

## JUDICIAL UPDATE

### 2007 - 2008 CASE LAW ON AMERICAN INDIANS

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For purposes of this symposium, the presenter has revised the synopses.

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## UNITED STATES SUPREME COURT

1. ***Carcieri v. Kempthorne***, Docket No. 07-526. Petition for certiorari was **granted** on February 25, 2008. **Issues:** (1) Does Indian Reorganization Act empower secretary to take land into trust for Indian tribes that were not recognized and under federal jurisdiction in 1934? (2) Does act of Congress that extinguishes aboriginal title and all claims based on Indian rights and interests in land preclude secretary from creating Indian country there? (3) Does providing land “for Indians” in Indian Reorganization Act establish sufficiently intelligible principle upon which to delegate power to take land into trust? **Holding below:** *Carcieri v. Kempthorne*, No. 03-2647, 497 F.3d 15. Secretary of Interior’s interpretation of Indian Reorganization Act’s definition of “Indian,” which includes “all persons of Indian descent who are members of any recognized Indian tribe now under federal jurisdiction” and their descendants who were residing within boundaries of any Indian reservation on June 1, 1934, 25 U.S.C. § 479, to cover members of tribes that were recognized and under federal jurisdiction at time request for trust acquisition is made, rather than as of June 18, 1934, enactment of statute, is reasonable, consistent with department’s prior interpretations, and entitled to deference, and thus includes Rhode Island tribe first recognized in 1983 for whom secretary, under 25 U.S.C. § 465, took into unreserved trust for tribe’s benefit 32-acre parcel of Rhode Island land in 1998; 1978 Rhode Island Indian Claims Settlement Act, which provided that “[e]xcept as otherwise provided in this [act], the settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island,” 25 U.S.C. § 1708(a), by its terms applied only to 1800 acres of “settlement lands” specified in act, did not implicitly repeal secretary’s authority under 28 U.S.C. § 465 to take other Rhode Island lands under trust for tribes, and thus did not preclude 1998 reservation of lands in trust for tribe; Section 465’s direction that land be acquired “for the purpose of providing land for Indians” has specific meaning in light of failure of allotment policy and congressional rejection of assimilation as goal, and thus does not violate nondelegation doctrine as lacking intelligible principle for execution.

2. ***Plains Commerce Bank v. Long Family Land and Cattle Company, Inc., et al.***, Docket No. 07-411. Decided June 25, 2008. **Issues:** Do Indian tribal courts have subject matter jurisdiction to adjudicate civil tort claims as “other means” of regulating conduct of nonmember bank, owning fee land on reservation, that entered into private commercial agreement with member-owned corporation? **Holding below:** *Plains Commerce Bank v. Long Family Land and Cattle Co. Inc.*, 491 F.3d 878. Tribal court had jurisdiction over claim by tribal members that defendant bank, South Dakota corporation with its principal place of business outside tribe’s reservation, discriminated against them, based on either their Indian ancestry or tribal affiliation, in terms of loan that bank made to their family-owned corporation, because claim satisfied requirements for first category of permissible tribal jurisdiction over nonmembers recognized in *Montana v. United States*, 450 U.S. 544 (1980), in that (i) bank had formed consensual relationship with tribal members, by virtue of loans to their corporation whose overwhelming tribal character clearly benefited bank (through loan guarantees by Bureau of Indian Affairs that greatly reduced bank’s risk) and bank’s related commercial relationships with corporation’s individual owners, and (ii) tribal tort law invoked by tribal members is appropriate “other means” of regulating activities of nonmember that have some nexus to consensual relationship, given that discrimination claim arose directly from pre-existing commercial relationship between tribal members and bank and sought to hold nonmembers, such as bank, to minimum standard of fairness when they voluntarily deal with tribal members. The Supreme Court reversed 491 F.3d 878.

## OTHER COURTS

### A. ADMINISTRATIVE LAW

3. *Cowdery, Ecker & Murphy, LLC v. U.S. Dept. of Interior*, No. 3: 07cv00879, \_\_\_ F. Supp. 2d \_\_\_, 2007 WL 2701140 (D. Conn. Sept. 14, 2007). Plaintiff Cowdery, Ecker & Murphy, LLC (“plaintiff” or “CEM”) commenced an action under the Freedom of Information Act, 5 U.S.C. § 552, *et seq.* (FOIA). CEM sought to compel the Department of the Interior (DOI) to disclose Senior Executive Service Performance Plan documents (performance reviews) prepared in the fiscal years 2004 and 2005 for James E. Cason, the nominal Associate Deputy Secretary of the Department of the Interior. In a separate lawsuit, CEM challenged a decision by the DOI to strip the Schaghticoke Tribal Nation (Tribe) of federal recognition as a tribal nation. CEM argued that Cason was not confirmed by the Senate and therefore was not properly installed in his position at the Department. CEM requested the documents at issue in a FOIA request and argued that their disclosure is necessary and bears on its appeal of the DOI’s decision. DOI claimed two exemptions from disclosure under FOIA: exemption 6, that disclosure would constitute an unwarranted invasion of Cason’s privacy, and exemption 5, that these documents would not be available by law in litigation with the agency because of the deliberative process privilege that protects candid internal discussions of legal or policy matters. DOI produced redacted versions of the requested documents to CEM. CEM argued that the redacted performance reviews do not satisfy its FOIA request, and that neither exemption applies. The court treated plaintiff’s motion as one for summary judgment, granted that motion, and ordered that DOI disclose non-redacted versions of the performance reviews to CEM.

4. *Me-Wuk Indian Community of Wilton Rancheria v. Kempthorne*, No. 07-412, \_\_\_ F.R.D. \_\_\_, 2007 WL 3088581 (D.D.C. Oct. 24, 2007). In Indian group’s action seeking restoration of status as a federally recognized tribe, second group, which had brought a complaint in the Northern District of California seeking the same recognition, moved to intervene. First group opposed the motion and, in the alternative, asked the court to limit scope of the claims to be set forth in the complaint-in-intervention. Secretary of the Interior (DOI) moved to transfer venue to the Eastern District of California and, after competing group indicated that if allowed to intervene, it would move to transfer venue to the Northern District of California, DOI indicated it would support transfer to that district. The district court held that: (1) putative intervenor had standing to intervene; (2) putative intervenor had a legally protectable interest in tribe’s restoration to federally recognized status; (3) putative intervenor showed that its interest might not be adequately represented by the parties; (4) permitting intervention did not impermissibly broaden the scope of the litigation; and (5) convenience of the parties and witnesses favored transfer to Northern District of California. Ordered accordingly.

5. *Alvarado v. Table Mountain Rancheria*, No. 06-15351, 2007 WL 4198261 (9th Cir. Nov. 29, 2007). Unsuccessful petitioners for admission to Table Mountain Rancheria (TMR) Indian tribe filed suit against TMR, several tribal members, former class representatives for prior settled class action that regained TMR Indian status under federal law, Secretary of Interior, and United States, claiming breach of covenant of good faith and fair dealing and breach of fiduciary duty, and seeking declaratory and injunctive relief compelling admission as tribal members. The district court, 2005 WL 1806368, dismissed for lack of subject matter jurisdiction. The appellate court held that: (1) complaint was not collateral attack on prior settlement; (2) ancillary jurisdiction did lie over claims; (3) original jurisdiction did not lie

**6. *California Valley Miwok Tribe v. United States***, No. 06-5203, 2008 WL 398455 (D.C. Cir. Feb. 15, 2008). Members of Indian tribe brought action on behalf of tribe challenging Secretary of the Interior's refusal to approve tribal constitution, seeking declaration that tribe was organized pursuant to Indian Reorganization Act. The district court, 424 F. Supp. 2d 197, granted government's motion to dismiss. Members appealed. The appellate court held that: (1) Secretary had authority under the Act to refuse to approve constitution, and (2) any error in district court's denial of members' motions for leave to file supplemental claims was harmless. Affirmed.

**7. *Miccosukee Tribe of Indians of Florida v. U.S.***, No. 06-13309, \_\_ F.3d \_\_, 2008 WL 397390 (11th Cir. Feb. 15, 2008). Native American Indian tribe brought action against the Environmental Protection Agency (EPA), and various EPA officials, alleging violation of the Freedom of Information Act (FOIA). The district court granted summary judgment in favor of defendants. Tribe appealed. The appellate court held that: (1) appellate court need not decide whether affidavit of EPA official charged with responding to FOIA requests was sufficient to demonstrate that search was adequate; (2) evidence was sufficient to allow court to determine whether EPA conducted adequate search; (3) fact issues precluded summary judgment on adequacy of search; (4) fact issues precluded summary judgment on whether exclusion of certain documents was reasonable; (5) district court was not required to draw adverse inference against EPA based on supplemental late discovery and production of documents; (6) Vaughn Index and affidavits, in conjunction with in camera review, provided adequate factual basis for claimed exemption based on privileges; and (7) withheld documents were exempt from disclosure based on deliberative process, attorney-client, and work product privileges. Affirmed in part, vacated in part, and remanded.

**8. *Penobscot Indian Nation v. U.S. Dept. of Housing and Urban Development***, Nos. 07-1282 and 07-1752, \_\_ F. Supp. 2d \_\_, 2008 WL 586471 (D.D.C. Mar. 5, 2008). In separate cases, private providers of seller-funded downpayment assistance (SFDPA) and tribal entities offering essentially same services as private SFDPA providers brought, or intervened in, action challenging regulation in which United States Department of Housing and Urban Development (HUD) established that Federal Housing Administration would no longer insure mortgages originated with SFDPA. Parties cross-moved for summary judgment. The district court held that: (1) HUD violated notice-and-comment requirements of Administrative Procedure Act (APA) in promulgating regulation; (2) HUD's explanation for regulation reflected lack of reasoned decisionmaking, and therefore violated APA; and (3) seriousness of regulation's deficiencies warranted both vacating regulation and remanding it. Regulation vacated and remanded.

**9. *Sauk County v. U.S. Dept. of Interior***, No. 07-543, 2008 WL 2225680 (W.D. Wis. May 29, 2008). Raising questions about the legality of the Indian Reorganization Act of 1934, 25 U.S.C. § 465, and other matters, plaintiff Sauk County sought review of a final action taken by the United States Department of the Interior under the Act. The department took into trust for defendant Ho-Chunk Nation approximately five acres of land located in Sauk County, Wisconsin. Plaintiff contended that the department's action was arbitrary and capricious, that

**10. *Mowa Band of Choctaw Indians v. U.S.***, No. 07-0508, 2008 WL 2633967 (S.D. Ala. July 2, 2008). The “Mobile-Washington County Band of Choctaw Indians of South Alabama” (MOWA) petitioned the Board of Indian Affairs for federal acknowledgment as an Indian tribe. The Assistant Secretary-Indian Affairs issued a Final Determination denying the MOWA’s petition for acknowledgment. The MOWA filed an appeal before the Interior Board of Indian Appeals, but that appeal was denied. However, the Interior Board of Indian Appeals sent one issue, concerning the appropriate burden of proof to be applied in the decision, to the Assistant Secretary for Indian Affairs. The Assistant Secretary declined to order reversal of the final determination. The MOWA initiated this suit seeking: (1) a declaration that it is an Indian Tribe to be recognized by the Bureau of Indian Affairs pursuant to the Treaty of Dancing Rabbit Creek, (2) review of the decisions of the Bureau of Indian Affairs denying the MOWA Federal Acknowledgment, and (3) a declaration that the MOWA is entitled to back payments of all federal monies that would have been paid to it if it had received Federal Acknowledgment. The MOWA later amended its complaint, asserting only its first two claims and omitting its claim for back payments. The court found that plaintiff’s claims were filed beyond the six year statute of limitations set forth in 28 U.S.C. § 2401(a) and are barred and granted defendant’s motion to dismiss.

**11. *Yankton Sioux Tribe v. U.S. Dept. of Health and Human Services***, No. 07-3096, \_\_\_ F.3d \_\_\_, 2008 WL 2628931 (8th Cir. July 7, 2008). The Yankton Sioux Tribe on behalf of its members and individual member Glenn Drapeau (collectively “the Tribe”) brought an action to challenge the decision of the United States Indian Health Service (IHS) to close an emergency room at the Wagner IHS Health Care Facility and to convert it to an urgent care facility. IHS and the other defendants moved to dismiss the Tribe’s claims on the grounds of res judicata and for failure to state a claim. The district court granted the motion, and the Tribe appealed. The appellate court affirmed.

**12. *Nulankeyutmonen Nkihtaqmikon v. Impson***, No. CV-05-168-B-W, \_\_\_ F. Supp. 2d \_\_\_, 2008 WL 3854543 (D. Me. Aug. 14, 2008). A group of private citizens, who are residents of the Pleasant Point Passamaquoddy Reservation in Maine, oppose the construction of a LNG terminal and banded together under the name Nulankeyutmonen Nkihtaqmikon (NN). Together with several individual plaintiffs, they did not appeal the BIA’s approval of the lease to the Interior Board of Indian Appeals (IBIA); rather, they filed a lawsuit in district court, challenging the BIA’s approval of the lease on multiple grounds: failure to comply with the procedural requirements of the National Environmental Policy Act (NEPA), 43 U.S.C. § 4321, *et seq.*, the National Historic Preservation Act (NHPA), 16 U.S.C. § 470, *et seq.*, the Leasing Act, and the Endangered Species Act (ESA), 16 U.S.C. § 1531, *et seq.* Instead of answering the Complaint, the BIA moved to dismiss on January 24, 2006. On November 16, 2006, after extensive briefing and an oral argument, the court granted the BIA’s motion to dismiss, concluding that the Plaintiffs lacked standing and that their claims were not ripe for adjudication. The court did not

## **B. CHILD WELFARE LAW AND ICWA**

**13.** *Alyssa B. v. Department of Health & Social Services, Division of Family & Youth Services*, No. S-12410, 2007 WL 2333330 (Alaska Aug. 17, 2007). Alyssa B. claimed, among other things, that the superior court lacked jurisdiction because her daughter is an Indian child under the Indian Child Welfare Act (ICWA). She contended that ICWA applies because the child's father is a native Hawaiian. The court found that the act defines "Indian tribe" as "any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village" and that native Hawaiians are not recognized by Congress as Indian tribes for the purposes of applying ICWA. The court found that the claim lacked merit and affirmed the superior court ruling.

**14.** *In re M. M.*, No. A115771, 2007 WL 2421759 (Cal. App. Ct. Aug. 28, 2007). This appeal from an order transferring a case from a California juvenile court to an Indian tribal court pursuant to the Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 *et seq.*, raised a question of first impression in California – does the transfer of a juvenile dependency case from state court to tribal court pursuant to 25 U.S.C. § 1911(b) deprive the California courts of jurisdiction over the dependency case and thus preclude any appeal from the transfer order? The court concluded that it does and dismissed the appeal for lack of jurisdiction.

**15.** *In re J.T.*, No. A117049, 2007 WL 2430128 (Cal. Ct. App. Aug. 29, 2007). Parent's parental rights to her three children were terminated by the superior court after mother had identified her possible Indian heritage. Mother appealed. The appellate court held that: (1) Indian Child Welfare Act (ICWA) notice of child dependency proceedings that was sent to Bureau of Indian Affairs rather than to all federally recognized tribes identified by mother was inadequate, and (2) ICWA notice of dependency proceedings had to be addressed to tribal chairperson or designated agent for service. Reversed and remanded.

**16.** *In re J.D.M.C.*, No. 23998, 2007 WL 2687317 (S.D. Sept. 12, 2007). Mother brought neglect petition against non-Native American father in tribal court. Tribal court entered emergency custody order, and then filed motion in circuit court to enforce order. Father filed motion for comity hearing and to invalidate order. The circuit court determined that tribal court had exclusive jurisdiction over proceedings and denied father's motion. Father appealed. The Supreme Court held that: (1) reservation was not Native American child's "domicile" as required for tribal court to exercise exclusive jurisdiction over neglect proceedings; (2) child was not ward of tribal court; (3) personal service agreement between state and tribe did not confer jurisdiction on tribal court over neglect proceedings; (4) tribal court's determination that it

**17. *In re Veronica G.***, No. A117131, 2007 WL 4171072 (Cal. Ct. App. Nov. 27, 2007). County human services agency filed juvenile dependency petitions on behalf of children. The superior court declared dependency as to both children. Mother and father appealed. The appellate court held that: (1) substantial evidence supported trial court's jurisdictional finding that children were at a substantial risk of serious physical and emotional harm from mother and father, and (2) failure to comply with notice requirements of Indian Child Welfare Act was not jurisdictional and did not require reversal of order. Affirmed and remanded.

**18. *In re A.W.***, No. 06-1074, 2007 WL 4214049 (Iowa Nov. 30, 2007). County attorney sought to terminate the parental rights of Indian mother and non-Indian father, and tribe moved to intervene under the Iowa Indian Child Welfare Act (Iowa ICWA). The district court granted motion to intervene. County attorney and guardian ad litem appealed, and the Attorney General moved to dismiss appeals. The Supreme Court held that: (1) county attorney had no authority to represent state in appeal from juvenile court in child in need of assistance case; (2) in a matter of first impression, county attorney could not challenge the constitutionality of legislative acts in court while representing the interests of the state; (3) definition of "Indian child's tribe" as used in Iowa ICWA included tribes which identified a child as a child of the tribe's community; (4) definition of "Indian child" in the Iowa ICWA violated the equal protection clause. Reversed and remanded.

**19. *In re Lawrence H.***, No. A-07-592, 2007 WL 4336333, (Neb. Ct. App. Dec. 11, 2007) Ida H. and Jose O. appealed the order of the separate juvenile court that terminated their parental rights to their son Lawrence H. The appellate court concluded that the juvenile court erred in deferring its ruling on the motion to transfer of the Omaha Tribe of Nebraska, reversed the juvenile court's denial of the motion to transfer, vacated and dismissed the order terminating parental rights, and remanded with directions to transfer the matter to tribal court.

**20. *In re J.S.***, No. 104648, 2008 WL 375916 (Okla. Civ. App. Jan. 10, 2008). Mother appealed decision of the district court terminating parental rights to minor Indian children. The appellate court held that: (1) trial court's incorrect application of a heightened "beyond a reasonable doubt" standard of proof was harmless error, but (2) Indian Child Welfare Act's requirement for "active efforts" at reunification sets a higher standard for social services departments than "reasonable efforts" standard of state termination of parental rights statutes. Reversed and remanded with directions.

**21. *In re M.B.***, No. 98,387, \_\_ P.3d \_\_, 2008 WL 398291 (Kan Ct. App. Feb. 15, 2008). The state petitioned to terminate mother and father's parental rights to their two children. The district court terminated parental rights. Father appealed. The appellate court dismissed the appeal and remanded the case. On remand the district court determined that the Indian Child Welfare Act (ICWA) applied, and declined to invalidate any of its prior rulings. Father appealed. The appellate court held that: (1) trial court failed to comply with the notice provisions of the ICWA; (2) trial court error in failing to promptly provide Indian tribe with



**22. *In re N.V.***, No. 07-0583, \_\_ N.W. 2d \_\_, 2008 WL 399259 (Iowa Feb. 15, 2008). At termination of parental rights hearing, mother requested the court to transfer jurisdiction of the proceeding to tribal court, and father joined the request. The district court granted the request. The state appealed. The Supreme Court held that: (1) trial court could not deny mother's request to transfer termination of parental rights proceeding to tribal court based on mother filing her request the day of scheduled termination hearing; (2) evidence supported finding that neither the parties nor the witnesses would suffer undue hardship if the termination of parental rights case was transferred to tribal court; and (3) doctrine of estoppel did not prevent parents from requesting transfer of termination of parental rights proceeding to tribal court. Affirmed.

**23. *In re William K.***, No. C055107, 2008 WL 757266 (Cal. Ct. App. Mar. 24, 2008). Appellant contended the juvenile court erred in failing to (1) set aside a voluntary declaration of paternity executed by another man; (2) find he was a presumed father under *Adoption of Kelsey S.* (1992) 1 Cal. 4th 816; and (3) require compliance with newly enacted § 224.3, subdivision (e)(1), relating to notice under the Indian Child Welfare Act (25 U.S.C. § 1901 *et seq.*). The appellate court affirmed.

**24. *In re H.B.***, No. B200606, 2008 WL 484058 (Cal. Ct. App. Mar. 25, 2008). Gail B., the mother of four-year-old H.B., appealed from the juvenile court's order terminating her parental rights under Welfare & Institutions Code § 366.26. Without ever affirmatively stating either she or H.B. may have American Indian ancestry, Gail B. contended the juvenile court's failure to inquire about such ancestry violated the Indian Child Welfare Act (25 U.S.C. § 1901 *et seq.*) and requires reversal of the termination order. The appellate court affirmed.

**25. *Karrie B. v. Catherine J.***, Docket No. S-12675, 181 P.3d 177 (Alaska Apr. 4, 2008). Office of Children's Services (OCS) filed a petition to terminate mother's parental rights to her two children. After a hearing, the superior court declined to order termination. The children's guardian ad litem (GAL) appealed. The Supreme Court held that: (1) absence of favorable long-term placement options was a valid factor for trial court to consider when determining whether termination was in children's best interests; (2) mother's ability to stay sober and her determination to stay sober were relevant factors for trial court to consider in determining whether termination was in children's best interests; and (3) bond between mother and children was an appropriate consideration of trial court in determining whether termination was in children's best interests. Affirmed.

**26. *In re Alice M.***, Docket No. H031794, 74 Cal. Rptr. 3d 863 (Cal. Ct. App. Apr. 9, 2008). The superior court terminated mother's parental rights. Mother appealed. The appellate court, 2007 WL 467761, reversed. On remand, the superior court, No. J40094, again terminated parental rights. Mother appealed. The appellate court held that: (1) mother's failure to object did not forfeit argument of improper Indian Child Welfare Act (ICWA) notice; (2) juvenile court had reason to know that child may be Indian child; (3) notice requirements, rather than only duty of further inquiry, were triggered; (4) notices did not comply with statutory requirements; (5) notices did not substantially comply with ICWA; and (6) notice to the Bureau of Indian

**27. *Erika K. v. Brett D.***, Docket No. A116590, 75 Cal. Rptr. 3d 152 (Cal. Ct. App. Apr. 18, 2008). Indian mother filed petition for custody of Indian child living with third party caretaker. Caretaker was joined as a party. The superior court, No. FS030459, granted custody of child to caretaker. Mother appealed. The appellate court held that: (1) caretaker could be properly joined as a party to mother's petition; (2) grant of child custody to unrelated, third party custodian does not require filing of guardianship petition; (3) nonparent may be awarded custody even when a parent seeks custody; (4) statute governing grant of child custody to a nonparent would apply, even though child originally came into care of nonparent as a result of consensual arrangement; and (5) trial court was not to consider whether Indian Child Welfare Act (ICWA) was unconstitutional as applied to child before applying substantive provisions of the ICWA to determine whether a constitutional issue actually existed. Reversed and remanded.

**28. *Thomas H. v. State of Alaska, Dept. of Health & Social Services, Office of Children's Services***, Docket No. S-12847, 184 P.3d 9 (Alaska May 16, 2008). Office of Children Services (OCS) filed petition to terminate father's parental rights to Indian children. The superior court granted petition. Father appealed. The Supreme Court held that: (1) father failed to remedy the conduct or conditions that placed the children at substantial risk of harm, such that termination of father's parental rights was warranted; (2) OCS made requisite "active efforts" under Indian Child Welfare Act (ICWA) prior to petitioning for termination of father's parental rights; and (3) qualified expert testimony, in combination with substantial evidence in record, supported determination that children would likely be harmed if returned to father. Affirmed.

**29. *In re Rayna N.***, Docket No. B206049, 2008 WL 2152866 (Cal. Ct. App. May 23, 2008). Tina L. (Mother) petitioned for a writ of mandate to compel the juvenile court to vacate its orders terminating reunification services as to her children Rayna N. and Rudy L., and setting a permanency planning hearing under Welfare and Institution Code § 366.26. Mother contended that the court failed to comply with the notice requirements of the Indian Child Welfare Act of 1978 (ICWA, 25 U.S.C. § 1901 *et seq.*), and of recently enacted California statutes governing custody proceedings involving Indian children (§§ 224 *et seq.*). The Los Angeles County Department of Children and Family Services (DCFS) agreed, and asked that the court follow the common practice of a limited reversal and remand to permit compliance. Mother challenged that procedure, contending that § 224.2, subdivision (d), one of the recent California statutes, prohibits it. The court held that when the juvenile court fails to comply with the notice requirements applicable in Indian child custody proceedings, § 224.2, subdivision (d), does not prohibit the established remedy of a limited reversal and remand.

**30. *Wilson W. v. State of Alaska***, Docket No. S-12828, 2008 WL 2389475 (Alaska June 13, 2008). A father appealed the superior court's finding that his four children are children in need of aid. In 2006 the Office of Children's Services (OCS) removed the children after investigating an incident of domestic violence and after the father subsequently threatened OCS social workers. The parents were unwilling to cooperate with OCS following the removal; OCS thus formed a case plan without their input. The superior court found that the children are in need of aid and that OCS made active efforts to reunite the family as required by the Indian Child Welfare Act (ICWA). The court concluded that the state made active efforts despite the

**31. *Valerie M. v. Arizona Department of Economic Security***, Docket No. 1 CA-JV 07-0033, 2008 WL 2426807 (Ariz. Ct. App. June 17, 2008). Mother appealed order of the Superior Court, terminating her parental rights to her three children. The appellate court held that: (1) reasonable doubt standard under Indian Child Welfare Act (ICWA) does not preempt the state-imposed burdens of proof for establishing termination grounds and best interests findings; (2) statutory termination grounds and best interests findings are to be found under the “clear and convincing evidence” standard; and (3) conflicting rule, requiring application of “beyond a reasonable doubt” standard in cases involving Indian children, was invalid. Affirmed.

**32. *In re adoption of C.D.***, Docket No. 20070171, 2008 WL 2522600 (N.D. June 25, 2008). Wife of child’s father filed petitions to adopt child and terminate mother’s parental rights. The district court dismissed petition under the Indian Child Welfare Act (ICWA). Wife appealed. The Supreme Court held that: (1) wife’s failure to object to Indian tribe’s motion to intervene did not result in waiver of petitioner’s claim that ICWA did not apply; (2) allegations in Indian tribe’s motions were not binding and conclusive on child’s status as an “Indian child”; and (3) notwithstanding evidence of Native American heritage, child was not an “Indian child” under ICWA, absent evidence of mother’s current membership in a federally recognized Indian tribe. Reversed and remanded.

**33. *Justin L. v. Superior Court***, No. B206462, 2008 WL 3522184 (Cal. Ct. App. Aug. 14, 2008). In dependency proceeding, the Superior Court, No. CK66262, removed two children from parents' custody and denied reunification services. Mother, father of one child, and alleged father of other child petitioned for writ of mandate. The appellate court held that failure to notify appropriate Indian tribes required remand for Indian Child Welfare Act (ICWA) compliance. Petitions granted in part and denied in part. The court expressed weariness with appeals in which “the only error is the Department’s failure to comply with ICWA,” noting 14 published opinions in 2002-05 and 72 unpublished cases statewide in 2005 alone reversing for non-compliance with ICWA.

## **C. CONTRACTING**

**34. *GasPlus, L.L.C. v. U.S. Department of Interior***, No. 03-1902, \_\_ F. Supp. 2d \_\_, 2007 WL 2506402 (D.D.C. Sept. 6, 2007). Gasoline distribution company sued the Department of the Interior (DOI), challenging under the Administrative Procedure Act a decision of the DOI’s Acting Assistant Secretary for Indian Affairs, which determined that a contract between an Indian tribe and the company was invalid. The parties cross-moved for summary judgment. The district court held that: (1) the company had standing, and (2) the management contract did not encumber Indian land. Plaintiff’s motion granted.

**35. *Oglala Sioux Tribe v. C & W Enterprises, Inc.***, No. CIV. 07-5024, \_\_ F. Supp. 2d \_\_, 2007 WL 2688555 (D.S.D. Sept. 10, 2007). Plaintiff, Oglala Sioux Tribe (OST) contracted with C&W Enterprises, Inc. (C&W), a South Dakota Indian owned corporation that qualifies for an Indian preference, to perform four road construction projects all of which were

**36. *Catawba Indian Tribe of South Carolina v. City of Rock Hill, SC***, No. 05-2050, \_\_\_ F.3d \_\_\_, 2007 WL 2729124 (4th Cir. Sept. 20, 2007). Appellant Catawba Indian Tribe (Tribe) filed suit against the City of Rock Hill (City), alleging that a recently enacted City ordinance impaired contracts previously entered into by the parties for the construction of water infrastructure to serve the Tribe’s reservation. The parties entered into a “Water And/Or Sewer Service Agreement And Restrictive Covenant,” essentially a promise from the City to provide water services in the future so long as the Tribe entered into a restrictive covenant for future annexation of the Reservation. The City later adopted an ordinance imposing water and wastewater impact fees for services that would create any new or additional demand on the City’s water and/or wastewater systems. The Tribe did not request service and installation of the its meters until after a deadline set by the City to avoid impact fees. The City imposed an impact fee in connection with the water meter and service installation which the Tribe paid under protest. It then initiated an action in district court, complaining that the City’s imposition of additional fees violated the Contracts Clause of the United States Constitution. The district court granted the City’s motion finding there was no “substantial” impairment. The appellate court held that the contracts were not impaired by the issuance of the Ordinance, which did not directly contravene any clause in the contracts. Accordingly, summary judgment was appropriate on the alternative ground that there was no impairment of the contracts. None of the contracts entered into by the parties prevented the City from imposing or changing fees unrelated to the actual installation of meters or the laying of pipes. Because the fee in question did not affect either of these contractual obligations, the imposition of the fee did not impair the obligation of the contract between the City and the Tribe. The appellate court affirmed the district court’s grant of summary judgment to the City.

**37. *Yankton Sioux Tribe v. Wynne***, No. CV 07-1119, 2007 WL 2949001 (D. Ariz. Oct. 9, 2007). Pending before the court were defendant Wynne’s motions to dismiss for improper venue and for lack of standing, and plaintiff’s motions to remand to state court and to stay. Defendant, an attorney who resides in Arizona but is not licensed to practice law in Arizona, performed legal work for plaintiff in various cases from 1999 to 2007. Plaintiff alleged that after it terminated defendant’s employment, defendant refused to release certain files relating to ongoing litigation, and asserted a “lien” on the files as a result of a fee dispute. Plaintiff filed claims for conversion and breach of fiduciary duty in superior court. Plaintiff’s prayer for relief requested injunctive relief directing defendant to turn over the legal files, compensatory and punitive damages, and attorney’s fees and costs. Defendant removed the action to federal court “pursuant to 28 U.S.C. § 1441 *et seq.*” The federal court’s order granted plaintiff’s motion to remand, along with the costs and fees incurred as a result of the removal; and dismissed as moot defendant’s motions.

**38. *In re Harper***, No. 07-5016, \_\_\_ F.3d \_\_\_, 2008 WL 192862 (10th Cir. Jan. 24, 2008). Chapter 7 trustee brought adversary proceeding to avoid credit union's lien against debtors' vehicle. The bankruptcy court entered judgment in trustee's favor and denied credit union's motion for new trial. Credit union appealed. The Bankruptcy Appellate Panel, 2007 WL 45918, affirmed. Credit union appealed. The appellate court held that: (1) state statute deeming security interest in vehicle registered by Indian tribe valid if perfected under tribal law did not apply to credit union's lien; (2) tribal title issued for vehicle was not "certificate of title" under Uniform Commercial Code; (3) credit union did not have purchase money security interest under Oklahoma law and could not rely on automatic perfection; (4) credit union was not entitled to statutory subrogation; and (5) credit union was not entitled to equitable subrogation. Affirmed.

**39. *Aleutian Pribilof Islands Ass'n, Inc. v. Kempthorne***, No. 06-2173, \_\_\_ F. Supp. 2d \_\_\_, 2008 WL 351284 (D.D.C. Feb. 11, 2008). Nonprofit that represented 13 tribal governments in Alaska, and was authorized to enter self-governance pacts with Secretary of the Interior to carry out programs, functions, services, and activities pursuant to Indian Self-Determination and Education Assistance Act (ISDEAA), brought action challenging Secretary's decision to provide to regional corporation created pursuant to Alaska Native Claims Settlement Act (ANCS) monies which previously had been provided on yearly basis to nonprofit. Parties cross-moved for summary judgment, and Secretary also filed partial motion to dismiss. The district court held that: (1) nonprofit did not fail to exhaust administrative remedies; (2) Bureau of Indian Affairs, in deciding nonprofit's request for ANCSA funds, had to apply criteria of ISDEAA and related regulations restricting government's discretion to decline Indian tribe funding proposals; and (3) remand for further proceedings was appropriate remedy for BIA's arbitrary and capricious decision not to apply ISDEAA criteria in deciding nonprofit's funding request.

**40. *Bank of America, N.A. v. Bills***, No. 3:00-00450, 2008 WL 682399 (D. Nev. Mar. 6, 2008). Before the court were multiple motions for summary judgment. Plaintiff Bank of America filed a complaint in interpleader to resolve a dispute between various parties as to who had authority to use a bank account opened in the name of "Winnemucca Indian Colony." The suit arose after two tribal factions, each claiming to be the lawful tribal council for the Winnemucca Indian Colony, claimed to be entitled to the funds. The court granted the Wasson Group's Motion for Summary Judgment, denied the Bills Group Motion for Summary Judgment, and ordered that all other pending motions were denied.

**41. *Menominee Indian Tribe of Wisconsin v. U.S.***, No. 07-812, \_\_\_ F. Supp. 2d \_\_\_, 2008 WL 680379 (D.D.C. Mar. 14, 2008). Indian tribe that operated health care system for tribal members pursuant to self-determination contract with Secretary of Health and Human Services (HHS) brought action against HHS, alleging breach of that contract. HHS moved to dismiss. The district court held that: (1) tribe's claims for certain years were barred by statute of limitations; (2) tribes claim for certain year was barred by laches; but (3) Secretary was not entitled to dismissal of claims for remaining years. Motion granted in part and denied in part.

**42. *Guidiville Band of Pomo Indians v. NGV Gaming, Ltd.***, Nos. 05-17066, 05-17067, \_\_\_ F.3d \_\_\_, 2008 WL 2521901 (9th Cir. June 26, 2008). At the core of the present dispute, is the meaning of the word "is" in 25 U.S.C. § 81 which requires the Secretary of the Department of the Interior (Secretary) to approve any "contract with an Indian tribe that

#### **D. EMPLOYMENT**

**43. *E.E.O.C. v. Navajo Health Foundation-Sage Memorial Hospital, Inc.***, No. CV-06-2125, 2007 WL 2683825 (D. Ariz. Sept. 7, 2007). Defendant's motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) was before the court. Plaintiff Equal Employment Opportunity Commission (EEOC) filed a complaint against defendant Navajo Health Foundation-Sage Memorial Hospital, Inc. (Sage Hospital) pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* Plaintiff alleged that defendant discriminated against several employees based on race and national origin. Plaintiff further alleged that defendant retaliated against the employees after they complained and filed EEOC charges. Plaintiff sought to correct these alleged unlawful employment actions and to secure appropriate relief for the aggrieved parties. The court found that Sage Hospital is an entity "sufficiently identified with the tribe that they may be considered to be 'tribal,'" and therefore entitled to the exemption found in 42 U.S.C. § 2000e(b). The court granted defendant's motion and dismissed the action for lack of subject matter jurisdiction.

**44. *Murphy v. Kickapoo Tribe of Oklahoma***, No. CIV-07-0118, 2007 WL 3392301 (W.D. Okla. Nov. 8, 2007.) Plaintiffs Murphy and Lackey filed an action against the Kickapoo Tribe of Oklahoma (Tribe), asserting breach of contract and fraud claims. Plaintiff Lackey contended the Tribe hired him to provide general maintenance services at its casino, but then wrongfully discharged him for filing a workers' compensation claim. Plaintiff Murphy alleged he was hired to service/clean the casino's air purifiers, but the Tribe breached their agreement by failing to pay the amount owed and by prematurely terminating the contract. The plaintiffs also alleged the defendant defrauded them by falsely advising them that the Kickapoo Tribal Court had exclusive jurisdiction over their claims. They contended they filed suit in the Kickapoo Tribal District Court, but the court dismissed their complaints on the basis of sovereign immunity. Defendant moved to dismiss the case for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) or, alternatively, for failure to state a claim under Fed. R. Civ. P. 12(b)(6). The court found that the defendant's motion to dismiss must be granted based on the defendant's assertion of sovereign immunity and dismissed the case for lack of subject matter jurisdiction.

**45. *Bittle v. Bahe***, No. 103716, 2008 WL 314902 (Okla. Feb. 5, 2008). This was an appeal from a dismissal of plaintiff's action alleging dram shop liability against an Indian tribe and its casino. The district court ruled that the doctrine of tribal sovereign immunity prevented the state court from exercising jurisdiction over the private tort action against the Indian tribe. The Supreme Court found the Indian tribe and its casino did not establish that they are shielded by the doctrine of tribal sovereign immunity from the exercise of state court jurisdiction in the case.

**46. *Parks v. Tulalip Resort Casino***, No. C07-1406, 2008 WL 786673 (W.D. Wash. Mar. 20, 2008). This matter was before the court on Defendant's motion to dismiss. Defendant argued that Plaintiff's complaint should be dismissed because Defendant possesses sovereign immunity from suit as a federally recognized tribe. Alternatively, Defendant argued that: (1) Tulalip Tribes is exempt from the requirements of Title VII of the Civil Rights Act; (2) Plaintiff has not exhausted federal or tribal administrative remedies; and (3) Plaintiff has not exhausted his tribal court remedies. Plaintiff, appearing pro se, responded that he established subject matter jurisdiction because the Fourth Circuit Court of Appeals has "held a decision over a Section 1981 claim regarding jurisdiction on a matter similar to this." Plaintiff further argued that: (1) he did not file suit against the Tulalip Tribes as an entity that governs the tribe members and government programs; (2) he contacted the EEOC and Human Rights Commission, but was unable to obtain assistance from these organizations because the matter "involved an Indian reservation"; and (3) he did not file a grievance because he was misled to believe that he did not meet the requirements for the Safety Manager position. The Court granted Defendant's Motion to Dismiss.

**47. *Indian Educators Federation v. Kempthorne***, No. 04-01215, 2008 WL 857444 (D.D.C. Mar. 31, 2008). Organization representing employees of the Office of Special Trustee and the Bureau of Indian Affairs (BIA) sued the Secretary of the Department of the Interior, claiming that the Indian Reorganization Act mandated certain employment practices. Organization moved for summary judgment, and the Secretary moved motion to dismiss or, in the alternative, for summary judgment. The district court held that: (1) term "Indian Office" meant positions in the Department of the Interior, whether within or without the BIA, that directly and primarily related to providing services to Indians, and (2) declaratory relief to that effect was warranted. Plaintiff's motion granted in part; defendant's motion denied.

**48. *Smith-Barrett v. Potter***, No. 05-CV-6354L, 2008 WL 857439 (W.D.N.Y. Mar. 31, 2008). United States Postal Service (USPS) employee brought Title VII action against USPS alleging discrimination due to her gender and/or American Indian race. USPS moved for summary judgment. The district court held that: (1) American Indians and their descendants are protected from discrimination by Title VII; (2) employee's non-membership in Indian tribe did not preclude her from bringing Title VII action alleging discrimination due to her American Indian race; (3) USPS's proffered reasons for selecting Caucasian candidates for certain positions rather than employee were not pretext for racial discrimination; and (4) USPS did not retaliate against employee in violation of Title VII. Motion granted.

**49. *Ogden v. Iowa Tribe of Kansas and Nebraska***, Docket No. WD 67912, 2008 WL 1860167 (Mo. Ct. App. Apr. 29, 2008). Former employee brought action against employer, a Native American tribe, for breach of employment agreement and wrongful discharge. The circuit court granted employer's motion to dismiss based upon tribal sovereign immunity. Former employee appealed. The appellate court held that on a question of first impression, tribal sovereign immunity barred the suit of a former employee against the tribe itself relating to his employment at a tribal business located off the reservation. Affirmed.

**50. *Lawrence v. Department of Interior***, No. 06-35448, \_\_ F.3d \_\_, 2008 WL 2025075 (9th Cir. May 13, 2008). Indian employee of Bureau of Indian Affairs (BIA) sought review of Merit Systems Protection Board's decision, denying petition for review of Department of Interior's denial of his claim for increased retirement benefits for firefighting duties, alleging that BIA's failure to notify him of application deadline for retroactive reclassifications of firefighting service credit violated federal trust responsibility toward Indians, Indian Preference Act (IPA), and Title VII's prohibition against employment discrimination based on race. The district court, 2006 WL 850878, granted BIA summary judgment. Employee appealed. The appellate court held that: (1) application deadline for service credit was not waived by lack of actual notice; (2) deadline was not waived by circumstances beyond employee's control; (3) lack of actual notice did not violate federal trust responsibility; (4) retroactive reclassification of firefighting service was not required by IPA; and (5) lack of actual notice did not disparately impact Indians, under Title VII. Affirmed.

**51. *Lobo v. Miccosukee Tribe of Indians of Florida***, No. 07-15073, 2008 WL 2222074 (11th Cir. May 30, 2008). Not selected for publication in the Federal Reporter. Appellants Felix Lobo and Liza Suarez appealed the dismissal of their Fair Labor Standards Act, 29 U.S.C. § 201 (FLSA), complaint. The district court dismissed the complaint because the Appellees, the Miccosukee Tribe and its chairman Billy Cypress, enjoy sovereign immunity. On appeal, the Appellants argued that the district court erred because the FLSA is a statute of general application that applies to Indian tribes. The appellate court affirmed.

**52. *Gibson v. Fluor Daniel Services Corp.***, No. 07-1881, 2008 WL 2385489 (4th Cir. June 11, 2008). Not selected for publication in the Federal Reporter. Six Native Americans brought employment discrimination suit against Fluor Daniel Services Corporation (Fluor). The employees alleged that they were subjected to a hostile work environment, unlawfully terminated, refused promotion, refused hiring, and retaliated against in violation of 42 U.S.C. § 1981 and suffered, at Fluor's hands, intentional infliction of emotional distress, negligent infliction of emotional distress, negligent hiring or supervision, and wrongful discharge in violation of state law. The district court granted summary judgment to Fluor; the appellate court affirmed.



## **E. ENVIRONMENTAL REGULATIONS**

**53. *Maine v. Johnson***, Nos. 04-1363, 04-1375, 2007 WL 2258265 (1st Cir. Aug. 8, 2007). Petitions were brought for review of decision of the Environmental Protection Agency (EPA) which gave state of Maine permitting authority, under the Clean Water Act (CWA) and the Maine “Settlement Acts,” with regard to discharge of pollutants into territorial waters of certain Indian tribes, but exempted two tribal-owned facilities from the state’s permitting program. On consolidation of petitions, the appellate court held that: (1) EPA did not err in giving state permitting authority with regard to 19 facilities which discharged pollutants into territorial waters of two Indian tribes; but (2) EPA erred in exempting from that authority two Indian tribe-owned facilities; and (3) court lacked jurisdiction to review issue of whether EPA, after granting state permitting authority, retained authority to review state-issued permits in light of a general trust relationship between the federal government and two Indian tribes. Affirmed in part and vacated and remanded in part.

**54. *U.S. v. Newmont USA Ltd.***, No. CV-05-020, \_\_\_ F. Supp. 2d \_\_\_, 2007 WL 2386425 (E.D. Wash. Aug. 21, 2007). United States brought action against mining companies under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) for clean up of former open-pit uranium mine located on Indian reservation. Companies filed counterclaims to hold United States liable for response costs as site’s owner. Parties filed cross-motions for summary judgment. The district court held that: (1) United States was “owner” of mine for CERCLA purposes, and (2) counterclaims were not barred by CERCLA provision limiting fiduciary’s liability to value of trust assets. Companies’ motion granted.

**55. *Swinomish Indian Tribal Community v. Western Washington Growth Management Hearings Board***, No. 76339-9, 2007 WL 2683150 (Wash. Sept. 13, 2007). Indian tribe and environmental advocacy group sought judicial review of two decisions of Western Washington Growth Management Hearings Board, the first of which was a compliance order that largely upheld county’s effort to comply with Growth Management Act (GMA), with exceptions for enforcement of watercourse protection measures in critical areas and the need for more specificity in county’s monitoring program and adaptive management process, and the second of which found that county had failed to correct the deficiencies identified in compliance order. The superior court granted the motion of county, tribe, and advocacy group for certification for direct review by the appellate court, and the appellate court granted direct review. The Supreme Court accepted tribe’s motion to transfer the consolidated appeal to the Supreme Court. The Supreme Court held that: (1) “protection” of critical areas does not require enhancement or improvement of conditions in a critical area that is already in a degraded condition; (2) county’s “no harm” standard for anadromous fish habitat in agricultural areas satisfied “protection” requirement; (3) county provided reasoned justification for its decision not to establish mandatory riparian buffers along streams and rivers on upland strip of land; and (4) county was required to establish benchmarks for its salmon habitat monitoring program. Board affirmed.

**56. *Nulankeyutmonen Nkihtaqmikon v. Impson***, No. 06-2733, \_\_\_ F.3d \_\_\_, 2007 WL 2685200 (1st Cir. Sept. 14, 2007). Group of Indian tribe members and individual tribe members brought action for declaratory and injunctive relief, alleging that approval by Bureau of Indian Affairs (BIA) of lease of tribal land on which developer sought to construct liquefied natural gas (LNG) terminal violated Indian Long-Term Leasing Act, National Environmental

**57. *U.S. v. Newmont USA Ltd.***, No. CV-05-020, 2007 WL 2751872 (E.D. Wash. Sept. 19, 2007). Before the court was the Spokane Tribe of Indian's Motion to Intervene for a Limited Purpose under Fed. R. Civ. P. 24(a)(2). The property or transaction which was the subject of the action are the EPA's expenditures related to response actions taken pursuant to CERCLA at the Midnite Mine Superfund Site, located within the Spokane Indian Reservation. The court found the tribe had not demonstrated a sufficient interest in the proceeding to warrant intervention as of right under Fed.R.Civ.P 24(a)(2). The sole effect of the court's prior ruling is that the United States is an "owner" of the subject property as defined in CERCLA and cases interpreting that Act. The court's ruling on that issue was not binding on the tribe in any manner as to the relationship of the tribe and the United States or the interest of the tribe in reservation lands. The district court denied the Spokane Tribe of Indian's Motion to Intervene for Limited Purpose and denied as moot the Spokane Tribe of Indians Motion to Dismiss for Lack of Jurisdiction or Alternatively, to Amend Judgment.

**58. *United States v. FMC Corporation***, No. 06-35429, \_\_ F.3d \_\_, 2008 WL 2552262 (9th Cir. June 27, 2008). Native American tribe sought enforcement of consent decree between mining company and United States. The district court, 2006 WL 544505, held that tribe could enforce the decree. After granting company's motion for a stay, 2006 WL 1382192, the district court, denied company's subsequent motions for stay and for clarification, and lifted the stay previously issued. Mining company appealed. The appellate court held that tribes were not intended third-party beneficiaries to consent decree, vacated the district court's orders, and remanded with instructions to dismiss the action.

**59. *Quapaw Tribe of OK v. Blue Tee Corp.***, No. 03-CV-0846, 2008 WL 2704482 (N.D. Okla. July 7, 2008). Before the court were: Federal Defendants' Motion for Judgment on the Pleadings; Federal Defendants' Combined Motion for Summary Judgment; and Plaintiffs' Motion for Partial Summary Judgment. The motions for summary judgment addressed the issue of whether the Environmental Protection Agency (EPA) is "diligently proceeding with a remedial investigation and feasibility study" at the Tar Creek Superfund Site. The non-federal defendants filed responses taking no position on the motions; noting however, that if the Quapaw Tribe's claim under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 (CERCLA) was dismissed as to the federal defendants, it should also be dismissed as to the non-federal defendants. The court granted Federal Defendants' Motion for Judgment on the Pleadings; granted the Federal Defendants' Combined Motion for Summary Judgment; and denied Plaintiffs' Motion for Partial Summary Judgment. The Tribe's CERCLA claim was dismissed without prejudice.

## **F. FISHERIES, WATER, FERC, BOR**

**60.** *U.S. v. State of Washington*, C70-9213, 2007 WL 2437166 (W.D. Wash. Aug. 22, 2007). This was a designated subproceeding of *United States, et al., v. State of Washington, et al.*, C70-9213. The United States, in conjunction with the tribes, initiated the sub-proceeding seeking to compel the state of Washington to repair or replace culverts that impede salmon migration to or from spawning grounds. The request for determination, filed pursuant to the permanent injunction in the case, maintained that the state has a treaty-based duty to preserve fish runs so that the tribes can earn a “moderate living.” The state’s original answer asserted cross- and counter-requests for determination, claiming injunctive and declaratory relief against the United States for placing a disproportionate burden of meeting the treaty-based duty (if any) on the state and also asserted that the United States managed its own lands in such a way as to create a nuisance that unfairly burdens the state. The parties agreed that material facts were not in dispute, but they were unable to arrive at a settlement, and asked the court to resolve the legal issues presented. The court ordered that the state’s motion for summary judgment was denied. The tribes’ cross-motion for partial summary judgment was granted. The court declared that the right of taking fish, secured to the tribes in the Stevens Treaties, imposes a duty upon the state to refrain from building or operating culverts under state-maintained roads that hinder fish passage and thereby diminish the number of fish that would otherwise be available for tribal harvest.

**61.** *United States v. Alpine Land & Reservoir Company*, No. 06-17375, 510 F.3d 1035 (9th Cir. Dec. 7, 2007). United States and Indian tribe sought judicial review of decision of Nevada State Engineer that largely granted applications of landowners in Newlands Reclamation Project to transfer water rights between different parcels of property. The district court affirmed State Engineer’s decision, and its opinion was affirmed in part, reversed in part, and remanded at 291 F.3d 1062, and again at 340 F.3d 903. On remand, the district court affirmed State Engineer’s decision, and tribe appealed. The appellate court held that: (1) substantial evidence supported State Engineer’s determination that landowners did not abandon their water rights as to certain parcels; but (2) landowners forfeited their water rights in other parcels; and (3) remand was warranted for State Engineer to determine whether a successive five-year period passed without a thwarted attempt to transfer water rights during that period as to certain parcels. Affirmed in part, reversed in part, and remanded.

**62.** *Reber v. Steele*, No. 2:08-CV-051, 2008 WL 444545 (D. Utah Feb. 14, 2008). Plaintiff Reber filed a petition pursuant to 28 U.S.C. § 2254, challenging his adjudication as a delinquent by the juvenile court. The juvenile court found that he violated Utah Code Ann. § 23-20-4(3)(a) (wanton destruction of protected wildlife) during the 2002 deer hunting season by shooting and killing a trophy buck mule deer within the exterior boundaries of the Uintah and Ouray Indian Reservation without a valid state hunting license. Reber alleged that as member of the Uintah Band of Indians he possesses hunting rights that are counted among the various rights of user reserved to the Band under the Executive Order of October 3, 1861, and the Act of May 5, 1864, ch. 57, 13 Stat. 64, which set apart the Uintah Indian Reservation for their use and occupancy. Reber asserted that the state of Utah does not have jurisdiction to regulate or punish the exercise of his hunting rights as a member of the Uintah Band within the reservation’s boundaries. The court found that while the merits of persistent questions concerning the construction and legal effect of the Ute Partition Act may ultimately be decided in a federal judicial forum, § 2254 does not afford Reber an appropriate procedural vehicle for pursuing his

**63.** *In re SRBA*, Case No. 39576, \_\_\_ P.3d \_\_\_, 2008 WL 427550 (Idaho Feb. 19, 2008). City appealed decision in the Snake River Basin Adjudication denying city’s claimed federal reserved water right. The district court affirmed. City appealed. The Supreme Court held that: (1) act clearly and unambiguously did not convey a water right to city, and (2) even if act was ambiguous as to conveyance of a water right, the language would be construed against the city having a federal water right on Indian reservation. Affirmed.

**64.** *Wagoner County Rural Water Dist. No. 2 v. U.S.*, No. 07-CV-0642, 2008 WL 559437 (N.D. Okla. Feb. 26, 2008). The Grand (Neosho) River flows into the Fort Gibson Reservoir located in Eastern Oklahoma. The civil action arose from the control over and use of waters impounded at the Fort Gibson Reservoir. The complaint asserted that the Cherokee Nation “may claim some right, title or interest in and to the waters impounded at the Fort Gibson Reservoir, the water which flows . . . into the Fort Gibson Reservoir, or the subsurface ground water taken from water wells on land near the Fort Gibson Reservoir.” According to plaintiffs, the Cherokee Nation should “come forth” and assert any rights, title or interests that it may have in the Fort Gibson water. The Cherokee Nation filed a motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) on sovereign immunity grounds. Plaintiffs did not allege that the Cherokee Nation waived its sovereign immunity. Plaintiffs claimed instead that the “tribal sovereign immunity of the Cherokee Nation of Oklahoma has been abrogated by Congress’ enactment of the McCarran Amendment.” According to plaintiffs, “[b]ecause the Cherokee Nation’s sovereign immunity is co-extensive with that of the United States and the McCarran Amendment waived the sovereign immunity of the United States regarding the adjudication of water rights, the sovereign immunity of the Cherokee Nation has also been waived.” The court found that plaintiffs’ argument was wholly without merit and that the court lacks subject matter jurisdiction as to the Cherokee Nation absent a clear waiver. The court granted the Cherokee Nation’s Motion to Dismiss and dismissed the Cherokee Nation as a party. Only the United States and its agencies remain as defendants in the action.

**65.** *Klamath Tribes of Oregon v. PacificCorp*, No. 05-36010, 2008 WL 539226 (9th Cir. Feb. 28, 2008). Not selected for publication in the Federal Reporter. The Klamath Tribes of Oregon, the Klamath Claims Committee, and individual members of the Klamath Tribe (collectively the Tribe) appealed from the district court’s grant of summary judgment in favor of PacificCorp. The appellate court found that the Tribe’s cause of action for damages was foreclosed by its prior decision in *Skokomish Indian Tribe v. United States*, 410 F.3d 506 (9th Cir. 2005) (en banc) and affirmed.

**66.** *Salmon Spawning & Recovery Alliance v. Lohn*, No. 06-1462, 2008 WL 782851 (W.D. Wash. Mar. 20, 2008). This case concerned a challenge to two decisions by the National Marine Fisheries Service (NMFS) involving Puget Sound Chinook salmon: the approval of a resource management plan prepared by the Puget Sound Indian Tribes and the Washington Department of Fish and Wildlife (WDFW), and the biological opinion issued by NMFS regarding the effects of its decision to approve the plan. Before the Court were Plaintiffs’ motion for summary judgment and defendants’ cross-motion for summary judgment. Numerous Indian tribes and WDFW participated in the matter as amici curiae and opposed plaintiffs’

**67. *Ottawa Tribe of Oklahoma v. Ohio Department of Natural Resources***, No. 3:05 CV 7272, 2008 WL 878824 (N.D. Ohio, Mar. 31, 2008). Ottawa Tribe filed complaint seeking right to fish and hunt in Ohio and on Lake Erie without restrictions from state department of natural resources (DNR). State filed motion for summary judgment. The district court held that: (1) laches barred tribe's action to enforce treaties granting it exclusive hunting and fishing rights in northern Ohio; (2) laches did not bar tribe's action to enforce treaties granting it fishing rights in Lake Erie; but (3) any rights to fish on Lake Erie previously granted to tribe under Treaty of Detroit terminated upon ratification of Treaty of 1831. Motion granted.

**68. *Nez Perce Tribe v. NOAA Fisheries***, No. CV-07-247, 2008 WL 938430 (D. Idaho Apr. 7, 2008). The Lewiston Orchard Project (LOP) is a series of reservoirs, dams, and canals that provides irrigation water to the Lewiston area. It is owned by the Bureau of Reclamation (BOR) and operated by the Lewiston Orchards Irrigation District (LOID). The LOP withdraws water from creeks that are designated as critical habitat for the Snake River Basin steelhead, a threatened species under the Endangered Species Act (ESA). The withdrawals degrade critical habitat by reducing flows during spawning season and drying up creek beds during summer months. The loss of this habitat has caused steelhead mortality to exceed reproduction in the drainages affected by the LOP. This was of grave concern to the Nez Perce Tribe, as the steelhead play an important role in their culture. All of the drainages affected by the LOP lie within the Tribe's treaty fishing areas. The BOR proposed a plan to improve the operation of the LOP by maintaining certain minimum flows in these critical streams. The ESA required that the plan be reviewed by the National Oceanic and Atmospheric Administration (NOAA) to determine whether it complied with the ESA. NOAA issued a Biological Opinion (BO) finding that the plan did comply with the ESA. The Tribe appealed that decision to this Court. The court found that NOAA's findings were not supported by a reasoned analysis. There is no assurance that the minimum stream flows proposed by the BOR will improve habitat to promote both the survival and recovery of the steelhead, as required by the ESA. The Court set aside the Biological Opinion.

**69. *National Wildlife Federation v. National Marine Fisheries Service***, Nos. 06-35011, 06-35019, 524 F.3d 917 (9th Cir. Apr. 24, 2008). Environmental advocacy organizations brought action alleging that National Marine Fisheries Service (NMFS) violated requirements of the Endangered Species Act (ESA) in its issuance of biological opinion (BiOp) that proposed operations of Federal Columbia River Power System (FCRPS) dams and related facilities would not jeopardize listed salmon and steelhead in the lower Columbia and Snake Rivers or adversely modify their critical habitat. After the district court, 2005 WL 1278878, held the BiOp invalid, and subsequently, 2005 WL 1398223, granted in part organizations' motion for a preliminary injunction, the appellate court, 422 F.3d 782, affirmed and remanded. The district court, 2005 WL 2488447, remanded to NMFS, with instructions. NMFS appealed. On consolidation of appeals the appellate court held that: (1) NMFS's use of hypothetical "reference operation" in jeopardy analysis violated ESA by excluding from the proposed action's impacts the effects of related operations deemed nondiscretionary; (2) BiOp failed to incorporate degraded baseline conditions into its jeopardy analysis; (3) BiOp failed to adequately consider proposed action's impacts on the listed species' chances of recovery; and (4) NMFS acted

**70.** *U.S. v. Washington*, No. CV 9213, Subproceeding No. 89-305, 2008 WL 2474594 (W.D. Wash. June 13, 2008). This matter was before the court for consideration of the Suquamish Tribe’s Motion for Summary Judgment as to their Request for Dispute Resolution (Request). The Request was filed pursuant to authority conferred by the Amended Shellfish Implementation Plan ¶ 9. 1. The Suquamish Tribe asked that the court adopt and enforce a plan proposed by the Suquamish for the harvest of clams on tidelands leased by A & K Trust (Trust) at Chico Bay in Kitsap County, Washington. The court found that the Trust presented no evidence that would create a factual issue with respect to the Suquamish Tribe’s treaty-based right to harvest clams at the Trust’s Chico Bay tidelands. And the Trust presented no evidence or argument as to why the Court should not adopt the Tribe’s proposal for proceeding with that harvest. The court granted the Tribe’s motion for summary judgment.

**71.** *Roberts v. Hager*, No. 07-35197, 2008 WL 2787558 (9th Cir. July 18, 2008). Not selected for publication in the Federal Reporter. Roberts appealed the district court’s grant of summary judgment in favor of the state of Montana and numerous Montana government officials in his suit alleging that a Montana big game hunting regulation violates the Equal Protection Clause of the Fourteenth Amendment. The challenged regulation permits only “tribal members” to hunt big game on Indian reservations in Montana. The regulation clearly classifies based on tribal membership rather than racial status as an Indian. The appellate court found that the district court correctly reviewed the regulation under the rational basis standard and affirmed.

**72.** *U.S. v. Oregon*, No. 68-513, 2008 WL 3834169 (D. Or. Aug. 13, 2008). The Court ruled in the dispute between the Confederated Tribes and Bands of the Yakama Nation (Yakama) and the Confederated Tribes of the Colville Reservation (Colville) (representing its constituent tribe, the Wenatchi), over fishing rights purportedly granted by an 1894 agreement at the “Wenatshapam Fishery” near the town of Leavenworth, Washington. Colville sought to intervene in the case on two occasions, once in 1989 and once in 1999, but its requests were denied. In 2002, instead of moving to intervene yet again, the Colville Wenatchi began fishing at Icicle Creek. On August 18, 2003, the court granted Yakama's motion for injunctive relief, enjoining Colville and its constituent tribes from fishing at Icicle Creek and holding that Colville was precluded by res judicata from asserting the arguments it raised in opposition to Yakama's motion. Colville appealed that holding, and the Ninth Circuit reversed and remanded the case “for trial on the merits.” *United States v. State of Oregon*, 470 F.3d 809, 818 (9th Cir. 2006). The court found that the Wenatchi and Yakama have joint fishing rights to fish at the Wenatshapam Fishery, which is located at the confluence of the Wenatchee River and Icicle Creek.

## **G. GAMING**

**73.** *State of Texas v. United States*, No. 05-50754, 2007 WL 2340781 (5th Cir. Aug. 17, 2007). This litigation involved a challenge to procedures adopted by the Secretary of the Interior Department (Secretary) to circumvent the consequences of the Supreme Court’s Eleventh Amendment decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S.

**74. *United Keetoowah Band of Cherokee Indians in Oklahoma v. U.S. ex rel. Norton***, No. 06-7033, 2007 WL 2562352 (10th Cir. Sept. 6, 2007). Not selected for publication in the Federal Reporter. This action involved a dispute between the United Keetoowah Band of Cherokee Indians in Oklahoma (UKB), the United States, and Oklahoma, regarding whether UKB can legally operate a gaming facility on certain land in Tahlequah, Oklahoma (Land). UKB asserted that the Land is “Indian land” as defined by the Indian Gaming Regulatory Act, 25 U.S.C. § 2703(4), and subject to regulation by the National Indian Gaming Commission (Commission). UKB began operating a gaming facility on the Land in 1991 and the Commission began regulating those gaming operations in 1993. In September 2000, the Commission informed UKB by letter that it had reached the conclusion that the Land was not “Indian land” and therefore the IGRA does not apply to UKB’s gaming operations. The Commission ceased all regulation of those operations. Oklahoma then informed UKB that its gaming operations on the Land were in violation of state law, which it intended to enforce against UKB. UKB filed a declaratory judgment action against Oklahoma in state court. The state court enjoined Oklahoma from enforcing its laws against UKB’s purported gaming violations “during the pendency of this action until such time that a final order is entered.” Oklahoma removed the case to federal court and filed a declaratory judgment counterclaim against UKB. All parties filed motions for summary judgment. The district court asked for briefing on whether the Commission’s September 2000 letter determining that the Land was not Indian land was a final decision under the APA and whether that determination was arbitrary and capricious. The district court concluded that the Commission’s letter was a final agency action. The district court reversed the Commission’s determination as arbitrary and capricious and remanded to the Commission for further proceedings. Oklahoma appealed the district court’s order. The state of Oklahoma appealed the district court’s order setting aside a final decision of the Commission and remanding to the Commission for further proceedings. In the same order, the district court also denied as moot the State’s summary judgment motion and noted that a preliminary injunction maintaining the status quo remained in effect. The appellate court dismissed the appeal for lack of jurisdiction because the order was not a final order.

**75. *Unkeowannulack v. Table Mountain Casino***, No. CV F 07-1341, 2007 WL 4210775 (E.D. Cal. Nov. 28, 2007). This case arose from the refusal of defendants Table Mountain Casino (Casino) and the Table Mountain Rancheria Tribal Gaming Commission (Commission) to pay a jackpot of nearly \$750,000 to plaintiff. Plaintiff played a progressive link jackpot slot machine. Plaintiff inserted his money, pulled the lever, apparently won, and the progressive jackpot system counted from \$0 to \$737,203.60. Casino employees arrived shortly thereafter, told plaintiff that the machine had malfunctioned and that no jackpot would be paid out. Plaintiff then called an attorney who came to the Casino to try to verify the jackpot and resolve the dispute. Before the Commission arrived, Casino employees began to disassemble the other progressive jackpot slot machines that were connected to plaintiff’s machine. Casino employees allegedly made threats against plaintiff and did not take efforts to properly preserve plaintiff’s slot machine. Plaintiff alleged that the Casino and the Commission violated his Fifth and Fourteenth Amendment rights to due process based on an unfair investigation of an allegedly

**76. *Wisconsin v. Ho-Chunk Nation***, No. 07-1584, 2008 WL 114887 (7th Cir. Jan. 14, 2008). State of Wisconsin brought action to compel arbitration in dispute over failure of Indian tribe to make certain payments to state. The district court, 402 F. Supp. 2d 1008, compelled arbitration. Tribe appealed. The appellate court, 463 F.3d 655, vacated and remanded. On remand, the district court, 2006 WL 3813654, granted state's motion to amend complaint to seek declaratory and injunctive relief, to allege breach of contract, and to compel performance under compact terms. Tribe counterclaimed alleging breach of contract and violations of Indian Gaming Regulatory Act (IGRA). The district court, 478 F. Supp. 2d 1093, granted in part and denied in part motions of tribe to dismiss or for summary judgment. Tribe took interlocutory appeal. The appellate court held that: (1) federal jurisdiction under IGRA was limited to alleged compact violations relating to seven items listed in catch-all provision; (2) Congress abrogated sovereign immunity of tribe with respect to state's claim to enjoin tribe's class III gaming due to its alleged refusal to submit to binding arbitration; (3) federal court had jurisdiction over cause of action brought by state seeking declaratory judgment that it had negotiated in good faith with tribe as required by IGRA; (4) supplemental jurisdiction existed over contractual claim; (5) independent basis for federal jurisdiction existed to address causes of action brought by state to enforce dispute resolution provision in gambling compact with Indian tribe pursuant to Federal Arbitration Act as it related to arbitrable claims; (6) state court decision which purportedly served to invalidate prior waiver of sovereign immunity by state of Wisconsin in gambling compact with Indian tribe did not affect issue of whether waiver of sovereign immunity by Indian tribe remained intact; and (7) determination had to be made as to which claims were arbitrable. Affirmed in part, vacated in part, and remanded.

**77. *Rumsey Indian Rancheria of Wintun Indians of Cal. v. Dickstein***, No. 2:07-02412, 2008 WL 648451 (E.D. Cal. Mar. 5, 2008). Plaintiffs moved to remand action to state court. Defendants H. Dickstein, J. Zerbi, Distein & Zerbi and Dickstein & Merin (Defendants) opposed the motion. Plaintiffs filed an action in the Superior Court of the State of California in the County of Yolo. Plaintiff Rumsey Band of Wintun Indians (the Tribe) is a sovereign Indian tribe who owns the Cache Creek Casino Resort. Defendant Howard Dickstein (Dickstein) is the Tribe's former attorney and Defendant Arlen Opper (Opper) is the Tribe's former financial advisor. Plaintiffs alleged that Opper and Dickstein "repeatedly involved the Tribe in complicated investments or transactions in which the business terms were more favorable to others than they were to the Tribe. Many such deals were fraught with self-dealing and conflicts of interest they failed to disclose." Plaintiffs further alleged that Opper collected fees for purportedly managing Tribal assets, without actually managing them, and Opper's entire method and structure of compensation was an artifice created by Opper and Dickstein to avoid regulatory oversight of Opper's management of an Indian-owned gaming facility, which was illegal without the prior approval of the National Indian Gaming Commission. Plaintiffs' Complaint comprised fourteen state law claims including breach of contract, breach of fiduciary duty, unjust enrichment and violation of the California Business and Professions Code Section 17200. Defendants removed the action to the district court under 28 U.S.C. §§ 1441 and 1446, arguing



**78. *Michigan Gambling Opposition v. Kempthorne***, No. 07-5092, \_\_\_ F.3d \_\_\_, 2008 WL 1932769 (D.C. Cir. Apr. 29, 2008). Michigan non-profit corporation brought action challenging federal defendants' decision to place two parcels of land into trust for Indian band for proposed casino. The band intervened. The district court, 477 F. Supp. 2d 1, granted summary judgment for defendants. Plaintiff appealed. The appellate court held that: (1) Checklist for Gaming Acquisitions Gaming-Related Acquisitions and Indian Gaming Regulatory Act (IGRA) Determinations was not binding on Department of Interior (DOI) with regard to whether environmental impact statement (EIS) was necessary in assessing impact of proposed Indian casino site on traffic; (2) DOI was justified in finding that mitigation of traffic impact was sufficient, and that EIS was not necessary; and (3) provision of Indian Reorganization Act (IRA) that authorized Secretary of Interior to acquire land for Indians contained intelligible principle to guide Secretary's discretion, and thus did not violate non-delegation doctrine. Affirmed on other grounds in part

**79. *State ex rel Dewberry v. Kulongoski***, Docket Nos. 160323044; A124001, 2008 WL 2357330 (Or. Ct. App. June 11, 2008). Relators petitioned for writ of mandamus to bar state from carrying out compact that permitted Confederated Tribes of Coos, Lower Umpqua, and Suislaw Indians to open casino. The Circuit Court dismissed petition. Relators appealed dismissal but successfully moved to hold appeal in abeyance pending resolution of their declaratory judgment action in federal court. Following federal court's dismissal of that action, relators reactivated appeal. The appellate court held that: (1) rule of civil procedure pertaining to joinder of necessary parties does not apply in mandamus proceedings; (2) declaratory judgment action was neither a plain nor adequate alternative remedy so as to bar mandamus action because availability of declaratory relief would be unilaterally controlled by adverse party, i.e., the Confederated Tribes; and (3) claim preclusion was not alternative basis for affirming judgment. Reversed and remanded.

**80. *Butte County, CA v. Hogen***, No. 08-519, 2008 WL 2410407 (D.D.C. June 16, 2008). Pending before the Court were the Mechoopda Indian Tribe of Chico Rancheria, California's (Tribe's) Motion to Intervene. The Tribe is a federally-recognized Indian tribe that currently has no reservation or federally-protected lands. In 2001, the Tribe's casino developers purchased a 630 acre plot of land in Butte County, California (Butte County) on which the Tribe intends to pursue economic development through Indian gaming. The NIGC concluded that, once taken into trust, the 630-acre plot at issue in the case would qualify as restored Indian lands and, thus, is a location on which the Tribe could conduct lawful gaming activity and approved an Amendment to the Tribe's Tribal-Gaming Ordinance authorizing tribal gaming at the proposed casino site in Butte County. The Assistant Secretary for Indian Affairs approved an application accepting the land at issue into trust for the purpose of tribal gaming. Butte County challenged the NIGC's approval of the Tribal-Gaming Ordinance and the Assistant Secretary's decision to accept the land into trust. The Tribe moved for an order permitting its permissive intervention as a defendant under Fed. R. Civ. P. 24(b). While Defendants consented to the Tribe's intervention, Butte County opposed the Tribe's motion to intervene. The Court found that the

**81. *PPI, Inc. v. Kempthorne***, No. 4:08cv248, 2008 WL 2705431 (N.D. Fla. July 8, 2008). Plaintiff, PPI, Inc. (PPI), is licensed by the state of Florida to operate the Pompano Harness Racing Track. PPI is allowed under Florida law to offer pari-mutuel wagering, poker, and slot machines at its Pompano Park facility. It is prohibited by Florida law to operate any other type of gaming activities. Under 5 U.S.C. § 704 of the Administrative Procedure Act, PPI sought judicial review of the approval of the tribal-state compact that ostensibly allows the Seminole Tribe of Florida to conduct Class III gaming, specifically banked card games such as blackjack and baccarat. Named as defendants were Dirk Kempthorne, in his official capacity as Secretary of the Interior, and George Skibine, in his official capacity as Acting Assistant Secretary-Indian Affairs (collectively “federal defendants”). PPI is also suing Florida Governor Crist, under 42 U.S.C. § 1983 for executing the compact in violation of PPI’s rights under the Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(1). PPI argued that the compact is invalid to the extent it allows the Seminole Tribe to conduct banked card games that are prohibited by Florida law. PPI sought judgment setting aside the final agency action approving the compact, and a declaratory judgment that the provisions of the compact concerning banked card games violates the Indian Gaming Regulatory Act. PPI also sought a declaratory judgment against Governor Crist and a permanent injunction to enjoin implementation of the provisions. PPI contended that it stands to suffer irreparable injury through the loss of competitive standing, customer good will, and revenue, because its customers will be diverted to the banked card games that are offered by the Seminole Tribe. PPI requested a preliminary injunction against the federal defendants and Governor Crist to prohibit them from implementing or enforcing the banked card game provisions of compact during the pendency of the litigation. The court denied PPI’s motion for preliminary injunction

**82. *Wisconsin v. Ho-Chunk Nation***, No. 05-cv-632, \_\_ F. Supp. 2d \_\_, 2008 WL 2698112 (W.D. Wis. July 10, 2008). Plaintiff State of Wisconsin filed an action to compel arbitration of disputes arising under its gaming compact with defendant Ho-Chunk Nation. The court compelled arbitration and the Nation appealed, arguing that the court lacked subject matter jurisdiction. The appellate court agreed with the Nation and remanded the case with instructions to dismiss. *Wisconsin v. Ho-Chunk Nation*, 463 F.3d 655, 661 (7th Cir. 2006) (Ho-Chunk I). When it did so, it suggested the possibility of permitting amendment of the complaint on remand, a suggestion the court adopted. The Nation moved for dismissal of the amended complaint on the grounds of sovereign immunity and lack of subject matter jurisdiction or, in the alternative, for summary judgment on a variety of claims. The court denied the Nation’s motion to dismiss, holding, among other things, that the court had jurisdiction over the controversy and that the Nation was not immune from suit. The Nation took an interlocutory appeal from the order, challenging the denial of its immunity defense. The appellate court held that the district court had jurisdiction over the claims and that the Nation had waived its immunity from suit. *Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921 (7th Cir. 2008) (Ho-Chunk II). The appellate court found that the court had erred in addressing the merits of the Nation’s summary judgment motions before resolving arbitrability and remanded the case to the district court for a determination of arbitrability of the State’s causes of action against the Nation. Following the remand order, the state moved for an order compelling arbitration, which was opposed by the Nation. The Nation moved for summary judgment, arguing that it would be error for the court to order arbitration before deciding whether, in entering into a gaming compact with the Nation, the

**83.** *Florida House of Representatives v. Crist*, Docket No. SC07-2154, 2008 WL 2669767, (Fla. July 3, 2008). State House of Representatives and its speaker filed petition for writ of quo warranto disputing Governor's authority to bind State to Indian gaming compact without legislative authorization or ratification. The Supreme Court held that: (1) it had quo warranto jurisdiction; (2) "necessary business" clause of state constitution does not authorize governor to execute compacts contrary to the expressed public policy of state or to create exceptions to the law; (3) absent a tribal-state compact, any gambling prohibited in Florida is prohibited on tribal land; (4) by authorizing tribe to conduct "banked card games" that were illegal throughout State, and thus illegal for the tribe, Indian gaming compact violated state law; (5) Governor's execution of compact authorizing types of gaming that were prohibited under state law violated separation of powers; and (6) Governor lacked authority to bind State to compact that departed from State's public policy by legalizing types of gaming that were illegal everywhere else in the state. Petition granted.

## **H. LAND CLAIMS**

**84.** *Yankton Sioux Tribe v. Podhradsky*, No. CIV 98-4042, \_\_ F. Supp. 2d \_\_, 2007 WL 4568988 (D.S.D. Dec. 19, 2007). On remand from the Eighth Circuit, the district court found the following categories of land within the original 1858 treaty boundaries of the Yankton Sioux Reservation remain part of the reservation and are Indian country under 18 U.S.C. § 1151(a): (a) land reserved to the federal government in the Act of Aug. 15, 1894, Ch. 290, 28 Stat. 286, 314-19, and then returned to the Yankton Sioux Tribe; (b) land allotted to individual Indians that remains held in trust; (c) land taken into trust under the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-77); and (d) Indian owned fee land that has continuously been held in Indian hands. The court ordered a Declaratory Judgment be entered in favor of the plaintiffs and plaintiff-intervenor declaring that these categories of land within the original 1858 treaty boundaries of the Yankton Sioux Reservation remain part of the reservation and are Indian country under 18 U.S.C. § 1151(a) and that except for the declaratory relief granted, denied all other claims asserted in the action as to the boundaries of the reservation.

**85.** *United States v. Lowry*, No. 06-10469, 2008 WL 141851 (9th Cir. Jan. 16, 2008). The court was presented with the following question of first impression: Who bears the burden of proof when a defendant is charged with occupation of Forest Service land in violation of 36 C.F.R. §§ 261.10(b) and (k)? Must the prosecution prove that the defendant does not have individual aboriginal title, or is the claim an affirmative defense? The court held that the occupant claiming individual aboriginal title bears the burden of demonstrating such title as an affirmative defense. Applying that standard, the court concluded that the defendant failed to meet the burden, and affirmed the judgment of the district court upholding the defendant's convictions.

**86. *Oneida Tribe of Indians of Wisconsin v. Village of Hobart, Wisconsin***, No. 06-C-1302, 2008 WL 821767 (Wis. Mar. 28, 2008). Indian tribe brought action for declaratory and injunctive relief against village's condemnation of a portion of tribe's newly-acquired property and levy of a special assessment on such property. After village counter-claimed for declaratory relief, the parties cross-moved for summary judgment. The district court held that: (1) land within original boundaries of Indian reservation, which, after being conveyed by the United States to individual tribal members in fee simple, was transferred to third parties before being reacquired by the tribe, was subject to village's authority under Wisconsin law to condemn private land for public roadways and to charge against such land the costs of improvements, and (2) tribe's claim that it was entitled to return of previously-paid assessment would be dismissed. Judgment for village.

**87. *Western Shoshone National Council v. United States***, No. 2007-5020, 2008 WL 2166051 (Fed. Cir. May 22, 2008). The Western Shoshone sought to invalidate a 1977 Indian Claims Commission (ICC) judgment awarding compensation for the taking of the Western Shoshone's aboriginal lands in Idaho, Utah, Nevada, and California. The Western Shoshone also sought additional compensation and other relief under the Treaty of Ruby Valley of 1863. The Court of Federal Claims granted the United States' motion to dismiss the Western Shoshone's action for lack of subject matter jurisdiction and for failure to state a claim. Because the Appellants filed their challenge twenty-four years after the Court of Claims affirmed the ICC's judgment, and because legislation specifically precludes the Appellants' current challenge, the appellate court affirmed.

## **I. RELIGIOUS FREEDOM**

**88. *Acceses Fund v. U.S. Dept. of Agriculture***, No. 05-15585, \_\_\_ F.3d \_\_\_, 2007 WL 2410135 (9th Cir. Aug. 27, 2007). Advocacy group sued United States Forest Service (USFS), asserting that decision to ban rock climbing at Cave Rock, a site within a national forest on the shore of Lake Tahoe with religious and cultural significance to the Washoe Tribe, violated Establishment Clause and was arbitrary and capricious under Administrative Procedure Act. The district court granted USFS summary judgment. Advocacy group appealed. The appellate court held that: (1) climbing ban had secular purpose of cultural preservation; (2) climbing ban did not endorse Washoe religion; and (3) climbing ban was reasonably based on non-arbitrary considerations. Affirmed.

**89. *Alvarez v. Hill***, No. 06-35068, \_\_\_ F.3d \_\_\_, 2008 WL 659570 (9th Cir. Mar. 13, 2008). Prisoner brought action against prison officials alleging that they substantially burdened his religious exercise by denying him various accommodations. The district court, 2005 WL 3447943, granted summary judgment in favor of officials. Prisoner appealed. The appellate court held that: (1) prisoner's complaint satisfied the short and plain statement pleading standard, and (2) RLUIPA claims need satisfy only the short and plain statement pleading standard. Affirmed in part, reversed in part, and remanded.

**90. *United States v. Friday***, No. 06-8093, 2008 WL 1971504 (10th Cir. May 8, 2008). Defendant, a member of the Northern Arapaho Tribe of Wyoming, was charged with violating Bald and Golden Eagle Protection Act after he shot bald eagle, without permit, for use

**91. *United States v. Vasquez-Ramos***, Nos. 06-50553, 06-50694, 2008 WL 2552254 (9th Cir. June 27, 2008). Mario Manuel Vasquez-Ramos and Luis Manuel Rodriguez-Martinez (Defendants) were charged by information for possessing feathers and talons of bald and golden eagles and other migratory birds without a permit in violation of the Bald and Golden Eagle Protection Act, 16 U.S.C. §§ 668-668d, and the Migratory Bird Treaty Act, 16 U.S.C. §§ 703-712. Defendants moved to dismiss the information claiming that prosecuting their possession of the feathers and talons violated the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-1 to 2000bb-4. In *United States v. Antoine*, 318 F.3d 919, 924 (9th Cir. 2003), under nearly identical facts, the court held that there was no RFRA violation. Since *Antoine* remains binding law, the court affirmed the district court's order denying Defendants' motion to dismiss.

**92. *Fowler v. Crawford***, No. 07-2946, \_\_\_ F.3d \_\_\_, 2008 WL 2853203 (8th Cir. July 25, 2008). State prisoner brought action against prison officials, alleging that officials' refusal to grant him access to a sweat lodge in which to practice his Native American faith violated the Religious Land Use and Institutionalized Persons Act (RLUIPA). The district court, 2007 WL 2137803, granted summary judgment to prison officials. Prisoner appealed. The appellate court held that: (1) prohibition on sweat lodge was in furtherance of compelling governmental interest, and (2) ban was the least restrictive means by which to further compelling interest. Affirmed.

**93. *Navajo Nation v. U.S. Forest Service***, Nos. 06-15371, 06-15436, 06-15455, 2008 WL 3167692 (9th Cir. Aug. 8, 2008). Numerous Indian tribes, their members, and environmental organization brought action challenging the Forest Service's decision to authorize proposed use of recycled wastewater to make artificial snow for commercial ski resort located in national park on mountain considered sacred by tribes. Following bench trial, the United States District Court for the District of Arizona, Paul G. Rosenblatt, J., 408 F. Supp. 2d 866, held that the proposed use did not violate the Religious Freedom Restoration Act (RFRA) and granted Forest Service's motion for summary judgment on claims brought under National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA). Appeal was taken. The Court of Appeals, 479 F.3d 1024, affirmed in part, reversed in part and remanded, and application for rehearing en banc was granted. The Court of Appeals held that: (1) proposed use of recycled wastewater to make artificial snow for commercial ski resort located in national park on mountain considered sacred by some Indian tribes would not "substantially burden" free exercise of religion by tribal members, within meaning of the RFRA; (2) Final Environmental Impact Statement (FEIS) prepared by Forest Service satisfied requirements of NEPA; and (3) in

## **J. SOVEREIGN IMMUNITY and FEDERAL JURISDICTION**

**94.** *Auto-Owners Ins. Co. v. Tribal Court of the Spirit Lake Indian Reservation*, No. 06-3562, \_\_\_ F.3d \_\_\_, 2007 WL 2189094 (8th Cir. Aug. 1, 2007). Insurer filed declaratory judgment action against insured Indian elementary school and education board, seeking determination of whether commercial general liability policy and commercial umbrella policy covered alleged sexual assault of student. The district court denied insured's motion to dismiss and granted insurer summary judgment. Insured appealed. The appellate court held that: (1) court lacked diversity jurisdiction; (2) court lacked federal question jurisdiction; and (3) court lacked supplemental jurisdiction. Reversed and remanded for entry of dismissal.

**95.** *Buzulis v. Mohegan Sun Casino*, No. 06-P-1638, 2007 WL 2257658 (Mass. App. Ct. Aug. 9, 2007). Casino patron brought action against casino, security guard, director of risk management for casino, and risk management, seeking recovery for injuries sustained at casino. The district court granted defendants' motion to dismiss based on tribal sovereign immunity, and patron appealed. The appellate court held that: (1) tribe's gaming disputes court had exclusive jurisdiction over patron's claim against casino, and (2) security guard, director, and risk management were entitled to tribal sovereign immunity if they were acting within representative capacity and within scope of their authority. Remanded.

**96.** *United States v. Mitchell*, No. 03-99010, \_\_\_ F.3d \_\_\_, 2007 WL 2482077 (9th Cir. Sept. 5, 2007). Following a jury trial, defendant was convicted in district court of first degree murder, felony murder, carjacking resulting in death, and related federal crimes involving other Navajos on the Navajo Indian reservation in Arizona. Defendant was sentenced to death. Appeal was taken. The appellate court held that: (1) Federal Death Penalty Act (FDPA) extended to carjacking committed by defendant, a Native American against other Native Americans in Indian country; (2) Major Crimes Act did not preclude federal court's exercise of jurisdiction over Native American charged with federal carjacking resulting in death; (3) imposition of death sentence for Native American convicted of carjacking resulting in death did not violate the right of free exercise of religion; (4) excusal for cause of jury member based on juror's perceived inability to set aside religious opposition to the death penalty was warranted; (5) exclusion of jurors based on jurors' views that, based on their Navajo traditional religion and culture, they would be unable to set those views aside and apply the law impartially, did not violate the Religious Freedom Restoration Act or the American Indian Religious Freedom Act; (6) joinder of robbery and car-jacking counts was permissible and declining to sever them was not manifestly prejudicial; (7) probative value of evidence of post-mortem decapitation and dismemberment, thus of photographs depicting it, was not outweighed by the potential for undue prejudice; (8) district judge's ex parte meetings with United States marshal were not stages of the trial implicating defendant's right to be present at critical stages of the proceeding; (9) jury instruction on pecuniary gain was warranted; and (10) defendant could waive the right of presence at penalty phase of capital murder trial. Affirmed.

**97. *Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino and Resort***, No. 06-01596, 2007 WL 2701995 (D. Colo. Sept. 12, 2007). This matter was before the court pursuant to defendants' motions to dismiss and plaintiff's motion to convert the motions to dismiss to motions for summary judgment. Plaintiff is a Colorado corporation that provides training and consulting services via online education courses. Defendant Chukchansi Gold Resort and Casino is owned and operated by the Tribe. Plaintiff asserted fourteen copyright infringement, RICO, conversion, and misappropriation claims in the action, claiming that the Casino purchased a single license for one of the plaintiff's courses, ostensibly for the Casino's director. However, the Casino devised and implemented a scheme to record and transcribe the class, thereby making it available to all of the Casino's 1,300 employees without further payment to the plaintiff and in doing so, duplicated plaintiff's copyrighted content, and included the Casino's trademark in place of the plaintiff's. The defendants moved to dismiss the complaint arguing: (i) that the court lacked subject-matter jurisdiction over the action because they are entitled to sovereign immunity; (ii) that the complaint failed to state valid copyright claims because it did not allege that the plaintiff had secured copyright registrations for the contents of the class; (iii) that the defendants, as governmental entities, are "categorically immune" from RICO; and (iv) that the common-law conversion and misappropriation claims against them are preempted by federal copyright law. The court granted in part the Chukchansi Defendants' Motion to Dismiss, insofar as the claims against Defendant Picayune Rancheria of the Chukchansi Indians were dismissed on the grounds of sovereign immunity, and insofar as the plaintiff's common-law claims for conversion and misappropriation were dismissed as preempted by federal law, and ruling was reserved in part, as to the immunity of Defendants Chukchansi Gold Casino and Resort and Chukchansi Economic Development Authority, to be determined at an evidentiary hearing on the terms set forth herein.

**98. *Miner Electric, Inc. v. Muscogee (Creek) Nation***, No. 06-5216, \_\_\_ F.3d \_\_\_, 2007 WL 2714148 (10th Cir. Sept. 19, 2007). Miner Electric, Inc., and Russell E. Miner (Miner parties) filed a complaint in federal district court against Muscogee (Creek) Nation (Nation), a federally-recognized Indian tribe. The Miner parties sought declaratory and injunctive relief related to a forfeiture order entered by the Nation's District Court. The Nation moved to dismiss the complaint based upon its sovereign immunity. The district court denied the motion to dismiss and subsequently granted summary judgment in favor of the Miner parties. On appeal, the Nation argued that the district court erred in denying its motion to dismiss and in granting summary judgment. The appellate court held that the Nation has not waived, nor has Congress abrogated, its sovereign immunity. The court reversed and remanded, with instructions to the district court to vacate its judgment in favor of the Miner parties and to enter a judgment of dismissal.

**99. *State v. Losh***, No. A06-1910, 2007 WL 2916548 (Minn. Ct. App. Oct. 9, 2007). Defendant, an enrolled member of band of Indian tribe, was convicted in the district court of driving after revocation of driver's license, which occurred on reservation of another band of tribe. Defendant appealed. The appellate court held that district court had subject-matter jurisdiction over offense. Affirmed.

**100. *Fidelity Exploration and Production Co. v. U.S.***, No. 06-35307, \_\_\_ F.3d \_\_\_, 2007 WL 3256587 (9th Cir. Nov. 6, 2007). Oil and gas lessee brought action against United States under Quiet Title Act (QTA), seeking to quiet title to portion of bed of Tongue River, which United States claimed as trustee for Northern Cheyenne Indian Tribe. The district court dismissed action. Lessee appealed. The appellate court held that statute of limitations on lessee's claim began to run no later than 1926, when Act of Congress recognized middle channel of River as eastern boundary of Northern Cheyenne Reservation. Affirmed.

**101. *United States v. Littlejohn***, No. 2:05CR5, 2007 WL 4079086 (D.N.C. Nov. 15, 2007). The government sought to garnish the defendant's per capita distribution of gaming revenues received twice a year from the tribe. The tribe answered that such funds are immune from garnishment due to the sovereign nature of the Tribe. Defendant Littlejohn also answered that the funds are immune because there is a child support order pending in the Cherokee Tribal Court, which must be paid from the same distribution. The district court (1) denied the garnishee's motion to quash the writ of garnishment on the basis of sovereign immunity; (2) ordered that any order(s) entered in the Cherokee Tribal Court for the defendant's child support obligation have priority over the writ of garnishment issued by the district court until such time as the child support obligation has expired; (3) entered an order of garnishment which attaches to each per capita distribution of gaming revenues on account of the defendant, subject to the priority of the pending child support obligation; and (4) ordered that any per capita gaming revenue that exceeds the child support obligation shall be garnished in favor of the United States.

**102. *United States v. Lambert***, No. 2:05 CR 214, 2007 WL 4118380, (W.D.N.C. Nov. 16, 2007). This matter was before the court on the court's Writ of Continuing Garnishment and the answer of the Eastern Band of Cherokee Indians (Tribe), as the Garnishee. The court sentenced the defendant to serve twelve months imprisonment for her convictions for embezzlement and theft. As part of that judgment, the defendant was ordered to pay an assessment of \$100.00 and restitution of \$225,706.00 to the victims of the crime. The government sought to garnish the defendant's per capita distribution of gaming revenues received twice a year from the tribe. The tribe has answered that such funds are immune from garnishment due to the sovereign nature of the tribe. The government filed an Annual Accounting of Garnishment stating that the government received one per capita garnishment payment from the tribe totaling \$4,652.00 and the balance after the posting of the payment is \$219,999.69. The court denied the garnishee's motion to quash the writ of garnishment, and entered an order of garnishment in the amount of \$219,999.69, computed through October 30, 2007, which attaches to each per capita distribution of gaming revenues on account of the defendant.

**103. *All Mission Indian Housing Authority v. Magante***, No. 06-1678, \_\_\_ F. Supp. 2d \_\_\_, 2007 WL 4285166 (S.D. Cal. Nov. 19, 2007). Indian housing authority, which was federally-sanctioned and federally-funded, brought unlawful detainer action seeking to evict tenants from home which housing authority was renting to them based on the tenants' failure to pay rent. The district court held that: (1) federal court did not have jurisdiction, pursuant to Native American Housing Assistance and Self-Determination Act, to hear action, and (2) Indian housing authority did not assert cause of action cognizable under federal common law. Case dismissed.



**104. *Burlington Northern & Santa Fe Railway Company v. Vaughn***, No. 05-16755, 2007 WL 4276671 (9th Cir. Dec. 7, 2007). Railroad brought suit against two officials in Hualapai Indian Tribe, seeking declaratory and injunctive relief against their efforts to enforce or collect the Tribe's possessory interest tax against railroad for use of its right-of-way through the reservation. The district court denied tribe's motion to dismiss. Tribe sought interlocutory appeal. The appellate court held that: (1) on a matter of first impression, denial of tribe's sovereign immunity claim was appealable on an interlocutory basis as a collateral order; (2) tribal official allegedly responsible for administration and collection of challenged tax was not immune from suit; (3) tribal Chairman was immune from suit; and (4) it would not exercise pendent appellate jurisdiction over tribe's remaining claims. Affirmed in part, reversed in part, and dismissed in part.

**105. *Osage Nation v. State of Oklahoma Ex Rel. Oklahoma Tax Commission***, No. 03-5162, 2007 WL 4553668 (10th Cir. Dec. 26, 2007). Not selected for publication in the Federal Reporter. The district court permitted the Osage Nation (Nation) to sue the state of Oklahoma, the Oklahoma Tax Commission, and individual members of the Tax Commission in their official capacities in federal court to enjoin the state's assessment of income tax on tribal members who are employed by the Nation and reside in Osage County, Oklahoma. The court found that the Nation sought to assert sovereign rights in direct opposition to the historically exercised sovereign authority of the state of Oklahoma. The appellate court reversed the district court decision to allow the Nation's suit to proceed against the state of Oklahoma and the Oklahoma Tax Commission and remanded for dismissal of those defendants. As to the individual defendants, the decision of the district court was affirmed.

**106. *Governor of Kansas v. Kempthorne***, No. 06-3213, \_\_\_ F.3d \_\_\_, 2008 WL 241111, (10th Cir. Jan. 30, 2008). Governor of Kansas and several Indian tribes challenged decision of Department of Interior (DOI) to take tract of land into trust for Wyandotte Indian Tribe upon which Tribe intended to operate casino. The district court, 430 F. Supp. 2d 1204, affirmed trust status of tract, and plaintiffs appealed. The appellate court held that: (1) Quiet Title Act prevented application of Administrative Procedure Act waiver; (2) action qualified as quiet title action so as to render Quiet Title Act analysis applicable; (3) prior lawsuit did not affect application of Quiet Title Act in current action; and (4) neither order of court in prior litigation between parties, nor Secretary's continued participation in current litigation, provided means on judicial review to avoid application of United States' sovereign immunity in current action in absence of valid waiver by Congress. Appeal dismissed and remanded to district court with instructions to vacate its judgment and dismiss case.

**107. *Polk County v. Department of Land Conservation and Development***, Nos. 03-001541; A122385 (Control), A122732, 2008 WL 542192 (Ore. Ct. App. Jan. 30, 2008). County and activist groups sought review of a Land Conservation and Development Commission (LCDC) order which required county to justify an exception to a Statewide Land Use Planning Goal and to take action under the additional provisions of an LCDC rule regarding an area which the county sought to designate as an urban unincorporated community. The appellate court affirmed and dismissed activist group's petition for lack of standing, 199 Or. App. 501, 112 P.3d 409, and activist group appealed. The supreme court vacated and remanded, 342 Or. 344, 153 P.3d 123. On remand, the appellate court held that: (1) activist group had standing to appeal LCDC decision; (2) LCDC could treat boundaries drawn in county's initial application of the Unincorporated Communities Rules as the establishment, rather than the expansion, of

**108.** *U.S. v. Duckey*, No. CR 07-869, 2008 WL 619145 (D. Ariz. Mar. 3, 2008). Before the court were the Colorado River Indian Tribe's motion to quash subpoena, and the juvenile victim's motion to quash subpoena. Defendant served a subpoena on the custodian of records for the Colorado River Indian Tribe Behavioral Health demanding the disclosure of all records regarding services provided to the juvenile victim. Defendant asserted that he has a right under the Confrontation Clause and the Due Process Clause to access the documents. The court found that the juvenile victim's counseling record was neither an investigatory file, nor in the government's possession, custody, or control and so was not subject to compelled disclosure, and the court was not obligated to conduct an in camera inspection. The court granted the Tribe's motion to quash subpoena, and granted the juvenile victim's motion to quash subpoena.

**109.** *Kalispel Tribe of Indians v. Moe*, No. CV-03-423, 2008 WL 687527 (E.D. Wash. Mar. 12, 2008). Before the court was Plaintiff Kalispel Tribe of Indians' Motion for Summary Judgment seeking an order ruling that all of defendant Moe's Rule 13(b) permissive counterclaims are barred by the doctrine of tribal sovereign immunity. Plaintiff entered into a written Joint Venture Agreement with Spokane Raceway Park, Inc. (SRP) to develop certain real property. In connection with the agreement, SRP gift deeded forty (40) acres of real estate to the United States in trust for Plaintiff. A governing board, the Joint Venture Board, was created in connection with the joint venture. Relations between Plaintiff and SRP deteriorated when Defendant Orville Moe threatened to damage Plaintiff's Northern Quest Casino property. This deterioration culminated in the court issuing a Preliminary Injunction against SRP, Defendants, and others. The court granted Plaintiff's Motion for Summary Judgment and dismissed Defendant's three counterclaims.

**110.** *In re DeCora*, Bankruptcy No. 06-11697-7, 2008 WL 1956261 (W.D. Wis. Mar. 28, 2008). Trustee brought adversary proceeding against debtor and bank, seeking to avoid bank's security interest in debtor's right to receive tribal per capita distributions from tribal gaming revenues and compel turnover of postpetition funds received by bank. The Bankruptcy Court held that: (1) tribe's payments to bank, under debtor's assignment, were made using funds belonging to debtor; (2) bank's security interest was not perfected under tribal ordinances governing payment of per capita distributions; and (3) bank's security interest was unperfected and could be avoided by trustee. Security interest avoided.

**111.** *State ex rel. Suthers v. Cash Advance and Preferred Cash Loans*, Docket No. 07CA0582, 2008 WL 1745824 (Colo. Ct. App. Apr. 17, 2008). State Attorney General opened investigation against two internet lending businesses to determine whether their lending practices violated Uniform Commercial Credit Code (UCCC) and the Colorado Consumer Protection Act (CCPA). Following failure of purported corporate owners of businesses to answer subpoenas, and initiation of contempt proceedings, purported owners moved to dismiss. Two corporations formed by tribal nations, claiming to own the lending businesses, joined the motion, asserting

**112. *Wopsock v. Natchees***, No. 06-4215, 2008 WL 2152435 (10th Cir. May 23, 2008). This case centered on a dispute over the membership on the Business Committee of the Ute Indian Tribe of the Uintah and Ouray Reservation and the financial management of the Tribe's assets. Ronald Wopsock, Luke Duncan and Cassandra Kochamp, enrolled members of the Ute Indian Tribe, filed an eight-count complaint in district court against various private parties and tribal and federal officials. The plaintiffs alleged two ordinances passed by the Business Committee impermissibly amended the Tribe's constitution, giving rise to various federal claims. The first amended complaint alleged, *inter alia*, violations of the Indian Reorganization Act (IRA) and conspiracy to violate plaintiffs' civil rights. The district court dismissed all claims and denied the plaintiffs' motion to amend their complaint. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, the appellate court affirmed the judgment of the district court, holding that the plaintiffs' IRA claims are barred by sovereign immunity and the plaintiffs failed to state a claim under the civil rights conspiracy statutes. The court further held the district court did not abuse its discretion in denying the motion to amend the complaint.

**113. *U.S. v. Menominee Tribal Enterprises***, No. 07-C-316, 2008 WL 2273285 (E.D. Wis. June 2, 2008). This matter was before the court on the Government's motion for a protective order seeking limitations on further discovery by Defendant Menominee Tribal Enterprises (MTE) and directing the MTE to remove from its website discovery materials it has or will in the future obtain in the case. Also before the Court was a motion of the Menominee Indian Tribe of Wisconsin (the Tribe) to quash a subpoena issued by MTE to Lisa S. Waukau, an elected member of the Menominee Tribal Legislature, directing Waukau to appear for a deposition in the matter. The Tribe, which is not a party to the lawsuit, argued that MTE's subpoena of Waukau is barred under the doctrine of tribal immunity because any information she may have on the matter is information she obtained in her official capacity as a member or Chairperson of the Menominee Tribal Legislature. Finally, MTE filed a motion to compel production of documents from the United States, for an additional seven hours to complete its examination of an individual it views as a key witness against it, and for relief in connection with electronic discovery. The court denied the United States' motion for a protective order barring MTE's dissemination of discovery materials on its website and its motion to seal the deposition of Douglas Cox. The Tribe's motion to quash the subpoena compelling the deposition of Lisa Waukau was granted, and MTE's motion to compel the production of BIA invoices, invoice review policies, and related documents was denied.

**114. *Shepherd v. Stade***, Docket No. A07-1220, 2008 WL 2246259 (Minn. Ct. App. June 3, 2008). Appellant asserted that the Shakopee Mdewakanton Sioux Community (the tribe) is an indispensable party to the suit and that, because the tribe cannot be joined, the suit must be dismissed. The appellate court concluded that the tribe is neither a necessary nor an indispensable party and affirmed the district court's decision.

**115. *Hunt Construction Group, Inc. v. Oneida Indian Nation***, Docket No. CA 07-02515, 2008 WL 2612035 (N.Y. App. Div. July 3, 2008). Plaintiff commenced an action seeking damages resulting from the alleged breach by defendant, the owner of the Turning Stone Casino & Resort, of its construction contract with plaintiff. Defendant moved to dismiss the complaint on, *inter alia*, the grounds that Supreme Court “lack[ed] . . . subject-matter jurisdiction and personal jurisdiction over [defendant] on the basis of sovereign immunity.” The appellate court concluded that the lower court erred in denying the motion.”

**116. *Hendrix v. Coffey***, No. CIV-08-605, 2008 WL 2740901 (W.D. Okla. July 10, 2008). This action represents an internal dispute over tribal membership matters governed by the Comanche Business Committee (CBC). Plaintiffs Hendrix, Revell and Hendrix III alleged that they were improperly disenrolled as tribal members from the Comanche Nation. Plaintiffs claim their disenrollment was a conspiracy scheme conceived by the CBC in response to plaintiff Hendrix’s efforts to gather information concerning the mismanagement of tribal programs and funds. Plaintiff Wells collected signatures to a petition to recall a CBC Committeeman. Despite having collected enough signatures, defendants allegedly failed to carry out the recall process as required by tribal law. Instead, defendants allegedly issued an inflammatory full page advertisement in a local newspaper declaring the recall petition fraudulent and implied that federal criminal actions were being taken against one or more plaintiffs. Furthermore, the tribal officials allegedly revoked recognition of plaintiffs’ Comanche Nation membership resulting in the denial of plaintiffs’ rights to investigate tribal government mismanagement, run or vote in the recently completed tribal election process and receive tribal benefits. In addition, plaintiffs claim dissatisfaction with the tribal process provided them because they were not permitted to submit contrary evidence prior to the CBC’s action. Plaintiffs commenced the action alleging, *inter alia*, violations of the Indian Civil Rights Act (ICRA) and their due process and equal protection rights. Defendants moved to dismiss the instant claims for lack of subject matter jurisdiction. The court granted defendants’ motion to dismiss and dismissed the action for lack of subject matter jurisdiction.

**117. *Vann v. Kempthorne***, No. 07-5024, \_\_ F.3d \_\_, 2008 WL 2890559 (D.C. Cir. July 29, 2008). Descendants of freed slaves of Cherokee Nation sued Secretary of Department of Interior (DOI), tribe, tribal chief, and other tribal officers, under Administrative Procedure Act (APA), seeking injunctive and declaratory relief regarding disenfranchisement from tribal elections allegedly in violation of Thirteenth and Fifteenth Amendments, Cherokee constitution, treaty, Principal Chiefs Act, and Indian Civil Rights Act (ICRA). The district court denied tribe’s motion to dismiss. Defendants appealed. The appellate court held that: (1) tribe was protected by sovereign immunity; (2) suit was not foreclosed against tribal officers under *Ex parte Young* doctrine; (3) suit was not foreclosed against tribal officers under Seminole Tribe exception to *Ex parte Young* doctrine; and (4) suit was not foreclosed against tribal officers by tribe’s special sovereignty interests. Reversed in part and remanded.

**118. *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. California***, No. 06-16145, 2008 WL 3169486 (9th Cir. Aug. 8, 2008). This appeal concerned the joinder requirements of Rule 19 of the Federal Rules of Civil Procedure and their effect on litigation brought by an Indian tribe engaged in casino gaming. The Cachil Dehe Band of Wintun Indians of the Colusa Indian Community (Colusa), entered into a gaming compact with the state of California in 1999. Colusa brought an action for declaratory and injunctive relief against the State, its Governor and the California Gambling Control Commission (collectively,

**119. *Morgan v. 2000 Volkswagen, License No. 279, VIN # 3VWRA29M2YM125643***, No A07-1922, 2008 WL 3290230 (Minn. Ct. App. Aug. 12, 2008). Enrolled member of Indian tribe, who was charged with committing an offense on his reservation that triggered vehicle forfeiture statute, moved to dismiss forfeiture action. The district court denied motion. Tribe member appealed. The appellate court held that vehicle forfeiture statute was civil/regulatory in nature and thus could not be enforced by state against Indian-owned vehicles for conduct occurring on owner's reservation. Reversed.

**120. *Marceau v. Blackfeet Housing Authority***, No. 04-35210, (9th Cir. Aug. 22, 2008). Plaintiffs are members of the Blackfeet Indian Tribe who bought or leased houses built under the auspices of the United States Department of Housing and Urban Development (HUD). The houses had wooden foundations that had been pressure-treated with toxic chemicals. Plaintiffs alleged that the use of wooden foundations caused their houses to deteriorate and that the chemicals in the wood have caused, and continue to cause, health problems for those who live in the houses. On behalf of a class of persons similarly situated, Plaintiffs sued HUD, the Secretary of HUD, the Blackfeet Tribal Housing Authority and its board members (the Housing Authority) under several theories. The district court dismissed the entire complaint under Federal Rule of Civil Procedure 12(b)(6). On rehearing, the court held: (1) plaintiffs must exhaust their tribal court remedies before suing the Housing Authority; (2) the government did not undertake a trust responsibility toward Plaintiffs to construct houses or maintain or repair houses; and (3) Plaintiffs alleged sufficient facts to state claims against HUD under the Administrative Procedure Act (APA). The court readopted its earlier opinion with respect to Plaintiff's breach of contract claims and affirmed the district court's dismissal of the case except as to Plaintiffs' claims against the Housing Authority and its board members and Plaintiffs' claims under the APA. As to those claims, the court reversed and remanded for further proceedings.

## **K. SOVEREIGNTY, TRIBAL INHERENT**

**121. *Cohen v. Winkleman***, No. CIV-07-645, 2007 WL 2746913, (W.D. Okla. Sept. 20, 2007). Plaintiff Cohen previously sued defendants Dr. C. Kim Winkleman and Comanche Nation College claiming they had breached an employment agreement and violated the Indian Civil Rights Act (ICRA), 25 U.S.C. §§ 1301-1303. The court dismissed that action, finding it lacked subject matter jurisdiction over the plaintiff's claims due to the sovereign immunity of the Comanche Nation. In that case, the court recognized that jurisdiction over the plaintiff's ICRA claim might exist under the Dry Creek rule, which allows an action to be

**122. *Village of Pender v. Parker***, No. 4:07CV3101, 2007 WL 2914871 (D. Neb. Oct. 4, 2007). This case raised the question of whether or not the Village of Pender, and the other plaintiffs' businesses, are physically within the Omaha Indian Reservation such that the Omaha Tribe may regulate and tax liquor sales in Pender. Before the court was a motion to amend seeking to add the Village of Pender as a plaintiff. Also pending was a motion to dismiss the case because plaintiffs failed to exhaust their tribal court remedies. The court: (1) granted the motion to amend the complaint; (2) denied the motion to dismiss; (3) stayed the case to allow the plaintiffs to exhaust their remedies in the Omaha Tribal Courts; and (4) kept a temporary restraining order in place with the defendants bound by its terms during the pendency of the stay

**123. *Michigan Property & Cas. Guar. Ass'n v. Foucault-Funke American Legion Post 444***, No. 2:07-135, 2007 WL 3121583 (W.D. Mich. Oct. 23, 2007). Defendant Foucault-Funke American Legion Post 444 brought suit against plaintiff, Michigan Property & Casualty Guaranty Association, in the Keweenaw Bay Indian Community Tribal Court. Post 444 sought damages for MPCGA's failure to settle a claim on behalf of Legion Insurance Company. Plaintiff asserted that the tribal court lacked jurisdiction to hear the case and filed a motion to dismiss in the tribal court. The tribal court had not ruled on the motion. Plaintiff then filed an action asking the district court to declare that the tribal court lacks jurisdiction over plaintiff and to enjoin the tribal court from further proceedings. Before the court was defendant's motion to dismiss based on plaintiff's failure to exhaust tribal remedies. Because plaintiff is required to exhaust tribal remedies prior to initiating suit in this court, granted defendant's motion to dismiss.

**124. *Meyer & Associates, Inc. v. Coushatta Tribe of Louisiana***, No. 2006-1542, 965 So. 2d 930 (La. Ct. App. Oct. 24, 2007). After disputes arose in execution of joint venture contracts between Indian tribe and a general consulting engineering firm, which had contracted to provide professional services to tribe in connection with a capital improvement program it had instituted, tribe filed suit in its tribal court against engineering firm. Subsequently, firm filed suit in the trial court against tribe. The district court ruled that the exhaustion of tribal remedies doctrine did not apply and denied tribe's exception of lack of subject matter jurisdiction. Tribe filed writ application, urging that trial court erred in failing to stay the proceeding to allow tribal court the first opportunity to determine whether it validly waived its sovereign immunity and in finding that the trial court had subject matter jurisdiction. The appellate court held that doctrine of exhaustion of tribal remedies applied, and therefore, trial court proceedings would be stayed in order to allow tribal court to determine whether tribe waived its sovereign immunity. Writ granted.

**125. *LECG, LLC v. Seneca Nation of Indians***, No. 06-1303, 2007, \_\_ F. Supp. 2d \_\_, WL 3196299, (D.D.C. Oct. 31, 2007). Provider of forensic accounting and consulting services related to independent counsel's review of financial transactions and other issues regarding construction, financing, management, and operation of Indian tribe's casino business brought action against tribe, seeking enforcement of binding arbitration provision in parties' agreement. Tribe moved to stay the action pending exhaustion of ongoing tribal court proceedings. The district court held that: (1) provider failed to exhaust its tribal remedies; (2) arbitration clause in parties' agreement did not negate requirements of tribal exhaustion doctrine; and (3) provider was not excepted from exhaustion of tribal remedies requirement. Motion granted.

**126. *First Specialty Insurance Corporation v. Confederated Tribes of the Grand Ronde Community of Oregon***, No. 07-05, 2007 WL 3283699 (D. Or. Nov. 2, 2007). The Confederated Tribes of the Grand Ronde Community of Oregon (Tribe) sued its investment advisors in circuit court, which sent the action to arbitration pursuant to an agreement between the parties. The Tribe lost in arbitration and the arbitrators awarded the investment advisors attorney fees and costs. The Tribe then brought a successful action in its tribal court system to vacate the arbitration award. First Specialty Insurance Corporation, the successor by assignment to the investment advisors, brought the action in the district court asking that the tribal court's vacation of the arbitration award be declared invalid and for an entry of judgment on the arbitration award. The district court concluded that the tribal court had jurisdiction and granted comity to its ruling.

**127. *Atwood v. Fort Peck Tribal Court Assiniboine***, No. 06-35299, \_\_ F.3d \_\_, 2008 WL 161347 (9th Cir. Jan. 18, 2008). Non-Indian father sued his Indian daughter's maternal aunt, who was seeking custody of his daughter after death of her Indian mother, and the tribal court that had granted temporary custody to child's maternal grandmother, challenging jurisdiction of tribal court, alleging substantive due process violation, and seeking injunctive relief. The district court granted defendants' motion to dismiss. Father appealed. The appellate court held that: (1) domestic relations exception did not bar suit; (2) father failed to exhaust tribal remedies; (3) exhaustion was not excused by bad faith; (4) exhaustion was not excused on ground of delay; and (5) exhaustion was not excused for lack of tribal jurisdiction. Affirmed.

**128. *Farmers Union Oil Co. v. Guggolz***, No. CIV 07-1004, 2008 WL 216321 (D.S.D. Jan 24, 2008). Plaintiff Farmers Union Oil Company, a retailer operating a gas station and convenience store, is a South Dakota Cooperative Corporation conducting business on non-Indian fee land, within the exterior boundaries of the Standing Rock Sioux Indian Reservation. Defendant Guggolz is an enrolled member of the Standing Rock Sioux Tribe and a resident within the exterior boundaries of Standing Rock. Defendant Standing Rock Sioux Tribal Court is a governmental unit serving the tribe. Defendant Zuger is the Associate Tribal Judge presiding over the underlying civil matter pending in tribal court. Defendant Guggolz's complaint in tribal court alleged personal injuries stemming from an alleged slip and fall incident on Farmers Union premises. Farmers Union filed a special appearance and answered Guggolz's complaint, objecting to tribal court jurisdiction and then filed a motion to dismiss. The tribal court denied the motion and Farmers Union did not petition the Standing Rock Sioux Tribal Supreme Court for interlocutory review of the tribal court decision. Instead, Farmers Union instituted a suit, pursuant to 28 U.S.C. § 1331, seeking to enjoin the prosecution of a civil action in the tribal court and seeking a declaratory judgment that the tribal court lacks subject matter jurisdiction. Thereafter, Judge Zuger and the tribal court filed a motion to dismiss or stay the federal action pending exhaustion of tribal remedies. Defendant Guggolz joined in defendants' motion and filed her own motion to dismiss or stay the action pending exhaustion of tribal remedies. The district court (1) denied defendants' motions to dismiss; and (2) granted defendants' motions to stay.

**129. *Cornelius v. Kansas Department of Revenue Division of Motor Vehicles***, No. 97,466, 180 P.3d 579 (Kan. Ct. App. Apr. 4, 2008). Motorist sought judicial review of suspension of driver's license after he was issued several citations during stop at sobriety checkpoint. The district court affirmed, and motorist appealed. The appellate court held that: (1) corporal for tribal police department did not lack jurisdiction to issue citations to motorist at sobriety checkpoint located outside tribe boundaries, and (2) corporal had statutory authority to issue traffic citations after he had been deputized by county sheriff. Affirmed.

**130. *Nord v. Kelly***, No. 07-1564, 520 F.3d 848 (8th Cir. Apr. 4, 2008). Non-Native American driver of semi-truck, and his father, whose business owned semi-truck, brought action against member of Red Lake Band of Chippewa Indians and Red Lake Nation Tribal Court, seeking declaration that Tribal Court lacked personal jurisdiction over driver and father, who were sued by member in Tribal Court for personal injuries sustained by member in automobile accident that occurred on state highway within reservation. The district court, 474 F. Supp. 2d 1088, granted summary judgment for plaintiffs. Defendants appealed. The appellate court that: (1) Tribal Court lacked personal jurisdiction over plaintiffs; (2) state's federally granted right-of-way to construct and maintain road over tribal lands as a public highway was valid; (3) plaintiffs did not have consensual commercial relationships with the tribe or its members as required for first Montana exception to apply; and (4) tribe's ability to regulate and to exercise adjudicatory authority over non-members on highway was not important to its tribal sovereignty, as required for second Montana exception to apply. Affirmed.



**131. *State of Washington v. Pink***, Docket No. 36485-9-II, 2008 WL 2390860 (Wash. Ct. App. June 3, 2008). Defendant, a tribal member, was charged with unlawful possession of a firearm, arising from traffic stop on Indian reservation. The superior court granted defendant's motion to dismiss. State appealed. The appellate court held that: (1) tribe did not transfer ownership of land to the state when it granted the state easement to build highway; (2) tribe continued to have jurisdiction to prosecute crimes committed on the land by tribal members, except for statutory exceptions; and (3) state did not have jurisdiction because defendant did not commit any traffic violations involving the operation of a motor vehicle.

**132. *MacArthur v. San Juan County***, No. 2:00-CV-584, 2008 WL 2627610 (D. Utah July 2, 2008). **Quoted from Order.** "Plaintiffs' counsel acknowledges the substance of the Tenth Circuit's ruling in this case, namely, that the Navajo tribal court lacked subject matter jurisdiction over the defendants named in the interlocutory tribal court orders that Singer, Riggs and Dickson sought to enforce in this court. Counsel's objection to the proposed order-and indeed, many of plaintiffs' recent submissions to this court-raises a more fundamental question: how is it possible for the federal courts to diminish Navajo tribal court authority over non-Indians, particularly in the context of litigation in which the Navajo Nation is not a party? Counsel insists that neither this court nor the court of appeals has addressed this question in the opinions already issued in this case, and that the answer to this question casts serious doubt upon the validity and binding effect of the Tenth Circuit's judgment. If anything, plaintiffs argue, the legal status of the Navajo Nation, the federal government's fiduciary relationship with the Navajo Nation, and principles of res judicata require that the federal courts summarily enforce orders of the Navajo tribal courts without further examination or inquiry." Objection overruled.

**133. *Barber v. Simpson***, No. 06-16880, 2008 WL 2705638 (9th Cir. July 11, 2008). Not selected for publication in the Federal Reporter. Wesley Barber appealed a judgment of the district court denying declaratory and injunctive relief from an eviction order entered in the Washoe Tribal Court, evicting him from a plot of land within Washoe Indian Country. Both Barber and appellees Simpson and Turner, the plaintiffs in the tribal court eviction action, are members of the Washoe Tribe. Barber argued that the tribal court lacked jurisdiction to order his eviction because (1) the United States was an indispensable but unjoined party in the action against him, and (2) 28 U.S.C. § 1346(f) gives the federal district courts exclusive original jurisdiction over quiet title actions involving property in which the United States has an interest. The appellate court found that Barber failed to establish that the tribal court exceeded its jurisdiction and affirmed.

**134. *Beltran v. Harrah's Arizona Corporation***, No. 2 CA-CV 2007-0169, 2008 WL 2931392 (Ariz. Ct. App. July 31, 2008). Appellants Raul and Ann Beltran appealed from the trial court's dismissal of their personal injury complaint against appellees Harrah's Arizona Corporation, Harrah's Entertainment, Inc., and the Ak-Chin Indian Community. The Beltrons contended, for several reasons, the trial court erred in finding them precluded from bringing their claim in superior court on the ground the claim had already been litigated in the Ak-Chin Indian Community tribal court. The appellate court affirmed.

## L. TAX

**135.** *Winnebago Tribe of Neb. v. Morrison*, No. 02-4070, 2007 WL 2582175 (D. Kan. Sept. 6, 2007). Plaintiff Indian tribes alleged that they were subjected to Kansas Motor Vehicle Fuel Tax, contrary to the provisions in federal and state law. The court previously entered an injunction requiring the return of property seized from the plaintiffs. The matter was before the court on plaintiffs' motion for summary judgment. Plaintiffs argued that the relief they sought was appropriate because federal law barred the defendants from imposing the taxes in question – the legal incidence of tax on the plaintiffs was an attempt to tax for a transaction occurring in Indian country. Further, they argued that the attempted taxation was improper under Kansas law because the plaintiffs do not meet the definition of a “distributor of first receipt” under K.S.A. 79-3408(c). The court granted the motion for a preliminary injunction and directed return of the seized property. The Attorney General filed a notice of appeal and submitted an application for a stay. The request for a stay was denied by the appellate court and the parties executed an agreed-upon order to effect the return of the seized property. The court found that sanctions should not issue because the delay in the return of the seized property was brief, and was largely occasioned by the necessary delay in the defendants' attempt to legitimately, if unsuccessfully, appeal the injunctive relief awarded and plaintiffs failed to show any separate injuries arising from the delay. The court granted plaintiffs' motion for summary judgment and denied their motion for sanctions.

**136.** *County of Seneca v. Eristoff*, No. B200606, 852 N.Y.S. 2d 493 (N.Y. App. Div. Mar. 6, 2008). County commenced Article 78 proceeding to compel Commissioner of Taxation and Finance to collect and remit local share of sales and other taxes on cigarettes and motor fuel sold to non-Indians at businesses owned or operated by Indian tribes. The Supreme Court dismissed petition, and county appealed. The appellate court held that county failed to demonstrate proprietary interest exception to general rule barring suit against state by local governments. Affirmed.

**137.** *City of New York v. Milhelm Attea & Bros., Inc.*, No. 06-CV-3620, 2008 WL 1926686 (E.D.N.Y. Apr. 30, 2008). City brought amended complaint against a group of cigarette wholesalers, alleging that they violated the Contraband Cigarette Trafficking Act (CCTA) by shipping in excess of 10,000 unstamped cigarettes to reservation retailers who re-sold the cigarettes to the public. Defendants moved to dismiss. The district court held that: (1) abstention was not appropriate; (2) city did not lack capacity to bring suit against wholesalers as alleged state agents; (3) city stated claim for violation of CCTA; (4) city stated public nuisance claim; and (5) tribes and state were not necessary parties. Motions denied.

**138.** *Barona Band of Mission Indians v. Yee*, No. 06-55918, \_\_ F.3d \_\_, 2008 WL 2440528 (9th Cir. June 18, 2008). Indian tribe brought action against California State Board of Equalization (SBE), seeking declaratory relief from imposition of state sales tax on construction materials purchased by non-Indian electrical subcontractor from non-Indian vendor and delivered to Indian land pursuant to contract for \$75 million casino expansion. The district court granted tribe's motion for summary judgment, and the SBE appealed. The appellate court held that: (1) legal incidence of sales tax fell upon subcontractor and thus tax was not per se invalid as a tax on tribe or its members; (2) sales tax was valid under Bracker preemption analysis; and (3) Indian Gaming Regulation Act (IGRA) did not preempt sales tax. Reversed and remanded.

## **M. TRUST BREACH AND CLAIMS**

**139.** *Navajo Nation v. U.S.*, No. 2006-5059, \_\_ F.3d \_\_, 2007 WL 2685641 (Fed. Cir. Sept. 13, 2007). The court stated that the threshold question in this case was whether the Navajo Nation (Nation) has a cognizable money-mandating claim under 28 U.S.C. § 1505, the Indian Tucker Act, against the United States for a breach of trust in a lease of the Nation's lands for coal mining to Peabody Coal Co. (Peabody). Only if there is such a claim, could the court evaluate whether the United States breached its trust duties based on the parties' cross-motions for summary judgment. The appellate court found that because the governing law establishes such a fair inference in the case and because the undisputed facts as determined by the Court of Federal Claims demonstrated that the government breached its trust duties, and reversed the decision of the Court of Federal Claims and remanded for further proceedings consistent with this opinion.

**140.** *Day v. Apoliona*, No. 06-16625, \_\_ F.3d \_\_, 2007 WL 2948897 (9th Cir. Oct. 11, 2007). Native Hawaiians, as defined under Hawaiian Homes Commission Act (HCCA), filed § 1983 suit against trustees of Office of Hawaiian Affairs (OHA), seeking to enforce asserted right to ensure that trust funds were devoted to betterment of conditions of Native Hawaiians, as required by Hawai'i Admission Act. The district court, 451 F. Supp. 2d 1133, dismissed. Native Hawaiians appealed. The appellate court, 496 F.3d 1027, held that each Native Hawaiian had individual right as trust beneficiary to enforce trust terms by filing § 1983 suit. State of Hawai'i moved to intervene to petition for rehearing. The appellate court held that Native Hawaiians would not be prejudiced by intervention of State of Hawai'i. Motion granted.

**141.** *Wilkinson v. United States*, No. 1:03-cv-02, 2007 WL 3544062 (D.N.D. Nov. 9, 2007). The Plaintiffs (the Wilkinsons), members of the Three Affiliated Tribes (Tribe) at the Fort Berthold Indian Reservation in North Dakota sued the United States alleging trespass of several family allotments, conversion of farm equipment, intentional infliction of emotional distress, and wrongful death in the death of Ernest Wilkinson, under the Federal Tort Claims Act. The court found that the United States injured the Wilkinsons in its trespass and conversion of real and personal property and by intentionally inflicting emotional distress. The court ordered the United States to pay the Wilkinsons \$459,976 in damages.

**142.** *The Tohono O'odham Nation v. United States*, No. 06-944L, \_\_ Fed. Cl. \_\_, 2007 WL 4510206 (Fed. Cl. Dec. 19, 2007). Indian tribe brought suit against the United States alleging that the government breached its fiduciary duties as trustee of various funds and property owned by the tribe. Defendant moved to dismiss. The Court of Federal Claims held that statute divesting the Court of Federal Claims of jurisdiction to hear claims that are already pending in another court was applicable to preclude jurisdiction over suit. Motion granted.

**143.** *Harvest Institute Freedman Federation v. U.S.*, No. 06-907 L, \_\_ Fed. Cl. \_\_, 2008 WL 215823 (Fed. Cl. Jan. 15, 2008). Ancestors of slaves owned by Indian tribes brought suit against the United States alleging that post-Civil War treaties between the United States and the tribes which prohibited slavery and gave freedmen equal rights as members of the tribes were breached when the tribes did not allocate land properly to freedmen under the treaties, and seeking the value of the land the tribes did not turn over to their ancestors. The Court of Federal Claims held that: (1) continuing claims doctrine did not apply to running of statute of limitations on plaintiffs' claim, and (2) plaintiffs failed to state a claim. Judgment for defendant.

**144. *AK-Chin Indian Community v. U.S.***, No. 06-932, \_\_\_ Fed. Cl. \_\_\_, 2008 WL 241275 (Fed. Cl. Jan 25, 2008). Indian tribe brought suit against the United States seeking damages for breach of trust obligations. Government moved to dismiss. The Court of Federal Claims held that preponderance of the credible evidence supported conclusion that plaintiff's complaint in federal district court was filed after it filed a complaint asserting the same claim in the Court of Federal Claims, and thus statute divesting the Court of Federal Claims of jurisdiction over a claim against the United States which is pending in another court was not applicable. Motion denied.

**145. *Office of Hawaiian Affairs v. Housing and Community Development Corporation of Hawai'i***, Docket No. 25570, 2008 WL 257181 (Haw. Jan. 31, 2008). Office of Hawaiian Affairs (OHA), and native Hawaiians, brought action for declaratory and injunctive relief against state and against Housing and Community Development Corporation of Hawai'i, seeking to enjoin defendants from alienating ceded lands from the public lands trust. After trial, the circuit court entered partial judgment for defendants, and certified the judgment for interlocutory appeal. The Supreme Court held that: (1) joint resolution of United States Congress, and related state legislation, give rise to state's fiduciary duty to preserve the corpus of the public lands trust, i.e., the ceded lands, until such time as unrelinquished claims of native Hawaiians are resolved; (2) earlier action did not have collateral estoppel effect; (3) action was not barred by sovereign immunity; (4) Office of Hawaiian Affairs did not waive its claims, through its conduct; (5) claims were ripe; (6) action did not present a nonjusticiable political question, and (7) issuance of permanent injunction was warranted. Vacated and remanded.

**146. *Hinsley v. Standing Rock Child Protective Services***, No. 07-1435, \_\_\_ F.3d \_\_\_, 2008 WL 304755 (8th Cir. Feb. 5, 2008). Mother brought Federal Tort Claims Act (FTCA) action against Bureau of Indian Affairs and child protection agency operated by Indian tribe pursuant to self-determination contract, alleging that agency negligently placed her brother in her home without notifying her that brother was child molester, resulting in his molestation of her daughter. The district court, 470 F. Supp. 2d 1037, entered summary judgment for agency. Mother appealed. The appellate court held that alleged failure of agency to warn mother was subject to FTCA's discretionary function exception. Affirmed.

**147. *Pelt v. Utah***, No. 2:92-CV-639, 2008 WL 723740 (D. Utah Mar. 14, 2008). Beneficiaries of the Navajo Trust Fund (NTF or Trust Fund) filed a class action against the NTF trustee, Defendant State of Utah, seeking relief for alleged mismanagement of Trust Fund monies. They sought, among other things, an equitable accounting of Trust Fund income and expenditures. The matter was before the court on cross-motions for partial summary judgment regarding the scope and nature of Utah's duty to account for and invest Trust Fund income. The court found that only the following two questions need to be decided at this stage of the litigation: (1) what is the scope of Utah's obligation to account for the oil and gas royalties that are the source of NTF funds? and (2) what is the scope of Utah's duty to account for investment income? The court held that the 1933 statute creating Utah's trust obligations does not require Utah to routinely oversee or independently verify the federal government's collection of the oil and gas royalties that are or should be deposited into the NTF. Accordingly, Utah's income accounting need only contain documentation of income actually received and deposited into the NTF. The court also held that Utah's duty to account for investment income is governed by the common law prudent man standard, which was incorporated into Utah's State Money Management Act. Further, that duty to account is limited to income received from investment

**148.** *Garreaux v. United States*, No. CIV 07-3021, 2008 WL 895825 (D.S.D. Mar. 31, 2008). After Court of Federal Claims dismissed her complaint against government, Native American tenant who allegedly entered into agreement with housing authority to purchase dwelling brought suit against United States, Secretary of Department of Housing and Urban Development and Secretary of Department of Interior under Federal Tort Claims Act (FTCA) and Administrative Procedure Act (APA), seeking damages and declaratory and injunctive relief. Defendants moved to dismiss. The district court held that: (1) federal district court lacked subject matter jurisdiction to hear FTCA claims, and (2) tenant could not sustain claims under APA. Motion granted.

**149.** *Osage Tribe of Indians of Oklahoma v. United States*, No. 99-550 L, 81 Fed. Cl. 340 (Fed. Cl. Mar. 31, 2008). Indian tribe brought suit against the United States alleging that government violated its duty as trustee of tribe's mineral estate by failing to collect all moneys due from tribal oil leases and to deposit and invest those moneys as required by statute and according to fiduciary duty owed to tribe. Government was found liable for breach of fiduciary duties, 72 Fed. Cl. 629. Subsequently, individuals who identified themselves as personal owners of allotted tribal shares moved to intervene. Plaintiffs filed motion to disqualify proposed intervenors' counsel. The Court of Federal Claims held that tribe's former counsel was disqualified from representing tribal headright owners who sought to intervene in suit. Motion granted.

**150.** *Samish Indian Nation v. U.S.*, No. 02-1383 L, \_\_ Fed. Cl. \_\_, 2008 WL 2220685 (Fed. Cl. May 27, 2008). Plaintiff is a federally recognized Indian tribe that sought compensation for the benefits it would have received between 1969 and 1996, if it had been properly recognized by the federal government during that time period. The government, in its motion to dismiss, contended that the court lacked jurisdiction over plaintiff's second amended complaint. Due to a discovery dispute, only limited issues from defendant's motion to dismiss were before the court. Those issues concerned the general question: do the networks of statutes, regulations, and agency practices that underlie the Tribal Priority Allocation (TPA) system and the Indian Health Service (IHS) funding process confer jurisdiction on this court? The court found that it lacked jurisdiction over the funding processes and granted in part defendant's motion.

**151.** *Passamaquoddy Tribe v. U.S.*, No. 06-942 L, \_\_ Fed. Cl. \_\_, 2008 WL 2501195 (Fed. Cl. June 19, 2008). Before the court was Defendant's Motion to Dismiss Pursuant to 28 U.S.C. § 1500. On December 29, 2006, plaintiff filed a complaint (COFC) requesting damages for breaches of trust by the United States. The same day, plaintiff filed a complaint (DDC) in the United States District Court for the District of Columbia also requesting relief related to breaches of trust responsibilities by the United States. The Court of Federal Claims

**152. *Day v. Apoliona***, No. 05-00649, 2008 WL 2511198 (D. Hawai'i June 20, 2008). Plaintiffs are individuals who describe themselves as having “not less than one-half part” Hawaiian blood. They challenged the manner in which the Office of Hawaiian Affairs (OHA), the current trustee of a public land trust created by the act through which Hawaii became a state, P.L. 86-3 (March 18, 1959), reprinted in 73 Stat. 4, 5 (Admission Act), has been and is spending certain funds it controls. Plaintiffs argued that OHA violates federal law by spending the public trust money to better the conditions of all persons having any quantum of Hawaiian blood, instead of restricting such spending to benefit only people who, like them, have “not less than one-half part” Hawaiian blood. To the extent Count I of the First Amended Complaint sought to hold the OHA trustees individually liable for damages under § 1983, the court granted the individual trustees summary judgment. To the extent Counts I, II, and IV of the First Amended Complaint sought injunctive relief or a declaration that, under the Admission Act, the OHA trustees must use public trust funds only for the betterment of the conditions of people who have “not less than one-half part” Hawaiian blood, the court ruled that the Admission Act is not so restrictive. Summary judgment was granted in favor of Defendants on the remaining claims asserted in the First Amended Complaint.

**153. *Zephier v. Catholic Diocese of Sioux Falls***, Docket Nos. 24124, 24194, 2008 WL 2553267 (S.D. June 25, 2008). Seventy-two former students of St. Paul's School brought suit against four entities claiming that they were responsible for mental, physical and/or sexual abuse during the years 1947-1954 and 1958-1973. The circuit court granted summary judgment in favor of all defendants, concluding that a statute of limitations barred the claims. Thereafter, ten of the students moved to amend the complaint attempting to show a timely filing. Before the circuit court's ruling on the motion to amend, nine of the students filed an appeal. Notwithstanding the filing of the appeal, the circuit court held a hearing on the merits and denied the motion to amend. The nine students then appealed the dismissal of their sex abuse claims and the denial of their motion to amend. The Supreme Court affirmed in part, reversed in part, and remanded.

**154. *Kuroiwa v. Lingle***, No. 08-00153, 2008 WL 2622816 (D. Hawai'i July 3, 2008). Plaintiffs filed a complaint titled “Six Non-Ethnic Hawaiians' Complaint for Breach of Trust and Deprivation of Civil Rights and to Dismantle Office of Hawaiian Affairs,” naming as defendants various state officers in their official capacities (State Defendants), and the trustees of the Office of Hawaiian Affairs in their official capacities (OHA Defendants). The complaint sought injunctive relief for defendants' alleged “breach of Hawaii's federally created ceded lands trust and the incidentally related state public trust; and defendants' civil conspiracy to deprive them of equal protection of the laws and equal privileges and immunities under the laws.” Before

**155. *Johnson v. U.S.***, No. 07-3347, \_\_\_ F.3d \_\_\_, 2008 WL 2853210 (8th Cir. July 25, 2008). Arrestee brought action against United States under Federal Tort Claims Act (FTCA), alleging that Bureau of Indian Affairs (BIA) correctional officer committed various torts, including false and unlawful arrest. The district court, 2007 WL 2688556, dismissed for lack of subject matter jurisdiction. Arrestee appealed. The appellate court held that: (1) alleged tortious acts of BIA officer were not within scope of his employment; (2) District Court did not abuse its discretion in failing to hold evidentiary hearing; and (3) District Court did not abuse its discretion in failing to allow arrestee further discovery. Affirmed.

**156. *Bennion v. U.S.***, No. 07-35132, 2008 WL 3564533 (9th Cir. Aug. 12, 2008). Not selected for publication in the Federal Reporter. Irving Bennion appealed the district court's dismissal of his Federal Tort Claims Act claims for medical malpractice and premises liability. The claims arose when Bennion fainted and was burned in a steam room at the Tribal Wellness Center on the Coeur d'Alene Tribe Indian Reservation. Bennion claimed that a physical therapist at the site, Dan Smith, committed malpractice by allowing him to use the steam room unsupervised. His premises liability claim asserts that the steam ran unreasonably hot and that the United States was responsible. The district court dismissed the malpractice claim on the ground that Bennion had failed properly to designate any expert who could testify to the standard of care as required under Idaho law. The court also rejected Bennion's claim that Smith himself had admitted malpractice in a deposition and therefore could serve as an expert. As to the premises liability claim, the court found that the United States could not be liable because it did not operate or control the Tribal Wellness Center. The appellate court affirmed.

**157. *Cobell v. Kempthorne***, No. 96-1285, \_\_\_ F. Supp. 2d \_\_\_, (D.D.C. Aug 7, 2008). Following finding that Department of Interior breached of its duty under the Indian Trust Fund Management Reform Act to produce an accounting for individual Indian money (IIM) account holders, 91 F. Supp. 2d 1, affirmed by 240 F.3d 1081, bench trial was conducted for purpose of determining whether the Department of Interior must make restitution for funds received but which cannot be proven to be credited to IIM account holders. The district court applied its earlier ruling that Department of Interior's 2007 historical accounting plan did not satisfy Department's obligation under Indian Trust Fund Management Reform Act to produce an accounting of individual Indian money trust accounts and ordered restitution of \$456 million.

## **N. MISCELLANEOUS**

**158. *United States v. Refert***, No. 07-1158, 2008 WL 657861 (8th Cir. March 13, 2008). Defendant was convicted in the district court of health care fraud and making false claims against the United States and appealed. The appellate court held that: (1) failure to give jury instruction on whether defendant was regarded as an Indian by the community was not plain error; (2) sufficient evidence established that defendant received free medical services based on her misrepresentations; (3) district court did not plainly err in ordering restitution for costs

**159. *Bone Shirt v. Hazeltine***, No. 07-2145, 524 F.3d 863 (8th Cir. May 5, 2008). Native American voters, as prevailing parties in their suit claiming that South Dakota legislative redistricting plan violated Voting Rights Act, moved for expert witness fees, under Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act (VRARA). The district court denied motion. Voters appealed. The appellate court held that expert fees award under VRARA would have impermissible retroactive effect. Affirmed.

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