

JUDICIAL UPDATE
2003 - 2004 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 2004

Case synopses are reprinted or derived from Westlaw with permission of West Group.
For purposes of this symposium, the presenter has revised the synopses.

UNITED STATES SUPREME COURT

1. *Norton v. Southern Utah Wilderness Alliance*, U.S. Sup. Ct. No. 03-101 (June 14, 2004). Environmental groups sued Interior Department for failure to manage wilderness study areas so as not to impair their suitability for preservation as wilderness as required by the Federal Land Policy and Management Act of 1976 (FLPMA). A unanimous Supreme Court concluded that plaintiffs cannot sue under the Administrative Procedure Act's provision authorizing suit to compel agency action unlawfully withheld or unreasonably delayed, 5 U.S.C. § 706(1). Such a claim can proceed only where an agency failed to take a discrete agency action that is required. This precludes broad programmatic attacks. Here, the Act's non-impairment mandate is an object to be achieved which leaves BLM discretion to decide how to achieve that object.

2. *South Florida Water Management District v. Miccosukee Tribe of Indians*, No. 02-626, ___ S. Ct. ___, 2004 WL 555324 (U.S. Mar. 23, 2004). Indian tribe and environmental organization brought action against regional water management district, alleging violation of Clean Water Act ("CWA"). The district court granted summary judgment for plaintiffs, and water district appealed. The Eleventh Circuit, 280 F.3d 1364, affirmed in part, vacated in part, and remanded. Certiorari was granted. The Supreme Court held that: (1) "discharge of a pollutant," for which a National Pollutant Discharge Elimination System ("NPDES") permit is required under the CWA, includes point sources that do not themselves generate pollutants, and (2) triable issues existed regarding whether canal and wetland areas were meaningfully distinct water bodies. Vacated and remanded.

3. *United States v. Lara*, No. 03-107, 124 S. Ct. 1628 (U.S. Apr. 19, 2004). Following denial of his motion to dismiss on basis of prior tribal court conviction, defendant, an Indian nonmember of the tribe, pleaded guilty in district court to assault on a federal officer occurring in Indian country. Defendant appealed. A panel of the Eighth Circuit affirmed, 294 F.3d 1004. On rehearing en banc, the appellate court reversed and remanded with instructions. Certiorari was granted. The Supreme Court held that: (1) source of tribe's power to prosecute and punish defendant for violence to a policeman was inherent tribal sovereignty rather than delegated federal authority; (2) Congress possessed constitutional power to lift or relax restrictions on Indian tribes' criminal jurisdiction over nonmember Indians that political branches of government had previously imposed; and (3) the Double Jeopardy Clause could not bar federal prosecution of defendant for assaulting a federal officer after Indian tribe's prosecution and punishment of him for violence to a policeman, absent any showing that the source of the tribal prosecution was federal power. Reversed.

OTHER FEDERAL COURTS

A. ADMINISTRATIVE LAW

4. *Buckles v. Indian Health Service/Belcourt Service Unit*, No. A4-02-133, ___ F. Supp. 2d ___, 2003 WL 21459545 (D.N.D., Jun. 24, 2003). Former employees of Indian Health Service ("IHS") initiated action against IHS and current employees, alleging that

defendants improperly disclosed confidential medical records. Individual defendants moved to dismiss. Former employees requested jury trial. The district court held that: (1) Privacy Act and Freedom of Information Act (“FOIA”) did not allow suits against individual defendants; (2) any tort claims against individual defendants were deemed actions against United States; and (3) former employees were not entitled to jury trial. Defendant's motion granted, and plaintiff's denied.

5. *Carciere v. Norton*, 2003 WL 22480578 (D.R.I. Sept. 29, 2003). State challenged final determination of the Secretary of the Interior to accept a 31-acre parcel of land into trust for the benefit of Indian tribe. Although tribe received federal recognition after effective date of the Indian Reorganization Act, it nevertheless qualified as a tribe within the meaning of that Act. Acceptance of parcel into trust did not violate federal constitutional provisions. Dismissed.

6. *Cline v. Norton*, No. 8:02CV500, 2003 WL 22052230 (D. Neb. Sept. 2, 2003). This matter came before the court on defendants' motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) and (6). Levering, an enrolled member of the Bannock Tribe at Fort Hall, Idaho, was the beneficial owner of land held in trust for him by the United States. Upon his death, the DOI had to determine who was entitled to the land. A probate hearing was held and the court issued an order determining that his two sons were the heirs. A petition filed to reopen the estate was denied. Plaintiffs appealed and the IBIA vacated and remanded for a determination as to whether these were proper parties to seek to re-open the estate. The court determined that these plaintiffs were not proper parties to seek re-opening of the estate and determined that evidence submitted by petitioners was conflicting and inconclusive. The court concluded that Levering died leaving the two heirs. Plaintiffs appealed and the IBIA affirmed the decisions. Plaintiffs filed a complaint in federal court. The appellate court concluded that the petitioners received an administrative review that comports with the requirements of the due process clause and all the process to which they are entitled and granted defendants' motion to dismiss.

7. *Confederated Salish and Kootenai Tribes v. United States*, No. 02-35491, ___ F.3d ___, 2003 WL 22119843 (9th Cir. Sept. 15, 2003). Indian tribes sought declaration that United States was required to take certain land in trust for tribes or tribal member to whom land was sold. The district court granted summary judgment for United States, and tribes appealed. The appellate court held that United States had discretion in determining whether to grant tribe's request to acquire land within reservation boundaries. Affirmed.

8. *Flathead Joint Board of Control v. United States Dep't of the Interior and Confederated Salish and Kootenai Tribes*, No. CV 02-38-M-DWM (D. Mont. Feb. 3, 2004). Documents concerning tribe's water rights are protected from disclosure notwithstanding the ruling of the Supreme Court in *Department of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001). In that case, the U.S. Supreme Court rejected reliance on Exemption 5 to the Freedom of Information Act. Here, documents are protected as commercial or financial information by Exemption 4.

9. *Huffer v. Stuart*, No. 03-2535, 2003 WL 23105333 (7th Cir. Dec. 29, 2003). Pro se litigant Huffer applied for federal grants on behalf of an organization he identified as the Central Illinois Chippewa Tribal Court and the Central Illinois Tribal Council ("Tribal Council").

10. *Nato Indian Nation v. State Of Utah*, No. 02-4062, 2003 WL 21872551 (10th Cir. Aug. 8, 2003). This case was not selected for publication in the Federal Reporter. Nato Indian Nation ("Nato") which presented itself as "a sovereign indigenous government, whose citizenship is comprised of federally supervised and non-federally supervised indigenous citizens from various [Native American] tribal affiliations...." appealed the dismissal of its complaint against Utah. Nato entered into an "intent to Joint Venture" with a private party regarding a mineral interest on state land. When Nato was informed that another private party claimed ownership to the mineral interest, it filed a complaint, signed by Henry Clayton, who listed his capacity as Chief Justice, Ministry of Justice, Western Regional Office, First Federal District Court, Nato Indian Nation. The complaint alleged that Utah mismanaged school trust lands relating to Nato's mineral interest. Other than asserting it is "a sovereign indigenous government," Nato provided no indication of its origin or legal status. The state filed a motion to dismiss, which the district court granted, holding: 1) it lacked subject matter jurisdiction over Nato's claims; 2) the White Mesa Utes and/or the Skull Valley Band of Goshutes could seek relief on their own initiative; 3) absent formal recognition by the Department of the Interior, Nato lacked standing to assert rights before the court as a recognized Native American Indian tribe; and 4) the two individuals who represented Nato at the hearing on the state's motion to dismiss were not licensed attorneys and were not entitled to appear before the court in a representative capacity. The appellate court affirmed the district court's dismissal of Nato's complaint for lack of subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1362, its determination that Nato is not an "Indian tribe or band with a governing body duly recognized by the Secretary of the Interior," and its refusal to allow Chief Henry Clayton to represent Nato in court proceedings.

11. *Neighbors For Rational Development, Inc. v. Gail Norton*, No. 02-2085, ___ F.3d ___, 2004 WL 1739490 (10th Cir. Aug. 4, 2004). Owners of property adjoining tract of Indian land, which Secretary of the Interior had agreed to hold in trust for 19 Indian Pueblos, brought suit challenging acquisition, seeking declaratory judgment that acquisition was null and void due to Secretary's failure to comply with applicable laws, and to permanently enjoin Secretary from proceeding with or authorizing development of property until Secretary complied with all applicable federal laws. The district court upheld acquisition. Property owners

appealed. The appellate court held that: (1) action was barred by Quiet Title Act, which excludes Indian lands from Act's waiver of sovereign immunity, to extent it sought to nullify trust acquisition, and (2) request for permanent injunction was moot. Dismissed and remanded.

12. *Posenjak v. Department of Fish & Wildlife of State of Washington*, No. 02-35737, (9th Cir. Aug. 20, 2003). Not selected for publication in the Federal Reporter. Posenjak alleged that the defendants violated his rights under the Point Elliott Treaty, Jan. 22, 1855, 12 Stat. 927. Posenjak's claims depend on his membership in the Snoqualmoo Tribe which may have rights under the Point Elliott Treaty if its members are "descended" from treaty signatories, and if it has "maintained an organized tribal structure." At the time summary judgment was granted to the Washington State Fish and Wildlife (and others) the record contained very few allegations relevant to whether the Snoqualmoo Tribe had "maintained an organized tribal structure" since the time of the Point Elliott Treaty. Those allegations that it did contain were too conclusory and too vague to defeat a properly supported motion for summary judgment. The court therefore affirmed summary judgment for Fish & Wildlife, on the ground that Posenjak failed to plead facts sufficient to establish that the Snoqualmoo Tribe has rights under the Point Elliot Treaty. Before the district court granted summary judgment to Island County Posenjak supplemented the record with facts relating to the history of Snoqualmoo Tribe. However, Posenjak failed to allege any facts to support a claim that the County Commissioner was involved in any violation of Posenjak's rights. Posenjak did allege that other Island County employees were involved in the incidents, but he did not allege either that the events were a result of a "policy statement, ordinance, regulation, or decision officially adopted and promulgated by [Island County]'s officers," or that Island County has "customs or policies that amount to deliberate indifference" and that those policies were "the moving force behind" a county employee's violations of Posenjak's rights. The appellate court affirmed summary judgment for Island County and the county commissioner. Affirmed.

13. *South Dakota v. U.S. Dept. of the Interior*, No. CIV. 00-3026-RHB, __ F. Supp. 2d __, 2004 WL 867825 (D.S.D. Apr. 19, 2004). State, city, and country sought declaratory and injunctive relief from Department of the Interior's ("DOI") plan to take a parcel of land into trust for an Indian tribe. Parties cross-moved for summary judgment. The district court held that: (1) DOI had rational bases for its decision to take the land into trust, and (2) statute authorizing acquisition of land to be held in trust for Indian tribes was not an unconstitutional delegation of legislative power. Plaintiffs' motion denied and government's motion granted.

B. ALASKA NATIVE CLAIMS SETTLEMENT ACT

14. *Chickaloon-Moose Creek Native Ass'n., Inc. v. Norton*, No. 01-35921, __ F. 3d __, 2004 WL 354195 (9th Cir. Feb. 26, 2004). Village corporations and regional corporation in Alaska brought actions contesting Department of Interior decision regarding which lands would be conveyed from federal government to regional corporation, for reconveyance to villages. Actions were consolidated. District court entered judgment for government, and plaintiffs appealed. The appellate court held: (1) Department's interpretation of its agreement with regional corporation, which governed land conveyance, was not entitled to deference; (2) agreement between Department and regional corporation precluded conveyance of lands designated in second appendix to agreement if conveyance of lands designated in first appendix was sufficient in quantity to satisfy villages' acreage entitlements under the Alaska

15. *City of Saint Paul v. Evans*, No. 02-35958, __ F.3d __, 2003 WL 22208787 (9th Cir. Sept. 25, 2003). City brought suit to invalidate settlement of land rights dispute with Native American corporation, and the Native American corporation responded by counterclaiming for enforcement of settlement agreement. The district court entered order dismissing city's claims on limitations grounds, but allowed it to assert identical claims in alleged defense to Native American corporation's counterclaim and rejected those defenses on merits. Appeal was taken. The appellate court held that city which had brought time-barred claims to invalidate settlement of land rights dispute with Native American corporation was barred on timeliness grounds not only from pursuing its claims to invalidate settlement but, when Native American corporation responded to its suit by counterclaiming for enforcement of settlement agreement, from raising identical claims as alleged affirmative defenses. Affirmed.

C. INDIAN CHILD WELFARE ACT ("ICWA")

16. *Azure Lone Fight v. Cain*, No. A4-04-054, __ F. Supp. 2d __, 2004 WL 1068954 (D.N.D. May 12, 2004). Mother petitioned for writ of habeas corpus, challenging the validity of Indian tribal court order which granted temporary custody of her two children to their father. Construing the petition as an application for habeas corpus relief under the Indian Civil Rights Act, 25 U.S.C. § 1301 et seq., the court dismissed the mother's challenge on the grounds that she had not exhausted her tribal court remedies and that habeas corpus relief is generally not available to challenge the propriety of tribal court's custody determinations. Petition denied without prejudice.

D. CONTRACTING

17. *Big Crow v. Rattling Leaf*, No. CIV. 03-3006, __ F. Supp. __, 2004 WL 51618 (D.S.D. Jan. 2, 2004). Rattling Leaf ("RRL"), who is not a federal employee but claims to be a "covered employee" under the FTCA due to the provisions of 25 U.S.C. § 450f, filed a petition for certification pursuant to 28 U.S.C. § 2679(d)(3). The Attorney General denied the petition. RRL was the director of the Natural Resources Department of the Tribe, trained to act as a law enforcement officer, certified as a law enforcement officer through the state of South Dakota, and was a commissioned law enforcement officer through the Tribe. At the time of the accident, he was in uniform, driving a vehicle belonging to the Bureau of Indian Affairs ("BIA"), equipped with a police radio to allow communications between and among tribal police officers and RRL. He was on patrol and heard on the police radio a request for assistance from a police officer for the Tribe. He was the closest officer and responded as requested. The accident and tragic death of Ms. Big Crow followed. The court found that there was not a claim that RRL was acting for some independent purpose of his own or on some personal frolic; he was not doing so. No requirement can be found in statute, regulation, or contract to the effect that a tribal employee paid under one self-determination contract cannot be performing functions under another self-determination contract. The court found that he was doing exactly what the Tribe had promised

18. *Hopland Band of Pomo Indians v. Norton*, No. C 04-00102 WAH (N.D. Cal. July 1, 2004). Plaintiffs proposed to contract under Pub. L. 93-638 for programs contemplated by the Indian Law Enforcement Reform Act of 1990. BIA rejected the contract, concluding that deputation agreements and law enforcement services are not contractible and that Interior Department moratorium on issuance of deputation agreements prevented BIA from proceeding. The government's motion to dismiss is denied. The tribe has stated a claim under Pub. L. 93-638 as well as the Law Enforcement Reform Act.

E. EMPLOYMENT

19. *Aroostook Band of Micmacs v. Executive Director Maine Human Rights Com'n.*, Civ. 03-24-B-K, 2004 WL 349923 (D. Me. Feb. 24, 2004). Indian tribe challenged state's authority to pursue claims of tribal employment discrimination in state court, in an action seeking relief in the hopes of forestalling current and future investigations and complaints against the Band under the Maine Human Rights Act and the Maine Whistle Blower Protection Act. The Executive Director and the members of the Maine Human Rights Commission, and three former employees of the Band were defendants. The parties filed cross-motions for summary judgment. The court concluded it does not have jurisdiction and dismissed the action based upon lack of subject matter jurisdiction.

20. *Buckles v. Indian Health Service/Belcourt Service Unit*, No. A4-02-133, ___ F. Supp. 2d ___, 2004 WL 637884 (D.N.D. Mar. 30, 2004). Two employees who worked for the Indian Health Service ("IHS"), sued co-workers and supervisors regarding the alleged violation of the Privacy Act by disclosure of employees' confidential medical information to Indian tribal council that sought employees' removal from positions following an investigation regarding their alleged abuse of prescription drugs. After employer was substituted as party, tort claims were deemed actions against the United States, and individual defendants were dismissed, a bench trial was held on employees' Privacy Act, retaliation, and defamation claims. The district court held that: (1) District Court lacked subject matter jurisdiction over defamation and retaliation claims; (2) alleged disclosure of employees' confidential medical information contained in memorandum did not violate the Privacy Act; and (3) alleged disclosure of prescription list by supervisory personnel did not violate the Privacy Act. Claims dismissed with prejudice.

21. *Chayoon v. Chao*, No. 03-6143, 355 F.3d 141 (D. Conn. Jan. 16, 2004). Employee at casino operated by Indian tribe sued tribal officials for violation of Family and Medical Leave Act ("FMLA"). The district court dismissed, and employee appealed. The appellate court held that tribe was immune from suit for damages. Affirmed

22. *Holz v. Nenana City Public School District*, No. , ___ F.3d ___, 2003 WL 22455766 (9th Cir. Oct. 30, 2003). Holz, an Alaskan Native, filed suit against Nenana City Public School District (“School District”) and School District officials. Holz alleged that the defendants violated federal and state civil rights laws by failing to hire her for various positions with the School District. The district court concluded that the School District is an “arm of the state” and thereby immune from suit under the Eleventh Amendment and granted summary judgment in favor of defendants. Holz appealed contending that the School District is not an “arm of the state” entitled to Eleventh Amendment immunity, and that the School District is not a state agency, but rather is akin to a local or county agency, most importantly because Alaska is not legally required to satisfy any possible judgment against the School District. The appellate court found that the district court erred in its ruling and reversed.

23. *Nakai v. Ho-Chunk Nation*, No. 03-C-0331-C, 2004 WL 1085214 (W.D. Wis. May 7, 2004). Plaintiff, Nakai a citizen of the state of Wisconsin and an enrolled tribal member of the Ho-Chunk Nation, brought a civil suit under 25 U.S.C. § 1302 of the Indian Civil Rights Act contending that defendant Ho-Chunk Nation violated the provisions of the Act when it discharged her from employment after she had been away from work for the birth of her child. Before the court was defendant's motion to dismiss on the ground of sovereign immunity. Defendant alleged that, as a federally recognized Indian tribe, it enjoys sovereign immunity from suit and neither it nor Congress has waived that immunity. The court concluded that plaintiff had not shown that her suit against defendant comes within any exception to defendant's sovereign immunity so as to allow it to go forward in this court and granted defendant's motion and dismissed the case.

24. *Prescott v. Little Six, Inc.*, No. CIV. 0204741DSDSRN, ___ F. Supp. 2d ___, 2003 WL 22251622 (D. Minn., Sept. 30, 2003). This matter was before the court upon defendants' objections to the August 4, 2003 report and recommendation. Defendants objected on three grounds: (1) that the court lacks subject matter jurisdiction over plaintiffs' claims because the Employee Retirement Income Security Act of 1974 (“ERISA”) does not apply to defendants, (2) that the court must defer to the determination of the Shakopee Mdewakanton Sioux (Dakota) Community Court that no ERISA plan exists, and (3) that defendants possess tribal sovereign immunity which has not been waived. After a de novo review the court adopted those parts of the report and recommendation consistent with its order. It was ordered that: (1) Defendants' motion to dismiss was granted with respect to the claims of plaintiffs against defendants Little Six, Inc.; (2) Defendants' motion to dismiss was granted with respect to the claims of plaintiffs against defendant Little Six, Inc., in its capacity as plan administrator for the Little Six, Inc., Retention Plan and in its capacity as plan administrator for the Little Six, Inc., Executive 457 Plan; (3) Defendants' motion to dismiss was denied with respect to all claims of plaintiff Prescott; (4) Defendants' motion to dismiss was denied with respect to the claims of plaintiffs against defendants Little Six, Inc., Life Insurance Plan, Little Six, Inc., Separation Pay Plan and Little Six, Inc., Supplemental Retirement Plan. (5) Defendants' motion to dismiss was denied with respect to the claims of plaintiffs against defendant Little Six, Inc., in its capacity as plan administrator for the Little Six, Inc., Life Insurance Plan, in its capacity as plan administrator for the Little Six, Inc., Separation Pay Plan and in its capacity as plan administrator for the Little Six, Inc., Supplemental Retirement Plan.

25. *Sharber v. Spirit Mountain Gaming Inc.*, No. 01-35500 (9th Cir. Sept. 4, 2003). Plaintiff employee of Spirit Mountain Casino asserted a claim against the casino involving the Family and Medical Leave Act. The district court dismissed, holding that Sharber must exhaust his claims in tribal court, including issues regarding tribal sovereign immunity. The Court of Appeals affirmed in part. The court reversed dismissal of the claim and remanded with directions to stay the federal action until the exhaustion of the claim in tribal court.

26. *Snyder v. The Navajo Nation*, Nos. 02-16632, 03-15395, ___ F.3d ___, 2004 WL 1277031 (9th Cir. June 10, 2004). Indian tribe's law enforcement officers sued tribe and United States for violations of Fair Labor Standards Act ("FLSA"). The district court dismissed claims, and officers appealed. The appellate court held that: (1) FLSA's overtime pay provision did not apply to law enforcement officers employed by Indian tribe, and (2) provision of Indian Self Determination and Education Assistance Act, deeming tribal members employed under self determination contracts to be federal employees for purposes of tort liability, did not make them federal employees for purposes of FLSA. Affirmed.

F. ENVIRONMENTAL REGULATIONS

27. *Blackbear v. Norton*, No. 02-4230, 2004 WL 407037 (10th Cir. Mar. 5, 2004). Not selected for publication in the Federal Reporter. Plaintiffs in this case are members of the Skull Valley Band of Goshute Indians, a federally recognized tribe located in western Utah. They brought suit in district court challenging a variety of governmental and tribal actions surrounding the Bureau of Indian Affairs' ("BIA") conditional approval of a lease between their tribe and Private Fuel Storage, L.L.C., for placement of a spent nuclear fuel storage facility on the Skull Valley Indian Reservation. The district court dismissed the suit and the appellate court affirmed.

28. *Nuclear Energy Institute, Inc. v. Environmental Protection Agency*, Nos. 01-1258, 01-1268, 01-1295, 01-1425, 01-1426, 01-1516, 02-1036, 02-1077, 02-1116, 02-1179, 02-1196, 03-1009, 03-1058, ___ F.3d ___, 2004 WL 1531942 (D.C. Cir. July 9, 2004). Challenges were brought to statutory and regulatory scheme governing creation of federal nuclear waste repository at Yucca Mountain, Nevada. The appellate court held that: (1) environmental organizations and state had standing under Hobbs Act; (2) Environmental Protection Agency ("EPA") violated Energy Policy Act ("EnPA") by choosing 10,000-year compliance period for its radiation-exposure standards; (3) Nuclear Regulatory Commission ("NRC") did not have to require that repository rely primarily on its geologic setting to isolate waste from human environment; (4) NRC did not have to specify minimum performance standards for each of "multiple barriers" required by Nuclear Waste Policy Act ("NWPA"); (5) NRC acted reasonably by evaluating proposed repository based on overall system performance, rather than barrier-by-barrier; (6) Property Clause gave Congress authority to designate particular site for repository; and (7) designation of site comported with Tenth Amendment and was otherwise constitutional. Petitions granted in part and denied in part.

29. *Shivwits Band of Paiute Indians v. State of Utah*, No. 2:95CV1025TC (D. Utah Oct. 22, 2003). Utah Department of Transportation and City of St. George, Utah lack authority to impose restrictions on the placement of billboards on land held by the United States in trust for the Shivwits Band of Paiute Indians. Although land is outside Indian reservation it is Indian Country.

30. *Skull Valley Band Of Goshute Indians v. Nielson*, No. 02-4149, ___ F.3d ___, 2004 WL 1739491 (10th Cir. Aug. 4, 2004). Indian tribe and private company planning to operate storage facility for spent nuclear fuel (“SNF”) on reservation lands brought action against state officials for declaratory and injunctive relief from operation of state laws restricting storage activities. The district court granted summary judgment in favor of plaintiffs. Defendants appealed. The appellate court held that: (1) plaintiffs had standing to bring action; (2) action was ripe for judicial review; (3) statutes requiring counties to facilitate regulation of SNF facilities were preempted by federal law; (4) statutes requiring compensation for unfunded potential liabilities of facilities were preempted; (5) statute abolishing limited liability for stockholders in companies operating facilities was preempted; and (6) statutes affecting roads in area of proposed facility were preempted. Affirmed.

31. *Spirit of Sage Council v. Norton*, No. CIV.A. 98-1873, ___ F. Supp. ___, 2003 WL 22927492 (D.D.C. Dec. 11, 2003). Native American and conservation organizations, and their individual members, brought action challenging validity of two federal regulations, alleging violations of Endangered Species Act (“ESA”) and Administrative Procedure Act (“APA”). Parties cross-moved for summary judgment. The district court held that: (1) plaintiffs had standing to sue; (2) plaintiffs' claims were ripe for review; (3) permit revocation regulation was legislative rule subject to APA's notice and comment requirements; (4) public notice and comment proceeding conducted after permit revocation regulation was promulgated did not cure agencies' failure to adhere to APA's notice and comment requirements; (5) vacating of permit revocation rule and remand to agencies with instructions to truly begin anew APA's notice and comment procedures was appropriate remedy for agencies' failure to comply with APA; and (6) remand of "no surprises" rule was warranted. Permit revocation rule vacated, and all regulations remanded.

G. FISHERIES, WATER, FERC, BOR

32. *Alsea Valley Alliance v. Dep’t of Commerce*, No. 01-36071 (9th Cir. Feb. 24, 2004). Intervenor environmental groups appealed from an order invalidating a National Marine Fisheries Service final rule designating as threatened the naturally spawned population of Oregon coast coho salmon. The district court held the rule was improper by excluding hatchery coho populations from the listings protection although NMFS had held them to be part of the same distinct population segment. The federal agencies declined to appeal and announced a review of their regulation. Intervenor’s appeal is dismissed because no final agency action exists.

33. *Confederated Tribes of Umatilla Indian Reservation v. Bonneville Power Admin.*, Nos. 01-71736, 01-71740, ___ F.3d ___, 2003 WL 22038692 (9th Cir. Sept. 2, 2003). Indian tribes and others petitioned for review of decisions of Bonneville Power Administration (“BPA”), alleging that BPA both exceeded its legal authority and violated its statutory duty to treat fish and wildlife equitably with power. The appellate court held that: (1) BPA's alleged

34. *Delaunay v. Collins*, No. 02-8097, 2004 WL 377665 (10th Cir. Mar. 2, 2004). Not selected for publication in the Federal Reporter. This appeal stems from a feud between neighbors in Wyoming over access to and use of water on tribal lands. Charlene and Manuel Delaunay, alleged that defendant Collins and his two sons (the "Collins") intentionally blocked their water supply because of Manuel's race in violation of 42 U.S.C. §§ 1981, 1982, and 1985(3). The Collins are enrolled members of the Northern Arapaho Tribe of the Wind River Reservation. Charlene is also an enrolled member; Manuel is a Caucasian, French citizen. At trial, the jury unanimously found for the Delaunays and awarded damages in the amount of \$350,000. The district court granted injunctive relief and attorneys' fees and remitted the amount of the compensatory damages award. The appellate court affirmed the judgment of the district court and dismissed the case.

35. *Domtar Maine Corp., Inc. v. Federal Energy Regulatory Commission*, Nos. 97-1300 and 02-1178, ___ F.3d ___, 2003 WL 22432854 (D.D.C. Oct. 28, 2003). (Passamaquoddy Tribe, Intervenor) Owner of dams upstream from its hydroelectric facilities sought review of FERC order denying exemption from licensing requirement. The appellate court held that: (1) upstream dams were not exempt from licensing requirement, and (2) finding that upstream dams enhanced downstream power generation, and thus required licenses, was not arbitrary or capricious. Relief denied.

36. *Eyak Native Village v. Daley*, No. 02-36155, ___ F.3d ___, 2004 WL 1588113 (9th Cir. Jul. 12, 2004). ORDER: "The district court decided the federal paramountcy question and thereby avoided determining the existence or extent of the plaintiff villages' claimed aboriginal rights. As an appellate body, we would be greatly assisted by an initial determination by the district court of what aboriginal rights, if any, the villages have. We therefore VACATE the district court's order granting summary judgment for defendants. We REMAND with instructions that the district court decide what aboriginal rights to fish beyond the three-mile limit, if any, the plaintiffs have. For purposes of this limited remand, the district court should assume that the villages' aboriginal rights, if any, have not been abrogated by the federal paramountcy doctrine or other federal law. The en banc panel retains jurisdiction over all future proceedings in this matter."

37. *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, No. 03-35279 (9th Cir. Aug. 6, 2004). Plaintiffs challenged six biological opinions regarding timber harvest effects on protected spotted owls. Summary judgment in favor of defendants is reversed because critical habitat analysis was fatally flawed by relying on an unlawful regulatory definition of "adverse modification" and disregarding the recovery goal of the Endangered Species Act. Fish and Wildlife Service cannot authorize the complete elimination of critical habitat necessary only for recovery simply because a smaller amount of critical habitat necessary for species survival is not diminished.

38. *In re American Rivers and Idaho Rivers United*, No. 03-1122 (D.C. Cir. June 22, 2004). Coalition of environmental organizations petitioned the Federal Energy Regulatory Commission to formally consult under Section 7 of the Endangered Species Act regarding FERC's regulatory authority over hydropower operations affecting protected fish in the Snake River Basin. After petition went unanswered for more than six years, a writ of mandamus compelling a response appropriately issued.

39. *Nez Perce Tribe v. National Oceanic and Atmospheric Admin. Fisheries*, No. CV 04-60-RE, 2004 WL 1179333 (D. Or. May 27, 2004). Defendants' motion to transfer venue pursuant to 28 U.S.C. § 1404(a) was before the court. Plaintiff Nez Pierce Tribe, filed the case challenging analyses and decisions made by three federal agencies related to impacts on natural resources by the North Lochsa Face Ecosystem Management Project ("NLF Project") in the Clearwater National Forest in Idaho. Plaintiff sought judicial review of (1) the Final Supplemental Environment Impact Statement and Record of Decision (ROD) issued by the U.S. Forest Service for the NLF Project; (2) the "no jeopardy" determination and biological opinion for Snake River Basin steelhead issued by the National Oceanic and Atmospheric Administration Fisheries for the NLF Project; and (3) the determination of the U.S. Fish and Wildlife Service that the NLF Project is not likely to adversely affect Columbia River bull trout. Defendants moved to transfer venue to the U.S. District Court for the District of Idaho. Defendants asserted, and plaintiff did not contest, that this case could have been brought in the District of Idaho (i.e., jurisdiction and venue are both proper in the District of Idaho). Defendants further asserted that the District of Idaho is the appropriate venue for this case because it is where the NLF Project will take place, where the operative facts occurred, and where local interest is substantial. Plaintiff argued that deference should be paid to its choice of venue, that a substantial portion of the actions and omissions giving rise to this case arose in the District of Oregon, and that this district has expertise and local interest in the controversy. The court held that plaintiff's choice of venue is not entitled to deference and pursuant to 28 U.S.C. § 1404(a), granted defendants' motion to transfer venue, and transferred the case to the United States District Court for the District of Idaho.

40. *Seiber v. United States*, No. 03-5010 (Fed. Cir. Apr. 10, 2004). Denial of a federal incidental take permit to authorize logging on 40 acres of protected owl habitat owned by plaintiffs was neither a physical nor a regulatory taking. Plaintiffs were not deprived of all economically viable use of the timber on their 200-acre parcel. No economic injury was shown to have resulted from the alleged temporary taking.

41. *Tulare Lake Basin Water Storage Dist. v. United States*, No. 98-101L (Fed. Cl. Dec. 31, 2003). Plaintiffs are entitled to just compensation for water losses arising from federal biological opinions issued pursuant to the Endangered Species Act that limited plaintiffs' contractually conferred rights to water under contracts between plaintiffs and the California Department of Water Resources. The contracts entitled plaintiffs to a percentage of the water identified as available in a particular year. Because pumping curtailments associated with federal agency biological opinions deprived plaintiffs of water previously determined to be available, just compensation was awarded.

42. *United States v. Clifford Matley Family Trust*, Nos. 01-15778, 01-15813, 354 F.3d 1154 (9th Cir. Jan. 20, 2004). After court-appointed Water Master reclassified private farm land from "bottom land" to "bench land" for purposes of water allocation within Newlands Reclamation Project, federal government and Indian tribe sought evidentiary hearing. Following district court remand, Water Master restated his original findings, and the district court adopted Master's report and approved reclassification. Government and tribe appealed. The appellate court held that: (1) Master was not required to follow federal rules of evidence or civil procedure; (2) Master's failure to hold evidentiary hearing did not deprive tribe of due process, despite its property interest in water now allocated to farm; and (3) Water Master could not make reclassification determination without considering principle of beneficial use. Reversed and remanded.

43. *United States v. Pyramid Lake Paiute Tribe of Indians*, Nos. 01-15665, 01-15814, 01-15816, 01-16224, and 01-16241, ___ F.3d ___, 2003 WL 21976617 (9th Cir. Aug. 20, 2003). United States and Pyramid Lake Paiute Tribe of Indians sought judicial review of decision of Nevada State Engineer that largely granted applications of landowners in Newlands Reclamation Project to transfer water rights between different parcels of property. The district court affirmed State Engineer's decision. United States and Tribe appealed. The appellate court held that: (1) owners were not entitled to blanket exemption from operation of Nevada's forfeiture and abandonment laws; (2) evidence supported finding that some owners had neither abandoned nor forfeited their water rights; and (3) water rights attached to parcels through which irrigation ditches passed only to extent water was applied to parcel to produce crops. Affirmed in part, reversed in part, and remanded.

44. *Westlands Water Dist. v. U.S. Dept. of Interior*, Nos. 03-15194, 03-15289, 03-15291, 03-15737, ___ F.3d ___, 2004 WL 1558290 (9th Cir. Jul. 13, 2004). Water and utility districts brought action against Department of Interior, challenging administration of federal water project and implementation of fisheries restoration legislation. Native American tribes intervened as defendants. Parties cross-moved for summary judgment. The district court granted motions in part and denied them in part. Appeal was taken. The appellate court held that: (1) under National Environmental Policy Act ("NEPA") and implementing regulations, statement of purpose and need was not unreasonably narrow in geographically limiting scope of environmental impact statement ("EIS") or in excluding consideration of nonflow measures; (2) range of alternatives considered in EIS was reasonable; (3) supplemental environmental impact statement ("SEIS") was not required to discuss National Marine Fisheries Service's Biological Opinion requiring mitigation of impacts to Sacramento River temperatures; (4) California energy crisis did not pose "significant new circumstance" that compelled issuance of SEIS; (5) Fish and Wildlife Service ("FWS") BioOp RPM (reasonable and prudent measures) involving mitigation of X2 movement was major change and therefore invalid under Endangered Species Act (ESA) regulations; and (6) NMFS RPM directing that recommended flow regime by implemented as soon as possible was properly set aside. Affirmed in part, reversed in part, and remanded.

H. GAMING

45. *Artichoke Joe's California Grand Casino v. Norton*, No. 02-16508, ___ F.3d ___, 2003 WL 22998116, (9th Cir. Dec. 22, 2003). Plaintiffs are California card clubs and charities that are prohibited under California state law from offering casino-style gaming. They challenged the validity of compacts entered into under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721, between the state of California and certain Indian tribes. Pursuant to an amendment to the California Constitution that permits casino-style gaming only on Indian lands ("Proposition 1A"), California has entered into 62 compacts ("Tribal-State Compacts") with Indian tribes allowing such gaming. Plaintiffs brought this action, in federal district court, against various state defendants and the Secretary and Assistant Secretary of the United States Department of the Interior, alleging that Proposition 1A and the Tribal-State Compacts violate IGRA and their rights to equal protection guaranteed by the Fifth and Fourteenth Amendments. The district court granted summary judgment to both the state defendants and the federal defendants. Because the appellate court held that Proposition 1A and the Tribal- State Compacts are consistent with IGRA and do not violate the guarantees of equal protection, it affirmed.

46. *Burdett v. Harrah's Kansas Casino Corp.*, Nos. CIV.A. 02-2166-KHV, CIV.A. 03-2189-KHV, ___ F. Supp. ___, 2003 WL 22911880 (D. Kan. Dec. 10, 2003). Wife of man who committed suicide as alleged result of debt collection activity directed at recovering debts that he incurred gambling at local casino brought action and survivor's action to recover under the Fair Debt Collection Practices Act ("FDCPA"), under the Fair Credit Reporting Act ("FCRA"), and on negligent or intentional infliction of emotional distress theory. On motions to dismiss and for entry of summary judgment, the district court held that: (1) widow had no standing to pursue cause of action under the FDCPA based on collection efforts directed solely at late husband; (2) widow could not recover on negligent infliction of emotional distress theory, given complete lack of evidence that she had sustained any physical injury; (3) debt collector's conduct in continuing, even after debtor committed suicide, to direct 23 collection letters to home that he shared with his wife, did not support cause of action for intentional infliction of emotional distress; (4) survivor action that widow brought some three years after her late husband's death, for debt collector's alleged violations of the FDCPA, would be dismissed as failing to state claim; and (5) allegations in complaint were sufficient to state claim under Kansas law for negligent, but not for intentional, infliction of emotional distress. Summary judgment motion sustained; dismissal motion sustained in part and overruled in part.

47. *City of Roseville v. Norton*, No. 02-5277, ___ F.3d ___, 2003 WL 22681310, (D.D.C. Nov. 14, 2003). Municipalities and nonprofit organization brought action challenging the Secretary of Interior's decision to take a parcel of land into trust for Indian tribe for the purpose of operating a casino. The district court dismissed, and plaintiffs appealed. The appellate court held that government's taking into trust of land for terminated Indian tribe that had been restored to federally recognized status was "restoration of lands" within meaning of Indian Gaming Regulatory Act. Affirmed.

48. *Grand Traverse Band of Ottawa and Chippewa Indians v. Office of United States. Attorney for the Western District of Michigan*, No. 02-1679, __ F. 3d __, 2004 Fed. App. 0151P, 2004 WL 1144510 (6th Cir. May 24, 2004). Indian band sought declaratory judgment as to legality of gambling operation. The district court entered judgment for plaintiff. State appealed. The appellate court held that Indian band was a restored tribe, for purposes of Indian Gaming Regulatory Act. Affirmed.

49. *In Re: Sac & Fox Tribe Of The Mississippi In Iowa / Meskwaki Casino Litigation*, Nos. 03-2329, 03-2355, 03-2357, 03-2390, 03-2392, 03-2393, 2003 WL 22015767 (8th Cir. Aug. 27, 2003). In separate actions, Indian tribe's elected tribal council sought declaratory and injunctive relief following appointment of rival council which had taken control of tribal facilities, and appointed council challenged National Indian Gaming Commission ("NIGC") order closing casino. The district court denied relief to either council. Consolidating appeals, the appellate court held that: (1) council was required to exhaust administrative remedies before seeking judicial relief from temporary closing order; (2) grant of preliminary injunction enforcing closing order was not abuse of discretion; (3) elected council's gaming violation claims against appointed council were not moot; and (4) court lacked jurisdiction to resolve internal tribal leadership dispute. First judgment affirmed; second judgment affirmed in part, reversed in part and remanded.

50. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. U.S.*, No. 03-2323, __ F.3d __, 2004 WL 909159, (7th Cir. Apr. 29, 2004). The plaintiff Tribes appealed the district court's opinion and order declaring the gubernatorial concurrence provision of the Indian Gaming Regulatory Act ("IGRA") constitutional and not in violation of the federal government's trust obligation to Indians. The appellate court affirmed the judgment of the district court.

51. *Miller v. Sodak Gaming, Inc.*, No. 02-2288, 2004 WL 690064 (6th Cir. Mar. 30, 2004). Not selected for publication in the Federal Reporter. Plaintiff Miller appealed the order of the district court granting summary judgment in favor of Sodak Gaming, Inc. ("Sodak") on Plaintiff's claims of breach of contract, breach of implied contract, promissory estoppel and unjust enrichment. Plaintiff claimed that Sodak is obligated to pay her a "primary progressive jackpot" of \$1,571,862.00 that she purportedly won on a "Wheel of Fortune" slot machine at the Kewadin Shores Casino in St. Ignace, Michigan owned and operated by the Sault Ste. Marie Tribe of Chippewa Indians. The appellate court AFFIRMED the district court's order granting summary judgment in favor of Sodak Gaming, Inc. and denying Miller's motion to amend her complaint finding that because there was no genuine issue of material fact that Miller was not a jackpot winner under the rules of the game, Sodak was entitled to judgment as a matter of law. AFFIRMED.

52. *Victor v. Grand Casino-Coushatta*, No. 03-30703, __ F.3d __, 2004 WL 212836 (5th Cir. Feb. 19, 2004). Slot machine player who claimed to have won large jackpot sued casino, Indian tribe, and casino corporation in state court for breach of contract after casino refused to pay, asserting that malfunction in slot machine had generated jackpot. Action was removed to federal court on basis of diversity jurisdiction. The district court remanded to state court based on determination that parties were nondiverse and federal subject matter jurisdiction was lacking. Defendants appealed. The appellate court held that court lacked jurisdiction to

I. LAND CLAIMS

53. *Cayuga Indian Nation of New York v. Village of Union Springs*, No. 5:03-CV-1270, __ F. Supp. 2d __, 2004 WL 884589 (N.D.N.Y. Apr. 23, 2004). Indian tribe filed suit against local governments seeking declaratory and injunctive relief regarding the nature of use of property that it owned within defendants' municipal boundaries. Defendants filed a counterclaim seeking declaratory and injunctive relief against tribe. Upon tribe's motion for summary judgment, and defendants' cross motion for a preliminary injunction, the district court held that: (1) reservation status of Indian land was not terminated by treaty, and therefore it remained Indian country for jurisdictional purposes; (2) exceptional circumstances did not exist to warrant state or local regulation of construction and gambling-related activities on property located within Indian country; and (3) local governments failed to show that they would suffer irreparable harm unless Indian tribe was preliminarily enjoined from conducting Class II gaming without first complying with Indian Gaming Regulatory Act (IGRA). Plaintiff's summary judgment motion granted, defendants' motion denied.

54. *Cermak v. Norton*, No. CIV.98-1248DSDSRN, __ F. Supp. 2d __, 2004 WL 1402696 (D. Minn. Jun. 22, 2004). This matter began in 1944, when the Department of Interior issued Indian Land Certificates 64 and 65 to John Cermak, an Indian. The certificates indicated that "the said John Cermak and his heirs are entitled to immediate possession of said land, which is to be held in trust, by the Secretary of the Interior, for the exclusive use and benefit of the said Indian, so long as said allottee or his heirs occupy and use said land." The matter was before the court on defendants' motion to dismiss, or in the alternative, for summary judgment. Also before the court was plaintiff's cross-motion for summary judgment. The court upheld the IBIA's position that occupants of lands under such certificates hold only beneficial life interests, and granted defendants' motion for summary judgment and denied plaintiff's cross-motion for summary judgment.

55. *Green v. State of Rhode Island*, No. 03 698, __ F. Supp. 2d, 2003 WL 22471177, (D.R.I. Oct. 31, 2003). This case concerned a thirty-four square mile portion of land ("Land") in northern Rhode Island. Green, Chief of the Seaconke Wampanoag Indian Tribe, bought the action claiming that a 1661 deed from the Wampanoags to a colonist reserved use and occupation rights over the Land, which now comprises significant portions of Cumberland and Woonsocket, Rhode Island. Even though the Tribe no longer occupies the Land, the Wampanoags sought, *inter alia*, a declaration from the court that they are the lawful and equitable owners of the Land. Defendants collectively filed a Motion to Dismiss asserting that the Rhode Island Indian Claims Settlement Act, 25 U.S.C. § 1701 *et seq.*, bars the Wampanoags' claims. The court granted the Motion to Dismiss.

56. *Shawnee Tribe v. United States*, No. 03-2042-GTV, __ F. Supp. 2d __, 2004 WL 722517 (D. Kan. Mar. 30, 2004). Indian tribe sought judicial review of the General Service Administration's ("GSA") denial of its request to transfer to trust for tribe's benefit a land parcel, allegedly within boundaries of Indian reservation, that had been declared to be excess property available for disposal under the Federal Property and Administrative Services Act. The federal

57. *Stockbridge-Munsee Community v. Oneida Indian Nation of New York*, No. 86CV1140 LEKGJD, 2003 WL 21715863 (N.D.N.Y. Jul. 24, 2003). The Stockbridge-Munsee Community ("Plaintiff") alleges that its land was illegally taken by New York State and various counties and towns in New York. Plaintiff moved for summary judgment and Defendants and Defendant-Intervenor filed cross-motions for summary judgment. The parties were asked to submit additional briefing on the State's Eleventh Amendment immunity argument in the wake of *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991). Plaintiff then moved for a stay when the Supreme Court decided to review *Seminole Tribe v. State of Florida*, 11 F.3d 1016 (11th Cir.1994). The stay was granted. After the *Seminole* decision, Plaintiff asked the court to keep the stay in place and it has remained in place while Plaintiff's request that the U.S. intervene on its behalf has been under review by the DOI and the DOJ. Plaintiff now asks the court (i) to refer this matter to a mediator; (ii) to lift the stay for the limited purpose of determining the proper tribal claimant to the land at issue in this case; and (iii) to grant it leave to file a supplemental memorandum in support of its motion for summary judgment against Defendant-Intervenor. The court denied Plaintiff's motion to refer the case to a mediator and also denied Plaintiff's motion to lift the stay for the limited purpose of determining the proper tribal claimant to the land at issue. The court found that the case must now go forward notwithstanding the federal government's failure to indicate whether it intends to intervene. The stay will terminate on December 1, 2003. Plaintiff's motion for summary judgment and defendants' cross-motions for summary judgment will be reinstated on December 1, 2003, even if the federal government has not yet made its intervention decision.

58. *Wyandotte Nation v. Unified Government of Wyandotte County/Kansas City, Kansas*, No. CIV.A.01-2303-CM, 2004 WL 1588133 (D. Kan. Jul. 14, 2004). Indian tribe brought suit seeking a declaratory judgment quieting title to land located in Kansas City, Kansas. Defendants included the Unified Government of Kansas City and Wyandotte County, Kansas, and numerous private landowners. Defendants filed motions to dismiss. The district court held that: (1) sections of land alleged to have been given to the Wyandotte Nation by the Delaware tribe in an 1843 transaction were included in the term "Wyandott country" found in 1855 treaty between the Wyandotte Nation and the United States; (2) Kansas statutes of limitation were applicable to counts of complaint by claiming trespass, and seeking declaratory judgment quieting title, and thus those counts were time-barred; and (3) United States was "indispensable party" who could not be joined in action, so that action could not in equity and good conscience proceed solely against landowners who had no role in original issuance of patents. Motions granted.

J. RELIGIOUS FREEDOM

59. *Bonnichsen v. United States*, 367 F.3d 864 (9th Cir. 2004). Tribal coalition sought review of district court decision that 9,000 year old remains of Kennewick Man were not Native American within the meaning of Native American Graves Protection and Repatriation Act (NAGPRA) and that Secretary of the Interior erred in assuming that coalition was a proper claimant under NAGPRA. Affirmed. NAGPRA requires a showing of relationship to a presently existing tribe, people or culture in order for remains to be considered Native American.

60. *Hoevenaar v. Lazaroff*, No. 03-4119, 2004 WL 1664043 (6th Cir. Jul. 23, 2004). Not recommended for publication in the Federal Reporter. Hoevenaar is a native American of Cherokee ancestry currently serving a life sentence in the Ohio prison system. While incarcerated, Hoevenaar began to practice a native religion which contains as one of its tenets a requirement that he not cut his hair. As a result, Hoevenaar claims that prison rules regulating hair length violate his right to practice his religious beliefs and are in violation of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000cc *et seq.* (2000). Following a hearing on the Plaintiff's request for a temporary injunction, the district court granted limited relief under RLUIPA, allowing Hoevenaar to maintain a "kouplock" (a two inch by two inch square section at the base of the skull that is grown longer than the person's remaining hair). However, because the appellate court recently held RLUIPA to be unconstitutional, it REVERSED the decision of the district court granting injunctive relief to Hoevenaar, GRANTED Warden Lazaroff's motion for summary reversal, and REMANDED with instructions that the injunction be vacated.

61. *Natural Arch And Bridge Society v. Alston*, No. 02-4099, 2004 WL 569888 (10th Cir. Mar. 23, 2004). This case concerned the management policies and practices of Defendant National Park Service ("Park Service") that prevent visitors to the Rainbow Bridge National Monument from approaching the rock span that is the central attraction of the Monument unless those visitors are Native Americans or are engaging in Native American religious ceremonies. The first cause of action was based on an alleged violation of the Establishment Clause in the First Amendment of the United States Constitution. The second, cause of action was based on an alleged violation of "the Equal Protection component of the Fifth Amendment of the United States Constitution." After discovery, the plaintiffs filed a motion for summary judgment and the defendants filed a motion to dismiss. The district court denied plaintiffs' motion for summary judgment and granted defendants' motion to dismiss. *Natural Arch and Bridge Society v. Alston*, 209 F.Supp.2d 1207 (D. Utah 2002) and the appellate court affirmed the judgment.

62. *Pounders v. Kempker*, No. 03-2054, 2003 WL 22462034, (8th Cir. Oct. 31, 2003). Not selected for publication. Missouri inmate appealed the district court's preservice dismissal of his complaint brought under 42 U.S.C. § 1983 and the Religious Land Use and Institutionalized Persons Act, claiming that defendants substantially burdened his religious practice by not permitting him to use a sweat or purification lodge. Appellate court reversed and remanded for further proceedings.

63. *Thompson v. Scott*, Case No. 03-40408, ___ Fed. Appx. ___, 204 WL 57718 (5th Cir. Jan. 9, 2004). Native American inmate filed civil rights suit in state court alleging that state prison officials violated First Amendment and Religious Land Use and Institutionalized Persons Act (“RLUIPA”) by failing to adequately accommodate his religious beliefs. After removal, the district court entered summary judgment in favor of officials, and inmate appealed. The appellate court held that: (1) inmate did not have standing to challenge requirement that inmates pass written test on Native American practices in order to participate in Native American services; (2) confiscation of inmate's medicine bag and dream catcher did not violate his rights; and (3) fact issues remained as to whether compelling government interest required inmates’ hair to be no more than one eighth inch long. Affirmed in part, vacated in part, and remanded.

64. *Yankton Sioux Tribe v. United States Army Corps of Engineers*; No. CIV. 02-4126 ___ F. Supp. 2d ___, 2003 WL 1957419 (D.S.D. Apr. 18, 2003). MEMORANDUM OPINION AND ORDER. State defendants filed a Motion to Allow Adoption of Archeologist's Recommendations, Doc. 45. The Court had previously granted a preliminary injunction in favor of the plaintiffs, the Yankton Sioux Tribe, and its individual members, prohibiting the State defendants from conducting any excavation, building, or other construction activities at certain locations of the North Point Recreation Area. Plaintiffs objected to any order that would “further disturb the human remains and artifacts unearthed by the defendants.” After an evidentiary hearing the court ordered a complicated set of requirements concerning sites and borrow dirt for work to be performed and granting and denying parts of the motions.

K. SOVEREIGN IMMUNITY and FEDERAL JURISDICTION

65. *Armstrong v. Mille Lacs Tribal Police Dept.*, Nos. 02-3536, 02-3556, 63 Fed. Appx. 970, (8th Cir. May 27, 2003). In these consolidated appeals, Jeffrey D. Armstrong and William Lawrence – d/b/a Native American Press/Ojibwe News--appealed the district court's adverse grant of summary judgment in their 42 U.S.C. § 1983 action. The appellate court agreed with the district court's analysis; and declined to address the new arguments and allegations appellants raised. Affirmed

66. *County of Mille Lacs v. Benjamin*, No. 03-2527, 03-2537, ___ F. 3d ___, 2004 WL 421781 (8th Cir. Mar. 9, 2004). County of Mille Lacs (“County”) and the First National Bank of Milaca (“Bank”), appealed from an order of the district court dismissing their action seeking to determine the legal status of the boundaries of the Mille Lacs Band of Chippewa Indians (“Band”) reservation.. The district court, 262 F.Supp.2d 990, dismissed with prejudice. County and bank appealed. The appellate court held that (1) bank and county both lacked standing to bring action, and (2) dismissal with prejudice was erroneous. Affirmed in part and reversed in part.

67. *Davis v. United States*, No. 02-6198 (10th Cir. Sept. 10, 2003). Indian tribe was an indispensable party with respect to claims alleging wrongful exclusion from assistance programs, and a district court correctly ruled that it lacked jurisdiction to hear a Certificates of Degree of Indian Blood claim because plaintiffs failed to show exhaustion of administrative remedies. Affirmed.

68. *Delorme v. U.S.*, No. 02-3460, ___ F.2d ___, 2004 WL 51243 (8th Cir. Jan. 13, 2004). Delorme, hereditary chief of the Little Shell Band of Indians of North Dakota, brought this action for an accounting of funds to be distributed pursuant to two federal appropriations statutes dealing with Chippewa land claims. The district court dismissed the action because the United States had not waived its sovereign immunity. Delorme appealed and the court affirmed the dismissal because standing is lacking.

69. *Freedom Holdings, Inc. v. Spitzer*, No. 02-7492, 2004 WL 26498 (D.N.Y. Jan. 6, 2004). Cigarette importers challenged validity of New York contraband statutes. The district court dismissed the complaint, and importers appealed. The appellate court held that: (1) statutes did not violate dormant Commerce Clause, and (2) statutes were preempted by federal antitrust laws. Affirmed in part, reversed in part, and remanded.

70. *Garza v. Traditional Kickapoo Tribe of Texas*, No. 03-50209, 2003 WL 22391241 (5th Cir Oct. 21, 2003). Not selected for publication in the Federal Reporter. Garza appealed from the dismissal of his 42 U.S.C. § 1983 suit on the defendants' motion for summary judgment. The suit included claims of deprivation of a property and/or liberty interest; Fourth Amendment excessive force and illegal arrest claims, and state law claims of false imprisonment and assault as a result of his removal from the casino. The appellate court held that the Traditional Kickapoo Tribe of Texas is entitled to sovereign immunity in this damages suit, that summary judgment was properly granted as to the § 1983 claims against defendants, and affirmed.

71. *Hawk v. Bellavia*, No. 03-C-0686-C, 2004 WL 1176167 (W.D. Wis. May 25, 2004). Hawk brought suit contending that the state of Wisconsin violated his rights in a number of ways, such as by enforcing state insurance laws on and off an Indian reservation and by forcing plaintiff to make payments to certain tribes without due process of law. The case was before the court on the motion of defendants to dismiss, on plaintiff's motion for injunctive relief, and on plaintiff's motion to remove. The court ordered that: (1) the motion to dismiss filed by defendants Bellavia and Collins was GRANTED without prejudice; (2) plaintiff's motion for injunctive relief was DENIED; (3) plaintiff's motion to remove a case pending in the Circuit Court for Outagamie County was DENIED; (4) Defendants Wisconsin Commissioner of Insurance and Wisconsin Department of Financial Institutions were DISMISSED from the case on the court's own motion for plaintiff's failure to accomplish timely service on them; and (5) plaintiff's "appeal" from the Oneida Appeals Commission was DENIED for lack of jurisdiction.

72. *Kaw Nation ex rel. McCauley v. Lujan*, No. 03-6213, ___ F.3d ___, 2004 WL 1814189 (10th Cir. Aug. 16, 2004). Members or former members of Indian tribe's Executive Council brought action for declaratory and injunctive relief from the allegedly improper appointment of three tribal judges. One judge and tribe's chairman moved to dismiss. Following dismissal, plaintiffs moved to amend judgment and for relief from judgment. The district court dismissed. Plaintiffs appealed. The appellate court held that: (1) declaratory and injunctive relief, and monetary damages, were not available under Indian Civil Rights Act; (2) district court lacked subject matter jurisdiction pursuant to supplemental jurisdiction statute; and (3) district court lacked original jurisdiction over claims. Affirmed.

73. *Krystal Energy Co. v. Navajo Nation*, No. 02-17047, ___ F.3d ___, 2004 WL 235453 (9th Cir. Feb. 10, 2004). In bankruptcy proceeding, company brought adversary action against Indian tribe. The district court dismissed, and company appealed. The appellate court held that Congress had abrogated tribe's sovereign immunity by statute. Reversed and remanded.

74. *Macomber v. United States*, No. 03-17129, 2004 WL 1398570 (9th Cir. Jun. 22, 2004). Not selected for publication in the Federal Reporter. Macomber appealed pro se the district court's dismissal of his action against the United States, President George Bush, Hawaii Governor Linda Lingle, and other state and local executive and judicial officials in his action alleging claims of conspiracy and racial discrimination against native Hawaiians, arising when Macomber was prosecuted in state court for a criminal operation upon Hawaii homelands. Macomber alleged that his arrest violated the sovereignty of the Kingdom of Hawaii and his rights as a Native Hawaiian living on Hawaiian home lands because the state has no authority on the home lands. The appellate court affirmed for the reasons stated by the district court in its order.

75. *Mashantucket Pequot Tribe v. Redican*, No. CIV.A.3:02-CV-1828, ___ F. Supp. ___, 2004 WL 551239 (D. Conn. Mar. 18, 2004). The plaintiff, the Mashantucket Pequot Tribe brought a trademark action against the defendant, Redican, Jr. d/b/a CBNO FOXWOOD.COM ("Redican"), alleging various violations of federal and state trademark law, including the Anticybersquatting Consumer Privacy Act ("ACPA"), *see* 15 U.S.C. §§ 1114, 1125, and of the Connecticut Unfair Trade Practices Act, *see* Connecticut General Statutes § 42-110a *et seq.* The Tribe's claims were based on its allegations that Redican registered the domain names FOXWOOD.ORG and FOXWOOD.COM, among others; operated a website using the latter domain name which offered advertisements and enabled website users to access the websites of on-line casinos and marketers merely by clicking on an icon; and ultimately made unsuccessful efforts to sell his domain name registrations to the Tribe. Redican moved to dismiss the complaint, claiming that the court lacked personal jurisdiction over him. The court concluded that it can assert personal jurisdiction over Redican and denied the motion.

76. *Narragansett Indian Tribe of Rhode Island v. Banfield*, C.A. No. 02-524S, ___ F. Supp. 2d ___, 2003 WL 22725538 (D.R.I. Nov. 19, 2003). Indian tribe brought action against members of Indian housing authority, seeking to enjoin enforcement of discovery order by superior court which, in action by Chief Sachem for libel and slander, granted motion by housing authority members to compel answers against Sachem Chief regarding tribal documents. Members moved to dismiss. The district court held that: (1) Rooker-Feldman doctrine foreclosed district court jurisdiction, and (2) motion to amend complaint to include Rhode Island Superior Court justices as defendants was futile. Defendants' motion granted.

77. *Navajo Nation v. Peabody Holding Company, Inc.*, No. 02-7083, 2003 WL 21000930 (D.C. Cir. Apr. 23, 2003). Not selected for publication in the Federal Reporter. The complaint in this case alleged that appellants, through a pattern of wrongdoing, violated the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.*, the federal law of Indian trusts, and various tort and contract doctrines, for which appellees sought treble damages. Appellants asserted that, because the alleged wrongdoing related to appellants' behavior leading to the establishment of royalty rates under coal leases between the parties, the disputes now at

78. *Peabody Coal Co. v. Navajo Nation*, No. 03-15272, ___ F.3d ___, 2004 WL 1326277 (9th Cir. Jun. 15, 2004). Lessee of coal mining rights brought action against Indian tribe, seeking enforcement of arbitration settlement agreement setting royalty rates. The district court for the dismissed for lack of subject matter jurisdiction, and company appealed. The appellate court held that court lack federal question jurisdiction. Affirmed.

79. *Shenandoah v. Halbritter*, No. 03-7862, ___ F.3d ___, 2004 WL 692170 (2d Cir. Apr. 2, 2004). Residents of Indian reservation brought action seeking habeas corpus relief under Indian Civil Rights Act (“ICRA”), alleging that tribe's housing ordinance was used to retaliate against the residents for their resistance against tribal leadership. The district court dismissed and residents appealed. The appellate court held that (1) tribe's enforcement of housing ordinance did not constitute a sufficiently severe restraint on the residents' liberty to invoke federal court's habeas corpus jurisdiction, and (2) housing ordinance was not a bill of attainder. Affirmed.

80. *Steffler v. Cow Creek Band of Umpqua Tribe of Indians*, No. 03-35138, 2004 WL 830080 (9th Cir. Apr. 12, 2004). Not selected for publication in the Federal Reporter. Steffler appealed pro se from the district court's judgment dismissing his 25 U.S.C. § 1303 petition for lack of jurisdiction. Steffler contended that the district court erred by dismissing his petition for lack of jurisdiction because the Cow Creek Band Board of Directors unlawfully caused him to be subjected to Oregon state criminal proceedings. The appellate court held that a person must be detained in some way by tribal authority to invoke subject matter jurisdiction under 25 U.S.C. § 1303. Because Steffler was detained only by Oregon state authorities, and because the record does not reveal that the tribe acted in any way to cause the detention, we conclude that the district court did not err in dismissing Steffler's petition for lack of jurisdiction. Affirmed.

81. *Taylor v. Bureau of Indian Affairs*, No. 03 CV 1819-LAB BLM, ___ F. Supp. 2d ___, 2004 WL 1632835 (S.D. Cal. Jul. 9, 2004). Plaintiffs brought this action pursuant to the Administrative Procedures Act (“APA”), Title 5, U.S.C. § 702 *et seq.* in response to the BIA’s Written Notice of Intent to Impound Plaintiffs’ cattle. Plaintiffs’ cattle were allegedly grazing on land belonging to the Los Coyotes Band of Indians (the “Band”). Plaintiffs sought to set aside the BIA’s determination to impound their cattle, and to enjoin the BIA from taking further action with respect to the Impound Notice. BIA brought a motion to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) and (7) for failure to state a claim upon which relief can be granted and for failure to join a party under Rule 19 respectively. The Court found that Plaintiffs failed to join a party indispensable to a large part of their claims, and failed to state a cause of action pursuant to the Indian Civil Rights Act and for a Fifth Amendment due process violation. Accordingly, it GRANTED the BIA’s motion to dismiss, and

82. *United States v. Bird*, No. 02-30246/82 (9th Cir. Sept. 8, 2003). Federal courts have subject matter jurisdiction over crimes enumerated in 18 U.S.C. § 1153, that are (1) committed by an Indian, (2) on an Indian reservation, (3) against a person or property of any person, regardless of that person's race. Interlocutory appeal dismissed.

83. *United States v. M.C.*, No. CR-02-219MV, ___ F. Supp. 2d ___, 2004 WL 635148 (D.N.M. Mar. 24, 2004). Juvenile defendant filed motion to dismiss, for lack of federal jurisdiction, an indictment charging him with a murder committed at an Indian school located on land administered by Bureau of Indian Affairs (BIA). The district court held that land on which school was located did not constitute land set aside by the federal government for the use of Indians as Indian land, and therefore was not a dependent Indian community. Motion granted.

84. *Wade v. Blue*, No. 03-2245, ___ F.3d ___, 2004 WL 1161943 (4th Cir. May 26, 2004). Individual members of Indian tribe brought action alleging that tribal leadership was acting improperly in its control over the tribe's assets and affairs. The district court denied defendants' motion to dismiss. The appellate court held that absent establishment of a tribal court, all civil actions involving internal matters of Indian tribe were required to be brought in South Carolina courts. Reversed and remanded with instructions.

L. SOVEREIGNTY, TRIBAL INHERENT

85. *Greene v. McCaleb*, No. 02-17054, 2003 WL 1900726 (9th Cir. Apr. 16, 2003). Not selected for publication in the Federal Reporter. Greene appealed the district court's judgment dismissing his action alleging that the BIA wrongfully failed to intervene when the Choctaw Nation of Oklahoma denied Greene tribal membership. The appellate court found that the district court properly dismissed Greene's action because only the Choctaw Nation may grant him tribal membership. The appellate court affirmed.

86. *Medicine Blanket v. Rosebud Sioux Tribal Police Dep't*, No. 03-3175 (8th Cir. Mar. 24, 2004). (unpublished). Plaintiff appeals from dismissal of his civil rights action arising out of his arrest upon the Rosebud Sioux Reservation. Grant of summary judgment to tribal officers was proper where claims challenging conduct of tribal officers on reservation are the subject of ongoing litigation in the tribal court system. Jurisdiction to resolve internal tribal disputes and interpret tribal constitutions lies with Indian tribes.

87. *Prairie Band of Potawatomi Indians v. Wagnon*, No. 99-4136-JAR (E.D. Kan. Aug. 15, 2003). Indian tribe requested order requiring the State to grant recognition to motor vehicle registrations and titles issued by the Prairie Band of Potawatomi Indians. The district court entered a preliminary injunction which was affirmed by the Tenth Circuit Court of Appeals. Plaintiff's motion for summary judgment is granted and defendants are permanently enjoined from application and enforcement of the Kansas motor and registration and titling laws against the plaintiff and any persons who operate or own a vehicle properly registered and titled under tribal law.

88. *Smith v. Salish Kootenai College*, No. 03-35306, ___ F.3d ___, 2004 WL 1753362 (9th Cir. Aug. 6, 2004). In a dispute, arising out of a traffic accident on a public highway on an Indian reservation, in which plaintiff, a non-member of the tribe who was a student at a college on the reservation, brought action alleging negligence and spoliation of evidence, a jury in the tribal court found for the college. Student brought action in federal court, alleging that the tribal court lacked jurisdiction over his claim. The district court dismissed. Student appealed. The appellate court held that tribal court lacked jurisdiction. Reversed and remanded.

89. *United States v. Archambault*, No. 02-2411, 2004 WL 1058069 (8th Cir. May 12, 2004). Not selected for publication in the Federal Reporter. Archambault appealed the district court's denial of his motion to dismiss the indictment against him, contending nonmember Indians cannot be tried in both tribal and federal court for the same offense conduct without violating the Double Jeopardy Clause. Archambault also appealed the district court's order quashing his subpoena of a tribal treasurer, who Archambault posits would present evidence of the financial relationship between the tribe and the federal government, in support of his claim the tribe's authority to prosecute nonmember Indians was delegated rather than inherent. Because the appellate court concluded that both of Archambault's contentions are controlled and precluded by the Supreme Court's recent decision in *United States v. Lara*, 124 S. Ct. 1628, 1639, (2004) (holding tribes have inherent, rather than delegated, power to prosecute nonmember Indians and thus prosecutions brought by a tribe and the federal government for same offense conduct are brought by different sovereigns and do not violate the Double Jeopardy Clause), it affirmed the district court decision.

M. TAX

90. *Ahmaogak v. Commissioner of Internal Revenue*, No. 10849-01, 2003 WL 21701173 (U.S. Tax Ct. Jul. 23, 2003). Taxpayers petitioned for review of IRS' denial of their request to abate interest. The Tax Court, held that taxpayer's liability resulted from their failure to pay their tax liability when due. There were no dilatory or erroneous acts by IRS employee in performing ministerial act, as would preclude abatement of interest, since review of history of examination of taxpayers' income tax return in Appeals officer's chronology of events showed nothing out of ordinary in either sequence of events or passage of time from event to event. Decision for IRS.

91. *Chippewa Trading Co. v. Cox*, No. 03-1445, ___ F.3d ___, 2004 WL 828087 (6th Cir. Apr. 19, 2004). Indian corporation brought § 1983 action, challenging constitutionality of Michigan's Tobacco Products Tax Act ("TPTA"). The district court dismissed, and corporation appealed. The appellate court held that corporation had adequate state court remedy by which to pursue its federal constitutional challenges, and thus federal abstention was warranted. Affirmed.

92. *Coeur d'Alene Tribe of Idaho v. Hammond*, No. 02-35965 (9th Cir. Aug. 19, 2004). Idaho officials appealed order enjoining them from collecting the motor fuels tax on fuel delivered by non-tribal distributors to tribally-owned gas stations for sale on Indian reservations. After the Supreme Court of Idaho ruled in 2001 that the incidence of the tax fell impermissibly on Indian tribes, Idaho legislature amended the tax law to state that the incidence of the tax falls on non-tribal distributors. However, because the relevant operative provisions of the fuel tax that

93. *Narragansett Indian Tribe of Rhode Island v. Rhode Island*, No. C.A. 03-296S, ___ F. Supp. ___, 2003 WL 23018759 (D.R.I. Dec. 29, 2003). Narragansett Indian Tribe of Rhode Island brought action for declaratory judgment against state of Rhode Island, seeking declaratory judgment that State could not enforce its cigarette sales and excise tax scheme against Tribe with respect to smoke shop located on Tribe's Settlement Lands. State brought action in state court against Tribe, seeking declaratory judgment that Tribe's failure to comply with state excise, retail, and sales taxes was unlawful. Tribe removed State's action to federal court, and actions were consolidated. On cross-motions for summary judgment, the district court held that: (1) district court lacked jurisdiction over state's action; (2) legal incidence of cigarette tax scheme fell on consumers, and, thus, State could not be barred from enforcing tax by virtue of Tribe's sovereign status; and (3) state did not violate federal law or Tribe's sovereign rights by executing search warrant on Settlement Lands. Dismissed and remanded in part; State's motion granted in part.

94. *Oneida Indian Nation of New York v. City of Sherrill*, No. 01-7795, 337 F.3d 139 (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. Certiorari granted ___ U.S. ___ (Jun. 28, 2004).

95. *Prairie Band Potawatomi Nation v. Richards*, No. 99-4071-JAR, 2003 WL 2156881 (D. Kan. Jul. 2, 2003). The Tribe brought suit seeking injunctive and declaratory relief, asking the Court to issue an order prohibiting the State from collecting motor fuel tax from fuel distributors who deliver fuel to the Nation Station. The Tribe claimed that the Indian Commerce Clause, the Tribe's sovereign right to self-government and self-determination, the Act for Admission of Kansas, or other federal law prohibited imposition of the Kansas fuel tax laws on distributors distributing fuel to the Tribe. The defendant moved for summary judgment and its motion was granted by the court. This matter was before the court on Plaintiff's Motion to Reconsider and Alter Judgment brought pursuant to Fed. R. Civ. P. 59(e). The court denied the Motion.

96. *Prairie Band Potawatomi Nation v. Richards*, No. 03-3218, ___ F.3d ___, 2004 WL 1790008 (10th Cir. Aug. 11, 2004). Indian tribe brought suit for declaratory and injunctive relief, challenging state's imposition of tax on motor fuel supplied to gas station operated by tribe on reservation property by non-Indian distributor. The district court granted summary judgment dismissing action. Tribe appealed. The appellate court held that tax was incompatible with, and outweighed by, strong federal and tribal interests against tax, and thus was preempted by federal law. Reversed.

97. *Reservation Telephone Cooperative v. Henry*, Nos. A4-02-121, A4-02-126, ___ F. Supp. 2d ___, 2003 WL 22015786 (D.N.D. Aug. 26, 2003). The Plaintiffs commenced an action against the Three Affiliated Tribes and the Tax Director for injunctive and declaratory relief alleging that a possessory interest tax imposed by the Three Affiliated Tribes cannot be assessed against rights-of-way and telephone lines granted and used by the Cooperatives throughout the Fort Berthold Indian Reservation. The district court granted plaintiff's motions for summary judgment.

98. *State of South Dakota v. Mineta*, No. CIV. 02-3034, ___ F. Supp. 2d ___, 2003 WL 21999399 (D.S.D. Aug. 21, 2003). State brought action against Secretary of Transportation, seeking declaration that the Secretary, who assertedly had taken final action to require the state to require highway contractors to pay, and charge to the state, occupational taxes levied by Indian tribes in connection with construction projects on state highways which traverse Indian reservations, had no such authority, and that the Secretary could not withhold federal highway funds because of state action to not honor and reimburse highway contractors for such tribal occupational taxes. On the Secretary's motion to dismiss, the district court held that there was no final agency action and the state had suffered no injury, and thus, the action was not ripe for review. Motion granted.

99. *Warbelow's Air Ventures, Inc. v. Commissioner of Internal Revenue*, No. 02-73328, 2003 WL 22417080 (9th Cir. Oct. 22, 2003). Not selected for publication in the Federal Reporter. Taxpayer petitioned for redetermination of deficiencies arising from denial of Indian employment credit ("IEC"). The Tax Court, 2002 WL 1396736, decided in favor of IRS. Taxpayer appealed. The appellate court held that in statute permitting tax credit for wages paid to Indian tribal members, phrase "within an Indian reservation" referred to land on the village or regional corporation lands. Affirmed.

100. *Winnebago Tribe of Nebraska v. Kline*, No. 02-4070-JTM, ___ F. Supp. 2d ___, 2004 WL 73284 (D. Kan. Jan. 15, 2004). Indian tribes challenged state's right to collect motor vehicle fuel taxes from tribally-operated businesses. State moved to dismiss. The district court held that: (1) tribe was not "person" who could sue under § 1983; (2) Eleventh Amendment did not bar suit; (3) Tax Injunction Act did not bar tribes' suit, but did bar claims by individual tribal members; (4) principles of comity did not warrant dismissal of suit; (5) abstention was not warranted; (6) complaint stated sovereign immunity claim; and (7) suit was not barred by Hayden-Cartwright Act. Motion granted in part and denied in part.

N. TRUST BREACH AND CLAIMS

101. *Benally v. U.S.*, No. CIV01-2542-PHX-MHM, ___ F. Supp. 2d ___, 2003 WL 21513097 (D. Ariz. Jun. 12, 2003). Patient brought action against the United States for medical malpractice under the Federal Tort Claims Act alleging an Indian Health Service employee left a towel inside her after a Cesarean section. The United States brought a motion to permit it to contact patient's treating physician *ex parte*. The district court held that: (1) Arizona law dictated the existence and scope of any physician-patient privilege, and (2) United States was prohibited from interviewing patient's treating physician *ex parte*. Motion denied.

102. *Cobell v. Norton*, No. CIV.A.96-1285(RCL), __ F.Supp. 2d __, 2003 WL 22211405 (D.D.C. Sept. 25, 2003). Beneficiaries of Individual Indian Money (“IIM”) trust accounts brought class action suit against Secretary of the Interior and other federal officials, alleging breach of fiduciary duty in management of accounts. Following affirmance of holding that officials breached their fiduciary duties, the district court found Secretary in contempt. The appellate court vacated and remanded. On remand, the district court, held that: (1) court had remedial authority to enter structural injunction; (2) Interior Department was obligated to account for all fund assets deposited or invested since commencement of allotment process in 1887; (3) structural injunction in order to obtain such accounting was warranted; and, in separate opinion, that (4) traditional common-law trustee duties governed Department's administration of IIM trust; (5) Department had to administer IIM trust in compliance with applicable tribal law and ordinance; and (6) Department's plan to correct deficiencies in its administration of IIM trust had, at minimum, to ensure that its title, leasing, and accounting systems were integrated and functional. Ordered accordingly.

103. *Cobell v. Norton*, No. CIV.A.96-1285(RCL), __ F. Supp. 2d __, 2004 WL 515460 (D.D.C. Mar. 15, 2004). Following issuance, in beneficiaries' action against Secretary of Interior for mismanagement of Individual Indian Money (“IIM”) trust accounts, of preliminary injunction, requiring Department of Interior to disconnect computers providing access to trust data from Internet pending security determination, except those systems impacting life or property and those which DOI certified did not house or access trust data or were secure from Internet access by unauthorized users, 274 F.Supp.2d 111, DOI filed certifications attesting to security of systems in which trust data resided or to absence of such data on others. In evaluating the certifications, the district court held that: (1) certifications were facially and substantially inadequate, as well as internally inconsistent; (2) DOI's proposal for approving future reconnection of computers and for monitoring systems that were still connected to Internet was inadequate; and (3) modified preliminary injunction, requiring agencies of DOI to disconnect all computer systems from Internet, regardless of whether system housed or provided access to trust data, except those essential for protection against fires or other threats to life or property, was warranted.

104. *Cobell v. Norton*, No. CIV.A.96-1285(RCL), __ F. Supp. 2d __, 2004 WL 515470, (D.D.C. Mar. 15, 2004). Beneficiaries of individual Indian money (“IIM”) trust accounts brought action against Secretary of Interior, Secretary of Treasury and other trustees seeking declaratory and injunctive relief from alleged mismanagement of trust accounts under Indian Trust Fund Management Reform Act. A preliminary injunction was issued, 274 F.Supp.2d 111, requiring the Department of Interior to disconnect computers providing access to trust data from the Internet pending a security determination. The district court, entering a subsequent preliminary injunction that superseded and replaced the previous preliminary injunction, held that: (1) all Information Technology Systems within the custody or control of Department of the Interior and its employees, agents, and contractors, that housed or accessed individual Indian trust data and were currently disconnected from the Internet were required to remain disconnected from the Internet and could not be reconnected until court order was issued approving reconnection; (2) all Information Technology Systems essential for protection against fires or other threats to life or property would remain connected to the Internet, subject to requirement that Interior provide sworn declarations identifying every system that remained connected and setting forth reasons it believed such system was essential for protection

105. *Cobell v. Norton*, No. CIV.A.96-1285(RCL), ___ F. Supp. 2d ___, 2004 WL 515488 (D.D.C. Mar. 15, 2004). Beneficiaries of individual Indian money (“IIM”) trust accounts brought action against Secretary of Interior, Secretary of Treasury and other trustees seeking declaratory and injunctive relief for alleged breach of trust under Indian Trust Fund Management Reform Act. Secretary of Interior moved for a protective order regarding beneficiaries' notice of deposition of former chief appraiser for Bureau of Indian Affairs (“BIA”) and request for production of documents. Beneficiaries moved to compel deposition and production of documents. The district court held that: (1) beneficiaries were entitled to depose BIA former chief appraiser, but (2) beneficiaries were not entitled to compel production of appraisal records and all documents which directly or indirectly related to material regarding appraisal of individual Indian allotted land to evaluate management of trust assets. Motions granted in part and denied in part.

106. *Cobell v. Norton*, No. CIV.A.96-1285(RCL), ___ F. Supp. 2d ___, 2004 WL 515491 (D.D.C. Mar. 15, 2004). After special master, in action alleging that Secretaries of the Interior and Treasury breached their fiduciary duties by mismanaging Individual Indian Money (“IIM”) trust accounts, issued interim report, concluding that Secretary of Interior had filed false and misleading quarterly status report for accounts it managed with court and beneficiaries, in violation of court order, 91 F.Supp.2d 1, Secretary moved to disqualify special master from participation in case. The district court held that: (1) disqualification of special master was not warranted, and (2) Secretary waived its right to seek disqualification of special master, on grounds that special master's impartiality was questionable because he had retained services of former contractor for Department of Interior to assist with his investigation. Motion denied.

107. *Cobell v. Norton*, No. 03-5262, 04-5084, 2004 WL 758956 (D.C. Cir. Apr. 7, 2004). Not selected for publication in the Federal Reporter. Consolidated with 04-5084. Upon consideration of the emergency motion for stay pending appeal filed in No. 04-5084; the opposition thereto, and motion to vacate the administrative stay issued on March 24, 2004; the reply to the opposition to the motion for stay pending appeal, and opposition to the motion to vacate the administrative stay; the reply to the opposition to the motion to vacate the administrative stay; the motion to exceed word limits for appellees' brief; the response thereto; and the reply, it is ORDERED that the administrative stay be dissolved, that the motion for stay pending appeal be granted, and that the district court's preliminary injunction issued on March 15, 2004 be stayed to the extent that the injunction requires disconnection from the internet of "Information Technology Systems" that were connected as of that date. Appellants have made a substantial case on the merits, and the remaining stay factors, particularly the irreparable harm to the appellants if a stay is not granted, strongly favor the grant of a stay. It is FURTHER ORDERED that the motion to vacate the administrative stay be dismissed as moot. It is FURTHER ORDERED that the motion to exceed word limits for appellees' brief be denied.

108. *Cobell v. Norton*, No. CIV.A.96-1285(RCL), ___ F. Supp. 2d ___, 2004 WL 1194649, (D.C. Cir. May 27, 2004). In action by beneficiaries of Individual Indian Money (“IIM”) trust accounts, alleging breach of fiduciary duties through mismanagement of accounts by Secretaries of the Interior and Treasury, plaintiffs moved for attorneys' fees and costs. The district court held that: (1) request for attorney's fees and related expenses, arising out of second contempt trial, would be denied; (2) request for attorney's fees, as sanction for litigation misconduct, would be denied; (3) award of attorney's fees and costs was warranted insofar as it pertained to fees and costs incurred in phase one trial; (4) no award of attorney's fees and expenses was warranted insofar as requested award pertained to fees and expenses incurred in prosecuting phase 1.5 trial; and (5) bill of costs would be denied. Ordered accordingly.

109. *Confederated Tribes of Warm Springs Reservation of Oregon v. United States*, No. 02 5167, 2004 WL 1254557 (Fed. Cir. June 8, 2004). Not selected for publication in the Federal Reporter. This case centers on an improper federal government sale of timber owned by the Confederated Tribes of the Warm Springs Reservation of Oregon (“the Tribes”) in 1990. The original trial in this case took place before the United States Court of Federal Claims seven years ago, and the first appeal in this case was decided three years ago. In *The Confederated Tribes of the Warm Springs Reservation of Oregon v. U.S.*, 248 F.3d 1365 (Fed. Cir. 2001) the appellate court vacated a Court of Federal Claims determination that the Tribes could not receive a monetary judgment from the government based on the government’s alleged mismanagement of the Tribes’ timber. Noting that trust law imposed fiduciary obligations on the government to manage the Tribes’ timber in the Tribes’ best interests, the appellate court remanded the case for a determination of three issues: (1) the amount that the Tribes would have earned from the sale of the green timber that was improperly included in the blowdown sale; (2) the amount of timber, if any, that was harvested under the logging contract but is missing from the BIA records and did not result in payment to the Tribes; and (3) the amount of timber that was harvested in trespass, if any, and whether the BIA breached its duty to the Tribes by failing to prevent that trespass. On remand, the Court of Federal Claims made a determination of the above three issues and assessed the amount of damages owed by the government to the Tribes for the mismanagement of the Tribes’ timber resources to be \$13,805,607. The appellate court affirmed the Court of Federal Claims’ liability determinations and damage awards to the Tribes.

110. *Demery v. U.S. Dept. of Interior*, No. 03-1787, ___ F.3d ___, 2004 WL 224464 (8th Cir. Feb. 6, 2004). Husband brought action against United States Department of the Interior (“DOI”) under Federal Tort Claims Act (“FTCA”), for wrongful death of his wife who drowned allegedly as result of negligence of Bureau of Indian Affairs (“BIA”) in failing to properly mark and warn of dangers posed by lake water that was prevented from freezing through use of aeration system. The district court granted DOI's motion for summary judgment. Husband appealed. The appellate court held that: (1) decisions regarding maintenance of aeration system, whether warnings of open water would be posted, and method and manner of those warnings were discretionary; (2) decision to maintain aeration system was type of judgment that discretionary-function exception was designed to protect; and (3) decisions regarding manner and method of warning of open water were types of judgments that discretionary-function exception was designed to protect. Affirmed.

111. *Kaw Nation v. Springer*, No. 02-6169, ___ F. 3d ___, 2003 WL 22005982 (10th Cir. Aug. 25, 2003). Indian tribe sought damages from former tribal officials and other individuals who had allegedly misused federal housing assistance funds. The district court dismissed for lack of subject matter jurisdiction, and tribe appealed. The appellate court held that no private civil cause of action existed for violation of criminal statute proscribing such misuse. Affirmed.

112. *Kennard v. Comstock Resources, Inc.*, No. 03-8012, ___ F.3d ___, 2004 WL 723249 (10th Cir. Apr. 5, 2004). Relators brought qui tam False Claims Act (“FCA”) suit against oil and gas well operator, alleging fraudulent underpayment of royalties to Indian tribe. The district court dismissed for lack of subject matter jurisdiction, and relators appealed. The appellate court held that: (1) there had been prior public disclosure, but (2) relators were original source. Reversed and remanded.

113. *Navajo Nation v. United States*, No. 00-5086, ___ F.3d ___, . 2003 WL 22417227 (Fed. Cir. Oct. 24, 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 Federal Claims Court dismissed complaint. Nation appealed and the appellate court reversed. Certiorari was granted; Supreme Court, 123 S.Ct. 1079, reversed and remanded. On remand, the appellate court held that question whether Nation preserved, in the Court of Federal Claims, issue of whether a network of statutes and regulations, outside of the Indian Mineral Leasing Act of 1938, imposed judicially enforceable duties upon the United States in connection with the lease at issue should be determined in the first instance by the Court of Federal Claims. Remanded.

114. *Pueblo of Laguna v. U.S.*, No. 02-24 L, ___ Fed. Cl. ___, 2004 WL 542633 (Fed. Cl. Mar. 19, 2004). The Pueblo of Laguna tribe seeks an accounting and recovery for monetary loss and damages relating to the government's alleged mismanagement of the tribe's trust funds and other properties, including royalties from the exploitation of uranium ore reserves on the tribe's New Mexico reservation. The Pueblo requested that the court issue an order directing various government agencies to take steps to ensure the preservation and availability of documents, in various media, potentially relating to its claims against the government. Failure to do so, plaintiff contends, will result in the destruction or loss of relevant documentation, as evidenced by the government's mishandling of Indian records in cases pending before the U.S. District Court for the District of Columbia. For its part, defendant first argued that the court lacks jurisdiction to enter an order of the type requested by plaintiff. It also contended that the proposed order is unnecessary and would be overly burdensome, partly in light of existing record retention procedures at the government agencies most likely to be implicated by the tribe's claims. The court ordered (this is one of eight items ordered): “General Obligation to Preserve. During the pendency of this litigation or until further order of the court, defendant, its agencies, and its employees must take reasonable steps to preserve every document, data or tangible thing in its possession, custody or control, containing information that is relevant to, or may reasonably lead to the discovery of information relevant to, the subject matter involved in the pending litigation. Plaintiff is reminded that it also has a similar duty to preserve evidence relevant to this case.”

115. *Quarles v. U.S. ex rel. Bureau of Indian Affairs*, No. 03-5035, __ F.3d __, 2004 WL 1345114 (10th Cir. Jun. 16, 2004). Owner of land on Osage Indian reservation sued oil companies and federal government to recover for damage caused by waste water leaks from oil production. The district court dismissed for failure to exhaust administrative remedies, and owner appealed. The appellate court held that arbitration requirement in Osage Allotment Act applied only to claims "arising under" Act. Reversed and remanded.

116. *Shoshone Indian Tribe of Wind River Reservation, Wyoming v. United States*, Nos. 458-79 L, 459-79 L, __ Fed. Cl. __, 2003 WL 22790190, (Fed. Cl. Nov. 24, 2003). Indian tribes brought action against the United States for breach of fiduciary duty in the management and payment of royalties on oil and gas production on Indian lands. On defendant's motion in limine to exclude testimony and evidence regarding certain claims for breach of trust after 1988, the Court of Federal Claims, held that: (1) letter to the government in which Indian tribes expressed their intention not to seek damages for breach of fiduciary duty in the management and payment of royalties on oil production on Indian lands, with respect to certain periods and leases, was not an effective release of claims by trust beneficiaries; (2) letter did give rise to promissory estoppel; and (3) letter did not create basis for equitable estoppel. Motion denied.

117. *Shoshone Indian Tribe of Wind River Reservation v. United States*, Nos. 03-5036, 03-5037, __ F.3d __, 2004 WL 736687 (Fed. Cir. Apr. 7, 2004). Indian tribes brought action against the United States, alleging breach of trust in mismanaging the tribes' sand and gravel resources up to the point of collection and with respect to its handling of tribal funds post-collection. The Court of Federal Claims, 51 Fed. Cl. 60, denied government's motion to dismiss. Government appealed and tribes cross-appealed. The appellate court held that: (1) statute relating to tribes' remedies for mismanagement of trust funds expressly waived Government's sovereign immunity and deferred accrual of tribes' action; (2) allegation that Government mismanaged tribes' sand and gravel assets by failing to obtain the best possible market rates for the contracts failed to state a claim; but (3) allegation that Government mismanaged tribes' sand and gravel assets by failing to manage and timely collect proceeds from approved mining contracts sufficiently stated a claim; and (4) tribes were entitled to interest as part of their damages. Affirmed in part, reversed in part, and remanded.

118. *United States ex rel. Southern Ute Indian Tribe v. Hess*, No. 02-1212, __ F.3d __, 2003 WL 22664678 (10th Cir. Nov. 12, 2003). United States brought action on behalf of Southern Ute Tribe to determine ownership of gravel located on land acquired by landowners through exchange patent which reserved "all minerals" in trust for Tribe. On remand, 194 F.3d 1164, the district court held for United States. Landowners appealed. The appellate court held that exchange patent's reservation of "all minerals" for benefit of Indian tribe did not include gravel. Reversed and remanded.

O. MISCELLANEOUS

119. *Carroll v. Nakatani*, Nos. 02-15483, 02-15565, __ F.3d __, 2003 WL 22038774, (9th Cir. Sept. 2, 2003). Non-native Hawai'ians brought separate actions challenging provision of Hawai'i Constitution that created agencies providing special benefits to natives as a violation of the equal protection clause. The district court granted summary judgments for the state and

state defendants, and plaintiffs appealed. The appellate court held that plaintiffs lacked standing to bring suit. Affirmed.

120. *Crue v. Aiken*, Nos. 02-3627, 03-2281, 03-2951, __ F. 3d __, 2004 WL 1191710, 7th Cir. June 1, 2004). University students and faculty members, who wished to contact prospective student athletes to make them aware that university and its athletic program utilized a mascot they believed was degrading to Native Americans, brought civil rights action against chancellor of university, seeking declaratory judgment that chancellor's preclearance directive banning all speech directed toward prospective student athletes without prior permission violated their First Amendment rights. The district court granted partial summary judgment for plaintiffs. The appellate court held that: (1) action was not mooted by chancellor's resignation and retraction of preclearance directive; (2) free speech rights of university students and faculty were infringed by preclearance directive; (3) chancellor was not entitled to qualified immunity from liability for issuing preclearance directive; and (4) district court did not abuse its discretion by allowing petition for award of attorney fees to be filed one day late due to excusable neglect. Affirmed.

121. *Frank v. Forest County*, No. 02-2433, __ F.3d __, 2003 WL 21649662, (7th Cir. Jul. 15, 2003). This suit by an Indian tribe claimed that a county board of supervisors redistricted the county in a manner that violated both the equal protection clause and the Voting Rights Act. The district court granted summary judgment for the defendants and the tribe appealed. Affirmed.

122. *Oti Kaga, Inc. v. South Dakota Housing Development Authority*, No. 02-1673, __ F.3d __, 2003 WL 22118954 (8th Cir. Sept. 15, 2003). Non-profit housing corporation established and operated by Native Americans brought action against state housing authority and members of its board, alleging racial discrimination, in connection with rejection of its applications for tax credits and state funding. The district court granted summary judgment in favor of defendants. Non-profit corporation appealed. The appellate court held that: (1) corporation had Article III standing to assert discrimination action in connection with denial of application for tax credits; (2) corporation had prudential standing to assert racial discrimination claim, under the Fair Housing Act; (3) corporation failed to establish prima facie claim of disparate treatment based upon race, in connection with denial of funding; and (4) corporation's disparate impact claim was barred, under FHA. Affirmed.

123. *Pro-Football, Inc. v. Harjo*, No. CIV.A. 99-1385(CKK), __ F. Supp. __, 2003 WL 22246923 (D.D.C. Sept. 30, 2003). Before the court were cross motions for summary judgment in this long-running trademark cancellation case. At issue in this appeal is the decision of the Trademark and Appeal Board ("TTAB") to cancel six federal trademark registrations involving the professional football team, the Washington Redskins, because it found that the marks "may disparage" Native Americans or "bring them into contempt, or disrepute." The Court reviewed the parties' briefings, the Local Civil Rule 7.1(h) statements of undisputed material facts, and the oppositions to those statements as well as the entire record submitted, the relevant case law and statutory framework, and the transcript of the motions hearing, the Court concluded that the TTAB's decision must be reversed.

124. *United States v. Blaine County, Montana*, No. 02-35691, ___ F.3d ___, 2004 WL 737008 (9th Cir. Apr. 7, 2004). United States challenged county's at-large voting system for electing members to county commission as violative of Native American residents' rights under Voting Rights Act. The district court upheld constitutionality of statute and found that it was violated. County appealed. The appellate court held that: (1) vote dilution provision was constitutional exercise of Congress' powers under Fourteenth and Fifteenth Amendments, and (2) evidence supported finding that county's at-large voting system violated statute. Affirmed.

S:\ISYS\WL\WLMEMO\2004_Sep_DraftUpdate_01.doc
nmc:8/25/04