JUDICIAL UPDATE
2002 - 2003 FEDERAL CASE LAW
ON AMERICAN INDIANS

by Thomas P. Schlosser

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

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

September 2003

UNITED STATES SUPREME COURT

1. ***Inyo County, California v. Paiute Shoshone Indians of the Bishop Community of the Bishop Colony***, No. 02-281, __ S.Ct. __, 2003 WL 21134442 (U.S. May 19, 2003). Indian tribe and its wholly-owned gaming corporation brought action challenging county's authority to seize casino employment records as part of welfare fraud investigation. The district court dismissed for failure to state claim, and appeal was taken. The Ninth Circuit, 291 F.3d 549, affirmed in part, reversed in part, and remanded. The appellate court held that county criminal jurisdiction did not authorize execution of warrant to search tribal employee records on reservation because the tribe had sovereign immunity. The Court also held that the district attorney and sheriff were acting as county officers in obtaining and executing the search warrant and thus the county could be held liable under § 1983 for their acts. Further, neither officer was entitled to qualified immunity because no reasonable officer could have concluded that the lack of jurisdiction was a mere technicality. Certiorari was granted. The Supreme Court held that tribe was not "person" who could sue under § 1983. Vacated and remanded.

2. ***United States. v. Navajo Nation***, No. 01-1375, __ S.Ct. __, 2003 WL 716670 (U.S. Mar. 4, 2003). Navajo Nation brought suit alleging that Secretary of Interior breached fiduciary duties owed to Nation by approving coal lease amendments negotiated by Nation and lessee. The Court of Federal Claims dismissed complaint. The appellate court reversed. Certiorari was granted. Supreme Court held that Tribe's claim for compensation did not derive from any liability-imposing provision of Indian Mineral Leasing Act or its implementing regulations. Reversed and remanded. Justice Souter filed dissenting opinion in which Justices Stevens and O'Connor joined.

3. ***United States. v. White Mountain Apache Tribe***, No. 01-1067, __ S.Ct. __, 2003 WL 716687 (U.S. Mar. 4, 2003). Indian tribe brought suit under the Indian Tucker Act, alleging that the United States breached its fiduciary duty to manage land and improvements held in trust for tribe but occupied by the United States. The Court of Federal Claims dismissed suit. The appellate court reversed and remanded, and certiorari was granted. Supreme Court held that United State's breach of fiduciary duty to maintain and preserve trust property gave rise to substantive claim for money damages under the Indian Tucker Act. Affirmed and remanded. Justice Ginsburg filed concurring opinion in which Justice Breyer joined. Justice Thomas dissented and filed an opinion in which Chief Justice Rehnquist, Justice Scalia, and Justice Kennedy joined.

OTHER FEDERAL COURTS

A. ADMINISTRATIVE LAW

4. ***Burt Lake Band of Ottawa and Chippewa Indians v. Norton***, No. CIV.A. 01 703 (RWR), ___ F.Supp.2d ___, 2002 WL 1969315 (D.D.C. Aug 26, 2002). Indian tribe sought injunction to direct Department of the Interior (DOI) to place tribe on list of recognized tribes. DOI moved to dismiss. The district court held that: (1) tribe failed to exhaust administrative remedies, and (2) tribe failed to file proof of timely service upon Secretary and Assistant Secretary of DOI. Dismissed.

5. ***Mashpee Wampanoag Tribal Council, Inc. v. Norton,*** No. 02-5139, __ F.3d __, 2003 WL 21766634 (DC Cir. Aug. 1, 2003). Tribal council brought action against Secretary of Department of Interior and others, alleging unreasonable delay by the Bureau of Indian Affairs ("BIA") in issuing decision regarding its petition for federal recognition completed almost six years earlier. Tribal council moved for writ of mandamus under Administrative Procedure Act ("APA"). The district court granted motion, and appeal was taken. The appellate court held that district court should not have concluded that the BIA had delayed unreasonably, in violation of requirements of the APA in processing putative tribe's petition for recognition, based upon number of years that petition had been before the BIA, without first considering the BIA's limited resources and effect of granting relief upon other equally-deserving petitioners for recognition. Reversed and remanded.

6. ***Miccosukee Tribe of Indians of Florida v. Southern Everglades Restoration Alliance***, No. 01-16226, __ F.3d __, 2002 WL 2013529 (11th Cir. Sept. 4, 2002). Indian Tribe brought action under Federal Advisory Committee Act (FACA) against Southern Everglades Restoration Alliance (SERA), its former director, and various federal agencies and officials who had allegedly participated in SERA or relied on its advice, alleging that its advice caused continuing damage to tribal lands in Everglades. The district court dismissed action for failure to state claim. Tribe appealed. The appellate court held that: (1) complaint was sufficient to establish tribe's standing at pleading stage; (2) SERA was "advisory committee" subject to FACA, even if it included no non governmental entities representing private interests. Affirmed in part; reversed and remanded in part.

7. ***Michigan Department of Environmental Quality v. United States Environmental Protection***, No. 01-3534, __ F.3d __, 2003 WL 151531 (6th Cir. Jan. 23, 2003). Michigan Department of Environmental Quality petitioned for review of order of the EPA, Environmental Appeals Board. The appellate court held that Michigan Department of Environmental Quality procedurally defaulted at the administrative appeals level its objections to the actions of the EPA Administrator by failing to identify with sufficient clarity and specificity its objections to issuance of wastewater permit for municipal facility located on fee lands within the boundaries of the reservation of the Saginaw Chippewa Indian Tribe of Michigan. Petition for review denied.

8. ***State of South Dakota ex rel Barnett v. United States Department of Interior***, No. 01-3611, __ F.3d __, 2003 WL 215170 (8th Cir. Feb. 3, 2003). South Dakota, brought an action against the Department of Interior to prevent the United States from placing approximately 91 acres of land located outside the Lower Brule Reservation into trust on behalf of the Lower Brule Sioux Tribe. Pursuant to FED. R.CIV. P. 24, the Tribe moved to intervene both as a matter of right and for permissive intervention. The United States supported the Tribe's bid for permissive intervention but opposed its motion for intervention as a matter of right. The district court denied the Tribe's motions. The appellate court affirmed.

B. ALASKA NATIVE CLAIMS SETTLEMENT ACT

9. ***Native Village of Quinhagak v. U.S.,*** No. 01-35430, __ F.3d __, 2002 WL 31246680 (9th Cir. Oct. 8, 2002). Alaskan native villages brought action against federal and state governments to enforce subsistence fishing rights under Alaska National Interest Lands Conservation Act. After villages prevailed on merits, the district court awarded attorneys' fees to villages for litigation phase of action only. Villages and state government cross appealed. The appellate court held that: (1) villages were "prevailing parties" entitled to fees, and (2) district court had discretion to award fees for pre litigation administrative activities. Affirmed in part, reversed in part, and remanded.

C. CHILD WELFARE ACT (ICWA)

10. ***Navajo Nation v. Confederated Tribes and Bands of the Yakama Indian Nation,*** Nos. 1-35039, 01-35041, 331 F.3d 1041 (9th Cir. Jun. 9, 2003). Indian nations challenged off-reservation adoption of Indian child. The district court granted summary judgment for adoptive parents. Nations appealed. The appellate court held that Washington state court had jurisdiction over adoption proceedings. Affirmed.

11. ***Roe v. Keady***, No. 02-3167, 329 F.3d 1188, 2003 WL 21101490 (10th Cir. May 15, 2003). The Roes, adoptive parents to Robert Booth Roe, a minor plaintiff, brought suit under 42 U.S.C. §§ 1981 and 1983 against defendants, employees of the Kansas Department of Social and Rehabilitation Services, for failing to conduct a proper inquiry into abuse by his natural parents. They alleged that defendants had a duty to investigate concerns about possible abuse voiced before and after Robert's birth, that defendants relied improperly on the BIA to look into and respond to the matter, and that this conduct reflected discrimination based on Robert's status as a Native American. On cross-motions for summary judgment, the district court held that the evidence did not show any actionable discriminatory animus behind defendants' conduct, and granted their motion on the basis of qualified immunity. The appellate court affirmed.

12. ***U.S. v. Juvenile Male***, No. 01-10693, __ F.3d __, 2003 WL 21698005 (9th Cir. Jul. 23, 2003). Juvenile arrested for assaulting Salt River Pima-Maricopa Indian Reservation tribal police officers appealed from order of the district court which granted government's motion to transfer juvenile to adult status. He contended that the district court lacked jurisdiction because it never received his juvenile records before ordering the transfer, and he also challenged the court's consideration of arrests that did not result in convictions as part of his prior delinquency record. The appellate court held that: (1) court did not receive prior juvenile court records prior

to transfer, as required by statute; (2) juvenile did not waive challenge based on court's failure to receive prior records; and (3) court's error was not harmless. Reversed and remanded.

D. CONTRACTING

13. ***American Federation of Government Employees, AFL-CIO v. U.S.***, No. 02-5142, 330 F.3d 513 (D.C. Cir. Jun. 6, 2003). Federal employees and their unions brought action challenging constitutionality of Defense Appropriations Act provision granting outsourcing preference for firms "under 51 percent Native American ownership." The district court granted government's motion for summary judgment, and plaintiffs appealed. The appellate court, held that: (1) rational basis review, rather than strict scrutiny, applied in determining whether provision violated equal protection; (2) provision granting outsourcing preference for firms "under 51 percent Native American ownership" was rationally related to legitimate legislative purpose of promotion economic development of federally recognized Indian tribes and their members, as required by equal protection; (3) federal employees did not have a fundamental interest in public employment for purposes of substantive due process. Affirmed.

14. ***Cherokee Nation of Oklahoma v. Thompson***, No. 01-7106, __ F.3d __, 2002 WL 31656725 (10th Cir. Nov. 26, 2002). Indian tribes brought action against United States under Indian Self Determination and Education Assistance Act (ISDA), seeking to recover full contract support costs incurred in performing self determination contracts. The district court, 190 F. Supp.2d 1248, granted summary judgment to United States. Tribes appealed. The appellate court held that tribes were not contractually or statutorily entitled to recover full contract support costs. Affirmed.

15. ***Navajo Nation v. Department of Health & Human Services***, No. 99-16129, 325 F.3d 1133, (9th Cir. Apr. 8, 2003). Navajo Nation sued Department of Health and Human Services (HHS), seeking order requiring HHS Secretary to enter into self-determination contract with Nation, pursuant to Indian Self-Determination and Education Assistance Act ("ISDEAA"), for Temporary Assistance to Needy Families ("TANF") funds. The district court dismissed action for failure to state claim. Nation appealed. On rehearing en banc, the appellate court held that ISDEAA was not available as route for Nation's administration of TANF funds. Affirmed.

16. ***Scutti Enterprises, LLC. v. Park Place Entertainment Corp.***, No. 02-7371, __ F.3d __, 2003 WL 559399 (2d Cir. Feb. 28, 2003). Plaintiff sued for tortious interference with a contractual and prospective business relationship with the St. Regis Mohawk Tribe concerning the management of the Mohawk Bingo Palace. District court dismissed plaintiff's case for failure to state a claim upon which relief could be granted. The appellate court found that Scutti could not sustain its contractual claim, but found that its prospective business relationship claim should be allowed to proceed beyond the pleading stage. Affirmed in part, vacated, and remanded in part.

17. ***Sonoma Falls Developers, LLC v. Nevada Gold & Casinos, Inc.***, No. C-03-906 VRW, __ F.Supp. 2d __, 2003 WL 21710104 (N.D. Cal. Jul. 16, 2003). This action for removal arises out of a dispute over contracts awarded by the Dry Creek Rancheria Band of Pomo Indians to develop a casino. Plaintiffs allege that defendants engaged in unfair competition under

California law and intentionally interfered with their contractual relations with the Tribe. Defendants became aware of the Tribe's agreements with Sonoma Falls when they approached the Tribe seeking to assist in a casino development project in 1998. Defendants entered into an agreement to fund, develop, and construct a casino for the Tribe. This agreement constituted a breach of the Sonoma Falls's exclusive agreements with the Tribe. The court concluded that removal was improper and granted plaintiffs' motion to remand to state court.

18. ***Thompson v. Cherokee Nation of Oklahoma,*** No. 02-1286, __ F.3d __, 2003 WL 21511710 (Fed. Cir. Jul. 3, 2003). Tribal contractor under self-governance contracts entered pursuant to Indian Self-Determination and Education Assistance Act (ISDEAA) appealed contracting officer's denial of its claim under Contract Disputes Act for full indirect contract support costs for past fiscal years, alleging that failure of Secretary of Health and Human Services (HHS) to pay full indirect costs was breach of contract and violated ISDEAA. The Department of Interior Board of Contract Appeals granted summary judgment in contractor's favor. Secretary appealed. The appellate court held that: (1) Secretary lacked discretion to refuse to reprogram funds available from lump-sum appropriation to meet contractual obligation to pay tribal contractor full indirect contract support costs in accordance with ISDEAA; (2) appropriations acts did not contain statutory cap; (3) appropriations act did not apply retroactively to limit amount of funds available in earlier years for payment of tribal contractor's indirect contract support costs; (4) appropriations act could not be applied to clarify prior appropriations acts to establish congressional intent to set statutory cap on federal payments of indirect contract support costs; (5) tribal contractor's claim was not rendered moot because filed after close of relevant fiscal years; (6) Secretary was not excused from meeting contractual obligation to tribal contractor for full contract support costs under ISDEAA; and (7) award of damages to tribal contractor did not violate Appropriations Clause. Affirmed.

19. ***Turn Key Gaming, Inc. v. Oglala Sioux Tribe***, No. 01-2957, 313 F.3d 1087, 2002 WL 31875288 (8th Cir. Dec. 27, 2002). On appeal of breach of contract action brought against Indian tribe by casino developer, district court's grant of summary judgment to tribe was affirmed, but case was remanded, 164 F.3d 1092, for consideration of developer's claims regarding reimbursement of certain costs, and of tribe's counterclaim. On remand, the district court made award of damages to tribe. Developer appealed. The appellate court held that: (1) cost of completion of permanent casino was correct measure of damages; (2) findings as to expenses were not erroneous; (3) tribe's sovereign immunity prevented developer from bringing claims arising under separate agreement in federal court; and (4) award of prejudgment interest was proper. Affirmed.

E. EMPLOYMENT

20. ***Curtis v. Sandia Casino,*** No. 02-2274, 2003 WL 21349313 (10th Cir. Jun. 17, 2003). (Not selected for publication.) Curtis, an Hispanic woman with a history of physical disability was employed by the Sandia Casino ("Casino"), owned and operated by the Pueblo of Sandia, a federally recognized Indian tribe located in New Mexico. Curtis filed suit in federal court alleging she was forced to resign her management position at the Casino in because of her race, disability, and age (68 years). She asserted federal and state law claims of employment discrimination and sought damages and injunctive relief. The appellate court found the district

court correctly construed her federal claims as brought against the Pueblo of Sandia under Title VII of the Civil Rights Act of 1964, the Americans With Disabilities Act, and the Age Discrimination in Employment Act. These enactments do not confer jurisdiction on the federal courts to hear complaints against sovereign Indian tribes. The Title VII claim failed because Title VII precludes jurisdiction over employment discrimination claims against Indian tribes. The § 1981 claim failed because the more specific statutory enactment of Title VII controls the subject matter. The ADA claim failed because the ADA excludes Indian tribes as employers subject to suit. Finally, the ADEA claim failed because the ADEA does not apply to Indian tribes. The appellate court adopted the reasoning of the district court and affirmed.

21. ***Malabed v. North Slope Borough,*** Nos. 99-35684, __ F.3d __, 2003 WL 21524776 (9th Cir. Jul. 8, 2003). The North Slope Borough appealed an order enjoining it from enforcing a local ordinance that gives a preference in Borough employment to members of federally recognized Indian tribes. The appellate court certified a question to the Alaska Supreme Court asking whether the North Slope Borough ordinance violates local law, state statutory law, or the Alaska Constitution. After receiving a response it concluded that the ordinance violates the Alaska Constitution's guarantee of equal protection. The appellate court held that Title VII, § 703(i), does not preempt state law that otherwise would prohibit reverse discrimination in employment in favor of members of federally recognized tribes, and it held that the Ordinance is invalid under the Equal Protection Clause of Alaska's Constitution. Affirmed.

22. ***Solomon v. Interior Reg'l Housing Auth.***, No. 01-35766, 313 F.3d 1194, 2002 WL 31845936 (9th Cir. Dec. 20, 2002). Title 25 U.S.C. § 450e(b) provides that "[a]ny contract, subcontract, grant, or subgrant pursuant to [an act] authorizing Federal contracts with or grants to Indian organizations or for the benefit of Indians, shall require that to the greatest extent feasible," preference shall be given to Indians in the employment and training opportunities connected with the grant. This appeal asks to decide whether that statute creates a private right of action for a Native Alaskan who applied unsuccessfully for a job with a Native Alaskan regional housing authority. The answer to that question is 'no.'

23. ***Thomas v. Choctaw Management/Services Enter.***, No. 02-20793, 313 F.3d 910, 2002 WL 31680819 (5th Cir. Dec. 16, 2002). Husband and wife employed by unincorporated business venture wholly owned by Indian tribe brought Title VII action against venture and against supervisory employee, alleging discrimination based on religion and pregnancy. The district court granted defendants' motion to dismiss, and employees appealed. The appellate court held that: (1) as a matter of first impression, tribe owned enterprise was exempt from liability under Title VII, and (2) supervisor was not "employer" and thus was not potentially liable under Title VII. Affirmed.

F. ENVIRONMENTAL REGULATIONS

24. ***Reno Sparks Indian Colony v. U.S. Environmental Protection Agency***, No. 02-71503, __ F.3d __, 2003 WL 21659158, (9th Cir. Jul. 16, 2003). Petition was filed for review of Environmental Protection Agency rule purporting to clarify that, in table listing Nevada's Clean Air Act (CAA) designations for various airborne pollutants, terms "rest of state" and "entire state" referred not to single baseline area for CAA purposes but to more than 250 distinct

hydrographic areas, each of them constituting its own separate baseline area. The appellate court held that: (1) rule was not arbitrary, capricious, or otherwise not in accordance with law, as would violate Administrative Procedure Act, on basis that it mischaracterized agency's original 1978 boundary designations for Nevada or directly contradicted agency's 1991 regulation, directed to all listed states, stating that term "rest of state" should be assumed to constitute single baseline area, and (2) rule was interpretive rather than legislative and EPA thus did not violate APA by issuing it without allowing for notice and comment. Petition denied.

25. ***South Florida Water Management Dist. v. Miccosukee Tribe***, No. 00-15703, 280 F.3d 1364 (11th Cir. Feb. 1, 2002), *cert. granted*, Supreme Court Docket No. 02-626. In a citizen suit brought under the Clean Water Act, the tribe and others established that the Water District was violating the Clean Water Act by discharging pollutants from the S-9 Pump Station into Water Management District 3A without a National Pollution Discharge Elimination System permit. Water Management area 3A was historically part of the Everglades. A canal dug by the Army Corps of Engineers collects contaminated run-off and seepage which is moved by the S-9 pump station into an off-reservation portion of the Everglades sought to be restored by the Miccousukee Tribe. The appellate court held that the pumping of already polluted water constitutes the addition of pollutants to navigable waters from a point source, accordingly an NPDES permit is required. On June 27, 2003, the Supreme Court granted the petition for certiorari filed by the South Florida Water Management District.

G. EXHAUSTION OF TRIBAL COURT REMEDIES

26. ***Gaming World Intern., Ltd. v. White Earth Band of Chippewa Indians***, No. 01-3040, 317 F.3d 840, 2003 WL 162775 (8th Cir. Jan. 24, 2003). This case grows out of a dispute related to the construction and management of a casino in Mahnomen, Minnesota. Approximately one month after the Band filed a declaratory judgment action against Gaming World in the White Earth Band of Chippewa Tribal Court, Gaming World filed a petition seeking declaratory relief and arbitration. The district court granted Gaming World's motion to compel arbitration, and the Band appealed. The appellate court affirmed that the district court had jurisdiction because of the federal statutes and tribal authorities involved in this contract dispute. The appellate court reversed the district court for refusing to require exhaustion of tribal court remedies prior to ruling on the motion to compel arbitration. The court noted that the Second, Fifth, Eight and Ninth Circuits require exhaustion when a party tries to avoid tribal court jurisdiction by seeking an order to compel arbitration in federal court.

27. ***Hartman v. Kickapoo Tribe Gaming Comm'n***, No. 01-3400, __ F.3d __ (10th Cir. Feb. 11, 2003). Tammy Hartman sued the tribe, Gaming Commission, and individual commissioners over the Kickapoo Tribe Gaming Commission's suspension of her gaming license. The district court dismissed her claim, holding that IGRA provides no private right of action and further holding that, as for the tribal defendants, the doctrine of exhaustion of tribal court remedies applied. Affirmed.

28. ***Kahawaiolaa v. Norton***, No. CIV. 01-00817, 2002 WL 31084264 (D.Haw. Aug. 30, 2002). Native Hawaiians brought action seeking declaratory judgment and injunction relating to exclusion of native Hawaiians from acknowledgment as Indian tribe under regulations of

Department of the Interior (DOI). Government moved to dismiss and plaintiffs moved for summary judgment. The district court held that action presented nonjusticiable political question. Government's motion granted and plaintiffs' motion denied.

H. FISHERIES, WATER, FERC, BOR

29. ***U.S. v. Braren***, Nos. 02-35441, __ F.3d __, 2003 WL 21688618 (9th Cir. Jul. 21, 2003). The State of Oregon, the U.S., the Klamath Tribes, and individual landowners have spent the past twenty-five years trying to determine rights to water in Oregon's Klamath Basin. The federal courts determined the scope of the federal water rights in 1979, affirmed the legal rights at issue, and approved leaving the quantification of water amounts to state proceedings. Oregon has proceeded with an administrative adjudication of the competing claims to water in the Klamath Basin. The U.S. and the tribe asked the district court to clarify the scope of the federal water rights involved and to assess the propriety of the water rights standard recently announced in a preliminary administrative assessment issued in the Oregon Adjudication. The appellate court held that this dispute is not ripe for federal judicial determination and vacated the district court's judgment and remanded the case to the district court to enter an order staying all federal proceedings pending completion of the Oregon Adjudication and related appellate review.

I. GAMING

30. ***American Greyhound Racing, Inc. v. Hull***, Nos. 01-16672, 305 F.3d 1015, 2002 WL 31085603 (9th Cir. Sept. 19, 2002). Racetrack owners brought state court action to enjoin Governor of Arizona from entering gaming compacts that would allow Indian tribes to conduct slot machine, keno, or blackjack gaming. After removal of action to federal court, the district court, 146 F.Supp.2d 1012, granted injunctive relief, and cross appeals were taken. The appellate court held that: (1) the "interest" required under rule providing for joinder of a person as a necessary party must be a legally protected interest but need not be a property right; (2) Indian tribes with existing compacts with State for operation of gaming casinos were necessary and indispensable parties to the action; and (3) the public rights exception to the requirement of joinder of otherwise indispensable parties did not apply. Vacated and remanded with instructions.

31. ***Artichoke Joe's v. Norton***, No. CIV.S01 248 DFL, ___ F.Supp.2d ___, 2002 WL 1808272 (E.D. Cal. Aug 05, 2002). California card clubs brought action against state and federal defendants, seeking declaratory and injunctive relief with respect to existing and future compacts between California and Indian tribes allowing tribes to exercise exclusive class III gaming rights on Indian land. Upon cross motions for summary judgment, the district court held that: (1) plaintiffs were not entitled to enjoin California from entering into future compacts with Indian tribes; (2) Indian tribes were not necessary parties; (3) compacts permitting class III gambling on Indian tribal lands did not violate IGRA; and (4) compacts did not violate the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments.

32. ***Catskill Development, L.L.C. v. Park Place Entertainment Corp.***, No. 00CIV8660, ___ F.Supp.2d ___, 2002 WL 1962114 (S.D.N.Y. Aug 22, 2002). Casino development group brought action against competitor alleging tortious interference with contractual relations and

tortious interference with prospective business relationships in connection with development and management of Native American casino. On competitor's motion for summary judgment, the district court held that: (1) approval of National Indian Gaming Commission was required for land purchase agreement between group and tribe, and (2) competitor did not tortiously interfere with group's prospective business relations with tribe. Motion granted.

33. ***In re Indian Gaming Related Cases,*** No. 01-16283, 331 F.3d 1094 (9th Cir., Jun. 11, 2003) Indian tribe brought action alleging that California had refused to negotiate in good faith with the tribe to conclude a tribal-state compact, as required by the Indian Gaming Regulatory Act (IGRA), and moved in the district court for an order that would require it to do so. The district court denied the motion and entered judgment for the State, and tribe appealed. The appellate court held that: (1) revenue sharing trust fund, which required that gaming tribes share gaming revenues with non-gaming tribes, was not impermissible under IGRA, and (2) State did not act in bad faith in violation of IGRA by insisting that tribe adopt special distribution fund provision as a precondition to entering a tribal-state compact. Affirmed.

34. ***Lac Courte Oreilles Band Of Lake Superior Chippewa Indians Of Wisconsin v. United States***, No. 02-C-0533-C, __ F.Supp.2d __, 2003 WL 1957481 (W.D. Wis. Apr. 22, 2003). This was a civil action for declaratory relief in which three Wisconsin Indian tribes challenged the constitutionality of the gubernatorial concurrence requirement in the Indian Gaming Regulatory Act. Plaintiffs contended that Congress's inclusion of such a provision is an unconstitutional delegation of power, or, alternatively, that it violates the appointments clause, Art. II, § 2; the Tenth Amendment; and the Fifth Amendment equal protection clause. The court ordered judgment in favor of defendants.

35. ***Match E Be Nash She Wish Band of Pottawatomi Indians v. Engler***, No. 01-1624, __ F.3d __, 2002 WL 31094134 (6th Cir. Sept. 20, 2002). Indian tribe brought action pursuant to Indian Gaming Regulatory Act (IGRA) to force state into casino negotiations. The district court dismissed action, 173 F.Supp.2d 725. The appellate court held that Indian tribe did not have standing to bring suit against state under IGRA. Affirmed.

36. ***Sac & Fox Tribe of Mississippi in Iowa v. U.S.,*** Nos. C03-50-LRR, __ F. Supp. 2d __, 2003 WL 21212640 (N.D. Iowa May 22, 2003). In intra-tribal dispute between elected Indian tribal council and appointed council, in which appointed council took control of tribal facilities, including casino, Bureau of Indian Affairs (BIA) stated its continued recognition of elected council as tribal leadership and National Indian Gaming Commission (NIGC) ordered closure of casino. Appointed council petitioned for review of NIGC's action and moved for temporary restraining order or stay of administrative action. Government moved to dismiss and sought enforcement of closure order. Elected council intervenors moved for temporary restraining order ("TRO") to enjoin appointed council from operating casino and enjoin NIGC from implementing closure order. The district court held that: (1) court lacked jurisdiction over appointed council's request for TRO, and (2) government was entitled to preliminary injunction. Ordered accordingly.

37. ***Seneca Cayuga Tribe of Oklahoma v. National Indian Gaming Commission,*** No. 01-5066, 327 F.3d 1019, 2003 WL 1889944 (10th Cir. Apr. 17, 2003). Three Indian tribes,

authorized to conduct gaming operations on their reservations, and gaming device manufacturer sought declaratory and injunctive relief, alleging that Magical Irish Instant Bingo gaming machine qualified as a Class II game of pull-tabs under Indian Gaming Regulatory Act (IGRA). The district court held that machine was a permissible Class II aid and not an illegal gambling device under Johnson Act. Government appealed. Plaintiffs moved to dismiss as moot. The appellate court held that: (1) appeal was not moot; (2) collateral estoppel argument was waived; (3) Johnson Act proscription of gambling devices did not apply to IGRA Class II technologic aids; and (4) machine was a Class II technologic aid to game of pull-tabs. Affirmed

38. ***United States v. Santee Sioux Tribe of Nebraska***, No. 02-1503, __ F.3d __, 2003 WL 1339280 (8th Cir. Mar. 20, 2003). The government appealed from the district court order granting the Santee Sioux Tribe relief from a prior order of contempt. Because the appellate court concluded that Lucky Tab II machines are not prohibited Johnson Act gambling devices and are not prohibited "facsimiles" within the meaning of 25 U.S.C. § 2703(7), the Tribe is not conducting class III gaming in contravention of the federal court's prior order and affirmed the judgment of the district court.

39. ***United States v. Seminole Nation of Oklahoma***, No. 01-7108, __ F.3d __, 2002 WL 31895070 (10th Cir. Dec. 31, 2002). United States filed an action in district court to enforce temporary closure orders issued to Seminole Nation of Oklahoma ("Nation"), by Chairman of the National Indian Gaming Commission ("NIGC"). The district court dismissed the government's suit reasoning that the NIGC Chairman exceeded his authority in ordering the closure of the Nation's gaming facilities rather than just the particular games at issue. The government appealed the district court's dismissal of the suit. The appellate court vacated the district court order and upheld the NIGC action.

J. LAND CLAIMS

40. ***State of New York v. Shinnecock Indian Nation,*** No. 03-CV-3243, __ F. Supp. 2d __, 2003 WL 21786024 (EDNY Jul. 29, 2003). Plaintiffs sought injunctive, as well as declaratory, relief alleging five causes of action. In the first cause of action, the plaintiffs alleged: a violation of IGRA. Defendants removed the case to federal court on the ground that the complaint pled a federal question on its face. The court held that (1) the complaint explicitly pleads a federal question in its first cause of action; (2) the complaint raises questions relating to the possessory rights of Indian tribes in tribal lands that are federal in nature and subject to complete federal preemption. Plaintiff's motion to remand was denied.

K. RELIGIOUS FREEDOM

41. ***Bonnichsen v. U.S.,*** No. CIV. 96 1481 JE, 217 F.Supp.2d 1116, 2002 WL 31002142 (D.OR. Aug 30, 2002). After remand, 969 F. Supp. 628, scientists sought judicial review of a final agency decision that awarded remains of more than 9,000 year old Kennewick Man to a coalition of Indian tribes and denied their request to study those remains. The district court held that: (1) remains of Kennewick Man were not Native American within meaning of Native American Graves Protection and Repatriation Act (NAGPRA); (2) Secretary of the Interior erred in assuming that coalition of four federally recognized Indian tribes and a band that was not

federally recognized was a proper claimant under NAGPRA and in failing to separately analyze the relationship of the particular tribal claimants to the remains; (3) evidence did not support determination that there was a "cultural affiliation" between remains and tribal claimants; and (4) plaintiffs would be permitted to study the remains.

42. ***Crow Creek Sioux Tribe v. Brownlee,*** No. 02-5049, 331 F.3d 912 (D.C. Cir. Jun. 17, 2003). Tribe brought suit to enjoin implementation of Water Resources Development Act (WRDA), which called for transfer of federal Pick-Sloan lands from Army Corps of Engineers to state of South Dakota. The district court denied preliminary injunction, and tribe appealed. The appellate court held that tribe did not show actual and imminent injury for Article III standing to challenge transfer under WRDA, which specifically preserved federal enforcement of cultural protection statutes. Remanded with instructions.

43. ***Narragansett Indian Tribe v. Warwick Sewer Authority,*** No. 02-2672, __ F.3d. __, 2003 WL 21512228 (1st Cir. Jul. 3, 2003). Indian tribe sought injunction against sewer construction project, on basis of alleged desecration of ancestral burial sites in violation of National Historic Preservation Act (NHPA). The district court denied relief, and tribe appealed. The appellate court held that: (1) tribe could not demand reversal of prior finding that sewer route would not affect significant Native American archaeological material; (2) NHPA provided no grounds for injunction requiring sewer construction project to use a bucket with a flat blade, rather than teeth, for digging; and (3) Sewer Authority had fulfilled its responsibilities to consult with tribe. Affirmed.

44. ***U.S. v. Antoine***, No. 02 30008, __ F.3d __, 2003 WL 203114 (9th Cir. Jan. 31, 2003). Appellant Antoine, a member of a Canadian Indian tribe, was sentenced to two years in prison for violating the Bald and Golden Eagle Protection Act (BGEPA). The appellate court held that Antoine's prosecution did not violate the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb 4, and the district court properly rejected his claim. Affirmed.

L. SOVEREIGN IMMUNITY and FEDERAL JURISDICTION

45. ***Bassett v. Mashantucket Pequot Museum and Research Center Inc.,*** No. CIV.A.3:96 CV 1947, __ F. Supp. 2d __, 2002 WL 31109385 (D. Conn. Aug 06, 2002). Fired motion picture producer sued the museum, its Executive Director, and others, alleging violations of federal and state laws. The district court dismissed complaint in part. Producer appealed. The appellate court, 204 F.3d 343, vacated and remanded. Directors, as sole remaining defendants, moved to dismiss amended complaint. The district court held that: (1) directors had tribal immunity from official capacity suit, seeking monetary damages; (2) directors did not have tribal immunity from official capacity suit, seeking injunctive relief; (3) producer could not proceed with personal capacity suit for damages; and (4) exhaustion of tribal remedies was not required. Motion granted in part, denied in part.

46. ***Gobin v. Snohomish County***, No. 00-36031, 304 F.3d 909, 2002 WL 31062667 (9th Cir. Sept. 18, 2002), *cert. denied*, ___ U.S. ___ (2003). Tribal member sought declaration that county had no land use jurisdiction over reservation land which he owned in fee simple and sought to rezone and subdivide. The district court entered summary judgment for member.

County appealed and the appellate court held that: (1) the right of Indians to alienate their lands freely does not provide a county with a concomitant right to exert *in rem* land use regulation over those lands, and (2) no special circumstances existed under which county could exercise jurisdiction over land. Affirmed.

47. ***In re Davis Chevrolet, Inc.,*** No. B-97-12542 PHX-GBN, 01-01314, 282 B.R. 674 (Bankr. D. Ariz. Aug 29, 2002). Trustee of Chapter 7 estate of an automobile dealership that was located on Indian land objected to proofs of claim filed by tribe and filed adversary proceeding against it for allegedly failing to accord certain business opportunities to debtor, in alleged violation of requirements of Navajo Business Preference Act. On motion to dismiss filed by tribe, the Bankruptcy Court held that: (1) by filing proofs of claim in Chapter 7 case for amounts allegedly owing on debtor's lease and promissory note, tribe waived its immunity in adversary proceeding brought by trustee for tribe's failure to accord certain business opportunities to debtor; and (2) tribal exhaustion doctrine did not apply. Motion denied.

48. ***In re Mayes,*** No. EO-02-067, 294 B.R. 145 (10th Cir. BAP Jun 11, 2003). Chapter 7 debtor moved to avoid judgment lien possessed by Indian tribe, as allegedly impairing exemption to which he would otherwise be entitled, and tribe moved to dismiss on sovereign immunity grounds. The bankruptcy court granted motion, and appeal was taken. The Bankruptcy Appellate Panel held that: (1) contested matter brought by debtor to avoid state court judgment lien on exemption impairment grounds qualified as "suit" against tribe, of kind barred by tribe's sovereign immunity; and (2) tribe's waiver of its immunity from suit in state court, by commencing and obtaining judgment against Chapter 7 debtor in that forum, was not waiver of its immunity from suit in federal court. Affirmed.

49. ***In re Russell, Debtor, Russell v. Fort McDowell Yavapai Nation***, Bankruptcy No. 02-06628 PHX-RJH, Adversary No. 02-01215 __ B.R. __, 2003 WL 21104914 (Bkrtcy. D. Ariz. May 15, 2003). Debtor Russell, a tribal member of the Fort McDowell Yavapai Nation ("Nation"), filed and received his Chapter 7 discharge and then filed a complaint to preclude the Nation from collecting a $200,000 debt by withholding his monthly entitlement to gaming revenues. The Nation moved to dismiss on the ground of tribal sovereign immunity. The court found that the term "other foreign or domestic government" in § 101(27) unequivocally, and without implication, includes Indian tribes as "governmental units." Section 106(a) unequivocally abrogates sovereign immunity as to governmental units, including Indian tribes, with respect to application of the enumerated sections of the Bankruptcy Code, including § 524's injunctive effect of the discharge. Consequently the Nation's motion to dismiss on grounds of sovereign immunity was denied. This does not, however, mean that Debtor will prevail. Since the Nation is owed on the loan and owes Debtor the per capita payments, both on account of pre-petition transactions, it may have additional protections under § 541 (a)(6), §552 (b)(1) or § 553 that also survive the discharge. These issues must await another motion.

50. ***Kennedy v. Hughes***, No. 02-2112, 2003 WL 1384027 (10th Cir. Mar. 20, 2003). (Not selected for publication.) Plaintiffs, members of two different Indian tribes, filed suit in district court against several officials of the Santa Clara Pueblo Tribe, claiming violations of their civil and constitutional rights as protected by the Indian Civil Rights Act. Concluding that the Indian Civil Rights Act does not authorize plaintiffs' suit, the district court dismissed the action. The

appellate court ruled that in order for the *Dry Creek Lodge* exception to apply plaintiffs must demonstrate that the dispute involves a non-Indian party, a tribal forum is not available, and the dispute involves an issue falling outside internal tribal affairs, citing *Ordinance 59 Ass'n v. U.S. Dept. of the Interior Secretary,* 163 F.3d 1150, 1156 (10th Cir. 1998). The court affirmed the district court's dismissal.

51. ***Milios v. Mashantucket Pequot Tribal Nation***, No. 02-2162 (1st Cir. March 21, 2003). (Not selected for publication.) A dissatisfied gambler sued the tribe, asserting diversity jurisdiction, the Indian Civil Rights Act, and 42 U.S.C. § 1985 (2) as jurisdictional basis. The district court dismissed. The appellate court affirmed, holding that no such jurisdictional basis exists for this type of claim.

52. ***N.L.R.B. v. Chapa De Indian Health Program, Inc.***, Nos. 02-15576, __ F.3d __, 2003 WL 124703 (9th Cir. Jan. 16, 2003). Chapa De Indian Health Program, Inc. ("Chapa De") appealed the district court order enforcing National Labor Relations Board ("NLRB") subpoenas. Chapa De challenged the NLRB's jurisdiction, but the district court held that jurisdiction was not "plainly lacking." The appellate court affirmed.

53. ***Penn v. U.S.***, No. 02-1731, __ F.3d __, 2003 WL 21543782 (8th Cir. Jul. 10, 2003). Individual defendants appealed the district court's denial of their motion for summary judgment on the basis of absolute and qualified immunity. In addition to Federal Tort Claims Act claims not at issue in this appeal, Penn claimed that the four individual defendants violated her constitutional right to due process by serving and executing a tribal court order excluding her from the Standing Rock Sioux Indian Reservation. The appellate court reversed, holding that the tribal court exclusion order was not facially invalid merely because it was directed toward a non-member.

54. ***Saucerman v. Norton,*** No. 01-17009, 2002 WL 31557880 (9th Cir. Nov. 19, 2002). (Unreported) Former permittees brought action against tribal and federal officials alleging violations of Administrative Procedures Act and their constitutional rights after tribal officials acted to enforce self help eviction ordinance. The district court dismissed complaint, and permittees appealed. The appellate court held that United States had sovereign immunity under Quiet Title Act. Affirmed.

55. ***Turley v. Eddy,*** No. 02-56782, 2003 WL 21675511 (9th Cir. Jul. 16, 2003). (Not selected for publication in the Federal Reporter). Plaintiffs sued individual officers of the Colorado River Indian Tribes ("CRIT") for evicting them from land known as the Western Boundary. The court stated that CRIT is a necessary party because it claims an interest in the land and its interest would be impaired by the plaintiffs' suit; CRIT cannot be joined because it has tribal sovereign immunity; and CRIT is indispensable because a judgment rendered in its absence would be prejudicial to CRIT. Because Indian trusts lands are at stake, the United States is also a necessary and indispensable party. The appellate court stated that CRIT has a legitimate, non-frivolous claim of interest in the Western Boundary lands and that the district court properly dismissed the case. AFFIRMED.

56. ***United States v. Mancha***, No. 01-30335, 2002 WL 31528056 (9th Cir. Nov. 13, 2002). Mancha, a member of the Blackfeet Indian Tribe, appealed his convictions including felon in possession of a firearm. Mancha argued that the 1855 Blackfeet Treaty which reserves to the Tribe the rights of hunting, fishing, and self-defense implies an individual tribal member's right to possess firearms and applying the felon in possession statute violated Mancha's treaty right to possess firearms. The appellate court held that the treaty rights belong to the Tribe, not to individuals, and nothing in the 1855 Treaty precludes application of the felon in possession statute to a convicted felon simply because that felon retains membership in the Tribe. Affirmed.

M. SOVEREIGNTY, TRIBAL INHERENT

57. ***Burlington Northern Santa Fe Railroad Co. v. The Assiniboine and Sioux Tribes of the Fort Peck Reservation***, No. 01-35681, __ F.3d __, 2003 WL 1193201 (9th Cir. Mar. 17, 2003). The Assiniboine and Sioux Tribes of the Fort Peck Reservation impose on Burlington Northern Santa Fe Railroad Company ("BN") a non-Indian corporation, an ad valorem tax levied on the value of "all utility property," defined as including "any publicly or privately owned railroad." The Tribes have, since 1987, imposed the annual tax on the rail line, which paid it from 1987 to 1999. BN challenged the tax when it was first imposed but lost. *See Burlington N. R.R. v. Blackfeet Tribe of Blackfeet Indian Reservation*, 924 F.2d 899 (9th Cir.1991) (Burlington I), *cert. denied*, 505 U.S. 1212 (1992). Burlington I held that the congressionally-conferred right-of-way used by BN was on trust land and that the ad valorem tax was valid. In 1997, however, the Supreme Court held, in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), that a right-of-way granted by the federal government and crossing through Indian trust land is the equivalent of non-Indian fee land. The appellate court concluded that case law has developed substantially since Burlington I. The Tribes should, however, be permitted some discovery regarding the second *Montana* exception. The court vacated the summary judgment and remanded.

58. ***United States v. Lara***, No. 01-3695, __ F.3d __, 2003 WL 1452033 (8th Cir. Mar. 24, 2003). After a Spirit Lake Nation Reservation tribal court convicted him of assaulting a police officer, Lara was indicted by the federal government for assault on a federal officer. Lara moved to dismiss the indictment on double jeopardy and selective prosecution grounds. Following the district court's denial of the motion, Lara entered a conditional plea of guilty to the indictment, reserving his right to appeal the denial of his motion to dismiss. A panel of the appellate court affirmed, holding that because the power of the Spirit Lake Nation derives from its retained sovereignty and not from Congressionally delegated authority, Lara's conviction on the federal charge did not run afoul of the Double Jeopardy Clause. The appellate court granted Lara's petition for rehearing en banc, vacating the panel's opinion and judgment, and reversed the decision.

59. ***United States v. Long***, No. 02-1473, 324 F.3d 475, 2003 WL 1400831 (7th Cir. Mar. 20, 2003). The question in this case was whether Long, a member of the Menominee Tribe of Wisconsin, can be prosecuted by the United States for the same conduct that was the subject of an earlier tribal prosecution. If the Menominee prosecution is properly characterized as one flowing from independent sovereign powers, then there is no Double Jeopardy bar to the subsequent federal prosecution. If, on the other hand, the Menominee were acting solely under powers delegated by Congress, then the first prosecution will stand as a bar to the second. The

district court concluded that because the Tribe's powers were first eliminated, and then later restored by act of Congress, its prosecution of Long was undertaken as an arm of the federal government and dismissed the federal indictment relying on the Fifth Amendment's Double Jeopardy Clause. The appellate court came to the opposite conclusion about the source of authority that lay behind the Tribe's prosecution. The appellate court held that the Tribe was exercising its own sovereign power, and thus the dual sovereignty exception to the Double Jeopardy Clause authorizes the sequential federal and tribal prosecutions and reversed the district court's decision and remanded.

N. TAX

60. ***Oneida Indian Nation of New York v. City of Sherrill***, No. 01-7795, __ F.3d __ (2d Cir. July 21, 2003). A 1794 treaty recognized that the Oneida Reservation included lands in Sherrill and Madison Counties. During the 1800's, much of the reservation was sold to non-members but recently the tribe and tribal members have begun repurchasing parcels. The tribe sued the city after Sherrill began eviction proceedings because taxes went unpaid on certain tribal properties. The district court held the city could not tax the tribe. The appellate court held that property owned by the plaintiff tribe in Sherrill is within Indian country, and consequently exempt from local taxes. Affirmed.

61. ***Quinault Indian Nation v. Grays Harbor County***, No. 01-35219, 310 F.3d 645, 2002 WL 31488220 (9th Cir. Nov. 8, 2002). The Quinault Indian Nation ("Nation") purchased forest land, most of which was located in Grays Harbor County, WA. When the Nation transferred the land to the U.S. to hold in trust, the County imposed a $58,000 compensating tax. The Nation sought declaratory and injunctive relief from the tax. The district court granted summary judgment in favor of the County, holding that the tax was a permissible "taxation of land" under the Indian General Allotment Act of 1887. The appellate court had to determine whether the tax should be characterized as a permissible taxation of land, an "ad valorem tax," or as an impermissible tax, an "excise tax." The court stated that since the tax is triggered by the sale or transfer of the property and the amount of the tax is derived from a formula that is a hybrid of market value and tax savings, it does not fall easily within the ad valorem category. Although the excise tax box may not be a perfect fit, it is more akin to an excise tax than any other. The court held that the ambiguity inherent in the tax scheme tips the balance in favor of the Nation and reversed.

62. ***Ramsey v. U.S.***, No. 01-35014, 302 F.3d 1074 (9th Cir. Sept. 11, 2002). Taxpayer, who was enrolled member of Yakama Nation, brought suit against United States seeking refund of federal excise taxes for heavy vehicle use, and diesel fuel use, which had been imposed in connection with his operation of logging trucks on public highways outside Yakama Reservation. The district court entered summary judgment in favor of taxpayer. United States appealed. The appellate court held that Yakama Treaty of 1855 did not contain "express exemptive language," and thus did not exempt member from paying federal taxes on heavy vehicle use and diesel fuel. Reversed and remanded.

63. ***Thompson v. County of Franklin***, No. 01-7107, __ F.3d __, 2002 WL 31746563 (2d Cir. Dec. 9, 2002). Appeal from judgment of the district court in Indian plaintiff's action seeking injunctive and declaratory relief that property to which she holds title is within "Indian Country" and thus immune from county's ad valorem taxation. Judgment in defendant's favor affirmed. Affirmed.

64. ***Winnebago Tribe of Nebraska v. Stovall***, No. 02-3301, __ F.3d __ (10th Cir. Aug. 28, 2003). The State of Kansas attempted to assess fuel tax on a corporation wholly owned by a tribe. The tribal corporation manufactures motor fuel on its reservation in Nebraska and sells the fuel to others, including federally recognized tribes in Kansas. The State of Kansas taxes the "distributor of first receipt," and after unsuccessfully attempting to collect the tax, began seizing tribal property. The district court granted injunctive relief in favor of the tribes, and defendants appealed, alleging failure to abstain from hearing the case and error in granting a preliminary injunction over claims of Eleventh Amendment immunity. The appellate court rejected the contention that the State had not interfered with tribal self-government. The appellate court also held that the Eleventh Amendment did not bar the suit because the complaint alleges an ongoing violation of federal law and seeks prospective relief. Affirmed.

O. TRUST BREACH AND CLAIMS

65. ***Cobell v. Norton***, No. CIV.A. 96 1285(RCL), __ F. Supp. 2d __, 2003 WL 133214 (D.D.C. Jan. 17, 2003). Before the Court are thirteen separate motions to disqualify the presiding judge, Special Master Alan Balaran, and Special Master Monitor Joseph S. Kieffer, III from participating in proceedings against 39 individuals, present or former employees of the United States government whose employment required them to participate in activities related to the individual Indian trust accounts at issue in the present action. In the alternative, movants seek discovery relating to alleged ex parte communications among the Master, the Monitor, other government employees, and the Court. The Court finds the recusal motions to be without merit.

66. ***Cobell v. Norton***, No. CIV.A.96-1285 (RCL), __ F. Supp. 2d __, 2003 WL 972064 (D.D.C. Mar. 11, 2003). Beneficiaries of Individual Indian Money (IIM) trust accounts brought action alleging that Secretaries of Interior and Treasury breached their fiduciary duties by mismanaging accounts. On plaintiffs' motion for litigation sanctions, the district court, held that government's bad faith submission of false affidavit in support of summary judgment motion was sanctionable. Motion granted.

67. ***Cobell v. Norton***, No. CIV.A. 96-1285(RCL), __ F. Supp. 2d __, 2003 WL 1960018 (D.D.C. Apr. 28, 2003). Upon consideration of defendants' motions for partial summary judgment that the Interior Department's historical accounting plan and trust management plan comport with their obligation to perform a historical accounting, plaintiffs' briefs in opposition thereto, defendants' reply briefs, and the applicable law in this case, the court found that defendants' motions should be denied.

68. ***Cobell v. Norton***, No. 02-5374, __ F.3d __ (D.C. Cir. July 18, 2003). In 2001, the district court appointed Joseph S. Keiffer, III as "Court Monitor" and in April 2002 the court reappointed Keiffer over defendants' objection. On April 17, 2002, the court held Secretary Norton and Assistant Secretary McCaleb in contempt of court based, in part, on events disclosed in the Court Monitor's reports. *See* ***Cobell v. Norton***, 226 F.Supp. 2d 161 (D.D.C. 2002). The appellate court reversed, holding that the district court erred in holding either official in criminal contempt on counts that concerned conduct that took place prior to their taking office. The appellate court also held that Secretary Norton did not fail to comply with the court ordered steps toward completing an accounting. Further, the Secretary's candid critique of prior reports to the court did not show those reports were intentionally false or misleading. Orders vacated and remanded for further proceedings.

69. ***Haceesa v. United States***, No. 01-2252, __ F.3d __, 2002 WL 31390854 (10th Cir. Oct. 24, 2002). After his death, Haceesa's disease diagnosed correctly as hantavirus pulmonary syndrome. Suit was brought alleging medical malpractice in the failure to diagnose Haceesa's hantavirus. The suit was brought under the Federal Tort Claims Act. The district court found the government liable and awarded damages of over $2.1 million. On appeal, the government no longer disputed its liability, but challenged the damages awarded. First, it argued that New Mexico's $600,000 statutory cap on medical malpractice recoveries applied. Second, it argued that its liability should be reduced to reflect its comparative negligence relative to a subsequent health care provider that also failed to diagnose Haceesa's hantavirus. Third, it argued that certain of the plaintiffs' claims were barred because they were not administratively exhausted at the time suit was filed. The district court rejected all three arguments. The appellate court concluded that the district court erred (1) in concluding that the recovery cap did not apply; (2) in failing to calculate the government's liability on the basis of New Mexico's "loss of chance" approach; and (3) in concluding that the estate's claim for wrongful death was timely filed. Reversed and remanded for further proceedings consistent with the appellate court opinion.

70. ***Shoshone Indian Tribe of the Wind River Reservation, Wyoming v. U.S.*** No. 458-79 L, __ Fed. Cl. __, 2003 WL 21437158 (Fed. Cl. Jun. 6, 2003). Indian tribes brought action against the United States for breach of fiduciary duty by the Minerals Management Service and its predecessors in the management and payment of royalties on oil and gas production on Indian lands. On defendant's motion to dismiss, and plaintiffs' motion for summary judgment, the Court of Federal Claims held that: (1) although government had no fiduciary duty to "maximize" oil and gas revenue from production of oil and gas on Indian lands, it did have a fiduciary duty to properly value the oil and gas upon which royalties were paid, and (2) government did not breach its trust obligations to Indian tribes with respect to settlement amount from which tribes were paid oil and gas royalties by oil and gas lessee when it failed to obtain royalties for the tribes on 47% of settlement amount attributable to take-or-pay payments. Defendant's motion denied in part and granted in part; plaintiff's motion granted in part.

71. ***Skokomish Indian Tribe v. U.S*** , No. 01-35028, 332 F.3d 551 (9th Cir. Jun. 3, 2003). Indian tribe brought action alleging that city's 1924 development of federally-licensed hydroelectric power project violated tribe's rights under Treaty, Federal Power Act, and state law. The district court granted summary judgment for defendants, and tribe appealed. The appellate court held that: (1) judge's status as a customer of the electric utility did not require

recusal; (2) U.S. was properly dismissed as a defendant; (3) district court lacked jurisdiction to grant summary judgment for city as to tribe's Treaty-based claims but should have dismissed; and (4) statute of limitations barred claims under Washington law. Affirmed in part, and vacated and remanded with instructions in part.

72. ***U.S. v. City of Tacoma, Wash.,***No. 00-35070, 332 F.3d 574 (9th Cir. Jun. 4, 2003). U.S., acting on its own behalf and as trustee for Skokomish Indian tribe, sought declaratory judgment to invalidate city's 1921 condemnation proceedings and void land transfers by tribe. Parties cross-moved for summary judgment. The district court granted summary judgment for government. City appealed. The appellate court held that: (1) U.S. had standing; (2) condemnation proceedings were without effect and conveyed no interest to city; and (3) U.S. was not estopped, on basis of actions of federal officials, from bringing action. Affirmed.

73. ***United States v. Big Crow***, No. 02-2917 327 F.3d 685, 2003 WL 21000813 (8th Cir. May 5, 2003). Defendant was convicted by a jury in district court on five counts of theft from an Indian tribal organization. Defendant appealed. The appellate court held that defendant's occupation of tribal property without paying full amount of rent owed did not constitute conversion or theft of the property. Reversed and remanded with instructions.

74. ***United States v. Goings***, No. 02-2299, __ F.3d __, 2002 WL 31802216 (8th Cir. Dec. 16, 2002). Defendants appealed a conviction of theft from an Indian tribal organization and conspiracy to commit theft from an Indian tribal organization. The appellate court held that district court could impose enhancement for abusing position of public or private trust. Affirmed.

P. MISCHELLANEUOUS

75. ***Arakaki v. State of Hawaii***, No. 00-17213, __ F.3d __, 2002 WL 31890826 (9th Cir. Dec. 31, 2002). Defendants-appellants, State of Hawaii, et al., appeal the district court's grant of summary judgment holding that the State's constitutional and statutory requirements that the trustees of the Office of Hawaiian Affairs be "Hawaiian" are invalid under the Equal Protection Clause of the Fourteenth Amendment, the Fifteenth Amendment, and the Voting Rights Act. Affirmed in part and vacated in part.

76. ***Brown & Williamson Tobacco Corp. v. Pataki***, No. 01-7806, __ F.3d __, 2003 WL 303038 (2d Cir. Feb. 13, 2003). Appeal from a judgment in favor of plaintiffs in an action challenging the constitutionality of a New York State statute restricting the direct shipment of cigarettes to New York consumers, the district court having found that the statute discriminates against interstate commerce in violation of the Commerce Clause. The State argued that it intends to enforce the statute's provisions against Indian sellers to the extent it is legally able to do so . . . Furthermore, the statute penalizes independently entities that deliver cigarettes directly to New York consumers, so the State may enforce that provision against carriers that transport cigarettes from Indian reservations to New York consumers. Reversed.

77. ***Person v. Brown***, No. 02-35171, 312 F.3d 1036, 2002 WL 31702751 (9th Cir. Dec. 4, 2002). Four American Indian plaintiffs appealed the district court's judgment in favor of defendant officials of the state of Montana on the plaintiffs' vote dilution claim under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. The district court held that the plaintiffs had standing to allege Native American vote dilution only with respect to the House and Senate districts where they resided. Also, the court held that the plaintiffs had not shown vote dilution in the House and Senate districts where they resided. Finally and alternatively, the district court held that, even if the plaintiffs had shown vote dilution, their claim failed because of the state's imminent redistricting and because any remedy would impermissibly disrupt the 2003 elections. The appellate court concluded that the district court did not clearly err in determining that the totality of circumstances did not establish vote dilution in the districts where plaintiffs resided. Affirmed.

T:\WPDOCS\0099\00000\WLMEMO2003UPDATE003.doc
nmc:9/3/03