

JUDICIAL UPDATE

2009 – 2010 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. *United States v. Tohono O’odham Nation*, Docket No. 09-846. Petition was **filed** on Jan. 15, 2010; **granted** on April 19, 2010. **Issues:** Does 28 U.S.C. § 1500 deprive the Court of Federal Claims of jurisdiction over a claim seeking monetary relief for the government’s alleged violation of fiduciary obligations if the plaintiff has another suit pending in federal district court based on substantially the same operative facts, especially when the plaintiff seeks monetary relief or other overlapping relief in the two suits? **Holding below:** *Tohono O’odham Nation v. United States*, 2009 WL 650283. Under 28 U.S.C. § 1500, the United States Court of Federal Claims lacks jurisdiction over “any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States.” In *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545 (Fed. Cir. 1994), the Federal Circuit held that Section 1500 applies only if two claims “arise from the same operative facts” and “seek the same relief.” The thrust of the claims brought by the Tohono O’odham Nation in district court indicated that the plaintiff was seeking a declaration that the United States was in breach of its duties as a trustee and the specific performance of those duties. The relief sought is entirely equitable, and includes an accounting, a restatement of trust account balances in conformity with the accounting, and any “equitable relief that may be appropriate (e.g., disgorgement [or] equitable restitution . . .).” In the claims court, the plaintiff’s complaint, filed one day after the district court complaint, seeks only damages at law for “gross breaches of trust” and requests no injunctive or equitable relief. Accordingly, because the relief requested in each complaint is different from the other, Section 1500 does not divest the claims court of jurisdiction, and the claims court erred by dismissing the action for lack of subject matter jurisdiction.

OTHER COURTS

A. ADMINISTRATIVE LAW



2. *Schaghticoke Tribal Nation v. Kempthorne*, No. 08-4735, __ F.3d __, 2009 WL 3335901 (2nd Cir. Oct. 19, 2009). Indian tribe appealed judgment of the district court, 587 F. Supp. 2d 389, upholding a decision of the Department of the Interior which denied the tribe’s petition for federal acknowledgement. The appellate court held that: (1) decision to deny tribe’s request for acknowledgement was not the result of any improper political influence, and (2) decision was not a violation of the Vacancies Reform Act. Affirmed.

3. *Nkihtaqmikon v. Impson*, No. 08-2122, __ F.3d __, 2009 WL 3448231 (1st Cir. Oct. 28, 2009). Following dismissal, 462 F. Supp. 2d 86, of action challenging Bureau of Indian Affairs approval of Indian tribe’s decision to lease tribal land to be used for a liquefied natural gas terminal, appeal was taken. The appellate court, 503 F.3d 18, affirmed in part and remanded in part, and BIA filed a second motion to dismiss. On remand, the district court, 573 F. Supp. 2d 311, granted motion. Plaintiffs appealed. The appellate court held that appellate court’s prior ruling that administrative exhaustion was mandatory was the law of the case. Affirmed.

4. ***Nkihtaqmikon v. Bureau of Indian Affairs***, No. CV-05-188, ___ F. Supp. 2d ___, 2009 WL 4441262 (D. Me. Dec. 2, 2009). In this long-pending Freedom of Information Act (FOIA) litigation, the court concluded that by failing to timely identify documents responsive to FOIA requests, the Bureau of Indian Affairs violated FOIA, and the Court ordered the Solicitor of the Department of the Interior or her designee to certify that no previously unidentified FOIA-susceptible records exist within the agency. The Court allowed Plaintiff's attorney to petition for attorney's fees and costs, but only for legal services upon which the Plaintiff substantially prevailed. The Court denied Plaintiff's other demands for relief, including its claim that the BIA's FOIA violation in this case represents a larger pattern or practice of FOIA violations.

5. ***Crow Creek Sioux Tribe v. Donovan***, No. Civ. 09-3021, 2009 WL 4730696 (D.S.D. Dec. 9, 2009). Plaintiffs Crow Creek Sioux Tribe (Tribe) and the Crow Creek Housing Authority filed a complaint invoking the Administrative Procedure Act, 5 U.S.C. §§ 701-706, and the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*, on Defendants, Shaun Donovan, Secretary of the United States Department of Housing and Urban Development (HUD), and Rodger J. Boyd, Deputy Assistant Secretary for HUD Native American Programs. The complaint sought judicial review as well as declaratory, injunctive, and other relief relating to the suspension of three members of the Crow Creek Housing Authority's Board of Commissioners and the Tribe's Tribal Council. Three members of the Tribal Housing Authority's Board of Commissioners were suspended from participation in procurement and non-procurement transactions "as a participant or principal with HUD and throughout the Executive Branch of the Federal Government" by the Acting Director of HUD's Departmental Enforcement Center. The suspensions were based on a criminal indictment charging them with bribery and retaliation. HUD took the position that the suspended members were barred from participating in any vote to appoint their successors. The Plaintiffs alleged that the suspension of the three members left the Board of Commissioners without a quorum to do business, and thus, has made it impossible for the Board of Commissioners and the Tribal Council to make the necessary appointments to fill the vacancies of the three suspended members. Plaintiffs asked the Court to stay HUD's action in suspending the three board members and further sought to enjoin the Defendants from re-imposing the suspension without first consulting with the Plaintiff. The court denied as premature Plaintiffs' motion for judgment on the pleadings, and denied as moot Defendants' motion to dismiss.



6. ***Menominee Tribal Enterprises v. Solis***, No. 09-2806, 2010 WL 1050273 (7th Cir. Mar. 24, 2010). The Menominee Indian tribe owns a sawmill on its reservation in Wisconsin. The Department of Labor cited the tribe (technically the tribal entity that operates the sawmill, but it has no substantial existence apart from the tribe) for violations of OSHA, 29 U.S.C. §§ 651 *et seq.*, rejecting the tribe's contention that it is exempt. The tribe filed a petition for review of an order of the Occupational Safety and Health Review Commission. The appellate court found that the sawmill and related commercial activities of the Menominees' enterprise are subject to the Occupational Safety and Health Act and denied the petition for review.

7. ***St. Croix Chippewa Indians of Wis. v. Salazar***, No. 08-5430, 2010 WL 2767119 (C.A.D.C. July 6, 2010). The St. Croix Chippewa Indians of Wisconsin brought suit in the district court challenging two actions of the Department of the Interior related to St. Croix's then-pending application to open a casino. First, St. Croix alleged that Interior had unlawfully reversed the sequence of the two steps of the process to review its application. Second, St. Croix alleged that Interior had promulgated a substantive rule, styled as a guidance memo, without the required period of notice and comment under the Administrative Procedure Act (APA). The district court dismissed St. Croix's complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief could be granted. Of note for this appeal, the district court concluded that St. Croix had not alleged an injury in fact sufficient to confer Article III standing. The appellate court agreed that St. Croix had no standing, and affirmed the judgment of the district court on that ground.



8. ***Butte County, Cal. v. Hogen***, No. 09-5179, ___ F.3d ___, 2010 WL 2735666 (D.D.C. July 13, 2010). County brought action against members of National Indian Gaming Commission (NIGC) and Department of Interior, challenging agency decisions concerning intervening tribe, in which NIGC approved gaming ordinance enacted by tribe and department took parcel of land in county into trust on behalf of tribe. The district court, 609 F.Supp.2d 20, dismissed action. County appealed. The appellate court held that NIGC failed to provide county with adequate statement of grounds for its decision. Remanded.



9. ***Evans v. U.S. Dept. of Interior***, No. 08-35938, ___ F.3d ___, 2010 WL 1905022 (9th Cir. May 13, 2010). Tribes of the Tulalip Reservation sought to intervene in action brought by the Snohomish Tribe of Indians to achieve federal recognition. The district court denied intervention. Tulalip Tribes appealed. The appellate court held that Tulalip Tribes were not entitled to intervene. Affirmed.

B. CHILD WELFARE LAW AND ICWA

10. ***M.S. v. O.S.***, No. D053996, 97 Cal. Rptr. 3d 812 (Cal. Ct. App. Aug. 7, 2009). Mother brought action to establish paternity and child support. After genetic testing confirmed paternity, the Superior Court, No. ED72626, entered child support order, and father appealed. The appellate court held that: (1) court could include father's bonus income from Indian tribe in his gross annual income for purposes of determining child support, but (2) tribe's payment of father's attorney fees could not be included in father's gross annual income for purposes of child support. Reversed and remanded.

11. ***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

12. *Danielle A. v. State*, No. S-13377, 2009 WL 2902499 (Alaska Sept. 11, 2009). In dependency case, the Office of Children's Services (OCS) petitioned to extend custody of Indian child for one year, and mother sought enforcement of prior order's reunification deadline. The Superior Court, denied mother's request and extended custody for six months. Mother appealed. The Supreme Court held that: (1) the trial court was not required to make removal findings in order to extend the OCS custody of child; (2) evidence supported finding that child continued to be a child in need of aid; and (3) the trial court was required to determine whether the OCS complied with the Indian Child Welfare Act's (ICWA) placement and active efforts requirements before it could extend OCS's custody of Indian child. Affirmed; remanded.

13. *In the matter of B.B.A.*, No. 106242, 2009 WL 3358687 (Okla. Ct. App. Sept. 11, 2009). Appellant, Cherokee Nation, appealed the district court's final decree of adoption of an Indian child in favor of a non-Indian family. The district court found the biological parents' unified voice concerning the placement and adoption of their Indian child with the non-Indian family was sufficient good cause to deviate from the preference requirements of the Indian Child Welfare Act (ICWA), and the Oklahoma Indian Child Welfare Act (OICWA). Affirmed.

14. *Sandy B. v. State*, No. 106247, 2009 WL 3049721 (Alaska Sept. 25, 2009). Mother and father appealed orders of the Superior Court that terminated their parental rights under the Indian Child Welfare Act (ICWA). The Supreme Court held that: (1) record supported a finding that the Office of Children's Services (OCS) made active but unsuccessful efforts to reunite mother and father with Indian child; (2) expert had substantial education in his specialty of psychology and, thus, met the heightened standard for qualification as an expert under ICWA; (3) trial court could allow the expert to testify by telephone; and (4) trial court could rely in part on the testimony of the expert in finding that continued custody of Indian children by mother and father was likely to result in serious emotional or physical damage to children. Affirmed.

15. *In the Interest of J.L.*, No. 09-0945, 2009 WL 4114171 (Iowa, Nov. 25, 2009). J.L., L.R., and S.G. appealed from the district court's ruling that they, through their attorney/guardian ad litem, could not object to the transfer of jurisdiction to a tribal court pursuant to Iowa Code section 232B.5 (2009). Because the court found section 232B.5 violates the children's due process rights under the United States and Iowa Constitutions, it reversed and remanded for further proceedings.

16. *In the Matter of J.J.L., D.J.L., and R.D.L.L.*, No. DA 09-0370, 2010 WL 107083 (Mont. Jan. 12, 2010). The State filed a petition to terminate father's parental rights to his three children. The District Court, No. DDJ 08-085-Y, terminated parental rights. Father appealed. The Supreme Court held that: (1) counsel's failure to object to hearsay evidence presented during the adjudication hearing and his failure to file a response to the Department of Public Health and Human Service's brief in support of the admission of the evidence constituted ineffective assistance of counsel, and (2) evidence supported finding that the Indian Child Welfare Act (ICWA) did not apply to termination of parental rights case. Reversed and remanded.

17. *In re Welfare of S.L.J.*, No. A09-80, ___ N.W. 2d ___, 2010 WL 1933691 (Minn. May 14, 2010). Private attorney, who was appointed in termination of parental rights action to represent indigent parent who was entitled to counsel under federal Indian Child Welfare Act (ICWA), sought order requiring county to pay his attorney fees and expenses. The district court issued a peremptory writ of mandamus requiring county to pay attorney and to establish a system for payment of costs for representing indigent parents in juvenile protection cases. County appealed. The appellate court, 772 N.W. 2d 833, affirmed in part and reversed in part. County filed petition for review. The Supreme Court held that: (1) although entitled to appointed counsel under ICWA, indigent Indian parents in juvenile protection proceedings are not entitled to the appointment of a public defender; (2) the cost of court-appointed counsel to represent indigent Indian parents in juvenile protection proceedings is to be paid by the county in which the juvenile protection proceedings are held; and (3) a judicial order compelling the payment of county funds must be paid no later than the first fiscal year after the order is received by the county. Affirmed.

18. *Kent v. State Department of Health and Social Services*, No. S-13578, 2010 WL 2244002 (Alaska Jun. 4, 2010). After an initial petition to terminate parental rights was filed, the Office of Children's Services (OCS) filed a second petition to terminate mother and father's parental rights. The superior court terminated parental rights. Father appealed. The Supreme Court held that: (1) as a matter of first impression, the OCS's second petition to terminate father's parental rights was not barred by the doctrine of res judicata, and (2) the trial court could consider new evidence regarding mother's circumstances when determining whether to terminate father's parental rights. Affirmed.

19. *In re the adoption of D.C.*, No. 49A02-0909-CV-862, 2010 WL 2297916 (Ind. Ct. App. Jun. 9, 2010). Child's stepfather petitioned for adoption of biological father's child. The superior court granted petition, and father appealed. The appellate court held that: (1) Indian Child Welfare Act did not apply to stepfather's petition to adopt Native American biological father's child; (2) father's consent to adoption was not required; and (3) child's adoption by stepfather was in best interest of child. Affirmed.

20. *In re the Welfare of L.N.B.-L.*, No. 28850-2-II, 38854-5-II, 2010 WL 2591063 (Wash. Ct. App. Jun 29, 2010). JB-L and KL, the mother and father, respectively, of four-year old LNB-L and three-year old ADB-L, appealed the juvenile court's order terminating their parental rights. LNB-L and ADB-L each qualify as an "Indian child" under the Indian Child Welfare Act (ICWA). JB-L and KL assign error to several findings of fact and conclusions of law, and they assert that the Department of Social and Health Services failed to establish several elements of RCW 13.34.180(1) and ICWA. The parents raised numerous other arguments, including the Department's alleged failure to provide proper notice to Indian tribes that had an interest in the proceedings. The appellate court affirmed the termination orders, but held that the Department should have notified three additional tribes under state law. Therefore, the appellate court remanded for proper notice, holding that if the notified tribes decline to intervene, the termination orders will stand. If any of the tribes chooses to intervene, the juvenile court shall hold further proceedings consistent with this opinion.

21. *Dale H. v. State, Dept. of Health & Social Services*, No. S-13632, ___ P.3d ___, 2010 WL 2696996 (Alaska July 9, 2010). Office of Children's Services (OCS) filed petition to terminate father's parental rights. Following a trial, the Superior Court granted petition, and

22. *In re B.C.*, Nos. 25423, 25466, 25503, 25559, __ N.W. 2d __, 2010 WL 2780031 (S.D. July 14, 2010). Pending before the Court were motions to dismiss in four abuse and neglect appeals. The Indian Child Welfare Act (ICWA) applies to these proceedings. In each instance, a parent appealed termination of parental rights. Although a Tribe intervened in each case at the circuit court level, none of the appealing parents served a notice of appeal on the intervening Tribe. The State contended that this failure to serve a notice of appeal requires dismissal. The Supreme Court held that failure of the parents to file notice of appeal on Tribes that had intervened required dismissal. Motions to dismiss appeals were granted.

23. *J.P.H. v. Florida Dept. of Children and Families*, Nos. 1D10-1725, 1D10-1924, __ So. 3d __, 2010 WL 2873139 (Fla. Dist. Ct. Apps. July 23, 2010). The appellate court found that because the proceedings involved Indian children within the meaning of the Indian Child Welfare Act, 25 U.S.C. § 1912, *et seq.*, the trial court erred in not applying the standards and requirements of the Act. Most notably the trial court did not apply 25 U.S.C. § 1912(f), which requires that any order terminating parental rights to an Indian child be supported “by evidence beyond a reasonable doubt,” rather than the clear and convincing evidence standard set forth in Chapter 39, Florida Statutes. The appellate court found that the trial court erred when it denied the affected tribe's petition to intervene because it was not represented by a Florida attorney. The tribe had a clear right to intervene pursuant to § 1911(c) of the Act, and is not required to be represented by a member of the state bar, since enforcement of state prohibitions on the unauthorized practice of law interfere with and are thus preempted in the narrow context of state court proceedings subject to the Indian Child Welfare Act. *See In re Elias L.*, 277 Neb. 1023, 767 N.W.2d 98 (2009); *In re N.N.E.*, 752 N.W.2d 1 (Iowa 2008); *State ex rel. Juvenile Dep't of Lane County v. Shuey*, 119 Or. App. 185, 850 P.2d 378 (1993). The appellate court reversed the order terminating appellants' parental rights and remanded to the circuit court for further proceedings.

24. *In re Skyler H.*, No. D056307, __ Cal. Rptr. 3d __, 2010 WL 2926017 (Cal. Ct. App. July 28, 2010). This case raised the issue whether a child's specific but attenuated Indian heritage invokes ICWA notice requirements under section 224.3, subdivision (b), which describes circumstances that may provide reason to know the child is an Indian child. The appellate court held that the trial court has discretion to consider the totality of the information presented concerning the child's family circumstances to determine whether it meets the threshold required for ICWA notice – “the court knows or has reason to know the child is an Indian child.” (§ 224.2.) The appellate court further held ICWA notice is not required unless the totality of the family's circumstances indicate there is a low but reasonable probability the child is an Indian child and held that the case need not be remanded for ICWA notice because the family's specific but attenuated Indian heritage does not provide reason to know the child is an Indian child.

C. CONTRACTING

25. *Arctic Slope Native Association, Ltd. v. Sebelius*, Nos. 2008-1532, 2008-1607, 2009-1004, ___ F.3d ___, 2009 WL 3082337 (Fed. Cir. Sept. 29, 2009). Indian tribes and tribal health care providers, as members of putative class action suits that were denied certification, challenged Indian Health Service (IHS) contracting officers' denial of Contract Disputes Act (CDA) claims that IHS had failed to pay full amount of contract support costs incurred in providing health services to tribal members under IHS contracts pursuant to Indian Self-Determination and Education Assistance Act (ISDA). The Civilian Board of Contract Appeals, 2008 WL 3052447, dismissed claims as time-barred. Appeal was taken. The appellate court held that: (1) limitations period for CDA claims was not tolled under class action tolling doctrine, but (2) in matter of first impression, limitations period for CDA claims was subject to equitable tolling. Affirmed in part, reversed in part, and remanded.

26. *Boye v. United States*, No. 07-195 C, 2009 WL 3824371 (Fed. Cl. Nov. 12, 2009). Plaintiffs alleged that they had not been paid the wages and benefits to which they are entitled pursuant to various self-determination contracts executed by their employer, the Navajo Nation, and the United States Department of the Interior. They brought a claim as purported third-party beneficiaries. Defendant moved to dismiss the complaint for lack of jurisdiction and for failure to state a claim upon which relief could be granted pursuant to Rule 12 of the Rules of the United States Court of Federal Claims. The court granted defendant's motion.

27. *Oneida Indian Nation v. Hunt Const. Group, Inc.*, No. 09-00354, ___ N.Y.S. 2d ___, 2009 WL 3790451 (N.Y. App. Div. Nov. 13, 2009). Plaintiff, the owner of the Turning Stone Casino & Resort, commenced an action seeking damages resulting from the alleged breach by defendant of its construction contract with plaintiff. Plaintiff moved to dismiss the second through fifth counterclaims on the ground that it had waived sovereign immunity only with respect to counterclaims seeking to enforce the terms of the contract and thus the Supreme Court lacked subject matter jurisdiction over the second through fifth counterclaims. The appellate court agreed with plaintiff that the court erred in denying those parts of the motion seeking to dismiss the second counterclaim to the extent it alleges the breach of implied warranties; the fourth counterclaim, for quantum meruit and unjust enrichment; and the fifth counterclaim, for an account stated and modified the order accordingly. The contract permitted the parties to mediate "[a]ll claims, disputes and other matters . . . arising out of, or relating to, [the contract], the Project, the Work, the Contract Documents or the breach thereof" and, following the initial recommendation of the mediator, the parties were entitled to "bring any action in a court of competent jurisdiction to resolve the dispute" (emphasis added). Because plaintiff waived its sovereign immunity only for claims seeking to enforce the terms of the contract, the courts of New York are not courts of competent jurisdiction with respect to any other claims. As plaintiff correctly contended, the contract is not internally inconsistent. Plaintiff agreed to mediate claims beyond those encompassed by the waiver of sovereign immunity. It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motion with respect to the second counterclaim to the extent it alleges breach of implied warranties and dismissing that counterclaim to that extent and granting those parts of the motion with respect to the fourth and fifth counterclaims and dismissing those counterclaims and as modified the order is affirmed without costs.

28. *Fort Peck Housing Authority v. U.S. Dept. Of Housing And Urban Development*, Nos. 06-1425, 06-1447, 2010 WL 582653 (10th Cir. Feb. 19, 2010). Not selected for publication in the Federal Reporter. This case involved the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA), 25 U.S.C. §§ 4101-4243. In that Act Congress directed the Department of Housing and Urban Development (HUD) to enter into a collaborative process with interested Native American tribes and their designated housing entities (Tribal Housing Entities) to adopt regulations providing for an annual, equitable distribution of available funds for low-income housing assistance. A regulation promulgated in 1998 disqualified funding for housing units which were no longer owned or operated by a Tribal Housing Entity. In subsequent years HUD mistakenly overpaid Fort Peck Housing Authority (Fort Peck) for dwelling units it no longer owned or operated. After discovering its oversight HUD demanded a refund. Fort Peck partially repaid HUD, but then sued, alleging the “owned or operated” regulation was invalid. The district court agreed but determined Fort Peck was not entitled to a return of all monies it had already refunded. HUD appealed from the court’s invalidation of its regulation and Fort Peck cross-appealed from the denial of return of its repayments. The appellate court reversed the invalidation of HUD’s regulation, dismissed Fort Peck’s cross-appeal, and remanded.

D. EMPLOYMENT

29. *Sober v. Soaring Eagle Casino and Resort*, No. 08-11522, 2009 WL 3254355 (E.D. Mich. Oct. 9, 2009). Plaintiff Jennifer Sober filed a complaint alleging employment and civil rights actions against her former employer, Soaring Eagle Casino and Resort, which is wholly owned and operated by the Saginaw Chippewa Indian Tribe of Michigan (Saginaw Chippewa). Initially, the Court abstained from addressing Plaintiff’s complaint because Plaintiff had not exhausted her remedies before the tribal court. Subsequently, the parties indicated that the tribal court had ruled in favor of Defendant, concluding that Defendant had not waived sovereign immunity. Plaintiff then filed a motion for summary judgment on the issue of sovereign immunity in the district court, arguing that the tribal court erroneously found in Defendant’s favor when it concluded that “nothing in the Tribal Constitution nor the FMLA as adopted by the Tribe waives the right to sovereign immunity.” Defendant filed a motion to dismiss, arguing Plaintiff’s complaint should be dismissed for failure to exhaust tribal court remedies. The court found that Defendant was correct that exhaustion of tribal claims, including direct appeals, is required, and granted Defendant’s motion to dismiss, dismissed Plaintiff’s motion for summary judgment, and dismissed the complaint with prejudice.



30. *Dobbs v. Anthem Blue Cross and Blue Shield*, No. 07-1398, 07-1402, 2010 WL 1225342 (10th Cir. Mar. 31, 2010). Beneficiaries of group health insurance policy purchased under employee benefit plan established by Indian tribe brought suit against health insurer in state court, asserting state law causes of action. Insurer removed action and moved to dismiss all claims on basis of Employee Retirement Income Security Act (ERISA) preemption. The district court dismissed claims, and beneficiaries appealed. The appellate court, 475 F.3d 1176, vacated and remanded. On remand, insurer renewed motion to dismiss. The district court, 2007 WL 2439310, granted motion. Beneficiaries appealed. The appellate court held that: (1) Pension

31. *Somerlott v. Cherokee Nation Distributors Inc.*, No. CIV-08-429, 2010 WL 1541574 (W.D. Okla. Apr. 16, 2010). Plaintiff brought this action for unlawful termination under Title VII and the ADEA against Cherokee Nation Distributors, Inc., now known as C.N.D., L.L.C (“CND”). CND is a limited liability corporation wholly owned by Cherokee Nation Businesses, Inc. which is a corporation wholly owned and regulated by the Cherokee Nation. Plaintiff alleged that she was wrongfully terminated as a result of reporting a sexual liaison in the workplace. Plaintiff, a woman of over 40 years of age, contended her termination was motivated by discrimination based on her gender and/or age and the desire of her supervisor to punish her for her lawful objection to the hostile work environment. Plaintiff offers that the ultimate hiring of a younger replacement at substantially lower pay than Plaintiff was receiving is evidence of discrimination. Defendants’ motion to dismiss offered support that CND is entitled to tribal sovereign immunity from suit and is explicitly excluded from liability under Title VII and ADEA. Plaintiff contended that CND is sufficiently attenuated from tribal government so as not to be considered an “arm of the tribe” and, therefore, is neither protected by the tribe’s sovereign immunity, nor entitled to the tribal exclusions from Title VII and ADEA. The court found that it could not accept Plaintiff’s argument that CND, a commercial enterprise of the Cherokee Nation, was too attenuated from Cherokee governmental interests to be protected by the sovereign immunity of the Cherokee Nation. CND’s tribal immunity as a commercial enterprise of the Cherokee Nation exists absent express abrogation by Congress or the explicit waiver of that immunity by the Cherokee Nation. As there is no evidence of either abrogation or waiver, CND is immune from Plaintiff’s suit. The Court found that Defendants are entitled to rely on tribal sovereign immunity to defeat Plaintiff’s action and dismissed the amended complaint.

32. *Bolt v. Iowa Enterprises*, No. CIV-10-0145, 2010 WL 1875667 (W.D. Okla. May 10, 2010). In this case, plaintiff Patricia Bolt asserted claims against Iowa Enterprises d/b/a Iowa Mini-Mart (Iowa Mini-Mart) and Bobby Fields, stated to be the Public Safety Director of the Iowa Tribe of Oklahoma. She asserted claims for discrimination and retaliation, based on Title VII of the Civil Rights Act of 1964, the Indian Self-Determination and Education Assistance Act of 1975, and the Federal Tort Claims Act. Both defendants moved to dismiss, arguing that subject-matter jurisdiction was lacking, as they are protected by the doctrine of sovereign immunity, and that the complaint otherwise fails to state a claim. The complaint alleged that Iowa Mini-Mart is a “business . . . owned and operated by the Iowa Tribe of Oklahoma.” There is nothing in the complaint to suggest that Iowa Mini-Mart is any sort of entity separate from the Iowa Tribe itself. As such, the complaint states no basis for avoiding the conclusion that tribal sovereign immunity bars any claims against Iowa Mini-Mart which is the Iowa Tribe. Absent some basis for avoiding the application of the doctrine of sovereign immunity, the court found it lacks subject-matter jurisdiction over plaintiff’s claims which must be dismissed. The court granted the motions to dismiss of Iowa Mini-Mart and defendant Fields and the complaint was dismissed.

33. *Robbins v. Sault Ste. Marie Tribe of Chippewa Indians*, Docket No. 290321, 2010 WL 2016322 (Mich. Ct. App. May 20, 2010). Defendant Sault Ste. Marie Tribe of Chippewa Indians appealed the trial court's denial of its motions for judgment notwithstanding the verdict and for new trial, following a jury verdict for plaintiff Kandra Robbins. Sault Ste. Marie Tribe first employed Robbins in 1992. In 2001, she was hired as the Tribe's chief judge, serving as an at-will employee until February 2002, when she signed an employment contract with the Tribe. The written employment agreement provided that Robbins would receive a severance payment equal to two years' salary if her employment was terminated. The contract provided, however, that the Tribe was not obligated to pay severance under certain conditions, including if Robbins voluntarily resigned her employment. On January 31, 2006, Robbins submitted her resignation to the Tribe's board of directors, effective February 14, 2006. The Tribe argued that its Governmental Team Member Manual (the manual) was incorporated into the contract and allowed the Tribe to accept resignations immediately. Robbins argued that the manual was not part of the contract, citing several sections of the manual that directly contradicted the written employment agreement. The court found that even if it were to consider the merits of the argument, it would not reverse. The court declined the Tribe's invitation to limit its sovereignty by applying the Michigan common law of municipal corporations to hold these actions of the Tribe invalid and affirmed.



34. *Equal Employment Opportunity Commission v. Peabody Western Coal Company*, No. 06-17261, 610 F.3d 1070 (9th Cir. June 23, 2010). The Equal Employment Opportunity Commission (EEOC) sued lessor of coal mines on Navajo Nation, claiming violation of Title VII by alleged discrimination on basis of national origin against non-Navajo Indians due to lessor's preference for employing Navajo workers pursuant to terms of lease approved by Department of Interior (DOI) under Indian Mineral Leasing Act (IMLA), and seeking injunctive relief, damages, and order requiring lessor to make and preserve records. The district court, 214 F.R.D. 549, granted lessor summary judgment and ruled that Nation was necessary and indispensable party who could not be joined, and that lawsuit presented nonjusticiable political question. EEOC appealed. The appellate court, 400 F.3d 774, reversed and remanded. Following joinder of Nation on remand, the district court, 2006 WL 2816603, again granted lessor summary judgment. EEOC appealed. The appellate court held that: (1) joinder of Nation was not rendered infeasible by EEOC's amended complaint; (2) Secretary of Interior was required party; (3) joinder of Secretary of Interior was not feasible; (4) equity and good conscience required dismissal of damages claim; but (5) equity and good conscience permitted EEOC to proceed with injunctive claim. Reversed in part and vacated in part.

E. ENVIRONMENTAL REGULATIONS

35. *Port of Arlington v. U.S. Dept. of Army*, Civil No. 08-1344, 2009 WL 2843184 (D. Or. Aug. 27, 2009). The Port of Arlington (Port) brought suit against the Army Corps of Engineers (Corps) challenging the way the Corps dealt with the Port's applications for a Section 10 Rivers and Harbors Act permit and a Section 404 Clean Water Act permit. The Confederated Tribes of the Umatilla Indian Reservation (CTUIR), the Confederated Tribes and Bands of the Yakama Nation, the Nez Perce Tribe, and the Confederated Tribes of the Warm Springs (collectively, Tribes) were defendant-intervenors. Before the court was the Corps'



36. *Native Village of Kivalina v. ExxonMobil Corp.*, No. C 08-1138, 663 F. Supp. 2d 863, 2009 WL 3326113 (N.D. Cal. Sept. 30, 2009); 9th Cir. No. 09-17490. Plaintiff Native Village of Kivalina (the Village) is the governing body of an Inupiat Eskimo village of approximately 400 people who reside in the City of Kivalina (Kivalina). The complaint alleged that as a result of global warming, the Arctic sea ice that protects the Kivalina coast from winter storms has diminished, and that the resulting erosion and destruction will require the relocation of Kivalina's residents. The Village and Kivalina (Plaintiffs) named twenty-four oil, energy and utility companies as defendants from whom they sought damages under a federal common law claim of nuisance based on their alleged contribution to the excessive emission of carbon dioxide and other greenhouse gases which they claim are causing global warming. The court concluded that Plaintiffs' federal claim for nuisance is barred by the political question doctrine and for lack of standing under Article III. The court granted Defendants' motions to dismiss for lack of jurisdiction and denied the remaining motions to dismiss as moot. Plaintiffs' state law claims were dismissed without prejudice to refiling in state court.

37. *South Fork Band of Western Shoshone of Nevada v. United States Department of the Interior*, No. 09-15230, 2009 WL 4360798 (9th Cir. Dec. 3, 2009). Indian tribes brought action challenging Bureau of Land Management's (BLM) approval of mining project on federal land. The district court, 643 F. Supp. 2d 1192, denied tribes a preliminary injunction. Tribes appealed. The Court of Appeals held that: (1) tribes had no likelihood of success on merits of Federal Land Policy and Management Act (FLPMA) claim; (2) BLM failed to take requisite hard look at environmental impacts of ore transport under National Environmental Policy Act (NEPA); and (3) BLM failed to take hard look at impacts of mine dewatering. Affirmed in part, reversed in part, and remanded.

38. *Hui Malama I Na Kupuna O Nei v. Wal-Mart*, No. 28477, __ P.3d __, 2009 WL 4828961 (Hawai'i App. Dec. 16, 2009). Plaintiffs brought action against city and city planning department, alleging they failed to comply with statute and seek review and comment from the State Historic Preservation Division (SHPD) before issuing grading and building permit applications for project where 42 human skeletal remains were subsequently uncovered. The circuit court granted city's motion for summary judgment, and plaintiffs appealed. The appellate court held that: (1) SHPD review and comment was not required in light of city's determination that development would have "no effect" on historic properties, and (2) city conducted proper review of whether proposed project would have an effect on historic properties or burial sites. Affirmed.

39. *Parachester Village Neighborhood Council v. City of Richmond*, No. A123859, 105 Cal. Rptr. 3d 736, (Cal. Ct. App. Feb. 24, 2010). Objectors filed petition for writ of mandate and a complaint seeking declaratory and injunctive relief against city, alleging that city was required to conduct environmental review before entering into municipal services agreement to Indian tribe's proposed nearby casino. The superior court, No. CIV MSC07- 01090 granted peremptory writ of mandate, invalidating the agreement, and city appealed. The appellate court held that: (1) casino was not a "project" of the city, and (2) city's entry into agreement was not approval of a "project". Reversed and remanded.

40. *Native Village Of Point Hope v. Salazar*, Nos. 09-73942, 09-73944, 10-70166, 10-70368, 2010 WL 1917085 (9th Cir. May 13, 2010). Not selected for publication in the Federal Reporter. In these expedited petitions for review, the court consider the allegations of Native Village of Point Hope (NVPH) and Alaska Eskimo Whaling Commission (AEWC) (collectively, "petitioners") that the Minerals Management Service (MMS) failed to discharge its obligations under the National Environmental Policy Act (NEPA) and the Outer Continental Shelf Lands Act (OCSLA) in approving Shell Offshore Inc. and Shell Gulf of Mexico Inc.'s (Shell) proposed Beaufort and Chukchi Sea Exploration Plans. Petitioners claim there are multiple deficiencies in the two Environmental Assessments prepared by the MMS, as well as deficiencies in both of Shell's proposed exploration plans. The court concluded that, as to both exploration plans, the MMS met its obligations under NEPA to take a "hard look at the consequences of its actions," to "base[] its decision on a consideration of the relevant factors," and to "provide[] a convincing statement of reasons to explain why a project's impacts are insignificant." *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 730 (9th Cir. 2001) (alteration, citations, and internal quotation marks omitted). The court also concluded that the MMS's decision to approve Shell's exploration plans under OCSLA was "supported by substantial evidence on the record considered as a whole." 43 U.S.C. § 1349(c)(6). In addition, because petitioners failed to prove that the MMS "relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before [the MMS] or is so implausible that it could not be ascribed to a difference in view or product of agency expertise," *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (en banc) (internal quotation marks omitted), the court concluded that the MMS did not act arbitrarily or capriciously. The court denied the petitions and granted Shell's motion to strike the petitioners' extra-record declarations.

41. *Northern Cheyenne Tribe v. Montana Dept. of Environmental Quality*, No. DA 09-0131, __ P.3d __, 2010 WL 1997421 (Mont. May 18, 2010). Northern Cheyenne Tribe (Tribe), Tongue River Water Users' Association (TRWUA), and Northern Plains Resource



42. *Hydro Resources, Inc. v. U.S. E.P.A.*, No. 07-9506, __ F.3d __, 2010 WL 2376163 (10th Cir. Jun. 15, 2010). Mining company that sought to operate uranium mine and New Mexico Environmental Department petitioned for review of Environmental Protection Agency's (EPA) decision to implement, pursuant to Safe Drinking Water Act (SDWA), federal underground injection control program on company's lands. The appellate court, 198 F.3d 1224, dismissed the petitions and remanded. On remand, the EPA determined that land fell within a dependent Indian community, and company petitioned for review. The appellate court, 562 F.3d 1249, denied the petition, and company petitioned for rehearing en banc. The appellate court held that: (1) petitioner suffered injury in fact such that it had standing to contest EPA's determination; (2) "dependent Indian communities" under statute providing primary federal criminal jurisdiction over certain territories consist only of lands explicitly set aside for Indian use by Congress or its designee and federally superintended; and (3) petitioner's land did not fall within a "dependent Indian community," so as to subject proposed mine to EPA regulation. Panel opinion vacated; petition for review granted; EPA's determination vacated.

43. *Suquamish Tribe v. Central Puget Sound Growth Management Hearings Bd.*, No. 39017-5-II, __ P.3d __, 2010 WL 2679841 (Wash. Ct. App. July 7, 2010). Citizens petitioned for review of county's comprehensive plan. The Central Puget Sound Growth Management Hearings Board validated the plan, and citizens appealed. The Thurston Superior Court affirmed, and citizens appealed. The appellate court held that: (1) Board impermissibly used a bright-line rule when it approved county's minimum urban density of four dwelling units per acre; (2) Board impermissibly used a bright-line rule when it approved a net rural residential density of one dwelling unit per five acres that was used in county's rural wooded incentive program; (3) ample specific standards did not govern county's rural wooded incentive program, as required by the Growth Management Act (GMA); and (4) the Board did not decide all of the relevant issues before it when it approved county's comprehensive plan. Reversed in part and remanded.

44. *Skull Valley Band of Goshute v. Davis*, No. 07-cv-0526, 2010 WL 2990781 (D. Utah July 26, 2010). Plaintiffs, the Skull Valley Band of Goshute Indians ("Skull Valley Band") and Private Fuel Storage, LLC ("PFS"), invoked the Administrative Procedure Act ("APA"), to obtain review of two decisions made by the Department of Interior ("DOI"): (1) denying a right-of-way application submitted by PFS, and (2) disapproving a lease between the Skull Valley Band and PFS. The court vacated those decisions and remanded the right-of-way application and Plaintiffs' lease to the DOI for further consideration.

45. *Pit River Tribe v. U.S. Forest Service*, No. 09-15385, ___ F.3d ___, 2010 WL 2991395 (9th Cir. Aug. 2, 2010). Native American tribe and environmental groups sued Bureau of Land Management (BLM), United States Forest Service (USFS), Advisory Council on Historic Preservation, Department of Interior (DOI), and geothermal lessee, alleging that leasing procedures and approval of geothermal power plant, pursuant to Geothermal Steam Act, on federal land that had religious and cultural significance to tribe, violated National Environmental Policy Act (NEPA) and National Historic Preservation Act (NHPA). The district court, 306 F. Supp. 2d 929, granted defendants summary judgment. Appeal was taken. The appellate court, 469 F.3d 768, reversed and remanded. On remand, the district court, 2008 WL 5381779, granted tribe summary judgment and remanded to agencies. Tribe appealed. The appellate court held that: (1) summary judgment and remand order did not constitute appealable final decision; (2) remand order was not appealable interlocutory order refusing injunction; (3) appeal was reviewable under All Writs Act; (4) agencies had discretion to extend leases on remand; and (5) district court's remand guidance to agencies was appropriate. Affirmed in part, reversed in part, and remanded with instructions.

46. *Native Village of Point Hope v. Salazar*, No. 1:08-cv-0004, ___ F. Supp. 2d ___, 2010 WL 3083541 (D. Alaska Aug. 5, 2010). Plaintiffs filed a Complaint for Declaratory and Injunctive Relief challenging Defendants' decision to offer approximately 29.4 million acres of public lands on the outer continental shelf of the Chukchi Sea for oil and gas leasing. Plaintiffs allege that the decision, together with the Chukchi Sea Planning Area Oil and Gas Lease Sale 193 and Seismic Surveying Activities in the Chukchi Sea Final Environmental Impact Statement (FEIS), violate the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), and the Administrative Procedure Act (APA). The Court found the Agency's failure to comply with the clear instructions of § 1502.22 was an abuse of discretion. This does not necessarily require the Agency to completely redo the permitting process, but merely to address the three concerns addressed above. In all other respects the Court found Defendants complied with NEPA. The Court granted in part Plaintiffs' Motion for Summary Judgment Docket and denied in part the Cross-Motion for Summary Judgment. This matter was REMANDED to the Agency to satisfy its obligations under NEPA in accordance with the opinion.

F. FISHERIES, WATER, FERC, BOR.

47. *UTE Distribution Corp. v. Secretary of Interior of U.S.*, No. 08-4147, ___ F.3d ___, 2009 WL 3336097 (10th Cir. Oct. 19, 2009). Following dismissal, by the district court, 624 F. Supp. 2d 1322, of action challenging Department of the Interior's determination that Indian tribe's water rights were previously divided and distributed pursuant to the Ute Partition and Termination Act, distribution corporation representing terminated "mixed-blood" former members of the tribe appealed. The appellate court held that action was untimely filed. Affirmed, and remanded with instructions.

48. *State v. Guidry*, No. 37301-7, ___ P.3d ___, 2009 WL 4919329 (Wash. App. Dec. 22, 2009). Larry Guidry, who lives on the Nisqually Indian Reservation with his wife who is a member of the Tribe, appealed his convictions for first degree fish dealing without a license, first degree fish trafficking without a license, four counts of participation of a non-Indian in an Indian fishery for commercial purposes, and four counts of first degree commercial fishing without a

49. *Upper Skagit Indian Tribe v. Washington*, No. 07-35061, 590 F.3d 1020 (9th Cir. Jan. 5, 2010). Upper Skagit Tribe filed request for determination that Saratoga Passage and Skagit Bay were not within Suquamish Tribe's 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 previously in government's underlying suit against State of Washington. The district court granted Upper Skagit Tribe summary judgment. Suquamish Tribe appealed. On rehearing, the appellate court held that Suquamish Tribe's treaty right, as adjudicated by district court, was not intended to include Saratoga Passage and Skagit Bay. Affirmed.

50. *Miccosukee Tribe of Indians of FL v. U.S.*, No. 08-23001, ___ F. Supp. 2d ___, 2010 WL 55467 (S.D. Fla. Jan. 7, 2010). Indian tribe brought action alleging that federal government's water management actions infringed on tribe's constitutional and statutory rights by causing high water levels on lands to which tribe held perpetual leasehold. After the government's motion to dismiss was granted in part and denied in part, 656 F. Supp. 2d 1375, the government moved for reconsideration and Judgment on the pleadings. The district court held that: (1) tribe was not collaterally estopped from bringing equal protection claim; (2) tribe had parens patrie standing to bring equal protection claim; (3) government waived sovereign immunity as to equal protection claim; and (4) tribe was not required to bring equal protection claim under the Administrative Procedure Act (APA). Motions denied.

51. *In re the general adjudication of all rights to use water in the Gila River system and source*. Nos. WC-07-0001-IR, WC-07-0003-IR. 2010 WL 569853 (Ariz. Feb. 19, 2010). As part of adjudication of water rights of users of river, the Superior Court approved agreement settling Indian tribe's claims to water rights in river, and granted summary disposition disposing of objections of non-settling parties. Non-settling parties filed interlocutory appeal. The Supreme Court, sitting en banc, held that: (1) agreement did not affect the water rights or remedies for injury to water rights of non-settling parties; (2) agreement did not allocate more water to tribe than it could have proved at trial; (3) agreement did not unlawfully bind non-settling parties; and (4) agreement's safe harbor provision did not violate non-settling party's equal protection rights. Affirmed.

52. *Karuk Tribe of Northern California v. California Regional Water Quality Control Bd.*, Nos. A124351, A124369, A124370, (Cal. Ct. App. Mar. 30, 2010). Private parties asked the California Regional Water Quality Control Board, North Coast Region (Board) to enforce California's law governing waste discharge to several hydroelectric dam-reservoirs on the Klamath River. The trial court sent the matter back to the Board so that it could reconsider its initial refusal in light of two decisions by the United States Supreme Court, which the court believed deserved "a more complete response" by the Board than appeared in its original resolution rejecting the private parties' request. The Board again concluded that it was powerless to act. After entering a final judgment denying the plaintiffs any relief, the trial court awarded them \$138,000 in attorney fees, half of which was to be paid by the Board and half by

53. *U.S. v. Alpine Land & Reservoir Co.*, No. 08-16767, 2010 WL 1348015 (9th Cir. Apr. 7, 2010). Not selected for publication in the Federal Reporter. The legal issues in this appeal are essentially identical to those decided in *United States v. Orr Water Ditch Co.*, No. 07-17001. This appeal arose from Ruling 5823 of the Nevada State Engineer, allocating groundwater rights in the Dayton Valley Hydrographic Basin (the Basin). The Pyramid Lake Paiute Tribe of Indians (the Tribe) opposed many of the applications. The Tribe contended that the groundwater in the Basin was over-appropriated and that granting the applications would impair their federally decreed water rights under the Alpine Decree. The State Engineer ruled against the Tribe, ruling that the Tribes decreed water rights were not protected against diminution as a result of allocations of groundwater. The Tribe appealed the Engineers ruling to the federal district court. The district court held that it did not have subject matter jurisdiction over the Tribes appeal, holding that the appeal should be brought in the Nevada state court. The district court so held even though the Tribe contended in its appeal that the Engineers ruling adversely affected its water rights under the Alpine Decree. The district courts holding was inconsistent with the appellate courts decision in *United States v. Orr Water Ditch Co.* The appellate court vacated and remanded to the district court for further proceedings consistent with that decision.



54. *U.S. v. Orr Water Ditch Co.*, No. 07-17001, ___ F.3d ___, 2010 WL 1338127 (9th Cir. Apr. 7, 2010). Indian tribe brought action for review of decision of the Nevada State Engineer which allocated certain groundwater rights. The district court dismissed, and tribe appealed. The appellate court held that: (1) district court decree which allocated to Indian tribe senior rights to water in river did not adjudicate only rights to surface water in the river, but forbade groundwater allocations that adversely affected tribe's decreed water rights, and (2) district court had subject matter jurisdiction over tribes petition. Reversed and remanded.



55. *U.S. v. Orr Water Ditch Co.*, No. 07-17021, 2010 WL 1347878 (9th Cir. Apr. 7, 2010). Not selected for publication in the Federal Reporter. Appellant Tahoe Reno Commercial Center, LLC (TRCC) appealed the dismissal of its appeal of Nevada State Engineer Ruling 5747 for lack of subject matter jurisdiction. In a separate disposition the court reversed and remanded the district courts decision dismissing, for lack of subject matter jurisdiction, an appeal of the same ruling by the Pyramid Lake Paiute Tribe of Indians. *United States v. Orr Water Ditch Co.*, No. 07-17001. TRCC complained that the State Engineers ruling failed to grant TRCC's

56. *Miccosukee Tribe of Indians of Florida v. U.S.*, No. 08-23001, ___ F. Supp. 2d ___, 2010 WL 2730095 (S.D. Fla. July 12, 2010). Before the court was Defendants’ Motion for Summary Judgment. This case involves a federally-recognized Indian tribe claiming that certain water management actions by Defendants have caused high water levels on lands to which the Indian Tribe has rights, in violation of the Tribe's constitutional rights. Plaintiff Miccosukee Tribe of Indians of Florida (the “Miccosukee Tribe” or the “Tribe”) is a federally recognized Indian Tribe residing on land in and near Everglades National Park. All “aboriginal” rights that the Miccosukee Tribe had to the lands were extinguished in 1982 as part of a court settlement between the United States and the Seminole Nation of Indians. The Miccosukee Tribe now holds a perpetual leasehold (the “Lease”) to a 189,000-acre tract of land (the “Leased Area”) to the north of Everglades National Park. The Lease was granted to the Miccosukee Tribe in 1982 by the Board of Trustees of the State of Florida Internal Improvement Trust Fund. Under rational basis review, the Corps' challenged conduct must bear a rational relation to some legitimate end. *Nat'l Parks*, 324 F.3d at 1245. In determining whether the Corps' challenged conduct survives rational-basis scrutiny, this Court must determine if there is a legitimate goal the Corps could have been pursuing and whether there is a nexus between the challenged conduct and the achievement of its goal. *Joel*, 232 F.3d at 1358. In conducting this analysis, it is only necessary to identify a goal the Corps could have been pursuing, without respect to whether the Corps was actually pursuing this goal when it engaged in the challenged conduct. The Corps left the S-12A gate open from July 15 to July 24, 2008, to protect the fledging of the sparrows and to mitigate the effects of the fire. This is a legitimate goal and the closure of the S-12A gate directly furthered the Corps' goal of protecting the sparrow by keeping water levels low in the relevant area during that period and directly furthered the goal of permitting the Corps to execute its water management obligations. Therefore, the Corps' challenged conduct survives rational-basis scrutiny. The court granted Defendants’ Motion for Summary Judgment and denied all pending motions as moot.

57. *Miccosukee Tribe of Indians of Florida v. U.S.*, Nos. 04-21448, 04-CV-22072, 05-CV-20663, ___ F. Supp. 2d ___, 2010 WL 1506267 (S.D. Fla. Apr. 14, 2010). Indian tribe and environmental organization filed action challenging state’s water quality standards in protected area. The district court, 2008 WL 2967654, granted plaintiffs’ motion for summary judgment and remanded to Environmental Protection Agency (EPA). Plaintiffs moved to compel state and federal governments to comply with summary judgment order. The district court held that: (1) EPA’s determination failed to comply with summary judgment order; (2) EPA’s failure to require state of Florida to comply with water quality standards in protected area was contrary to Clean Water Act; and (3) modification of state’s National Pollution Discharge Elimination System permits were required. Motions granted in part.

58. *State v. Jim*, No. 28079-9, __ P.3d __, 2010 WL 1856282 (Wash. Ct. App. May 11, 2010). State appealed from decision of district court dismissing, on jurisdiction grounds, the prosecution of an enrolled member of an Indian tribe for second-degree unlawful use of a net and retaining undersized sturgeon. The superior court reversed. Discretionary review was granted. The appellate court held that State lacked jurisdiction to prosecute defendant for fishing violations at the Maryhill Treaty Fishing Access Site, though that site was not on Yakama reservation land, where the site was acquired for Indians' use and benefit in lieu of treaty fishing grounds submerged or destroyed by dam construction. Superior Court reversed.



59. *U.S. v. Confederated Tribes of Colville Indian Reservation*, Nos. 08-35961, 08-35963, __ F.3d __, 2010 WL 2105224 (9th Cir. May 27, 2010). United States brought action against states on behalf of Native American tribes to define treaty fishing rights. Confederation of tribes intervened as defendant. The district court dismissed confederation's claim on behalf of constituent tribe and confederation appealed. The appellate court, 470 F.3d 809, reversed and remanded. Following remand and trial, the district court, 2008 WL 3834169, entered findings of fact and conclusions of law regarding joint fishing rights of constituent tribe and plaintiff-intervenor tribe. Plaintiff-intervenor tribe appealed, and confederation cross-appealed. The appellate court held that: (1) 1894 agreement provided constituent tribe with non-exclusive fishing rights at fishery; (2) confederation did not relinquish all fishing rights held in fishery when it signed 1894 agreement; and (3) constituent tribe did not have primary rights at fishery. Affirmed.

60. *United States v. Washington*, No. 08-35794, 2010 WL 293112 (9th Cir. Jan. 27, 2010). Indian tribe moved to reopen judgment, 476 F. Supp. 1101, that had denied tribal members treaty fishing rights on ground that tribe had not maintained organized tribal structure. The district court denied relief. Tribe appealed. The appellate court, 394 F.3d 1152, reversed. On remand, the district court, 2008 WL 6742751, again denied relief. Tribe appealed. The appellate court en banc, held that federal recognition obtained by Indian tribe was not extraordinary circumstance that warranted reopening of previous denial of treaty rights. Affirmed.

G. GAMING

61. *Cachil Dehe Band of Wintun Indians of Colusa Indian Community v. California*, No. 04-2265, 2009 WL 2971547 (E.D. Cal. Sept. 11, 2009). This matter was before the court on defendants State of California, California Gambling Control Commission (CGCC), and Governor Arnold Schwarzenegger's (defendants) motion to stay execution of final judgment entered on Aug. 19, 2009. Plaintiff Cachil Dehe Band of Wintun Indians of the Colusa Indian Community (Colusa) and plaintiff-intervenor Picayune Rancheria of the Chukchansi Indians' (Picayune) (plaintiffs) challenged interpretation of various terms in their California Class III Gaming Compacts. Plaintiffs contended that defendants' interpretation of the Compact impermissibly limited the amount of licenses available to Compact tribes. Colusa also challenged defendants' interpretation of other provisions of the Compact that it argued impermissibly limited its gaming opportunities. The court granted Colusa's motion for summary judgment with respect to its claims regarding (1) Colusa's priority in the draw

62. *Knox v. State, ex rel. Otter*, No. 35787-2008, ___ P.3d ___, 2009 WL 4093711 (Idaho Nov. 27, 2009). Casino guests who developed clinical addictions to video gaming at casino on Indian reservation brought action against State, challenging constitutionality of statute authorizing Indian tribes to conduct gaming using tribal video gaming machines. The district court granted State's motion to dismiss. Casino guests appealed. The Supreme Court held that: (1) casino guests lacked standing, as a declaration that statutes were unconstitutional would not result in a substantial likelihood that the video gaming machines would be removed from the casino, and (2) res judicata barred further litigation between State and Indian tribes regarding whether tribes' conducting tribal video gaming violated state constitution. Affirmed.

63. *McCracken v. Perdue*, No. 09-43, 2009 WL 5067298 (N.C. Ct. App. Dec. 22, 2009). The State appealed from the trial court's order entering judgment in favor of plaintiffs McCracken and Amick, Inc., dba The New Vemco Music Co., and its principal owner, Ralph Amick, on their claim that the State is not permitted under federal Indian gaming law to grant the Eastern Band of Cherokee Indians of North Carolina ("the Tribe") exclusive rights to conduct certain gaming on tribal land while prohibiting it throughout the rest of the State. The appellate court concluded that state law providing the Tribe with exclusive gaming rights does not violate federal Indian gaming law and reversed the trial court's order.

64. *Big Lagoon Rancheria v. California*, No. 09-01471, 2010 WL 1532323 (N.D. Cal. Apr. 16, 2010). Pursuant to the Indian Gaming Regulatory Act (IGRA), Plaintiff Big Lagoon Rancheria sought an order finding that Defendant State of California has failed to negotiate in good faith toward the formation of a tribal-State compact for class III gaming. The State moved to stay all proceedings in the action, except for discovery, pending a determination by the Bureau of Indian Affairs (BIA) as to whether Big Lagoon was under federal jurisdiction in 1934. The State contends that one of its affirmative defenses to Big Lagoon's action turns on the BIA's decision. In the alternative, the State asked the Court to continue the dispositive motion filing and hearing date by at least six months. Big Lagoon opposed the motion. The Court DENIED the State's Motion to Stay.

65. *California Valley Miwok Tribe v. California Gambling Control Com'n*, No. D054912, 2010 WL 1511744 (Cal. Ct. App. Apr. 16, 2010). The California Valley Miwok Tribe appealed from a judgment of dismissal following an order sustaining the demurrer filed by the California Gambling Control Commission (the Commission) on the basis that the Miwok Tribe lacked capacity or standing to pursue its action against the Commission. The appellate



66. *Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*, Nos. 08-55809, 08-55914, ___ F.3d ___, 2010 WL 1542452 (9th Cir. Apr. 20, 2010). The Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 et seq. , provides that a state must negotiate in good faith with its resident Native American tribes to reach compacts concerning casino-style gaming on Native American lands. Defendants-Appellants/Cross-Appellees the State of California (the State) and Governor Arnold Schwarzenegger (Governor Schwarzenegger) (collectively as parties to this litigation, the State) appealed the district court's finding that, in violation of IGRA, 25 U.S.C. § 2710(d)(3)(A), the State negotiated in bad faith with Plaintiff-Appellee/Cross-Appellant the Rincon Band of Luiseno Mission Indians (Rincon) concerning amendments to the parties' existing tribal-state gaming compact. The district court based its bad faith finding on the State's repeated insistence that Rincon pay a portion of its net revenues into the State's general fund, which the district court determined to be an attempt by the State to impose a tax on the tribe in violation of 25 U.S.C. § 2710(d)(4). The State challenged the district court's characterization of its requests as an attempt to impose a tax, and argued that even if it was attempting to impose a tax, that alone is insufficient to support the finding of bad faith. The appellate court affirmed the district court's finding that the State of California negotiated with Rincon in bad faith by conditioning its agreement to expand Rincon's Class III gaming rights on Rincon's agreement to pay a percentage of its revenues to the State's general fund. The district court's order compelling the parties to reach a compact or submit their best offers to a mediator pursuant to § 2710(d)(7) was effective forthwith.



67. *Wells Fargo Bank, N.A. v. Lake of Torches Economic Development Corp.*, No. 09-CV-768, 2010 WL 1687877 (W.D. Wis. Apr. 23, 2010). Wells Fargo Bank, N.A. (Wells Fargo), brought an action to enforce a Trust Indenture agreement against Lake of the Torches Economic Development Corporation (Corporation), a corporation chartered by the Lac du Flambeau Band of Lake Superior Chippewa Indians. The Trust Indenture was designed to secure repayment of the principal and interest on \$50 million in bonds issued by the Corporation. The Court found the Trust Indenture to be a management contract executed without prior approval from the National Indian Gaming Commission (NIGC). This rendered the contract, and the waiver of sovereign immunity contained therein, void under the Indian Gaming Regulation Act (IGRA). Therefore, the Court dismissed the case because it lacked jurisdiction over the defendant. Before the Court were the plaintiff's motions to alter or amend the judgment and for leave to file an amended complaint. The court found that aside from dismissing the case without leave to amend, there was no error of law in the initial proceedings and the proposed amendments were futile. The court denied Wells Fargo's motion to vacate the judgment and denied Wells Fargo's motion to for leave to file an amended complaint.

68. *Elem Indian Colony of Pomo Indians v. Pacific Development Partners*, No. C 09-1044, 2010 WL 2035331 (D. Cal. May 19, 2010). Claimants brought action to vacate or modify an arbitral award made in favor of Respondent Indian Tribe. The arbitrator found that a purported contract for casino development was void for two independent reasons: (1) lack of

69. *Big Lagoon Rancheria v. State of Cal.*, No. 09-01471, 2010 WL 2350483 (N.D. Cal. Jun. 8, 2010). Defendant State of California filed objections to Magistrate Judge Joseph C. Spero's April 13, 2010 Order Denying Defendant's Motion for a Protective Order. The State seeks leave to file a motion to reconsider the denial of its objections, asserting that Judge Spero's Order is contrary to the Ninth Circuit's decision in *Rincon Band of Luiseno Mission Indians v. Schwarzenegger*, 602 F.3d 1019 (9th Cir. 2010), which issued on April 20, 2010. Under Civil L.R. 7-9(b)(2), a party may ask a court to reconsider an interlocutory decision if the party can show the “emergence of . . . a change of law occurring after the time of such order.” The Court granted the State leave to file a motion for reconsideration and remanded the motion to Magistrate Judge Spero to consider the impact of *Rincon* on his prior decision.

70. *Amador County, Cal. v. Salazar*, No. 05-658, __ F. Supp. 2d __, 2010 WL 2724204 (D.D.C. July 12, 2010). 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). The district court, 592 F. Supp. 2d 101, dismissed action for failure to state a claim. County moved for reconsideration. The district court held that: (1) Secretary's decision was committed to agency discretion and was unreviewable under APA, and (2) approval by Secretary of gaming compact could never violate IGRA. Motion denied.

71. *Madewell v. Harrah's Cherokee Smokey Mountains Casino*, No. 2:10cv08, 2010 WL 2574073 (W.D.N.C. Jun. 18, 2010). Before the Court was Defendants' Motion to Dismiss and Motion to Stay or Remove; the Memorandum and Recommendation of the Magistrate Judge, regarding the disposition of that motion; and the Defendants' Objection to the Memorandum and Recommendation and Motion for Reconsideration. Plaintiffs Betty Madewell and Edward L. Madewell filed a diversity action against the Defendants Harrah's Cherokee Smokey Mountains Casino, Tribal Casino Gaming Enterprise (TCGE), Harrah's NC Casino Co., LLC (“Harrah's NC Casino”), and the Eastern Band of Cherokee Indians (EBCI), seeking damages in excess of \$75,000 for personal injuries sustained when Mrs. Madewell tripped and fell while visiting the Harrah's Cherokee Smokey Mountains Casino & Hotel in Cherokee, North Carolina. It is alleged in the Complaint that the EBCI, through the TCGE, owns and operates the Casino. It is further alleged that Harrah's NC Casino has contracted with the EBCI to manage the Casino. The Plaintiffs alleged, and the Defendants admitted, that Harrah's NC Casino is a “corporation” organized under the laws of the State of North Carolina. The Plaintiffs allege that they are residents of Tennessee. After receiving an extension of time to answer or otherwise respond to the Complaint, the Defendants filed a Motion to Dismiss and Motion to Stay or Remove. The Plaintiffs did not file a response to the Defendants' Motion. The Court accepted the Magistrate Judge's Recommendation that the Defendants' Motion to Dismiss be granted as to the Defendants Harrah's Cherokee Smokey Mountains Casino, Tribal Casino Gaming Enterprise, and the Eastern Band of Cherokee Indians. Upon reconsideration of the Motion to Dismiss with respect to the Defendant Harrah's NC Casino Co., LLC, the Court further concluded that the Defendant should be dismissed without prejudice as a matter of comity.

72. *Cachil Dehe Band of Wintun Indians of Colusa Indian Community v. California*, No. 09-16942, ___ F.3d ___, 2010 WL 3274490 (9th Cir. Aug. 20, 2010). The parties to this dispute, the State of California and two California Indian tribes, signed Gaming Compacts intended “to initiate a new era of tribal-state cooperation” with respect to gaming in the state. Central to the Compacts is a formula to calculate the number of gaming devices California tribes are permitted to license. How to interpret this opaquely drafted and convoluted formula has preoccupied the parties for some time, as the result has significant economic implications. Indeed, math and money have led to a breakdown in the cooperative spirit envisioned by the Compacts. This appeal springs from a disagreement between California and plaintiff Cachil Dehe Band of Wintun Indians of the Colusa Indian Community and plaintiff-intervenor Picayune Rancheria of the Chukchansi Indians (“Picayune”) (collectively, “Colusa”). The parties agree that the formula sets a ceiling on the number of licenses in the pool. But the tribes claim the formula permits more licenses, while California maintains that it sets a lower limit. Acknowledging that the formula language is ambiguous, California and Colusa each offered different interpretations. The district court adopted yet a different formulation, introduced by Colusa as an alternative way to calculate the license pool. The parties also submitted extrinsic evidence purporting to explain their calculations. The appellate court affirmed in part the grant of summary judgment to Colusa because it agreed that the limit on licenses exceeds that recognized by California. However, the appellate court’s interpretation of the governing provisions differs slightly from the district court’s formulation. The appellate court also affirmed the denial of California’s motion for summary judgment. The appellate court upheld the remedy ordered by the district court of a license draw open to all eligible tribes, administered according to the process delineated in the Compacts. The court concluded that, under §§ 4.3.1 and 4.3.2.2(a)(1), the Compacts authorize 40,201 licenses for distribution through the license draw process. As this number exceeds the limit employed by California and proffered in its cross-motion for summary judgment, the court affirmed in part the grant of summary judgment to Colusa and the denial of California’s cross-motion for summary judgment. It also affirmed, as being within the district court’s discretion, the order of a license draw open to all eligible Compact Tribes. Affirmed in part and reversed in part. Who knew that simple math could be so tricky?

H. LAND CLAIMS

73. *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

74. *U.S. v. Torlaw Realty, Inc.*, Nos. 06-56057, 07-55877, 2009 WL 2823357 (9th Cir. Sept. 2, 2009). Not selected for publication in the Federal Reporter. Defendant-Appellant Kim Lawson, Jr. appealed the district court’s summary adjudication orders and its Findings of Fact and Conclusions of Law and Judgment in favor of Plaintiff-Appellee United States. The appellate court found that the district court properly enjoined Lawson’s operation of a waste disposal facility on allotment TM 314, as the land use agreement he formed with the allottees constituted a commercial lease in all but name and lacked the required approval from the Bureau of Indian Affairs. Undisputed facts established that Lawson and his brother, in the name of Lawson Enterprises, “possessed” the allotment, exercising control over the entire property by clearing and grading it, making substantial capital investments, and covering it with waste during a span of fourteen years. Conclusory declarations asserting that the allottees did not convey a possessory interest in the land to Lawson or Lawson Enterprises cannot defeat summary adjudication. In any event, revocable permits are subject to BIA approval. The appellate court rejected Lawson’s argument that the Government was not in possession of the allotment and thus one of the elements of a prima facie case for trespass was not met in this case finding that as the Government holds the allotment in trust for allottees, it has the power to control occupancy on the property and to protect it from trespass. Affirmed.

75. *T.P. Johnson Holdings, LLC v. Poarch Band Of Creek Indians*, No. 3:09-305, 2009 WL 2983201 (M.D. Ala. Sept. 17, 2009). Plaintiffs (Johnson Land Owners) own property in Tallapoosa County, Alabama, adjacent to a casino operated by Defendants, the Poarch Band of Creek Indians (Poarch Band) and two corporations wholly owned by the Tribe. In their amended complaint, the Johnson Land Owners alleged they were injured when a portion of a casino parking deck intruded onto their land. The Poarch Band moved to dismiss the case for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted.

76. *Sisseton-Wahpeton Oyate v. U.S. Dept. of State*, No. CIV 08-3023, ___ F. Supp. 2d ___, 2009 WL 3153655 (D.S.D. Sept. 29, 2009). This was an action brought by four federally recognized Indian tribes for declaratory and injunctive relief against the United States arising over the planned construction of an oil pipeline through the Tribes' aboriginal and treaty protected territory in eastern North Dakota and South Dakota. The United States filed a motion to dismiss for lack of jurisdiction, and, alternatively, for failure to state a claim. The court found that the proposed project, at no point, crosses the boundaries of any present-day reservations in South Dakota. The proposed pipeline, although running, in part, through lands previously ceded to the United States will be located exclusively on land that was restored to the public domain. When the Tribes ceded the land in question back to the United States, they lost the right of absolute use and occupation of lands . . . conveyed, and therefore, the Tribes no longer have the incidental power to regulate the use of the lands by non-Indians. The court also found that Plaintiffs did not identify any treaty language that imposes a specific duty regarding preservation of historic resources on the government. Consequently, the plaintiffs failed to establish a treaty basis for their trust claim, and therefore, even if the court had jurisdiction, the claim should be dismissed for failure to state a claim. The court granted the motions to dismiss.

77. *Northern Arapaho Tribe v. Harnsberger*, No. 08-CV-215-B, ___ F. Supp. 2d ___, 2009 WL 3229758 (D. Wyo. Oct. 6, 2009). The Northern Arapaho Tribe (NAT), brought an action seeking injunctive relief against alleged unlawful taxation by the State and County Defendants within the Wind River Indian Reservation (Reservation). The NAT rested its assertion of illegal taxation on the boundary descriptions resulting from the Treaty of Fort Bridger, the Lander Purchase Agreement of 1874, and the Thermopolis Purchase Agreement of 1897. The critical aspect of Plaintiff's allegations was its interpretation of a later surplus land act, the Act of March 3, 1905, which served to codify, with amendments, an April 21, 1904 agreement (1904 Agreement). The Court noted that Plaintiff took the position that it never officially agreed to the 1904 Agreement. Before the court were several motions to dismiss. The court granted the motions to dismiss.

78. *U.S. v. Milner*, Nos. 05-35802, 05-36126, ___ F.3d ___, 2009 WL 3260528 (9th Cir. Oct. 9, 2009). United States, on own behalf and as trustee on behalf of Indian tribe, sued waterfront homeowners, claiming violations of common law trespass, Rivers and Harbors Appropriation Act (RHA), and Clean Water Act (CWA), arising from ambulatory tideland property boundary coming to intersect with shore defense structures erected by homeowners. Following bench trial, the district court, 2005 WL 3072830, granted government summary judgment, ordered removal of structures and payment of civil penalty, and denied award of attorney fees, under Equal Access to Justice Act (EAJA). Homeowners appealed. The appellate court held that: (1) United States, not state of Washington, owned tidelands; (2) homeowners' construction of structures to prevent erosion was no defense to trespass claim; (3) common enemy doctrine did not apply as defense to trespass claim; (4) homeowners intended and caused trespass; (5) homeowners violated RHA by refusing to remove structures; (6) fact issue precluded summary judgment as to CWA violation; and (7) award of attorney fees was not warranted under EAJA. Affirmed in part, reversed in part, and remanded.

79. *Office of Hawaiian Affairs v. Housing and Community Development Corp. of Hawai'i*, No. 25570, ___ P.3d ___, 2009 WL 3447270 (Hawai'i, Oct. 27, 2009). Office of Hawai'ian Affairs (OHA), and native Hawai'ians, sued state and Housing and Community Development Corporation of Hawai'i (HCDCH), seeking to enjoin alienation of ceded lands from public lands trust. Following bench trial, the First Circuit Court entered partial judgment for HCDCH. The Supreme Court, 177 P.3d 884, vacated and remanded with directions to grant injunctive relief, based on federal congressional resolution apologizing for role of United States in overthrowing Hawai'ian monarchy. State petitioned for a writ of certiorari. The U.S. Supreme Court, 129 S. Ct. 1436, 173 L. Ed. 2d 333, reversed and remanded. Following settlement of claims brought by all plaintiffs but one, the State filed motion to dismiss claims of remaining plaintiff. The Supreme Court held that: (1) plaintiff, a descendant of those peoples inhabiting the Hawai'ian islands in 1778, and claiming Hawai'ian cultural and religious attachments to the 'aina or land, had standing to enforce State's compliance with public lands trust provisions, but (2) in light of legislative enactment setting forth procedures for carrying out State's fiduciary responsibilities with regard to land trust, plaintiff's challenge was not ripe for review. Motion to dismiss appeal denied; circuit court judgment vacated, and case remanded with directions.

80. *Robinson v. United States*, No. 07-17052, 2009 WL 3525634 (9th Cir. Nov. 2, 2009). Easement holders brought action against the United States as trustee for Indian tribe, asserting claims for disruption of lateral and subjacent support, negligence, and nuisance, and alleging that an unshored slope caused subsidence and that a curb, concrete walkway, wrought iron fence, and fire hydrant encroached onto the easement. The district court, 2007 WL 2580612, dismissed the suit for lack of subject matter jurisdiction due to the sovereignty of the United States under the Quiet Title Act. Easement holders appealed. The appellate court vacated and remanded.

81. *The Tunica-Biloxi Tribe of Louisiana v. Blalock*, No. 09-459, 2009 WL 3617648 (La. Ct. App. Nov. 4, 2009). The plaintiff tribe filed a possessory action in state district court, seeking tort damages for use and a determination as to the ownership of property in Avoyelles Parish. The trial court signed a stipulated judgment awarding possession of the disputed property to the Tribe. The damages issue remained pending. Subsequently, the appellant filed a petition of intervention, arguing that it acquired a portion of the disputed tract prior to the filing of the possessory action. The plaintiff filed an exception to the petition for intervention, asserting that the trial court lacked subject matter jurisdiction due to sovereign immunity. The trial court granted the exception. The intervenor appealed. The appellate court affirmed.



82. *Yankton Sioux Tribe v. Podhradsky*, Nos. 08-1441, 08-1488, ___ F.3d ___, 2010 WL 1791365 (8th Cir. May 6, 2010). AMENDED OPINION. In this action the Yankton Sioux Tribe (Tribe) and its members sought declaratory and injunctive relief against officials of Charles Mix County and the state of South Dakota in respect to the boundaries of the Yankton Sioux Reservation. In an earlier stage of the case the court held that the Tribe's 1894 cession of certain land to the United States had diminished, rather than disestablished, the reservation and that some land retained reservation status. *Yankton Sioux Tribe v. Gaffey* (Gaffey II), 188 F.3d 1010 (8th Cir. 1999), *cert. denied*, 530 U.S. 1261 (2000), and remanded to the district court for further development of the record and for "findings relative to the status of Indian lands which

83. *Unalachtigo Band of Nanticoke Leni Lenape Nation v. Corzine*, No. 08-2775, ___ F.3d ___, 2010 WL 2038844 (3rd Cir. May 25, 2010). The Unalachtigo Band of Nanticoke-Lenni Lenape Nation filed complaint, based on Nonintercourse Act, seeking possession of land in New Jersey that previously constituted the Brotherton Indian reservation. The Stockbridge-Munsee Community intervened, claiming non-frivolous interest in the property and moved to dismiss for failure to join it as indispensable party. The district court dismissed complaint sua sponte for lack of standing and denied Community's motion to dismiss. Community appealed. The appellate court held that district court lacked jurisdiction to rule on Community's motion once it determined that Band's complaint should be dismissed for lack of standing. Vacated in part.

84. *Yellowbear v. Attorney General of the State of Wyoming*, No. 09-8069, 2010 WL 2053516 (10th Cir. May 25, 2010). Yellowbear, a Wyoming state prisoner, sought federal habeas relief under 28 U.S.C. § 2254 from his state conviction for the murder of his daughter. Yellowbear argued that the Wyoming state courts that heard his case lacked jurisdiction because the crime occurred in a federal Indian reservation. The Wyoming Supreme Court rejected this argument on direct appeal, explaining that the land in question is not within an Indian reservation. Later, a federal district court denied Yellowbear's § 2254 habeas petition challenging the ruling. The appellate court affirmed district court's disposition.

85. *Yankton Sioux Tribe v. U.S. Army Corps of Engineers*, No. 08-2255, ___ F.3d ___, 2010 WL 2178929 (8th Cir. Jun. 2, 2010). Indian tribe sued Army Corps of Engineers (COE) for allegedly violating Water Resources Development Act (WRDA) by transferring and leasing to South Dakota several recreational areas purportedly located within external boundaries of Indian reservation. The district court, 2008 WL 895830, granted COE summary judgment, and 2009 WL 1097538, denied tribe's motion for relief from judgment. Tribe appealed. The appellate court of Appeals held that: (1) recreational areas were outside external boundaries of reservation; (2) tracts formerly held in trust were outside external boundaries of reservation; and (3) Attorney General was not disqualified from representing COE. Affirmed on other grounds.

86. *Iowa Tribe Of Kansas and Nebraska v. Salazar*, No. 08-3277, ___ F.3d ___, 2010 WL 2253537 (10th Cir. Jun. 7, 2010). Native American tribes and governor of Kansas brought action against Department of Interior, challenging federal government's title to real property held in trust for specific tribe. The district court, 2008 WL 4186890, dismissed action for lack of subject matter jurisdiction. Plaintiffs appealed. The appellate court held that: (1) tract was held in trust, and thus plaintiffs were required to proceed under Quiet Title Act (QTA), and (2) court lacked subject matter jurisdiction, as Congress had not waived sovereign immunity as to QTA claims. Appeal dismissed.

87. *Burley v. San Joaquin County Sheriff's Office*, No. 2:09-01657, 2010 WL 2574024 (E.D. Cal. Jun 25, 2010). Plaintiff, proceeding without counsel, filed this action on June 15, 2009, with the principal purpose of preventing defendants from evicting the California Valley Miwok Tribe (Tribe) from the property at issue in this case. A status conference was held to address several questions presented by the filings in this case, including: (1) whether this action was brought on behalf of Silvia Burley, individually, or on behalf of the Tribe; (2) if the action was brought on behalf of the Tribe, whether the Tribe had retained counsel in order to appear in federal court; and (3) whether the threatened eviction that forms the basis of plaintiff's lawsuit remains imminent, an issue previously raised in another court order. There has been some lingering confusion in this case as to whether Silvia Burley, a non-attorney, is an individual plaintiff in this case or is only pursuing claims on behalf of the Tribe as an authorized representative. If Ms. Burley is only representing the Tribe in federal court, concerns arise regarding the impermissible representation of an entity by a non-attorney. At the status conference, Ms. Burley represented that: (1) the Tribe owns the property that is at the heart of this dispute, which is consistent with the record in this case; (2) the claims in this case are the solely the Tribe's claims; and (3) the Tribe authorized her to bring this lawsuit on its behalf as its representative. As a result of these representations and the record in this case, the undersigned will recommend that this case be dismissed without prejudice because Ms. Burley, a non-attorney, cannot represent the Tribe in federal court. For the foregoing reasons, IT IS HEREBY RECOMMENDED that: 1. This case be dismissed without prejudice and that the Tribe be informed that if it wishes to re-file this action, it may only appear in federal court through an attorney.

88. *Amelia Peters Bingham v. Commonwealth of Massachusetts*, No. 09-2049, 2010 WL 2978141 (1st Cir. July 30, 2010). (Quoted from the opinion.) Plaintiffs styled this claim as a class action on behalf of themselves and all similarly situated descendants of the South Sea Indians, now known as the Mashpee Wampanoag. The Mashpee Wampanoag have been a federally recognized tribe since 2007. 72 Fed. Reg. 8007-01 (Feb. 22, 2007). Plaintiffs do not claim that the Commonwealth or Town directly seized lands from their tribal ancestors. Rather,

89. *Ninilchik Native Ass’n, Inc. v. Cook Inlet Region, Inc.*, No. 3:10-cv-00075, ___ F. Supp. 2d ___, 2010 WL 3123092 (D. Alaska Aug. 6, 2010). Before the court was defendant’s motion to join required parties or dismiss. Plaintiff Ninilchik is an Alaska Native Village Corporation formed pursuant to the Alaska Native Claims Settlement Act of 1971, 43 U.S.C. § 1601, *et seq.* (“ANCSA”). Defendant CIRI is an Alaska Native Regional Corporation formed pursuant to ANCSA. As part of a comprehensive settlement of aboriginal land claims, Alaska Native Claims Settlement Act provided for the withdrawal, selection, and conveyance of approximately 44 million acres of federal land within the State of Alaska to Native regional and village corporations. Under ANCSA, the United States Department of the Interior (“Interior”) was mandated to withdraw all available public lands in a township in which any Native village was located, as well as all public lands in two concentric rings of townships around each village. Section 12(a) of ANCSA (43 U.S.C. § 1611(a)) authorized each village to select a designated number of acres from these withdrawn lands for conveyance to the village corporation (“§ 12(a) selections”). Section 12(b) of ANCSA (43 U.S.C. § 1611(b)) required Interior to allocate additional lands to each regional corporation on the basis of Native population. The regional corporations were then required to distribute those § 12(b) lands among their constituent village corporations. In April 2010, Ninilchik filed the Complaint that gives rise to the instant action. It argued that CIRI is obligated under 43 U.S.C. §§ 1601-1642 and related provisions to convey to Ninilchik the lands selected and identified in its Request for Reconveyance. Ninilchik further alleged that a failure to convey the lands it requested is a breach of the § 12(a) Conveyance Agreement and other related ANCSA agreements. CIRI argued that the tracts of land requested by Ninilchik in its Request for Reconveyance are among lands that the other villages have a legal claim to under an agreement called the “§ 12(b) Selection Agreement.” CIRI contended that the villages should be joined because they have a legally protected interest in the availability of land from which their § 12(b) selections are to be made and because failure to join these parties may expose CIRI to “multiple, or otherwise inconsistent obligations.” In the instant case, Ninilchik asked the court to satisfy its ANCSA § 12(a) entitlements by conveying title to the lands it identified in its Request for Reconveyance. If Ninilchik were to prevail on its claims, the court could provide complete relief to Ninilchik by providing title to the land it seeks without invalidating any of the agreements signed by the other villages. While the court’s decision in this case could incidentally affect the § 12(b) selections of the other villages, this impact does not create a legally protected interest requiring the villages to be joined. The court denied the defendant’s motion to join required parties or dismiss.



90. *Oneida Indian Nation of New York v. County of Oneida*, Nos. 07-2430, 07-2548, 07-2550, ___ F.3d ___, 2010 WL 3078266 (2d Cir. Aug. 9, 2010). Three groups of the Oneida Indian Nation brought action against the State of New York and two counties, seeking redress for allegedly unlawful transfers of approximately 250,000 acres of ancestral land in central New York. The United States intervened as plaintiff. The district court, 500 F. Supp.2d

I. RELIGIOUS FREEDOM

91. *Brown v. Hawaii*, No. 07-00556, 2009 WL 3818233 (D. Hawai'i Nov. 13, 2009). Following two rounds of motions to dismiss, Plaintiff filed a third amended complaint asserting, among other things, a claim under the Native American Graves and Repatriation Act (NAGPRA) against Defendants the State of Hawai'i (State), the former Administrator of the State Historic Preservation Division (SHPD) of the Department of Land and Natural Resources (DLNR), the then-current Administrator of SHPD, and the Director of the DLNR (collectively, "State Defendants"). Previously, Plaintiff filed a motion for summary judgment as to the NAGPRA claim, but the motion was denied because there were genuine issues of material fact as to whether SHPD was in compliance with the statute. Based on the evidence presented at trial, the Court found that Plaintiff had not established that injunctive relief was appropriately issued in his favor because he failed to show that he suffered irreparable harm or that he will likely suffer such harm immediately in the absence of injunctive relief. The Court: (1) denied as moot the State Defendants' motions for judgment on partial findings; (2) found that Plaintiff failed to prove that he is entitled to permanent injunctive relief as to his NAGPRA claim by a preponderance of the evidence; and (3) found that the State Defendants are entitled to judgment on the NAGPRA claim.

92. *Bear v. Fleming*, Civ. No. 10-5030, 2010 WL 1999462 (D.S.D. May 18, 2010). Plaintiff Aloysius Dreaming Bear (Bear), a Lakota student and graduating senior at Oelrichs High School is a lifelong resident of the Pine Ridge Indian Reservation and a member of the Oglala Sioux Tribe. He brought suit against the members of the school board and the superintendent of the school district alleging defendants violated his right to free speech under the First Amendment by requiring him to wear a cap and gown over his traditional Lakota clothing at the 2010 graduation proceedings. Bear sought a preliminary and permanent injunction enjoining defendants from imposing the cap and gown policy on him and other Lakota students at the 2010 and all future graduation events. At the beginning of the school year, Bear informed his class sponsor of his intent to wear traditional Lakota regalia and clothing at his graduation. The sponsor informed Mr. Dreaming Bear he could do so because it was the students' graduation. Mr. Dreaming Bear later learned the school board required him to wear a cap and gown over his traditional clothing. The court found that the public interest weighs in favor of the school board. Graduation exercises are important not only to the students but also to schools, communities, families, and the public. The tradition of the cap and gown is time-honored and is part of the very fabric of the academic experience throughout the nation. The public expects regularity and solemnity in graduation proceedings. To surrender control of graduation proceedings to students runs the risk of undermining the high standards the public expects. The court found that Mr. Dreaming Bear did not make the necessary showing that preliminary injunctive relief should issue. Because the court declined to issue a preliminary

► **93. *A.A. v. Needville Independent School District***, No. 09-20091, 2010 WL 2696846 (5th Cir. Jul. 9, 2010). Native American student and his parents sued school district alleging that exemption to the district's grooming policy requiring student to wear his long hair in a bun on top of his head or in a braid tucked into his shirt violated his rights under the federal constitution and the Texas Religious Freedom Restoration Act (TRFRA). The district court, 2009 WL 6318214, issued permanent injunction preventing school district from applying its grooming policy to student. School district appealed. The appellate court held that: (1) student had a sincere religious belief in wearing his hair visibly long; (2) requirement that student wear his long hair in a bun or tucked inside his shirt if braided was a substantial burden on the free exercise of this belief; (3) school district's interests in teaching hygiene, preventing disruption, and avoiding safety hazards were not compelling interests that justified the burden; and (4) school district's interests in instilling discipline, asserting authority, and in uniformity were also not compelling interests. Affirmed.

94. *Geronimo v. Obama*, No. 09-303, 2010 WL 2947052 (D.D.C. July 27, 2010). Plaintiffs, a group of twenty descendants of the Native American Geronimo, sued President Barack Obama, Secretary of Defense Robert Gates, Secretary of the Army Peter Geren, Yale University, and the Order of Skull and Bones under the Native American Graves Protection and Repatriation Act ("NAGPRA"), 25 U.S.C. § 3001 *et seq.*, seeking, among other things, an order under § 3002 requiring the defendants to return Geronimo's remains and pay money damages. President Obama, Gates, and Geren ("federal defendants") moved to dismiss the complaint for lack of subject matter jurisdiction and for failure to state a claim. The court found that because plaintiffs failed to establish the necessary express waiver of sovereign immunity by the United States, and because the complaint failed to state a claim, the motion was granted and the complaint was dismissed as to all defendants.

J. SOVEREIGN IMMUNITY and FEDERAL JURISDICTION

95. *State v. Davis*, No. A07-36, __ N.W. 2d __, 2009 WL 2878109 (Minn. Sept. 10, 2009). Native American member of one band of tribe who was allegedly driving through Indian reservation of another band of the same tribe of which he was not a member was convicted in the District Court of speeding and failing to provide proof that he had insurance on his vehicle. Native American appealed. The appellate court, 2008 WL 2726950, affirmed. Native American petitioned for review, which was granted. The Supreme Court held that Native American was subject to state court's jurisdiction. Affirmed.

96. *Rosales v. U.S.*, No. 08-512 L, 98-860, __ Fed. Cl. __, 2009 WL 3286594 (Fed. Cl. Oct. 7, 2009). Indians filed suits against United States, claiming breach of fiduciary and trust duties, under panoply of statutes including Indian Reorganization Act (IRA) and Native American Graves Protection and Repatriation Act (NAGPRA), seeking to invalidate tribal elections and to wrest from tribal government beneficial ownership of two parcels of land for which United States allegedly effected taking without just compensation by granting parcels to

97. *Frazier v. Brophy*, No. 08-2919, 2009 WL 3228781 (2nd Cir. Oct. 8, 2009). Not selected for publication in the Federal Reporter. Plaintiff Frazier appealed from orders of the district court dismissing claims against certain defendants-appellees and granting summary judgment in favor of other defendants-appellees. The appellate court found that the district court correctly ruled that it lacked subject matter jurisdiction to hear the case on either federal question or diversity grounds. The dismissal of the suit from federal court does not foreclose all relief against the tribe, its casino, and its agents since the Oneida Nation has a trial and appellate court system. To the extent Frazier has live claims against the tribe, its casino, or the casino's employees, he could attempt to bring them there. Remanded to district court with orders to dismiss for lack of subject matter jurisdiction.

98. *Gristede's Foods, Inc. v. Unkechaug Nation*, No. 06-1260, ___ F. Supp. 2d ___, 2009 WL 3235181 (E.D.N.Y. Oct. 8, 2009). Plaintiff Gristede's Foods, Inc. commenced an action against the Unkechaug Nation (Unkechaug) and the Shinnecock Tribe (Shinnecock); individual defendants Harry Wallace (Chief Wallace), the Poospatuck Smoke Shop and Trading Post (Smoke Shop) and others, alleging violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-68, and the Lanham Act, 15 U.S.C. § 1125(a), and state law claims for unjust enrichment, unfair competition, deceptive trade practices, and false advertising arising from defendants' tax-free cigarette sales and advertising. The court granted the motions to dismiss in part and denied in part, as follows: (1) the Unkechaug Nation's and, as sued in his official tribal capacity, Chief Harry Wallace's motion to was granted; and (2) As sued in his individual capacity and in his capacity as owner of the Poospatuck Smoke Shop, Chief Wallace's and the Poospatuck Smoke Shop's motion to dismiss was denied.

99. *Memphis Biofuels, LLC v. Chickasaw Nation Industries, Inc.*, No. 08-6145, 585 F.3d 917 (6th Cir. Nov. 4, 2009). Biodiesel refining company brought action against federally chartered tribal corporation that delivered diesel fuel and soybean oil to the company for refining, seeking a declaratory judgment that the corporation's waiver of sovereign immunity was effective, an order compelling arbitration, and a temporary restraining order (TRO) prohibiting the corporation from proceeding with a case against the company in tribal court. The district court dismissed the suit for lack of subject matter jurisdiction. Company appealed. The Court of Appeals, Cole, Circuit Judge, held that: (1) as a matter of first impression, incorporation under the Indian Reorganization Act (IRA) did not automatically waive tribal sovereign immunity; (2) corporation's charter did not contain an express waiver of sovereign immunity; and (3) contractual provision purporting to waive sovereign immunity was insufficient to waive immunity, absent board approval as required by charter. Affirmed.

100. *NGV Gaming, Ltd. v. Upstream Point Molate, LLC*, Nos. C-04-3955, C-05-1605, 2009 WL 4258550 (N.D. Cal. Nov. 24, 2009). The Guidiville Band of Pomo Indians (Band) and Guidiville Band of Pomo Indian Gaming Agency (Agency) filed a motion to

101. *Hunter v. U.S.*, No. 09-355, 2009 WL 4857378 (Fed. Cl. Dec. 8, 2009). Hunter brought a suit alleging that he is a direct descendant of an Eskimo Indian, but that his adoption by non-Eskimo parents severed the tribal affiliation to which Mr. Hunter believes he is entitled. “[A]ttempting to obtain his tribal affiliation, rights, and benefits,” plaintiff asked the court to order the Bureau of Indian Affairs (BIA) to produce information and documents that may lead to plaintiff’s admission into the Eskimo Indian Tribe. Because plaintiff did not seek monetary damages, but instead sought only equitable relief, the court dismissed the claim for lack of subject matter jurisdiction.

102. *U.S. v. Bird*, No. 2:09cr15, 2009 WL 4801374 (W.D.N.C. Dec. 8, 2009). This matter was before the court on the Defendant’s Objections to Garnishment and Request for Hearing and the Government’s Response to Defendant’s Objections to Garnishment and Request for Hearing. Defendant was found guilty by jury verdict of attempt to commit murder, assault with intent to commit murder, assault with a dangerous weapon with intent to do bodily harm, assault resulting in serious bodily injury, and using, carrying and possessing a firearm during a crime of violence. Defendant was sentenced to a total sentence of 330 months imprisonment. The Judgment of Conviction in a Criminal Case requires that he support his dependants during his incarceration and pay restitution in the amount of \$56,198.06 for medical services rendered to his victim. The Government moved for a writ of continuing garnishment as to tribal gaming proceeds due to the Defendant, who is an enrolled member of the Eastern Band of Cherokee Indians (Band). The writ issued to the Band on that same date advising that an answer must be made within ten days after service of the writ. The Band/Garnishee has not filed an answer; however, the Defendant filed objections to the garnishment and sought a hearing. The court denied Defendant’s Objections to Garnishment and Request for Hearing and ordered that during the pendency of the appeal, the Eastern Band of Cherokee Indians shall pay the garnished amounts into the registry of the Clerk of Court for the United States District Court for the Western District of North Carolina.



103. *Jeffredo v. Macarro*, No. 08-55037, ___ F.3d ___, 2009 WL 4912143 (9th Cir. Dec. 22, 2009). The Pechanga Band of the Luiseño Mission Indians (Pechanga Tribe) disenrolled a number of its members (Appellants) for failing to prove their lineal descent as members of the Tribe. Appellants brought a petition for habeas corpus under 25 U.S.C. § 1303 of the Indian Civil Rights Act (ICRA), claiming their disenrollment by members of the

104. *Nason v. 1991 Buick, Plate No. VX1501/MN, VIN 1G4EZ13LXMU408829*, No. A08-1622, 2010 WL 431443 (Minn. Ct. App. Feb. 9, 2010). Not Reported in N.W.2d. Appellant challenged the district court’s dismissal of a civil forfeiture proceeding on the ground that it lacks subject-matter jurisdiction. Appellant Mille Lacs County seized respondent Margaret M. Nason’s 1991 Buick (vehicle) after the vehicle’s operator, Matthew J. Hvezda, was arrested for second-degree test refusal in violation of Minn. Stat. §§ 169A.20. Both the incident leading to Hvezda’s charge and the subsequent seizure of respondent’s vehicle occurred on Nay Ah Shing Drive, which is located on land held in trust by the federal government for the Mille Lacs Band of Ojibwe Indians, or on “Indian Country” as defined by 18 U.S.C. § 1151 (2006). Respondent, the registered owner of the vehicle, was served with a notice of seizure and intent to forfeit vehicle; she was not involved in the incident leading to the charge and was not a defendant in the criminal case. Respondent is an enrolled member of the Fond du Lac Band but is not enrolled in the Mille Lacs Band. Both the Fond du Lac Band and the Mille Lacs Band are member bands of the Minnesota Chippewa Tribe, a federally recognized Indian tribe. Respondent filed a claim in Mille Lacs County conciliation court, arguing that she is entitled to the return of her vehicle because the state of Minnesota lacks subject matter jurisdiction to seize and forfeit the vehicle. Respondent based this argument on the facts that the incident and seizure occurred on the Mille Lacs Reservation and that respondent is an enrolled member of the Minnesota Chippewa Tribe. Appellant moved for summary judgment, arguing that the state has subject-matter jurisdiction over the forfeiture proceeding. Because respondent’s sole challenge to the forfeiture was the state court’s lack of subject-matter jurisdiction, appellant argued that it was entitled to summary judgment on the ground that the forfeiture was properly in state court. Based on the state’s strong interest of promoting safety on state roads and the weaker tribal interest in self-governance present in this case, the appellate court concluded that a forfeiture proceeding against respondent in state court was not preempted by federal or tribal interests, concluded that the state has subject-matter jurisdiction to hear the forfeiture action involving respondent’s vehicle, and reversed.

105. *Native American Arts, Inc. v. Contract Specialties, Inc.*, No. 09-3879, 2010 WL 658864 (N.D. Ill. Feb. 18, 2010). Native American Arts (NAA) sued Contract Specialties, Inc. d/b/a Sunburst Companies (Sunburst) under the Indian Arts and Crafts Act of 1990 and the Indian Arts and Crafts Enforcement Act of 2000. Sunburst moved to dismiss NAA’s complaint for lack of personal jurisdiction, improper venue, violation of the Equal Protection Clause, lack of standing, and failure to plead a cause of action. In the alternative, Sunburst moved to transfer the action to the District of Rhode Island. NAA is an Indian-owned arts and crafts organization involved in the manufacture, distribution, and sale of authentic Indian arts and crafts and is headquartered in the Northern District of Illinois. NAA is composed of members of the Ho-Chunk Nation, an Indian tribe recognized by the United States. Sunburst is a wholesaler and supplier of arts, crafts, and artworks throughout the United States, including products of a traditional Indian style. Sunburst is not an Indian arts and crafts organization within the terms of 25 U.S.C. § 305e. Sunburst has directly or indirectly offered, displayed, advertised, and sold various goods in a manner that falsely suggests they are Indian produced in violation of the

106. *United States v. Maggi*, No. 08-30223, 09-30052, 2010 WL 917199 (9th Cir. Mar. 16, 2010). Defendants with Indian blood were convicted under the Major Crimes Act in unrelated trials in the United States District Court for aggravated sexual abuse of a minor in Indian country and for assault with a dangerous weapon and firearms offenses during a crime of violence on Indian reservation. Defendants appealed. On consolidation of appeals, the appellate court held that: (1) defendant whose Indian tribe was not federally recognized and whose other Indian blood was 11/64ths was not shown to be an "Indian" within the meaning of the Act, and (2) defendant who was descendant member of federally recognized tribe was not an Indian under the Act. Reversed, and convictions vacated.

107. *Quart v. Fleming*, No. CIV-08-1040, 2010 WL 1257827 (W.D. Okla. Mar. 26, 2010). Plaintiff brought the action in her individual capacity and as the Personal Representative of Joe Wesley Hart who she claimed died as a result of injuries sustained during a confrontation with officers of the Citizen Potawatomi Nation's tribal police force at the FireLake Casino, which is owned by the Citizen Potawatomi Nation and located on Indian land. Plaintiff's federal claims are based on 42 U.S.C. § 1983; alleging that Fleming and Irwin restrained Mr. Hart without a warrant or probable cause and used excessive force in doing so, thereby violating his constitutional rights. She contended the Sheriff of Pottawatomie County was liable for the conduct of Irwin and Fleming because they were allegedly acting under Shirey's supervision and authority at the time of the incident by carrying out the policies and procedures of the Pottawatomie County Sheriff's office. Defendants argued that the undisputed evidence established that, at the time of the incident, they were acting solely in their capacities as police officers of the Tribe and that, as a result, tribal immunity precluded Plaintiff's claims against them and deprived the federal court of subject matter jurisdiction. The court found that although tribal immunity is properly asserted in a Rule 12(b)(1) motion, resolution of that issue was intertwined with the merits of Plaintiff's claims because she sued Fleming and Irwin in both their official and individual capacities and that tribal immunity extends to the official capacity claims, but does not protect tribal officials sued in their individual capacities. The court found that the Tribal police officers responded to a report of a disturbance at the Casino on Indian land. As a matter of law, Defendants were authorized to respond to the reported disturbance, to eject the offending individual from Indian land, or detain and transport him to the proper jurisdiction, regardless of his non-Indian status. The undisputed facts in the record establish that, under the applicable law, Defendants were entitled to tribal immunity to the extent they were sued in their official capacities. The motion to dismiss pursuant to Rule 12(b)(1), converted to a motion for summary judgment, was granted.



108. *Burrell v. Armijo*, Nos. 09-2034, 09-2039, 09-2154, __ F.3d __, 2010 WL 1662482 (10th Cir. Apr. 27, 2010). Farm lessees sued federally-recognized Indian tribe, tribal governor, and lieutenant governor, inter alia, alleging violations of their federal civil rights and breach of farm lease. After a jury found governor and lieutenant governor liable for discriminating and conspiring to discriminate against lessees, those officials moved for judgment as a matter of law based in part on sovereign immunity. The district court granted motion as to lieutenant governor, denied motion as to governor, and awarded attorney’s fees to lessees as prevailing parties. Lessees and governor appealed. The appellate court held that: (1) governor was entitled to judgment as a matter of law based on sovereign immunity, and (2) any error in district court’s grant of motion to strike portions of complaint was harmless. Affirmed in part and reversed in part.

109. *Henin v. Cancel*, No. 09-22965, __ F. Supp. 2d __, 2010 WL 1737106 (S.D. Fla. Apr. 28, 2010). This case arose from events following an arrest made by police officers at a casino located on the reservation of the Miccosukee Tribe of Indians of Florida (Miccosukee Tribe). Henin filed suit against four police officers and the United States claiming that following his arrest he was assaulted and battered, denied medical care and supplies, and subjected to physical, verbal and emotional abuse – all at the hands of the Miccosukee police officers. Three of the four counts alleged in the Complaint were made against the United States under the Federal Tort Claims Act (FTCA): negligence (Count I), assault and battery (Count II), and intentional infliction of emotional distress (IIED) (Count III). Henin alleged that each of the Defendant police officers was “commissioned as a law enforcement officer with the Bureau of Indian Affairs, an agency of the United States government, and was acting pursuant to that commission” and also alleged the United States was “the principal and/or employer of the abusing officers, who were acting within the scope of their employment pursuant to a tribal self-determination contract between the Miccosukee Corporation and the United States government and pursuant to law enforcement commissions granted by the Bureau of Indian Affairs.” The United States maintained the Court lacked subject matter jurisdiction because the FTCA specifically precludes Henin’s claim for assault and battery, and since the negligence and IIED claims arise out of the alleged assault and battery, they are also barred. Thus, the issue before the Court was whether the United States waived its sovereign immunity under the FTCA and agreed to be liable to Henin for the alleged actions taken by the four Miccosukee police officers. The court granted defendant’s motion and dismissed Counts I through II against the United States.

110. *In re Civil Commitment of Johnson*, Nos. A09-2225, A09-2226, __ N.W. 2d __, 2010 WL 1971676 (Minn. Ct. App. May 18, 2010). Enrolled members of Leech Lake and Bois Forte bands of Minnesota Chippewa Indian tribe moved to dismiss, for lack of subject-matter jurisdiction, county’s proceedings to have each of them civilly committed as a sexually dangerous person (SDP). The district court denied motions. Tribe members appealed. The appellate court held that: (1) Public Law 280 does not expressly grant the state subject-matter jurisdiction to civilly commit enrolled member of federally recognized Indian tribe as an SDP; but (2) state had subject-matter jurisdiction, even without express consent of Congress, to civilly commit enrolled members of Minnesota Chippewa Indian tribe as SDPs, as exceptional circumstances existed and federal law did not preempt state jurisdiction. Affirmed.

111. *United States v. Gallaher*, No. 09-30193, ___ F.3d ___, 2010 WL 2179162 (9th Cir. Jun. 2, 2010). The Federal Death Penalty Act of 1994 conditionally eliminated the death penalty for Native American defendants prosecuted under the Major Crimes Act or the General Crimes Act, subject to the penalty being reinstated by a tribe’s governing body. In 2005, a federal grand jury indicted defendant-appellant James H. Gallaher, Jr., for first degree murder, more than 14 years after he killed Edwin Pooler on the Colville Indian Reservation in eastern Washington. Because the Confederated Tribes of the Colville Reservation have not reinstated the death penalty, Gallaher argued that he is not subject to the death penalty and thus the five year federal statute of limitations for noncapital crimes applied to his offense. The appellate court disagreed and held that first degree murder remains a capital offense, regardless of whether capital punishment can be imposed in a particular case.

112. *Cherokee Nation v. Nash*, No. 09-CV-52, ___ F. Supp. 2d ___, 2010 WL 2690368 (N.D. Okla. July 2, 2010). Before the Court were Defendants Salazar and the U.S. Department of the Interior's Motion to Transfer Venue and to Suspend Obligation to Answer, or in the Alternative to Stay; and Motion of the Cherokee Freedmen to Transfer Or, in the Alternative, Stay. Defendants moved to transfer this action to the District Court for the District of Columbia (D.D.C.), where the action of *Vann v. Salazar*, 1:03CV-1711-HHK (D.C. Action), is currently pending. Federal Defendants and Freedmen Defendants filed the motions to transfer currently pending before this Court, requesting transfer of the action to the D.D.C. pursuant to (1) the “first to file” rule; and (2) 28 U.S.C. § 1404(a). Alternatively, Federal Defendants and Freedmen Defendants moved the Court to stay the action pending resolution of all proceedings or certain relevant proceedings in the D.C. Action, pursuant to the first to file rule. The court found that the Federal Defendants and Freedmen Defendants met their burden of showing that the first to file rule generally applies to this action and the D.C. Action. The court granted the Federal Defendants and Freedmen Defendants' motions to transfer pursuant to the first to file rule. This action was transferred to the District Court for the District of Columbia as related to the first-filed case of *Vann v. Salazar*, 1:03CV-1711-HHK. Alternative requests to stay the action were denied as moot.

113. *U.S. v. I.L.*, No. 09-3403, ___ F.3d ___, 2010 WL 3034681 (8th Cir. Aug. 5, 2010). The government filed a juvenile delinquency information in the district court against I.L., accusing her of committing acts of delinquency on the Omaha Indian Reservation in July 2008. I.L. was born in August 1992. The parties agreed, that if I.L. were an adult, the information would allege two criminal offenses: (1) assault with a dangerous weapon in Indian country, in violation of 18 U.S.C. §§ 113(a)(3) and 1153, and (2) second-degree murder in Indian country, in violation of 18 U.S.C. §§ 1111 and 1153. The U.S. Attorney certified both offenses are felony crimes of violence and there is a substantial federal interest to warrant the exercise of federal jurisdiction. The government moved the district court to transfer I.L. for adult criminal prosecution, pursuant to 18 U.S.C. § 5032. I.L. resisted the government’s motion, arguing (1) the district court lacked authority to transfer I.L. without the Omaha Tribe’s consent, and (2) in any event, I.L.’s transfer was not in the interest of justice. The district court granted the government’s motion, and I.L. appealed. The appellate court affirmed the district court’s order transferring I.L. for adult criminal prosecution.

K. SOVEREIGNTY, TRIBAL INHERENT

114. *Kaltag Tribal Council v. Jackson*, No. 08-35343, 2009 WL 2736172 (9th Cir. Aug. 28, 2009). Plaintiffs-Appellees Kaltag Tribal Council (Kaltag), Selina Sam, and Hudson Sam (Kaltag plaintiffs) filed a case in district court against three employees of the State of Alaska, Department of Health and Human Services. The Kaltag plaintiffs alleged that an adoption judgment issued by the Kaltag court is entitled to full faith and credit under § 1911(d) of the Indian Child Welfare Act (ICWA), and that the Alaska employees were required to grant the request for a new birth certificate. The district court granted the Kaltag plaintiffs' motion for summary judgment and denied the Alaska employees' summary judgment motion. The Alaska employees appealed. The appellate court found that the district court correctly found that neither the ICWA nor Public Law 280 prevented the Kaltag court from exercising jurisdiction and that reservation status is not a requirement of jurisdiction because "[a] Tribe's authority over its reservation or Indian country is incidental to its authority over its members." Affirmed.

115. *State v. Eriksen*, No. 80653-5, 216 P.3d 382 (Wash. Sept. 17, 2009). Defendant, a non-Indian, who had been detained by a tribal police officer after pursuit beyond the reservation borders after being observed on the reservation driving at night with high beams and drifting across the center divider, was convicted in the Superior Court of driving under the influence (DUI). Defendant appealed. The Supreme Court held that: (1) in a matter of first impression, tribal officer had inherent sovereign authority to continue fresh pursuit of driver who broke traffic laws on reservation, and (2) tribal officer had statutory authority to continue fresh pursuit of driver who broke traffic laws on reservation. Affirmed.

116. *Water Wheel Camp Recreation Area v. LaRance*, No. CV-08-0474, 2009 WL 3089216 (D. Ariz. Sept. 23, 2009). Plaintiffs Water Wheel Camp Recreational Area, Inc. and Robert Johnson were sued for eviction in an action pending in the Tribal Court of the Colorado River Indian Tribes. Plaintiffs asked the District Court to prevent Defendants - a judge and clerk of the Tribal Court-from proceeding with the Tribal Court action. Plaintiffs argued that the Tribal Court lacked subject matter jurisdiction under *Montana v. United States*, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981). The court concluded that the Tribal Court properly exercised jurisdiction over Water Wheel, but not over Robert Johnson. The court granted Plaintiffs' request for declaratory relief with respect to Mr. Johnson and denied it with respect to Water Wheel.

117. *Almazan v. Harrah's Entertainment, Inc.*, No. 09 CV 1189, 2009 WL 3401275 (S.D. Cal. Oct. 20, 2009). Plaintiff Rachel Almazan filed a wrongful death action in California Superior Court, alleging that her husband was exposed to Legionella bacteria while staying at Harrah's Rincon Casino and Resort (Casino). The Casino is located on the reservation of the Rincon San Luiseno Band of Mission Indians (Tribe). Defendant Harrah's Entertainment, Inc. (Harrah's) removed the action to federal district court based upon diversity jurisdiction and then moved to dismiss for lack of subject matter jurisdiction, lack of personal jurisdiction, failure to state a claim upon which relief can be granted, and failure to join a party under Rule 19. The court found that although the pleadings do not make clear who is responsible for day-to-day operations of the Casino, the Tribal-State Compact between the State of California and the Tribe ensures that the Tribe is ultimately responsible for the Casino's operations and any guest of the Casino arguably enters a commercial relationship with the Tribe and is subject to the Tribe's civil jurisdiction regarding disputes that arise out of that relationship. Because the Tribe may

118. *Geroux v. Assurant, Inc.*, No. 2:08-cv-00184, 2009 WL 4068700 (W.D. Mich. Nov. 23, 2009). Plaintiff Geroux brought a complaint for unpaid benefits pursuant to long-term disability coverage provided by his employer, the Keweenaw Bay Indian Community, in the Tribal Court of the Keweenaw Bay Indian Community, L'Anse Reservation, Michigan. Plaintiff sought compensation for alleged underpayment of benefits under the policy of "approximately \$230.39 per month since December 21, 1982." Defendants Assurant, Inc. (Assurant) and Union Security Insurance Company (Union Security) removed the case to federal court on the basis of federal question jurisdiction, claiming that Plaintiff's claims were covered by ERISA. Defendant Union Security answered Plaintiff's Complaint and brought a counterclaim for Declaratory Judgment pursuant to 28 U.S.C. § 2201 seeking a declaration from this court that it is the exclusive forum for Plaintiff's claims and that the tribal court lacks jurisdiction over Plaintiff's claims. The counterclaim further asserted that Union Security should not be required to exhaust its claims in tribal court because that court lacks jurisdiction over ERISA claims. Plaintiff moved to remand this action to the tribal court and moved to dismiss Defendant Union Security's counterclaim. The court found that Defendants did not fulfill the burden of demonstrating the court's jurisdiction and granted Plaintiff's motions to remand and to dismiss the counterclaim. This matter was remanded to the Keweenaw Bay Indian Community Tribal Court.

119. *State v. Kurtz*, Nos. 05FE0031; A132184, ___ P.3d ___, 2010 WL 535156 (Or. Ct. App. Feb. 17, 2010). Defendant, who was stopped by an Indian tribal police officer outside the boundaries of an Indian reservation, following a pursuit from within the reservation, was convicted in the circuit court of attempting to elude a police officer with a vehicle, and resisting arrest. He appealed. The appellate court held that: (1) Indian tribal police officer did not qualify as a "police officer," and (2) he did not qualify as a "peace officer." Reversed.

120. *Shakopee Mdewakanton Sioux (Dakota) Gaming Enterprise v. Prescott*, No. A09-684, ___ N.W. 2d ___, 2010 WL 606943 (Minn. Ct. App. Feb. 23, 2010). Appellant challenged a district court order denying the enforcement of a tribal court money judgment. Respondent Leonard Prescott was the chief executive officer and chairman of the board of directors of Little Six, Inc., a gaming enterprise owned by the Shakopee Mdewakanton Sioux Community, from 1991 to 1994. In 2005, the community transferred ownership of Little Six to appellant Shakopee Mdewakanton Sioux (Dakota) Gaming Enterprise (the Enterprise), a noncorporate tribal entity. In 1993, the community adopted a gaming ordinance that established licensing requirements for certain employees, including Prescott. The licensing system was administered by the Shakopee Mdewakanton Sioux Community Gaming Commission. Prescott applied to the commission for a license and received a temporary license pending a background investigation. In May 1994, the commission denied Prescott's application and suspended his temporary license, finding that he had engaged in negligence, fraud, and misconduct. Prescott appealed the commission's decision to the tribal court (licensing case), arguing that political and personal bias on the part of two commissioners violated his due-process rights and required their removal from further proceedings. The tribal court agreed, but the tribal court of appeals reversed, determining that Prescott had failed to submit actual evidence of bias. Prescott also challenged the merits of the commission's decision. The lengthy appeal process culminated in

121. *Eagle v. Yerington Paiute Tribe*, No. 08-16786, ___ F.3d ___, 2010 WL 1816756 (9th Cir. May 7, 2010). Following her conviction, in an Indian tribal court, of criminal child abuse, petitioner sought writ of habeas corpus. The district court denied the petition, and petitioner appealed. The appellate court held that Indian tribe was not required to plead and prove petitioner's Indian status beyond a reasonable doubt. Affirmed.

122. *U.S. v. Bird*, No. 2:09cr15, 2010 WL 1849011 (W.D. N.C. May 7, 2010). Defendant was found guilty of attempted murder, assault with intent to commit murder, assault with a dangerous weapon with intent to do bodily harm, assault resulting in serious bodily injury, and using and carrying a firearm during a crime of violence. Defendant was sentenced to a total of 330 months imprisonment and ordered to pay restitution for medical services to his victim in the amount of \$56,198.06. Defendant filed a notice of appeal which remains pending. The government moved for a writ of garnishment as to the Eastern Band of Cherokee Indians (Band) in order to garnish tribal gaming proceeds which are payable to the Defendant. The Band argued that the Defendant's per capita distribution of gaming revenues received from the Band are immune from garnishment due to the sovereign nature of the Band. It does not argue that there is any existing order of child support which must be paid from the per capita distribution. The court ordered that any motion to quash the writ of garnishment contained within the Answer of the Garnishee was denied; that any future child support order which is properly entered in the Cherokee Tribal Court for the support of the Defendant's children shall have priority over the writ of garnishment issued by the Court until such time as the child support obligation has expired; and entered a Final Order of Continuing Garnishment in the

123. *U.S. v. Owl*, No. 2:08cr21-2, 2010 WL 1849008 (W.D. N.C. May 7, 2010). Defendant was charged with attempted robbery, assault with intent to commit murder, kidnapping, assault with a dangerous weapon with intent to do bodily harm, assault resulting in serious bodily injury, and using and carrying a firearm during a crime of violence. Defendant entered into a plea agreement with the government pursuant to which he pled guilty to attempted robbery and using and carrying a firearm during a crime of violence and was sentenced to a total of 177 months imprisonment. He was ordered to pay restitution to his victim in the amount of \$17,803.70 and \$200 in assessments. The government moved for a writ of garnishment as to the Eastern Band of Cherokee Indians (Band) in order to garnish tribal gaming proceeds which were payable to the Defendant. The Band argued that the Defendant's per capita distribution of gaming revenues received from the Band are immune from garnishment due to the sovereign nature of the Band. It does not argue that there is any existing order of child support which must be paid from the per capita distribution. The court ordered that any motion to quash the writ of garnishment contained within the Answer of the Garnishee was denied; that any future child support order properly entered in The Cherokee Tribal Court for the support of the Defendant's children shall have priority over the writ of garnishment issued by the Court until such time as the child support obligation has expired; and that a Final Order of Continuing Garnishment is hereby entered in the amount of \$18,003.70, which attaches to each per capita distribution of gaming revenues on account of the Defendant.

124. *Miccosukee Tribe of Indians of Fla. v. Kraus Anderson Const. Co.*, No. 07-13039, ___ F.3d ___, 2010 WL 2138957 (11th Cir. May 28, 2010). Miccosukee Tribe brought suit to enforce tribal court judgment against contractor. The district court, 04-22774, granted contractor summary judgment on ground that disallowance of contractor's appeal of tribal court judgment violated due process. Tribe appealed. The appellate court held that federal question jurisdiction was lacking. Reversed and remanded with instruction.

125. *State of New Mexico v. David Harrison*, No. 31,224, 2010 WL 3169294 (N.M. June 8, 2010). The Supreme Court was asked to determine whether a state, county, or local peace officer, who is not cross-commissioned with the Bureau of Indian Affairs (BIA) or an Indian nation, tribe, or pueblo, see NMSA 1978, § 29-1-11 (2005), has the authority to pursue an Indian into Indian country to investigate an off-reservation crime committed in the officer's presence. The Supreme Court concluded that state officers have the authority to enter Indian country to investigate off-reservation crimes committed by Indians, so long as their investigation does not infringe on tribal sovereignty by circumventing or contravening a governing tribal procedure.

126. *U.S. v. Questar Gas Management Co.*, No. 2:08CV167, 2010 WL 2671332 (D. Utah July 1, 2010). This matter was before the court on Defendant Questar Gas Management Company's ("Questar") Motion for Temporary Restraining Order and Preliminary Injunction seeking to enforce provisions of a Surface Use and Access Concession Agreement (Agreement") entered into between Questar and The Ute Indian Tribe of the Uintah and Ouray Reservation (Tribe). Questar's request for injunctive relief stems from actions of the Tribe on June 22 and 23, 2010, at three of Questar's construction sites located on land owned by the Tribe – the Stagecoach Processing Plant, the Stagecoach Processing Plant expansion known as Iron



127. *Gillette v. North Dakota Disciplinary Board Counsel*, No. 09-1598, 610 F.3d 1045 (8th Cir. July 9, 2010). Attorney who was the subject of pending North Dakota disciplinary proceedings brought cause of action against the assistant disciplinary counsel of the Disciplinary Board of the Supreme Court of North Dakota to enjoin the proceedings. Attorney represented five members of the Tribe in wrongful discharge actions against the Tribe in the Fort Berthold reservation's tribal court. The cases settled when the Tribe agreed to pay each plaintiff \$35,000. Gillette then sued his clients in tribal court, seeking a 30% contingent fee. One client filed a written complaint with the Board, alleging that Gillette had committed ethical violations by unilaterally altering initial written agreements establishing a 10% contingent fee arrangement. The District Court, 593 F.Supp.2d 1063, granted Board's motion to dismiss. Attorney appealed. The appellate court held that: (1) North Dakota had extremely important state interest in assuring the professional conduct of the attorneys it licensed; (2) North Dakota attorney disciplinary proceeding was ongoing state judicial proceeding; and (3) equal protection challenge could be raised in pending disciplinary action. Affirmed.

128. *Lanphere v. Wright*, No. 09-36035, 2010 WL 2790929 (9th Cir. July 15, 2010). Not selected for publication in the Federal Reporter. Plaintiffs Amber Lanphere and Paul Matheson appealed the district court order dismissing, for failure to exhaust tribal remedies, this action against Defendants Puyallup Indian Tribe and Chad Wright, head of the Puyallup Tribal Tax Department, concerning the imposition by the Tribe of certain cigarette taxes on non-Indians. The appellate court found that Plaintiffs correctly stated that exhaustion of tribal

129. *State v. Hester*, No. A09-1784, 2010 WL 3000144 (Minn. Ct. App. Aug. 3, 2010). A district court jury found Brian Hester guilty of test refusal under the Minnesota Impaired Driving Code, Minn. Stat. §§ 169A.01-.78 (2008). Following conviction he moved for a new trial. Hester’s challenge was two-fold. First, Hester argued that Lower Sioux peace officers were not authorized by the DWI code to administer a preliminary breath test or request the additional chemical test. Second, he claimed that even if the DWI code could include Lower Sioux peace officers, the Lower Sioux Indian Community failed to comply with the statutory requirements to qualify as a law enforcement agency and therefore lacked authority to appoint peace officers. The appellate court found that because the Lower Sioux Indian Community substantially complied with the statutory requirements to appoint peace officers and the appointed peace officers are authorized to enforce the impaired-driving code’s testing requirements, the district court did not abuse its discretion by denying Hester’s motion for a new trial.

130. *QEP Field Services Company v. Ute Indian Tribe of the Uintah and Ouray Reservation*, No. 2:10-cv-00700, 2010 WL 3069832 (D. Utah Aug. 4, 2010). QEP Field Services Company sought to enjoin the Ute Indian Tribe of the Uintah and Ouray Reservation (the “Tribe”) from limiting access to QEP’s Stagecoach Processing Plant, the Iron Horse Turnaround expansion project, and related construction activities. The court determined that because the Tribal Court entered its preliminary injunction against QEP without jurisdiction, that preliminary injunction is not valid. The court further found that QEP established the four factors necessary to obtain a preliminary injunction. The court granted QEP’s motion for a preliminary injunction.

131. *Schroeder v. Mille Lacs Band of Ojibwe Indians*, No. A10-229, 2010 WL 3220147 (Minn. Ct. App. Aug. 17, 2010). Not Reported in N.W.2d. Relator Derek Schroeder was employed by respondent Mille Lacs Band of Ojibwe Indians, working on a full-time basis as a Gaming Regulatory Authority (GRA) Investigator and also maintained part-time employment as a tribal police officer for the Mille Lacs Tribal Police Department. The casino had a policy of not allowing firearms on the premises; signs to this effect were posted at each entrance. Further, a GRA employee-conduct policy, which relator signed and acknowledged reading in August 2006, expressly prohibited “[p]ossession of dangerous or unauthorized materials, such as explosives or firearms, in the workplace.” Relator had been informed by e-mail in June 2009 that he had the authority of a tribal police officer only when he was on duty with the tribal police, and that he would not be treated in a law-enforcement capacity while working as a gaming investigator. On August 10, 2009, relator brought a handgun to work at the casino. Following his shift as a gaming investigator at the casino, relator had a training exercise involving shooting. Relator did not feel comfortable leaving the gun in his vehicle, so he brought it inside the casino and left it in a duffle bag in his office. Relator told one coworker

L. TAX

132. *Confederated Tribes and Bands of the Yakama Nation v. Gregoire*, No. CV-08-3056, ___ F. Supp. 2d ___, 2010 WL 55904 (E.D. Wash. Jan. 4, 2010). Native-American tribal organization brought action against Washington state governor and others, challenging defendants' imposition and anticipated enforcement of cigarette tax on Native American retailers' sales to non-Native Americans. Parties moved and cross-moved for summary judgment. The district court held that: (1) legal incidence of tax did not fall on Native American retailers; (2) organization's claim that state lacked authority to enforce tax was not ripe for adjudication; (3) res judicata barred organization's argument that enforcement of tax was preempted by treaty; and (4) striking organization's request for court to revisit prior decision was warranted. Organization's motion denied and defendants' motion granted in part and denied in part.

133. *Crow Creek Sioux Tribal Farms, Inc. v. U.S. I.R.S.*, No. Civ. 09-3031, ___ F. Supp. 2d ___, 2010 WL 55318 (D.S.D. Jan. 6, 2010). Native-American tribe and related corporate entity brought action against Internal Revenue Service (IRS) and several IRS employees, seeking injunctive relief to stop public auction of land IRS had seized pursuant to tax lien arising from tribe's failure to pay certain employment taxes. Tribe moved for temporary restraining order (TRO) or preliminary injunction. The District Court held that factors weighed against issuance of TRO. Motion denied.

134. *Townsend v. Spitzer*, 69 A.D. 3d 1026, 891 N.Y.S. 2d 740 (N.Y. App. Div. Jan. 7, 2010). Assembly member and convenience store near Native American reservation petitioned, under Article 78, to compel Governor and others to enforce state tax laws by collecting sales and other taxes on cigarettes and motor fuel sold to non-Native Americans at businesses owned or operated by Native American tribes. The Supreme Court, 2008 WL 6623807, dismissed petition. Assembly member appealed. The Supreme Court, Appellate Division, held that refusal to enforce tax laws did not constitute unlawful nullification of assembly member's vote. Affirmed.

135. *Blue Lake Rancheria v. U.S.*, No. 08-4206, 2010 WL 144989 (N.D. Cal. Jan. 8, 2010). Plaintiffs Blue Lake Rancheria and Blue Lake Rancheria Economic Development Corporation (Plaintiffs) filed a suit for a refund of federal unemployment taxes paid on behalf of Mainstay Business Solutions (Mainstay), which is an unincorporated enterprise of the Blue Lake Rancheria Indian Tribe. Defendant United States denied Plaintiffs' previous request for a tax refund. Before the court were Plaintiffs and the United States cross-motions for summary judgment. The Court concluded that the tribal exception to "employment" of § 3306(c)(7) is only available to an Indian tribe where that Indian tribe is the common law employer of the individual in question. The Court also found that the undisputed material facts presented by Mainstay are legally insufficient to establish that Mainstay is the common law employer of the employees in question in this suit. The Court granted the United States' Motion for Summary Judgment and denied Plaintiffs' Motion for Summary Judgment.

136. *State v. Maybee*, No. 35200, 2010 WL 143459 (Idaho, Jan. 15, 2010). State filed complaint against tribal member, who resided on reservation in New York, for sale of unstamped cigarettes in interstate commerce, alleging violations of the Tobacco Master Settlement Agreement Complementary Act and the Master Settlement Agreement (MSA). The District Court granted State summary judgment, and issued injunction. Seller appealed. The Supreme Court held that: (1) the Tobacco Master Settlement Agreement Complementary Act prohibits selling, or offering for sale, noncompliant cigarettes, in Idaho; (2) tribal member's sales of noncompliant cigarettes took place in Idaho for purposes of Complementary Act; (3) Complementary Act is not preempted by the Interstate Commerce Clause; (4) neither the Agreement Complementary Act, nor the tobacco permit requirement of Idaho's Prevention of Minors' Access to Tobacco Act (MAA), is preempted by the Indian Commerce Clause; and (5) attorney general was entitled to recover reasonable attorney fees. Affirmed.

137. *City of New York v. Golden Feather Smoke shop, Inc.*, Nos. 09-3942 and 09-3997, 2010 WL 724707, (2nd Cir. Mar. 4, 2010). City brought action against businesses and proprietors that sold cigarettes on Native American reservation land, seeking injunctive relief, penalties, and damages under the Contraband Cigarette Trafficking Act (CCTA) and New York's Cigarette Marketing Standards Act (CMSA). After denying defendants' motion to dismiss for lack of subject-matter jurisdiction on grounds of tribal sovereign immunity, 2009 WL 705815, the district court, 2009 WL 2612345, granted the city a preliminary injunction that enjoined the sale of untaxed cigarettes other than to members of the reservation's nation for their personal use. Defendants appealed. The appellate court held that: (1) city was not required to make a showing of irreparable harm to obtain a preliminary injunction under either the CCTA or the CMSA, and (2) certification of questions to the New York Court of Appeals was warranted to resolve the issue of whether the provisions of New York's tax code imposing a tax on cigarettes and setting up a tax-exempt coupon program for cigarette sales on Native American reservations either individually or in combination imposed a tax on cigarettes sold on reservations when some or all of those cigarettes might be sold to persons other than members of the reservation's nation or tribe. Questions certified.



138. *Mike v. Franchise Tax Board*, No. D054439, 2010 WL 744297 (Cal. Ct. App. Mar. 5, 2010). Taxpayer brought action against Franchise Tax Board (FTB) for refund of income taxes attributable to distributions from gaming operations on her tribe's reservation. The superior court, No. 2007-00067324, entered judgment for FTB. Taxpayer appealed. The



139. *Osage Nation v. Irby*, No. 09-5050, 2010 WL 745718 (10th Cir. Mar. 5, 2010). Indian tribe brought action against State of Oklahoma, Oklahoma Tax Commission, and Commission's members seeking declaration that tribe's reservation had not been disestablished and remained Indian country, and that tribe members who were employed and resided within reservation's geographical boundaries were exempt from paying state income tax, and seeking injunction prohibiting defendants from collecting income tax from such members. Following reversal of its decision to allow the suit to proceed against the State and the Tax Commission, 260 Fed. Appx. 13, the district court, 597 F. Supp. 2d 1250, granted summary judgment to remaining defendants. Tribe appealed. The appellate court held that Osage reservation was disestablished by Congress. Affirmed.

140. *Oneida Indian Nation of New York v. Madison County, Oneida County, N.Y.*, Nos. 05-6408, 06-5168, 06-5515, ___ F.3d ___, 2010 WL 1659452 (2nd Cir. Apr. 27, 2010). In first case, Indian tribe brought action against county, alleging that parcels of land that tribe had purchased within boundaries of former reservation were exempt from taxation. The district court, 145 F. Supp. 2d 226, 145 F. Supp. 2d 268, determined that parcels were not taxable, and county appealed. The appellate court, 337 F.3d 139, vacated judgment, and certiorari was granted. The Supreme Court, 544 U.S. 197, reversed and remanded. On remand parties cross-moved for summary judgment. The district court entered summary judgment in favor of tribe, 401 F. Supp. 2d 219, and denied county's motion for relief from judgment, 235 F.R.D. 559. County appealed. In second case, tribe brought action against another county seeking declaratory and injunctive relief preventing county from foreclosing on property owned by tribe in that county for non-payment of taxes, and separate Indian band sought to intervene. The district court entered summary judgment in favor of tribe and denied motion to intervene, 432 F. Supp. 2d 285. County appealed, and cases were consolidated on appeal. The appellate court held that: (1) tribe's sovereign immunity from suit barred counties' actions to foreclose, and (2) proposed intervenor was not a necessary party. Affirmed.

141. *Cayuga Indian Nation of New York v. Gould*, No. 74, ___ N.E. 2d ___, 2010 WL 1849339 (N.Y. May 11, 2010). Indian tribe brought action against counties' sheriffs and district attorneys, seeking, inter alia, judgment declaring that statute governing taxes imposed on qualified reservations provided exclusive means by which to tax cigarette sales on an Indian reservation to non-Indians and non-member Indians, and that tribe's two convenience stores were located within a qualified reservation. The Supreme Court, 21 Misc. 3d 1142(A), 2008 WL 5158093, denied tribe's motion for summary judgment and granted sheriffs' cross-motion for summary judgment. Tribe appealed. The Supreme Court, Appellate Division, 66 A.D. 3d 100, 884 N.Y.S. 2d 510, reversed. Leave to appeal was granted. The appellate court held that: (1) execution of search warrant did not preclude tribe from bringing declaratory judgment action; (2) convenience stores were located on a "qualified reservation"; and (3) tribe's retailers could not be prosecuted for possession and sale of untaxed cigarettes. Affirmed as modified.



142. *Confederated Tribes of Chehalis Reservation v. Thurston County Bd. of Equalization*, No. C08-5562BHS, 2010 WL 2595232 (W.D. Wash. Jun 23, 2010). This matter was before the Court on Plaintiffs' Amended Motion to Amend Judgment. Plaintiffs, Confederated Tribes of the Chehalis Reservation (Tribe) and CTGW, LLC (CTGW), 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, alleging that Defendants were violating the U.S. Constitution as well as federal common law by imposing a personalty tax on CTGW's facility, the Great Wolf Lodge (Lodge). After cross-motions for summary judgment were filed, the Court issued an order granting Defendants' motion for summary judgment and denying Plaintiffs' motion for summary judgment regarding Bracker preemption. The court granted in part and denied in part Plaintiffs' Amended Motion to Amend April 2, 2010 Judgment in Civil Case and denied as moot Plaintiffs' request pursuant to 28 U.S.C. § 1292(b).

143. *State ex rel. Edmondson v. Native Wholesale Supply*, No. 107241, ___ P.3d ___, 2010 WL 2674999 (Okla. July 6, 2010). Attorney General brought action against cigarette importer and distributor, which was a tribally-chartered corporation wholly owned by an individual of Native-American ancestry, alleging violations of the Oklahoma Master Settlement Agreement Complementary Act. Cigarette importer moved for dismissal based on lack of personal and subject matter jurisdiction. The district court denied the motion as to personal jurisdiction, but entered judgment for importer upon finding that enforcement of the Complementary Act against importer would violate the Indian Commerce Clause, depriving the trial court of subject matter jurisdiction. Both parties appealed. The Supreme Court held that: (1) cigarette importer and distributor had sufficient minimum contacts with Oklahoma to satisfy due process requirements for asserting personal jurisdiction; (2) importer and distributor was not clothed with tribal immunity from suit; (3) enforcement of Oklahoma Master Settlement Agreement Complementary Act against cigarette importer did not violate the Indian Commerce Clause. Affirmed in part, reversed in part, and remanded.

144. *Muscogee Creek Nation v. Oklahoma Tax Commission*, No. 09-5123, 2010 WL 2700535 (10th Cir, Jul. 9, 2010). Indian tribe brought action under § 1983 against the Oklahoma Tax Commission (OTC) and its commissioners in their official capacities, alleging OTC and the commissioners deprived the tribe of due process of law and violated its Fourth Amendment rights in stopping tribe vehicles outside Indian country, searching them for cigarettes failing to bear a tax stamp, and seizing unstamped cigarettes. The district court dismissed the complaint for lack of subject matter jurisdiction and for failure to state a claim. Tribe appealed. The appellate court held that: (1) Eleventh Amendment barred claims against the OTC; (2) Eleventh Amendment did not bar claims against the commissioners to the extent they requested a declaratory judgment that OTC's stops and searches of tribe vehicles were unlawful and a prohibitory injunction directing commissioners to cease interfering with tribe's vehicles and their lading; (3) Eleventh Amendment barred claims against commissioners to the extent they requested an injunction directing the return of the seized cigarettes or damages to compensate tribe for monetary value of the cigarettes; (4) tribe did not constitute a "person" entitled to bring suit for prospective relief against commissioners under § 1983; and (5) Indian Commerce Clause did not, by itself, automatically bar or preempt state of Oklahoma from enforcing its cigarette tax laws outside Indian country. Affirmed.

145. *Miccosukee Tribe of Indians of Florida v. United States of America*, No. 10-CV-21332, 2010 WL 3195661(S.D. Fla. Aug. 11, 2010). (From the Opinion) This cause was before the Court upon the United States’ Motion to Deny the Miccosukee Tribe of Indians’ Petition to Quash IRS Summons to Morgan Stanley (Motion). The Miccosukee Tribe is attempting to use tribal sovereign immunity as a shield to protect a limited class of records from the scrutiny of the United States. This it may not do. Tribal sovereign immunity is a principle of federal common law, and the Supreme Court has consistently reaffirmed the general rule that an Indian tribe is subject to suit only where Congress has authorized suit or the tribe has waived its immunity. However, this rule is not absolute, and federal appeals courts, including the Eleventh Circuit, have consistently recognized that “[t]ribal sovereign immunity does not bar suits by the United States” and cannot be invoked “to prevent the federal government from exercising its superior sovereign powers.” Because “tribal sovereign immunity may not be asserted against the United States” in such a case, the Tribe’s immunity argument fails as a matter of law and the enforceability of the Summons at issue must be assessed in accordance with the framework articulated by the Supreme Court in *United States v. Powell*, 379 U.S. 48 (1964). The Court denied the Tribe’s request that the Summons be quashed on grounds of tribal sovereign immunity, overbreadth, and irrelevance. However, a limited adversary hearing will be held regarding the Tribe’s allegations that: (a) the Summons was issued in bad faith for an improper purpose; and (b) the United States is already in possession of the requested information.

M. TRUST BREACH AND CLAIMS

146. *Askinuk Corporation v. Lower Yukon School District*, No. S-12786, 214 P.3d 259 (Alaska July 31, 2009). Native village corporation brought action against school district seeking to reform or invalidate a lease of property to school district for one dollar per year. The Superior Court awarded summary judgment to school district. Corporation appealed. The Supreme Court held that: (1) chair of corporation’s board of directors had apparent authority to execute lease; (2) corporation was statutorily precluded from avoiding lease on the ground that board did not follow internal requirements for corporate action; (3) statute barring a corporation from contesting the validity of an instrument signed by two specified officers did not allow corporation to avoid lease; (4) lease was supported by consideration; (5) renegotiation provision was not illusory consideration; (6) no disparity of bargaining power existed between corporation and school district; and (7) fact that chair of corporation’s board also sat on board of school district did not make lease unconscionable. Affirmed.

147. *Eastern Shawnee Tribe of Oklahoma v. United States*, No. 2008-5102, 2009 WL 2959977 (Fed. Cir. Sept. 17, 2009). Indian tribe sued United States, seeking damages for alleged breach of fiduciary duties as trustee of tribe’s assets and property. The Court of Federal Claims, 82 Fed. Cl. 322, dismissed without prejudice on jurisdictional grounds. Tribe appealed. The appellate court held that tribe’s claim in district court did not bar tribe’s claim in Court of Federal Claims. Reversed and remanded.

148. *Confederated Tribes and Bands of The Yakama Nation v. U.S.*, No. 09-160L, ___ Fed. Cl. ___, 2009 WL 3286777 (Fed. Cl. Oct. 8, 2009). Indian tribe and Indian landowners, as lessors, sued United States, claiming breach of trust and fiduciary duties by failing to collect

149. *Samish Indian Nation v. U.S.*, No. 02-1383, __ Fed. Cl. __, 2009 WL 4457303 (Fed. Cl. Nov. 30, 2009). Indian tribe sued United States, seeking compensation for programs, services, and benefits that tribe allegedly would have received over nearly 30-year time span but for Department of Interior's (DOI) improper omission of tribe from list of federally recognized tribes. Government moved to dismiss for lack of subject matter jurisdiction. The Court of Federal Claims held that: (1) claims based on federal grants-in-aid did not derive from money-mandating sources of jurisdiction; (2) claims under federal revenue sharing program were moot; (3) claims under Housing Act were not based on money-mandating source of jurisdiction; (4) claims for housing improvement program benefits were not based on money-mandating source of jurisdiction; (5) claims for commodity food distribution program benefits were not based on money-mandating source of jurisdiction; (6) claims for employment and training assistance programs benefits were not based on money-mandating source of jurisdiction; and (7) no fiduciary relationship between government and tribe created money-mandating source of jurisdiction. Dismissed.



150. *In re United States*, No. 908, 2009 WL 5125518 (Fed. Cir. Dec. 30, 2009). The United States petitioned for a writ of mandamus to direct the Court of Federal Claims ("trial court") to vacate its orders requiring the United States to produce documents that it asserts are protected by the attorney-client privilege. Jicarilla Apache Nation ("Jicarilla") opposed. The appellate court held that the United States cannot deny an Indian tribe's request to discover communications between the United States and its attorneys based on the attorney-client privilege when those communications concern management of an Indian trust and the United States has not claimed that the government or its attorneys considered a specific competing interest in those communications. Accordingly, the court adopted the fiduciary exception in tribal trust cases. Under the fiduciary exception, a fiduciary may not block a beneficiary from discovering information protected under the attorney-client privilege when the information relates to fiduciary matters, including trust management. Because the appellate court found that the trial court correctly applied the fiduciary exception to the United States' privileged communications, it denied the United States' petition for a writ of mandamus.

151. *Miami Tribe of OK v. U.S.*, No. 03-2220, __ F. Supp. 2d __, 2010 WL 55920 (D. Kan. Jan 4, 2010). Indian tribe brought action under Administrative Procedures Act (APA) seeking judicial review of decision of Department of Interior, Bureau of Indian Affairs (BIA), denying tribe member's application to gift portion of his interest in restricted land to tribe. Tribe filed claim alleging breach of trust. Parties consented to exercise of jurisdiction by magistrate judge. Tribe moved for equitable relief to remedy wrongful administrative actions. BIA moved to dismiss breach of trust claim. The district court held that: (1) prior partition order transferring restricted undivided interest in particular allotment to United States in trust for benefit of Indian owners did not permanently change individual Indian owners' interest in that allotment from restricted fee allotment to trust allotment; (2) Court could not order BIA to recognize Indian tribe as having jurisdiction over particular restricted fee allotment on any future

152. *Oenga v. U.S.*, No. 06-491L, ___ Fed. Cl. ___, 2010 WL 605175 (Fed. Cl. Feb. 12, 2010). The dispute at issue was based on violations by BP Exploration (Alaska) Inc. (BPX) of a 1989 lease between plaintiff landowners of a Native allotment and BPX. The lease gave BPX, subject to certain restrictions, the right to operate oil production facilities on the allotment. In the September 18, 2008 decision, this court granted the defendant's motion to dismiss two of the plaintiffs' three claims for lack of subject matter jurisdiction. The court, however, granted in part the plaintiffs' motion for partial summary judgment with regard to the portion of the third claim concerning the Lisburne Participating Area (PA), which the court deemed to be outside the scope of the lease between the plaintiffs and BPX. While the plaintiffs filed the present suit on June 30, 2006, they maintain that it was not until 2007, during the discovery phase of this case, that they learned of the intervenors' production from the Lisburne PA that is now at issue. After learning of this production, the plaintiffs wrote to BIA on June 4, 2007 demanding that the government give notice to the tenant by June 18, 2007 that it was in violation of the lease and was to stop use of the property. The letter also demanded that the government collect damages for BPX's past lease violations. It is undisputed that the government did not take this action. The government breached its trust responsibilities to monitor the plaintiffs' lease and ensure compliance with its terms in 2001. Damages that the government should have collected from BPX at that time, plus damages stemming from BPX's continued use of the allotment for purposes outside the scope of the lease are now due to the plaintiffs. These damages will be measured as the present fair annual rental of the improper use of the allotment. The precise methodology for determining present fair annual rental will require a fact hearing and expert opinion should this case proceed to trial. The plaintiffs are not entitled to interest on the damages the government should have collected or allowed the plaintiffs to collect from BPX. Each of the plaintiffs', defendant's, and intervenors' motions for partial summary judgment with respect to the measure and period of damages is thus granted in part and denied in part.

153. *Hoopa Valley Tribe v. United States*, No. 2009-5084, 2010 WL 774325 (Fed. Cir. Mar. 9, 2010). The Hoopa Valley Tribe, on its own behalf and acting as *parens patriae*, and twelve members of the Hoopa Valley Tribe (collectively, Hoopa Valley) appealed from a final decision of the Court of Federal Claims. *See Hoopa Valley Tribe v. United States*, 86 Fed. Cl. 430 (2009). The Court of Federal Claims held that Hoopa Valley lacks standing to challenge the distribution of trust funds to the Yurok Tribe, and the court entered judgment in favor of the government. The appellate court agreed that Hoopa Valley lacks standing but vacated and remanded with instructions to dismiss Hoopa Valley's complaint without prejudice.

154. *The Osage Tribe of Indians of Okla. v. U.S.*, Nos. 99-550 L, 00-169 L, ___ Fed. Cl. ___, 2010 WL 1783457 (Fed. Cl. Apr. 20, 2010). Indian tribe sued United States, seeking damages for breach of government’s fiduciary duties as trustee of tribe’s mineral estate by failure of Bureau of Indian Affairs (BIA) to collect, invest, and deposit revenues generated from tribe’s oil and gas leases. Tribe moved for summary judgment. The Court of Federal Claims held that: (1) damages calculation was appropriate based on law of the case; (2) interest damages methodology was law of the case; and (3) tribe had standing to seek interest damages. Motion granted in part and denied in part.

155. *O’Bryan v. U.S.*, No. 08-664, ___ Fed. Cl. ___, 2010 WL 1990049 (Fed. Cl. May 14, 2010). Plaintiff, a member of the Oglala Sioux Indian Tribe, sued to recover damages for injuries allegedly caused by the Bureau of Indian Affairs (BIA) in its administration of grazing permits granted to plaintiff on the Pine Ridge Indian Reservation in Shannon County, South Dakota. Plaintiff alleged that the BIA (1) unlawfully cancelled plaintiff’s grazing permits on lands that the United States holds in trust and manages for the benefit of the Oglala Sioux Tribe; (2) impermissibly collected a rental payment for a period during which plaintiff was denied access to the permitted grazing lands; and (3) improperly assessed penalties for the overstocking of cattle on those lands. Defendant moved to dismiss the complaint for lack of jurisdiction and for failure to state a claim upon which relief can be granted. The court granted in part and denied in part, defendant’s motion to dismiss.

156. *The Shoshone Indian Tribe of the Wind River Reservation, Wyoming v. United States*, No. 79-4582 L, 79-4592 L, 2010 WL 2197771 (Fed. Cl. May 27, 2010). Plaintiffs’ Claim II alleged that seven oil and gas leases were unlawfully converted from Act of August 21, 1916 (1916 Act) leases, Pub. L. No. 64-218, 39 Stat. 519 (1916), to Indian Mineral Leasing Act (1938 Act) leases, Pub. L. No. 75-506, 52 Stat. 347 (1938) (codified at 25 U.S.C. §§ 396a-396g (2006)). Plaintiffs claimed damages based on the theory that they would have obtained better royalty and renewal terms if the leases had remained 1916 Act leases instead of being converted to 1938 Act Leases. Defendant argued that plaintiffs’ claim was time-barred by 28 U.S.C. § 2501 (2006), which bars a suit against the United States unless it is filed “within six years after such claim first accrues.” Defendant argued that plaintiffs’ claim first accrued between the early 1940s and the mid 1950s “because the “conversions” occurred pursuant to public law and the execution of lease instruments of which [p]laintiffs had actual, contemporaneous, and first-hand knowledge.” The court found that pursuant to defendant’s argument, plaintiffs’ complaint, filed in 1979, was filed more than six years after Claim II accrued and should be dismissed as time-barred.

157. *Cole v. Federal Bureau of Investigations*, No. CV-09-21, ___ F. Supp. 2d ___, 2010 WL 2541216 (D. Mont. Jun 17, 2010). Members of two separate Native American families brought action against Federal Bureau of Investigations (FBI), its field office, the United States Attorney’s Office for South Dakota and related defendants, alleging discrimination against Native Americans in criminal investigations and prosecutions on or near Crow Indian Reservation. Defendants moved to dismiss for failure to state claims upon which relief could be granted. The district court adopted findings and recommendations of the Magistrate Judge, which held that: (1) members of two separate families did not have standing to bring individual claims against defendants; but (2) personal representatives of estates of deceased Native Americans had standing to bring individual claims; (3) plaintiffs failed to state Bivens equal protection claim against FBI and its Supervisory Agent; but (4) plaintiffs stated Bivens equal

158. *Jicarilla Apache Nation v. U.S. Dept. of Interior*, No. 09-5157, ___ F.3d ___, 2010 WL 2794271 (D.D.C. July 16, 2010). Indian tribe brought action against the Department of the Interior under the Administrative Procedure Act (APA), alleging that the Department's rejection of a major portion analysis methodology developed by the Minerals Management Service (MMS) to calculate royalties owed to the tribe pursuant to natural gas leases was an arbitrary and capricious departure from the Department's precedent and violated the Department's regulations and fiduciary duties. The district court, 604 F.Supp.2d 139, denied the tribe's motion for summary judgment and, on its own motion, granted summary judgment to the Department. Tribe appealed. The appellate court held that: (1) revised MMS regulations for calculating royalties applied prospectively only; (2) Department's failure to provide a reasoned explanation for departing from precedent rendered its decision arbitrary and capricious; and (3) Department's error in retrospectively applying regulations was not harmless. Reversed in part and remanded.

159. *U.S. ex rel Kennard v. Comstock Resources, Inc.*, No. 9:98-CV-266, 2010 WL 2813529 (E.D. Tex. July 16, 2010). This was a qui tam case brought by Relators on behalf of the United States Government against Defendants Comstock Resources, Inc. and Comstock Oil & Gas, Inc. (Defendants or "Comstock") under the False Claims Act (FCA), 31 U.S.C. § 3729, *et seq.* The case centered around oil and gas leases issued by the State of Texas while it was a trustee for the Alabama and Coushatta Indian Tribes of Texas (Tribe) to Comstock's predecessors in title, and later federal Mineral Agreements approved by the federal government after it became trustee for the Tribe. Comstock pays royalties under the leases to the Minerals Management Services, an agency of the United States Department of the Interior, which remits such royalties to the Tribe. Relators alleged that Comstock knowingly submitted false MMS-2014s reports with the Minerals Management Service of the Department of the Interior. A Form MMS-2014s is "[u]sed monthly to report lease-related transactions essential for royalty management to determine the correct royalty amount due, reconcile or audit data, and distribute data to appropriate accounts." 30 C.F.R. § 210.10(c)(1) (2005). The MMS-2014 requires the operator to identify a particular MMS Lease (by Accounting Identification Number ("AID")), the royalty percentage associated with that lease, the total sales volume and value for the month, and the royalty volume and value for the month under the lease. The form does not require the operator to provide any affirmative statement on the validity of the underlying lease. Relators argue that the alleged invalidity of the underlying leases entitled the United States, as trustee for the Tribe, to one hundred percent of the royalties and that the MMS-2014s were therefore false statements under the federal False Claims Act. Comstock's rights to conduct operations on the Tribal Lands derive from seven leases originally issued by the State of Texas General Land Office (GLO) and two Minerals Agreements issued by the United States Department of the Interior (DOI) (collectively the "Leases"). Comstock is the successor-in-interest to the rights of Black Stone Oil Company ("BSOC"). The Court found that the Leases are valid, and found that even if they were invalid, there was no evidence that Defendants had the guilty knowledge required under the FCA. The Court granted Defendants' motion for complete summary judgment and dismissed the qui tam action.

160. *Day v. Apoliona*, No. 08-16704, ___ F.3d ___, 2010 WL 2891054 (9th Cir. July 26, 2010). Plaintiffs are “native Hawaiians,” defined in section 201(a) of the Hawaiian Homes Commission Act, Pub. L. No. 67-34, 42 Stat. 108 (1921) (HHCA), to mean “any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778.” As such they are beneficiaries of a “public trust” created in the Hawaii Admission Act, Pub. L. No. 86-3, 73 Stat. 4 (1959) (Admission Act). Plaintiffs appealed from the district court's grant of summary judgment to the OHA trustees. They contended that the trustees of the Office of Hawaiian Affairs (OHA), a Hawaii state agency that administers a portion of the public trust's proceeds, breached the trust. Plaintiffs challenged four projects on which the OHA trustees spent parts the trust proceeds: (1) to lobby for and support the proposed Native Hawaiian Government Reorganization Act of 2007; (2) to fund a contract with Native Hawaiian Legal Corporation (NHLC), under which NHLC agrees to render a range of legal services including “[a]ssertion and defense of quiet title actions,” protection of water rights, “[p]reservation of Native Hawaiian Land Trust entitlements” and preservation of traditional practices and culturally significant places; (3) to fund a contract with Na Pua No‘eau Education Program (Na Pua), which identifies itself as “a Hawaiian Culture-based Education Resource Center within the University of Hawaii ... that provides educational enrichment program activities to Hawaiian children and their families”; (4) to fund a contract with Alu Like, Inc. which is a nonprofit service organization that strives to help Hawaiians achieve social and economic self-sufficiency by providing early childhood education, services to the elderly, employment preparation and training, library and genealogy services, specialized services for at-risk youth and information and referral services. The appellate court affirmed.

161. *Jones v. Norton*, No. 2:09-cv-00730, 2010 WL 2990829 (D. Utah July 26, 2010). Plaintiffs filed this lawsuit against various Defendants in connection with the shooting death of Todd R. Murray which occurred while he was being pursued by police on the Uintah-Ouray Indian Reservation. Defendants Vance Norton and Vernal City moved to dismiss the claims against them. The court held that Detective Norton did not have jurisdiction to seize Mr. Murray. Because there are disputed issues of fact concerning whether Mr. Murray was seized and whether exigent circumstances justified the seizure if it occurred, the court denied Defendants’ motion to dismiss the § 1983 claims.

N. MISCELLANEOUS

162. *Davidson v. State ex rel. North Dakota State Bd. of Higher Educ.*, No. 20100022, ___ N.W. 2d ___, 2010 WL 1372484, (N.D. Apr. 8, 2010). Enrolled members of Native American tribe brought action against State Board of Higher Education to enforce settlement agreement between Board and National Collegiate Athletic Association and to enjoin Board from shortening time period for their tribe and another tribe to consider approving or rejecting school’s use of Fighting Sioux nickname and logo. The district court dismissed. Members appealed. The Supreme Court held that Board could retire nickname before deadline in settlement agreement for it to either retire nickname or obtain namesake approval from tribes. Affirmed.

163. *Large v. Fremont County, Wyo.*, No. 05-CV-0270, ___ F. Supp. 2d ___, 2010 WL 1737640 (D. Wyo. Apr. 29, 2010). This matter was before the Court following a nine-day bench trial. The Court made the following findings of fact and conclusions of law. The Plaintiffs are enrolled members of the Eastern Shoshone Tribe and the Northern Arapaho Tribe. The defendants are Fremont County, the members of the County Commission, and the County Clerk, who were sued in their official capacities. The plaintiffs all reside on the Wind River Indian Reservation, and are all residents of Fremont County, Wyoming. The Fremont County Commission consists of five members elected from the county at-large, with no ward residency requirement. The plaintiffs challenged the elections for the County Commission on the basis that the elections dilute Indian voting strength in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973(b), and the Fourteenth and Fifteenth Amendments of the United States Constitution. Plaintiffs asked the Court to find that Fremont County’s at-large method for electing county commissioners violates the Voting Rights Act, and asked the Court to set aside the County’s system. The court found that plaintiffs carried their burden of proving compactness, cohesion, and white bloc voting and also satisfied the totality of the circumstances test. The court found that the plaintiffs showed that at-large elections for the Fremont County Commission dilute Indian voting strength in violation of Section 2 of the Voting Rights Act. The court ordered defendants to propose a remedy to the Court, consistent with the opinion and applicable case law, that requires the election of county commissioners in Fremont County by district, rather than at-large. The Court ordered defendants to propose a timetable for implementation with the next election cycle in mind and further ordered that defendants are permanently enjoined from utilizing the existing at-large voting system in the future.

164. *Cottier v. City of Martin*, No. 07-1628, ___ F.3d ___, 2010 WL 1780054 (8th Cir. May 5, 2010). Action was brought on behalf of Native American voters challenging configuration of city wards as violative of the Voting Rights Act (VRA) and the Fourteenth and Fifteenth Amendments. The district court denied relief, and voters appealed. The appellate court, 445 F.3d 1113, reversed and remanded. On remand, the district court found that ordinance violated the VRA, 466 F. Supp. 2d 1175, and imposed remedy, 475 F. Supp. 2d 932. City appealed. The appellate court affirmed, 551 F.3d 733, and rehearing en banc was granted. The appellate court held that: (1) law of the case doctrine did not preclude Court of Appeals, sitting en banc following entry of final judgment, from considering issues raised in prior panel decision in same case; (2) an en banc court may overrule an erroneous panel opinion filed at an earlier stage of the same case, overruling *Robertson Oil Co. v. Phillips Petroleum Co.*, 14 F.3d 373; and (3) plaintiffs failed to show that white majority in city voted sufficiently as a bloc to enable it usually to defeat the minority’s preferred candidate in city council elections, as precondition to vote dilution claim. Vacated and remanded.

165. *Arturo Rojas Cardona, et al. v. Juan Jose Rojas Cardona, et al.*, No. CV-10-0017, ___ P.3d ___, 2010 WL 2977310 (Ariz. July 30, 2010). This case involved an attempt to serve process on persons and business entities in Mexico via postal channels and email. In 2008, the Lac Vieux Desert Band of Lake Superior Chippewa Indians and a holding company created by the Tribe (collectively, the “Tribe”) filed an action in the Maricopa County Superior Court against Arturo and Juan Jose Rojas Cardona and four corporate entities (collectively, the “Six Defendants”). The lawsuit concerned the Tribe's investment in a casino project in Guadalupe, Mexico. The Tribe moved ex parte for alternative service on the Six Defendants. The superior court approved the “cobbling together” of service by the following means: (1) certified mail to the Six Defendants' attorneys of record at their domestic addresses; (2) email to Juan Jose Rojas

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