JUDICIAL UPDATE

2004 - 2005 CASE LAW

ON AMERICAN INDIANS

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August 2005

UNITED STATES SUPREME COURT

1. ***Cherokee Nation of Oklahoma v. Leavitt,*** No. 02-1472, 125 S. Ct. 1172 (U.S. Mar. 01, 2005). Indian tribes sued Secretary of Health and Human Services ("HHS") under Indian Self-Determination and Education Assistance Act, seeking to recover full contract support costs, i.e. reasonable administrative costs incurred by tribes pursuant to self-determination health services contracts that would not have been incurred by HHS' Indian Health Service. The district court granted summary judgment to HHS Secretary. The appellate court affirmed. In second action, tribe appealed contracting officer's denial of its claim for similar costs. The Department of Interior Board of Contract Appeals found in tribe's favor. The appellate court affirmed. Certiorari was granted to resolve conflict. The supreme court held that, where Congress had appropriated sufficient legally unrestricted funds to pay contracts in question, government could not avoid its contractual obligation to pay contract support costs on grounds of "insufficient appropriations. " Affirmed in part and reversed in part and remanded. Justice Scalia filed opinion concurring in part. The Chief Justice took no part in the decision of the cases.

2. ***City of Sherrill, New York v. Oneida Indian Nation of N.Y.,*** No. 03-855, 125 S. Ct. __, 2004 WL 1431959 (U.S. Mar. 29, 2005). A 1794 treaty recognized that the Oneida Reservation included lands in Sherrill and Madison Counties. During the 1880'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 Second Circuit Court of Appeals affirmed, concluding that property owned by the Tribe is Indian country. The Supreme Court reversed. The damages remedy upheld in Oneida II does not support declaratory and injunctive relief recognizing sovereign status. The doctrine of laches, which focuses on one side's inaction and the other's legitimate reliance, applies here to bar the reestablishment of Indian sovereign control after two centuries since the Oneidas last exercised regulatory control. Justice Stevens dissented.

3. ***Alaska v. United States,*** 125 S. Ct. 2137 (U.S. Jun. 6, 2005). State of Alaska filed action against the federal government to resolve dispute over title to certain submerged lands underlying waters located in Alaska. The Supreme Court appointed a special master who recommended a grant of summary judgment in favor of the federal government, and Alaska filed exceptions. The Supreme Court held that: (1) the waters were not historic inland waters; (2) waters did not qualify as inland waters under juridical bay theory; (3) federal government reserved the submerged lands underlying Glacier Bay and the remaining waters within the monument's boundaries, supporting federal government's claim; and (4) Alaska Statehood Act expressed Congressional intent to retain submerged lands underlying the waters of Glacier Bay National Park in Alaska as part of a federal reservation, rebutting the presumption that Alaska held title to those lands. Exceptions overruled. Justice Scalia filed an opinion concurring in part, and dissenting in part, in which Chief Justice Rehnquist, and Justice Thomas joined.

OTHER COURTS

A. ADMINISTRATIVE LAW

4. ***Alvarado v. Table Mountain Rancheria,*** No. C 05-00093 MHP, 2005 WL 1806368 (N.D. Cal. July 28, 2005). Plaintiffs, 35 individuals who claim Native American ancestry, filed an action against the Table Mountain Rancheria, Secretary of the Interior Gale Norton, the United States, and various members of the Table Mountain Rancheria Indian Tribe seeking to compel the Table Mountain Rancheria to recognize them as members and to provide them with the full benefits of tribal membership. Plaintiffs also prayed for damages arising from the denial of the accrued membership benefits for which they otherwise would have been eligible. Defendants moved to dismiss for lack of subject matter jurisdiction pursuant to FED. R. CIV. P. 12(b)(1). The court granted in part and denied in part defendants' motion to dismiss for lack of subject matter jurisdiction. Plaintiffs claims against the tribal defendants, the Watt plaintiffs, and the United States were DISMISSED WITH PREJUDICE. To the extent that defendants' motion to dismiss for lack of jurisdiction was denied, plaintiffs' remaining claims were DISMISSED WITHOUT PREJUDICE giving plaintiffs 30 days to amend their claims against the Secretary of the Interior for the purpose of satisfying the requirements of 5 U.S.C. § 704.

5. ***Carcieri v. Norton,*** No. 03-2647, 398 F.3d 22 (1st Cir. Feb. 9, 2005). State and town challenged Interior Department decision to accept 31-acre parcel of land into trust for benefit of Indian tribe. The district court granted summary judgment for Interior, and appeal was taken. The appellate court held that: (1) federally recognized tribe was entitled to benefits of Indian Reorganization Act, even if it was not recognized and under federal jurisdiction on date of Act's enactment; (2) Rhode Island Indian Claims Settlement Act did not impair tribe's ability to seek trust acquisition of lands that it acquired by purchase with non-settlement funds; and (3) Bureau of Indian Affairs' finding that parcel of land acquired by tribe qualified for trust acquisition was not arbitrary or capricious. Affirmed.

6. ***Citizens for Safety & Env't v. Wash. State Dept. of Transp.,*** No. 53116-6-I, 2004 WL 2651499 (Wash. Ct. App. Nov. 22, 2004). Citizens for Safety and Environment ("Citizens") sought to invalidate a permit issued by the Washington State Department of Transportation to the Muckleshoot Indian Tribe. The permit allows the Tribe to access its property and the White River Amphitheatre from State Route 164. In sum, the EIS traffic impact analysis was challenged, fully litigated, and found adequate by a federal court on the same grounds and utilizing the same standards applicable in state court under SEPA. The appellate court concluded that the doctrine of collateral estoppel bars Citizens' state claims. Because the collateral estoppel issue was dispositive, the appellate court did not address the remaining contentions of the parties.

7. ***Filesteel v. McConnel,*** No. 04-36111, 2005 WL 1843296 (9th Cir. Aug. 4, 2005). Not selected for publication in the Federal Reporter. Levi Enemy Boy appealed pro se the district court's order dismissing the action filed by Enemy Boy and Edward Filesteel, members of the Assiniboine and Gros Ventre Tribes of the Fort Belknap Indian Reservation, challenging the validity of a secretarial election, which amended the constitution and charter of the Fort

Belknap Indian Community. The action was brought before the district court under the Administrative Procedures Act ("APA"), 5 U.S.C. § 706 and the Indian Reorganization Act, 25 U.S.C. § 476. The appellate court review was governed by the APA, which provides that the appellate court may not set aside the decision of the agency unless "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). The appellate court found that Enemy Boy's showing was insufficient to establish that the challenged secretarial election was not conducted in accordance with the tribal constitution and applicable statutes and regulations. Affirmed

8. ***Kahawaiolaa v. Norton,*** No. 02-17239, __ F.3d __, 2004 WL 2389906 (9th Cir. Oct 27, 2004). Native Hawaiians or native Hawaiian groups as defined by the Hawaiian Homes Commission Act, brought suit against the Secretary of the Department of Interior ("DOI"), alleging that DOI regulations excluding native Hawaiians from tribal recognition process for Indian tribes violated equal protection. The district court granted defendant's motion to dismiss, and plaintiffs appealed. The appellate court held that: (1) political question doctrine did not preclude consideration of suit; (2) rational basis standard of review was applicable to plaintiffs' equal protection challenge; and (3) regulations did not violate equal protection. Affirmed.

9. ***Miami Tribe of Oklahoma v. United States,*** No. CIV.A.03-2220-DJW, __ F Supp. __, 2005 WL 1473983 (D. Kan. June 22, 2005). Indian tribe brought action under Administrative Procedures Act seeking judicial review of Department of Interior's Bureau of Indian Affairs' ("BIA") decision denying tribe member's application to gift portion of his interest in restricted land to tribe. The district court held that: (1) BIA's holding that there were no "special circumstances" warranting approval of transfer was arbitrary, and (2) denial of approval on ground that transfer would increase further fractionation of individually-owned Indian lands was arbitrary. Reversed.

10. ***Neighbors For Rational Dev., Inc. v. 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.

11. ***Sac & Fox Tribe of Miss. In Iowa Election Bd. v. Bureau of Indian Affairs,*** No. C 04-1-LRR, __ F. Supp. 2d __, 2005 WL 524592 (D. Iowa Mar. 2, 2005). Indian tribe's election board brought action against Bureau of Indian Affairs ("BIA"), objecting to BIA recognition of tribal council elected by dissident group. New election board appointed by recognized council moved to dismiss. The district court held that court lacked jurisdiction to resolve intra-tribal dispute requiring interpretation of tribal constitution. Motion granted.

12. ***Shawnee Tribe v. U.S.,*** No. 04-3256, __ F.3d __, 2005 WL 1023392 (10th Cir. May 3, 2005). The Sunflower Army Ammunition Plant ("Sunflower Property" or "Plant") is a

13. ***Tanadgusix Corp. v. Huber***, No. 02-36142, __ F.3d __, 2005 WL 913471 (9th Cir. Apr. 21, 2005). St. Paul village corporation, organized under Alaska Native Claims Settlement Act, brought action against United States alleging breach of federal surplus property agreement. The district court granted judgment for United States. Plaintiff appealed. The appellate court held that property reverted to United States. Affirmed.

B. ALASKA NATIVE CLAIMS SETTLEMENT ACT

C. CHILD WELFARE ("ICWA")

14. ***Doe v. Mann,*** No. 04-15477, 415 F.3d 1038 (9th Cir. July 19, 2005). Native American mother challenged state's authority to terminate her parental rights. The district court, 285 F.Supp.2d 1229, held for state, and mother appealed. The appellate court held that: (1) Rooker-Feldman doctrine did not bar federal review of state decision, and (2) tribe's jurisdiction over child dependency proceeding was not exclusive. Affirmed.

15. ***Fresno County Depart. of Children and Family Serv. v. Superior Court,*** No. F045698, 2004 WL 2099259 (Cal. Ct. App. Sept. 21, 2004). In dependency proceeding in which termination of parental rights was not disputed, Indian tribe, joined by county Department of Children and Family Services and children's mother, petitioned juvenile court to place two young half-siblings, one of whom was Indian child within meaning of Indian Child Welfare Act ("ICWA"), with an Indian family, but children's attorney objected. The Superior Court denied

petition, finding that substantial evidence supported finding of good cause to disregard ICWA preference for Indian family placement of the two children; and juvenile court did not exceed its authority by ordering department to explain any subsequent change in placement with Indian family, and ordered department to explain to court any subsequent change in children's current placement. Department filed petition for extraordinary writ. The appellate court held that: (1) ICWA did not restrict juvenile court, in making good cause determination, to considerations contained in federal guidelines and state rule of court; (2) good cause finding under ICWA was subject to substantial evidence standard of appellate review; (3) substantial evidence supported finding of good cause to disregard ICWA preference for placement of these two children; and (4) juvenile court did not exceed its authority by ordering department to explain any subsequent change in placement. Petition denied.

16. ***In re Fried***, No. 258432, 2005 WL 1225154 (Mich. Ct. App. May 24, 2005). Respondent appeals as of right the trial court's order terminating his parental rights to the minor child under MCL 712A.19b(3)(c)(i). The appellate court affirmed the trial court's decision not to apply the Indian Child Welfare Act of 1978 (ICWA), 25 USC 1901 *et seq.* because the ICWA does not apply to termination cases when the minor child is claimed to be an Indian child from an Indian tribe that is not recognized as eligible for services provided to Indians by the Secretary of the Interior. The appellate court also affirmed the trial court's finding of statutory grounds for termination of respondent's parental rights and its finding that termination was in the child's best interests.

17. ***In re the Adoption of B.G.J.***, No. 91,997, 111 P.3d 651 (Kan. Ct. App. (May 13, 2005). In adoption proceeding, the district court granted Indian tribe's motion to intervene, determined that Indian Child Welfare Act ("ICWA") applied to child's placement, determined that prospective adoptive parents had satisfied their burden of establishing good cause for deviation from ICWA's placement preferences, and granted prospective adoptive parents' adoption petition. Tribe appealed. The appellate court held that: (1) in a matter of first impression, it would apply abuse of discretion standard in reviewing trial court's finding that good cause existed to deviate from ICWA's placement preferences, and (2) good cause existed for deviation from ICWA's adoptive placement preferences. Affirmed.

18. ***In re the Interest of R.E.K.F.***, No. 72 /04-1864 & 05-0251, 2005 WL 1366449 (Iowa Jun. 10, 2005). A father appealed the termination of his parental rights to his daughter. He contended the state did not comply with the tribal notice provisions of the Iowa Indian Child Welfare Act. Because the state notified the wrong Indian tribe, the appellate court remanded for further proceedings.

19. ***In re Joshua S.,*** No. B170343, 2005 WL 1941324 (Cal. Ct. App. Aug. 15, 2005). Children appealed from order of the superior court terminating dependency jurisdiction after their indigent maternal grandmother with whom they lived on a Canadian Indian reservation was appointed their legal guardian. The appellate court, 131 Cal.Rptr.2d 656, reversed and remanded, finding that juvenile court abused its discretion by terminating jurisdiction without considering whether termination was in children's best interests. Following remand, the superior court, No. CK23643, again terminated jurisdiction. Children again appealed. The appellate court held that: (1) state funding for children was available, should placement be modified from

20. ***In re the Welfare of the Children of J.B. and G. A.-C., and T.F.,*** No. 2003AP634**,** 698 N.W.2d 160, (Minn. Ct. App. Mar. 30, 2005). Department of Children and Family Services ("DCFS") sought to terminate father's parental rights to Indian child in accordance with the Indian Child Welfare Act ("ICWA"). The district court terminated parental rights. Father appealed. The appellate court held that: (1) father was not permitted to unenroll child from mother's tribe under ICWA; (2) individual qualified as an expert under the ICWA; (3) evidence was sufficient to support finding that termination of parental rights was in child's best interest; (4) DCFS made active efforts to avoid breakup of Indian family; (5) trial court did not abuse discretion in bifurcating mother and father's proceedings; and (6) father's tribe received notice of proceeding. Affirmed.

21. ***In re A.N.,*** No. 04-364, 2005 WL 277909 (Mont. Feb. 1, 2005). The district court terminated father's parental rights. Father appealed. The supreme court held that: (1) efforts of state Department of Public Health and Human Services were sufficiently active to satisfy section of Indian Child Welfare Act ("ICWA") requiring that state show that it made active efforts to provide remedial services and rehabilitative programs designed to prevent breakup of Indian family; (2) state's ICWA expert witness was not required to meet personally with father or children; and (3) father was not entitled to six-month continuance of temporary legal custody. Affirmed.

22. ***In re Christopher W***, No. E035622, 2004 WL 2066857, (Cal. Ct. App. Sept. 15, 2004). Order terminating parents' parental rights to their one-year-old son was entered in the Superior Court. Parents appealed. The appellate court held that: (1) notice under the Indian Child Welfare Act ("ICWA") was not required, and (2)"parental relationship" exception to adoption as permanent plan did not apply. Affirmed.

23. ***In re Guardianship of J.C.D.*** No. 22998, 686 N.W.2d 647, (S.D. Aug. 25, 2004). Paternal grandparents petitioned for permanent guardianship of grandchild, and mother filed a motion to transfer jurisdiction to tribal court. The Circuit Court denied the motion. Mother appealed. The Supreme Court, held that: (1) the Indian Child Welfare Act ("ICWA") applied to proceeding in which paternal grandparents sought permanent guardianship of grandchild, and (2) good cause did not exist to prevent transfer of paternal grandparent's petition for permanent guardianship of Indian grandchild to tribal court. Reversed.

24. ***In re Kenneth M., et al.***, No. C046285, 19 Cal.Rptr.3d 752 (Cal. Ct. App. Oct. 15, 2004). After the Court of Appeal denied mother's writ petition challenging order denying her reunification services, mother's parental rights to two minor children were terminated in the Superior Court, Mother appealed. The appellate court held that: (1) mother was not entitled to reunification services even in absence of finding that she was perpetrator of physical abuse of one child, and (2) denying mother psychological evaluation was not abuse of discretion. Conditionally reversed and remanded with directions.

25. ***In re T.H.,*** Dkt. No. 100,822, 2005 WL 110344 (Okla. Ct. App. Jan. 20, 2005). State sought termination of mother's parental rights to three minor children. The district court

granted termination. Mother appealed. The appellate court held that: (1) mother failed to protect children from heinous and shocking abuse, thereby supporting the termination of her parental rights, and (2) immediate termination of mother's parental rights could be ordered, even though Indian Child Welfare Act required the offering of remedial services. Affirmed.

26. ***In the Interest of J.S.B., Jr., and Concerning J.S.B., Sr. and O.L.J.,*** No. 22907, 2005 WL 3053295 (S.D. Jan. 5, 2005). Following hearing on abuse and neglect proceedings, the Circuit Court terminated parental rights of both parents. Father appealed. The Supreme Court held that: (1) Adoption and Safe Families Act did not relieve Department of Social Services of any duty it held under Indian Child Welfare Act to provide active efforts to reunite child with his father, and (2) termination of father's parental rights was warranted. Affirmed.

27. ***In the Interest of M.H., L.U.H., W.H., Jr., L.S.H., and T.H., Concerning T.R.T., W.H., Sr., and M.M.,*** Nos. 23092, 23093. 2005 WL 23196, (S.D. Jan. 5, 2005). State sought to terminate the parental rights of father and mother, who were Native American, and the Indian tribe intervened, after receiving notification of the matter as required by ICWA. The Circuit Court, found that termination of parental rights was in the best interest of children. Mother, father, and tribe appealed. The Supreme Court held that attorney was not qualified as an expert under the ICWA to testify in termination proceeding. Reversed and remanded.

28. ***In the matter of Baby Boy L. v. Christopher Yancey***, No. 99,815, 2004 WL 2797052, (Okla. Dec. 7, 2004). Non-Indian mother sought termination of parental rights to Indian child and order of eligibility for adoption without Indian father's consent. The district court determined that the "existing Indian family exception" controlled the Indian child custody proceeding and the child was eligible for adoption without the consent of the father. The father appealed. The Court of Civil Appeals affirmed. Certiorari was granted. The Supreme Court held that: (1) the "existing Indian family exception" to application of Indian Child Welfare Act, if the proceeding does not involve the dissolution of an Indian family or the removal of custody from the Indian parent, is no longer viable, overruling *In the Matter of S.C.*, 833 P.2d 1249; *In the Matter of Adoption of Baby Boy D,* 742 P.2d 1059; *In the Matter of Adoption of D.M.J.*, 741 P.2d 1386, and (2) applying state and federal Indian Child Welfare Acts was constitutional. Court of Civil Appeals vacated; trial court reversed; cause remanded.

29. ***In the Matter of S.M.H. and In the Matter of L.M.H.,*** Nos. 91,519, 91,520, 103 P.3d 976 (Kan. Ct. App. Jan. 14, 2005). State filed petitions alleging that Native American children were children in need of care ("CINC"). A magistrate concluded that clear and convincing evidence supported determination that mother was unable to provide adequate care and control necessary for physical, mental, or emotional health of children. The district court affirmed the magistrate's ruling. Mother appealed. The appellate court held that: (1) substantial competent evidence supported finding that children were without care and control necessary for their physical, mental, or emotional health, as necessary to support conclusion that they were CINC; (2) trial court, in concluding that children were CINC, erred in failing to apply standards of proof set forth in Indian Child Welfare Act; and (3) error in failing to follow standard of proof set forth in ICWA in determining that Indian children were CINC was not harmless. Reversed.

30. ***Jonathon S. v. Tiffany S.***, No. E037183, 2005 WL 1111734 (Cal. Ct. App. May 11, 2005). Order terminating a mother's parental rights was entered in dependency

proceedings in the superior court and mother appealed. The appellate court held that: (1) mother had standing to contend that juvenile court erred by failing to ensure that notice was given in accordance with Indian Child Welfare Act (ICWA), and (2) appellate court had jurisdiction to reverse only the order terminating mother's parental rights, and not any earlier orders. Reversed and remanded.

31. ***State v. Nona M. (In re Brittany C.),*** Nos. A-04-820 through A-04-826, 2005 WL 627366 (Neb. Ct. App. Mar. 15, 2005). Numerous petitions were filed by Department of Health and Human Services alleging that mother's four children were neglected. Mother applied to enroll children in Indian tribe. Following children's enrollment in tribe, the tribe filed motions to intervene in these matters. Trial court and parties treated hearing on tribe's request to intervene as hearing on transfer of cases to tribal court. The county court denied request to transfer jurisdiction to tribe. Mother appealed. The appellate court held that: (1) orders denying mother's requests to transfer jurisdiction to tribal court were final, appealable orders, and (2) trial court's decision not to transfer jurisdiction over neglect petitions to tribal court was not abuse of discretion. Affirmed.

D. CONTRACTING

32. ***Allender v. Scott,*** No. CIV-04-0935 BB/RLP, 2005 WL 1805993 (D.N.M. Jan. 27, 2005). Non-Indian individual who was arrested by tribal police officer for refusing to give his Social Security number during traffic stop brought action in state court against, inter alia, tribal police officer and his supervisor, alleging negligent and intentional torts and violations of his civil rights. Following removal, officer and supervisor moved for certification as federal employees acting within scope of their employment at time of incident giving rise to arrestee's tort claims. The district court held that: (1) supervisor and officer were "requested" to assist in the enforcement of state law by the New Mexico State Police, for purposes of authority granted by section of the Indian Law Enforcement Reform Act which authorized federal employees to assist with enforcement of state law "when requested" by a state or local law enforcement official; (2) supervisor and officer acted as federal officers when they enforced state law pursuant to a cooperative agreement under cross-commissioning contract authorized by the Indian Self-Determination and Education Act; (3) supervisor and officer were acting within scope of their employment at time of incident giving rise to arrestee's tort claims; and (4) supervisor and officer were entitled to protections of the Federal Tort Claims Act.

33. ***Comanche Indian Tribe of Okla. v. 49, L.L.C.***, No. 02-8108, 2004 WL 2823323 (10th Cir. Dec. 9, 2004). Indian tribe brought breach of contract action against lessor of gaming machines that tribe offered for play at its casinos, which were located on tribal land. Lessor submitted demand for arbitration, and tribe moved to dismiss demand for arbitration. The district court stayed proceedings and compelled arbitration, and tribe appealed. The appellate court held that: (1) parties' contracts related to and affected interstate commerce, and thus came within ambit of the Federal Arbitration Act, and (2) District Court's order staying proceedings pending arbitration, rather than dismissing case, was not an appealable final decision. Appeal dismissed.

34. ***Hoopa Valley Indian Tribe v. Ryan***, No. 03-16940, __ F.3d __, 2005 WL 1593466 (9th Cir. July 08, 2005). In an effort to address ongoing declines in salmon and

steelhead populations in the Trinity River basin, the Bureau of Reclamation adopted a multifaceted restoration program. The Hoopa Valley Indian Tribe sought funding to implement many of the proposed restoration projects under the mandatory contracting provisions of the Indian Self-Determination and Education Assistance Act. After the Bureau refused to execute mandatory contracts for the Tribe's proposals, the Tribe brought suit. The district court dismissed, holding the projects were not for the benefit of Indians but benefited the general public, and were thus not subject to mandatory compacting. Affirmed.

35. Kaw Nation v. Norton, No. 04-1029. 405 F.3d 1317 (Fed. Cir. May 02, 2005). United States appealed decision of Department of Interior Board of Contract Appeals which nullified government's acceptance of Indian tribe's attempted retrocession of its tribal court system. The appellate court held that: (1) appeal was moot, and (2) vacatur of decision was warranted. Vacated.

36. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Kean-Argovitz Resorts,* No. 03-1267, __ F.3d __, 2004 WL 1969554 (6th Cir. Sept. 8, 2004). In November 1998, the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians ("Tribe") entered into two agreements with Kean-Argovitz Resorts and Kean-Argovitz Resorts, Michigan, L.L.C. (collectively "KAR") relating to the development and management of a proposed gaming facility in Michigan. Before the agreements had been approved by the Chairman of the National Indian Gaming Commission, the Tribe unilaterally terminated its relationship with KAR. The Tribe then filed this action in federal court, seeking both a declaration that the agreements are void and a permanent injunction to prevent KAR from attempting to enforce the arbitration clause contained in one of the agreements. KAR filed a counterclaim, seeking to compel the Tribe to submit to arbitration. The district court concluded that the agreements were void under federal law and granted summary judgment in favor of the Tribe. The appellate court vacated the judgment of the district court and remanded the case with instructions to refer the case to arbitration.

37. *Mentz v. U.S.,* No. A1-03-123, __ F. Supp. 2d __, 2005 WL 503732 (D.N.D. Mar. 4, 2005). Injured purchaser of snowmobile from instructor at tribally controlled school brought Federal Tort Claims Act suit, seeking damages. Government moved to dismiss. The district court held that instructor was not acting within scope of his employment at time of accident. Motion granted.

38. *NGV Gaming, LTD v. Upstream Point Molate, LLC*, No. C 04-3955-SC, 2005 WL 318646 (D. Cal. Jan. 31, 2005). Casino development group sued competitors for tortious interference with contract. Competitors moved to dismiss. The district court held that: (1) development agreement was valid; (2) group's damages were not too speculative to provide basis for recovery; and (3) claim was not preempted by federal law. Motion denied.

39. *United States v. Flaschberger,* No. 04-1845, 408 F.3d 941 (7th Cir. May 31, 2005). Defendant who prepared annual grant applications and certified at the end of each fiscal year compliance with conditions placed on the grants for two small vocational schools, the Lac Courte Orielles Ojibwa Community College and the College of Menominee Nation, ("Consortium"), was convicted in the district court of mail fraud and appealed. A 2001 audit revealed that the applications and certifications had been false: the Consortium overstated the

40. ***Woodruff v. Covington***, Nos. 02-7040, 02-7051, 2004 WL 2603640 (10th Cir. Nov. 17, 2004). Former patient brought action under Federal Tort Claims Act ("FTCA") against United States, two medical facilities, and physician, alleging defendants' negligence resulted in the surgical removal of his bladder. The district court (189 F.Supp.2d 1283) denied physician's motion to dismiss, and appeal was taken. The appellate court held that: (1) physician's notice of appeal of district court's denial of immunity was timely; (2) district court orders denying motions to dismiss on immunity grounds were immediately appealable under the collateral order doctrine; (3) physicians were not entitled to immunity as federal employees under the FTCA; and (4) congress did not expressly extend FTCA immunity to independent contracting physicians practicing at Indian health care facility. Affirmed.

E. EMPLOYMENT

41. ***Chayoon v. Sherlock***, No. 25450, 2005 WL 1473902 (Conn. App. Ct. June 28, 2005). Plaintiff Chayoon, appealed from the trial court's judgment dismissing his wrongful termination action against several defendants who were at all relevant times employed by the Mashantucket Pequot Gaming Enterprise at Foxwoods Resort Casino. On appeal, the plaintiff claimed that: (1) the court improperly granted defendants' motion to dismiss and (2) court's decision should be ''vacated'' and ''declared void'' because it was rendered more than 120 days following the short calendar oral argument. The appellate court affirmed the court's dismissal for lack of subject matter jurisdiction because the defendants are immune from suit.

42. ***E.E.O.C. v. Peabody Western Coal Co.,*** No. 02-17305, __ F.3d __, (9th Cir. Mar 10, 2005). Equal Employment Opportunity Commission ("EEOC") filed Title VII complaint against coal company, claiming it engaged in prohibited national origin discrimination by giving hiring preference to members of Navajo tribe over job applicants from other tribes. The district court granted summary judgment for company, and EEOC appealed. The appellate court held that: (1) it was feasible to join tribe as party, and (2) EEOC's claim did not present nonjusticiable political question. Reversed and remanded.

43. ***Prescott v. Little Six, Inc.,*** No. 03-3702, __ F. 3d __, 2004 WL 2360019 (8th Cir. Oct. 21, 2004). Former executive employees of Indian tribal casino brought action under Employee Retirement Income Security Act, seeking benefits under employee benefits plan. The district court denied casino's motion to dismiss and casino appealed. The appellate court held

44. ***Wright v. Colville Tribal Enterprise Corporation***, No. 53950, 2005 WL 1208715 (Wash. Ct. App. May 23, 2005). Wright sued his supervisor, Colville Tribal Enterprise Corporation ("CTSC"), and CTSC's parent corporation for racial discrimination and harassment, negligent supervision, and negligent infliction of emotional distress in state court. Respondents moved to dismiss for lack of subject matter jurisdiction. They alleged that Wright had entered into a consensual relationship with the Colville Tribe and that his claims would have a direct effect on the political integrity and the economic security of the Tribe. Respondents also claimed tribal sovereign immunity. The trial court granted the motion to dismiss. Because the alleged conduct occurred off the reservation, the appellate court found that the state court did have subject matter jurisdiction. It also found that, because CTSC is organized primarily for commercial purposes and its actions do not bind the Tribe, they do not enjoy tribal sovereign immunity. The appellate court reversed and remanded.

45. ***Yashenko v. Harrah's NC Casino Co., LLC,*** No. CIV.2:03 CV 226, 2005 WL 137183, (D.N.C. Jan. 20, 2005). Terminated casino employee sued casino management company for violation of Family and Medical Leave Act ("FMLA") and racial discrimination. Parties cross-moved for summary judgment. The district court held that: (1) company did not violate FMLA by failing to retain employee whose position had been eliminated while he was on protected leave; (2) company did not retaliate against employee; and (3) company could not be held liable under § 1981 for its use of tribal hiring preferences. Plaintiff's motion denied; defendant's motion granted.

F. ENVIRONMENTAL REGULATIONS

46. ***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.

47. ***Spirit of the Sage Council v. Norton,*** Nos. 03-5345, 04-5262, 04-5263, 04-5264, __ F.3d __, 2005 WL 1267753 (D.C. Cir. May 31, 2005). Native American and conservation groups brought action under Endangered Species Act challenging "no surprises" rule and "permit revocation" rule jointly promulgated by Fish and Wildlife Service ("FWS") and National Marine Fisheries Service ("NMFS"). The district court, 294 F.Supp.2d 67, ruled that FWS had not provided adequate opportunity for public to comment upon permit revocation rule, and enjoined Services from applying no surprises rule. Services appealed. The appellate court held that appeal was moot. Vacated and remanded.

G. FISHERIES, WATER, FERC, BOR

48. ***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.

49. ***Kennewick Public Hosp. Dist. v. Pollution Control Hearings Board,*** Nos. 22741-3-III, 22742-1-III, 22758-8-III, 2005 Wash. App. LEXIS 454 (Wash. Ct. App. Mar. 17, 2005). The Department of Ecology ("Ecology") approved five applications for surface water rights from the Columbia River. The Confederated Tribes of the Umatilla Indian Reservation, the Nez Perce Tribe, and the Yakama Nation appealed the approvals to the Pollution Control Hearings Board ("PCHB"). The PCHB reversed Ecology's approvals, finding it failed to adequately consult with the Indian tribes as required by WAC 173-531A-060 and WAC 173-563-020(4). The applicants, Kennewick Irrigation District, Mercer Ranches, and Kennewick Public Hospital District, as well as Ecology, appealed. The appellate court affirmed.

50. ***Klamath Tribes of Oregon v. Pacificorp,*** No. Civ. 04-644-CO, 2005 WL 1661821 (D. Or. July 13, 2005). Plaintiffs filed suit alleging trespass and violations of their fishing rights under the Treaty between the United States of America and the Klamath and Moadoc Tribes and Yahooskin Bank of Snake Indians, Oct. 14, 1864 (Treaty of 1864), 16 Stat. 707. *See United States v. Adair*, 723 F.2d 1394, 1398 (9th Cir.1983). Defendant moved for summary judgment, arguing that the termination of the Klamath Tribe, effective 1961, rendered any claim asserted by plaintiffs subject to the Oregon statutes of limitations, and that the limitations period regarding plaintiffs' treaty and trespass claims against defendant or its predecessors expired prior to the restoration of the Tribe's status in 1986. The Magistrate Judge issued Findings and Recommendation and recommended that defendants' motion for summary judgment be granted finding that the Klamath Termination Act "presents clear congressional intent to redefine the relationship between the Tribe [and the federal government] [and to] remove the special protections previously afforded the Tribe, and this requires the application of the state statute of limitations to the Tribe's claims." The district court adopted the Magistrate's Recommendation ruling that Defendant's Motion for Summary Judgment was GRANTED, and plaintiffs' motion for partial summary judgment was DENIED as moot.

51. ***Midwater Trawlers v. Dep't of Commerce,*** No. 03-35398, (9th Cir. Dec. 28, 2004). Midwater Trawlers Cooperative, West Coast Seafood Processors, and the Fishermen's Marketing Association (collectively "Midwater") challenged the Secretary of Commerce's decision to allocate a portion of the U.S. harvest of Pacific whiting to the Makah Indian Tribe ("Makah Tribe"). Appellants argued that the allocation runs afoul Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson-Stevens Act"), 16 U.S.C. § 1801 *et seq*., and the Administrative Procedure Act ("APA"). In an earlier appeal in this case, the appellate court concluded that the National Marine Fisheries Service ("Fisheries Service") had failed to explain

52. ***National Wildlife Fed'n (Nez Perce Tribe of Idaho, Plaintiff-Intervenor-Appellant) v. U.S. Army Corps of Engineers***, Nos. 03-35235, 03-35237, __ F.3d __, 2004 WL 2211639 (9th Cir. Oct. 4, 2004). Environmental groups brought suit claiming that issuance by Army Corps of Engineers of Record of Consultation and Statement of Decision ("ROD") regarding Corps' operation of four dams on lower Snake River in state of Washington was arbitrary and capricious and contrary to law. The district court granted summary judgment to Corps. Environmental groups appealed. The appellate court held that: (1) Corps was not arbitrary and capricious in concluding that there were no further steps it could take to reduce temperature exceedences, and (2) Corps was not arbitrary and capricious in concluding that its operation of the dams did not cause water temperature exceedences. Affirmed.

53. ***Pacific Coast Fed'n of Fishermens' Ass'n. and Yurok Tribe v. Bureau of Reclamation***, No. C 02-02006 SBA (N.D. Cal. Mar. 8, 2005). The Yurok Indian Tribe intervened as a plaintiff in a case concerning federal non-compliance with the Endangered Species Act with respect to the Klamath River. The Yurok Tribe alleged that Reclamation violated federally reserved fishing rights and breached its trust obligation to the Tribe by failing to provide adequate levels of water in 2002 which contributed to the largest adult salmon die-off on record. The district court dismissed the case as moot and because it asserted a claim under APA § 706(2) that falls outside the court's jurisdiction. While common law trust duties may inform the interpretation of statutory mandates, they do not provide an independent basis for judicial action.

54. ***San Carlos Apache Tribe v. U.S.,*** No. 03-16874, __ F.3. __, 2005 WL 1869138, (9th Cir. Aug. 9, 2005). San Carlos Apache Tribe sued United States, seeking to enjoin release of water from San Carlos Reservoir, and asserting claims under, inter alia, National Historic Preservation Act ("NHPA"). The district court, 272 F.Supp.2d 860, granted government's summary judgment motion, and Tribe appealed. As a matter of first impression, the appellate court held that no private right of action exists under NHPA's provision requiring federal agency to "take into account the effect of [any] undertaking on" historic sites. Affirmed.

55. ***San Carlos Apache Tribe v. U.S.,*** No. 03-16874, 2005 WL 1903556, (9th Cir. Aug. 9, 2005). The San Carlos Apache Tribe ("Tribe") sought to enjoin the United States from releasing any additional water from the San Carlos Reservoir ("Lake"), except for 10 cubic feet per second, until there is a minimum pool of 75,000 acre-feet of water in the Lake. The district court granted summary judgment to the United States on some claims and dismissed the rest, prompting this appeal. The appellate court affirmed the district court's grant of summary judgment on the Tribe's claims under Section 9 of the Endangered Species Act, 16 U.S.C.

56. ***Skokomish Indian Tribe v. U.S.***, No. 01-35028, 410 F.3d 506, (9th Cir. June 3, 2005). Indian tribe brought action alleging that city's 1924 development of federally-licensed hydroelectric power project violated tribe's rights under Treaty, Federal Power Act ("FPA"), and state law. The district court granted summary judgment for city, and tribe appealed. The appellate court affirmed in part and vacated and remanded in part. On rehearing en banc, the appellate court amended its opinion and held that: (1) complaint failed to state tort claim against United States; (2) United States was exempt from any liability, under FPA; (3) tribe could not recover monetary damages for city's alleged violations of U.S.-tribal treaty; (4) tribe was not "person" entitled to bring § 1983 action; (5) tribe's state law claims against city were time-barred; (6) FPA did not create federal private right of action; and (7) denial of recusal motion was not abuse of discretion. Affirmed in part and transferred to Court of Federal Claims in part.

57. ***U.S. v. Orr Water Ditch Co.,*** Nos. 03-16654 and 03-16941, 391 F.3d 1077 (9th Cir. Dec. 14, 2004). After the Nevada State Engineer approved in part the applications of the United States and an Indian tribe to make temporary changes to two water rights, city and irrigation district appealed the ruling to a federal court. The district court applied Nevada statute providing for an automatic stay of such a ruling. United States and tribe appealed. The appellate court held that district court was required to apply Nevada statute rather than federal rule governing the availability of injunctions. Affirmed.

58. ***U.S. v. State of Wash.,*** No. 03-35145, __ F.3d __, 2005 WL 22864 (9th Cir. Jan. 6, 2005). Samish Indian Tribe moved to reopen judgment, 476 F. Supp. 1101, that had denied tribal members treaty fishing rights on ground that tribe had not maintained organized tribal structure. The district court denied relief and tribe appealed. The appellate court held that: (1) federal recognition of tribe was extraordinary circumstance warranting relief from judgment, and (2) finality concerns did not justify denial of relief. Reversed.

59. ***U.S. v. State of Wash.,*** No. CV 9213, 2005 WL 1703093 (W.D. Wash. July 20, 2005). This matter was before the Court for consideration of a motion for summary judgment filed by the Port Gamble and Jamestown S'Klallam Tribes ("S'Klallam"), and a cross-motion for partial summary judgment filed by the Skokomish Indian Tribe ("Skokomish"). The court GRANTED the S'Klallam motion for summary judgment, and DENIED the Skokomish motion for partial summary judgment. Pursuant to the Hood Canal Agreement and the Court's Order approving and adopting it, the Court declared: (1) that the area north of Ayock Point is an "in common" management area, and (2) that the Skokomish 2004/2005 management plan, which was issued unilaterally and which set limits on S'Klallam harvests of various species of shellfish, violated that Agreement. The Skokomish Indian Tribe is enjoined from any further unilateral creation or execution of shellfish harvest management plans, unilateral imposition of harvest quotas upon the Port Gamble and Jamesstown S'Klallam Tribes, or other actions in violation of the Hood Canal Agreement. This Order constituted a final Order for purposes of appeal, and closed this subproceeding. All remaining pending motions were stricken.

60. ***United States, in its own right and on behalf of the Lummi Indian Nation. v. Washington, Dept. of Ecology,*** No. 2:01 CV 00047Z, __ F. Supp. 2d __, 2005 WL 1244797 (W.D. Wash. May 20, 2005). United States brought action in its own right and on behalf of Lummi Indian Nation against state of Washington and fee landowners and water associations seeking declaratory judgment that Treaty of Point Elliott impliedly reserved groundwater under Lummi Peninsula for use and benefit of those Indians. Lummi Indian Nation intervened. Parties brought motions for summary judgment. The district court held that: (1) Lummi Reservation was Indian reservation, and was "Indian Country"; (2) Lummi Reservation was permanent reservation; (3) Treaty of Point Elliott did not reserve water for additional community or "homeland" purposes as primary purpose of reservation; (4) fact issue existed as to quantity of impliedly reserved water for practicably irrigable acreage ("PIA") on reservation; (5) quantity of impliedly reserved water for tribe's domestic use, to make reservation livable, could not be based solely upon agricultural award; (6) evidence of water sources outside Lummi Peninsula had to be excluded, except as those sources related to determination of PIA within that area; (7) members of Indian tribe could use their treaty-reserved water for any purpose once allotted; and (8) preponderance of evidence was appropriate burden for proof as to what federal Indian reserved water rights were held by tribe and its members. Motion granted and denied in part.

H. GAMING

61. ***Carruthers v. Flaum***, No. 03 CIV.7768(CM), __ F. Supp. 2d __, 2005 WL 767875 (S.D.N.Y. Mar. 31, 2005). The Unkechaug Indian Nation wants to open gaming facilities at sites in Sullivan County. The tribe has been recognized by the state of New York, pursuant to Indian Law, Art. 10, §§ 150-53, however, it has not been federally recognized. Because the Unkechaugs is not a federally-recognized Indian tribe, it cannot take advantage of the provisions of the Indian Gaming Regulatory Act, ("IGRA"), to overcome New York State's prohibition against gambling. In spite of this, plaintiff Carruthers, and two other individuals established two limited liability corporations for the purpose of developing and operating high-stakes gaming facilities on Unkechaug ancestral land and entered into contracts with the Unkechaugs relating to the development of the gaming operations (the "gaming agreements"). Carruthers sued multiple defendants for tortiously interfering with his relationship with his partners and with the gaming agreements with the Unkechaugs. All defendants but one moved for judgment dismissing the first sixteen claims. The court held that the gaming agreements are not valid and cannot be enforced because they have as their purpose an illegal activity – gambling – and they fall within no exception to New York State's prohibition against all forms of gaming. The court dismissed with prejudice the first Sixteen Causes of Action and the Twenty-Fifth Cause of Action.

62. ***First American Kickapoo Operations, L.L.C. v. Multimedia Games, Inc.,*** No. 03-6283, __ F.3d __, 2005 WL 1463501 (10th Cir. June 22, 2005). Former casino operator sued replacement operator for, *inter alia*, tortious interference with contract. The district court granted summary judgment for replacement operator, and former operator appealed. The appellate court held that: (1) operating lease was void, as unapproved management contract; (2) tortious interference claim required existence of valid underlying contract; and (3) contract was not severable into valid and invalid provisions. Affirmed.

63. ***Governor of State of Kansas v. Norton,*** No. 03-4140 JAR, 2005 WL 1785275 (D. Kan. July 27, 2005). This case concerned the decision of the Secretary of the Interior to take land (the "Shriner Tract") into trust on behalf of the Wyandotte Indian Tribe of Oklahoma ("the Tribe"), purportedly under the mandate of Pub. L. 98-602. Plaintiffs asked for reversal of the decision arguing that defendant acted in an arbitrary and capricious fashion by failing to scrutinize whether Pub. L. 98-602 funds were used to purchase the Shriner Tract. The court remanded the proceedings to the federal agency for the limited purpose of consideration of supplemental evidence.

64. ***Northern Arapaho Tribe v. State of Wyo.***, Nos. 02-8026, 02-8031, __ F.3d __, 2004 WL 2668795 (10th Cir. Nov. 23, 2004). The Northern Arapaho Tribe brought an action seeking a declaration that the state of Wyoming failed to negotiate in good faith with the Tribe in violation of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 et seq. Partially granting the Tribe's motion for judgment on the pleadings, the district court held that Wyoming failed to negotiate in good faith with regard to calcutta and parimutuel wagering and ordered the parties to complete a compact within sixty days. The court further held that casino-style gaming and slot machine wagering were against Wyoming public policy and thus not subject to negotiation. Both parties appealed. The appellate court affirmed in part and reversed in part and remanded for further proceedings.

65. ***Shobar v. California***, No. 03-56995, 2005 WL 1395012 (9th Cir. Jun. 14, 2005). Not selected for publication in the Federal Reporter. Plaintiffs appealed from the district court's order dismissing their case for failure to state a claim and failure to join an indispensable party. Because appellants' claims raised questions of federal law under the Indian Gaming Regulatory Act ("IGRA"), the appellate court rejected appellants' argument that the district court lacked federal question jurisdiction and held that the district court correctly dismissed appellants' claim because no private cause of action exists to enforce the state-tribal compact under either IGRA or the terms of the compact itself. The appellate court held that even if appellants could state a claim, the suit could not proceed because the Santa Ynez Band of Mission Indians is an indispensable party under Fed. R. Civ. P. 19, and tribal sovereign immunity precludes the Band's joinder. Affirmed.

66. ***Tunica-Biloxi Tribe of Louisiana v. Warburton/Buttner,*** No. Civ. A. 04-1516RBW, 2005 WL 1902889 (D.D.C. July 20, 2005). The plaintiff brought this action seeking, among other relief, an injunction prohibiting the defendant from continuing to litigate a breach of contract claim against the plaintiff in the California superior court ("the California action"). The plaintiff posited that such injunctive relief is warranted because the issues raised in the California action are within the exclusive purview of the Indian Gaming Regulatory Act ("IGRA") "which completely preempts all matters arising within, or collateral to, the issuance of approval of gaming management contracts," and thus the defendant cannot pursue its claims in the California superior court. The court granted the defendant's motion to dismiss.

67. ***U.S. ex rel. Saint Regis Mohawk Tribe v. President R. C. St. Regis Management Co***., No. 702CV845, 2005 WL 1397133 (N.D.N.Y. Jun. 13, 2005). The Saint Regis Mohawk Tribe ("the Tribe") filed a qui tam action seeking a declaration that a Construction Contract entered into between defendants President R. C. St. Regis Management Company ("President") and Anderson-Blake Construction Corporation ("Anderson-Blake") in 1998 is void and

unenforceable. Defendants brought counter claims in quantum meruit and under the United States Constitution. Both Defendants and Plaintiffs moved for summary judgment. The court found that the Construction Contract does not pertain to the management of a gaming operation and is therefore not a management contract or collateral agreement that requires approval of the Commission under the IGRA and is not void for failure to obtain approval. Accordingly, the court ordered that: (1) Defendants' motion for summary judgment was granted; (2) Plaintiff's motion for summary judgment was denied to the extent it sought a declaration that the Construction Contract is void; (3) Plaintiff's motion for summary judgment was granted to the extent it seeks dismissal of defendants' counterclaims; and (4) the action was dismissed in its entirety.

68. ***U.S. v. Casino Magic Corp***, Nos. 03-3043, 03-3149, 2004 WL 2026770, (8th Cir. Sept. 13, 2004). United States and its relator brought qui tam action against casino manager under Indian Gaming Regulatory Act, disputing the legality of contracts for a casino project. After the district court granted summary judgment for casino manager, United States and its relator appealed. The appellate court declared the contracts illegal and remanded for a determination of damages. Upon remand, the district court awarded damages in the amount of $350,000. Parties cross-appealed. The appellate court held that: (1) borrowing fees arising out of management company's loans to tribe, made as part of a co-lender agreement through a bank, did not constitute management fees and thus were properly excluded from damages calculation; (2) indirect costs, including licensing fees, legal fees, and a donation to a men's softball team, along with other unverifiable expenses did not constitute management fees; (3) company was not entitled to offset its out-of-pocket expenses against the calculated damages; and (4) district court's reasons for denying prejudgment interest, in damages calculation, did not rise to the level of exceptional circumstances justifying deviating from the general rule of awarding prejudgment interest. Affirmed in part and reversed in part.

69. ***U.S. v. Garrett,*** No. 03-4569, 2005 WL 354116 (4th Cir. Feb. 15, 2005). Not selected for publication in the Federal Reporter. Following denial of his motions to dismiss, defendant was convicted, upon conditional plea of guilty, in the district court for offense relating to conducting gambling business. Defendant appealed, challenging denial of motions to dismiss. The appellate court held that: (1) North Carolina did not violate defendant's equal protection rights by prosecuting him for same activities in which Native American tribes were permitted to engage, and (2) alleged discrimination by gaming laws of North Carolina against those who conducted gaming outside tribal land failed to state claim under dormant commerce clause. Affirmed.

I. LAND CLAIMS

70. ***Cayuga Indian Nation of N.Y. v. Pataki,*** Nos. 02-6111, 02-6130, 02-6140, 02-6200, 02-6211, 02-6219, 02-6301, 02-6131, 02-6151, __ F.3d __, 2005 WL 1514245 (2nd Cir. June 28, 2005). State, county, and private defendants appealed from a judgment of the district court awarding tribal plaintiffs approximately $248 million in damages and prejudgment interest against the State for the late-eighteenth-century dispossession of their land, in violation of the Nonintercourse Act. Tribal plaintiffs cross-appealed from the award of prejudgment interest and the denial of the remedy of ejectment. The appellate court held that: (1) tribe's possessory land claim sounding in ejectment was barred by laches; (2) no basis existed for

finding constructive possession or immediate right of possession as could support claim for trespass damages; and (3) United States, as plaintiff-intervenor in Indian tribe's suit, was subject to defense of laches. Reversed.

71. ***Delaware Nation v. Com. of Pa.,*** No. Civ. A. 04-CV-166, 2004 WL 2755545 (E.D. Pa. Nov. 30, 2004). Plaintiff, a federally recognized Native American tribe sought to recover possession of 315 acres of land purchased from the Proprietors of Pennsylvania in 1741. Nine motions to dismiss pursuant to FED. R. CIV. P. 12(b)(6) for Plaintiff's failure to plead facts sufficient to support a claim to the parcel of land at the center of the dispute were before the court. The court granted the defendants' motions.

72. ***Greene v. State of R.I.,*** No. 03-2670, 398 F.3d 45 (1st Cir. Feb. 11, 2005). Seaconke Wampanoag Indian Tribe sought declaration that it owned land tract. The district court dismissed, and tribe appealed. The appellate court held that claim was barred by Rhode Island Indian Claims Settlement Act. Affirmed.

73. ***Seneca Nation of Indians v. N.Y.,*** Nos. 02-6185(L), 02-6195(XAP), 02-6197(C) and 02-6213(C), __ F.3d __, 2004 WL 2008588 (2d Cir. Sept. 9, 2004). Indian tribes brought suit under Trade and Intercourse Act ("Act"), alleging the invalidity of an 1815 conveyance in which the state of New York purportedly purchased Grand Island and other islands in the Niagara River from predecessor tribe, on basis that no United States treaty commissioner was present at the negotiations and the agreement was never ratified by the United States Congress as required by the Act. The district court dismissed. Tribes appealed. The appellate court held that at the time of the conveyance, the islands were not tribal land protected by the Act inasmuch as they were already owned by the State. Affirmed.

74. ***Unalachtigo Band of the Nanticoke-Lenni Lenape Nation v. State***, 867 A.2d 1222 (N.J. Super. Ct. App. Div. Feb. 28, 2005). Native American group, claiming to be direct descendants of Native American tribe who lived on former reservation in New Jersey, and its tribal chairperson brought action against state and governor, seeking specific performance of colonial treaty that had barred the sale of the reservation land and prohibited non-Indians from settling on the reservation. The court dismissed complaint for lack of subject matter jurisdiction. Native American group and tribal chairperson appealed. The appellate court held that: (1) state courts lacked subject matter jurisdiction over the suit, and (2) any contract created between the tribe and state through legislation that ratified the colonial treaty was later rescinded when both the state and the tribe agreed, for valuable consideration, to sell the reservation land. Affirmed.

75. ***Western Mohegan Tribe and Nation v. Orange County,*** No. 04-0449-CV, __ F.3 __, 2004 WL 2965960 (2nd Cir. Dec. 23, 2004). Western Mohegan Tribe and Nation sued state of New York and its Governor, alleging that they were wrongly in possession of land contained in ten New York counties, in violation of federal common law and Indian Trade and Intercourse Act. The district court dismissed action. Tribe appealed. The appellate court held that claim against Governor was functional equivalent of action to quiet title, and thus was not subject to ex parte Young exception to Eleventh Amendment. Affirmed.

J. RELIGIOUS FREEDOM

76. ***Blackhawk v. Pa.,*** No. 02-3947, 02-4158, 381 F.3d 202, (3d Cir. Aug. 20, 2004). Native American owner of black bears brought § 1983 action against Pennsylvania Game Commission and individual Commission officials, alleging that they violated his First Amendment right to free exercise of religion by refusing to grant him exemption to permit fee requirement for keeping wildlife in captivity. The district court (225 F. Supp.2d 465) enjoined officials from charging owner a permit fee, but declined to hold individual defendants liable. Owner and officials appealed. The appellate court held that: (1) statute allowing waiver of fee for permit to keep wildlife in captivity was not generally applicable, and thus was subject to strict scrutiny; (2) statute did not withstand strict scrutiny; and (3) officials were qualifiedly immune from liability. Affirmed.

77. ***Brown ex rel. Indigenous Inmates at N.D. State Prison v. Schuetzle,*** No. A1-03-127, 368 F. Supp.2d 1009 (D.N.D. May 4, 2005). Native American inmates at state penitentiary brought civil rights action against corrections defendants, alleging that they were being deprived of their right to freely exercise their religion. Defendants filed motion to dismiss or, in the alternative for summary judgment. The district court held that: (1) state penitentiary's failure to hire or appoint an individual that met chief's requirements for conducting sacred sweat lodge ceremonies did not constitute a violation of Native American inmates' civil rights under the First Amendment and Religious Land Use and Institutionalized Persons Act and (2) First Amendment prohibited state penitentiary from adopting a policy that prevented the attendance of non-Native Americans at sweat lodge ceremonies in accordance with chief's statement of protocols for the seven sacred rites. Motion granted.

78. ***Cholla Ready Mix, Inc. v. Mendez***, No. 03-15423 (9th Cir. Sept. 1, 2004), *cert. denied*, No 04-952 (Apr. 18, 2005). Woodruff Butte has cultural and historical importance to the Hopi Tribe. In previous litigation, the court directed consultation with the Tribe before Arizona Department of Transportation spends federal funds on a construction project using materials from Woodruff Butte. The Arizona State Historic Preservation Officer concluding that the Butte is an important cultural landmark. Cholla Ready Mix asserted that state defendants' actions violated the Establishment Clause. The district court dismissed. Affirmed.

79. ***Warsoldier v. Woodford,*** No. 04-55879, __ F.3d __, 2005 WL 1792117 (9th Cir. July 29, 2005). Native American inmate sued officials of California Department of Corrections ("CDC"), challenging CDC's hair grooming policy as violating his rights under Religious Land Use and Institutionalized Persons Act ("RLUIPA"). The district court denied inmate's request for preliminary injunction and he appealed. The appellate court held that: (1) policy imposed substantial burden on inmate's religious practice; (2) policy was not least restrictive alternative to achieve CDC's interest in prison security, and thus violated RLUIPA; (3) inmate faced possibility of irreparable injury absent issuance of injunction; and (4) balance of hardships favored inmate. Reversed and remanded.

80. ***Wyoming Saw Mills, Inc. v. U.S. Forest Serv.***, No. 02-8009 (10th Cir. Sept. 21, 2004). Wyoming Saw Mills brought suit concerning an Historic Preservation Plan adopted by the Forest Service for the Medicine Wheel National Historic Landmark, a wide circle of stones located in the Big Horn Mountains, which is sacred to American Indians. Plaintiff asserted the

K. SOVEREIGN IMMUNITY and FEDERAL JURISDICTION

81. ***Ackerman v. Edwards,*** No. C045118, 121 Cal. App. 4th 946, 17 Cal. Rptr. 3d 517 (Cal. Ct. App. Aug. 18, 2004), *cert. denied.* No. 04-1253. Ackerman sued the Chairperson of the Redding Rancheria and members of the Tribal Council challenging a resolution governing reconsideration of enrollment. The trial court held it lacked jurisdiction over Ackerman's claim and dismissed. The appellate court *Santa Clara Pueblo v. Martinez* to conclude that no federal cause of action exists for enforcement of the rights created under the Indian Civil Rights Act, except the petition for habeas corpus. The court rejected the argument that the jurisdiction conferred by Pub. L. 280 would allow state courts to exercise jurisdiction not available in federal court under the ICRA. Affirmed.

82. ***Aroostook Band Of Micmacs v. Ryan***, No. 04-1517, __ F.3d __, 2005 WL 845191 (1st Cir. Apr. 13, 2005). The question in this case was whether a federal court has jurisdiction to hear an Indian tribe's suit to stop a state agency from investigating tribal employees' complaints of workplace discrimination. The Maine Human Rights Commission investigated complaints by three former employees of the Aroostook Band of Micmacs, and asserted that it has the authority to investigate any future complaints, pursuant to Maine antidiscrimination law. The Band filed an action for injunctive and declaratory relief against the Commission's investigations, arguing that such investigations impermissibly encroach upon the Band's inherent tribal sovereignty, congressionally-affirmed right to self-governance without state interference, and sovereign immunity from judicial or quasi-judicial proceedings. The district court concluded that the Band's complaint did not invoke a right to relief under federal law, but rather invoked affirmative federal defenses to state law actions, and therefore did not satisfy the well-pleaded complaint rule and dismissed the action for lack of subject matter jurisdiction. The appellate court reversed and remanded.

83. ***Bercier v. Kiga***, No. 31052-0-II, 2004 WL 2941568 (Wash. Ct. App. Dec. 21, 2004). Bercier appealed the trial court's dismissal of his declaratory judgment action. He argued he should be exempt from all Washington excise taxes and regulations because, as a member of the Fort Peck Indian Tribe who resides and sells tobacco products on the Puyallup Indian reservation, he is an Indian doing business on Indian trust land, entitled to exemptions under RCW 82.24.260, 82.24 .900, and 82.26.040. Holding that Bercier is not entitled to a tax exemption because he is not enrolled in the Puyallup Tribe on whose land he is doing business, the appellate court affirmed.

84. ***Building Inspector and Zoning Officer of Aquinnah v. Wampanoag Aquinnah Shelfish Hatchery Corp.,*** No. SJC-09211 2004 WL 2809313 (Mass. Dec. 9, 2004). Building inspector brought action against Indian tribe, seeking to enjoin tribe from constructing a shed and pier on tribal land in violation of zoning ordinance, and trust, which held property adjacent to tribal land, and community association intervened. The superior court granted tribe summary judgment. Building inspector applied for direct appellate review. Upon grant of application, the Supreme Judicial Court held that tribe had expressly waived its sovereign immunity with respect to municipal zoning enforcement. Vacated and remanded.

85. ***Cabazon Band of Mission Indians v. Smith,*** No. 02-56943, __ F.3d __, 2004 WL 2495936 (9th Cir. Nov. 3, 2004). The Cabazon Band of Mission Indians ("Tribe") appealed the district court's order granting summary judgment to the County of Riverside and its Sheriff (collectively, "Defendants"). Through its suit, the Tribe sought a determination that vehicles operated by its Public Safety Department are "authorized emergency vehicles" permitted to use and display emergency light bars while traveling on public roads between the noncontiguous portions of the Tribe's reservation. Before the Tribe's suit, Defendants repeatedly stopped and cited the Tribe's police officers for violating California's Vehicle Code whenever the officers traveled on non-reservation roads to respond to emergency calls from different portions of the reservation. The Tribe argued that prohibiting its emergency vehicles from displaying emergency light bars created an undue burden on its ability to effectively perform on-reservation law enforcement functions. The appellate court concluded that applying the light bar prohibition to the Tribe's police vehicles is discriminatory and reversed.

86. ***Fair Political Practices Comm'n v. Santa Rosa Indian Comm. of the Santa Rosa Rancheria,*** No. C044555, 2004 WL 2397204 (Cal. Ct. App. Oct 27, 2004). Fair Political Practices Commission filed action against Indian Tribe for failure to comply with reporting requirements for campaign contributions contained in the Political Reform Act. The superior court entered an order granting Tribe's motion to quash. Commission appealed. The appellate court held that doctrine of Indian tribal immunity did not bar the suit against the tribe, under state's right to ensure a republican form of government guaranteed by the United States Constitution. Reversed and remanded.

87. ***Francis v. Dana-Cummings***, Dkt. No. WAS-04-477, 2005 WL 567491 (Me. Mar. 10, 2005). Tenant sued tribal housing authority to recover damages for an alleged illegal eviction, and brought separate action for the same relief against the housing authority's executive director. Actions were consolidated. The superior court granted summary judgment in favor of executive director, but denied housing authority's motion for summary judgment. Housing authority and tenant appealed. The Supreme Court held that: (1) the dispute between housing authority and tenant was not an "internal tribal matter" protected from state-court interference under the Maine Indian Claims Settlement Act, and (2) executive director could not take advantage of the protection afforded by the Act's "internal tribal matters" provision. Affirmed; vacated and remanded.

88. ***Humes v. Fritz Co., Inc.,*** Dkt. No. 53349-5-I, 2005 WL 196443 (Wash. Ct. App. Jan. 31, 2005). Crane operator brought personal injury action against truck driver and trucking company, after truck driver drove away before crane cable was detached from container that crane had loaded into truck. Accident took place on Indian reservation land, and crane operator was injured when he jumped from crane to avoid risking injury or death in a flipover of crane. On pretrial motions for summary judgment, the superior court ruled that the trier of fact could not allocate fault for crane operator's injury to Indian tribe, and that crane operator was not contributorily negligence. The jury returned a verdict in favor of crane operator, and defendants appealed. The appellate court held that: (1) tribe's sovereign immunity did not bar allocation of fault to tribe; (2) crane operator satisfied requirements of emergency doctrine; (3) defendants were not entitled to instruction on contributory negligence; and (4) trial court properly instructed jury on proximate causation. Reversed in part, affirmed in part, and remanded.

89. ***In re Marriage of Jacobsen,*** No. B161615, Cal. App. 2d Dist. Div. 6 (Aug. 26, 2004). Jacobsen, a member of the Santa Ynez Band of Mission Indians, appealed a family court award of spousal support to her former husband. As an enrolled member she receives a per capita distribution of Chumash Indian tribal gaming revenues. A tribal resolution provides that per capita distributions shall not be allocated to former spouses who are not members of the Tribe. The tribal customs and traditions set forth in the resolution are inconsistent with California law and public policy regarding temporary spousal support. Affirmed.

90. ***In re Sonoma County Fire Chief's Application***, No. C 02-04873 JSW, 2005 WL 1005079 (N.D. Cal. Apr. 29, 2005). Before the court was the motion of the Dry Creek Rancheria Band of Pomo Indians ("Tribe") for summary judgment. The issue was whether the court should permit Sonoma County to assert jurisdiction over the on-reservation activities of tribal members because of the existence of sufficient "exceptional circumstances" to warrant the assertion. The county contended that exceptional circumstances exist because of health and safety concerns. Specifically, it argued that because the tribe's casino is a large commercial business catering to non-tribal members, lacks its own fire department, and relies on the Geyserville Fire Department in case of fire emergency, exceptional circumstances exist sufficient to overcome Indian sovereignty. The enumerated list of concerns related only to the County's enforcement of its health and safety codes. The court found that without more, those circumstances are insufficient as a matter of law to overcome the high burden of Indian sovereignty, tribal self-determination, self-sufficiency, and economic development and no "exceptional circumstances" exist to warrant an exception to the general preclusion of the County from jurisdiction to enforce its health and safety regulations. The Tribe's motion for summary judgment was granted.

91. ***Jena Band of Choctaw Indians v. Tri-Millennium Corp., Inc.,*** No. Civ. A. 98-CV-0829, 2005 WL 1719215 (W.D. La. July 22, 2005). Before the court were two motions filed by defendants seeking dismissal of or summary judgment upon plaintiffs' ("Jena Band") action for a declaratory judgment. Each of defendants' motions was predicated upon the pendency of the related state court action or, in the alternative, the settlement agreements entered into by the parties in connection with the state court action, both of which defendants argued precluded the court from considering the case. Plaintiffs' complaint sought a declaration that certain agreements between Jena Band and defendants are void under federal law and that a Louisiana state court does not have jurisdiction over an ongoing action by defendants seeking enforcement of those agreements. Plaintiffs disputed this and requested that the court: (1) deny defendants' motions; (2) lift its abstention order; (3) address the merits of the case; and (4) enter a judgment declaring that the state court is without jurisdiction to consider Defendants' claims. Defendants' motions were granted in part and denied in part.

92. ***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.

93. ***Lamere v. Superior Court,*** No. E036474, 2005 WL 1862700 (Cal. Ct. App. Aug. 8, 2005). Enrolled members of Indian band brought action alleging violation of band law and federal law against members of band's enrollment committee which had initiated disenrollment procedures against members. The superior court overruled committee members' demurrer. Committee members petitioned for writ of mandate. The appellate court held that state court had no jurisdiction under federal Public Law 280 over action. Petition granted in part and denied in part.

94. ***Longie v. Spirit Lake Tribe,*** Dkt. No. 04-1578, 2005 WL 517014 (8th Cir. Mar. 7. 2005). Longie, an enrolled tribal member, requested a land exchange involving tracts within the Spirit Lake Nation Indian Reservation. The Tribal Council approved the transfer, as did Longie, but Tribal Council members did not sign the deed authorizing the formal conveyance. Longie made improvements on the property but was notified by the BIA that the transfer had not occurred and that he owed rent for use of the land. Member of Indian tribe brought quiet title action against tribe. The district court dismissed, and appeal was taken. The appellate court held that: (1) court lacked federal question jurisdiction, and (2) court lacked mandamus jurisdiction. Affirmed.

95. ***Magiera v. Norton***, Nos. 02-17364, 01 00467 LRH, 2004 WL 1987349, (9th Cir. Sept. 2, 2004). Plaintiffs appealed the district court's dismissal without prejudice of their suit against William Bills and Secretary of the Interior Gale Norton, in her official capacity, for actions arising out of a dispute over the governance of the Winnemucca Indian Colony in Winnemucca, Nevada. The appellate court affirmed the district court finding that plaintiffs had not demonstrated that the United States hadunequivocally waived its sovereign immunity, and plaintiffs had not pursued their claims against Bills on appeal.

96. ***McNally CPA's & Consultants S.C. v. DJ Hosts, Inc.,*** No. 03-1159, 2004 WL 2676605 (Wis. Ct. App. Nov. 24, 2004). The Ho-Chunk Nation purchased 100% of the shares in DJ Hosts, Inc., a for-profit Wisconsin corporation. After the purchase, McNally CPA's, an accounting firm, sued DJ Hosts for money owed. The circuit court dismissed McNally's action based on tribal sovereign immunity. The court reasoned that because the Ho-Chunk, a federally recognized Indian tribe, wholly owns DJ Hosts, the Ho-Chunk's immunity extends to DJ Hosts. The appellate court disagreed. DJ Hosts argued that the circuit court's decision should be upheld on the alternative ground that the Ho-Chunk is an indispensable party that may not be joined. The appellate court concluded that the Ho-Chunk is not an indispensable party and reversed the circuit court's order and remanded for the court to allow McNally to proceed with its action against DJ Hosts.

97. ***Miccosukee Tribe of Indians v. Napoleoni,*** No. 1D04-1774, 2004 WL 2964879 (Fla. Dist. Ct. App. Dec. 15, 2004). The Miccosukee Tribe of Indians sought (1) a writ of certiorari to review a non-final discovery order in this workers' compensation action requiring a tribal official to appear for deposition; and (2) a writ of prohibition barring any further proceedings by the Florida Department of Labor, Division of Administrative Hearings, and the Judge of Compensation Claims ("JCC") in this matter. The appellate court found that the JCC lacks subject matter jurisdiction, and granted both a writ of certiorari quashing the discovery order and a writ of prohibition barring further proceedings.

98. ***Minnesota v. Jones,*** No. A05-365, 2005 WL 1743875 (Minn. Ct. App. July 26, 2005). This was an appeal from a pretrial order dismissing the complaint charging respondent with failing to comply with the predatory-offender registration statute. The state argued that the district court erred in determining that Minn. Stat. § 243.166 (2002) is civil/regulatory and therefore unenforceable against a Native American tribal member residing on a reservation. Affirmed.

99. ***Narragansett Indian Tribe Of Rhode Island v. Rhode Island,*** No. 04-1155, 407 F.3d 450 (5th Cir. May 12, 2005). Federally recognized Indian tribe 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 tribal 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. The district court, remanded state case and granted summary judgment to state in federal case brought by Tribe. Tribe appealed. The appellate court held that: (1) federal court lacked subject matter jurisdiction over state's complaint; (2) legal incidence of the cigarette tax fell on the consumer of cigarettes, not the tribal distributor of the cigarettes; (3) Settlement Act did not completely abrogate Indian tribe's sovereign immunity on the settlement lands; and (4) state violated Indian Tribe's sovereign rights when it enforced the criminal provisions of its cigarette tax laws on settlement lands. Affirmed in part, reversed in part, and remanded.

100. ***Narragansett Indian Tribe v. Rhode Island,*** No. 04-1155, __ F.3d __, 2005 WL 1594846 (1st Cir. July 8, 2005). Order Granting Rehearing En Banc. "A majority of the judges of this court in active service have voted to rehear en banc the questions of whether, to what extent, and in what manner Rhode Island may enforce its civil and criminal laws with respect to the operation of the Smoke Shop by the Narragansett Indian Tribe. Consequently, Parts II(D)(3) and (4) of the opinion of the panel in this case, *Narragansett Indian Tribe v. State of Rhode Island*., 407 F.3d 450, 463-66 (1st Cir.2005), are withdrawn, as are any other portions of the panel opinion that involve the enforcement questions. The judgment of this court dated May 12, 2005, is vacated."

101. ***Neighbors For Rational Dev., Inc. v. 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.

102. ***Quair v. Bega***, No. CV F 02 5891 REC DLB, 2005 WL 1221820 (E.D. Cal. May 19, 2005). This action arises out of the disenrollment and banishment of Petitioners Roselind Quair and Charlotte Berna ("Petitioners") from the Tribe. Petitioners filed amended petitions for writ of habeas corpus, pursuant to Section 1303 of the Indian Civil Rights Act,

25 U.S.C. § 1301 et seq., ("ICRA"),. Petitioners allege that because the proceedings which resulted in their disenrollment as members of the Tribe and banishment from the Tribe's Rancheria were in violation of their rights guaranteed under ICRA, the actions constituted an unlawful detention and restraint of liberty. The court found that Petitioners' insistence that obtaining discovery from the Tribe itself is essential to their case had no merit, and because there is no express waiver of immunity by the tribe or abrogation of tribal immunity by Congress under the ICRA and no support for an implied waiver of immunity, the court found that the Tribe was possessed of tribal immunity at the time the subject subpoenas were served, and quashed Petitioners subpoenas.

103. ***Quair v. Sisco***, No. CV F 02 5891 REC DLB, 2004 WL 3214396 (E.D. Cal. July 26, 2004). Quair, a former treasurer of the Santa Rosa Rancheria, was disenrolled and banished in the course of a lengthy internal political struggle. The court found that banishment is a punitive sanction and qualifies as detention for habeas corpus purposes and for jurisdiction under the Indian Civil Rights Act. The Tribe lacked an appeal mechanism within which plaintiff's could have been exhausted. The court construed the tribal constitution and concluded that BIA approval of the enrollment decision was required but had not been obtained. Summary judgment granted in part and denied in part.

104. ***Round Valley Indian Tribes v. McKay,*** No. C 04-02320 JSW, 2005 WL 552545 (D. Cal. Mar 8, 2005). The Tribes brought this action relating to property that the United States holds legal title to in trust for the Tribes. The Tribes sought declaratory and injunctive relief confirming the existence of a deeded casement, or in the alternative a proscriptive easement, across the McKay property for the benefit of the Tribes' reservation. The Tribes further sought damages for the alleged interference with its use of the easement over the McKay property and for damages allegedly caused by the McKays when they expanded an easement they hold over the Tribes' land. The McKays filed counterclaims against the Tribes seeking: (1) a decree of quiet title to establish ownership of the McKays' property free and clear of any easements claimed by the Tribes; (2) damages for trespass over the McKays' property; and (3) for an injunction against the Tribes and its members enjoining them from trespassing on the McKays' property. The court granted in part and denied in part the Tribes' motion to dismiss.

105. ***Seminole Tribe of Florida v. McCor,*** No. 2D04-4062, 2005 WL 1397400 (Fla. Dist. Ct. App. June 15, 2005). Casino patron brought negligence action against Indian tribe, seeking damages for injuries she allegedly sustained from being struck by a chair while she was at the Indian tribe's casino. The circuit court denied tribe's motion to dismiss or for summary judgment. Tribe sought certiorari review. The appellate court held that purchase of liability insurance by tribe did not result in waiver of tribe's immunity. Petition granted; order quashed.

106. ***U.S. v. Anderson,*** Nos. 03-10516, 2004 WL 2853229 (9th Cir. Dec. 14, 2004). Defendant, a member of an Indian tribe, appealed his conviction in the district court of theft and conspiracy to commit theft against an Indian tribal organization, mail fraud and wire fraud. The appellate court held that California did not have exclusive jurisdiction over tribe member who committed federal offenses of theft and conspiracy to commit theft from a tribal organization. Affirmed.

107. ***U.S. v. Pemberton***, No. 03-1302, __ F.3d __, 2005 WL 926433 (8th Cir. Apr. 22, 2005). Defendant, an Indian, was convicted in district court, on his guilty plea, of assault with dangerous weapon by discharging firearm at other parties in Indian country. The appellate court held that: (1) dispute regarding defendant's status as Indian, while relevant to matter of proof at trial, did not deprive district court of jurisdiction; (2) facts admitted by defendant, that he identified himself as an Indian, that he was born of Indian parents, that he lived for long periods of time on reservation and attended grade and high school on reservation, and that he had a child and lived together with mother and child on reservation, were sufficient to establish his status as Indian; and (3) defendant who admitted that victims had sustained permanent, life-threatening or serious bodily injuries was bound by his admission and could not successfully challenge the four-level enhancement imposed based on nature of victims' injuries. Affirmed.

108. ***U.S. v. Taylor,*** No. 03-30520, 2004 WL 1923590 (9th Cir. Aug. 27, 2004). Not selected for publication in the Federal Reporter. Taylor appealed the district court's denial of his motion for judgment of acquittal following his conviction for five counts of theft pursuant to 18 U.S.C. §§ 661 and 1153. The court found that Taylor's argument that the government failed to prove the essential element of his status as an "Indian" is without merit. Taylor did not dispute that the government produced evidence that he is of Sioux lineage; that he was "socially recognized" as an Indian; that he was raised on the Nez Perce Reservation and returned to live there as an adult; and that he had family members on the reservation with whom he was linked both in lineage and in social relations. Proof of these factors is sufficient to establish by circumstantial evidence, Taylor's status as an "Indian." Therefore, the district court did not err in denying Taylor's motion for judgment of acquittal. Affirmed.

109. ***United States of America v. Smiskin,*** No. CR042107EFS, CR042108EFS, 2005 WL 1288001 (E.D. Wash. May 31, 2005). Defendants were indicted on charges of violating the Contraband Cigarette Trafficking Act ("CCTA") after ATF agents seized 4,205 cartons of cigarettes from a trailer on Smiskin's property in Wapato, WA. As enrolled members of the Confederated Tribes and Bands of the Yakama Nation (the "Yakama Tribe"), defendants moved the court for a finding that the cigarettes they allegedly possessed were not contraband as contemplated under the CCTA and that the case should be dismissed. Defendants asserted that Yakama Treaty of 1855 secured the right to travel to Yakama Tribal members. It was Defendants' position that their prosecution under the CCTA abrogated their Treaty right to "travel and transport goods to market." The Court granted defendants' motion to dismiss and denied all other motions as moot.

L. SOVEREIGNTY, TRIBAL INHERENT

110. ***BNSF Railway Company v. Ray,*** No. 05-15688, D.C. No. CV-05-00386-DGC, 2005 WL 1635310 (9th Cir. July 11, 2005). Jeanette, Herbert, and Nicole Sullivan ("the Sullivans"), individually and as the survivors of four Native American Indians killed in an accident at a railroad crossing on the Hualapai Reservation, Arizona, appealed the district court's grant in favor of BNSF Railway Company ("BNSF") of a preliminary injunction ordering that the Sullivans halt prosecution of their suit against BNSF relating to the accident in Hualapai Tribal Court, and also that Hualapai Tribal Court halt any such proceedings. Affirmed.

111. ***Boozer v. Wilder,*** No. 03-35722, __ F.3d __, 2004 WL 1908178 (9th Cir. Aug. 27, 2004). In child custody dispute, father filed complaint requesting that an Indian tribal court or his daughter's grandparents be ordered to return the child to his custody. The district court dismissed. Father appealed. The appellate court held that father was required to exhaust his tribal court remedies. Affirmed.

112. ***Diepenbrock v. Merkel*** , Dkt. No. 90,708, 2004 WL 2115899, (Kan. Ct. App. Sept. 24, 2004). Diepenbrock suffered a heart attack while a patron of Harrah's Prairie Band Casino ("Casino") and received medical treatment from William Earl Merkel, Paul Juedes, and Topeka Air Ambulance, Inc. (defendants). Rita Diepenbrock ("Rita"), both as personal representative of Diepenbrock's estate, and in her own capacity, sued the defendants. Rita maintained that the defendants wrongfully caused the death of Diepenbrock. The defendants moved to dismiss Rita's petition for lack of subject matter jurisdiction. The defendants sought dismissal of the action on the grounds that the Tribal Court of the Prairie Band Potawatomi Nation had exclusive jurisdiction over this case. The trial court granted the defendants' motion. On appeal, Rita contended that the trial court erred in granting the defendants' motion to dismiss for lack of subject matter jurisdiction. The appellate court affirmed.

113. ***Ford Motor Co. v. Todecheene,*** Nos. 02-17048, 02-17165, __ F.3d __, 2005 WL 53326 (9th Cir. Jan. 11, 2005). Esther Todecheene, an on-duty law enforcement officer employed by the Navajo Department of Public Safety, died when her Ford Expedition patrol vehicle rolled over while she was driving on a dirt road within the Navajo Nation. The road is a reservation road, maintained by the Tribe. There is no federal or state right-of-way, and the road is not located on non-Indian fee land. Todecheene's parents sued Ford in Navajo tribal court alleging that the Ford Expedition was defective and unreasonably dangerous in design or manufacture. Ford denied the allegations and challenged the tribal court's subject matter jurisdiction over the action and personal jurisdiction over Ford. The tribal court determined that the lease-sale contracts covering the vehicle created a consensual relationship between Ford and the tribe. The court relied in part upon a contract provision stating that "[a]ll actions which arise out of this Lease or out of the transaction it represents shall be brought in the courts of the Navajo Nation." The court concluded that product liability and wrongful death claims fell within the ambit of the tribal statute, even though the tribal court had never decided a product liability claim. Ford did not appeal the tribal court ruling. Instead it sought injunctive and declaratory relief in federal court to halt the tribal court proceeding. The district court held that Ford was not required to exhaust tribal court remedies before challenging the tribal court's jurisdiction in federal court, because jurisdiction was plainly lacking and exhaustion would serve only to delay the proceedings. The Todecheenes and the Navajo Nation filed timely appeals. The appellate court found that under *Montana*, the tribal court's limited jurisdiction over nonmembers was in effect, because this case did not fall within either the consensual relations or self-government exceptions articulated in Montana; the matter was sufficiently exhausted in federal court and affirmed the judgment of the district court.

114. ***Gillette v.Marcellais***, No. A4-04-123, 2004 WL 2677268 (D.N.D. Nov. 22, 2004). Gillette, filed a petition for habeas corpus relief which arose out of a criminal complaint on the Turtle Mountain Reservation. Gillette later supplemented his petition with a Request for Stay and Order to Show Cause and requested that the appellate court bar his prosecution. Gillette's petition was denied for failure to exhaust all available remedies because he had not

yet been tried in tribal court. The district court noted that once tribal remedies have been exhausted, Gillette may seek redress from the district court, but it must adhere to the well-established doctrine of tribal exhaustion until Gillette has exhausted the remedies available to him within the tribal court system.

115. ***In re: Duane Garvais,*** No. CV-03-0291-JLQ (E.D. Wash. Dec. 2, 2004). Amended Petition For Writ of Habeas Corpus by Duane Garvais, at the time a United States Bureau of Indian Affairs police officer, who challenged the jurisdiction of the Spokane Tribe of Indians Tribal Court to try him on charges filed in that court. Garvis contended that he is not legally an "Indian" as defined by federal law granting limited criminal jurisdiction to tribal courts and also that at the time involved, being a federal police officer, he was entitled to sovereign immunity in that the charges against him arose out of his duties as a federal police officer. Petition granted.

116. ***Malaterre v. Amerind Risk Management,*** No. A4-04-088, __ F. Supp. 2d __, 2005 WL 1421835 (D.N.D. Jun. 20, 2005). Mothers of guests killed in house being leased from tribal housing authority on reservation, and guest who survived the fire, brought action against housing authority's insurer, seeking declaratory judgment regarding whether insurance coverage existed under tribe's insurance policy. Insurer moved to dismiss. The district court held that tribal exhaustion doctrine barred district court from considering the action. Motion granted.

117. ***Means v. Navajo Nation***, No. 01-17489, 2005 WL 2008433, (9th Cir. Aug. 23, 2005). This case, like *United States v. Lara*, concerns whether an Indian tribe can exercise criminal jurisdiction over a person who is not a member of the tribe, but who is an enrolled member of another Indian tribe. *Lara* declined to answer the question whether the tribal criminal prosecution of a nonmember Indian would violate the Due Process and Equal Protection guarantees of the Fifth Amendment. Means argued that by recognizing tribal criminal jurisdiction over nonmember Indians, the 1990 Amendments violate equal protection guarantees because they discriminate against him as an Indian, subjecting him to adverse treatment on account of his race. Nevertheless established law rejects Means's equal protection claim. *Morton v. Mancari* holds that federal statutory recognition of Indian status is "political rather than racial in nature."

118. ***Prairie Band Potawatomi Nation v. Wagnon***, No. 03-3322, __ F.3d __,, 2005 WL 681785 (10th Cir. Mar. 25, 2005). Plaintiff Prairie Band of Potawatomi Indians ("the Tribe"), a federally recognized Kansas Indian tribe, filed this action against Kansas state officials seeking to have its motor vehicle registrations and titles recognized by the state. The district court granted a preliminary injunction in favor of Plaintiff prohibiting enforcement of the state motor vehicle registration and titling laws with respect to vehicles registered and titled by the Tribe. *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234 (2001) ("Prairie Band I"). On August 6, 2003, following the outline and guidance provided by the appellate court in Prairie Band I, the district court granted Plaintiff's motion for summary judgment, permanently enjoining Defendants from further application and enforcement of Kansas' motor vehicle and titling laws against Plaintiff and any persons who operate or own a vehicle properly registered and titled pursuant to tribal law. The district court denied Defendants' motion to reconsider. Defendants appealed. The permanent injunction requested by the Tribe does not mandate state

119. ***Pro-Football, Inc. v. Harjo***, No. 03-7162, 2005 WL 1653048 (D.C. Cir. July 15, 2005). Petition was brought seeking cancellation of professional football team's registered "Redskins" trademarks, on ground they disparaged Native Americans. The Trademark Trial and Appeal Board cancelled registrations, and team sought judicial review. The district court, 284 F. Supp. 2d 96, granted summary judgment for team, and petitioners appealed. The appellate court held that defense of laches had to be assessed as to one individual petitioner, and could not be assessed from time that first mark was registered, where that petitioner had not yet reached age of majority at time of first registration. Remanded.

120. ***Smith v. Salish Kootenai College,*** No. 03-35306, __ F.3d __, 2004 WL 1753362 (9th Cir. Aug. 6, 2004), *rehearing granted, opinion withdrawn* (May 13, 2005). 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.

121. ***Spears v. Red Lake Band of Chippewa Indians***, No. 03-CV-2434JMRJSM, __ F. Supp. 2d __, 2005 WL 742301 (D. Minn. Mar. 30, 2005). Member of Indian tribe, convicted of multiple violations of tribal code due to his involvement in fatal automobile accident, petitioned for writ of habeas corpus. The district court held that accident constituted "single offense," within meaning of the Indian Civil Rights Act ("ICRA") limit on tribal prison sentences, even though his conduct violated tribal code provisions proscribing drunk driving, driving without license, negligent homicide, failure to stop, and refusal to submit to sobriety test; all violations were legally and factually intertwined, and thus arose from single criminal transaction. The ICRA limits tribal court sentences to 12 months' imprisonment for the "one offense." Accordingly, the 30-month sentence the tribal court imposed in this case was illegal. The petition for writ of habeas corpus was granted and the matter was remanded to the Red Lake Tribal Court for further proceedings.

122. ***U.S. v. Becerra-Garcia,*** No. 03-10654, 397 F.3d 1167 (9th Cir. Feb. 2, 2005). Defendant was convicted in the district court of conspiring to transport illegal aliens and transporting illegal aliens. Defendant challenged the district court's denial of his motion to suppress evidence, namely the discovery by tribal rangers of illegal aliens in his van while crossing the Tohono O'odham Nation. The appellate court held that: (1) tribal rangers were "government agents," and (2) minimally intrusive investigatory stop of vehicle conducted by tribal rangers was reasonable. Affirmed.

123. ***U.S. v. Terry,*** No. 04-2595, __ F.3d __ (8th Cir. Mar 07, 2005). Defendant was convicted in the district court upon his conditional plea of guilty to possessing a firearm after previously being convicted of a misdemeanor crime of domestic violence. He appealed denial of his motion to suppress a firearm and ammunition seized from his vehicle, and statements that he made following his seizure. The appellate court held that: (1) tribal police officers' seizure

124. ***United States v. Jarvison***, No. 04-2093, 2005 WL 1208928 (10th Cir. May 23, 2005). As part of its pretrial preparations, the government served Esther Jarvison with a subpoena to compel testimony two days before a pretrial hearing. During the hearing, Esther emphatically stated that she did not want to testify against her husband and that she and Jarvison had married in a traditional Navajo ceremony in Coyote Canyon within the Navajo Reservation on June 25, 1953. The district court found that the Jarvisons had a valid marriage based on this 1953 traditional Navajo ceremony, and concluded that the spousal testimonial privilege applied under *Trammel v. United States*, 445 U.S. 40 (1980). Affirmed.

125. ***United States v. Martin,*** No. 04-2711, __ F.3d __, 2005 WL 1513140 (8th Cir. June 28, 2005). Pursuant to his conditional guilty plea before the district court defendant was convicted of possession with intent to distribute marijuana after being arrested by the Oglala Sioux Tribal Department of Public Safety. Defendant appealed denial of his motion to suppress. The appellate court held that: (1) traffic stop of vehicle for having non-functioning brake light was objectively reasonable; (2) dog sniff did not unreasonably prolong traffic stop; and (3) Miranda warnings were not required. Affirmed.

126. ***Willman v. Wash. Util. and Transp. Comm'n***, No. 75821-2 (Wash. Sup. Ct. Aug. 11, 2005). In August 2002, the Yakama Tribal Council adopted a franchise ordinance whose preamble states in part: Utilities operating on the Reservation have placed Utility facilities on lands owned or controlled by the Yakama Nation without authorization or for which authorization has expired and the Tribal Council finds that it is in the public interest to require Utilities operating on the Reservation to obtain permission for such facilities by entering into agreements with the Yakama Nation. The ordinance requires any utility operating within the reservation to obtain a franchise from the Nation and provides for a fine of $1,000 per day for operating without a franchise. In addition, any utility operating within the reservation (regardless of whether it has obtained a franchise) is required to pay a franchise fee of three percent of its gross operating revenue. Affirmed.

M. TAX

127. ***Bruner v. U.S.,*** No. 02-CV-504-H(C), 2004 WL 2361991, (N. D. Okla. Aug. 17, 2004). This matter came before the court for a determination of whether a statute enacted by the U.S. Congress is enforceable under the Constitution of the United States. That statute, Section 3 of the Act of Congress dated May 10, 1928, 45 Stat. 495, provides in applicable part as follows: That all minerals, including oil and gas, produced on or after April 26, 1931, from restricted allotted lands of members of the Five Civilized Tribes in Oklahoma, or from inherited restricted lands of full-blood Indian heirs or devisees of such lands, shall be subject to all State and Federal taxes of every kind and character the same as those produced from lands owned by other citizens

of the state of Oklahoma. Plaintiffs argued that this enactment constituted an uncompensated "taking" of property and therefore violated the due process rights granted by the Constitution. Defendant replied that the statute effects no such taking and is fully within the constitutional power of Congress to impose taxes. The Court found the 1928 statute constitutional.

128. ***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 the state Supreme Court analyzed have not changed, the incidence of the motor fuel tax still falls on the tribes. Furthermore, the Hayden-Cartwright Act does not provide Congressional authorization for imposing the tax. Affirmed.

129. ***Keweenaw Bay Indian Community v. Naftaly,*** No. 2:03-CV-170, __ F. Supp. 2d __, 2005 WL 1307789 (W.D. Mich. June 1, 2005). Indian tribe sought declaratory judgment prohibiting collection of property taxes on lands held in fee simple by the tribe or its members. Parties cross-moved for summary judgment. The district court held that land was not subject to Michigan property tax. Judgment for plaintiff.

130. ***Mann v. ND Tax Commissioner*** , No. 20040174, 2005 WL 357624 (N.D. Feb. 16, 2005). Native Americans brought action against Tax Commissioner and Treasurer for declaratory and injunctive relief against imposition of motor fuels taxes on them on their reservations. The Northwest Judicial District Court issued permanent injunction against collection, dismissed all plaintiffs except one, and denied motions for reconsideration. Appeal and cross-appeal were taken. The Supreme Court held that: (1) denial of state's motion for reconsideration was not appealable without certification as final; (2) dismissal of all but one plaintiff without prejudice was not appealable without certification as final order; and (3) decision not to exercise supervisory authority was warranted. Appeals dismissed.

131. ***Prairie Band Potawatomi Nation v. Richards,*** No. 03-3218, 379 F.3d 979, 2004 WL 1790008 (10th Cir. Aug. 11, 2004), *cert. granted*, No. 04-631. 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.

N. TRUST BREACH AND CLAIMS

132. ***Cobell v. Norton,*** No. CIV.A. 96-1285, __ F.R.D. __, 2004 WL 2377222 (D.D.C. Oct. 22, 2004). Interior and Treasury Departments, whose statements of account to beneficiaries of Individual Indian Money trust accounts had been found to be deficient, sought approval of amended statements and related communications. Account beneficiaries who were members of class asserting Departments' breach of fiduciary duty objected. The district court held that: (1) statements and communications could be sent if accompanied by requisite notice, and

(2) allegations made in beneficiaries' pleadings would not be stricken as scandalous. Statements conditionally approved.

133. ***Cobell v. Norton,*** Nos. 03-5262 and 04-5084, __ F.3d __, 2004 WL 2753197 (D.D.C. Dec. 3, 2004). Beneficiaries of individual Indian money 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. The district court (310 F. Supp.2d 98) entered preliminary injunction requiring Department of Interior to disconnect computers from Internet until it could certify security of trust account data. Department appealed. The appellate court held that injunction was abuse of discretion to extent that it placed burden of persuasion on Department, disregarded Department's certifications on state of its computer security, and failed to hold evidentiary hearing on issue. Vacated and remanded.

134. ***Cobell v. Norton,*** No. 03-5314, 2004 WL 2828059 (D.C. Cir. Dec. 10, 2004). Members of Indian tribes and present or past beneficiaries of individual Indian money ("IIM") accounts filed a class action, alleging that Secretaries of the Interior and the Treasury, and the Assistant Secretary of the Interior for Indian Affairs had grossly mismanaged those accounts. The district court (283 F. Supp.2d 66) issued injunction ordering a complete historical accounting of trust fund assets, and to provide a comprehensive statement of the manner in which trust management would be conducted after Interior's proposed internal changes, and governmental defendants appealed. The appellate court held that: (1) statute prohibiting Department of Interior from being required, under any statute or common law principle, to engage in a historical accounting of Indian trust funds did not amount to a "legislative stay" of a final judicial injunction ordering a complete historical accounting of trust fund assets in violation of separation of powers principles; (2) portion of injunction requiring Department of the Interior to submit a plan to fulfill its fiduciary obligations regarding management of IIM accounts, did not exceed court's jurisdiction under Administrative Procedure Act (APA) to extent that order continued or logically extended original order to file a comprehensive plan, however, injunction was invalid insofar as it directed Interior, rather than Indian plaintiffs, to identify defects in its proposal and required the agency to comply with the comprehensive plan; (3) appointment of a monitor to report on Department of the Interior defendants' compliance with injunction requiring defendants to "fix the system" exceeded the scope of the district court's authority; and(4) court's authority was limited to considering specific claims that Department of Interior breached particular statutory trust duties, understood in light of the common law of trusts, and to ordering specific relief for those breaches. Vacated in part and remanded.

135. ***Cobell v. Norton,*** Civil Action No. 96-1285 (RCL), 226 F.R.D. 67 (D.D.C. Feb. 8, 2005). Beneficiaries of individual Indian money ("IIM") trust accounts brought suit against the Secretary of the Interior and other federal officials seeking declaratory and injunctive relief for breach of statutory duty to provide an accounting under Indian Trust Fund Management Reform Act. Plaintiffs filed motion to compel, and defendants filed motions for protective orders. The district court held that: (1) general discovery would be limited to matters relevant to plaintiffs' statutory claim that government defendants breached their statutory duty to provide an accurate accounting of all money in the IIM trust; (2) award of sanctions was not appropriate under rule authorizing award of expenses upon granting motion to compel disclosure; and (3) government did not establish good cause for protective orders precluding depositions of

officials of the Department of Interior. Plaintiffs' motion granted in part and denied in part; defendants' motions denied.

136. ***Cobell v. Norton,*** Civil Action No. 96-1285 (RCL), __ F. Supp. 2d __, (D.D.C. Feb. 23, 2005). Members of Indian tribes and present or past beneficiaries of individual Indian money accounts filed class action, alleging that Secretaries of Interior and Treasury and Assistant Secretary of Interior for Indian Affairs had grossly mismanaged those accounts. The district court issued injunction for complete historical accounting of trust fund assets and comprehensive statement of manner in which trust management would be conducted after Interior's proposed internal changes. Defendants appealed. The appellate court vacated in part and remanded. The district court held that: (1) structural injunction was warranted under court's equitable authority, and (2) stay of injunction pending appeal was not warranted. Ordered accordingly.

137. ***Cobell v. Norton,*** No. CIV.A. 96-1285RCL, __ F. Supp. 2d __, 2005 WL 1421832 (D.D.C. June 17, 2005). Before the court was the defendants' Motion to Strike Plaintiffs' Notice of Supplemental Information in Support of Plaintiffs' Renewed Request for Emergency Status Conference. The defendants made two arguments in support of their motion: First, defendants contended that the allegation in the plaintiffs' Notice – that the Lotus Notes remote dial-up system at BIA would constitute an illicit Internet connection – has no basis in fact and that the Notice should be stricken for that reason. The court found that the truth of plaintiffs' contention in this regard is a question of fact that may only be resolved after the current evidentiary hearing is completed and the court could not strike the plaintiffs' Notice for lack of evidentiary support on the basis of the unsupported assertions in the defendants' motion alone. The defendants' second argument was that the memorandum is shielded by the attorney-client privilege and should not be discoverable or subject to public release by the plaintiffs. Plaintiffs responded that the memorandum falls within the "fiduciary exception" to the attorney-client privilege. The court concluded that the defendants had failed, as a threshold matter, to demonstrate that any part of the memorandum is protected by the attorney-client privilege. The court found that defendants failed to satisfy the court that the plaintiffs' Notice makes allegations lacking any basis in fact; and the attorney-to-client communications contained in the memorandum are not protected by the attorney-client privilege and the court would not strike from the public record the plaintiffs' Notice, the memorandum, or any subsequently filed document that quotes or references the plaintiffs' Notice or the memorandum. The court denied defendants' motion.

138. ***Cobell v. Norton,*** No. 96-1285, 2005 WL 1618744 (D.D.C. July 12, 2005). The plaintiffs' Motion to Require Defendants to Give their Beneficiaries Notice of their Continuing Inability or Refusal to Discharge their Fiduciary Duties presents the question – whether the court should order the distribution of a notice containing information about this litigation to the entire 500,000-member plaintiff class. Federal Rule of Civil Procedure 23(d), the extensive factual record, and the prior law of the case govern the answer. After considering the plaintiffs' motion, Interior's memorandum in opposition, the plaintiffs' reply brief, the applicable law, and the entire record herein, the court granted the plaintiffs' motion.

139. ***Gros Ventre Tribe v. U.S., Bureau of Land Management****,* 344 F.Supp.2d 1221, No. CV 00-69-M-DWM (U.S. D.C. Montana, Oct. 22, 2004). Indian tribes brought action for declaratory and injunctive relief, alleging that the Government violated its trust responsibility to

140. ***LaFramboise v. Thompson,*** No. A4-04-011, __ F. Supp. 2d __, 2004 WL 1812659 (D.N.D. Aug. 16, 2004). Before the court was the defendants' motion for summary judgment. LaFromboise, a minor, entered a medical facility located on the Turtle Mountain Indian Reservation for treatment of a head injury. The facility is operated by defendant, the United States of America. Plaintiff filed the lawsuit asserting medical malpractice on the part of Indian Health Services hospital personnel and physicians allegedly under the control of the defendant, the United States of America. Additionally, the complaint alleged that LaFramboise suffered numerous medical complications as a result of his physician's failure to timely diagnose and treat the head injuries. Defendants moved for dismissal on the grounds that (1) the Plaintiff's claim should be dismissed for failure to provide an expert affidavit within three months of filing the lawsuit; and (2) the claim should be dismissed because the physician was not an employee of the United States but was an independent contractor. The court found the Plaintiff's claims under the Federal Torts Claim Act are governed by North Dakota law due to the statute's use of the phrase "law of the place." Under North Dakota law, a plaintiff in a medical malpractice action is required to file an expert affidavit within three months of the commencement of the action unless good cause is shown to extend the deadline, or the injury is of a type that is an obvious occurrence for which no expert opinion is needed. The court found the plaintiff failed to file the required expert opinion affidavit during the three-month period. In addition, no motion for a good cause extension was filed on a timely basis. The head injury at issue is not the type of injury that falls into the obvious occurrence exception to Section 28-01-46. The court granted defendants' motion to dismiss without prejudice.

141. ***Lindberg ex rel. Conservator for Backlund v. U.S.,*** No. CIV 03-4097, 368 F.Supp.2d 1028 (D.S.D. May 4, 2005). Student at Indian school brought action against the United States under the Federal Tort Claims Act ("FTCA"), alleging she was beaten during hazing incident. Government moved to dismiss for lack of subject matter jurisdiction. The district court held that: (1) FTCA's discretionary function exception did not apply to student's claim that she was beaten as result of school's failure to enact policy regarding staffing requirements in dormitories, and (2) exception did not apply to student's claim that she was beaten as result of school's negligent failure to hire a dormitory manager, in violation federal regulation. Motion denied.

142. ***Loudner v. U.S.,*** No. CIV 94-4294, __ F. Supp. 2d __, 2005 WL 1802514 (D.S.D. July 26, 2005). Following the entry of judgment in suit challenging distribution pursuant to Mississippi Sioux Tribes Judgment Fund Distribution Act, Native American trust beneficiaries filed a motion for attorney fees and expenses under the Equal Access to Justice Act ("EAJA"). The district court held that: (1) trust beneficiaries were "prevailing parties"; (2) Secretary of Interior's requirement that all Native American trust beneficiaries submit their applications to share in judgment fund within five months of the promulgation of the regulations

143. ***Parker v. United States,*** No. Civ. 03-3027, 2005 WL 1490052 (D.S.D. June 22, 2005). Parker was bitten by a dog while on the grounds of housing units owned and maintained by the Bureau of Indian Affairs ("BIA"). Parker brought a claim under the Federal Tort Claims Act, claiming that the BIA was negligent in failing to: monitor its property, take reasonable action when having knowledge of a dangerous condition, remove the dog from its property, post warnings of a dangerous dog on its property, require that the dog be kept away from persons in the area, enforce its rules and regulations pertaining to dangerous conditions on its premises, and protect individuals on the property. Parker claimed that she suffered temporary and permanent bodily and mental injury, pain and suffering, loss of income, impairment of earning capacity, cosmetic injury, and medical bills. Defendant countered that it owes no duty to protect Parker from the actions of its tenant's dog simply because it owns the property, and took the position that the defense of assumption of risk or Parker's own negligence barred recovery. The court granted a partial summary judgment to the effect that the defendant is not derivatively liable for the omissions and commissions of the tenant or the owner of the dog. Judgment in favor of the defendant without costs.

144. ***Scott v. Escalante,*** No. C045819RBL, 2005 WL 1355068 (W.D. Wash. Jun. 3, 2005). This matter was before the court on defendant United States' motion to dismiss. The United States argued that Scott's action was time barred under the relevant statute of limitations. Scott argued that the statute was tolled because he was unaware of the harms resulting from the alleged tortious action of the Escalantes in 1984. Scott and his sister were in the custody of the Quinault Indian Tribal Court when they were was placed in a foster care home with the Escalantes in 1983. Scott alleged that he and his sister were physically and sexually abused and that this abuse was the cause of his sister's death in 1984. The United States argued the timing of Scott's action is dispositive. Scott brought the action in October 2003, almost 20 years after he was removed from the custody of the Escalantes. He filed an administrative claim for damages with the Bureau of Indian Affairs, an agency of the Department of the Interior ("DOI"). DOI denied his claim. Scott then brought this action. The United States argued that the delay in Scott's reaction to the events of 1983 and 1984 deprived the court of subject matter jurisdiction and filed a motion to dismiss. The court found that Scott met his burden. He brought a claim under the Federal Torts Claims Act, which grants subject matter jurisdiction. The court found that the United States' argument was too limited and did not account for a scenario like Scott's. Scott alleged that although the abuse occurred up until 1984, he was only cognizant of his injury in 2003. A claim does not accrue until the injured party discovers both the existence and cause of the injury. This rule, the discovery rule, applies to FTCA claims. Under the discovery rule, Scott's claim was timely filed. The court ordered that Defendant United States' Motion to Dismiss was denied.

145. ***The Osage Nation and/or Tribe of Indians of Oklahoma v. United States,*** No. 00-169 L (SBC), 66 Fed. Cl. 244 (Fed. Cl. July 8, 2005). Indian tribe brought suit against the United States seeking damages for breach of fiduciary duty in the mismanagement of tribal trust funds and for failure to account. Plaintiff filed objections to government's privilege claims.

146. ***Wolfchild v. U.S.,*** No. 03-2684L, 2004 WL 2397352 (Fed. Cl. Oct. 27, 2004). The plaintiffs averred they are lineal descendants of the loyal Mdewakanton, and brought claims of breach of fiduciary duty and contract by the United States. The government filed a motion to dismiss, arguing that the court lacked subject matter jurisdiction and that the complaint failed to state a claim upon which relief may be granted. Plaintiffs filed a cross-motion for partial summary judgment that a trust exists for the benefit of the lineal descendants, that the government has breached its fiduciary duties, and that a contract exists and has been breached. The court granted in part and denied in part the government's motion to dismiss; granted in part and denied in part plaintiffs cross-motion for partial summary judgment.

O. MISCELLANEOUS

147. ***Alaska Inter-Tribal Council v. State of Alaska***, No. S-10844, 2005 WL 858698 (Alaska Apr. 15, 2005). The appellants alleged that Alaska's allocation of law enforcement services violates the constitutional rights of residents of off-road, predominantly Alaska Native, communities. Among other things, the plaintiffs alleged that the state violates their federal and state rights to equal protection of the law by adopting or creating a de jure discriminatory system of law enforcement, by engaging in intentional racial discrimination in providing law enforcement services, and by discriminating against residents of off-road, outlying communities in providing law enforcement services. The superior court rejected all their claims, in part on summary judgment and in part following a bench trial. On appeal, plaintiffs argued only that it was error to reject their federal and state equal protection claims. The appellate court concluded that the superior court did not err in holding that they did not prove that the state adopted or established a de jure discriminatory law enforcement system. It also held that the superior court did not err in rejecting, after trial, appellants' state equal protection claim alleging that the state's law enforcement system is linked to a discriminatory intent or purpose. The rejection of that claim after trial rendered harmless the appellants' argument that the court erroneously dismissed their corresponding federal claim on summary judgment. The appellate court also concluded that the superior court did not clearly err in holding that off-road and on-road communities are not similarly situated. The appellate court affirmed.

148. ***American Civil Liberties Union of Minn. v. Kiffmeyer,*** No. 04-CV-4653, 2004 WL 2428690 (D. Minn. Oct. 28, 2004). Plaintiffs brought a motion for a temporary restraining order pursuant to Rule 65 of the Federal Rules of Civil Procedure. The court ordered: (1) For purposes of Minn. Stat. Sec. 201.061, subd. 3, tribal identification cards that contain the name, address, signature and picture of the tribal member will have the same status as a Minnesota driver license. Therefore, such tribal identification cards are sufficient proof of identity and residency, and may be used without any other documentation to register to vote on election day

149. ***Cherokee Nation Of Oklahoma v. Norton***, No. 03-5055, __ F.3d __, 2004 WL 2595951 (10th Cir. Nov. 16, 2004). Cherokee Nation of Oklahoma brought action challenging decision of Department of the Interior ("DOI") to recognize Delaware Tribe of Indians as tribal entity separate form Cherokee Nation. Following remand, 117 F.3d 1489, and transfer to the district court, the district court, 241 F.Supp.2d 1368, sustained DOI's decision. Cherokee Nation appealed. The appellate court held that: (1) DOI's decision violated Federally Recognized Indian Tribe List Act, and (2) DOI's decision was arbitrary and capricious. Reversed.

150. ***Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate,*** No. 04-15044, __ F.3d __, 2005 WL 1804076 (9th Cir. Aug. 2, 2005). Non-Native Hawai'ian student brought suit against private school, charitable trust, and trustees under § 1981, challenging race-conscious admissions policy of accepting only students of native Hawai'ian ancestry. The district court, 295 F.Supp.2d 1141, entered summary judgment for school defendants, and student applicant appealed. The appellate court held that: (1) on issue of first impression in Ninth Circuit, suit under § 1981 was subject to substantive standards applicable to race-based challenges under Title VII; (2) race-based admissions policy did not constitute valid affirmative action plan that might supply legitimate nondiscriminatory reason for school's actions; and (3) policy was unlawful under § 1981. Affirmed in part, reversed in part.

151. ***Native American Arts, Inc. v. The Waldron Corp.,*** No. 04-3182, 399 F.3d 871 (7th Cir. Mar. 2, 2005). Seller of Indian manufactured arts and crafts sued non-Indian jewelry manufacturer for violation of Indian Arts and Crafts Act. The district court entered judgment for manufacturer, and seller appealed. The appellate court held that: (1) regulation interpreting unqualified use of term "Indian" was not meant to govern issue of liability, and (2) any failure to instruct on regulation was harmless. Affirmed.

152. ***Shirt v. Hazentine***, No. Civ. 01-3032-KES, 2004 WL 2093519, (D.S.D. Sept. 15, 2004). Native American voters brought suit alleging that South Dakota legislative redistricting plan violated Voting Rights Act. The district court held that redistricting plan which established a 90% supermajority of Indian voters in one district resulted in dilution of Indian voting rights, in violation of § 2 of the Voting Rights Act. Judgment for plaintiffs.

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