle has not been removed from the endangered species lists as of this date, therefore, sufficient evidence demonstrating the removal of the compelling governmental interest has not been presented. Any inadequacies in the permit system or the BGEPA must be addressed through Congress and the Fish and Wildlife Service. Affirmed.

L. Sovereign Immunity and Federal Jurisdiction

43. ***American Vantage Companies, Inc. v. Table Mountain Rancheria***, No. 00-17355, 2002 WL 1301449 (9th Cir., June 14, 2002). Gaming management company brought action against Indian tribe on promissory note and for breach of contract. The district court dismissed the action for want of subject matter jurisdiction, and company appealed. The appellate court held that: (1) neither tribe nor its casino was a "citizen" of any state, and thus, neither was subject to diversity jurisdiction; (2) tribe's waiver of immunity to suit in contract did not create de facto incorporation of the tribe, and thus, did not create de facto corporate state citizenship for diversity jurisdiction purposes; (3) casino which was unincorporated arm of unincorporated Indian tribe did not shed its noncitizenship for purposes of diversity jurisdiction by acting in commercial capacity; (4) tribe was not an "unincorporated association" for diversity jurisdiction purposes; and (5) company waived issue of federal question jurisdiction, raised for first time on appeal. The appellate court affirmed.

44. ***Bishop Paiute Tribe v. County of Inyo***, No. 01-15007, 275 F.3d 893 (9th Cir., Jan. 4, 2002). Tribe and tribally-chartered gaming corporation brought action against county, county district attorney, and county sheriff for declaratory and injunctive relief, and for damages under § 1983, arising from execution of a warrant to search tribal employee records as part of a welfare fraud investigation. The district court granted defendants' motion to dismiss for failure to state a claim. Tribe and the gaming corporation appealed. The appellate court held that: (1) county did not have criminal jurisdiction, under statute which granted several states criminal jurisdiction over reservation Indians, to execute warrant to search tribal employee records on reservation as part of a welfare fraud investigation; (2) tribe was possessed of sovereign immunity which barred county's execution of warrant to search tribal employee records on reservation as part of a welfare fraud investigation; (3) Indian Gaming and Regulatory Act did not preempt county's investigation of tribal gaming employees for potential welfare fraud; (4) state was not required to affirmatively adopt, through enabling legislation, federal statute which granted several states criminal jurisdiction and limited civil jurisdiction over reservation Indians, before it could properly exercise jurisdiction under the statute; (5) statute which granted several states criminal jurisdiction and limited civil jurisdiction over reservation Indians did not violate the Tenth Amendment; (6) district attorney and sheriff were acting as county officers in obtaining and executing the warrant, and thus, county could be held liable under § 1983 for their acts; (7) neither district attorney nor sheriff were entitled to qualified immunity; and (8) execution of search warrant beyond county officer's jurisdiction violated the Fourth Amendment and was actionable under § 1983. Affirmed in part, reversed in part, and remanded.

45. ***Cabazon Band of Mission Indians v. Smith***, No. 99-55229, 271 F.3d 910 (9th Cir., Nov. 26, 2001). The court of appeals ruled that the opinion filed on May 17, 2001, is hereby WITHDRAWN and the case is REMANDED to the district court to consider the impact, if any, on the resolution of the issues in the case of the Deputation Agreement dated July 18, 2001, entered into between the Cabazon Band and the Bureau of Indian Affairs. The, the district court was ordered to vacate the judgment which was the subject of this appeal and may hold such hearings and enter such further orders as it deems appropriate.

46. ***Demontiney v. United States ex. rel. Department of Interior, Bureau of Indian Affairs***, No. 99-35874, 255 F.3d 801 (9th Cir., July 16, 2001). This case arose from a contract dispute among an Indian tribal member, the tribe, and a federal agency over a construction project on tribal land. Chippewa Cree tribal member John Demontiney ("Demontiney") entered into a subcontract with the Chippewa Cree Tribe of Rocky Boy's Reservation (the "Tribe"), for engineering services to remodel the Bonneau Dam located on tribal land in Montana. Demontiney sued the Tribe and the Bureau of Indian Affairs, the prime contractor for the dam project, for breach of contract. The district court granted the motions to dismiss filed by the United States and the Tribe, concluding that neither the United States nor the Tribe had waived its sovereign immunity to suit in district court and that their sovereign immunity had not been otherwise abrogated. The district court transferred the claims against the United States to the United States Court of Federal Claims. Demontiney appealed the district court's grant of the motions to dismiss. The appeals court affirmed the district court decision.

47. ***Dewakuku v. Martinez***, No. 00-1587, 271 F.3d 1031 (Fed. Cir, Nov. 15, 2001). Dewakuku, a member of the Hopi Indian Tribe, purchased a home built by the Hopi Tribal Housing Authority ("HTHA") under a contract with the Secretary of Housing and Urban Development ("HUD" or the "Secretary"). It is undisputed that there were serious defects in the home, which Dewakuku reported to the HTHA. None of the requested repairs were made. Dewakuku filed suit alleging that HUD: (1) violated the Indian Housing Act of 1988 ("IHA") and its implementing regulations; (2) breached its obligations under the Annual Contributions Contract ("ACC") as its intended beneficiary; and (3) violated the Administrative Procedure Act ("APA") by failing to enforce the standards and perform its duties. The district court granted summary judgment and awarded Dewakuku the declaratory and injunctive relief she sought regarding HUD's statutory and regulatory responsibilities as to the development, design, and construction of her home, but denied her claim for money damages against HUD for breach of the ACC. The Secretary appealed the decision. The first issue considered by the appeals court turned on whether Dewakuku had an implied private right of action against the Secretary under the IHA. The second issue turned on whether Dewakuku was an intended beneficiary of the ACC. The appeals court agreed that Congress waived the Secretary's sovereign immunity under 42 U.S.C. § 1404a (1994), but it concluded that the IHA does not create an implied right of action against the Secretary and that Dewakuku is not a third party beneficiary of the ACC. Reversed on both issues and remanded.

48. ***E.F.W. v. St. Stephen's Indian High School***, No. 00-8002, 264 F.3d 1297 (10th Cir., Sept. 11, 2001). Mother brought civil rights action against tribal agency and its officials, and against employee of Indian Health Service (IHS), based on their actions in removing her Indian child from her custody and placing the child in a psychological care facility as a suicide risk and the filing and investigation of charges that the mother abused and/or neglected her daughter. The district court granted the tribal defendants' motion to dismiss, and in a separate order, granted summary judgement for the IHS employee, and granted remaining defendants' motions to dismiss. Mother appealed. The circuit court held that: (1) tribes did not waive their sovereign immunity; (2) neither tribal defendants nor IHS employee were state actors under § 1983; and (3) private school and its employees, and counseling service and its employee, who were allegedly acting under color of state law by

acting in concert with tribal social service agency, were therefore also not state actors. Affirmed.

49. ***Flying Horse v. United States***, No. 99-858C, 49 Fed. Cl. 419 (Fed. Cl., May 17, 2001). Plaintiffs, Native-Americans formerly employed in various positions at a tribal school located on an Indian reservation in North and South Dakota, filed an amended joint complaint for money damages under the Contract Disputes Act of 1978 against the United States through the Bureau of Indian Affairs, alleging breach of their individual written contracts of employment with the BIA. The alleged breach occurred when plaintiffs' contracts were canceled by the tribal school board and their positions thereafter filled by other individuals. Defendant moved to dismiss the amended complaint for lack of subject matter jurisdiction, arguing the following three separate grounds: (1) plaintiffs were employees of the federal government and, therefore, not independent contractors "procured for services" with the United States as contemplated under the CDA scheme; (2) plaintiffs did not comply with the jurisdictional prerequisites of the CDA; and (3) plaintiffs failed to exhaust their administrative remedies prior to filing suit. Plaintiffs countered that the plain language of the CDA and its legislative history establish that their contracts are covered by the Act. The court concluded that under a plain reading of the CDA, plaintiffs' contracts were within both the text and the spirit of the Act. Defendant's motion to dismiss was DENIED because (1) plaintiffs' contracts were covered under the CDA; (2) plaintiffs had fulfilled the jurisdictional prerequisites required under the CDA; and (3) plaintiffs were not required to exhaust any additional administrative remedies under the CDA. The parties were ordered to file a joint status report with the court.

50. ***Garcia v. Akwesasne Housing Authority***, No. 00-9029, 268 F.3d 76 (2nd Cir., Oct. 3, 2001). Appeal from a district court judgment dismissing claims against an agency of an Indian tribe and an agency official under the tribal exhaustion rule, and on the alternative ground of tribal sovereign immunity. This suit arose from a decision by the Akwesasne Housing Authority, ("AHA"), an agency of the St. Regis Mohawk Indian Tribe, to terminate the employment of the agency's Executive Director, Hilda Garcia (not a member of the St. Regis Mohawk Tribe). Garcia challenged her termination by filing a five-count pleading in the district court alleging discrimination, breach of contract, and tort claims under federal and state law and sought compensatory and punitive damages, attorney's fees and costs, and injunctive relief in the form of reinstatement. Defendants moved to dismiss the complaint for lack of subject matter jurisdiction, on the grounds that (1) the claims could not be presented in federal court because Garcia had not presented them to a tribal court in accordance with the tribal exhaustion rule, and (2) the claims were barred in any event by the doctrine of tribal sovereign immunity. The district court dismissed the action on the grounds that Garcia's claims against both the AHA and the agency official must first be litigated in the courts of the St. Regis Mohawk Tribe under the tribal exhaustion rule, and that the claims against defendant AHA had to be dismissed on the alternative ground of tribal sovereign immunity. On appeal, Garcia challenged both grounds of dismissal. The appellate court affirmed the judgment of the district court by dismissing all claims seeking damages from the AHA and naming the AHA as a defendant. In remaining respects, the judgment was vacated and the action was remanded to the district court for further proceedings consistent with the appellate court opinion. Affirmed in part, vacated in part, and remanded.

51. ***Gardner v. Ute Tribal Court Chief Judge***, No. 01-4037, 2002 WL 99539 (10th Cir., Jan. 25, 2002). Unpublished Disposition. Gardner appealed the dismissal of his lawsuit against various Ute tribal entities and representatives. In district court plaintiff alleged that he, a mixed-blood Uintah Indian, holds a possessory interest in the Uintah Valley in Utah based on an 1861 treaty, and that the Ute Tribe was wrongfully possessing and transferring the land and under section 2 of the Voting Rights Act of 1965 alleging that the Ute Tribe's system of election improperly disenfranchised mixed-blood Uintah Indians. Defendants' request for dismissal was granted. On appeal, plaintiff argued that the district court erred in dismissing his action because he raised a federal question regarding his possessory rights to the Uintah Valley, and a constitutional question regarding his inability to practice in the tribal court. Noting that plaintiff had not shown a waiver of immunity by the tribe, the appellate court affirmed the district court decision.

52. ***Grey Poplars Inc. v. One Million Three Hundred Seventy-one Thousand One Hundred (1,371,100) Assorted Brands of Cigarettes***, No. 00-35841 __ F.3d __, 2002 WL 362784 (9th Cir., Mar. 8, 2002). Grey Poplars, Inc., a tribally-licensed business of the Yakama Nation, appealed the district court's summary judgment in favor of the United States in a civil forfeiture action against 1,371,100 assorted brands of cigarettes which were seized by the Bureau of Alcohol, Tobacco and Firearms ("ATF") after it executed a search warrant authorizing federal agents to seize all cigarettes not marked with Washington state tax stamps at the trading post on the Yakama Indian Reservation. In executing the warrant, ATF agents seized 1,371,100 unstamped cigarettes. The forfeiture action was based on the federal Contraband Cigarette Trafficking Act ("CCTA"), which defines as contraband cigarettes in excess of 60,000 in quantity which do not bear evidence of payment of state cigarette taxes, with certain exceptions. Grey Poplars contended that the CCTA cannot be applied to the cigarettes in issue, which were seized while in Gray Poplars' possession on the Yakama Indian Reservation in the state of Washington. The district court granted the government's motion for summary judgment because the cigarettes bore no evidence of tax payment and there was no evidence that the cigarettes were pre-approved as exempt from the state tax by the Washington State Department of Revenue. The appellate court affirmed the district court's judgment of forfeiture.

53. ***Lampkin v. Little***, Nos. 01-7018, 01-7019, __ F.3d __, 2002 WL 555113 (10th Cir., Apr. 16, 2002). Police officer of native American tribe who had commission from county sheriff's office applied for order requiring indemnification from county under state tort claims act (GTCA) after jury returned verdict against the officer in arrestee's § 1983 action for use of excessive force. The district court denied the application, and arrestee and the officer appealed. The appellate court held that: (1) district court could not rely on jury's finding that the officer used excessive force in making arrest to conclude that he was not acting in good faith as required for county indemnification of the officer under GTCA; (2) even if the GTCA did permit the district court to rely upon jury findings in determining whether the officer was acting in good faith as required for county's indemnification of the officer, the court could not rely on jury's determination that the officer used excessive force to determine that he acted in bad faith; (3) district court's finding that the officer was not entitled to qualified immunity was insufficient to establish that the officer acted in bad faith as would preclude county's indemnification of the officer under the GTCA; (4) under Oklahoma law, as predicted by the Court of Appeals, the district court could not, when considering the officer's indemnification application pursuant to the GTCA, rely on new

evidence not presented at trial without holding an evidentiary hearing, to determine whether the officer acted in compliance with applicable written administrative policies of which he had knowledge, as required for indemnification under the Act; (5) district court could not rely on jury's findings or denial of qualified immunity to determine that the officer was not acting in good faith as would preclude a finding under the GTCA that he was acting in the scope of his employment; and (6) county's position on summary judgment motions on the arrestee's § 1983 excessive force claim against the officer, that the officer was acting in good faith and within the scope of his commission from the sheriff's office, did not preclude the county, for purposes of the officer's indemnification claim, from contesting whether the officer acted within the scope of employment or whether he acted in good faith when he committed the particular acts giving rise to the claim. Vacated and remanded.

54. ***Linneen v. Gila River Indian Community***, No. 00-15120, 276 F.3d 489 (9th Cir., Jan. 7, 2002), cert denied, 2002 WL 554299 (Jun. 24, 2002). The Linneens filed a complaint in district court alleging six federal and state causes of action based on allegations that a Gila ranger unlawfully detained and threatened them during an encounter on Gila land. The district court dismissed the complaint as to the Gila River Indian Community, the governor of the Community, and the Gila River Tribal Ranger based on tribal sovereign immunity. The court also held that it lacked jurisdiction over the ranger, to the extent he was sued in his individual capacity, because the Linneens had not exhausted tribal remedies, and dismissed the claims against the United States based on failure to comply with the Federal Tort Claims Act. The issue raised in the appeal was whether the district court correctly held that tribal sovereign immunity barred the claims. The court held that because the Linneens' suit was against the tribe, it was barred by tribal sovereign immunity unless that immunity had been abrogated or waived. The Linneens contended that the Gila Corporate Charter contains a waiver, but the court disagreed holding that the "sue and be sued" clause in the Community's corporate charter in no way affects the sovereign immunity of the Community as a constitutional, or governmental, entity. The court found no waiver of immunity because the alleged actions that formed the basis of the suit are clearly governmental rather than corporate in nature. The appellate court affirmed the district court dismissal. Cert denied, 2002 WL 554299, June 24, 2002.

55. ***Missouri River Services, Inc. v. Omaha Tribe of Nebraska***, No. 00-1094, 267 F.3d 848 (8th Cir., Sept. 12, 2001). Omaha Tribe of Nebraska brought action to vacate or modify arbitration award in favor of casino developer for developer's investment in unsuccessful casino project. District court entered judgment in favor of developer. Tribe appealed and the court of appeals held that: (1) tribe's waiver of sovereign immunity in agreement was limited to entry of judgment and execution only as to property or profits from the Nebraska bingo casino; (2) agreements not approved by Bureau of Indian Affairs (BIA) which waived Native American tribe's sovereign immunity as to gaming operations anywhere on tribal lands could not be considered in determining intent of parties in entering into contract for development of casino; and (3) arbitration order directing that award be satisfied by profits generated by tribe's Iowa casino was required to be set aside. Reversed and remanded.

56. ***Shivwits Band of Paiute Indians v. Utah***, No. 2:95CV1025C, — F.Supp.2d —, 2002 WL 191916, (D.Utah, Feb. 6, 2002). Defendants moved to vacate the court's preliminary

injunction order, which prevented their regulation of the use of land at issue in the suit by prohibiting the imposition of further stop work orders or interference with the construction or use of billboards, and sought summary judgment on the question of state and local land regulation arguing that the land is neither held in trust for the tribe nor that it is "Indian Country," either of which designation could prohibit state regulation. The case involves the purchase and subsequent leasing of property within the St. George, Utah city limits. Kunz, a business owner, contacted the Shivwits Band of Paiute Indians proposing that the Shivwits purchase property with money furnished by him. In exchange, the Shivwits would agree to lease the property back to Kunz on favorable terms. The Shivwits agreed to the proposal, were advanced money by Kunz, and bought two pieces of land. On the day of purchase, the Shivwits conveyed the property to the United States to be held in trust. Since an off-reservation trust acquisition must be approved by the Department of the Interior, the Shivwits submitted the necessary administrative documents for approval of the trust acquisition, and the request was approved by the local office of the BIA. Following acceptance of the subject property into trust, The Shivwits and Kunz entered into leases covering the property. There is no dispute that under state and local law, the placement of billboards on the subject property would be unlawful, but plaintiffs argue that the billboards are exempt because the property is held by the U.S. in trust for the Shivwits. St. George City issued a stop work order, forbidding further construction of billboards on the ground that it violated city and state outdoor advertising regulations and there were no city or state sign permits. Plaintiffs sued for declaratory judgment and preliminary and permanent injunctive relief. The counterclaim alleged that the statute authorizing land acquisitions, is unconstitutional, the taking of the land into trust and the approval of the lease was wrongly accomplished, and that the land is subject to state and local regulations. Protected by the preliminary injunction, five large billboards were erected and the billboard space leased by Kunz to various advertisers. The district court found that for it to make the factual determination on the status of the land for regulatory purposes, as Indian Country, as Native held non-Indian Country, or as trust land (any of which category may or may not subject the land to State and local regulation), it must first know the final decisions of the BIA and the Secretary of the Interior, and this information is unavailable until the NEPA process is complete. The question of whether the Defendants may regulate the land is therefore not ripe, and the court is unable to issue an opinion due to the Constitution's prohibition of the issuance of advisory opinions. For these reasons, the court denied the defendants' motions to vacate preliminary injunction order and for summary judgment.

57. ***Table Bluff Reservation v. Philip Morris, Inc.***, No. 00-15080, 256 F.3d 879 (9th Cir., Jul. 16, 2001). Table Bluff Reservation and nineteen other Indian tribes ("Tribes") sued Philip Morris and other tobacco companies after the companies signed a settlement agreement with state and territorial governments settling claims for, among other things, reimbursement of medical costs incurred in treating smoking-related illnesses. The Tribes contended (among other claims) that the agreement violated their tribal sovereignty, equal protection, and 42 U.S.C. § 1981. The district court dismissed the action, holding that the Tribes did not have standing to challenge the agreement. Because the Tribes did not demonstrate the injury required for Article III standing, the appeals court affirmed the district court's dismissal of the action.

58. ***United States v. Billadeau***, No. 01-1061, 275 F.3d 692 (8th Cir., Dec. 26, 2001). The government appealed the district court's dismissal of an indictment against Billadeau who was charged with forcibly resisting, opposing, impeding, and interfering with a federal officer engaged in the performance of his official duties. The indictment alleged that Billadeau, a non-Indian, fled in a motor vehicle after a BIA Police Officer stopped the vehicle within the exterior boundaries of the Fort Berthold Indian Reservation, upon suspicion that the driver was under the influence of an intoxicating substance and speeding. Billadeau asked whether the officer had been cross-deputized by the county sheriff, received a negative answer, advised that the sheriff could find him at his home, and drove away. The officer pursued and arrested Billadeau at his home (also within the reservation). The district court dismissed the indictment, concluding that a non-Indian's commission of traffic offenses on Indian land was punishable only under state law, which the BIA officer lacked authority to enforce. On appeal the appellate court found that a BIA officer has a statutory duty to arrest a suspect who commits an offense in Indian country in the officer's presence under the General Crimes Act ("GCA") which creates federal jurisdiction over crimes committed by non-Indians against Indians in Indian country. The GCA incorporates the Assimilative Crimes Act which provides that when conduct which would violate state law occurs on federal land, the relevant state law is assimilated into federal law unless there is already applicable federal law. The appellate court stated that the actions referenced in the indictment, drunk driving and speeding on an Indian reservation, are assimilated and the officer was therefore engaged in the performance of his official duties of enforcing federal law when he stopped Billadeau. The appellate court reversed the judgment of the district court, and remanded for reinstatement of the indictment.

59. ***United States v. Kornwolf***, No. 01-2394, __F.3d__, 2002 WL 54548 (8th Cir., Jan. 16, 2002). Kornwolf owned an American Indian headdress and Sioux dance shield, both of which contain golden eagle feathers. He came into possession of the artifacts through his great uncle before October 24, 1962, the effective date of the Bald and Golden Eagle Protection Act. Kornwolf was convicted of violating the Bald and Golden Eagle Protection Act, and the Migratory Bird Treaty Act, after attempting to sell the two Native American artifacts to an undercover law enforcement officer. Defendant appealed the conviction, challenging the constitutionality of the Acts. The appellate court noted that the case is "strikingly similar" to *Andrus v. Allard*, 444 U.S. 51, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979) and held that: (1) the prior Court of Appeals decision holding that the Acts did not effect a taking in violation of the Fifth Amendment, extended to bird feathers acquired prior to the effective date of the Acts, and (2) defendant's Fifth Amendment property right to just compensation was not violated. The appellate court concluded that because Allard is directly controlling, it did not need to examine the case in light of recent takings cases. The appellate court affirmed the lower court judgment.

60. ***United States v. Lara***, No. 01-3695, __F.3d__, 2002 WL 1358359 (8th Cir. June 24, 2002). Bureau of Indian Affairs officers arrested Lara on the Spirit Lake Nation Reservation for public intoxication. Lara is an Indian, but not a member of the Spirit Lake Nation. When BIA officers reminded Lara of the order excluding him from the Spirit Lake Nation Reservation, Lara struck an officer with his fist. Lara pleaded guilty in tribal court to three violations of the Spirit Lake tribal code, including violence to a police officer. Later, Lara was charged in federal court with misdemeanor assault of a federal officer.

Lara moved to dismiss the indictment, claiming the federal charges violated the prohibition against double jeopardy and impermissible selective prosecution. The district court denied Lara's motion to dismiss. Lara then entered a conditional guilty plea, reserving the right to appeal the denial of his pretrial motions. The appellate court reviewed de novo the district court's denial of Lara's motion to dismiss the indictment, and affirmed.

61. ***United States v. Long***, No. 01-CR-102, __F.Supp.2d__, 2002 WL 104807 (E.D.Wis., Jan 23, 2002). Long, an enrolled member of the Menominee Tribe, moved to dismiss a federal indictment on the ground that the prosecution of him by the United States violates the Double Jeopardy Clause since the Menominee Indian Tribe previously prosecuted and convicted him of the same offense. Long was charged in Menominee Tribal Court with stealing a truck and a federal grand jury indicted him for the same theft. Long pleaded no contest to the theft charge in tribal court and was sentenced to 120 days in the tribal jail. Long subsequently appeared before a magistrate judge on the federal charge and moved to dismiss on double jeopardy grounds. The appellate court ordered that the federal indictment be dismissed. (The opinion contains a discussion of the history of the Menominee tribal court Peacemaker system and the history of the tribal court in relation to federal and state actions.)

62. ***United States of America v. Male Juvenile (Pierre Y.),*** No. 00-30411, — F.3d —, 2002 WL 187420, (9th Cir., Feb. 7, 2002). Pierre Y. is a Native American juvenile adjudged a juvenile delinquent in federal court for two burglaries committed on the Fort Peck Indian Reservation, after he was previously tried and punished in tribal court for one of the offenses. Pierre was taken into custody by Fort Peck Tribal Police as a suspect in a house burglary. He admitted committing the burglary, as well as a second break-in. A petition was brought in Fort Peck tribal youth court for juvenile delinquency based on the first break-in and Pierre was sentenced to 90 days for theft and 90 days for burglary. Two months later, the United States charged Pierre with two counts of juvenile delinquency, relating to both incidents, and after a bench trial he was adjudged a juvenile delinquent and sentenced to 24 months in custody. Pierre raised numerous challenges to his federal prosecution contending that federal jurisdiction does not exist over the offenses; that the proceedings violated his rights to due process and equal protection of the laws; that his confession should have been suppressed; and that his right to a jury trial was violated. He raised two arguments concerning his sentence under the Federal Sentencing Guidelines: (1) the Major Crimes Act required the district court to apply state law juvenile penalty provisions, rather than federal law; and (2) if the Federal Guidelines were correctly applied, then the ambiguity created by the contradictory language in the Major Crimes Act which directs district courts to apply state punishment to offenses defined by state law, and the Sentencing Reform Act which directs district courts to apply federal sentencing law to offenses located in the Major Crimes Act, violates due process, because it deprives defendants of adequate notice regarding what sentencing scheme will determine their punishment. The appellate court affirmed the sentence.

63. ***United States v. Milk***, No. 01-2521, 281 F.3d 762 (8th Cir., Feb. 26, 2002). Milk appealed his conviction on charges of possession of marijuana with intent to distribute within 1,000 feet of a public housing authority arguing that a tribal housing authority does not fall within the meaning of "public housing authority" as used in 21 U.S.C. § 860 and that the district court erred in failing to give lesser included offense instructions to the jury. Milk

advanced two arguments: (1) that "public housing authority" is a term of art specifically defined in other parts of the Code as excluding Indian housing authorities; and (2) that clear legislative history demonstrates that "public housing authority" does not include Indian housing authorities. Both arguments hinged upon a definition of "public housing authority" found in Title 34 of the Code of Federal Regulations (C.F.R.) and in Title 42 of the United States Code. The court concluded that these definitions are neither controlling nor persuasive and there is no clear legislative history demonstrating that Congress wanted to exempt tribal housing authorities from the operation of 21 U.S.C. § 860. The court of appeals affirmed the lower court decision holding that (1) term "public housing authority" included tribal housing authority, and (2) the trial court's refusal to give the jury requested lesser included offense instructions was not error.

64. ***United States ex. rel. Steele v. Turn Key Gaming, Inc.***, No. 00-3615, 260 F.3d 971 (8th Cir., Aug. 16, 2001). The United States and its relator, John Yellow Bird Steele, ("the United States") appealed an adverse grant of summary judgment. The appeals court affirmed, but on different grounds from those established by the district court. The Oglala Sioux Tribe (the "Tribe") entered into contracts with Turn Key Gaming, Inc ("Rental Agreement") and with Wayne Barber ("Employment Agreement") (together, the "Agreements"). Federal law, 25 U.S.C. § 81 ("Section 81"), requires various types of agreements with Indian tribes to be authorized by certain designated federal officials. The parties had the Agreements authorized by the superintendent of the Pine Ridge Agency. The parties agreed that superintendents are not among officials designated to authorize contracts requiring Section 81 approval. Both Agreements terminated when the National Indian Gaming Commission approved a permanent management agreement. Prior to that the Tribe had paid $1,313,151 under the Rental Agreement, and $46,200 under the Employment Agreement. The United States, filed the qui tam action in order to recover the payments, which the United States characterized as void ab initio since they were not authorized by a duly empowered individual. The district court concluded that principles of agency and equity permitted enforcement of the Agreements and declined to address whether the Agreements required Section 81 approval. In its appeal, the United States reasserted its Section 81 argument and challenged equity and agency as sufficient bases to overcome the strictures of Section 81. The appellees disputed the United States' characterization of Section 81, and argued that the Agreements were not subject to its requirements. The appeals court agreed with the contention of appellees and affirmed.

65. ***United Tribe of Shawnee Indians v. United States***, No. 00-3140, 253 F.3d 543 (10th Cir., Jun. 13, 2001). The United Tribe of Shawnee Indians ("UTSI") brought this action for declaratory and mandamus relief against the United States, the Secretaries of Interior and Defense, and various federal administrative officials. UTSI sought a declaration of its status as a federally recognized Indian tribe, a mandate that it be included on the list of recognized tribes maintained by the Bureau of Indian Affairs, and a declaration that a constructive trust in its favor be placed on certain lands subject to disposition under the Federal Property and Administrative Services Act, 40 U.S.C. §§ 471 et. seq. (1) The district court granted defendants' motion to dismiss for lack of subject matter jurisdiction under Fed.R.Civ.P. 12(b)(1), concluding that UTSI's claims were barred by the doctrines of sovereign immunity, ripeness, standing, and primary jurisdiction. See United Tribe of Shawnee Indians v. United States, 55 F. Supp. 1238 (D. Kan. 1999). Affirmed.

M. Sovereignty, Tribal Inherent

66. ***Boxx v. Long Warrior***, No. 00-35073, 265 F.3d 771 (9th Cir. Sep. 6, 2001), cert denied, ___ U.S. ___ (Apr. 29, 2002). Long Warrior, a member of the Crow Tribe, was injured as a result of an accident while riding in Boxx's truck. Long Warrior filed her action in Tribal Court and, before the Tribal Court decided his motion to dismiss, Boxx filed suit in Federal District Court to enjoin the Tribal Court action. The District Court agreed with Boxx and concluded that Boxx was not required to exhaust Tribal Court remedies. The Court of Appeals affirmed. The Court rejected the argument that 25 U.S.C. § 2401 or 18 U.S.C. §1161 should be seen as delegations of authority for tribal courts to adjudicate alcohol-related highway accidents. The Court also dismissed the contention that the Tribal Court has jurisdiction because the Crow Tribe retained rights to the road in the right-of-way. The right-of-way was granted to the National Park Service "for road purposes in perpetuity." The Court concluded that because the non-Indian's activities directly arose out of the activities contemplated in the right-of-way, the Tribe lacks jurisdiction. Consensual relationships for purposes of Montana's first exception must be of a commercial nature. In addition, a negligence suit for personal injury damages does not satisfy Montana's second exception. Finally, in light of the previously decided cases, it is clear that the Tribal Court lacks jurisdiction, so exhaustion is not required.

67. ***Bugenig v. Hoopa Valley Tribe***, No. 99-15654, 266 F.3d 1201, (9th Cir., Sept. 11, 2001), cert denied, 122 S.Ct. 1296 (Mar. 18, 2002). Non-Indian owner of fee land located within the reservation brought action against tribe and tribal council for declaratory and injunctive relief from tribal ordinance that regulated logging on her land. The district court dismissed the action. Non-Indian landowner appealed. The Court of Appeals, 229 F.3d 1210, reversed and remanded. On rehearing en banc, the appellate court held that: (1) Congress expressly delegated the authority to the tribe to enact the ordinance in question, and (2) Congress had the authority to do so. Affirmed. Cert denied, 2002 WL 407094, March 18, 2002.

68. ***McDonald v. Means***, No. 99-36166, ___ F.3d ___ (9th Cir. Aug. 14, 2002). An accident on a BIA road within the Northern Cheyenne Indian Reservation seriously injured Means, a member of the Northern Cheyenne Tribe, whose car struck a horse belonging to McDonald. McDonald is an enrolled member of the Oglalla Souix Tribe, but not a member of the Northern Cheyenne Tribe. McDonald sued in U.S. District Court to challenge the Tribal Court's jurisdiction over a personal injury claim filed on behalf of Means. The District Court rejected tribal jurisdiction equating the BIA road with a state highway held in *Strate* to constitute alienated non-Indian land governed by the main rule in *Montana v. United* States, 450 U.S. 544 (1981). The Court of Appeals reversed, holding that the BIA road is a tribal road not governed by *Strate*. The Court of Appeals, however, upheld the District Court's decision to deny intervention by the Northern Cheyenne Tribe holding that the Tribe does not have a legally protected interest in maintaining a court system. Judge Wallace dissented.

69. ***Moore v. Nelson***, No. 00-15754, 270 F.3d 789 (9th Cir., Oct. 26, 2001) cert denied, 2002 EL 407094 (Mar. 18, 2002). Moore, a member of the Yurok Indian Tribe, filed a petition for habeas corpus in the federal district court to challenge a judgment of the Hoopa Valley Tribal Court ordering Moore to pay a penalty of $18,508.50 for cutting timber on the

Hoopa Valley Reservation without a permit. The petition was filed pursuant to a provision of the Indian Civil Rights Act that makes the writ of habeas corpus available in federal court to any person "to test the legality of his detention by order of an Indian tribe." See 25 U.S.C. § 1303. The district court dismissed the petition because Moore was not subject to "detention." The appeals court affirmed.

70. ***Morris v. Tanner***, No. 99-36007, 16 Fed. Appx. 652, 2001 WL 832722, (9th Cir., Jul. 24, 2001) Unpublished Disposition. This action challenging the constitutionality of the 1990 amendments to the Indian Civil Rights Act ("ICRA") was framed as a challenge to an act of Congress and fell under the court's federal question jurisdiction to review the constitutionality of congressional legislation. Plaintiff, a member of the Minnesota Chippewa Tribe, Leech Lake Reservation was cited for speeding and ordered to appear in the Flathead Reservation Tribal Court where he pleaded not guilty and filed a motion to dismiss. The motion to dismiss was denied by the district court on the ground that the 1990 ICRA amendments permit tribes to exercise criminal jurisdiction over non-member Indians. The district court did not address Morris's allegations that the 1990 amendments violate the equal protection component implicit in the due process clause of the Fifth Amendment, and the principle of separation of powers. On appeal the case was reversed and remanded for consideration of whether the complaint adequately stated a claim for relief by considering whether the 1990 ICRA amendments violate the equal protection component of the Fifth Amendment or the principle of separation of powers. The district court was also instructed to consider whether the term "Indian" as used in the 1990 amendments amounts to a political or racial classification and to consider the reach of the 1990 amendments and whether the amendments apply to "Indians" who are not enrolled in, or otherwise affiliated with, any tribe. The district court was also ordered to consider Morris's claim that the 1990 amendments violate the principle of separation of powers in light of the recent decision in United States v. Enas, 2001 WL 726669 (9th Cir. 2001). Reversed and remanded.

71. ***National Labor Relations Board v. Pueblo of San Juan***, Nos. 99-2011, 99-2030, 276 F.3d 1186 (10th Cir., Jan. 11, 2002). Rehearing en banc. The San Juan Pueblo tribal council enacted a right-to-work ordinance and also adopted a lease containing similar right-to-work provisions. The Pueblo asserts that the ordinance is a valid exercise of its inherent sovereign authority. The ordinance and lease were challenged in a declaratory judgment and injunction suit brought by the National Labor Relations Board ("NLRB") and the Local Union No. 1385 of the Western Council of Industrial workers ("Union") as an intervenor. The NLRB and the Union argued that the right-to-work provisions are invalid under the Supremacy Clause of the United States Constitution, due to preemption by the National Labor Relations Act, ("NLRA"). The NLRB and Union brought an appeal from the district court's decision granting summary judgment in favor of the Pueblo. On appeal, a divided panel affirmed the district court's decision. The appellate court granted the petitions of the NLRB and the Union for rehearing en banc. The en banc panel affirmed the district court decision finding that ". . . we are convinced that Congress did not intend by its NLRA provisions to preempt tribal sovereign authority to enact its right-to-work ordinance and to enter into the lease agreement. The NLRB and the Union had the burden to establish such intent of preemption, but they did not satisfy their burden. Since they failed to do so, we uphold the tribal right-to-work ordinance. Similarly we see no reason

to hold invalid the lease provisions entered into by the Tribe. Accordingly, the decision of the district court is AFFIRMED."

72. ***United States v. Long***, No. 01-CR-102, 183 F. Supp. 2d 1106 (E.D. Wis., Jan. 23, 2002). Long, an enrolled member of the Menominee Tribe, moved to dismiss a federal indictment on the ground that the prosecution of him by the United States violates the Double Jeopardy Clause since the Menominee Indian Tribe previously prosecuted and convicted him of the same offense. Long was charged in Menominee Tribal Court with stealing a truck and a federal grand jury indicted him for the same theft. Long pleaded no contest to the theft charge in tribal court and was sentenced to 120 days in the tribal jail. Long subsequently appeared before a magistrate judge on the federal charge and moved to dismiss on double jeopardy grounds. The appellate court ordered that the federal indictment be dismissed. (The opinion contains a discussion of the history of the Menominee tribal court Peacemaker system and the history of the tribal court in relation to federal and state actions.)

N. Tax

73. ***Campbell v. Commissioner of Internal Revenue***, No. 01-2338, 28 Fed. Appx. 613, 2002 WL 237741 (8th Cir., Feb. 20, 2002). Unpublished Disposition. Campbell, a member of the Prairie Island Indian Community, leased land from the tribe for farming until the land was reclaimed by the tribe to expand its gambling operations. As an enrolled member, Campbell receives per capita distributions from the tribe's gambling profits which the tribe reports to the IRS. After he lost an appeal of the tax court's decision on his 1992 taxes, Campbell filed another petition in tax court asserting the per capita distributions for 1991, 1993, and 1994 were not taxable. The tax court granted judgment in the favor of the IRS, holding collateral estoppel barred Campbell from contesting the taxability of the per capita distributions; the 1990 debt forgiveness was not excludable from income; Campbell could not deduct the expenses; and he owed the penalties. On appeal, Campbell contended his debt forgiveness should not be treated as income claiming that more than half his income came from farming in 1987, 1988, and 1989; that collateral estoppel did not bar his argument that the tribe's members could not be taxed on per capita distributions until the tribe had formally executed an IGRA gaming compact in 1994; and that he should be able to offset his income with unreimbursed expenses incurred in connection with services rendered on the tribal council's behalf. The appellate court upheld the tax court decisions on each of these issues and affirmed.

O. Trust Breach and Claims

74. ***Assiniboine and Sioux Tribe of the Fort Peck Indian Reservation v. Norton***, No. CIV.A 02-35, __ F. Supp. 2d __, 2002 WL 1627863 (D.D.C., July 23, 2002). Indian tribe brought suit against Secretary of the Interior to compel performance of trust obligations, including an accounting of its funds held in trust by the United States. Upon defendants' objection to tribe's designation of related case, the district court, held that for purposes of local civil rule pertaining to related cases, suit was "related" to suit filed by individual Indian plaintiffs against the trustee-delegates of the United States and other federal officials alleging that the federal government's trustee-delegates had breached their fiduciary duties, including the duty to provide an accurate accounting. Objection denied.

75. ***Cobell v. Norton***, No. CIV. A. 96-1285(RCL), 2001 WL 777076 (D.D.C., Jul. 11, 2001). (First report of the court monitor.) In its decision, Cobell v. Norton, 91 F. Supp. 2d 1 (D.D.C. 1999), the court concluded that the Department of the Interior (DOI) owed plaintiffs, the Indian Trust Account Holders and Trust beneficiaries, an accounting and also ruled that DOI had a duty to render an historical accounting. The Court, while establishing the scope of the accounting, left it to the Interior defendants to determine the "specific form" of the historical accounting. The Court Monitor's first review was directed at what has been done by the Interior defendants to render the court-ordered historical accounting.

76. ***Cobell v. Norton***, No. CIV.A.1:96CV01285, 2001 WL 1555296 (D.D.C. Dec. 6, 2001). REPORT AND RECOMMENDATION OF THE SPECIAL MASTER REGARDING THE SECURITY OF TRUST DATA AT THE DEPARTMENT OF THE INTERIOR. "Interior–in derogation of court order, common-law, and statutory and regulatory directives–has demonstrated a pattern of neglect that has threatened, and continues to threaten, the integrity of trust data upon which Indian beneficiaries depend. Rather than take any remedial action, its senior management has resorted to the condescending refrain that has consistently insinuated itself into the federal government's relationship with Native Americans, in general, and with IIM holders, in particular. And that is one that requests forbearance and trust on the grounds that reform continues to be the 'highest priority.' It is the view of the Special Master that, in this instance, such trust is not warranted, requests for forbearance should be denied and promises of future compliance should not be credited. The stakes are simply too high. An agency that ignores its own commissioned reports and those generated by other federal agencies; ignores pleas from its own staff for adequate funding; and spends tens of millions of dollars funding computer systems when the integrity of the very data to be loaded on those systems has been open to compromise for so many years, inspires little confidence. The security of systems housing trust data is no better today than it was ten years ago. The circumstances leading to the Court's alarm 'that BIA had no security plan for the preservation of [trust] data,' speak with compelling application today. The continued lack of trust data security is 'vivid proof' that Interior has 'still failed to make the kind of effort that they are going to be required to ever make trust reform a reality.' It is the recommendation of the Special Master that the Court intervene and assume direct oversight of those systems housing Indian trust data. Without such direct oversight, the threat to records crucial to the welfare of hundreds of thousands of IIM beneficiaries will continue unchecked."

77. ***Cobell v. Norton***, No. CIV. A. 96-1285 (RCL), 205 F.R.D. 52 (D.D.C., Jan. 15, 2002). This is a Memorandum and Order regarding the Special Master's November 14, 2001, Report and Recommendation of the Special Master Regarding the Security of Trust Data at the Department of the Interior and the First Status Report of the Special Master Regarding the Shutdown and Reconnection of Computer Systems at the Department of the Interior which concludes that "Interior's representations to the press and others, while not inaccurate, fail to adequately convey the delicate and extremely difficult process currently underway to bring IT systems on line. Ensuring the security of individual Indian trust data (on systems that were completely lacking in all measurable respects) in a manner consistent with federal regulation requires careful scrutiny. It would be precipitous to proceed otherwise."

78. ***Cobell v. Norton***, No. CIV.A.96-1285 (RCL), 184 F. Supp. 2d 1 (D.D.C., Feb. 5, 2002). This is the second status report of the special master regarding the shutdown and reconnection and/or resumption of computer systems at the department of the interior which details the posture of Interior's outstanding requests and addresses Interior's January 31, 2002, representations before the Court regarding the present status of its requests before the Special Master

79. ***Cobell v. Norton***, No. CIV.A.96-1285(RCL), __F. Supp.2d __, 2002 WL 1480903 (D.D.C., July 11, 2002). EIGHTH REPORT OF THE COURT MONITOR. This is the eighth report in a series of reports submitted by the Court Monitor pursuant to this Court's appointment Order of April 16, 2001, (and April 15, 2002 reappointment Order) to review and monitor "all of the Interior defendants' trust reform activities and file written reports of (the Court Monitor's) findings with the Court." This report will address the Court Monitor's review of the progress of trust reform with respect to the Secretary of the Interior's actions regarding the historical accounting since the Fifth Report of the Court Monitor submitted to this Court on February 1, 2002, to include the "Report to Congress on the Historical Accounting of Individual Indian Money Accounts" submitted by Defendants to this Court and Congress on July 2, 2002.

80. ***O'Toole v. United States***, No. 01-15310, __F.3d __, 2002 WL 1467625 (9th Cir., July 10, 2002). The O'Tooles have a ranch upstream from government-owned property held in trust for the Shoshone Indian Tribe by the Bureau of Indian Affairs. They allege that the BIA's negligent maintenance of the irrigation system on its property caused the river to back up onto their land, resulting in considerable damage. The district court dismissed the case for lack of subject matter jurisdiction, finding that the government's actions fell within the discretionary function exception to the Federal Tort Claims Act. The appellate court held that the BIA's decision to allow the irrigation system on its property to fall into disrepair to the detriment of neighboring landowners does not fall within the protection of the discretionary function exception to the FTCA. It is less like an FDA decision not to approve a drug for sale, or a National Park Service decision not to put up a guardrail that will block visitors' views, than like a government employee's negligent driving. It was not a decision "susceptible to policy analysis," Gaubert, 499 U.S. at 325, or "grounded in social, economic, and political policy," id. at 323 (quoting Varig, 467 U.S. at 814). The appellate court reversed the district court's dismissal for lack of jurisdiction and remanded.

81. ***White Mountain Apache Tribe v. United States***, No. 00-5044, 249 F.3d 1364 (Fed. Cir., May 16, 2001), cert. granted, No. 01-1067 (April 22, 2002). This case presents the question of whether a 1960 Act of Congress, Pub. L. 86-392, 74 Stat. 8 (1960), obligates the United States to maintain or restore certain property and buildings held by the United States in trust for the White Mountain Apache Tribe so that the tribe can maintain a suit for damages in the Court of Federal Claims. The court held that it does, though the obligation created is narrower than that claimed by the tribe. The Court of Federal Claims decision was reversed and remanded for further proceedings. The government controls and has the ability to use approximately thirty-five buildings on the site. The government has offered to terminate its trusteeship over an unspecified number of the buildings and to transfer control of them to the tribe. The tribe refused to accept the offer unless and until the government rehabilitates the buildings. At issue is the government's obligation as trustee to maintain and restore those buildings, which include barracks constructed by the United

States Army, the Native American boarding school and student dormitories, and various administrative buildings constructed by the Department of the Interior. The tribe adopted a "master plan" for the preservation and restoration of the Fort and commissioned an assessment of the trust property and obtained cost estimates for the repair and preservation of the buildings. According to that report, as of 1999, the total cost to rehabilitate the buildings amounted to approximately $14 million dollars. The court concluded that the 1960 Act created an enforceable fiduciary relationship between the United States and the tribe, the breach of which may give rise to a cognizable claim for money damages. The court remanded the case so that the Court of Federal Claims could determine whether the suit is premature as to buildings that the United States continues to use for administrative or school purposes and also to determine which portions of the property are under United States control. Reversed and remanded.

P. Miscellaneous

82. ***Earl Old Person v. Brown***, No. CV-S-96-04-GF-PMP, __ F.Supp.2d __, 2002 WL 171294 (D.Mont., Jan. 24, 2002). Plaintiffs sought declaratory and injunctive relief against continued use of Montana House and Senate legislative districts established by the1992 redistricting plan and adopted by Montana's 1990 Districting and Apportionment Commission and the Montana legislature following the 1990 federal decennial census. Plaintiffs are American Indians and tribal members living on either the Blackfeet or Flathead reservations. Plaintiffs contended that Montana's 1992 redistricting plan dilutes Indian voting strength in Montana House Districts which are located in areas encompassing the Blackfeet and Flathead Reservations and claimed that an additional majority-Indian House District and majority-Indian Senate District should be drawn for the Montana legislature. Plaintiffs further alleged that Montana's redistricting was "enacted and maintained" with a racially discriminatory purpose. The district court entered judgment for Defendants on both claims. The appellate court affirmed the trial court's ruling that Plaintiffs had failed to prove that Montana's Districting and Apportionment Commission adopted the 1992 redistricting plan with a discriminatory purpose. However, the appellate court held that the trial court had erred in two respects: (1) it found error in the trial court's reliance on the electoral success of American Indians in majority- Indian House Districts when it concluded that white bloc voting in majority- white House Districts was not legally significant; and (2) it found error in the trial court's finding with respect to "proportionality." As a result, the appellate court reversed the trial court's finding that Montana's 1992 redistricting plan did not dilute the voting strength of American Indians and remanded for retrial on the question of whether vote dilution had occurred.

83. ***Native American Arts, Inc. v. Chrysalis Institute, Inc.***, No. 01 C 5714, 2002 WL 441476 (N.D.Ill., Mar. 21, 2002). MEMORANDUM OPINION. This matter came before the court on a Chrysalis Institute ("Chrysalis") motion to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(6). Native American Arts, Inc. ("NAA"), wholly owned by members of the Ho-Chunk nation, is an arts and crafts organization involved in the distribution of authentic Indian arts and crafts. Chrysalis makes or sells artwork, crafts, and jewelry. Advertisements for Chrysalis products make references to Native Americans and "native hands" as well as explicit references to the Navajo and Jicarilla Apache tribes. In July 2001 NAA filed suit alleging that Chrysalis's products are not actually Indian made and

that Chrysalis had violated the Indian Arts and Crafts Act ("IACA") which prohibits the sale of a good in a way that falsely suggests it is an Indian product. The allegations involve conduct occurring as early as April 1996 and continuing until the filing date of the complaint. Chrysalis moved to dismiss the complaint on two grounds: (1) that NAA's complaint is barred by the applicable statute of limitations, and (2) that NAA inordinately delayed in filing this suit and that the doctrine of laches prevents them from pursuing the action. After a discussion of whether state or federal statutes of limitation apply to actions brought under the IACA and determining that the most analogous state statute is the Illinois Consumer Fraud Act (815 ILCS 505/10a), the court found that NAA's claims are subject to a three-year statute of limitations; however, the court found that Chrysalis cannot rely on laches to dismiss the complaint because within eight months of receiving a federal right to sue, NAA filed the complaint. The court denied Chrysalis's motion to dismiss.

84. ***Pro-Football, Inc. v. Harjo***, No. 99-1385 (CKK/JMF), __ F.Supp.2d __, 2002 WL 313634 (D.D.C., Feb. 27, 2002.). This matter was referred to the district court to hear defendants' motion to compel and plaintiff's two motions for protective orders. In 1933, George Preston Marshall purchased a National Football League ("NFL") franchise located in Boston, moved it to Washington, D.C., and renamed the team the "Redskins." The franchise registered the first of a series of "Redskins" marks with the United States Trademark Office in 1967. In 1992, a group of Native Americans ("Native Americans") petitioned the Patent and Trademark Office's Trademark Trial and Appeal Board ("TTAB") for cancellation of Pro-Football's federal trademark registrations involving the term "Redskin(s)." In April 1999, the TTAB ruled in favor of the Native Americans under the Lanham Act. Pro-Football subsequently filed this action for de novo review under § 1071(b) of the Lanham Act. At the same time the TTAB handed down its decision, the Estate of Jack Kent Cooke (a long-time owner) was selling the franchise. In May 1999, a bid was approved by the NFL, and the purchase closed in July 1999. In order to counter Pro-Football's laches defense, the Native Americans seek information relating to the worth of the Redskins marks. The laches defense originally was rejected on equitability grounds by the TTAB in a pretrial ruling. When Pro-Football again pleaded laches in its 1999 complaint, the Native Americans sought unsuccessfully to strike the defense in a motion for judgment on the pleadings, but the court deferred ultimate resolution of the laches issue to a later time. The Native Americans asserted that, because a laches argument requires a showing of economic prejudice, they are entitled to broad discovery of Pro-Football's financial records. The court concluded that defendants are entitled to production of specific information relevant to the value of the Redskins marks. In its order the court granted in part and denied in part the Native Americans' Motion to Compel Discovery; Pro-Football's Motion for a Protective Order Limiting Disclosure of Pro-Football's Documents; and Pro-Football's Motion for a Protective Order Quashing the Deposition of Daniel Snyder.