

JUDICIAL UPDATE

2008 - 2009 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. *Carciere v. Kempthorne*, Docket No. 07-526, 2009 WL 436679, (Feb. 24, 2009). The Indian Reorganization Act, 25 U.S.C. §479, permits the Secretary of the Interior to acquire land and hold it in trust to provide “land for Indians” only for a tribe that was under federal jurisdiction when the statute was enacted in 1934, and not for tribes subsequently recognized by the federal government, because the statute defines “Indian” as “members of any recognized Indian tribe now under Federal jurisdiction[.]” The Court held that Indian Reorganization Act does not empower secretary to take land into trust for Indian tribes that were not recognized and under federal jurisdiction in 1934. **Holding below:** *Carciere v. Kempthorne*, 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 465s 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. Reversed.

2. *Hawaii v. Office of Hawaiian Affairs*, Docket No. 07-1372, 556 U. S. ____ (Mar. 31, 2009), 2009 WL 814889. Does resolution to acknowledge overthrow of Kingdom of Hawaii, in which Congress apologized for United States’ role in that overthrow, strip Hawaii of its sovereign authority to sell, exchange, or transfer 1.2 million acres of state land – 29 percent of total land area of state and almost all of land owned by state – unless and until it reaches political settlement with native Hawaiians about status of that land? No. In *Office of Hawaiian Affairs v. Housing and Community Development Corporation of Hawai’i*, 77 P.3d 884, an action opposing state Housing and Community Development Corporation of Hawaii’s efforts in 1990s to transfer various parcels of ceded lands, including Leiali’i parcel, to private entrepreneurs for purpose of residential development, trial court’s ruling declaring that state was authorized to alienate ceded lands from public lands trust was vacated. In light of Apology Resolution enacted by Congress, which, along with related state legislation, gave rise to state’s fiduciary duty to preserve corpus of public lands trust – specifically, ceded lands – until such time as unrelinquished claims of native Hawaiians have been resolved, case was remanded for injunction against sale or other transfer to third parties of Leiali’i parcel and any other ceded lands from public lands trust until claims of native Hawaiians to ceded lands have been resolved. The Supreme Court reversed. When a state supreme court incorrectly bases a decision on federal law, the court’s decision improperly prevents the citizens of the State from addressing the issue in question through the processes provided by the State’s constitution. Here, the State Supreme Court incorrectly held

that Congress, by adopting the Apology Resolution, dictated that an injunction issue. Respondents defend that decision by arguing that they have both state-law property rights in the land in question and “broader moral and political claims for compensation for the wrongs of the past.” But we have no authority to decide questions of Hawaiian law or to provide redress for past wrongs except as provided for by federal law. The judgment of the Supreme Court of Hawaii is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

3. *United States v. Navajo Nation*, Docket No. 07-1410, 556 U.S. ____ (Apr. 6, 2009). The Supreme Court held: the Tribe’s claim for compensation fails. None of the sources of law cited by the Federal Circuit and relied upon by the Tribe provides any more sound a basis for its lawsuit than those analyzed in *Navajo I*. (a) *Navajo I* did not definitively terminate the Tribe’s claim. The Court in that case did not analyze statutes other than the IMLA, the IMDA, and §399. However, *Navajo I*’s reasoning—particularly its instruction to “train on specific rights-creating or duty-imposing statutory or regulatory prescriptions,” 537 U. S., at 506 – left no room for that result based on the sources of law relied on below. (b) Lease 8580 was not issued under § 635(a), so the Tribe cannot invoke that law as a source of money-mandating duties. This conclusion is not refuted by § 635(a)’s saving clause or by testimony that coal leasing was a centerpiece of the Rehabilitation Act’s program. (c) Also unavailing is the argument that the Secretary violated § 638’s requirement that he follow the Tribe’s recommendations in administering the “program authorized by this subchapter.” The word “program” refers to § 631, which directs the Secretary to undertake “a program of basic improvements for the conservation and development of the [Tribe’s] resources” and lists various projects to be included in the program. The statute does not require the Secretary to follow recommendations of the Tribe as to royalty rates under coal leases executed pursuant to another Act. (d) Title 30 U.S.C. § 1300(e) is irrelevant. That provision applies only “[w]ith respect to leases issued after” the statute was enacted in 1977. Lease 8580 was issued in 1964. (e) The Government’s “comprehensive control” over Indian coal, alone, does not create enforceable fiduciary duties. Analysis must begin with “specific rights-creating or duty-imposing statutory or regulatory prescriptions,” 537 U. S. at 506. If a statute or regulation imposes a trust relationship, then common-law principles are relevant in determining whether damages are available for breach of the duty, but the Tribe cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated, so trust principles do not come into play here. 501 F. 3d 1327, reversed and remanded. **Holding below:** *Navajo Nation v. United States*, 501 F.3d 1327, held that Indian tribe is entitled to judgment on its Indian Tucker Act claim against United States for breach of its trust duties related to lease of tribe’s lands for coal mining to third party. Although *United States v. Navajo Nation*, 537 U.S. 488, 71 U.S.L.W. 4146 (2003), held that 1938 Indian Mineral Leasing Act and its implementing regulations do not constitute substantive source of law required to establish such claim, network of other statutes and regulations cited by tribe, including 1950 Navajo-Hopi Rehabilitation Act, 1977 Surface Mining Control and Reclamation Act, and 1983 Federal Oil and Gas Royalty Management Act, are reasonably amenable to interpretation mandating right of recovery in damages against government, under Indian Tucker Act, for violating its common law fiduciary trust duties of care, candor, and loyalty, and duties imposed by such statutory network, and thus provide required substantive source of law.

OTHER COURTS

A. ADMINISTRATIVE LAW

4. *Alaska v. Federal Subsistence Bd.*, No. 07-35723, 2008 WL 4307444 (9th Cir. Sept. 23, 2008). State of Alaska brought action challenging decision of Federal Subsistence Board (FSB) granting residents of a rural community in Southeast Alaska a customary and traditional use determination (C&T determination) for moose throughout the relevant game management unit (GMU). The district court granted summary judgment in favor of federal defendants and defendant-intervenors. State of Alaska appealed. The appellate court held that: (1) substantial evidence supported FSB's finding that residents took moose for subsistence use in relevant portion of GMU; (2) FSB properly considered specific moose populations as directed by federal regulations, in granting C & T determination; and (3) FSB's decision to grant C & T determination was not arbitrary and capricious. Affirmed.

5. *Akiachak Native Cmty. v. U.S. Dept. of the Interior*, No. 06-0969, ___ F. Supp. 2d ___, 2008 WL 4571977 (D.D.C. Sept. 30, 2008). Plaintiffs, Akiachak Native Community, Chalkyitsik Village, Chilkoot Indian Association, Tuluksak Native Community, and Alice Kavairlook brought an action against the United States Department of the Interior (DOI) and the Secretary of the Interior challenging the validity of a regulatory bar prohibiting the Secretary from acquiring land located in Alaska into trust status for most federally recognized Indian tribes. Plaintiffs argued that the Alaska Native Claims Settlement Act (ANCSA) did not repeal any portion of the 1934 IRA or the 1936 amendments that made section 5 of the IRA applicable to Alaska and contended that the Part 151 regulations, to the extent that they preclude acquisition of land located in Alaska into trust status, violate 25 U.S.C. §§ 476(f) and (g), the provisions of the IRA that prohibit agencies from promulgating any regulation that "enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes." In addition, plaintiffs alleged that the Part 151 regulations violate the Administrative Procedures Act and the Equal Protection and Due Process Clauses of the Fifth Amendment to the U.S. Constitution. Plaintiffs sought declaratory and injunctive relief preventing DOI from applying the regulatory bar set forth in 25 C.F.R. § 151.1 insofar as it excludes federally recognized tribes or their members from petitioning to have land in Alaska taken into trust by the Secretary. The state of Alaska filed a motion to intervene as a defendant in the case, arguing that its interest in maintaining jurisdiction over the plaintiffs' land and its interest as a party to the settlement embodied in the ANCSA, 43 U.S.C. § 1601 *et seq.*, may be impaired by the outcome of the litigation and are not adequately represented by existing parties. The court granted Alaska's motion to intervene

6. *Stratman v. Leisno*, No. 07-35934, 2008 WL 4459077 (9th Cir. Oct. 6, 2008). Holder of grazing lessee sought enforcement of decision of Interior Board of Land Appeals which had found that village was not a deficiency village corporation entitled to lands under Alaska Native Claims Settlement Act (ANCSA). The district court dismissed the action and holder appealed. The appellate court held that: (1) Congress intended to treat village as an eligible village under ANCSA with right to public land, and (2) Congressional actions rendered moot a challenge to village's certification. Affirmed.

7. ***Wapato Heritage, LLC v. U.S.***, No. CV-08-177, 2008 WL 5046447 (E.D. Wash. Nov. 21, 2008). Before the court were Plaintiff's Motion for Partial Summary Judgment and Defendant's Cross Motion for Partial Summary Judgment. Plaintiff challenged an administrative ruling by Defendant Bureau of Indian Affairs (BIA) that Plaintiff failed to validly exercise an option to renew a lease for certain real estate located in Chelan County, Washington. Plaintiff moved for summary judgment on its third cause of action, seeking a declaratory judgment that the option to renew was validly exercised. Defendant filed a cross-motion for partial summary judgment, moving the court to dismiss Plaintiff's first four claims for relief: (1) for injunctive relief, enjoining Defendants from leasing the subject property to another entity or person; (2) for deprivation of property without due process in violation of the Fifth Amendment; (3) for a declaratory judgment that the option to renew was validly exercised; and (4) for arbitrary and capricious agency action in finding the lease had not been validly renewed. The court found that Plaintiff neither actually nor substantially complied with the renewal notice terms of the Master Lease; that the BIA lacked the authority to ratify any deficiency in compliance with those terms; and that Plaintiff is not entitled to an equitable exception for its failure to comply. The court denied plaintiff's motion for partial summary judgment and granted defendant's motion with respect to dismissal of claim three.

8. ***Menominee Indian Tribe of Wisconsin v. U.S. Dept. of Interior***, No. 08-C-950, 2008 WL 5099617 (E.D. Wis. Nov. 26, 2008). This matter was before the court on motion of the Menominee Indian Tribe of Wisconsin (Menominee) for a temporary restraining order enjoining the Defendants United States Department of the Interior and Dirk Kempthorne, Secretary of the United States Department of the Interior (collectively Interior) from processing Menominee's application to have land in Kenosha, Wisconsin, declared eligible for gambling under the Indian Gaming Regulatory Act (IGRA) and taken into trust for gaming purposes pursuant to the Indian Reorganization Act, 25 U.S.C. § 465. The court concluded that Menominee failed to establish a likelihood of success on the merits; that it is unlikely that the Tribe would be able to establish that there was final agency action to review; and that it was doubtful that the claim was ripe or that the Tribe had standing. The court further concluded that the Tribe failed to establish that it would either suffer irreparable harm or that there is no adequate remedy at law. The motion for a temporary restraining order was denied.

9. ***Morongo Band of Mission Indians v. State Water Resources Control Bd.***, No. S155589, 45 Cal. 4th 731, 199 P.3d 1142 (Cal. Feb. 9, 2009). Water rights holder petitioned for writ of mandate to challenge denial by the State Water Resources Control Board of its petition to disqualify attorney prosecuting license revocation proceeding against holder because she simultaneously acted as legal advisor to Board in unrelated administrative proceeding. The superior court issued writ of mandate compelling disqualification of attorney. Board appealed. The appellate court affirmed. The Supreme Court held that it did not violate license holder's right to due process for the prosecuting agency attorney to simultaneously serve as an advisor to Board on an unrelated matter. Reversed.

10. ***Pro Football, Inc. v. Harjo***, No. 03-7162, ___ F.3d ___, WL 1350607 (D.D.C. May 15, 2009). Native Americans petitioned to cancel professional football team's trademark registrations on ground that registrations disparaged Native Americans. The Trademark Trial and Appeal Board (TTAB), 1999 WL 375907, cancelled registrations, and team sought judicial review. The district court granted summary judgment in favor of team. Defendants appealed. The appellate court, 415 F.3d 44, remanded. The district court, 567 F. Supp. 2d 46, granted

judgment for team. Defendants appealed. The appellate court held that: (1) district court did not abuse its discretion in finding trial prejudice; (2) district court did not abuse its discretion in finding economic prejudice; and (3) district court did not abuse its discretion in finding that 29-month delay evinced lack of reasonable diligence. Affirmed.

11. *In re Shinnecock Smoke Shop*, No. 2009-1100, ___ F.3d ___, 2009 WL 1874078 (Fed. Cir. July 1, 2009). Trademark applicant, a United States citizen and member of the Shinnecock Indian Nation, appealed decision of Trademark Trial and Appeal Board, 2008 WL 4354159, affirming examining attorney's decision refusing to register the proposed marks. The appellate court held that: (1) Shinnecock Indian Nation qualified as an "institution" under Trademark Act; (2) Board did not err in affirming examining attorney's rejection of applicant's trademarks; (3) Patent and Trademark Office (PTO) refusal to register applicant's trademarks did not violate applicant's due process rights; and (4) PTO's refusal to register applicant's trademarks did not violate applicant's equal protection rights. Affirmed.

12. *Anderson & Middleton Co. v. Salazar*, No. 3:09-05033, 2009 WL 2424446 (W.D. Wash. Aug 4, 2009). Before the Court was Plaintiff Quinault Indian Nation's Motion for Summary Judgment and Defendant Secretary of the Interior's Cross-Motion for Summary Judgment. This case involves the bidding process for the sale of 26 parcels of tribal land owned by individual members of the Quinault Indian Tribe. The question before the Court was whether the Bureau of Indian Affairs (BIA) acted arbitrarily and capriciously in its management of the bidding process or its subsequent forfeiture of the Quinault Indian Nation's (QIN) deposit and right to purchase certain of the parcels. QIN and Anderson & Middleton Company (A&M) participated in the bidding process for the parcels. A&M bid on 20 of the parcels and QIN bid on all 26 parcels. The BIA determined that although A&M was the high bidder on the 20 parcels, QIN had the right to match that bid and purchase all 26 parcels. Both parties appealed. QIN claimed it had the right to purchase at "fair market value" without having to first match A&M's high bid. A&M argued that it was the high bidder and that QIN did not have the right to match. The Interior Board of Indian Appeals (IBIA) upheld the BIA's determination on both issues. QIN and A&M each sued the Secretary of the Interior, having authority over the Bureau of Indian Affairs (hereafter "Government"), asking the Court to overturn the IBIA's decision. The court found that the findings of the IBIA were not arbitrary or capricious. QIN had a statutory right to match the highest bid, but did not have the right to preempt the bidding process and purchase trust allotments at an appraised fair market value. The IBIA's decision was affirmed in its entirety. However, the court found the BIA failed to discharge its obligations to QIN under the Indian Land Consolidation Act, and the Agency's own administrative regulations. The BIA acted arbitrarily and capriciously when it forfeited QIN's deposit and right to purchase the 20 allotments subsequent to the IBIA decision. The court granted QIN's Motion for Summary Judgment and denied the Government's Cross-Motion for Summary Judgment concerning the forfeiture of QIN's deposit and right to purchase the 20 parcels. The court denied QIN's Motion for Summary Judgment and granted the Government's Cross-Motion for Summary Judgment concerning the IBIA's decision affirming the validity of the bidding process and QIN's statutory right to match.

13. *Patchak v. Salazar*, No. 08-1331, ___ F. Supp. 2d ___, 2009 WL 2576039 (D.D.C. Aug. 19, 2009). Plaintiff David Patchak brought a lawsuit challenging the Secretary of the Interior's (Secretary or United States) decision to take into trust two parcels of land in Allegan County, Michigan, on behalf of intervenor-defendant Match-E-Be-Nash-She-Wish Band of

Pottawatomi Indians (Tribe) pursuant to the Indian Reorganization Act (“IRA”), 25 U.S.C. § 465. Plaintiff sought an injunction barring the Secretary from taking the land into trust on the basis that the Tribe was not under Federal jurisdiction in June 1934, as required by the IRA. Before the Court was the United States’ Motion to Dismiss, the Tribe’s Motion for Judgment on the Pleadings, and plaintiff’s motions for preliminary injunctive relief. The court found that plaintiff failed to establish prudential standing, and granted the Motion to Dismiss and Motion for Judgment on the Pleadings and denied the motions for preliminary injunctive relief.

B. CHILD WELFARE LAW AND ICWA

14. *David H. v. Karen F.*, No. A118968, 82 Cal. Rptr. 3d 81(Cal. Ct. App. Aug. 19, 2008). After setting aside jurisdictional and dispositional orders in dependency case because of errors in complying with the Indian Child Welfare Act (ICWA), the superior court declared Indian child to be dependent and ordered reunification services. Mother appealed. The appellate court held that: (1) mother’s contention that juvenile court erred in extending child’s detention was moot; (2) any error was harmless in mother’s lack of representation when tribe’s ICWA representative received permission to testify by telephone; (3) juvenile court properly denied continuance of jurisdictional hearing; (4) mother forfeited argument that her automatic right to 20-day continuance under ICWA required continuance; (5) any error in trial court’s refusal to grant continuance was harmless; (6) appointment of new counsel two weeks before hearing did not infringe on mother’s ICWA right to counsel; (7) mother waived argument that jurisdictional petition was facially insufficient; (8) statute providing that challenges to facial sufficiency are not forfeited by failure to raise them in the trial court does not apply to dependency proceedings; (9) serious physical harm inflicted nonaccidentally by mother was sufficient to support dependency jurisdiction; and (10) child faced current substantial risk of physical harm if returned to mother’s custody. Affirmed.

15. *Stephen H. v. Arizona Dept. of Econ. Security*, No. CV-08-0026. 190 P.3d. 180 (Arizona Aug. 19, 2008). In child protection proceeding involving children of Indian descent, the Superior Court ordered that children be made wards of the court and placed under control of Department of Economic Security (DES). Parents appealed. The appellate court, 217 Ariz. 315, 173 P.3d 479, vacated dependency order, and children’s guardian ad litem appealed. The Supreme Court held that: (1) Indian Child Welfare Act (ICWA) requires qualified expert testimony that addresses determination that the Indian child is at risk of future harm, and (2) as matter of first impression, such testimony need not recite specific language of ICWA or express its conclusion in a particular way. Opinion of appellate court vacated, matter remanded.

16. *Empson-Laviolette v. Crago*, No. 284041, 2008 WL 4191453 (Mich. Ct. App. Sept. 11, 2008). Plaintiff Stephanie Empson-Laviolette (Empson), an enrolled member of the Pokagon Band of Potawatomi Indians (Tribe), appealed by right the trial court’s order granting sole custody of her son, Z.E., to appellees Shannon and Tricia Scott. Below, pursuant to the Indian Child Welfare Act (ICWA), Empson moved the trial court to dismiss the Scotts’ motion for custody and to return Z.E. to her custody because she had withdrawn her consent to the Scotts’ guardianship of Z.E. Because the ICWA allows the parent of an Indian child who consents to a foster care placement of the child to withdraw her consent to the placement at any time and to have the child returned to her custody, we agree with Empson that she was entitled to have Z.E. returned to her custody. Therefore, we vacate the trial court’s order granting custody

of Z.E. to the Scotts and remand for an order terminating the Scotts' guardianship of Z.E. and for the effectuation of the return of Z.E. to Empson.

17. *Roe v. Finfrock*, No. 283642, 2008 WL 4603462 (Mich. Ct. App. Sept. 25, 2008). In this termination of parental rights case involving an Indian child, respondent Theresa Finfrock appealed as of right the trial court order terminating her parental rights to her daughter Ashtyn Jasmin Roe. The trial court terminated Finfrock's rights after finding that her rights to another child had been terminated due to physical abuse and that prior attempts to rehabilitate her had been unsuccessful. As the Indian Child Welfare Act (ICWA) requires, the trial court further found that continued custody by Finfrock was likely to result in serious emotional or physical damage to the child. On appeal, Finfrock argued that the trial court erred by failing to require petitioner Department of Human Services (Department) to prove that it made "active efforts" to provide the remedial services and rehabilitative programs that the ICWA required. Finfrock further argued that the trial court clearly erred when it found that Finfrock's continued custody was likely to result in serious emotional or physical damage to the child. The court concluded that the ICWA requires the trial court to make findings regarding whether the Department made active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and regarding whether those efforts proved unsuccessful. Because the trial court did not make these findings, the appellate court reversed the trial court's order terminating Finfrock's parental rights and remanded for further proceedings consistent with this opinion.

18. *In re D.D.*, No. 3-08-0442, 2008 WL 4892482 (Ill. App. Ct. Nov. 5, 2008). Respondent D.D., Sr., is the father of the minors at issue, and respondent A.D. is the mother. The trial court found both respondents unfit to care for their minor children and terminated their parental rights. The minors met the definition of "Indian Child[ren]" under the federal Indian Child Welfare Act (ICWA); thus, the ICWA governed the case. On appeal, the respondents argued that the State did not meet its burden under sections § 1912(d) and (f) of the ICWA and that the mother's trial counsel provided ineffective assistance. The appellate court affirmed.

19. *Valerie M. v. Arizona Dept. of Econ. Security*, No. CV-08-0252, 2009 WL 56920 (Ariz. Jan. 12, 2009). Mother, a member of the Cherokee Nation, appealed order of the Superior Court, No. JD 13827, terminating her parental rights to her three children. The appellate court, J., 195 P.3d 192, affirmed. Mother appealed. The Supreme Court held that: (1) statutory termination grounds and best interests findings were to be found under the "clear and convincing evidence" standard; (2) reasonable-doubt standard for emotional or physical harm to the child under ICWA did not preempt state-imposed burdens of proof; and (3) conflicting rule, which required application of "beyond a reasonable doubt" standard in cases involving Indian children, was invalid.

20. *Marcia v. State*, No. S-13065, 2009 WL 152476 (Alaska Jan. 21, 2009). A mother appealed the termination of parental rights to her daughter, an Indian child for purposes of the Indian Child Welfare Act (ICWA). The ICWA standard for termination is "evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." The mother argued that the trial court erred (1) in considering the expert's qualifications as sufficient to meet the requirements of ICWA; and (2) in finding that the

evidence presented at trial was sufficient to prove beyond a reasonable doubt the likelihood of serious emotional or physical damage to the child. Because the trial court's reliance on the expert witness, which was first raised on appeal, did not constitute plain error, and because the court did not err in concluding that the state met its burden of proof, the Supreme Court affirmed.

21. *Kelly v. Kelly*, No. 20080103, 759 N.W. 2d 721 (N.D. Feb. 3, 2009). Husband sought a divorce, and wife, a member of an Indian tribe, filed a separate divorce action in tribal court. The district court granted the divorce but determined that the court lacked subject matter jurisdiction over the incidents of the marriage. Husband appealed. The Supreme Court held that: (1) trial court possessed subject matter jurisdiction over the incidents of the marriage, and (2) on remand the trial court was required to consider evidence to determine whether the state, the Indian reservation, or neither was child's home state. Reversed and remanded.

22. *In re of the Welfare of MG*, No. 36975-3-II, 2009 WL 313748 (Wash. Ct. App. Feb. 10, 2009). After child born prematurely and suffering drug withdrawals was placed in state care, and mother initially agreed to a dependency order so that child could be placed with her while she underwent drug treatment, child's health prevented such placement and mother moved to revoke the dependency order. The superior court denied mother's motion. Mother appealed. The appellate court held that: (1) Indian Child Welfare Act provision pertaining to voluntary placement of child in foster care did not apply to mother's attempt to revoke dependency order agreed to; (2) absence of an individual service and safety plan (ISSP) did not prejudice mother so as to warrant revocation of the order; (3) absent prejudice, lack of court colloquy with mother as to her understanding of the order did not require revocation of the order; and (4) there was no basis by which to grant mother's motion for relief from judgment. Affirmed.

23. *D.B. v. Superior Court*, No. A123439, 171 Cal. App. 197, 89 Cal. Rptr. 3d 566 (Cal. App. Feb. 18, 2009). County department of health and human services filed dependency petition. The superior court denied reunification services to father, set case for permanency planning hearing, and determined that Indian Child Welfare Act (ICWA) did not apply. Father petitioned for writ of mandate. The appellate court held that: (1) father's resistance to drug treatment ordered as parole condition supported denial of reunification services, but (2) additional information provided by father at dispositional hearing required new ICWA notice. Petition granted in part.

24. *In re H.W.*, No. B208598, 2009 WL 386954 (Cal. App. Feb. 18, 2009). E.H., the biological father of H.W. appealed from an order denying his Welfare and Institutions Code § 388 petition to modify juvenile court orders to find him a presumed father and grant him reunification services. E.H. asserted that the juvenile court orders cannot stand because of noncompliance with the notice requirements of the Indian Child Welfare Act. The appellate court reversed and remanded solely to ensure compliance with the Indian Child Welfare Act.

25. *Jared P. v. Glade T.*, No. 1 CA-JV 08-0083, __ P.3d __, 2009 WL 448174 (Ariz. Feb. 24, 2009). Putative father, who was an Indian, appealed from decision of the superior court finding that father could not impede the adoption and that Indian Child Welfare Act (ICWA) was inapplicable. The appellate court held that: (1) putative father acknowledged paternity, and because putative father acknowledged paternity and was a member of the Cherokee Nation, child was an Indian child within meaning of ICWA; and (2) trial court order which found that putative

father had not established paternity and, as a result, lost his right to participate in the adoption was not a final order for purposes of appeal. Vacated and remanded.

26. *In re Custody of C.C.M.*, No. 61724-9, __ P.3d __, 2009 WL 580749 (Wash. App. Mar. 9, 2009). Grandparents filed petition for nonparental custody of Indian child. The superior court awarded custody of child to grandparents. Father appealed. The appellate court, 119 Wash. App. 415, 81 P.3d 154, reversed and remanded. After remand, Indian tribe in which child was enrolled petitioned to intervene. After a bench trial, the superior court awarded custody to father, and grandparents appealed. The appellate court held that: (1) petition for nonparental custody was an action for foster care placement under Indian Child Welfare Act (ICWA); (2) tribe did not receive proper notice under ICWA, and thus order granting custody to father was invalid; (3) grandfather, as child's Indian custodian, did not possess the same right to custody as father; and (4) grandparents were required to prove entitlement to custody by clear and convincing evidence. Reversed and remanded.

27. *Ben M. v. State, Dept. of Health and Social Services, Office of Children's Services*, No. S-13090, __ P.3d __, 2009 WL 879755 (Alaska Apr. 3, 2009). Father appealed from decision of the Superior Court terminating his parental rights. The Supreme Court held that: (1) there was substantial evidence to support the trial court's finding, in termination of parental rights proceeding under the Indian Child Welfare Act (ICWA), that returning child to father's custody would be likely to result in serious emotional and/or physical damage to the child; and (2) Office of Children's Services (OCS) made active and reasonable efforts to provide remedial services to father. Affirmed.

28. *In re Holly B.*, No. C058116, __ Cal. Rptr. 3d __, 2009 WL 931651 (Cal. App. Apr. 8, 2009). After termination of reunification services in a child dependency proceeding, the superior court ordered psychological evaluation of child, modified its order to delete the order for psychological evaluation, and continued the child in foster care. Father appealed. The appellate court held that: (1) father lacked standing to assert on appeal that juvenile court abused its discretion in rescinding order for psychological evaluation, and (2) Indian Child Welfare Act (ICWA) issue was not cognizable on appeal from psychological evaluation order. Dismissed.

29. *In re Jeremiah G.*, No. C058223, __ Cal. Rptr. 3d __, 2009 WL 990538 (Cal. App. Apr. 14, 2009). Joann W. (mother) appealed from the dispositional orders of the juvenile court removing her son, Jeremiah, from her custody and denying her reunification services pursuant to Welfare and Institutions Code section 361.5, subdivision (b). Mother, who has a history of drug abuse and has previously failed to reunify with her three other children, claimed the considerations underlying § 361.5(b) do not apply in this case, and the dispositional orders did not comply with the Indian Child Welfare Act (ICWA). The court found that in a juvenile dependency proceeding, a claim that a parent, and thus the child, "may" have Native American heritage is insufficient to trigger ICWA notice requirements if the claim is not accompanied by other information that would reasonably suggest the minor has Indian ancestry. Here, the assertion that there was a "possibility" the great-grandfather of the minor's father "was Indian," without more, was too vague and speculative to require ICWA notice to the Bureau of Indian Affairs. The court shall affirmed the juvenile court's orders.

30. *Yancey v. Bonner*, No. 08-6220, 2009 WL 1058142 (10th Cir. Apr. 21, 2009). Not selected for publication in the Federal Reporter. Plaintiff Yancey appealed from a district

court order applying the Younger abstention doctrine in dismissing his lawsuit against defendant Stephen Bonner, an Oklahoma state court judge who presided over the contested adoption of Yancey's biological child. Yancey, a member of the Muscogee (Creek) Indian Nation of Oklahoma, fathered a child out of wedlock with a non-Indian woman in 2002. Shortly after the child was born, the mother relinquished her parental rights and placed the child with non-Indian prospective adoptive parents. The mother requested a judicial determination that the child was eligible for adoption by a non-Indian family and without the consent of the father, Yancey. The state trial court granted her request and terminated Yancey's parental rights. Yancey appealed the ruling, and the Oklahoma Supreme Court reversed the trial court ruling that the Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963 (ICWA) and its Oklahoma counterpart applied to the adoption proceedings, and that there was insufficient evidence to support the trial court's finding that the child was eligible for adoption without Yancey's consent. On remand, after a succession of petitions to terminate Yancey's parental rights and an intervening Oklahoma Supreme Court decision awarding the prospective adoptive parents interim custody, the state trial court ruled the adoption could proceed without Yancey's consent, notwithstanding the mandates of the ICWA. Yancey appealed that decision to the Oklahoma Supreme Court and that appeal is still pending. Yancey also filed an action in federal district court claiming the defendant's rulings in the state adoption proceeding have deprived him of his Fourteenth Amendment rights, as well as the protections afforded by the ICWA. Yancey raised one issue on appeal: Whether the district court erred in applying abstention when 25 U.S.C. § 1914 of the ICWA authorizes independent federal review of state court decisions involving the ICWA. The court found that the case is governed by Younger, Middlesex and Morrow, which mandate abstention and affirmed the judgment of the district court.

31. *People In the Interest of N.D.C.*, No. 08CA2304, __ P.3d __, 2009 WL 1152176 (Colo. Ct. App. Apr. 30, 2009). (from the opinion) P.R.D. (mother) appealed from the judgment terminating her parent-child legal relationship with her daughter, N.D.C. She asserted the judgment should be reversed because: (1) the Denver Department of Human Services (the department) did not send notice to her tribe, the Oglala Sioux (the tribe), in compliance with the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901 to 1963 (2001); and (2) the juvenile court did not comply with several substantive provisions of the ICWA. The appellate court concluded (1) the department erred by not filing the notices or the return receipt cards with the court and such errors were not harmless because there was no evidence in the record that the tribe knew mother was an enrolled tribal member or had lived on the reservation; and (2) the subsequent notices sent by the department did not comply with the ICWA. The court vacated the judgment and remanded with instructions that notice be given in accordance with the provisions of the ICWA and the Children's Code.

32. *In the Interest of M.F.*, No. 100,845, __ P.3d __, 2009 WL 1160342 (Kan. Ct. App. May 1, 2009). State filed a child in need of care (CINC) petition and sought custody of child. The child, who was discovered to have Native American heritage, was adjudicated a CINC, and state filed subsequent motion to terminate mother's parental rights. Mother's motion to transfer jurisdiction to tribal court was denied. The district court entered order terminating parental rights. Mother appealed. The appellate court held that: (1) evidence was sufficient to support the District Court's finding that there was "good cause" not to transfer jurisdiction to the tribe, but (2) the District Court's failure to comply with substantive Indian Child Welfare Act requirements required reversal. Reversed and remanded with directions.

33. *N.M. v. R.M.*, No. C056832, 2009 WL 1466194 (Cal. Ct. App. May 27, 2009). R.M. (appellant), father of N.M. (minor), appealed from the orders and judgment of the juvenile court setting a permanent plan of legal guardianship and appointing Y.C., a nonrelative, as the minor's legal guardian instead of P.M., the minor's paternal grandmother. Appellant contended there was insufficient evidence of good cause to deviate from the preference of the Indian tribe, the expert on the Indian Child Welfare Act, and the Sacramento County Department of Health and Human Services (Department) to place the minor with the paternal grandmother. The appellate court disagreed and affirmed the judgment.

34. *In the Matter of the Adoption of C.D.K.*, No. 2:08-CV-490, 2009 WL 1586659 (D. Utah June 4, 2009). In its Motion for Summary Judgment, Petitioner claimed that, as a matter of law, C.D.K. is an Indian Child, as defined by the Indian Child Welfare Act (ICWA), and that the Relinquishment Hearing did not comply with the requirements of the ICWA. Respondents, the adoptive parents, argued in their Motion for Partial Summary Judgment that Petitioner has failed to establish that C.D.K. is an Indian Child. Because the Court found that Petitioner provided sufficient evidence to establish that C.D.K. is an Indian Child pursuant to the ICWA and that the Relinquishment Hearing did not comply with the procedural requirements of the ICWA, the Court grant Petitioner's Motion for Summary Judgment and denied Respondents' Motion for Partial Summary Judgment.

35. *In re Elias L.*, Nos. S-08-1182, S-08-1183, 277 Neb. 1023, 767 N.W. 2d 98 (Neb. June 26, 2009). Department of Health and Human Services filed petitions alleging that two Indian children were children in need of assistance. Indian tribe moved to intervene. The county court denied the Tribe's motion to intervene because an attorney had not signed the motion. Tribe appealed. The Supreme Court held that requirement that an Indian tribe be represented by a Nebraska licensed attorney in accord with state statute governing unauthorized practice of law is preempted in context of state court child custody proceedings under the federal and state Indian Child Welfare Act. Reversed and remanded.

36. *In re Vaughn R.*, No. 2009AP627, 2009 WL 1846510 (Wis. Ct. App. June 29, 2009). This appeal of an order terminating Luis R.'s parental rights to Vaughn R. presents three issues involving the Indian Child Welfare Act of 1978, 25 U.S.C. § 1912: (1) Does § 1912(f) of the ICWA, which requires a showing of likely serious emotional or physical damage to the child from continued custody by the parent, apply where the child is placed outside the parental home at the time the termination of parental rights (TPR) proceeding is initiated? (2) Does the record support a determination that the social worker testifying for the County is a "qualified expert witness" within the meaning of § 1912(f)? (3) Does § 1912(d), which requires efforts to provide remedial and rehabilitative services to prevent the breakup of the Indian family, impose a burden of proof beyond a reasonable doubt in a TPR proceeding? The appellate court concluded that § 1912(f) applied even though the child had been placed outside the parental home before the TPR proceeding was filed. Because § 1912(f) applies, the County was required to prove beyond a reasonable doubt, by evidence that included testimony of "qualified expert witnesses," that returning Vaughn to Luis "is likely to result in serious emotional or physical damage" to Vaughn. The court concluded the record does not provide a reasonable basis for deciding that the county social worker was a "qualified expert witness" within the meaning of § 1912(f). The appellate court reversed and remanded for a new trial.

37. *Theresa BB. v. Ryan DD.*, No. 506368, __ N.Y.S .2d __, 2009 WL 1955803 (N.Y. App. Div. July 9, 2009). Children’s maternal grandmother filed application for custody of her Native American grandchildren. The Family Court dismissed the application, and grandmother appealed. The appellate court held that grandmother had no special right to custody of her Native American grandchildren that would allow her to override the right of the natural parent to surrender the child to a public agency and to confer on it the right to consent to the adoption of the children nor was she entitled to override a decision by tribal agency to place the children for adoption with adoptive parents to be selected by the agency. Affirmed.

38. *In re A.J.*, No. F057005, 2009 WL 2047587 (Cal. Ct. App. July 15 2009). Three-year-old juvenile dependent, A.J., is an Indian child within the meaning of the Indian Child Welfare Act (ICWA). His father, J.J., appealed from a juvenile court order appointing the child’s foster parent as his legal guardian. Appellant contended the court erred in finding good cause not to follow the placement preference of the child’s Indian tribe, the Pit River Tribe (Tribe), pursuant to ICWA. The Tribe’s preference was to place A.J. with his maternal grandmother. On review, the appellate court concluded there was substantial evidence supporting the good cause finding and affirmed.

39. *In re Welfare of R.A.J.*, No. A09-0140, __ N.W. 2d __, 2009 WL 2151292 (Minn. Ct. App. July 21, 2009). Appellant Leech Lake Band of Ojibwe (Band) challenged the district court’s jurisdiction to vacate an order transferring a child-welfare proceeding from the district court to the Leech Lake Tribal Court (tribal court), after the district court determined that the transfer was procured through misrepresentations made to gain the court’s agreement to transfer the proceeding.. The Band argued that under the Indian Child Welfare Act (ICWA), principles of tribal sovereignty, and foreign case law, the district court was without jurisdiction to vacate its transfer order. Affirmed.

40. *In re B.R.*, No. A122581, __ Cal. Rptr. 3d __, 2009 WL 2462658 (Cal. Ct. App. Aug. 13, 2009). County Department of Health and Human Services filed petition alleging jurisdiction over children. Following a contested hearing, the Superior Court ordered termination of parental rights, and mother appealed. The appellate court held that: (1) mother could raise for first time on appeal issue of lack of notice to Indian tribe; (2) issue of whether children were members of Indian tribe, based on biological father’s adoptive father’s one-quarter ancestry, was for tribe to determine such that tribe was entitled to notice of the proceedings; and (3) lack of notice was not harmless error. Conditionally reversed and remanded with directions.

C. CONTRACTING

41. *Greene v. Commissioner of the Minnesota Dept. of Human Services*, No. A06-804, 2008 WL 3926791 (Minn. Aug. 28, 2008). Buddie Greene, an enrolled member of the Minnesota Chippewa Tribe living off the Reservation in Aitkin County, challenged the reduction of her benefits under the Minnesota Family Investment Program. After Greene was referred to the Minnesota Chippewa Tribe for employment services, she requested that she receive employment services through the County, and failed to participate in the tribal program. As a result, Greene’s cash benefits were reduced. Following an administrative hearing, the Commissioner of the Minnesota Department of Human Services upheld the reduction of Greene’s cash benefits. The district court affirmed the Commissioner’s decision. On appeal, Greene argued that (1) the Commissioner improperly interpreted Minn. Stat. § 256J.645 (2006)

to require her to receive employment services through the Minnesota Chippewa Tribe; and (2) § 256J.645 violates her rights to equal protection under the United States and Minnesota Constitutions. The appellate court affirmed. *Greene v. Comm’r of Minn. Dep’t of Human Servs.*, 733 N.W. 2d 490 (Minn. App. 2007). The Supreme Court granted review and affirmed.

42. *Oglala Sioux Tribe v. C & W Enterprises, Inc.* No. 07-3269, ___ F.3d ___, 2008 WL 4093007 (8th Cir. Sept. 5, 2008). C & W Enterprises, Inc., appealed from a district court order permanently enjoining the state court from confirming an arbitration award against the Oglala Sioux Tribe for lack of subject matter jurisdiction. The matter began in 2002, when C & W Enterprises, Inc. (C & W), a Native American-owned business, entered into four separate contracts with the Oglala Sioux Tribe (Tribe) to perform road construction on the Oglala Sioux Pine Ridge Indian Reservation. The first three contracts contained explicit clauses waiving the Tribe’s sovereign immunity. The fourth (Base and Blotter) contract contained different language, and a different dispute resolution regime. The appellate court found that there was no contractual waiver of the Tribe’s sovereign immunity in the Base and Blotter contract which contained the Tribe’s consent to suit in its Tribal Court, with no arbitration provision. During arbitration on the contracts, C & W’s demand included claims arising from the Base and Blotter contract. The Tribe raised no objection and responded, raising its own arbitral counterclaims under the same contract. In a legal memorandum to the arbitrator, the Tribe first noted the Base and Blotter contract’s written waiver extended only to the Oglala Sioux Tribal Court, but explicitly stated: “The Tribe has not objected to the claimant’s inclusion of the Base and Blotter claim in the Arbitration Demand, however, for the sake of expediency in resolving the dispute on its merits.” The appellate court held that where there are contractual arbitration agreements and a tribe actively participates in that arbitration, and in the course of that arbitration raises its own affirmative claims involving a clearly-related matter, the Tribe voluntarily and explicitly waived any immunity respecting that related matter. The appellate court found that the South Dakota state court had jurisdiction to confirm the arbitral award and enter judgment thereon and concluded that the lower court’s injunction and declaration of rights were premised on a manifest error of law and were an abuse of discretion. The appellate court vacated the previously issued permanent injunction, and remanded for further proceedings.

43. *Ramah Navajo School Bd., Inc. v. U.S.*, No. 08-19C, 83 Fed. Cl. 786 (Fed. Cl. Sept. 18, 2008). Contractor which operated public health programs and facilities on Indian reservation brought suit against the United States to recover certain indirect contract support costs allegedly mandated by the Indian Self-Determination and Education Assistance Act (ISDA). Defendant filed motion to dismiss. The Court of Federal Claims held that: (1) statute precluding concurrent jurisdiction was applicable to divest the court of jurisdiction over claim of contractor that the government failed to pay indirect contract support costs with respect to fiscal years 1995-2003, and (2) contractor’s appeal of decision of contracting officer denying its claims for indirect contract support costs for fiscal years 1993-1996 was barred as untimely under the Contract Disputes Act. Motion granted.

44. *Tunica- Biloxi Tribe of Louisiana v. United States*, No. 02-2413, 2008 WL 4294831 (D.D.C. Sept. 22, 2008). Indian tribe and tribal organization brought action under Contract Disputes Act challenging manner in which Secretary of Department of Health and Human Services and Secretary of Department of Interior (DOI) calculated appropriate indirect cost rate to be used in self-determination contracts with Indian Health Service (IHS) entered into pursuant to Indian Self-Determination and Education Assistance Act. Government moved to

dismiss complaint or for summary judgment, and plaintiffs moved for partial summary judgment. The district court held that: (1) plaintiffs did not have standing to challenge DOI's approval of indirect cost rates; (2) plaintiffs were not required to exhaust DOI's internal appeals process before filing action; and (3) IHS could not pay more than its pro rata share of indirect costs incurred by plaintiffs. Motions granted in part and denied in part.

45. *Gasplus, L.L.C. v. U.S. Dept. of the Interior*, No. 03-1902, ___ F. Supp. 2d ___, 2009 WL 42926 (D.D.C. Jan. 6, 2009). Gasoline distribution company sued Department of the Interior (DOI), challenging decision in which Bureau of Indian Affairs (BIA) declared that management agreement between company and Indian tribe was terminated immediately for lack of approval by Secretary of the Interior, as required by statute. The district court, 510 F. Supp. 2d 18, granted summary judgment for company. Company applied for costs and attorney fees pursuant to Equal Access to Justice Act (EAJA). The district court held that: (1) company could not recover photocopying expense as part of cost award; (2) costs incurred in serving two defendants who were sued in their individual capacities under *Bivens* were not incurred as part of action against United States, and thus could not be recovered as part of cost award; (3) government's interpretation of statute underlying contract termination was not substantially justified; (4) government's alleged bad faith was not established by clear and convincing evidence, precluding award of discretionary fees; and (5) reduction in company's attorney fee award was not warranted on grounds that company did not prevail on its due process claim and its opposition to government's motion to remand.

46. *Leonard v. Dorsey & Whitney LLP*, Nos. 07-2220, 07-2242, 07-2258, 07-2261, 07-2260, ___ F.3d ___, 2009 WL 88855 (8th Cir. Jan. 15, 2009). Trustee of Chapter 7 estate of investment banking firm that had acted as lead lender in multimillion-dollar loan participation agreement, and participant in agreement, brought adversary complaints against attorneys retained by bankrupt firm, seeking to recover on theories of breach of fiduciary duty and malpractice. The bankruptcy court, 352 B.R. 103, entered judgment for trustee, and proposed findings and conclusions in favor of participant. The district court, 364 B.R. 1, affirmed in part and reversed in part. Attorneys appealed, and participant cross-appealed. The appellate court held that: (1) Court of Appeals had jurisdiction over trustee's claim for indemnity and contribution that was part of participant's adversary complaint; (2) participant was bound by marketplace standards of vigilance and independent inspection; (3) attorneys did not owe duty to participant; and (4) attorneys did not owe fiduciary duty to lead lender to disclose possible malpractice claim. Reversed in part and dismissed in part.

47. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. Salazar*, No. 08-CV-659, 2009 WL 1110409 (W.D. Wis. Apr. 24, 2009). This is a civil action for declaratory and injunctive relief brought under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450j-1(f), in which plaintiff Lac Courte Oreilles asked the court to bar defendants Ken Salazar, George Skibine, Kevin Skenandore and Lynn Lafferty from enforcing a bill for collection issued by the Bureau of Indian Affairs or pursuing any future right or remedy related to any disallowance of costs associated with the Single Agency audit for the fiscal year ending June 30, 2005. Before the court was defendants' motion to dismiss plaintiff's complaint under Fed.R.Civ.P. 12(b)(1) for lack of subject matter jurisdiction. Defendants asserted that because the Bureau of Indian Affairs had cancelled the bill for collection that is the subject of the lawsuit, there is no longer a case or controversy and the complaint must be dismissed. In the alternative, defendants argued that to the extent that

plaintiff is concerned about any future dispute regarding the disallowed costs for which defendants issued their bill for collection, such a dispute is not ripe. Plaintiff contended that a case and controversy exists because it has requested that defendants be prevented from pursuing any right of action or remedy related to the disallowance of costs that gave rise to the bill for collection. The court concluded that defendants' cancellation of the bill for collection did not satisfy plaintiff's entire demand for relief and that it is not clear that defendants will not engage in the activity at issue in the future, this case is not moot and that because plaintiff's requests presented a question of law and plaintiff may suffer hardship if a determination is not made, the court found that the matter was ripe and denied defendants' motion to dismiss.

48. *United Keetoowah Band of Cherokee Indians of Oklahoma v. U.S. Dept. of Housing and Urban Development*, No. 08-7025, ___ F.3d ___, 2009 WL 1575196 (10th Cir. June 5, 2009). Plaintiff-Appellant, the United Keetoowah Band of Cherokee Indians of Oklahoma (UKB), challenged a final agency action by the United States Department of Housing and Urban Development (HUD) which drastically reduced the federal funding that the UKB received for housing under the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA), 25 U.S.C. §§ 4101-4243. The basis of the UKB's claim was that HUD's decision was arbitrary and capricious (1) as a substantive matter because HUD's regulations implementing NAHASDA were contrary to the clear language of that statute, and (2) as a procedural matter because of various alleged defects in the process leading up to HUD's final agency action. The district court rejected the UKB's challenge, finding that HUD's regulations survived scrutiny under Chevron deference and concluded that the procedure employed by HUD was not arbitrary or capricious. *United Keetoowah Band of Cherokee Indians of Okla. v. U.S. Dep't of Hous. and Urban Dev.*, No. CIV-06-533-RAW, slip. op. at 5-10 (E.D. Okla. Jan 9, 2008). The UKB appealed the district court's order. The appellate court reversed.

49. *Salt River Sand and Rock Co. v. Dunevant*, No. 1 CA-SA 09-0083, ___ P.3d ___, 2009 WL 1872143 (Ariz. Ct. App. June 30, 2009). Mining company, as judgment debtor against whom \$18.4 million judgment was entered in underlying civil action, petitioned for special action seeking reversal of order of the superior court, Nos. CV 2004-004737 and CV 2005-018617, denying its motion to reduce amount of bond required for stay pending appeal of judgment. The appellate court held that: (1) Court of Appeals would accept special action jurisdiction as means of reviewing mining company's challenge against trial court's order denying its motion to reduce amount of supersedeas bond, and (2) company was entitled to stay based on alternate security upon showing of undue financial burden. Special action jurisdiction accepted; relief granted; remanded for further proceedings.

50. *Viejas Band of Kumeyaay Indians v. Lorinsky*, No. 29512, 116 Conn. App. 144, ___ A.2d ___, 2009 WL 2259977 (Conn. App. Ct. Aug. 4, 2009). Indian tribe brought action against life and health insurance broker, and broker's employer for breach of contract, breach of fiduciary duty, negligence, misrepresentation, fraud and violation of the Connecticut Unfair Trade Practices Act (CUPTA). Following a jury trial, the superior court entered judgment for tribe in the amount of \$916,933.98. Broker appealed. The appellate court held that: (1) accidental failure of suit statute permitted tribe to bring new action in state court after voluntary withdrawal from federal court; (2) evidence was sufficient to support jury award of \$678,239.40; (3) jury verdict was not inconsistent, or manifestly unjust; and (4) trial court did not abuse its discretion when it refused to set aside verdict. Affirmed.

D. EMPLOYMENT

51. *Louis v. Stockbridge-Munsee Cmty.*, No. 08-C-558, 2008 WL 4282589 (E.D. Wis. Sept. 16, 2008). Plaintiff Elton Louis filed an action pursuant to 42 U.S.C. § 1983 and the Wisconsin Fair Employment Act (WFEA), Wis. Stats. § 111.01 *et seq.*, claiming that Defendant Stockbridge-Munsee Mohican Community (Tribe) deprived him of property without due process of law and his right to employment in violation of the United States and Wisconsin Constitutions, and the WFEA. The Tribe filed a motion to dismiss on the ground that its tribal sovereign immunity prevented Louis from maintaining such a lawsuit; that the court lacked subject matter jurisdiction over the dispute; and that Louis failed to state a cognizable claim under either 42 U.S.C. § 1983 or the WFEA. The court concluded that it lacked jurisdiction over the matter because the Tribe had not waived its sovereign immunity, and in addition, Louis failed to state a claim under either § 1983 or the WFEA. The court granted the Tribe's motion and dismissed the case.

52. *Boye v. United States*, No. 07-195, 2008 WL 4416733 (Fed. Cl. Sept. 24, 2008). Current and former employees of the Navajo Nation Division of Public Safety (DPS) brought suit against the United States for breach of contract based on their purported status as third-party beneficiaries of various contracts between the Navajo DPS and the Bureau of Indian Affairs. Plaintiffs alleged that they did not receive wages and benefits equal to the wages and benefits paid to their BIA counterparts, as required by the relevant contract. Plaintiffs filed motion to supplement response to motion to dismiss, motion to expand scope of discovery, and motion to compel discovery. The Court of Federal Claims held that: (1) plaintiffs were not entitled to expand scope of discovery to include documents pertaining to memorandum of understanding between federal agencies regarding compensation for BIA criminal investigators; (2) plaintiffs were not entitled to compel further response to interrogatories propounded to awarding officials seeking evidence of intent to confer third-party beneficiary status on plaintiffs; and (3) plaintiffs were not entitled to compel production of documents and correspondence related to contracting parties' compliance with and enforcement of pay provisions of contracts. Motion to supplement granted; motions to expand and compel discovery denied.

53. *Indian Educators Fed'n Local 4524 of American Fed'n of Teachers, AFL-CIO v. Kempthorne*, No. 04-01215, ___ F. Supp. 2d ___, 2008 WL 5086985 (D.D.C. Dec. 3, 2008). Before the court were plaintiff's Motion for Summary Judgment and Defendant's Motion to Dismiss Or, in the Alternative for Summary Judgment. The Indian Educators Federation (IEF) filed a complaint that challenged the Secretary of the Interior's interpretation of Section 12 of the Indian Reorganization Act of 1934. IEF claimed that the Secretary was unlawfully failing to apply Section 12 – which mandates employment preferences for American Indians (commonly referred to as the “Indian preference”) – to positions outside the Bureau of Indian Affairs, particularly positions in the Office of Special Trustee for American Indians (OST) and the Office of the Assistant Secretary–Indian Affairs (AS-IA). More specifically, the parties disputed whether the term “Indian Office” in Section 12 should be interpreted to refer exclusively to the Bureau of Indian Affairs or whether it should be interpreted, in the context of Section 12 and prior agency interpretation, to mean all positions in the Interior Department that directly and primarily relate to the provision of services to American Indians. The court granted the Secretary's motion and denied IEF's motion.

54. *Graham v. Applied Geo Technologies, Inc.*, No. 4:08CV26, 2008 WL 5381940 (S.D. Miss. Dec. 19, 2008). This case was before the court on the motion of defendants Applied Geo Technologies, Inc. (AGT) and four of its managers to dismiss plaintiff's complaint for failure to exhaust tribal remedies in the courts of the Mississippi Band of Choctaw Indians. Defendant AGT was established by the Mississippi Band of Choctaw Indians as a for-profit "tribal entity" for the purpose of competing for federal contracts as a prime contractor. Plaintiff Johnny Graham, an African-American employee of AGT, filed the lawsuit in district court against AGT and four of its managers for alleged race discrimination and retaliation in violation of Title VII, 42 U.S.C. § 2000e et seq. , and 42 U.S.C. § 1981. Defendants moved to dismiss or stay plaintiff's suit based on the tribal exhaustion doctrine. The court granted defendants' motion to dismiss.

55. *Solis v. Matheson*, No. 07-35633, 2009 WL 1036083 (9th Cir. Apr. 20, 2009). Secretary of labor brought action against owners of retail store located on trust land within Indian Reservation alleging failure to pay overtime wages to its employees as required by Fair Labor Standards Act (FLSA). The district court, 2007 WL 1830738, entered judgment in favor of Secretary. Owners appealed. The appellate court held that: (1) intramural exception to federal regulation did not apply to exempt retail store from FLSA; (2) Treaty Rights Exception to federal regulation did not apply to exempt retail store from FLSA; (3) Secretary of Labor had authority to enter reservation in order to locate records and investigate FLSA violations; and (4) appointment of receiver was premature. Affirmed in part and vacated in part.

56. *Bolssen v. Unum Life Ins. Co. of America*, No. 09-C-202, 2009 WL 1307781 (E.D. Wis. May 7, 2009). Dennis A. Bolssen, who worked for the Oneida Tribe of Indians of Wisconsin, sued Unum Life Insurance Company of America (Unum) in Brown County Circuit Court, alleging Unum breached a contract to provide disability insurance benefits and also asserted claims for breach of fiduciary duty, fraud, conversion, and violation of Wis. Stat. § 628.46. Bolssen was receiving payments under the Tribe's disability insurance policy after he was injured in a fall. Unum requested that Bolssen attend an "independent medical examination" to perform an Activities Daily Living Assessment (ADLS). Based upon the results of the ADLS, Unum notified Bolssen that it would no longer continue to pay disability benefits under the long term disability claim and Bolssen sued. Unum removed the case to federal court asserting federal jurisdiction under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq. (ERISA). The matter was before the court on Bolssen's motion to remand the case back to state court for lack of federal jurisdiction. Bolssen, who worked for the Oneida Casino, contended that the contract under which he made his claim is not covered by ERISA because the "governmental plan" exception to ERISA applied. Unum asserted that the fact Bolssen was employed by the tribe is not dispositive of whether the plan is a governmental plan which would take it outside of ERISA and noted that Bolssen was employed by the Oneida Tribe's casino and his janitorial duties at the casino were commercial activities and not essential governmental functions. Unum also contended that ERISA governs as the plan itself provides that it was governed by ERISA, and because Unum administered Bolssen's claim in accordance with ERISA. The Court concluded that the plan under which Bolssen sought disability benefits is not a governmental plan exempt from ERISA, meaning that ERISA applies. The motion to remand was denied without prejudice.

E. ENVIRONMENTAL REGULATIONS

57. *Pit River Tribe v. Bureau of Land Mgmt.*, No. 2:02-CV-1314, 2008 WL 5381779 (E.D. Cal. Dec. 23, 2008). This matter was before the Court on remand from the Ninth Circuit in *Pit River Tribe v. U.S. Forest Service*, 469 F.3d 768 (9th Cir. 2006). The Court entered summary judgment for plaintiffs on the Fourth, Fifth and Ninth causes of action and ordered among other things that Defendant Calpine Corporation is enjoined from conducting any surface-disturbing activities on Leases CA 21924 and 21926 pending the following actions by defendants Bureau of Land Management and U.S. Department of Agriculture, Forest Service: (a) further environmental analysis and documentation pursuant to the National Environmental Policy Act, and (b) further analysis and documentation concerning the impacts to cultural resources and historic properties pursuant to the National Historic Preservation Act.

58. *Hydro Resources, Inc. v. United States Environmental Protection Agency*, No. 07-9506, 2009 WL 1027184 (10th Cir. Apr. 17, 2009). Mining company and New Mexico Environmental Department (NMED) petitioned for judicial review of Environmental Protection Agency's (EPA) decision to implement, pursuant to Safe Drinking Water Act (SDWA), federal underground injection control (UIC) program on certain New Mexico lands. The appellate court, 198 F.3d 1224, dismissed the petitions for review and remanded. On remand, the EPA determined that land on which company intended to operate uranium mine fell within a dependent Indian community. Company petitioned for review. The appellate court held that: (1) company had standing; (2) appropriate community of reference for assessing whether the land was within a dependent Indian community was local government organization of the Navajo Nation; (3) land within geographic boundaries of organization was set aside by federal government for use of Indians as Indian land; and (4) organization was under the superintendence of the federal government. Petition denied.

59. *Pakootas v. Teck Cominco Metals, Ltd.*, No. CV-04-256, 2009 WL 1796808 (E.D. Wash. June 19, 2009). Before the court were the Plaintiff Colville Confederated Tribes' Fed.R.Civ.P. 12(b)(6) Motion To Dismiss Defendant's Counterclaims. In its Answer to the Second Amended Complaint of the Tribes, Defendant Teck asserted two CERCLA counterclaims against the Tribes, contending the Tribes caused and contributed to the hazardous substances contamination of Lake Roosevelt. As part of its counterclaims against the Tribes for cost recovery, contribution, and declaratory relief, Teck alleged the Tribes "are covered 'persons' within the meaning of the term as it is used in CERCLA, 42 U.S.C. Section 9601(21)." The Tribes move to dismiss the counterclaims, asserting they are not "person[s]" subject to liability under CERCLA, 42 U.S.C. Section 9607(a), and that Teck's counterclaims are not based on "a cognizable legal theory." The court granted the Tribes' Motion To Dismiss and dismissed with prejudice Defendant's CERCLA counterclaims against the Tribes as they are not premised on a cognizable legal theory.

F. FISHERIES, WATER, FERC, BOR

60. *State v. Cayenne*, No. 80499-I, 2008 WL 4879790 (Wash. Nov. 13, 2008). Following jury trial, defendant, a member of Indian tribe, was convicted in the superior court of unlawful use of nets to take fish and, as part of sentence, was prohibited from owning gillnets during term of sentence, on and off-reservation. Defendant appealed. The appellate court, 158 P.3d 623, affirmed in part and vacated in part. State filed petition for review, which was

granted. The Supreme Court held that court could extend crime-related prohibition on owning gillnets during term of sentence to within boundaries of reservation. Decision of Court of Appeals reversed.

61. *Oswalt v. U.S.*, No. 97-733, ___ Fed. Cl. ___, 2008 WL 5337452 (Fed. Cl. Dec. 17, 2008). Lessees sued United States for, *inter alia*, alleged breach of lease agreements requiring government to provide irrigation water to seven allotments of leased land located in Indian reservation. Parties cross-moved for summary judgment. The Court of Federal Claims held that: (1) government had obligation to deliver equitable amount of irrigation water to allotments for which lessees made timely payments of operation and maintenance assessments; (2) lessees' alleged execution of promissory note to pay assessments did not satisfy their obligation to pay, and relieved government of its obligation to deliver water to affected allotments of land; (3) government breached lease agreements when it did not provide lessees with their proportionate share of irrigation water; and (4) factual issues precluded summary judgment on issue of damages.

62. *Miccosukee Tribe of Indians of Fla. v. U.S.*, No. 08-10799, ___ F.3d ___, 2009 WL 1199871 (11th Cir. May 5, 2009). Indian tribe brought action under the Endangered Species Act (ESA), alleging that biological opinion issued by the United States Fish & Wildlife Service (FWS), which found that Army Corps of Engineers' plan to restrict the flow of water in a marsh in the Everglades benefited the Cape Sable Seaside Sparrow, an endangered species, was faulty in failing to adequately consider the effect of the plan on another endangered species, the Everglades Snail Kite. Parties cross-moved for summary judgment. The district court, 528 F. Supp. 2d 1317, entered summary judgment in favor of government, and Indian tribe appealed. The appellate court of Appeals held that: (1) FWS, in preparing biological opinion, fulfilled its obligation to consult "best available scientific and commercial data"; (2) even assuming that the FWS, in preparing biological opinion, was obligated to give endangered species the benefit of doubt, that obligation could not stand alone as basis for challenging biological opinion in case in which the FWS fulfilled its statutory obligation to consider the "best available scientific and commercial data," and in which evidence was not evenly balanced; (3) negative impacts on endangered species' critical habitat need not be permanent in order to amount to "adverse modification" under the Endangered Species Act; (4) determination that the temporary flooding of 20% of kites' critical habitat to depth that killed woody vegetation on which it liked to perch, that drove off apple snails that it liked to eat, and that reduced its nesting success was not "adverse modification" of kites' critical habitat, within the meaning of the Endangered Species Act, was not arbitrary nor capricious; but (5) incidental take statement prepared by the FWS, to indicate how much "take" of the Everglades Snail Kite would be permissible before the FWS's obligation to engage in further consultation was triggered, was defective. Affirmed in part, reversed in part and remanded.

63. *U.S. ex rel. Lummi Nation v. Dawson*, No. 07-36057, 2009 WL 2014086 (9th Cir. July 2, 2009). This appeal was filed pro se by individuals who objected to the district court's approval of a settlement agreement regarding rights in the groundwater located on the aquifer underlying the Lummi Reservation on the Lummi Peninsula. The appellate court found that (1) the district court found the settlement agreement to be fundamentally fair, adequate, and reasonable, and its decision to approve the agreement was not based on an error of law or clearly erroneous findings of fact; (2) the district court gave the individuals who objected to the settlement agreement an opportunity to air their objections, and considered those objections

before approving the agreement; and (3) the settlement agreement does not violate the Appellants' equal protection rights because any preference given to the Indians is "political rather than racial in nature," and "can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." The appellate court affirmed.

64. *U.S. v. Washington*, Nos. 07-35062, 07-35124, 07-35219, ___ F.3d ___, 2009 WL 2004451 (9th Cir. July 13, 2009). United States instituted action against state to enforce Indian fishing rights under treaties with Indian tribes of Pacific Northwest. One tribe commenced subproceeding against other tribes for equitable apportionment of shared fishery. The district court, 2006 WL 3386868, dismissed subproceeding, and tribe appealed. The appellate court held that tribe was not entitled to equitable apportionment of fishery. Affirmed.

65. *New York v. Smith*, No. 08-CV-4422, 2009 WL 2390809 (E.D. N.Y. July 31, 2009). The State of New York (Plaintiff) commenced this criminal action against Defendant Smith in the Town Court of Southampton with the issuance of citations that were returnable in the Town Court. Defendant timely removed the case to federal court pursuant to 28 U.S.C. § 1443(1). Pending before the court was Plaintiff's motion to remand the action to the Town Court of Southampton, County of Suffolk. Defendant is a member of the Shinnecock Indian Nation (Shinnecock) and resides on the Shinnecock Indian Nation Reservation. Police Officer Brian Farrish ("Farrish") of the New York State Department of Environmental Quality boarded Defendant's vessel, searched the vessel, and seized out-of-season and undersized fish that were in violation of New York state fishing regulations. Farrish issued Defendant three citations for illegal possession of eighteen out-of-season summer flounder, sixteen out-of-season porgy, and two undersized blackfish. Defendant alleged that New York State illegally regulates the Shinnecock and therefore Defendant cannot litigate his civil rights in state court. Defendant also claimed that Farrish, by force or threat of force, interfered with Defendant in violation of 18 U.S.C. § 245(b)(1)(B). Within this section, Defendant claimed that his protected rights were violated because of (1) Sovereign Immunity; (2) The Fort Albany Treaty of 1664; (3) Wyandanch's Deed; (4) the Contract Clause; (5) the Indian Commerce Clause; (6) Congressional Indian Policy; (7) Federal Trust and; (8) United Nations' International Convention on the Elimination of All Forms of Racial Discrimination. Plaintiff argued that the case should be remanded to state court because Defendant had not shown that his criminal action is removable under 28 U.S.C. § 1443(1). The court granted Plaintiffs' motion to remand.

66. *Upper Skagit Tribe v. Washington*, No. 07-35061, ___ F.3d ___, 2009 WL 2393488 (9th Cir. Aug. 6, 2006). Upper Skagit Tribe filed request for determination that members of Suquamish Indian Tribe, upon changing fishing patterns to include Saratoga Passage and Skagit Bay, were fishing outside of their usual and accustomed fishing grounds and stations in Puget Sound, as established by federal government's treaties with tribes of Pacific Northwest and as adjudicated over three decades ago in government's underlying suit against State of Washington. The district court, 2007 WL 30869, granted Upper Skagit summary judgment. Suquamish appealed. The appellate court held that geographical scope of Suquamish's fishing grounds included waters at center of Puget Sound. Reversed and remanded.

67. *Ottawa Tribe of Oklahoma v. Logan*, No. 08-3621, ___ F.3d ___, 2009 WL 2497936 (6th Cir. Aug. 18, 2009). Ottawa Tribe of Oklahoma sought declaratory judgment that it had right to fish in Lake Erie without restrictions from Ohio Department of Natural Resources (DNR). The district court, 541 F. Supp. 2d 971, granted DNR summary judgment. Tribe

appealed. The appellate court held that whatever fishing rights Tribe had were extinguished when Tribe abandoned the land. Affirmed.

G. GAMING

68. *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

69. *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 governor had the authority to agree to a term in perpetuity and a waiver of the state's immunity from suit. The court concluded that claims 3, 4, 5 and 6 of the amended complaint are subject to arbitration under the terms of the parties' agreement. The Nation's motion for summary judgment was denied. The parties were ordered to resume arbitration and further proceedings were stayed pending arbitration.

70. *Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*, No. 06 55259, 2008 WL 3822538 (9th Cir. Aug. 8, 2008). Not selected for publication in the Federal Reporter. The Rincon Band of Luiseno Mission Indians (Rincon) brought an action against the governor of California (State) seeking, *inter alia*, reliance damages and a declaratory judgment regarding the aggregate maximum number of slot machine licenses available to Indian tribes in California who were parties to approximately 60 essentially identical Indian Gaming Compacts between those tribes and the State. The district court dismissed several of Rincon's claims. It dismissed the declaratory judgment action for failure to join all other tribes with similar compacts, who were subject to the same licensing pool, as required parties under Federal Rule of Civil Procedure 19. It dismissed the claim for damages as barred by the Eleventh Amendment of the U.S. Constitution. A partial final judgment was entered on the dismissed claims pursuant to Federal Rule of Civil Procedure 54(b). Rincon brought an appeal to challenge the dismissal of the declaratory judgment and reliance damage claims. The appellate court affirmed in part and reversed in part.

71. *City of Vancouver v. Hogen*, No. C08-5192BHS, 2008 WL 4443806 (W.D. Wash. Sept. 24, 2008). This dispute arose out of the Cowlitz Indian Tribe's attempt to construct and operate a gaming facility. The matter was before the court on Defendants' Motion to Dismiss. Plaintiff City of Vancouver filed a complaint against Defendants Philip N. Hogen, in his official capacity as Chairman of the National Indian Gaming Commission, and the National Indian Gaming Commission. Plaintiff sought declaratory and injunctive relief for alleged violations of the Administrative Procedure Act and the Indian Gaming Regulatory Act. Defendants filed a Motion to Dismiss arguing that Plaintiff not only lacked standing to bring the action but also failed to state a claim upon which relief could be granted. The court found that Plaintiff's alleged injury is hypothetical and could not be redressed by a favorable decision in the lawsuit and therefore, the Court was without jurisdiction to hear Plaintiff's claims because Plaintiff has failed to show that it has standing to bring this action. The court granted Defendant's Motion to Dismiss and dismissed the case.

72. *Luna Gaming-San Diego LLC v. Dorsey & Whitney, LLP*, No. 06CV2804, 2008 WL 4492617 (S.D. Cal. Sept. 30, 2008). Plaintiff Luna Gaming filed suit against various law firms and attorneys including Dorsey & Whitney (Dorsey), Holland & Knight (Holland), and Philip Baker-Shenk (Baker-Shenk) alleging causes of action for professional negligence, negligent misrepresentation and breach of fiduciary duty. Defendants Dorsey and Holland moved for summary judgment on the claims arguing, *inter alia*, that it did not in fact represent Plaintiff and did not have an attorney-client relationship with Plaintiff. Thomas Celani formed Luna Gaming for the purpose of entering into a gaming venture with the Ewiiapaayp Tribe (the Tribe). Plaintiff and the Tribe entered into an agreement to cooperatively build a casino on Tribe owned land (Project). The Tribe was represented by Defendant Dorsey & Whitney (Dorsey) prior to and throughout the course of the Project. After Plaintiff and the Tribe failed to build the

casino according to the Project plans, Plaintiff brought suit against Dorsey as well as other law firms and attorneys complaining of professional inadequacies and misrepresentations made in the course of the attorneys' representation. Plaintiff alleged that Dorsey had a joint representation relationship with both Luna Gaming and the Tribe while Dorsey denied that any such attorney-client relationship existed and contended that Dorsey only represented the Tribe with respect to the Project. The court granted in part and denied in part Defendant Dorsey's Motion for Summary Judgment and granted in part and denied in part Defendant Holland's and Baker-Shenk's Motion for Summary Judgment. Defendants' motions for summary judgment as to the second cause of action and in all other respects except as specified above were DENIED without prejudice.

73. *San Pasqual Band of Mission Indians v. California*, No. 07-55536, 2008 WL 4472608 (9th Cir. Oct. 6, 2008). Not selected for publication in the Federal Reporter. The San Pasqual Band of Mission Indians (San Pasqual) brought an action against the state of California, the California Gambling Control Commission, and the Governor of California (collectively, the State). The complaint sought a declaratory judgment regarding the aggregate maximum number of slot machine licenses available to Indian tribes in California who were parties to approximately sixty essentially identical Indian Gaming Compacts between those tribes and the state. The district court dismissed San Pasqual's action for failure to join all other tribes with similar compacts, who were subject to the same licensing pool, as required parties under Federal Rule of Civil Procedure 19. San Pasqual brought an appeal to challenge that dismissal. San Pasqual's declaratory judgment claim challenging the state's calculation of the maximum number of licenses in the 1999 Compact pool presents an issue identical to one addressed in *Cachil Dehe Band of Wintun Indians v. California*, 536 F.3d 1034 (9th Cir. 2008). In *Cachil Dehe Band*, the court held that an Indian tribe that is party to a 1999 Compact with California may proceed to litigate the size of the total license pool without joining other compacting tribes, because those tribes have no protectable interest in the size of the license pool that qualifies them as required parties within the meaning of Rule 19(a). That ruling controls the appeal of San Pasqual's declaratory judgment claim. Accordingly, the appellate court reversed the decision of the district court and remanded this claim for further appropriate proceedings.

74. *Catskill Dev. v. Park Place Entm't Corp.*, No. 06-5860, 2008 WL 4630309 (2d Cir. Oct. 21, 2008). Casino development group and land developer brought action against competitor alleging tortious interference with contractual relations and tortious interference with prospective business relationships in connection with development and management of Native American casino. Following grant of summary judgment for competitor, 217 F. Supp. 2d 423, the district court, 286 F. Supp. 2d 309, vacated its decision for purpose of allowing limited discovery into issue of whether competitor engaged in wrongful means to induce tribe to enter into a casino development agreement, and entered summary judgment in favor of competitor on claims for tortious interference with prospective business relations, 345 F. Supp. 2d 360. On appeal, the appellate court, 169 Fed. Appx. 658, vacated and remanded. On remand, the district court, 465 F. Supp. 2d 250, granted summary judgment for defendants. Plaintiffs appealed. The appellate court held that: (1) the appellate court was obliged to ascertain its jurisdiction independently; (2) litigation trust, created as condition to closing consolidation deal, was not created for improper purpose of manufacturing federal diversity jurisdiction; (3) National Indian Gaming Commission (NIGC) had authority to review contract to build and operate Native American casino although land upon which casino was to be built was not yet Indian land; (4) court owed only limited deference to position set forth in agency opinion letter in unrelated

case that had not been promulgated by agency regulation; (5) opinion letter that was entitled to Skidmore deference did not have any persuasive power; (6) federal voiding provisions applied to precursory obligation of Indian tribe to use reasonable best efforts in obtaining requisite government approvals; (7) land purchase agreement and development and construction agreement had to be considered to be subject to federal voiding provision; and (8) fraudulent acts and misrepresentations did not constitute wrongful conduct. Affirmed.

75. *Mudarri v. State*, No. 36130-2-II, 2008 WL 4916562 (Wash. Ct. App. Nov. 18, 2008). Private casino owner filed declaratory judgment action against state, seeking authorization to operate electronic scratch ticket lottery games at his private casino, or, alternatively, invalidation of compact between state and tribe, under which tribe had exclusive right to operate electronic scratch ticket games at its nearby casino. Parties filed cross-motions for summary judgment, and state filed motion to dismiss for failure to join tribe as an indispensable party. The superior court granted motion to dismiss in part, and granted state's motion for summary judgment in part. Owner appealed. The appellate court held that: (1) tribe was indispensable party to claims directly challenging validity of compact; (2) tribe was indispensable party to claims indirectly challenging validity of compact; (3) Gambling and Lottery Commission lacked authority to authorize private casino owner's proposed electronic scratch ticket lottery game; (4) statutes prohibiting non-Native American tribe electronic scratch ticket games and the Gambling and Lottery Commission's enforcement of this legislative prohibition did not violate owner's equal protection rights; and (5) owner's rights under Privileges and Immunities Clause of State Constitution were not violated. Affirmed.

76. *Alabama v. U.S.*, No. 08-0182, 2008 WL 5071904 (S.D. Ala. Nov. 24, 2008). This action involved a challenge by the plaintiff state of Alabama (State) to certain regulations promulgated by the defendant Secretary of the Department of the Interior addressing Indian gaming under the Indian Gaming Regulatory Act. The other defendants included the United States and the Department of the Interior, as well as intervenor-defendant Poarch Band of Creek Indians. The matter was before the court on the motions to dismiss filed by the federal defendants and the Poarch Band. The court granted the motions to dismiss and the action was dismissed without prejudice.

77. *Amador County, Cal. v. Kempthorne*, No. 05-658, ___ F. Supp. 2d ___, 2009 WL 37517 (D.D.C. Jan. 8, 2009). County brought action against the Department of the Interior (DOI), the Secretary of the DOI, and the Assistant Secretary for Indian Affairs, alleging that the approval of an amendment to the gaming compact between an Indian tribe and the state of California was an arbitrary and capricious decision in violation of the Administrative Procedure Act (APA) because the amendment authorized gaming in violation of the Indian Gaming Regulatory Act (IGRA). Defendants moved to dismiss. The district court held that: (1) county alleged an injury-in-fact as required to satisfy constitutional standing; (2) county alleged an injury fairly traceable to defendants' action that could be redressable through judicial means, as required for constitutional standing; (3) decision of Secretary to approve, disapprove, or take no action on compact was committed to agency discretion and was thus unreviewable under the APA; and (4) approval of compact could not violate the IGRA. Motion granted.

78. *Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. California*, No. 04-2265, 2009 WL 161081 (E.D. Cal. Jan. 22, 2009). This matter was before the court on proposed plaintiff-intervenor Picayune Rancheria of the Chukchansi Indians' (Picayune

79. *Quantum Entm't, Ltd. v. U.S. Dept. of Interior, Bureau of Indian Affairs*, No. 07-1295, __ F. Supp. 2d __, 2009 WL 401871 (D.D.C. Feb. 19, 2009). Company that provided consulting and management services to gas distribution businesses brought action against Bureau of Indian Affairs (BIA), asserting that BIA violated Administrative Procedure Act (APA) by promulgating a decision adverse to company. Parties filed cross-motions for summary judgment. The district court held that: (1) failure of Board of Indian Appeals to determine effects of retroactive application was arbitrary and capricious, and (2) failure to determine whether company's agreement was "relative to" Indian lands was arbitrary and capricious. Company's motion granted in part and denied in part; defendant's motion denied.

80. *Butte County, Cal. v. Hogen*, No. 08-00519, __ F. Supp. 2d __, 2009 WL 976642 (D.D.C. Apr. 13, 2009). Plaintiff Butte County, California (County) brought an action pursuant to the Administrative Procedures Act, 5 U.S.C. § 701 *et seq.* (APA), against the multiple defendants in their capacities as officials of the National Indian Gaming Commission (NIGC) or of the Department of the Interior (Department). The action challenged two decisions – one of the NIGC and another of the Department; both concerned defendant-intervenor Mechoopda Indian Tribe of Chico Rancheria (Tribe). First, the County challenged a 2007 NIGC decision, which, pursuant to the Indian Gaming Restoration Act, 25 U.S.C. §§ 2701 *et seq.* (IGRA), approved a gaming ordinance the Tribe had enacted. Second, the County challenged a 2008 Department decision to take a parcel of land in the County into trust on behalf of the Tribe (Chico Parcel) pursuant to the Indian Reorganization Act, 25 U.S.C. §§ 465 *et seq.* (IRA). These challenges raised the same question of law: whether the Chico Parcel qualifies as a "restoration of lands" under the IGRA thereby making it eligible for gaming under an IGRA exception to its general prohibition against gaming on Indian lands taken into trust after October 17, 1988. Before the court were Defendants' motion to dismiss, or, in the alternative for summary judgment, the Tribe's motion to dismiss, or, in the alternative for summary judgment, and the County's cross-motion for summary judgment. The court granted Defendants' motion to dismiss, or, in the alternative for summary judgment, granted the Tribe's motion to dismiss, or, in the alternative for summary judgment, and denied the County's cross-motion for summary judgment.

81. *Stop the Casino 101 Coalition v. Salazar*, No. C 08-02846, 2009 WL 1066299 (N.D. Cal. Apr. 21, 2009). This case concerned an action taken by officials of the United States Department of the Interior (Secretary), who approved an application by the Federated Indians of the Graton Rancheria (Tribe) to accept a 254-acre parcel of land (parcel”) near the City of Rohnert Park, California into trust. Plaintiffs are Stop the Casino 101 Coalition, an unincorporated association of citizens who live or own land or businesses close to the parcel, and individual members of the association. Plaintiffs alleged that the Secretary’s approval provided that the parcel shall be taken into trust for the purpose of a gambling casino and that the Tribe’s proposed hotel and casino complex cause harm to plaintiffs’ property by, *inter alia*, increasing traffic congestion, crime and pollution. Defendants and intervenors filed motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(1). The court found that plaintiffs did not alleged facts showing they suffered an injury in fact and did not have constitutional standing to bring the claims alleged in their complaint. The court granted the motions to dismiss.

82. *U.S. v. Moore*, Nos. 08-1177, 08-1615, ___ F. 3d ___, 2009 WL 1053073 (7th Cir. Apr. 21, 2009). Following denial of motion to dismiss indictment, 2000 WL 35729665, defendants were convicted following bench trial in the district court, 505 F. Supp. 2d 567, of conspiring to abstract, purloin and take, and carry away with intent to steal money belonging to gaming establishment run by Indian tribe. Defendants appealed. The appellate court held that: (1) allegations in indictment were sufficient to charge offense, and (2) sufficient evidence supported conviction. Affirmed

83. *Warren v. U.S.*, No. 06-CV-0226S, 2009 WL 1663991 (W.D.N.Y. June 15, 2009). Plaintiff commenced an action for declaratory and injunctive relief and filed a motion seeking to add three defendants: (1) Barry E. Snyder, Sr., President of the Seneca Nation of Indians (SNI); (2) E. Brian Hansberry, President and Chief Executive Officer of the Seneca Gaming Corporation; and (3) the Seneca Gaming Corporation. In addition, Plaintiff sought to add a fourth cause of action alleging that the National Indian Gaming Commission improperly approved the Seneca Nation of Indians’ gaming ordinance and its subsequent amendments thereto. SNI filed a Motion to file an amicus brief on the issue of whether the addition of claims against Snyder, Hansberry, and the Seneca Gaming Corporation was futile because the proposed defendants enjoy sovereign immunity from suit. Plaintiff opposed the granting of amicus curiae on three grounds: (1) the SNI is not an impartial entity; (2) it is the federal government that should make sovereign immunity arguments on behalf of the proposed defendants; and (3) the SNI can and should move to intervene in this action, rather than seek amicus curiae status. The court found that the SNI has an interest in the scope of its sovereign immunity that may be affected by a decision on Plaintiff’s motion and granted the request to file an amicus brief.

84. *State ex rel. Dewberry v. Kulongoski*, CC 16-03-23044; CA A124001; SC S056410, ___ P.3d ___, 2009 WL 1692734 (Or. June 18, 2009). Residents near site of proposed casino brought action as relators for a writ of mandamus, challenging the Governor’s authority to enter into a gaming compact with tribes, under which they would be permitted to open a casino. The Circuit Court dismissed the petition, and residents appealed. The appellate court, 187 P.3d 220, reversed and remanded, and the state appealed. The Supreme Court held that: (1) mandamus proceedings are not governed by Rule of Civil Procedure on joinder of necessary parties; (2) residents were not required to join Indian tribes in action for writ of mandamus challenging Governor’s authority; and (3) availability of a declaratory judgment action did not preclude action for mandamus by residents. Affirmed.

85. *Big Lagoon Rancheria v. California*, No. C 09-1471, 2009 WL 1855332 (N.D. Cal. June 29, 2009). Defendant State of California moved for judgment on the pleadings, asserting that it is entitled to Eleventh Amendment sovereign immunity from Plaintiff Big Lagoon Rancheria's claim for bad faith negotiation under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721. Big Lagoon opposed the motion, arguing that California had waived its sovereign immunity pursuant to statute or, alternatively, as part of an earlier settlement agreement with Big Lagoon. The Court denied the motion.

86. *Griffith v. Choctaw Casino of Pocola*, No. 104887, ___ P.3d ___, 2009 WL 1877899 (Okla. June 30, 2009). Casino patron who stepped into a flower bed and fell on her face and head while entering casino, sustaining injuries, brought negligence action against Native American tribe and its casino to recover damages. The district court dismissed action on basis of tribal sovereign immunity. Patron appealed. The Supreme Court held that: (1) tribe and its casino clearly and unequivocally consented to be sued for tort damages by patron as to preclude application of tribal immunity doctrine, and (2) District Court was a court of competent jurisdiction as the phrase was used in statutory Model Tribal Gaming Compact such that it could exercise jurisdiction over patron's tort claims. Dismissal order of the district court reversed; cause remanded for further proceedings.

87. *North County Community Alliance, Inc. v. Salazar*, No. 07-36048, ___ F.3d ___, 2009 WL 2032342 (9th Cir. July 15, 2009). Nonprofit organization, comprised of residents and property owners near Indian casino site, sued National Indian Gaming Commission (NIGC) and Department of Interior (DOI), claiming violation of Indian Gaming Regulatory Act (IGRA) by agencies' failure to make Indian lands determination, either before approving Nooksack Indian Tribe's proposed gaming ordinance or before Nooksacks licensed and began constructing casino, and violation of National Environmental Policy Act (NEPA) by failure to prepare environmental impact statement (EIS). The district court dismissed for lack of subject matter jurisdiction and for failure to state claim. Nonprofit organization appealed. The appellate court held that: (1) claim regarding NIGC's approval of ordinance for casino licensing and construction was not time-barred; (2) Indian lands determination was not required by IGRA prior to approving ordinance; (3) Indian lands determination was not required by IGRA prior to licensing and constructing casino; and (4) EIS was not required, under NEPA. Affirmed.

88. *Cachil Dehe Band of Wintun Indians of Colusa Indian Community v. California*, No. S-04-2265 (E.D. Cal. Aug. 19, 2009). Plaintiffs sought entry of final judgment on claims relating to the size of the Gaming Device license pool and Colusa's priority in the tiered drawing system. Defendants State of California, California Gambling Control Commission (Commission), and Governor Arnold Schwarzenegger's (collectively, defendants) opposed the motion. The court's April 22, 2009 Order granted Colusa's motion for summary judgment with respect to its claims regarding (1) Colusa's priority in the draw process; and (2) the number of gaming devices authorized by the Compact. The court also granted Picayune's motion for summary judgment in its sole claim regarding the number of gaming devices authorized by the Compact. The court granted defendants' motions regarding (1) defendants' retention of license fees; (2) the Commission's authority to administer the draw process; (3) defendants' refusal to schedule and conduct a round of draws; and (4) defendants' counting of multi-station games as equal to the number of their terminals. Pursuant to Federal Rule of Civil Procedure 54(b) the court directed entry of final judgment on Colusa's claims regarding (1) its priority in the draw process (2) the number of gaming devices authorized by the Compact; (3)

defendants' retention of license fees; (4) the Commission's authority to administer the draw process; (5) defendants' refusal to schedule and conduct a round of draws; and (6) defendants' counting of multi-station games as equal to the number of their terminals in accordance with the court's April 22 Order. It also ordered pursuant to Federal Rule of Civil Procedure 54(b) that the Clerk enter final judgment on Picayune's sole claim regarding the number of gaming devices authorized by the Compact. Further, within forty five (45) days of the entry of judgment pursuant to this Order, defendants shall schedule and conduct a draw of all available gaming device licenses, in accordance with the court's April 22 Order, and in which all eligible Compact Tribes may participate.

H. LAND CLAIMS.

89. *Wisconsin v. Stockbridge-Munsee Cmty.*, No. 04-3834, ___ F.3d ___, 2009 WL 113487 (7th Cir. Jan. 20, 2009). State of Wisconsin filed action alleging that Indian tribe was operating Class III electronic games of chance on land located outside the boundaries of the tribe's reservation in violation of Indian Gaming Regulatory Act (IGRA). The district court, 366 F. Supp. 2d 698, denied defendants' motion for summary judgment and granted state's motion for summary judgment. Defendants appealed. The appellate court held that: (1) 1981 Act intended to remove opened lands from the reservation, and (2) 1906 Act effectively abolished the reservation. Affirmed.

90. *Osage Nation v. Oklahoma ex rel. Oklahoma Tax Commission*, No. 01-CV-516, 2009 WL 204194 (D. Okla. Jan. 23, 2009). Indian tribe brought action against Oklahoma state tax commission and members of commission, seeking declaratory judgment that reservation boundaries were not disestablished and that reservation was Indian country, and injunction prohibiting commission and its members from imposing and collecting taxes on income of tribe's members who resided and earned income within reservation boundaries. Defendants moved to dismiss and motion was converted to one for summary judgment. The district court held that: (1) tribe had standing to bring suit challenging reservation status; (2) reservation was no longer intact; and (3) income of tribe members working and living on private fee lands was not exempt from taxation. Motion granted.

91. *Smale v. Noretap*, No. 62349-4, ___ P.3d ___, 2009 WL 1508759 (Wash. Ct. App. June 1, 2009). Putative landowners brought action against current landowners and Stillaguamish Tribe, seeking to quiet title to property allegedly obtained through adverse possession. The Superior Court, denied Tribe's motion to dismiss. Tribe appealed. The appellate court held that superior court's continuing jurisdiction over land for purposes of determining ownership did not offend tribal sovereignty. Affirmed.

92. *Yankton Sioux Tribe v. Podhradsky*, Nos. 08-1441/1488, 2009 WL _____ (8th Cir. Aug. 25, 2009). Indian tribe brought action against county and state officials of South Dakota, seeking declaratory and injunctive relief that Yankton Sioux Reservation boundaries had not been disestablished. In earlier litigation, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1988), and *Yankton Sioux Tribe v. Gaffey (Gaffey II)*, 188 F.3d 1010 (8th Cir. 1999), it was held that the Reservation was diminished by the Tribe's cession of certain lands to the United States in 1894 but that the Reservation was not disestablished entirely. On remand, the district court held that agency trust lands, outstanding allotments, IRA trust lands, and miscellaneous trust lands are Indian Country within the meaning of 18 U.S.C. § 1151. These holdings are affirmed,

but the Court vacates the district court's holding that fee lands continuously held in Indian ownership retain Reservation status under § 1151(a).

I. RELIGIOUS FREEDOM

93. *Snoqualmie Indian Tribe v. Fed. Energy Regulatory Comm'n*, No. 05-72739, 05-74060, 2008 WL 4478591 (9th Cir. Sept. 30, 2008). Indian tribe filed petition for review of an order of the Federal Energy Regulatory Commission (FERC) granting operator of hydroelectric power plant a license to operate for another 40 years. Operator cross-petitioned for review of FERC's decision to impose minimum water flow requirements that exceeded those established in Washington State Department of Ecology's water quality certification (WQC). The appellate court held that: (1) substantial evidence supported FERC's decision that granting operator a license to operate did not substantially burden tribal members' free exercise of their religion, in violation of the Religious Freedom Restoration Act (RFRA); (2) FERC did not fail to engage in government-to-government consultation with a federally recognized Indian tribe, as required by the National Historic Preservation Act (NHPA) and FERC regulations; (3) operator had standing under the Clean Water Act (CWA) to challenge revised water flow requirements imposed by FERC; (4) FERC had authority to impose minimum water flow requirements that exceeded those established in the WQC; and (5) substantial evidence supported FERC's decision to impose minimum water flow requirements that exceeded those established in the WQC. Petitions denied.

94. *Odneal v. Pierce*, No. 06-41165, 2009 WL 901511 (5th Cir. Apr. 3, 2009). Not selected for publication in the Federal Reporter. Shawn K. Odneal, a Native American religious practitioner, appealed the district court's dismissal of his Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc-2000cc-5 (RLUIPA) claims challenging prison regulations restricting the length of his hair, limiting his wearing of a medicine pouch, and requiring that a chaplain or qualified volunteer be present in order to hold religious ceremonies. He contended that defendants failed to secure additional Native American chaplains and volunteers resulting in an inadequate frequency of religious ceremonies. He also appealed the district court's denial of numerous motions for joinder filed by potential plaintiffs who are not parties to the appeal. The appellate court affirmed in part and reversed and remanded in part the district court's judgment.

J. SOVEREIGN IMMUNITY and FEDERAL JURISDICTION

95. *U.S. v. Pink*, No. CR08-5031, 2008 WL 2987324 (W.D. Wash. Aug. 1, 2008). This matter was before the Court on Defendant Pink's motion to withdraw his guilty plea of being a felon in possession of a firearm and to dismiss the indictment. Pink was a passenger in a car traveling in the Quinault Indian Nation (the Reservation) when county sheriff deputies stopped the car for traffic infractions. After determining that Pink was wanted on several outstanding warrants, the deputies arrested him also. Incident to his arrest, the deputies found ammunition in his pocket and an unloaded hunting rifle in the vehicle. Pink admitted the rifle was his and produced valid hunting tags issued to him by the Quinault Tribe. He indicated that he was a felon, but that his right to bear firearms "may have been restored by the tribe." Since his plea, Pink alleged that new information came to light which would have changed his plea decision if he had known it at that time: (1) notes from Mr. Pink's Community Corrections Officer (CCO) indicated that the CCO had told him that his right to possess a firearm on

Quinault Indian land had to be determined by Quinault police; (2) Mr. Pink has an assessed IQ of 62, considered “mildly mentally retarded.” Mr. Pink argued that the court should view the novelty of the CCO’s notes in light of his mental status, and that this combination of factors meets the standard to withdraw his plea. The United States asserted that, due to lack of novelty, they do not. The court found that Mr. Pink showed sufficient evidence to support his request to withdraw his guilty plea and granted that motion, but denied the motion to dismiss the indictment.

96. *Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. 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, the State). Colusa challenged the Commission’s interpretation of the compact and the Commission’s assumption of authority to administer unilaterally the licensing of electronic gaming devices. The district court concluded that the many other Indian tribes that had entered into identical gaming compacts with the State in 1999, as well as California’s non-gaming tribes, were required parties to this action. Because Indian tribes enjoy sovereign immunity and the action could not proceed in their absence, the district court granted the State’s motion for judgment on the pleadings. Colusa appealed. Because the court concluded that the absent tribes are not required parties to this action, it reversed the district court’s judgment (with one minor exception) and remanded for further proceedings. Amended opinion, 2008 WL 4683214 (9th Cir. Oct. 24, 2008).

97. *Turner v. Oklahoma*, No. CIV-08-0543, 2008 WL 4130661 (W.D. Okla. Aug. 29, 2008). This action was brought by plaintiff Turner on his own behalf and on behalf of the Kiowa Tribe of which he alleged he is a member. The complaint was entitled “Petition for Injunctive Relief” and primarily sought injunctive relief preventing defendants from entering Kiowa tribal land for the purpose of enforcing, against plaintiff or any other members of the Kiowa Tribe, Oklahoma’s anti-cock-fighting laws. The complaint also sought “judicial affirmation of the Kiowa Tribe’s right to exercise jurisdiction on its own lands” and “judicial affirmation that the State of Oklahoma lacks jurisdiction to regulate Indian commerce on Kiowa lands.” The court construed these requests as seeking declaratory relief. The court granted the State defendants’ and the Humane Society’s motions to dismiss. The claims against the moving defendants were dismissed without prejudice, except where otherwise noted.

98. *Peters v. U.S.*, No. 08-C-729, 2008 WL 4186172 (E.D. Wis. Sept. 5, 2008). Peters filed a petition pursuant to 28 U.S.C. § 2255, asserting that he received ineffective assistance of counsel in his criminal trial because his attorney wrongly stipulated that the location of the crime was in Indian country. Peters’ claim was that the court lacked jurisdiction over his criminal prosecution because the crime did not occur in Indian country. The crime occurred in Middle Village, Wisconsin, a community within the boundary of the Menominee Reservation. Although the crime occurred on the Menominee Reservation, Peters argued that the crime did not occur in Indian country because Middle Village has not been determined to be a “dependent Indian community” under 18 U.S.C. § 1151(b). The court found that it may be true that Middle Village is not a “dependent Indian community,” but Middle Village is located on

land “within the limits of any Indian reservation” under § 1151(a) and that is enough to make Middle Village “Indian country” within the meaning of the statute. *United States v. Webb*, 219 F.3d 1127, 1131 (9th Cir. 2000) (if the property is within boundaries of the reservation, it is Indian country) and, accordingly, Peters’ counsel was not ineffective in stipulating to the fact that the crime occurred in Indian country. The court denied the motion to vacate.

99. *Steele v. Hernandez*, No. 2:06-CV-02088, 2008 WL 4184295 (E.D. Cal. Sept. 10, 2008). Before the court was Defendant Marvin Hilpert’s Motion for Relief from Judgment and Request for Stay of Execution of Judgment. Plaintiff Juanita Steele brought an action against Cecilia Hernandez (Hernandez), Marsha Tolen (Tolen), and Marvin Hilpert (Hilpert). The action stemmed from a dispute involving individually allotted trust lands, known as Allotment 5029, located in Plumas County, California (the Allotment). Plaintiff sought to end an ongoing trespass to the Allotment, regain possession of the Allotment, and collect damages for the unpaid rental value of the Allotment, as well as damages incurred due to Defendants’ use and possession of the land. At a settlement conference, Plaintiff reached a settlement agreement with Defendants Hernandez and Tolen, but not with Hilpert. Plaintiff and Defendant Hilpert were ordered to personally appear for a Pretrial Conference. Defendant Hilpert failed to appear. At the Pretrial Conference, Plaintiff waived all claims as to damages, attorney’s fees, and costs. The only issue remaining before the Court was the issue of possession. Plaintiff moved for summary adjudication of that issue. The Court found there were no triable issues of fact as to possession as Defendant Hilpert is not authorized to occupy or reside on the Allotment. Accordingly, the Court entered summary adjudication in favor of Plaintiff and ordered Defendant Hilpert to vacate the property immediately. Defendant moved for relief from that Order under Federal Rule of Civil Procedure 60(b) and moved for a stay of execution of that Order under Rule 62(b), arguing that the Court was without jurisdiction to hear Plaintiff’s claim, that allowing the Order to stand would “create a dangerous precedent” and cause “chaos . . . in Indian country,” and that the other interest holders in the Allotment were not parties to the proceedings. The Court found there were no appropriate grounds to stay the enforcement of the Order and denied Hilpert’s motion.

100. *Chao v. Spokane Tribe of Indians*, No. CV-07-0354, 2008 WL 4443821 (E.D. Wash. Sept. 24, 2008). Before the court was Respondent Spokane Tribe of Indians’ (Tribe) Motion to Quash an administrative subpoena. The Tribe signed a Gaming Compact with the state of Washington. The Department of Labor (DOL) filed its Petition for Enforcement of an Administrative Subpoena after the Tribe refused to provide requested wage and hour records for employees working at the Casino. The subpoena was part of an investigation into alleged Fair Labor Standards Act (FLSA) violations launched as a result of a complaint forwarded to the Washington State Department of Labor and Industries. The Tribe responded to the subpoena with a motion to quash, contending it is a sovereign nation that is not subject to the provisions of the FLSA. DOL argued that the Tribe, even as a sovereign nation, is subject to the FLSA, a statute of general applicability. The court concluded the FLSA applies to the Casino and denied the Tribe’s motion to quash.

101. *American General Finance, Inc. v. Kent*, No. CIV-08-648, 2008 WL 4447065 (W.D. Okla. Sept. 26, 2008). Before the court was the motion for partial summary judgment filed by intervenor, United States of America. The action commenced when plaintiff, American General Finance, Inc., filed a petition against defendants, George L. Kent and Judith A. Kent, seeking to collect on a line of credit obligation incurred by defendant, George L. Kent, and to

foreclose a real estate mortgage executed by defendants securing payment of the line of credit. Subsequent to the filing of the action, defendants filed a motion to dismiss arguing that the property subject to the mortgage was held in trust by the United States of America for defendant, George L. Kent, an Indian male, and that dismissal was required because the United States of America was an indispensable party to the action. Defendants also argued that the court lacked subject matter jurisdiction because the land in question was Indian land and plaintiff had failed to obtain approval of the mortgage by the Secretary of the Interior approval of the mortgage. Plaintiff thereafter filed a motion for summary judgment on its claims. The state district court granted plaintiff's motion to the extent plaintiff sought summary judgment on the debt. The court took under advisement plaintiff's claim for foreclosure and the defendants' motion to dismiss. The court later denied the parties' motions in relation to the foreclosure claim, finding material facts in controversy concerning the validity of the real estate lien. The state district court entered a partial journal entry of judgment granting an *in personam* judgment in favor of plaintiff against defendants. The United States filed a motion to intervene and then filed a Notice of Removal, removing the action to federal district court. The district court granted the United States' motion to intervene and determined that the intervenor United States and defendants were entitled to summary judgment as to plaintiff's claim for foreclosure of the real estate mortgage executed by defendants and granted the United States' Motion for Partial Summary Judgment.

102. *U.S. v. Mahoney*, No. 07-30429, 2008 WL 4613959 (9th Cir. Oct. 16, 2008). Not selected for publication in the Federal Reporter. Peter Mahoney appealed his convictions for conspiracy to violate the Contraband Cigarette Trafficking Act (CCTA), 18 U.S.C. § 2342(a), and conspiracy to launder money. Mahoney contended that the CCTA does not apply to Native Americans. Mahoney argued that the district court erred in rejecting his proposed jury instruction, which would have stated that the government must prove Mahoney knew his actions violated the law; that the knowledge instruction was too confusing with respect to the money laundering counts; and that the district court failed to consider whether the tax loss in the Pre-sentence Investigation Report was fully attributable to Mahoney. The appellate court affirmed.

103. *In re Decora*, No. 08-cv-315, __ B.R. __, 2008 WL 4756683 (W.D. Wis. Oct. 28, 2008). Chapter 7 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, 387 B.R. 230, avoided bank's security interest and ordered bank to turn over to trustee all postpetition payments from tribe. Bank appealed. The district court held that at the time debtor filed his petition, a hypothetical judgment lien creditor would not have had rights in debtor's per capita payments superior to those of bank under applicable tribal law, and so trustee could not exercise his strong-arm rights to defeat bank's security interest in the payments. Reversed.

104. *U.S. v. Newell*, No. 1:08-CR-56-GZS, __ F. Supp. 2d __, 2008 WL 4776456 (D. Me. Oct. 31, 2008). Both government and defendants, who were charged with offenses in connection with alleged conspiracy to defraud United States, filed motions *in limine*. The district court held that: (1) balancing of evidence's probative value and potential for unfair prejudice was best conducted in the context of trial; (2) defendant could not reargue before jury issues of tribal sovereign immunity that were already decided in district court's order denying defendant's

motion to dismiss; and (3) government could present general testimony regarding Indian tribe's financial affairs as of month following purported end of conspiracy. Ordered accordingly.

105. *Dyer v. Bureau of Indian Affairs*, No. 3:07-CV-00611, 2008 WL 4813099 (D. Nev. Nov. 3, 2008). Before the court was Defendant Fort McDermitt Paiute and Shoshone Tribe's (Tribe) Motion to Dismiss. This was an action arising out of a disputed lease on the Fort McDermitt Paiute-Shoshone Indian Reservation. Plaintiffs are members of the Fort McDermitt Paiute and Shoshone Tribe and reside on the Fort McDermitt Indian Reservation. From July 1, 1997, until June 30, 2007, Plaintiffs, under the name "Snapp Livestock Association," leased "Giacometto Tract No. G-12" from the Tribe. In anticipation of the expiration of their lease, Plaintiffs requested that the Tribe renew their lease but the tribe decided to let the lease expire. Subsequently, the Tribe posted the tract as vacant and received eight lease applications, including an application from Plaintiffs as the Snapp Livestock Association. At a meeting the Tribe voted to grant a new, ten year lease to Arlo Crutcher. Plaintiffs submitted a letter to Bureau of Indian Affairs (BIA) Superintendent at the Western Nevada Agency, which the BIA forwarded to the Tribe. In the letter, Plaintiffs complained of the following: (1) Arlo Crutcher will sublease to a non-enrolled tribe member, his wife; (2) the Tribe cancelled a previous lease granted to Arlo Crutcher for nonpayment; (3) the Snapp Livestock Association is a cooperative association; and (4) Snapp Livestock Association should have been granted the lease pursuant to Article VII, Section 3 of the Tribe's Constitution. The court found that there is no indication that the Tribe waived or that Congress abrogated the Tribe's sovereign immunity and thus, the doctrine of sovereign immunity bars Plaintiffs' claim in this case. The court granted the Tribe's Motion to Dismiss.

106. *Native American Distrib. v. Seneca-Cayuga Tobacco Co.*, No. 07-5104, 546 F.3d 1288 (10th Cir. Nov. 17, 2008). Tobacco distributor brought action against tobacco manufacturer, a tribal enterprise, and individuals, alleging breach of contract and civil conspiracy. The district court, 491 F. Supp. 2d 1056, granted defendants' motions to dismiss, and distributor appealed. The appellate court held that: (1) manufacturer had sovereign immunity as enterprise of the tribe; (2) manufacturer was not equitably estopped from asserting its immunity; (3) distributor failed to state a civil conspiracy claim under the Sherman Act against individual defendants; and (4) distributor failed to state a price discrimination claim under the Robinson-Patman Act against individual defendants. Affirmed.

107. *U.S. v. Jadusingh*, No. 08-10177, 2008 WL 4925920 (11th Cir. Nov. 18, 2008). Not selected for publication in the Federal Reporter. Rowland Washington Jadusingh, a Seminole Indian, appealed the denial of his post-conviction motion to recover money and real property that was forfeited as a term of his plea of guilty to drug and firearm charges. Jadusingh argued that the district court did not have jurisdiction to order the forfeiture because he was not on tribal land at the time the seizure occurred, and he was not charged under the Major Crimes Act of 1885, and he was coerced to accept the forfeiture. The appellate court affirmed the denial of Jadusingh's motion.

108. *Hendrix v. Coffey*, No. 08-6161, 2008 WL 5206293 (10th Cir. Dec. 15, 2008). Not selected for publication in the Federal Reporter. In action brought by Native Americans alleging violations of the Indian Civil Rights Act (ICRA) after three of them were disenrolled as members of a tribe, the District Court, 2008 WL 2740901, dismissed the action. Native

109. *Lewis v. Phropher*, No. 08-2403-JWL, 2008 WL 5381854 (D. Kan. Dec. 22, 2008). Plaintiff Anthony Lewis asserted a claim for damages under 42 U.S.C. § 1983 against defendants Allen Phropher and Luke Keller, Jr., tribal police officers for the Iowa Tribe of Kansas and Nebraska, alleging that defendants violated his rights under the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution in connection with their arrest of him. The matter was before the court on defendants' motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(1), in which defendants argued that their sovereign immunity from suit deprives the court of subject matter jurisdiction. The court granted the motion in part, but granted plaintiff leave to file an amended complaint stating an actionable claim against defendants.

110. *State v. Beasley*, No. 34698, 2008 WL 5337079 (Idaho Ct. App. Dec. 23, 2008). The court found that the district court did not err by denying Beasley's motion to dismiss and Trooper Winans was not outside his jurisdiction when he arrested Beasley, as the state and the Shoshone-Bannock tribes share concurrent jurisdiction over Interstate 15 where it crosses the Fort Hall Indian Reservation. Also, the tribal extradition code does not apply to arrests by state agents in areas of concurrent jurisdiction, therefore, the arrest was not illegal and the district court was not required to relinquish jurisdiction over Beasley. Beasley's judgment of conviction is affirmed.

111. *U.S. v. Menominee Tribal Enterprises*, No. 07-C-316, 2009 WL 122802 (E.D. Wis. Jan. 16, 2009). The United States brought this action against Menominee Tribal Enterprises (MTE) and two of its employees. The government alleged that the Defendants submitted invoices seeking payment that contained false information, in violation of the False Claims Act, 31 U.S.C. § 3729. It further alleged that MTE breached contracts it had with the Bureau of Indian Affairs (BIA) when it made several large purchases without receiving prior approval. All parties have moved for summary judgment, at least as to some of the claims. The court: granted MTE's motion for judgment on the pleadings; denied the other Defendants' motions for judgment on the pleadings; denied the United States' motion for summary judgment; granted in part MTE's motion for summary judgment; dismissed all claims against Defendant MTE; and denied the other Defendants' motions for summary judgment. FCA claims against the individual Defendants remain.

112. *State v. Madsen*, No. 24654, 2009 WL 146688 (N.D. Jan. 21, 2009). After denying defendant's motion to suppress evidence found in search of hotel room at Indian casino, following a bench trial the Circuit Court convicted defendant of possession of controlled substances, intent to distribute marijuana, possession of marijuana, and ingesting substances. Defendant appealed. The Supreme Court held that reasonableness of search of defendant's hotel room by security guards had to be assessed under Fourth Amendment standards by virtue of the Indian Civil Rights Act, as the guards were government actors. Reversed and remanded.

113. *Boney v. Valline*, No. 3:05-cv-00683, 2009 WL 302053 (D. Nev. Jan. 22, 2009). Arrestee brought Bivens action against tribal police officer, seeking damages for officer's alleged violation of her First and Fourth Amendment rights in connection with her arrest and son's death. Officer moved for summary judgment. The district court held that: (1) on matter of first impression, officer was not acting under color of federal law, as required to subject officer

to arrestee's Bivens action, and (2) officer was not acting as a federal employee within meaning of Federal Tort Claims Act. Motion granted.

114. *Murphy v. Kickapoo Tribe of Oklahoma*, No. 07-6290, 2009 WL 166475 (10th Cir. Jan. 26, 2009). Not selected for publication in the Federal Reporter. Terry Murphy and Roger Lackey brought breach of contract, retaliatory discharge, and fraud claims against the Kickapoo Tribe of Oklahoma ("the Tribe") in the district court. Their claims were dismissed by the district court for lack of jurisdiction based on tribal sovereign immunity. The appellate court affirmed the dismissal because the district court lacked subject matter jurisdiction to consider the plaintiffs' claims, which arose solely under state law.

115. *Department of Health and Human Services v. Maybee*, No. Ken-08-32, 2009 WL 307474 (Maine Feb. 10, 2009). Scott B. Maybee appealed from an order entered in the Superior Court denying his motion for summary judgment and granting a summary judgment in favor of the Department of Health and Human Services. The Department brought a civil enforcement action pursuant to 22 M.R.S. 1555-C(8) (2008) because Maybee failed to obtain a retail tobacco vendor license in violation of 22 M.R.S. 1555-C(1) (2008). Maybee contended that because he conducts his tobacco delivery business from a location within the boundaries of an Indian reservation in New York State, the courts of Maine do not have subject matter jurisdiction, and the Maine vendor license requirement is preempted by federal law. Because subject matter jurisdiction exists and the Maine statute is not preempted, the Supreme Court affirmed.

116. *Seneca-Cayuga Tribe of Oklahoma v. Edmondson*, No. 06-CV-394, 2009 WL 484247 (N.D. Okla. Feb. 24, 2009). This matter was before the court on the defendant Attorney General's Motion to Dismiss Plaintiff's Second Amended Complaint. The lawsuit arose from a dispute between the Seneca-Cayuga Tribe of Oklahoma and the State of Oklahoma regarding state economic regulation of tobacco. In 1988, Oklahoma entered into a Master Settlement Agreement ("MSA") with various tobacco manufacturers and passed qualifying statutes to supplement the MSA and regulate Non-Participating Manufacturers (NPMs). The Qualifying Statutes require that NPMs deposit funds in a qualified escrow account. The amount each NPM must deposit depends on the units of tobacco products sold in the state by the NPM. The escrow funds are held by a federally-chartered financial institution. In its complaint, the Tribe requested, that the Court enter judgment pursuant to 28 U.S.C. § 2201 declaring that: (1) the Defendant has no legal right to enforce the Oklahoma Qualifying Statutes, including the Escrow Statute, against the Tribe; (2) that Defendant has no legal right to require compliance with the Qualifying Statutes as a condition of inclusion of the Tribe and their brands on the Oklahoma Directory of Certified Tobacco Manufacturers; and (3) that the Defendant has no authority to enforce the Qualifying Statutes in connection with the Tribe's tobacco sales to other federally recognized Indian Nations, regardless of their locations. The court denied defendant's motion to dismiss.

117. *U.S. v. Watchman*, No. 08-1202, 2009 WL 464995 (D. Ariz. Feb. 24, 2009). Defendant Ozzy Watchman asked the Court to dismiss the indictment against him on ten separate grounds related to the application and timing of the Sex Offender Registration and Notification Act. Defendant pled guilty to Sexual Abuse of a Minor in violation of 18 U.S.C. § 2243(a) and was sentenced to 18 months in prison with a three-year term of supervised release. Defendant's plea agreement and terms of supervision required Defendant to register with all state

and tribal sex offender agencies in any state where he resided, was employed, carried on a vocation, or was a student, as directed by the probation officer. Defendant registered with the state of Arizona, listing his address as Sawmill, Arizona, which is on the Navajo Indian Reservation. He subsequently updated his registration listing his address as the New Beginnings treatment facility in Tucson, Arizona. The indictment alleged that Defendant absconded from New Beginnings and was arrested on the reservation. The Government asserted that Defendant had resided on the Navajo reservation since absconding from the Tucson facility. Section 141 of the Adam Walsh Child Protection and Safety Act of 2006 contains the Sex Offender Registration and Notification Act (SORNA). SORNA imposes criminal penalties of up to ten years in prison on individuals who are required to register as sex offenders under SORNA, who travel in interstate or foreign commerce or enter or leave or reside in Indian country, and who knowingly fail to register or update a sex offender registration as required by SORNA. Indian tribes may become a registering jurisdiction under SORNA or may choose to allow another jurisdiction “within which the tribe is located” to fulfill the SORNA registration function. The Navajo Nation adopted a resolution electing to implement SORNA’s requirements and created a task force to implement a sex offender registry, but the registry has not yet been created. The Government argued that Defendant was obligated under SORNA to notify the state of Arizona – because the Navajo Nation did not yet have a registration system – that he had changed his address to the reservation. The indictment charged Defendant with a felony for failing to comply with this requirement. The court denied defendant’s motion to dismiss.

118. *State v. Roy*, No. A08-0116, __ N.W. 2d __, 2009 WL 511200 (Minn. App. Mar. 3, 2009). Defendant was convicted in the district court of being a felon in possession of a firearm. Defendant appealed. The appellate court held that state had jurisdiction to prosecute defendant, a tribal member, for a violation on a reservation of the felon-in-possession statute. Affirmed.

119. *Oglala Sioux Tribe v. C & W Enterprises, Inc.*, No. Civ. 07-5024, 2009 WL 973187 (D.S.D. Apr. 7, 2009). Plaintiff, Oglala Sioux Tribe (Tribe), moved for a temporary restraining order (TRO) and preliminary and permanent injunction to prevent defendant, C & W Enterprises, Inc. (C & W), from imposing an execution and levy on tribal funds held by the Bureau of Indian Affairs, the South Dakota Department of Revenue, and First National Bank of Gordon. The court granted the Tribe's TRO motion the same day. Upon the court's request, the parties briefed the issues of jurisdiction, abstention, and the merits. An evidentiary hearing on the preliminary injunction request was held. The court found that the Anti-Injunction Act and principles of the Younger abstention prevented the court from enjoining C & W from executing and levying on tribal funds.

120. *Means v. Holloway*, No. CIV. 09-5031, 2009 WL 1096020 (D.S.D. Apr. 22, 2009). In September of 2008, the state of South Dakota filed a criminal complaint against petitioner charging him with an unlawful act of fishing without a license. A bench warrant was issued for petitioner's arrest. In an attempt to avoid being arrested, petitioner has remained exclusively on the Pine Ridge Indian Reservation, where the state of South Dakota does not have jurisdiction to serve or execute the arrest warrant. Petitioner filed an application for writ of habeas corpus pursuant to 28 U.S.C. § 2241(c)(3), claiming that the unlawful fishing charges filed against him violate the treaties of the United States, and therefore bring the matter under the ambit of the federal habeas statute. The Court need not reach this question, however, as petitioner is not “in custody” as he must be to be eligible for relief under section 2241. The court also noted that the criminal charge petitioner is facing is from the state of South Dakota, which brings the matter under the purview of 28 U.S.C. § 2254, which allows for a writ of habeas corpus to issue from a federal court only after “the applicant has exhausted the remedies available in the courts of the State,” and as petitioner has not yet been convicted of any crime, he has not exhausted his state court remedies, and relief is not available from the federal court. The court denied petitioner’s application for writ of habeas corpus pursuant to 28 U.S.C. § 2241.

121. *Native American Arts, Inc. v. Peter Stone Co., U.S.A., Inc.*, No. 08 CV 3908, 2009 WL 1181483 (N.D. Ill. Apr. 30, 2009). Defendant Peter Stone Corp. (PSC) sells ethnic and eclectic styles of silver jewelry. Plaintiff Native American Arts (NAA) is a wholly Indian-owned arts and crafts manufacturing and distribution company staffed by members of the Ho-Chunk Nation. NAA filed its Complaint under the Indian Arts and Crafts Enforcement Act of 2000 (IACEA), 25 U.S.C. § 305 *et. seq.* NAA claimed that PSC's sale of certain merchandise through its catalog and website violated § 305e(a) of the IACEA, which states that a group such as NAA may bring a civil action “against a person who, directly or indirectly, offers or displays for sale or sells a good, with or without a Government trademark, in a manner that falsely suggests it is Indian produced, an Indian product, or the product of a particular Indian or Indian tribe or Indian arts and crafts organization, resident within the United States.” 25 U.S.C § 305c(a). Of the photo exhibits attached to NAA's Complaint, some of the jewelry was attached to cardboard backings, having sublimated Indian motifs in the background and the label of “Native American Designs” at the top of the backing. As a result of the alleged violations, NAA was seeking both an injunction, enjoining PSC from selling those particular items, as well as compensatory damages as provided in 25 U.S.C § 305e(a)(1) and (2)(A) & (B). PSC filed a motion to dismiss NAA's complaint, raising four issues: (1) the unconstitutionality of the IACEA; (2) lack of standing by NAA; (3) failure to plead with necessary particularity under Fed. R. Civ. Proc. 9(b); and (4) failure to state a claim under Fed. R. Civ. Proc. 12(b)(6). The court denied Defendant's Motion to Dismiss.

122. *State v. Seneca-Cayuga Tobacco Company*, No. COA08-812, 676 S.E. 2d 579 (N.C. Ct. App. May 19, 2009). State brought action against tribal tobacco companies, seeking preliminary and permanent injunctions requiring them to pay into escrow fund and file a certificate of compliance, and seeking an order prohibiting them from selling or delivering tobacco products in North Carolina for two years. Companies filed motion to dismiss. The Superior Court granted the motion to dismiss, and state appealed. The appellate court held that: (1) companies had not waived their sovereign immunity, and thus court lacked jurisdiction over them, and (2) state failed to present any evidence showing that tribal tobacco companies waived tribal sovereign immunity as required to survive summary judgment. Affirmed.

123. *Stroud v. Armenta*, No. 206934, 2009 WL 1396837 (Cal. Ct. App. May 20, 2009). In this action for defamation and interference with business advantage, Gene Stroud appealed from an order granting Tony Armenta's motion to quash service of the summons and complaint on grounds of tribal sovereign immunity. The Santa Ynez Band of Chumash Indians (Tribe) employed Stroud as a blackjack dealer at the Chumash Casino, a tribal enterprise (Casino). Stroud's supervisor was Tony Armenta, a member of the Tribe and its Director of Table Games. Stroud resigned from the Casino with the intention of starting his own non-Indian card room and applied to the California Gambling Control Commission (the Commission) for a card room license. The Commission conducted a background check and interviewed Armenta. Stroud's complaint claimed that Armenta made defamatory statements to the Commission and alleged that Armenta falsely reported that Stroud engaged in theft while employed by the casino. As a result of the false statements, Stroud alleged, his license application was delayed and may be denied. Armenta brought a motion to quash the summons for lack of jurisdiction based on tribal sovereign immunity. Armenta presented his declaration and that of the tribal Chairman (his brother) to establish that his statements to the Commission were made in his official capacity and within the scope of his valid authority. Stroud offered no evidence in rebuttal, relying instead on the allegations of his complaint. The trial court granted the motion to quash. The appellate court affirmed.

124. *Meherrin Indian Tribe v. Lewis*, No. COA08-928, __ S.E. 2d __, 2009 WL 1514940 (N.C. Ct. App. June 2, 2009). Indian tribe and alleged tribal office holders brought action against purported former office holders to quiet title, and seeking declaratory and injunctive relief. The Superior Court denied defendants' pre-answer motion to dismiss for lack of subject matter and personal jurisdiction, and for failure to state claim, and certified its order for immediate appeal. Defendants appealed, and plaintiffs moved to dismiss appeal as interlocutory and premature. The appellate court held that: (1) trial court's certification had no effect; (2) defendants could appeal denial of motion to dismiss for lack of personal jurisdiction; (3) motion to dismiss for lack of subject matter jurisdiction was not immediately appealable; (4) motion to dismiss for failure to state claim was immediately appealable; and (5) defendants were not entitled to sovereign immunity. Affirmed in part, dismissed in part.

125. *Native American Arts, Inc. v. Mangalick Enterprises, Inc.*, No. 08-4464, 2009 WL 1543734 (D. Ill. June 2, 2009). The complaint filed by Plaintiff, Native American Arts, Inc. (NAA), under the Indian Arts and Crafts Act of 1990, as amended by the Indian Arts and Crafts Enforcement Act of 2000 (25 U.S.C. § 305 *et seq.* (2000)) (Act) named Defendant, Mangalick Enterprises, Inc., d/b/a IAC International (Mangalick) and claimed that Mangalick violated the Act by selling inauthentic Indian goods in a manner that falsely suggested that they were authentic. Before the Court was Defendant's motion to dismiss which argued four bases for dismissal: (i) the Act violates the equal protection component of the Fifth Amendment's due process clause; (ii) NAA lacks standing to sue and thus the Court lacks subject matter jurisdiction; (iii) NAA failed to draft its complaint in accordance with Fed. R. Civ. P. 9(b); and (iv) NAA failed to state a claim upon which relief can be granted under Rule 12(b)(6). Pursuant to Federal Rule of Civil Procedure 24 and 28 U.S.C. § 2403(a), the Government intervened to defend the constitutionality of the Act. The court denied Defendant's motion to dismiss.

126. *State v. Atcitty*, Docket Nos. 27,189; 27,333; 27,940, __ P.3d __, 2009 WL 2601310 (N.M. June 4, 2009). The question presented in these consolidated cases was whether the State has the authority to require an Indian, who: (1) was convicted of a sex offense in a

court other than a New Mexico state court; (2) is an Indian living in Indian country; and (3) is not attending school or employed outside of Indian country, to comply with the State's Sex Offender Registration and Notification Act (SORNA), NMSA 1978, §§ 29-11A-1 to -10 (1999, as amended through 2007). Defendants are enrolled members of the Navajo Nation who were convicted in federal court of sex offenses involving minors. The State, in separate proceedings, charged Defendants with failing to register as sex offenders as required by SORNA. Defendants each filed motions to dismiss for lack of jurisdiction. Defendants asserted that the State lacked the authority to impose the registration requirements of SORNA on an Indian living in Indian country. The district court denied the motions. Defendants entered conditional pleas of guilty while reserving their right to appeal jurisdictional issues. The appellate court concluded that the State's application of SORNA to Defendants was not authorized by federal law and thus infringed on the Navajo Nation's tribal sovereignty. The appellate court reversed the district court's denial of Defendants' motions to dismiss, reversed the convictions of Atcitty and Billy for failure to register, and remanded case No. 27,333 for further proceedings consistent with this opinion.

127. *U.S. v. Oldbear*, No. 08-6095, __ F.3d __, 2009 WL 1608334 (10th Cir. June 10, 2009). Defendant was convicted in the district court of embezzling Indian tribal funds, and making a false statement to government agent. Defendant appealed. The appellate court held that: (1) exclusion of proffered defense witnesses' testimony did not violate defendant's due process right to present a defense; (2) witness testimony was insufficient to establish that it was habit of tribe to pay for personal vehicle expenses; (3) evidence was sufficient to support embezzlement convictions; (4) evidence was sufficient to support conviction for making false statement to government witness; and (5) any violation of defendant's Fifth Amendment right against self-incrimination was not reversible error. Affirmed.

128. *Dye v. Choctaw Casino of Pocola*, No. 104737, __ P.3d __, 2009 WL 1877902 (Okla. June 30, 2009). Casino patron who was struck and injured by a shuttle cart while walking through a casino's parking lot brought negligence action against Native American tribe and its casino to recover damages. The district court dismissed action on basis of tribal sovereign immunity. The appellate court reversed and remanded. Casino petitioned for certiorari review. The Supreme Court held that: (1) tribe and its casino clearly and unequivocally consented to be sued for tort damages by patron as to preclude application of tribal immunity doctrine, and (2) district court was a court of competent jurisdiction as the phrase was used in statutory Model Tribal Gaming Compact such that it could exercise jurisdiction over patron's tort claims. Opinion of the appellate court vacated; dismissal order of the district court reversed; cause remanded to district court for further proceedings.

129. *Harris v. Sycuan Band of Diegueno Mission Indians*, No. 08cv2111, 2009 WL 1883674 (S.D. Cal. June 30, 2009). Before the Court was a Motion to Dismiss the First Amended Complaint. Plaintiff initiated the action by filing a complaint seeking to enforce an arbitration award totaling \$160,00.00 for physical injuries allegedly suffered by Plaintiff as a result of the conduct of one of Defendant's employees. The complaint alleged that the Court had subject matter jurisdiction pursuant to the Federal Arbitration Act (FAA), 9 U.S.C. § 1, *et seq.* The Court dismissed the original complaint for lack of subject matter jurisdiction. Plaintiff filed the first amended complaint (FAC). The FAC stated: "The Court has jurisdiction over the instant case pursuant to the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*" and alleged that "all claims for damages for physical injuries against defendant . . . were governed by a 'Tort Claims

Ordinance” (Ordinance) duly enacted by Defendant. The FAC alleged that Plaintiff pursued her claim pursuant to the Ordinance, and that Plaintiff ultimately received an arbitration decision awarding Plaintiff the sum of \$160,000.00. The FAC alleged that the Ordinance “states that ‘the decision of an arbitrator on an appeal may be enforced in the United States District Court for the Southern District of California under the Federal Arbitration Act.’” The FAC sought a judgment “[i]n the amount of \$160,000 awarded by the arbitrator.” The court granted the Motion to Dismiss the First Amended Complaint and dismissed the action, but granted Plaintiff leave to file a second amended complaint.

130. *Murgia v. Reed*, No. 08-15618, 2009 WL 2011913 (9th Cir. June 30, 2009). Not selected for publication in the Federal Reporter. Officers Reed and Parsons (Defendants) filed an appeal from the district court’s denial of their motion to dismiss for lack of subject matter jurisdiction. Because their motion to dismiss was based on tribal sovereign immunity, the appellate court permitted the interlocutory appeal. Martha Murgia’s (Plaintiff) Bivens action against Defendants arose out of an altercation in a residence on the Gila River Indian Reservation in Arizona, culminating in the shooting death of Arlen Murgia, a tribal member. At the time, Defendants were tribal police officers with the Gila River Indian Community and were responding to a domestic disturbance call at the residence. Defendants moved to dismiss the action pursuant to Fed.R.Civ.P. 12(b)(1), alleging that they were protected by tribal sovereign immunity and were exclusively tribal officers, not federal actors as required under Bivens. The district court held that the Defendants were not entitled to sovereign immunity because the complaint named them in their individual capacities. The appellate court found that the district court erred in concluding that tribal sovereign immunity did not apply solely because the Defendants were sued in their individual capacities, finding that if Defendants were acting for the tribe within the scope of their authority, they were immune from Plaintiff’s suit regardless of whether the words “individual capacity” appear on the complaint. The appellate court vacated that portion of the district court’s order that denied the Defendants’ claim of sovereign immunity, and remanded for further proceedings on that question. The appellate court also found that the jurisdictional issue is intertwined with the merits of the Bivens action; whether the defendants were tribal or federal actors is crucial not only to the issue of sovereign immunity, but also to the Bivens claim itself. The appellate court vacated the district court’s order denying the Defendants’ motion to dismiss for lack of jurisdiction, and remanded with instructions to treat the motion as one for summary judgment. Vacated and remanded.

131. *Oberloh v. Johnson*, Nos. A08-0080, A08-0081, __ N.W. 2d __, 2009 WL 1918674 (Minn. Ct. App. July 7, 2009). Alleged shareholders of finance company filed individual actions against tribal treasurer alleging financial newsletters sent by treasurer to tribal members were defamatory. The district court denied treasurer’s motions for summary judgment. Treasurer appealed, and the appeals were consolidated. The appellate court held that treasurer was acting within scope of his authority when he sent financial newsletters, and thus tribal sovereign immunity barred the actions. Reversed.

132. *Oklahoma v. Tyson Foods, Inc.*, No. 05-329, ___ F.R.D. ___, 2009 WL 2176337 (N.D. Okla. July 22, 2009). State of Oklahoma brought action seeking monetary damages and injunctive relief against poultry producers for injury caused to the river watershed by producers' practice of storing and disposing of hundreds of thousands of tons of poultry waste on lands within the watershed. Producers filed motion to dismiss for failure to join Indian nation as a required party or in the alternative, motion for judgment on the pleadings. The district court held that non-party Indian tribe was an indispensable party whose joinder was not feasible, thus warranting dismissal of state's action. Motions granted in part and denied in part.

133. *U.S. v. Fox*, No. 08-2190, ___ F.3d ___, 2009 WL 2245238 (10th Cir. July 29, 2009). Following denial of motion to dismiss indictment in the district court, 557 F. Supp. 2d 1251, defendant pled guilty to being a felon in possession of a firearm. Defendant appealed. The appellate court held that: (1) Treaty Between the United States of America and the Navajo Tribe of Indians of 1968 guaranteed hunting rights that could be asserted by individual members of tribe, and (2) Treaty did not insulate individual tribal member from prosecution for possession of firearm by felon. Affirmed.

134. *Perry v. Seminole Tribe of Florida*, No. 8:08-CV-2455, 2009 WL 2365892 (M.D. Fla. July 30, 2009). Plaintiff's Complaint arose from events which took place on the Tampa Reservation of the Seminole Tribe of Florida. Plaintiff Perry was arrested and charged with DUI and Resisting Arrest Without Violence. These charges were terminated in favor Plaintiff Perry in Hillsborough County Criminal Court. Defendants move for dismissal under Rule 12(b)(1), Fed.R.Civ.P., because the Court does not have subject matter jurisdiction over Plaintiff's claims, based on the doctrine of tribal sovereign immunity. Defendants argued that each Defendant is immune from suit. Defendants argued that, in the absence of a clear, express and unmistakable waiver of immunity by the Seminole Tribe of Florida, or the clear, express and unmistakable abrogation of immunity by act of Congress, federal and state courts do not have jurisdiction to resolve civil disputes brought against the Seminole Tribe or any of its subordinate governmental units and its Tribal Police Officers and other employees and agents. The Court found that there was no clear, express and unmistakable waiver of immunity by the Seminole Tribe of Florida, nor was there a clear, express and unmistakable abrogation of tribal immunity by an act of Congress. The Court dismissed the case for lack of subject matter jurisdiction.

135. *Bressi v. Ford*, No. 07-15931, ___ F.3d ___, 2009 WL 2366552 (9th Cir. Aug. 4, 2009). Arrestee brought civil rights action against tribal police officers and United States after he was stopped and cited at a roadblock on a state highway crossing into tribal reservation. The district court granted summary judgment to the officers and the United States separately. Arrestee appealed. The appellate court held that: (1) tribal officers were acting under color of state law; (2) fact issues precluded summary judgment on § 1983 claim against officers; (3) officers were not acting under color of federal authority; and (4) officers were entitled to qualified immunity concerning the arrest. A suspicionless roadblock on a public right-of-way is permissible for a limited time and inquiry including obvious violations of tribal law. Affirmed in part, reversed in part, and remanded.

136. *High Desert Recreation, Inc. v. Pyramid Lake Paiute Tribe Of Indians*, No. 07-16254, 2009 WL 2371883 (9th Cir. Aug. 4, 2009). Not selected for publication in the Federal Reporter. High Desert Recreation, Inc. (HDR) appealed the dismissal for lack of subject matter jurisdiction of its action against the Pyramid Lake Paiute Tribe (Tribe), alleging breach of a lease of marina property within the Tribe's reservation. The court found that the attorney's fee provision in the lease between HDR and the Tribe did not amount to a unambiguous waiver of the Tribe's immunity because it did not identify a venue or a jurisdiction in the event of a suit. As a result, it was unclear whether the provision referred to suits brought before federal courts, or to suits brought before the Tribal Court, which has civil and criminal jurisdiction of all persons, including non-Indians acting within the exterior boundaries of the reservation. In addition, both Supreme Court precedent and that of the 9th Circuit hold that Indian tribes enjoy sovereign immunity from suits on commercial contracts, whether made on or off a reservation, so long as the subject business activity functions as an arm of the tribe. Since (a) the Tribe is a party to the lease alleged in this case, (b) the lease contemplates the use of marina property owned by the Tribe and is located on the tribal reservation, (c) economic advantages of both the lease and the operation of HDR's business inure to the Tribe's benefit, and (d) immunity under the lease protects the Tribe's treasury from HDR's suit for over one million dollars in compensatory and punitive damages, the business transacted via the lease is properly deemed an activity of the Tribe for sovereign-immunity purposes. Finally, the court did not read a grant of subject matter jurisdiction into 25 C.F.R. § 162. Dismissed.

137. *Liska v. Macarro*, No. 08-CV-1872, 2009 WL 2424293 (S.D. Cal. Aug. 5, 2009). Before the Court were Petitioner Joseph Liska's motion for default judgment and Respondent Donna Baron's motion to dismiss Petitioner's petition for writ of habeas corpus pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(2), and 12(b)(6). Petitioner Joseph Liska alleged he is a descendant of the Pechanga Band of Mission Luiseño Mission Indians (Tribe). Petitioner attempted to enter to the Pechanga Indian Reservation (Reservation) without prior permission from the Tribe. Mr. Liska allegedly made false statements to the ranger on duty at the reservation entrance, claiming he was lost and sought to promptly turn around his vehicle and leave. After passing the ranger post, Petitioner continued into the reservation and did not turn his vehicle around until a ranger stopped him. The Tribal Council of the Pechanga Band found that these actions constituted trespass and public nuisance and excluded Petitioner from the reservation pursuant to the Tribe's "Non-Member Reservation Access and Rental Ordinance" and informed Petitioner of his exclusion in a letter. Petitioner additionally alleged he attempted to enter the reservation to pray at his father's gravesite, but tribal rangers refused to let him enter the reservation. The rangers contacted the Riverside County Sheriff's Department, who dispatched a deputy to the scene. The deputy threatened to arrest Petitioner if he did not leave the reservation. Petitioner filed a "Complaint [for] Writ of Habeas Corpus" alleging Respondents illegally banished him from the Pechanga Band, in violation of the United States Constitution and the American Indian Civil Rights Act of 1968 ("ICRA"), 25 U.S.C. §§ 1301, 1302, and 1303. Petitioner also filed an affidavit in support of his complaint attaching: (1) the exclusion letter; and (2) a letter from the Pechanga Indian Reservation verifying Petitioner's application for enrollment to the Pechanga Band. Additionally, Petitioner requested the Court order respondents to provide him with "back pay he should have been receiving" during the membership moratorium period. This "back pay" allegedly consists of "per capita payments" and revenue from "trust land," both of which are "paid to all other members of the Pechanga Band." The Court granted Respondent's motion to dismiss the petition for lack of personal

jurisdiction under Fed.R.Civ.P. 12(b)(2), and alternatively for failure to state a claim under Rule 12(b)(6). The Court dismissed the petition with prejudice.

138. *U.S. v. George*, No. 08-30339, 2009 WL _____ (9th Cir. Aug. 25, 2009). Appellant Phillip W. George was convicted of sexual abuse of a minor on an Indian reservation, served his sentence, then failed to register as a sex offender pursuant to the Sex Offender Registration and Notification Act (SORNA), 18 U.S.C. § 2250. George was convicted of the SORNA offence in 2008 and contends on appeal that his conviction is invalid because Washington State, where he was required to register, had not implemented SORNA. SORNA's registration requirement is part of the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. 109-248. By interim rule, the U.S. Attorney General clarified that SORNA applies to all sex offenders regardless of when they were convicted. 72 Fed. Reg. 8894 (Feb. 28, 2007). Here, George was required to register as a sex offender even before the enactment of SORNA. The SORNA statute does not exceed Congress's Commerce Clause powers. Because he was under a continuing obligation to register, SORNA's application to Mr. George does not violate the Ex Post Facto Clause of the U.S. Constitution. Affirmed.

K. SOVEREIGNTY, TRIBAL INHERENT

139. *Garcia v. Gutierrez*, No. 26,484. 2008 WL 4146803 (N.M. Ct. App. July 8, 2008). This case was before the appellate court on appeal from a partial final order pursuant to a divorce between Angelina Garcia and Matthew Gutierrez. Gutierrez, a member of the Pueblo of Pojoaque, argued that the district court lacked subject matter jurisdiction over the issues raised in the petition as a matter of state law and that, even if the district court did have such jurisdiction under state statutes, its exercise of jurisdiction was improper as a matter of federal Indian law. The appellate court concluded that the district court had jurisdiction over those issues raised in the petition for dissolution of marriage that were unrelated to child custody, and affirmed the district court's order as to those issues. The question of the district court's subject matter jurisdiction over the custody dispute required the Court to determine whether land owned in fee by a non-Indian within the exterior boundaries of a pueblo is considered part of a "tribe" for purposes of determining the "home state" of a child under the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), NMSA 1978, Sections 40-10A-101 to -403 (2001). The appellate court concluded that such land is part of the tribe as that term is used in the UCCJEA, and held that the district court erred in concluding that the children in the case had no home state and in finding that it, rather than the tribal court, had jurisdiction. Accordingly, the appellate court reversed the district court as to the custody matters and remanded so that those claims may be dismissed.

140. *Meyer and Associates Inc. v. Coushatta Tribe of Louisiana*, No. 2007-CC-2256 (La. Sept. 29, 2008). Indian tribe filed suit in tribal court against engineering firm for damages related to various contracts concerning electric power plant. Subsequently, firm filed suit in district court against tribe for breach of contract. The district court, denied tribe's exceptions of *lis pendens* and lack of subject matter jurisdiction. Tribe filed writ application. The appellate court, 965 So. 2d 930, granted writ and ordered a stay to allow tribal court to decide whether tribe had waived its sovereign immunity. Granting certiorari, the Supreme Court held that: (1) district court could entertain issue of whether or not it had subject matter jurisdiction, as opposed to staying the matter in accordance with exhaustion of tribal remedies doctrine to allow tribal court to decide whether tribe had waived its sovereign immunity; (2) resolution of tribal

council gave chairman authority to waive tribe's sovereign immunity with respect to disputes arising under agreements related to power plant; and (3) district court could decline to stay matter to allow tribal court to determine if it had jurisdiction over the non-Indian party and, if so, to decide merits of case. Reversed and case remanded.

141. *U.S. v. Crow Feather*, No. 1:08-053, 2008 WL 4534222 (D.N.D. Oct. 3, 2008). Before the Court was the Defendant's Motion to Dismiss. Defendant, Louis Hepi Crow Feather, was indicted in federal court for possession of marijuana with intent to distribute, in violation of 21 U.S.C. § 841(a)(1). The indictment alleged that Crow Feather knowingly and intentionally possessed with intent to distribute approximately 640 grams of marijuana, a Schedule II controlled substance. Crow Feather contended that the court should dismiss the action because possession of marijuana with intent to distribute is an offense that is expressly prohibited by 18 U.S.C. § 1152 and is not an offense set forth in 18 U.S.C. § 1153. Crow Feather contended that, pursuant to 18 U.S.C. § 1152, he could not be prosecuted in federal court for possession of marijuana with intent to distribute because he already had been prosecuted and punished for the same crime by the Standing Rock Sioux Tribal Court. Crow Feather cited a criminal judgment from the Standing Rock Sioux Tribal Court which indicated that he pled guilty to criminal possession of a drug with intent to deliver or sell in violation of § 801 D of the Standing Rock Sioux Tribe Code of Justice. Crow Feather was sentenced by the tribal court to 180 days of imprisonment. The court found that because 18 U.S.C. § 1152 does not restrict prosecution for a violation of 21 U.S.C. § 841(a)(1), and because Crow Feather need not have committed a crime set forth in 18 U.S.C. § 1153 to be prosecuted in federal court, Crow Feather's motion to dismiss was denied.

142. *Eaton v. Mail*, No. C08-5538, 2008 WL 4534367 (W.D. Wash. Oct. 7, 2008). Plaintiffs filed a complaint for declaratory judgment seeking a declaration that (1) the Quinault Indian Nation lacks either personal or subject matter jurisdiction over Plaintiffs, who are non-Indians residing off the reservation, to enter any form of grandparent visitation order; (2) Plaintiffs' constitutional rights of freedom of association, due process, and ex post facto protection are violated by applying changes in the law that occur during the pendency of the action, which are effectively applied retroactively; and (3) the various rulings of the Quinault Tribal Court are invalid and without effect, nunc pro tunc. Plaintiff Shila Eaton and Jordan Mail had a child M.M., now referred to as M.E, who was born July 27, 2001. Jordan, a member of the Quinault Indian Nation, died in an automobile accident. Jake Eaton, joined by Shila Eaton, both non-Indians, filed a Petition for Adoption of M.M (M.E.) in state superior court. A decree of adoption was entered. The Tribe contended that pursuant to the Indian Child Welfare Act (ICWA) and Washington Law (RCW 26.27.201), an adoption proceeding concerning an "Indian child" requires the parties to provide notice to the "Indian child's tribe," and the Tribe contends that it did not receive notice. Defendants, Michael and Francine Mail, are the paternal grandparents of the minor child, M.E., and are enrolled members of the Quinault Tribe who reside on the Quinault Indian Reservation. The last time the grandparents visited M.E. was February 2005, when M.E. was about three and one-half years old. Shila Eaton stated that in 2005 she did restrict Defendants Mail to short visits, in a public place, under close supervision because of a history of problems interacting with the Mail family and because of M.E.'s young age. The Mails sought visitation rights with M.E. by filing a Petition for "Grandparental Visitation" in the Quinault Tribal Court, and served the Eatons with the Petition. The Tribal Court entered final Findings of Fact and Conclusions of Law. The Eatons contended that the Tribal Court matter was "under advisement" for eighteen months; the Mails describe there being

“prolonged litigation.” The Eatons argued in Tribal Court that the Tribe had no jurisdiction over non-Indians who reside off-reservation. The Tribal Court ruled that Defendants Mail are allowed to take M.E. from his mother’s custody every Saturday, without restrictions, for an unspecified duration of time. The Eatons filed two motions for reconsideration, which were denied by the Tribal Court. Shila and Jake Eaton moved in the case for a protective order to maintain the status quo of no visitation until the jurisdictional issues have been resolved. The court denied Plaintiffs’ Motion for a Protective Order, construed as a motion for injunctive relief to maintain the status quo, and dismissed the cause of action for failure to exhaust Quinault Tribal Court remedies.

143. *BNSF Ry. Company v. Ray*, No. 07-15076, 2008 WL 4710778 (9th Cir. Oct. 27, 2008). Defendants Delbert W. Ray, Sr., Chief Judge of the Hualapai Tribal Court, and Jolene Cooney, tribal court clerk, appealed from the district court’s order permanently enjoining them from taking any further action in a wrongful death suit filed in tribal court by the decedents of automobile passengers against BNSF Railway Company and two of its employees. The appellate court affirmed.

144. *Southwest Casino and Hotel Corp. v. Flyingman*, No. Civ-07-949-C, 2008 WL 4816516 (W.D. Okla. Oct. 27, 2008). Plaintiff filed a complaint alleging conversion, copyright infringement, tortious interference with contract, defamation, conspiracy, and conspiracy in violation of the federal RICO act. The claims were stayed pending resolution of a declaratory judgment action in the Cheyenne-Arapaho Tribal Court regarding ownership of casino surveillance video footage. Defendants filed a notice of the Tribal Court judgment along with a motion to lift the stay and for summary judgment. Based on a stipulated agreement between the parties, the Tribal Court found that the surveillance camera footage was owned by the Tribes. Defendants argued that, because of the Tribal Court’s judgment, Plaintiff could not prove the elements required for its claims for copyright infringement or violation of RICO. Therefore, Defendants requested the court enter summary judgment on their behalf on these two claims. Defendants also requested the court to reinstitute the stay with respect to the remaining four claims in order to give Plaintiff the chance to initially adjudicate those claims in Tribal Court. The same day that Plaintiff filed a response to Defendants’ motion to lift the stay and for summary judgment, Plaintiff also filed a motion to dismiss five of its claims without prejudice. Rather than responding to the merits of Defendants’ motion for summary judgment, Plaintiff’s response simply stated that the motion is moot because of its motion to dismiss. Plaintiff argued that the Tribal Court judgment effectively precluded its ability to assert its claims for conversion, copyright infringement, conspiracy, and conspiracy in violation of the federal RICO act. Furthermore, because Plaintiff’s claim for tortious interference with contract appears to implicate tribal affairs, Plaintiff agreed that it should be pursued, if at all, in Tribal Court. In Plaintiff’s response to Defendants’ motion to lift the stay and for summary judgment, Plaintiff argued that the doctrine of tribal exhaustion does not apply to its claim for defamation because the acts complained of did not occur on tribal property and were reasonably likely to cause harm to non-Indians outside the territorial confines of the Tribes. Therefore, Plaintiff requested that the court dismiss its claims for conversion, copyright infringement, tortious interference with contract, conspiracy, and conspiracy in violation of RICO without prejudice. Plaintiff further requested that the court proceed with its claim for defamation. The court found that Defendants’ motion for summary judgment raised a substantive challenge to Plaintiff’s claims. Plaintiff made no effort to meet the challenge raised by Defendants. The court denied Plaintiff’s motion to

dismiss. Plaintiff was given ten days to respond to the substantive allegations of Defendants' motion for summary judgment, should it choose to do so.

145. *Amerind Risk Mgmt. Corp. v. Malaterre*, No. 4:07-CV-059, 2008 WL 4899632 (D.N.D. Nov. 14, 2008). Administrator of self-insurance risk pool that insured federally subsidized Indian housing owned and operated by Indian tribes brought action against tribe members, seeking a declaratory judgment that administrator was not subject to a direct action, and seeking to enjoin the tribe members from proceeding with underlying wrongful death and personal injury action in tribal court against administrator. Parties cross-moved for summary judgment. The district court held that administrator entered into consensual relationship with Indian tribe, as required for tribal court to exercise jurisdiction over administrator in the underlying action. Summary judgment for defendants.

146. *PacifiCorp v. Real Bird*, No. CV-07-14, 2008 WL 5100945 (D. Mont. Dec. 3, 2008). PacifiCorp filed an action seeking declaratory and injunctive relief from an action for alleged trespass and violations of the American Indian Agricultural Resources Management Act (AIARMA) brought against it in Crow Tribal Court by the Real Birds. Pending before the court were PacifiCorp's Motion for Summary Judgment Re: Jurisdiction and the Real Birds' Motion to Dismiss. PacifiCorp owns and operates three high-voltage electric transmission lines located in Big Horn County, Montana. The transmission lines were built in 1957 across the Crow Indian Reservation on a federally approved 50-year right-of-way granted to PacifiCorp's predecessor, Pacific Power and Light. The 50-year right-of-way was granted subject to renewal. The Real Birds are the beneficial owners of two allotments. One of the high-voltage transmission lines owned by PacifiCorp crosses a portion of the Real Bird allotments on a 50-year right-of-way granted May 16, 1957. In 2006, PacifiCorp entered a right-of-way renewal agreement with the Crow Tribe, and negotiated additional individual agreements with approximately 1,500 individual allottees. The Real Birds did not consent to the right-of-way renewal. PacifiCorp filed an action to condemn the right-of-way across the Real Bird allotments that expired on May 15, 2007. The Real Birds filed a trespass action in Crow Tribal Court against PacifiCorp. Subsequently, the Crow Tribal Chairman approved a bill passed by the Crow Tribal Legislature, that authorized the Crow Tribe and Crow Tribal members "to enforce and protect in Crow Tribal Court their grazing and trespass rights on trust property [and] to bring challenges to trespasses upon their respective agricultural lands to the Crow Tribal Court, where such challenges may be litigated and resolved in accordance with the provisions of 25 C.F.R. Part 166, Subpart I" PacifiCorp filed this action, seeking a preliminary and permanent injunction against the Crow Tribal Court trespass action, and a declaration that the Crow Tribal Court lacks jurisdiction over PacifiCorp. The court found that in light of the court's prior ruling in the closely related condemnation action, *PacifiCorp v. Real Bird*, et al., CV-06-122, the Tribal Court lacks jurisdiction over matters already at issue in the condemnation action and the Crow Tribal Court is not an indispensable party under Fed.R.Civ.P. 19(a). The court granted PacifiCorp's Motion for Summary Judgment and denied the Real Birds' Motion to Dismiss.

147. *Francis v. Dana-Cummings*, No. WAS-08-223, 2008 WL 5173182 (Me. Dec. 11, 2008). Alleged owner of private residence on Indian tribe's reservation brought claims against executive director of tribal housing authority for violation of Maine Civil Rights Act, trespass, and illegal eviction, and executive director filed third-party complaint against authority. The superior court, 2002 WL 32068355, granted authority's motion to dismiss third-party complaint and *sua sponte* dismissed underlying complaint based on failure to state a claim and lack of

subject matter jurisdiction. Alleged owner appealed. The Supreme Judicial Court issued opinions, 840 A.2d 708, 868 A.2d 196, and 915 A.2d 412, vacating and affirming various trial court rulings and remanded case. On remand, the superior court entered summary judgment in favor of executive director, tribe, and authority. Alleged owner appealed. The Supreme Judicial Court held that dispute was internal tribal matter over which tribe and tribal court had exclusive jurisdiction not subject to regulation by the state. Affirmed.

148. *Martinez v. Martinez*, No. C08-5503, 2008 WL 5262793 (W.D. Wash. Dec. 16, 2008). This matter was before the court on motions of Defendants Helen Martinez and the Suquamish Tribe to dismiss Plaintiff's complaint for declaratory and injunctive relief. The Defendants asserted that because Plaintiff had failed to exhaust tribal court remedies, the District Court lacked jurisdiction to determine whether the Suquamish Tribe had jurisdiction to enter an order of protection against Plaintiff and to act upon a dissolution petition filed by Defendant Helen Martinez. A husband was not required to exhaust tribal remedies before challenging tribal jurisdiction over the dissolution of marriage and child custody in federal district court. The husband was a non-member of the tribe, and the wife was an Alaska Native Indian, but was not a member of the tribe asserting jurisdiction. The family domicile was on fee land, their domestic disputes and dissolution proceeding were distinctly non-tribal in nature and could not have been considered to have intruded on the internal relations of the tribe or threatened self-rule, and the dissolution proceeding and domestic relations between the husband and wife did not fall within the rubric of directly affecting the health and welfare of the tribe. The District Court denied the motion to dismiss and found that the Suquamish Tribe lacks jurisdiction to enter protective orders and act upon the dissolution petition regarding these non-members of the Suquamish Tribe.

149. *Dolgen Corp., Inc. v. The Mississippi Band of Choctaw Indians*, No. 4:08CV22, 2008 WL 5381906 (S.D. Miss. Dec. 19, 2008). This cause was before the court on the separate motions of plaintiffs Dollar General Corporation and Dolgen Corp., Inc. (Dolgen) and of Dale Townsend, for temporary restraining order and preliminary injunction to enjoin all defendants from taking any further steps in the prosecution of the Doe defendants' pending lawsuit against them in the Tribal Court of the Mississippi Band of Choctaw Indians. Plaintiff Dolgen operates a Dollar General store on trust land on the Choctaw Indian Reservation in Choctaw, Mississippi. Dolgen occupies the premises pursuant to a lease agreement with the Mississippi Band of Choctaw Indians (the Tribe) and a business license issued by the Tribe. The Tribe requested that Dolgen allow a juvenile tribe member to be placed at its store under a tribally implemented Youth Opportunity Program. Dolgen agreed, and allowed John Doe, a minor, to be placed in the store. Doe and his parents subsequently charged that, Townsend, the manager, molested the minor John Doe while Doe was working there. Based on the Does' allegation, counsel for the Tribe met with Townsend and advised the Tribe would be seeking an order of exclusion from the Tribal Court to permanently bar Townsend from coming onto the reservation for any purpose. Townsend agreed he would consent to entry of such an order, allegedly based on representations by the Tribe's counsel that no further legal proceedings would be brought against him based on John Doe's allegations. However, Doe and his parents filed suit in the Choctaw Tribal Court against Townsend, and against Dollar General and Dolgen seeking to recover actual and punitive damages. The Tribal Court concluded that it had jurisdiction over the Does' complaint. The ruling was appealed to the Tribal Supreme Court, and was affirmed. Once the issue of tribal jurisdiction was exhausted in the tribal court system, Dolgen and Townsend brought the present action in this court seeking a determination that there is no tribal jurisdiction over the Does'

complaint. The Court found that there is no conceivable basis upon which the Tribal Court may exercise jurisdiction over the claims against Townsend, permanently enjoined all defendants from further proceeding against him in the Tribal Court, denied Dolgen's motion for temporary restraining order and/or preliminary injunction, and enjoined defendants from further proceeding on their claims against him in the Tribal Court.

150. *Cossey v. Cherokee Nation Enterprises, LLC*, No. 105300, 2009 WL 146685 (Okla. Jan. 20, 2009). Non-Indian customer injured at Indian casino brought personal injury action against limited liability company (LLC) organized by Indian Tribe to run the casino. The district court denied motion by Indian Tribe's LLC to dismiss for lack of subject matter jurisdiction, and Indian Tribe's LLC filed petition for writ of certiorari. After granting the petition, the Supreme Court held that: (1) Indian Tribe was a party to customer's personal injury action; (2) Indian Civil Rights Act (ICRA) was not an impediment to state court jurisdiction over the action; (3) neither the Indian Gaming Regulatory Act (IGRA) nor Indian Tribe's tribal gaming compact with State of Oklahoma enlarged Tribal jurisdiction to include the action; and (4) state court had jurisdiction, as customer had not entered into a consensual relationship with the Tribe and customer's presence at the casino did not have a direct impact on the Tribe's political integrity. Affirmed in part, reversed in part, and remanded.

151. *Crowe & Dunlevy, P.C. v. Stidham*, No. 09-CV-095, 2009 WL 1100477 (D. Okla. Apr. 24, 2009). Law firm that represented Indian tribe in tribal court brought action against tribal court judge, seeking a judgment declaring that tribal court did not have jurisdiction over firm, did not have jurisdiction over tribe's expenditure of its governmental funds to firm, did not have jurisdiction over agreements entered between tribe and firm, and did not have jurisdiction to order firm to return all attorney fees paid from tribal treasury. Law firm moved for preliminary injunction, and judge moved to dismiss. The district court held that: (1) judge did not have judicial immunity; (2) judge did not have tribal sovereign immunity; (3) joinder rule did not require dismissal of the action; (4) venue in the District Court for the Northern District of Oklahoma was proper; (5) firm satisfied requirements for a preliminary injunction; and (6) bond was not required in connection with issuance of the preliminary injunction. Judge's motion denied, and law firm's motion granted.

152. *Sweet v. Hinzman*, No. C08-844JLR, 2009 WL 1175647 (D. Wash. Apr. 30, 2009). Petitioners sought relief against respondents for three violations of ICRA that they allege occurred when respondents banished petitioners from the Tribe on April 27, 2008: (1) denial of due process for banishment without adequate formal notice and without an opportunity for a hearing; (2) denial of equal protection for banishment without equal application of the laws; and (3) denial of the right to confront and offer witnesses for banishment without the opportunity to confront opposing witnesses and offer favorable witnesses. Petitioners raised these claims in a petition for a writ of habeas corpus, which was filed in May 2008. Petitioners sought an order setting aside and vacating the banishment, and restoring to Petitioners such rights as they had prior to the initiation of the banishment action on April 8, 2008. The court found a violation of Petitioners' rights to due to process under ICRA, and granted the petition and issued the writ. The court ordered that petitioners will remain socially banished for ninety (90) days following the date of this order to allow Respondents time to determine whether they wish to pursue full banishment against Petitioners.

153. *Elliott v. White Mountain Apache Tribal Court*, No. 07-15041, ___ F.3d ___, 2009 WL 1331858 (9th Cir. May 14, 2009). Non-Indian brought action against Native American Tribal Court, Tribal Judge, and Tribe, seeking injunctive and declaratory relief against defendants and from conducting any further proceedings in tribal court. The district court, 2006 WL 3533147, dismissed the action and non-Indian appealed. The appellate court held that: (1) district court's decision was final; (2) request for interlocutory appeal before tribal appellate court did not fully exhaust tribal remedies; and (3) tribal jurisdiction was not plainly lacking. Affirmed.

154. *Philip Morris USA, Inc. v. King Mountain Tobacco Co., Inc.*, No. 06-36066, ___ F.3d ___, 2009 WL 1622338 (9th Cir. June 11, 2009). Cigarette maker brought action against tribal corporation selling cigarettes alleging various federal and state law claims, including trademark infringement, and seeking injunctive relief against tribal corporation's continued sale of its products. After the tribal corporation brought an action for declaratory relief against cigarette maker in tribal court, the district court granted tribal corporation's request to stay the proceedings pending the tribal court's determination of its jurisdiction. Cigarette maker appealed. The appellate court held that tribal court did not have colorable jurisdiction over tribal corporation's action for declaratory relief. Reversed and remanded.

155. *Absentee Shawnee Tribe of Oklahoma v. Combs*, No. Civ-09-0091, 2009 WL 1752412 (W.D. Okla. June 18, 2009). In this action the Absentee Shawnee Tribe of Oklahoma and the Thunderbird Entertainment Center, Inc., a corporation organized under the laws of the Tribe and owned by the Tribe, asked the court to enjoin proceedings in a civil state court action pending before the District Court of Pottawatomie County, State of Oklahoma, as *Bittle v. Bahe*. Each defendant moved separately for dismissal under Fed.R.Civ.P 12(b)(1) and 12(b)(6), challenging the court's jurisdiction and the facial sufficiency of the complaint. *Bittle v. Bahe* is a negligence action brought by Shantona Bittle, who was injured in a car collision with Valentine Bahe. Bittle alleged the that collision occurred because Thunderbird Entertainment Center employees negligently served excessive amounts of alcohol to Bahe at the Thunderbird Entertainment Center, which is located on tribal land. The Absentee Shawnee Tribe of Oklahoma, the Thunderbird Entertainment Center, and Bahe are defendants in *Bittle v. Bahe*. District Court Judge Combs concluded that the state district court lacked subject matter jurisdiction over the controversy due to the Tribe's and the Thunderbird Entertainment Center's tribal sovereign immunity and dismissed *Bittle v. Bahe*. On appeal the dismissal was affirmed. On appeal to the Oklahoma Supreme Court, the order of dismissal was reversed, the Court concluding that the district court of Pottawatomie County had jurisdiction because the Tribe and the Thunderbird Entertainment Center had no immunity with respect to Bittle's negligence claim. Following these events, the federal action was brought by the Tribe and the Thunderbird Entertainment Center alleging that Judge Combs and the County District Court were attempting to exercise jurisdiction over the Tribe and The Thunderbird Entertainment Center in *Bittle v. Bahe*, but that only the Absentee Shawnee Tribal Court has jurisdiction over that dispute. The federal district court granted the motions to dismiss and the action was dismissed with prejudice.

156. *Attorney's Process and Investigation Services, Inc. v. Sac & Fox Tribe of the MS in IA*, No. 05-CV-168, 2009 WL 1783497 (N.D. Iowa June 18, 2009). Before the court were defendant's Motion to Dismiss and plaintiff's Summary Judgment Motion. The Sac & Fox Tribe of the MS in IA's Tribal Council filed a tort action on behalf of the Tribe against Attorney's Process and Investigation Services, Inc. (API) in Tribal Court. The Tribe alleged

trespass to land, trespass to chattel, theft of tribal funds and misappropriation of trade secrets. API filed a motion to dismiss in the Tribal Court claiming that court lacked subject matter jurisdiction. API then filed a complaint in federal district court alleging the Tribe breached a contract and asked the court to bar the Tribe's lawsuit in the Tribal Court and to compel arbitration. The federal court stayed its action pending exhaustion of remedies in the Tribal Court. The Tribal Court entered an order denying API's motion to dismiss, concluding it could exercise civil jurisdiction over API. That order was affirmed by the Tribal Appellate Court. The Tribal Court stayed its proceedings pending the federal court's resolution of issues related to the Tribal Court's exercise of civil jurisdiction over API. The federal court granted API's Motion to Reopen and lifted its stay and then concluded the Tribal Court's exercise of civil jurisdiction over API was proper and granted the motion to dismiss.

157. *Kirbie-Orozco v. Yankton Sioux Tribe Election Bd.*, No. Civ. 09-4104, 2009 WL 2058367 (D.S.D. July 15, 2009). A complaint and motion for a temporary restraining order were filed by Plaintiff Kirbie-Orozco. Plaintiff asked the court to "stop [the] Yankton Sioux Tribe election process," beginning with the primary scheduled for July 23, 2009. The complaint also asked the court to intervene in the tribal election to permit her to run for Tribal Chairperson. The court found that it has no subject matter jurisdiction over the intra-tribal matter and denied plaintiff's motion for a temporary restraining order and dismissed for lack of subject matter jurisdiction.

L. TAX

158. *Confederated Tribes of Chehalis Reservation v. Thurston County Bd. of Equalization*, No. C08-5562BHS, 2008 WL 4681630 (W.D. Wash. Oct 21, 2008). This matter was before the Court on Plaintiffs' Motion for a Preliminary Injunction. Plaintiffs Confederated Tribes of the Chehalis Reservation (Tribe) and CTGW, LLC, filed a complaint against Defendants Thurston County Board of Equalization; equalization board members John Morrison, Bruce Reeves and Joe Simmonds; Thurston County Assessor Patricia Costell; and Thurston County. Plaintiffs alleged that Defendants violated the U.S. Constitution as well as federal common law by imposing a personalty tax on Plaintiffs' facility, the Great Wolf Lodge. Plaintiffs also filed a Motion for Preliminary Injunction requesting that the Court issue an injunction to "enjoin Defendants from: (1) seeking to collect, collecting, or enforcing the collection of the personalty tax against Plaintiffs; and (2) proceeding to further litigate the case of *CTGW, LLC v. Patricia Costello, Thurston County Assessor*, No. 07-1110." The Tribe purchased 43 acres that was subsequently converted to non-contiguous federal trust property and is currently held in trust by the United States for the benefit of the Tribe. In 2005, the Tribe and Great Wolf Resorts Inc., a non-Indian corporation with water park expertise, formed a limited liability company, CTGW, LLC, under Delaware law, for the purpose of building and owning Great Wolf Lodge Grand Mound (Lodge). The Lodge is located on 39 of the 43 acres that are held in trust for the Tribe. The Tribe leases the property to CTGW. Under the CTGW LLC operating agreement, the Tribe has a majority "proportionate share" of CTGW's profits of 51%, and Great Wolf receives the remaining 49% of CTGW's profits. Plaintiffs claim that "[u]nder this unique structure, the Tribe is both the owner-lessor of the property and the majority-interest owner of the lessee." The Court found that Plaintiffs failed to show either that they will suffer irreparable injury or that the balance of hardships tips sharply in their favor and denied Plaintiffs' request for a preliminary injunction.

159. *United States v. Morrison*, No. 04-CR-699, 2009 WL 320333 (D.N.Y. Feb. 6, 2009). After jury found defendant guilty of Racketeer Influenced and Corrupt Organizations Act (RICO) conspiracy and being a felon in possession of a firearm, defendant filed motion to dismiss or for new trial. The district court held that: (1) defendant's alleged violations of the Contraband Cigarettes Trafficking Act (CCTA) in connection with his alleged sale of cigarettes lacking valid New York State tax stamps while operating retail cigarette business on Indian reservation could serve as predicate acts under RICO; (2) government was not barred from changing its theory of case for RICO conspiracy counts by arguing that predicate acts were on-reservation sale of unstamped cigarettes; (3) CCTA provision barring sale of cigarettes lacking tax stamp required by state law was not unconstitutionally vague; (4) application of the CCTA provision to defendant was not arbitrary, in violation of substantive due process; (5) application of CCTA provision to defendant was not result of selective enforcement, in violation of equal protection; (6) lack of scienter requirement the CCTA provision did not make the statute unconstitutionally vague; (7) tax attorney who advised defendant was not the equivalent of an authorized state official for purposes of entrapment by estoppel; and (8) evidence was sufficient to support the felon in possession conviction.

160. *White Earth Band of Chippewa Indians v. County of Mahnommen, Minnesota*, No. 07-3962, 605 F. Supp. 2d 1034 (D. Minn. Mar. 24, 2009). Indian tribe that owned casino brought action against county and county officials, alleging that the collection of real property taxes on casino property was unlawful, and seeking a refund of such taxes. County moved to dismiss certain claims on sovereign immunity grounds, and parties cross-moved for summary judgment. The District Court, held that: (1) money damages claim was barred by Eleventh Amendment; (2) claims for injunctive and declaratory relief were not barred by the Eleventh Amendment; (3) District Court would not abstain under Younger; (4) District Court would not abstain under Colorado River; and (5) White Earth Lands Settlement Act (WELSA) precluded county in Minnesota from assessing and collecting taxes on casino property. Motions granted in part, and denied in part.

161. *Barrett v. U.S.*, No. 08-6017, __ F.3d __, 2009 WL 903385 (10th Cir. Apr. 6, 2009). Native American Tribe member brought action against United States, seeking refund of federal income taxes, penalties, and interest paid on compensation for services rendered as tribal chairman. The district court entered summary judgment for U.S., and member appealed. The appellate court held that compensation paid to member was not exempt from federal income taxation. Affirmed.

162. *Idaho ex rel. Wasden v. Native Wholesale Supply Co.*, No. 08-CV-396, 2009 WL 940731 (D. Idaho Apr. 6, 2009). Pending before the Court were: (1) Defendant's Motion to Dismiss for Lack of Jurisdiction and (2) Plaintiffs' Motion to Remand to State Court. Defendant, Native Wholesale Supply Company (NWS) is owned by Arthur Montour, a member of the Seneca Nation. NWS is located on the Seneca Nation of Indians Territory in New York and chartered by the Sac and Fox Tribe of Oklahoma. NWS buys cigarettes from Grand Rivers Enterprises Six Nations, Ltd. (Grand Rivers), which is located on a Canadian reservation and owned by tribe members. NWS then sells the cigarettes to Native American tribes or entities owned by members and located on tribal land. The only person or entity NWS sells to within the borders of Idaho is owned by the Coeur d'Alene Tribe and located on trust land. The Idaho State Tax Commission and Idaho Attorney General, filed a Complaint against NWS and twenty John Does in the Idaho District Court of Ada County. It alleged NWS sold over 90 million cigarettes

in Idaho that are not on the compliant cigarette directory, violating Idaho Code § 39-8403(3)(c), an Ada County District Court injunction that prohibiting Grand Rivers from selling cigarettes in Idaho, the Idaho Consumer Protection Act, and the Idaho Cigarette Tax Laws, I.C. § 63-2503(1). NWS removed the case from the Ada County District Court to federal district court under 28 U.S.C. § 1441. Idaho moved to remand the case to state court for lack of subject matter jurisdiction. The court granted Plaintiffs' Motion to Remand to State Court and ordered Defendant to pay just costs any actual expenses, including attorney fees, caused by the Notice of Removal on the condition that Plaintiffs establish the amount pursuant to Dist. Idaho Loc. Civ. R. 54.1 and 54.2 by April 21, 2009.

163. *Calpine Const. Finance Co. v. Arizona Dept. of Revenue*, No. 1 CA-TX 07-0012, __ P.3d __, 2009 WL 1014583 (Ariz. Ct. App. Apr. 16, 2009). Taxpayer, which leased from Indian tribe land located on Indian reservation to construct and operate electric power generating plant with related improvements, filed suit against Department of Revenue and county to seeking refund of property taxes assessed on improvements and personal property. Parties filed cross-motions for summary judgment. The Arizona Tax Court granted summary judgment to defendants. Taxpayer appealed. The appellate court held that: (1) taxpayer, rather than tribe, owned improvements, and, thus, state could impose property tax on taxpayer as owner of improvements, and (2) exception to general rule that memorandum decisions shall not be regarded as precedent or cited in any court that exists when collateral estoppel applies did not apply to permit taxpayer's citation to two unpublished memorandum decisions. Affirmed.

164. *Smith v. Shulman*, No. 08-1896, 2009 WL 1689109 (2nd Cir. June 17, 2009). Not selected for publication in the Federal Reporter. Plaintiff-appellant Jonathan K. Smith (Smith) appealed from the judgment of the district court dismissing for lack of subject matter jurisdiction, a complaint against the defendant-appellee United States Commissioner of Internal Revenue. Smith sought a refund, injunctive relief, and a declaration that the Internal Revenue Service illegally assessed taxes, penalties, and interest on income that Smith, a member of the Shinnecock Indian Nation, earned on the Shinnecock Indian Reservation in tax year 2000. The appellate affirmed the judgment of the district court dismissing the action for lack of subject matter jurisdiction.

165. *Ho-Chunk Nation v. Wisconsin Dept. of Revenue*, No. 2007AP1985, __ N.W. 2d __, 2009 WL 1663882 (Wis. June 16, 2009). Ho-Chunk Nation appealed from decision of Tax Appeals Commission affirming Department of Revenue's denial of Tribe's claim for partial refund of cigarette taxes in respect to sales on reservations or trust lands. The Circuit Court affirmed and Tribe appealed. The Appellate Court, 754 N.W. 2d 186, affirmed. Tribe petitioned for review. The Supreme Court held that: (1) the phrase "was designated a reservation or trust land," in statute authorizing refunds for cigarette taxes provided the tax was collected on sales made on land that was designated a reservation or trust land on or before January 1, 1983, refers to the applicable formal process that must occur in order for land to be a reservation or trust land, and (2) land not formally accepted by the United States government until January 31, 1983, was not designated a reservation or trust land on or before January 1, 1983, and thus tribe was not entitled to refund. Decision of Court of Appeals affirmed.

166. *Keweenaw Bay Indian Community v. Rising*, No. 08-1585, 569 F.3d 589 (6th Cir. June 26, 2009). Tribe brought action against state, state treasury officials, and secretary of state, seeking declaratory and injunctive relief from the State's collection of sales and use taxes

on transactions involving tribe or its members, and asserting § 1983 claim that State's offset of federal funds violated various constitutional and statutory rights. The district court, 546 F. Supp. 2d 509, granted summary judgment for the State. Tribe appealed. The appellate court held that: (1) tribe's request for declaration concerning its tax immunities did not present justiciable question; (2) tribe's claim for declaration that Michigan tax policy was invalid was unripe; (3) issue of whether treaty affected Michigan's collection of sales and use taxes was not properly before the Court; (4) but remand was warranted to determine if tribe was person under § 1983. Affirmed in part, vacated in part, and remanded.

167. *Cayuga Indian Nation of New York v. Cayuga County Sheriff David S. Gould and Seneca County Sheriff Jack S. Stenberg*, No. 08-02582, 2009 WL 1981848 (N.Y. App. Div. July 10, 2009). This appeal presented two primary substantive issues. First, whether Tax Law § 471-e provides the exclusive means by which to tax cigarette sales on an Indian reservation to non-Indians or to Indians who are not members of that nation or tribe where the reservation is located (hereafter, non-member Indians), or whether Tax Law § 471 provides an independent basis for imposing a tax on such sales. Second, whether plaintiff's two convenience stores are located within a "qualified reservation" as that term is defined in Tax Law § 470(16)(a). The court agreed with plaintiff with respect to both issues, i.e., that § 471-e is the exclusive means for taxing such cigarette sales and that plaintiff's two stores are located within a qualified reservation. The court concluded that the judgment of Supreme Court (*Cayuga Indian Nation of N.Y. v. Gould*, 21 Misc. 3d 1142[A], 2008 N.Y. Slip Op 52478[U]) should be reversed.

M. TRUST BREACH AND CLAIMS

168. *Andrade ex rel. Goodman v. U.S.*, No. 05-3240, 2008 WL 4183011 (D. Ariz. Sept. 8, 2008). Before the Court was Plaintiff Ernest Andrade's motion for partial summary judgment. In an amended complaint, Plaintiff alleged that Child Protective Services (CPS) of the Colorado River Indian Tribe (Tribe) placed two minor children in his custody as a foster parent. Thereafter, the two minors allegedly sexually assaulted Anthony Goodman, who "suffered serious and permanent bodily injuries," as well as "pain, suffering, aggravating, inconvenience, mental and emotional distress . . ." that continues to this day. Plaintiff contended that the minors should have been under the care, control, and supervision of the Tribe's Social Services Department (Social Services), and that at the time the two minors were placed with Plaintiff by CPS, "Social Services knew, or should have known, that the minors had a history and propensity of acting out sexually," and thus "it was foreseeable that these minors would sexually assault another minor." Further, Plaintiff alleged that Social Services knew or should have known that Anthony Goodman, a minor, resided with Plaintiff, and thus would have been exposed to the two minors, but nonetheless failed to warn Plaintiff that the minors had a history and propensity of acting out sexually. Plaintiff contended that although "Social Services . . . had a duty to act safely and reasonably in placing [the two minors] in the Andrade home" and "to warn [Plaintiff] of [the minors] history and propensity of acting out sexually," Social Services breached that duty by allowing CPS to negligently place the two minors with Plaintiff. Plaintiff also contended that Social Services failed to follow its own "policies and procedures . . . that would have prevented the [two] foster children from being placed in the Andrade home and would have prevented the molestation of Anthony Goodman." In his amended complaint, Plaintiff contended that the Bureau of Indian Affairs (BIA) entered into a contract with the Tribe, under which "the BIA agreed to provide monies for law enforcement and investigative services to the Tribe and to monitor the Tribe's use of said funds in accordance with the Contract and

applicable law.” Plaintiff contended that “[b]y the terms of the Contract, for the purposes of the [FTCA], the Tribe and its employees are deemed to be employees of the Federal government while performing work under this Contract.” Defendant denied that the United States may be held liable under the FTCA. The court granted Plaintiff’s motion for partial summary judgment regarding the FTCA.

169. *Seneca v. United South and Eastern Tribes*, No. 08-11012, 2008 WL 4216874 (11th Cir. Sept. 16, 2008). Not selected for publication in the Federal Reporter. Dean Seneca, who was employed by the Agency for Toxic Substances and Disease Registry (ATSDR) appealed the district court’s order substituting the United States for the named defendants and dismissing his tort claims for failure to exhaust administrative remedies under the Federal Tort Claims Act. United South and Eastern Tribes (USET) is a non-profit organization that represents numerous American Indian tribes collectively. USET entered into a self-determination contract with the U.S. Department of Health and Human Services/Indian Health Service (HHS/IHS) to assist with health programs. In 2006, USET was asked to represent American Indian and Alaskan Native Tribes and testify before HHS’s Tribal Budget Consultation Session and the National Divisional Budget Formulation and Consultation Session. Prior to the budget meetings, Seneca attempted to contact employees at USET through phone calls, emails, and personal encounters to tell them what to include in their testimony. James Martin, then Executive Director of USET, wrote a letter to Seneca’s supervisor complaining about Seneca having contacted him and other USET employees inappropriately regarding the testimony. Seneca’s supervisor requested additional information and evidence, and USET supplied a second, more detailed letter about Seneca’s misconduct. Seneca’s job did not, apparently, require him to contact USET about the testimony, and the letter stated that his manner was also inappropriate and aggressive. As a result of the investigation into these complaints from USET, Seneca was officially reprimanded by his employer, removed from his position at the Office of Tribal Affairs, and reassigned to another division within ATSDR. Seneca filed this tort suit against USET, and three USET employees for making false statements disparaging him. Acting U.S. Attorney Sally Quillian Yates submitted a certification that the named defendants were acting in the scope of their employment as Federal Employees and stating this conclusion was reached after review of the Indian Self-Determination Agreement between the United States and USET and the declaration of Daretia Hawkins, an attorney for HHS, wherein Ms. Hawkins states her opinion that USET is a tribal contractor entitled to Federal Torts Claims Act (FTCA) coverage. The United States then filed a Notice of Substitution requesting that it be substituted as the defendant pursuant to the Federal Employees Liability Reform and Tort Compensation Act, 28 U.S.C. § 2679(d). The district court granted the substitution and then dismissed the case for failure to exhaust administrative remedies under the FTCA. The appellate court affirmed the district court’s substitution of the United States as the defendant and the subsequent dismissal of the case.

170. *Oenga v. United States*, No. 06-491L, 2008 WL 4323492 (Fed. Cl. Sept. 18, 2008). Owners of Alaska Native allotment brought suit against the United States alleging that the government breached its trust obligations in connection with a lease giving oil company the right to operate oil production facilities on the allotment. Lessee and working interest owners of oil and gas leases intervened as defendants. Plaintiffs filed motion for partial summary judgment, and government filed motion to dismiss, or in the alternative, for summary judgment. Intervenor filed motion for partial summary judgment. The Court of Federal Claims held that: (1) Indian Trust Accounting Statute (ITAS) was not applicable to claim that government

breached its trust obligations by failing to require or collect oil and gas royalties from oil company which held lease; (2) ITAS was not applicable to claim that government breached its trust obligations by failing to require or collect a fair annual rental from oil company; and (3) government had money-mandating duty to take action against violations of lease, and it breached that duty with respect to use of allotment for development and production of oil in participating area not encompassed by the lease. Plaintiffs' motion granted in part and denied in part; defendants' motions granted in part and denied in part.

171. *Yankton Sioux Tribe v. U.S.*, No. 05-1291, 84 Fed. Cl. 225 (Fed. Cl. Oct. 10, 2008). Indian tribe filed complaint against the United States alleging trust mismanagement and a failure to properly account for trust funds. Defendant filed motion to dismiss. The Court of Federal Claims held that statute precluding Court of Federal Claims from exercising jurisdiction over a claim against the United States when the same claim is pending in another court was applicable to divest the Court of jurisdiction over tribe's claim. Motion granted.

172. *Havasupai Tribe of the Havasupai Reservation v. Arizona Bd. of Regents*, No. 1 CA-CV 07_0454, and 1 CA-CV 07-0801, 2008 WL 5047641 (Ariz. Ct. App. Nov. 28, 2008). Indian tribe and individual members filed actions alleging state and federal claims against Arizona Board of Regents and others in connection with alleged misuse of members' blood samples. Following removal of actions to federal court, dismissal of federal claims, and remand of remaining claims to state court, defendants moved for summary judgment. The superior court, 2007 WL 1891490, entered summary judgment dismissing actions. Tribe and individual members appealed. The appellate court held that: (1) statutory requirement that notice-of-claim letter to a public entity contain "facts supporting" settlement demand does not require claimant to set forth facts sufficient to support the demand; (2) notice-of-claim letters from tribe and individual members met requirement of stating facts supporting settlement demands; (3) question of fact as to whether notices of tribe's cause of action were served within 180 days of date on which claims accrued precluded a summary judgment dismissing claims on limitations grounds; (4) general counsel for university and assistant Attorney General were appropriate legal officers representing Board of Regents on whom service of notice of tribe's claim could be effected; (5) notices of claims were not required to make separate settlement demands on each of the various alleged individual wrongdoers. Reversed and remanded.

173. *Osage Tribe of Indians of Oklahoma v. U.S.*, No. 99-550, __ Fed. Cl. __, 2008 WL 5377700 (Fed. Cl. Dec. 19, 2008). Headright owners, who had an interest in their pro rata share of the proceeds of Indian tribe's mineral estate, filed motion for leave to intervene in tribe's suit alleging that the United States violated its duty as trustee of the 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 the fiduciary duty owed to the tribe. The Court of Federal Claims held that: (1) group which proposed intervenors sought to represent was not an "identifiable group" under court's jurisdictional statute pertaining to Indian cases; (2) headright owners did not have a legally protectable interest, and therefore were not entitled to intervene as of right; and (3) permissive intervention was inappropriate. Motion denied.

174. *Ak-Chin Indian Cmty. v. U.S.*, No. 06-932, __ Fed. Cl. __, 2009 WL 141205 (Fed. Cl. Jan. 14, 2009). Before the court was Plaintiff's Motion to Compel and Memorandum in Support and responsive and reply documents. Plaintiff served two sets of production requests for document production ... and its first set of interrogatories on Defendant. Defendant

responded to plaintiff's discovery requests by "making documents available for inspection at the AIRR." The Court found that defendant's reliance on RCFC 34(b)(2)(E)(i) and RCFC 33(d) in order to justify its response to plaintiff's discovery requests is improper. The court found that in order to comply with the rule, defendant must specify the documents from which answers to plaintiff's interrogatories may be ascertained or derived and ordered that defendant shall comply with the court's December 5, 2008 Order.

175. *Samish Indian Nation v. U.S.*, No. 02-1383, 85 Fed. Cl. 525 (Fed. Cl. Jan 28, 2009). Indian tribe brought suit against the United States, seeking compensation for benefits it would have received under the Tribal Priority Allocation (TPA) system and the Indian Health Service (IHS) funding process if it had been properly recognized by the federal government during a nearly 28-year period. Following partial dismissal, 82 Fed. Cl. 54, tribe moved for entry of judgment. The Court of Federal Claims held that: (1) tribe's claims were not individual, cognizable claims, as required for entry of judgment, and (2) just reason existed for delaying entry of final judgment. Motion denied.

176. *Chippewa Cree Tribe of Rocky Boy's Reservation v. U.S.*, No. 02-6751, ___ Fed. Cl. ___, 2009 WL 349809 (Fed. Cl. Feb. 10, 2009). Indian tribes brought suit against United States seeking damages for mismanagement of judgment funds awarded by Indian Claims Commission. Proposed intervenors filed motion to intervene. The Court of Federal Claims held that: (1) interest of proposed intervenors, who had not been recognized as beneficiaries of compensation fund for ceded land, in gaining status as beneficiaries, was indirect or contingent, and thus was complete bar to granting intervention of right; (2) proposed intervenors did not hold interest that substantive law recognized as belonging to, or being owned by, them, as required to intervene as of right; (3) interest of proposed intervenors had not been impaired, as required to intervene as of right; (4) issue of whether existing parties adequately represented interest of proposed intervenors was not relevant to motion; (5) delay of 16 years in applying for intervention did not favor finding that intervention was timely; (6) existence of body of case law that addressed precise issue of contestations of tribal enrollment practices militated against existence of unusual circumstances that would have supported finding that motion to intervene as of right was timely; (7) prejudice to proposed intervenors by judgment in lawsuit would have been minimal at best; and (8) common question of law or fact did not exist, as required for permissive intervention. Motion denied.

177. *Wolfchild v. United States*, No. 2008-5018, ___ F.3d ___, 2009 WL 592459 (Fed. Cir. Mar. 10, 2009). Lineal descendants of Mdewakanton Sioux who were loyal to United States during 1862 Sioux Outbreak in Minnesota brought suit against United States for breach of fiduciary duty and contract in management of property originally provided for benefit of loyal Mdewakanton. The Court of Federal Claims, 62 Fed. Cl. 521, ruled that government had breached its fiduciary duties, and government filed interlocutory appeal. The appellate court held that: (1) Appropriations Acts did not create trust for benefit of loyal Mdewakanton and their lineal descendants; (2) Act that transferred United States' interest in land purchased with funds from Appropriations Acts terminated any trust relationship created by Appropriations Acts; and (3) Congress's change in identity of beneficiaries of Indian trust lands did not constitute compensable taking. Reversed and remanded.

178. *Elk v. United States*, No. 05-186L, 2009 WL 1164554 (Fed. Cl. Apr. 28, 2009). This case was before the court following trial. Plaintiff, a member of the Oglala Sioux Tribe,

sought relief under Article I of the Fort Laramie Treaty of April 29, 1868 (the 1868 Treaty), which provides that if “bad men” among the whites commit “any wrong” upon the person or property of any Sioux, the United States will reimburse the injured person for the loss sustained. Based on the evidence adduced at trial, the court found that plaintiff sustained a loss within the meaning of this clause and that she, therefore, is entitled to monetary relief from the United States under the Treaty of 1868 in the amount of \$590,755.06.

179. *Wilkinson v. United States*, No. 07-2274, 2009 WL 1212803 (8th Cir. May 6, 2009). Owners, and their heirs, of descendable interests on allotted Indian land held in trust by the Bureau of Indian Affairs (BIA) brought action against United States alleging trespass of several family allotments, conversion of farm equipment, intentional infliction of emotional distress (IIED), and wrongful death under the Federal Tort Claims Act. The district court, 314 F. Supp. 2d 902, granted summary judgment for United States and plaintiffs appealed. The appellate court, 440 F.3d 970, reversed and remanded. Following bench trial on remand, the district court, 2007 WL 3544062, found in favor of plaintiffs on the trespass, conversion, and IIED claims and assessed damages. United States appealed. The appellate court held that: (1) BIA’s leasing of allotments of Indian land did not amount to conversion of the owner’s farming equipment, and (2) noneconomic damages award of \$232,407 was properly based on ongoing anguish BIA caused landowners. Affirmed in part, reversed in part, and remanded.

180. *Osage Tribe of Indians of Oklahoma v. U.S.*, Nos. 99-550 L, 00-169 L, ___ Fed. Cl. ___, 2009 WL 1683284 (Fed. Cl. June 12, 2009). Before the court was Osage Nation’s Motion Regarding the United States’ Burden of Copying Responsive Documents at NARA Locations. Plaintiff sought to compel the United States to pay for copying and imaging costs in the second phase of discovery in the case. Plaintiff requested that the court “rule . . . that the United States is required to copy at its own expense any reasonable quantities of responsive documents identified by the Osage Nation at National Archives and Records Administration (NARA) facilities.” Plaintiff also argued that the United States “is required by law . . . in the ordinary course of its business as a trustee” to provide these copies. The court granted plaintiff’s motion and ruled that defendant shall bear the costs of copying and imaging in this case.

181. *Cobell v. Salazar*, Nos. 08-5500, 08-5506, ___ F.3d ___, 2009 WL 2195111 (D.D.C. July 24, 2009). Beneficiaries of individual Indian money (IIM) trust accounts brought class action against United States government, alleging that Secretaries of Interior and Treasury breached their fiduciary duties by mismanaging accounts. After court found that government had not succeeded in providing accounting mandated by Indian Trust Fund Management Reform Act, and that record demonstrated impossibility of rendering such accounting, 532 F. Supp. 2d 37, beneficiaries moved for equitable relief in nature of restitution. The district court, 569 F. Supp. 2d 223, granted the motion and awarded \$456 million. Parties cross-appealed. The appellate court held that beneficiaries were statutorily entitled to an accounting, and district court had obligation to exercise its equitable powers to ensure an equitable accounting. Vacated and remanded.

N. MISCELLANEOUS

182. *Cottier v. City of Martin*, No. 07-1628, ___ F.3d ___, 2008 WL 5215007 (8th Cir. Dec. 16, 2008). Action was brought on behalf of Native American voters challenging configuration of city wards as violative of § 2 of Voting Rights Act (VRA) and Fourteenth and Fifteenth Amendments. Following remand, 445 F.3d 1113, the district court, 475 F. Supp. 2d 932, found that ordinance violated VRA. City appealed. The appellate court held that: (1) district court's overall weighing of totality of circumstances was not clearly erroneous, and (2) district court did not abuse its discretion in adopting at-large, cumulative voting remedial plan. Affirmed.

183. *Gillette v. Edison*, No. 4:08-102, ___ F. Supp. 2d ___, 2009 WL 81919 (D.N.D. Jan. 14, 2009). Attorney who was the subject of pending North Dakota disciplinary proceedings brought cause of action to enjoin proceedings, based both on alleged violation of his equal protection rights and on theory that North Dakota Supreme Court did not have jurisdiction to discipline him for alleged misconduct occurring in connection with litigation in Indian tribal court. Defendant moved to dismiss. The district court held that: (1) North Dakota Supreme Court had jurisdiction and authority to discipline attorney who had been licensed to practice law in North Dakota for misconduct allegedly occurring in connection with his representation of clients before tribal court; and (2) North Dakota attorney disciplinary proceeding that attorney sought to enjoin was "ongoing state judicial proceeding," of kind contemplated by Younger abstention doctrine; (3) North Dakota had important interest in pending disciplinary proceeding; and (4) attorney had adequate opportunity to raise constitutional claims in disciplinary proceeding, so that attorney's lawsuit would be enjoined. Dismissal motion granted.

184. *Lazore v. NYP Holdings, Inc.*, No. 261 102674/08, ___ N.Y.S. 2d ___, 2009 WL 910863 (N.Y. App. Div. Apr. 7, 2009). Tribal council members brought defamation action against newspaper publisher. The court denied publisher's motion to dismiss. Publisher appealed. The appellate court held that newspaper editorials, essentially asserting that Indian tribe should not be permitted to run proposed casino because it amounted to criminal enterprise, did not defame individual members of tribal council. Reversed; motion granted.

185. *Lozeau v. Geico Indemnity Co.*, No. DA 08-0084, ___ P.3d ___, 2009 WL 1060056 (Mont. Apr. 21, 2009). Plaintiff motorist, who previously had filed negligence complaint in the Tribal Court, brought action against defendant motorist and insurer in the district court, alleging that defendant motorist's negligence caused automobile accident. The district court dismissed the complaint and plaintiff motorist appealed. The Supreme Court held that: (1) district court should have considered information outside the pleadings, and (2) equitable tolling applied to plaintiff motorist's District Court action. Reversed and remanded.

186. *Pyke v. Cuomo*, Docket Nos. 07-0334, 07-3524, ___ F.3d ___, 2009 WL 1458030 (2nd Cir. May 27, 2009). Class of Native American anti-gambling demonstrators brought § 1983 action alleging that New York officials denied them equal protection by failing to provide police protection on reservation. The district court, 2006 WL 3780808, granted summary judgment to defendants. Plaintiffs appealed. The appellate court held that: (1) New York officials' alleged roadblock policy did not amount to an express racial classification, and (2) decision to notify heavily armed Native American organization before entering reservation was not an express racial discrimination. Affirmed.

187. *Thomas v. Mundell*, No. 07-15388, ___ F.3d ___, 2009 WL 2032335 (9th Cir. July 15, 2009). County Attorney and victims of driving under the influence (DUI) offenses sued judges and commissioners of the Arizona Superior Court for injunctive and declaratory relief, alleging that special Spanish-speaking and Native American DUI courts instituted by that Court violated their federal constitutional and statutory rights. The district court dismissed claims for lack of standing. Plaintiffs appealed. The appellate court held that: (1) county attorney lack standing, and (2) victims lacked standing. Affirmed.

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