

## **JUDICIAL UPDATE**

### **2010 – 2011 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. *Madison County v. Oneida Indian Nation*, Docket No. 10-72. Case **decided** on Jan. 10, 2011. The Oneida Indian Nation passed a tribal declaration and ordinance waiving “its sovereign immunity to enforcement of real property taxation through foreclosure by state, county, and local governments within and throughout the United States.” The judgment is vacated and the case remanded to the United States Court of Appeals for the 2nd Circuit. That Court should address, in the first instance, whether to revisit its ruling on sovereign immunity in light of this new factual development, and – if necessary – proceed to address other questions in the case consistent with its sovereign immunity ruling. **Issues:** (1) Does tribal sovereign immunity from suit, to the extent it should continue to be recognized, bar taxing authorities from foreclosing to collect lawfully imposed property taxes? (2) Was the ancient Oneida reservation in New York disestablished or diminished? **Holding below:** *Oneida Indian Nation v. Madison County*, 602 F. 3d. 1019. The Oneida Indian Nation of New York, a federally recognized tribe, is immune from suit under the doctrine of tribal sovereign immunity, which exposes a tribe to suit only when Congress has authorized the suit or when the tribe has waived its immunity. Because neither condition is applicable in this case, the tribe is immune from foreclosure, for nonpayment of county taxes, by two New York counties on parcels of land within the boundaries of a reservation once occupied by the Oneidas, that were sold to non-Indians during the early 19th century and repurchased by the tribe on the open market in the early 1990s, thereby coming under the sovereign dominion of the tribe, even though the U.S. Supreme Court held, in *Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197, 73 U.S.L.W. 4242 (2005), that these parcels are not exempt from local taxation. A tribe’s immunity from suit is independent of its lands, and thus the court need not reach the counties’ argument that the tribe’s reservation has been disestablished, which would render the land in question no longer part of a reservation or otherwise part of Indian country, because the holding in this case does not depend on the resolution of that issue. Accordingly, this court’s prior holding on that issue, that the Oneidas’ reservation was not disestablished, remains controlling law of the circuit.

2. *United States v. Tohono O’odham Nation*, Docket No. 09-846. Case **decided** on Apr. 26, 2011. **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:** Common facts are sufficient to bar a CFC action where a similar case is pending elsewhere. If the two suits are based on substantially the same operative facts, § 1500 bars CFC jurisdiction regardless of the relief sought in each suit. Judgment reversed and case remanded. **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. (en banc) 1994), the Federal Circuit held that § 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, § 1500 does not divest the claims court of jurisdiction, and the claims court erred by dismissing the action for lack of subject matter jurisdiction.

**3. *U.S. v. Eastern Shawnee Tribe of Oklahoma***, No. 09-1521, \_\_\_ S. Ct. \_\_\_, 2011 WL 1631039 (U.S. May 2, 2011). The petition for a writ of certiorari was **granted**. The judgment was **vacated**, and the case was **remanded** to the United States Court of Appeals for the Federal Circuit for further consideration in light of *United States v. Tohono O’odham Nation*, 563 U.S. \_\_\_ (2011). **Holding below:** *Eastern Shawnee Tribe of Oklahoma v. United States*, 582 F.3d 1306. A suit filed in the Court of Federal Claims seeking relief that is not sought in a suit filed by the same plaintiff in a federal district court, and that the district court cannot award, is not barred by 28 U.S.C. § 1500, which provides that the Court of Federal Claims “shall not have jurisdiction of 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.” Accordingly, § 1500 does bar an Indian tribe’s suit in the Court of Federal Claims that, although arising from the same set of operative facts as a suit that it had filed eight days earlier in a federal district court, seeks consequential damages that are not sought in the district court and that the district court cannot award. The tribe’s district court complaint seeks only an accounting of its trust assets from the government and disavows at least some claims for money damages, stating that the tribe “may have claims to damages that cannot be ascertained” until after the government makes an accounting of the tribe’s trust property and accounts and that “[s]ome of these claims, should they exist, will have to be filed in the United States Court of Federal Claims.”

**4. *United States v. Jicarilla Apache Nation***, Docket No. 10-382, 2011 WL 2297786 (Jun. 13, 2011). Judgment Reversed and Case Remanded. **Issues:** Does the attorney-client privilege entitle the United States to withhold from an Indian tribe confidential communications between the government and government attorneys implicating the administration of statutes pertaining to property held in trust for the tribe? The Supreme Court, Justice Alito, held that, even if it were to recognize common law “fiduciary” exception to attorney-client privilege, to prevent trustee from withholding from trust beneficiaries attorney-client communications relating to administration of trust, exception did not extend to federal government in its capacity as “trustee” of Indian funds. **Holding below:** *In re United States*, 590 F.3d 1305. With respect to discovery of communications between the government and its attorneys relating to Indian trust funds, the United States’ relationship with the tribes is sufficiently similar to a private trust to justify adopting the attorney-client privilege’s fiduciary exception, under which a fiduciary may not block a beneficiary from discovering information protected under the attorney-client privilege when that information relates to fiduciary matters, including trust management. Accordingly, the United States cannot invoke the attorney-client privilege to deny an Indian tribe’s request to discover communications between the government and its attorneys that concern management of an Indian trust, when the United States has not claimed that the government or its attorneys considered a specific competing interest in those communications, such as statutes governing endangered species or natural resources.

## OTHER COURTS

### A. ADMINISTRATIVE LAW

5. *Butte County, Cal. v. Hogen*, No. 09-5179, \_\_ F.3d \_\_, 2010 WL 2735666 (D.C. Cir. Jul. 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.

6. *Carattini v. Salazar*, No. CIV-09-489, 2010 WL 4568876 (W.D. Okla. Nov. 3, 2010). This action pursuant to the Administrative Procedures Act (APA), 5 U.S.C. § 706, sought judicial review of a final determination of the United States Department of Interior (DOI) that two of the plaintiffs, Marquita Carattini and Richard Banderas, vacated their positions on the business committee of the Apache Tribe of Oklahoma and were validly replaced through a special election. The matter came before the Court for decision on the administrative record submitted by DOI and the parties' briefs. The Court found no procedural defect that would justify a reversal of the Decision under review and found that DOI's Decision should be affirmed.

7. *Patchak v. Salazar*, No. 09-5324, 2011 WL 192495 (D.C. Cir. Jan. 21, 2011). The district court dismissed David Patchak's suit to prevent the Secretary of the Interior from holding land in trust for an Indian tribe in Michigan. Patchak's appeal presented two jurisdictional issues: whether, as the district court held, he lacks standing; and whether, if he has standing, sovereign immunity bars his suit. The appellate court found that the terms of the Quiet Title Act do not cover Patchak's suit and that his action therefore falls within the general waiver of sovereign immunity set forth in § 702 of the Administrative Procedures Act. The judgment of the district court was reversed and the case was remanded for further proceedings.

8. *Bernard v. U.S. Dept. of the Interior*, No. 08-1019, 2011 WL 1256658 (D.S.D. Mar. 30, 2011). This action was an appeal from a final agency action taken by the Board of Indian Appeals (Board), the Board being authorized to deal with such matters by the Secretary of the Interior. The Board affirmed a decision made by the Great Plains Area Regional Director of the Bureau of Indian Affairs (BIA). Plaintiffs had requested that the agency declare a gift deed from plaintiffs to Grady W. Renville null and void. The gift deed from the present plaintiffs placed the described land in joint tenancy with right of survivorship, the owners being Maynard Bernard (one of the present plaintiffs) and defendant Renville. An application to make the transfer had been submitted to the agency by plaintiffs. The application stated: "I wish to Gift Convey my land to Maynard Bernard Grady W. Renville Joint Tenancy with the right of survivorship." The stated reason on the application was a joint business venture. The word "yes" is circled next to the statement: "I wish to waive the appraised value." The gift deed application was never approved by the BIA although the BIA agency superintendent approved the deed itself after the deed had been executed in the presence of a notary public. The deed was recorded in the appropriate BIA office. The court found that the relief sought by plaintiffs should be denied and the action should be dismissed with prejudice. The court ordered as

follows: (1) The motion to serve and file a second amended complaint was denied; (2) The agency action was not arbitrary, capricious, an abuse of discretion, or otherwise inconsistent with the law; (3) The agency action was affirmed and approved; (4) All other claims for relief were denied and the action was dismissed with prejudice; and (5) No costs will be taxed.

**9.** *County of Charles Mix v. U.S. Dept. of Interior*, No. CIV 10–3012, 2011 WL 1303125 (D.S.D. Mar. 31, 2011). Plaintiff Charles Mix County (Plaintiff) filed this action seeking declaratory and injunctive relief from the Department of the Interior’s decision to take 39 acres of land into trust for the Yankton Sioux Tribe (Tribe). Defendants moved to dismiss Plaintiff’s claims or, in the alternative, for summary judgment. Plaintiff then filed a cross-motion for summary judgment. The court denied Plaintiff’s Motion for Summary Judgment and granted Defendants’ Motion for Summary Judgment.

**10.** *Evans v. Salazar*, No. C08-0372, 2011 WL 1219228 (W.D. Wash. Mar. 31, 2011). This case arose out of a decision by the Department of Interior to deny an Indian group’s petition to become a federally acknowledged tribe. Plaintiffs, the Snohomish Tribe of Indians and its chairman Michael C. Evans, claimed to be the successor to the historical Snohomish tribe from the Puget Sound region of Western Washington. In 1855, the Snohomish tribe signed the Treaty of Point Elliott, which established the Tulalip reservation. Over the next several years, a substantial portion of the Snohomish tribe moved onto the Tulalip reservation, and although other tribes moved there as well, the Snohomish remained the largest group. Plaintiffs’ ancestors never moved onto the reservation. In 1926, a group consisting of both on- and off-reservation Snohomish created an organization that pursued treaty claims on behalf of Snohomish descendants. Many of Plaintiffs’ ancestors belonged to this organization, which remained active until at least 1935. That same year, the various tribes residing at Tulalip, including the Snohomish, elected to reorganize under a single tribal government. The resulting entity, known as the “Tulalip Tribes,” has since been federally acknowledged but has never included any of Plaintiffs’ ancestors. Plaintiffs characterize the 1935 Tulalip Reorganization as having caused a “rift” between the on-reservation and off-reservation Snohomish. They insist that the 1926 organization was the official governing body of the Snohomish tribe and that its off-reservation members - including Plaintiffs’ ancestors --continued to conduct tribal affairs after the on-reservation members “defected” to the Tulalip Tribes. Plaintiffs formally incorporated in 1950, creating the entity that continues to the present, though they describe this event as simply a “reorganization” of the 1926 organization. Plaintiffs argued that they represent the “true” Snohomish tribe. The Court granted Defendant’s motion for summary judgment and rejected Plaintiff’s claims.

**11.** *South Dakota v. U.S. Dept. of Interior*, No. CIV 10–3006, 2011 WL 1303022 (D.S.D. Mar. 31, 2011). Plaintiffs State of South Dakota, County of Charles Mix, and City of Wagner (Plaintiffs) filed this action seeking declaratory and injunctive relief from the Department of the Interior’s decision to take 39.9 acres of land into trust for the Yankton Sioux Tribe (Tribe). The Business and Claims Committee (Committee) of the Tribe enacted a resolution requesting that the BIA accept a 39.9-acre parcel of land into trust for the Tribe. The land is located in Charles Mix County, South Dakota, and is known as the “Wagner Heights Addition.” In its resolution, the Committee stated that it was responsible for providing suitable housing for the Tribe and its members, that the Wagner Heights Addition currently contained 11 residential homes and a 20-unit elderly complex, and that the use of the property would remain

the same should the BIA accept it into trust. The Superintendent issued a decision letter approving the acceptance of the Wagner Heights Addition into trust for the Tribe. Plaintiffs appealed the Superintendent's determination to the Regional Director (RD). Plaintiffs contended that the trust acquisition was unlawful for a number of reasons. First, Plaintiffs challenged the constitutionality of Section 5 of the Indian Reorganization Act (IRA), which provides the Secretary of the Interior (Secretary) with the authority to acquire trust land for Indian tribes. Plaintiffs claimed that Section 5 is an unconstitutional delegation of legislative power, that it operates to deprive South Dakota of a republican form of government, and that Section 5 violates both the Tenth and Fourteenth Amendments. Plaintiffs argued that the RD and the IBIA's decisions were arbitrary and capricious and therefore should be set aside under the Administrative Procedure Act (APA). The court granted Defendants' Motion for Summary Judgment in part and denied in part; granted Plaintiffs' Motion for Summary Judgment as to Count 8 and otherwise denied; and vacated the IBIA decision and remanded the case to the IBIA with instructions that the IBIA remand to the RD for the RD, after providing notice under Section 2.21(b), to conduct a de novo review and consider argument on the 23 documents discussed above and any other documents before making a decision on the application.

**12. *Cloverdale Rancheria of Pomo Indians of California v. Salazar***, No. 5:10-1605, 2011 WL 1883196 (N.D. Cal. May 17, 2011). Plaintiffs brought an action under the Administrative Procedure Act (APA) seeking a writ of mandamus compelling Defendants to recognize what Plaintiffs claimed is the duly authorized government of the Cloverdale Rancheria of Pomo Indians. Defendants moved to dismiss the action for lack of subject-matter jurisdiction, contending that Plaintiffs have not challenged "final agency action" as that term is used in the APA. Proposed intervenors, who also claim to represent the Cloverdale Rancheria of Pomo Indians, moved to intervene in the action and for sanctions against Plaintiffs. The Court concluded that it is without jurisdiction to hear the claims currently before it and granted Defendants' motion to dismiss the action without prejudice.

**13. *Hollywood Mobile Estates Limited v. Seminole Tribe of Florida***, No. 09-15336, 2011 WL 1938427 (11th Cir. May 23, 2011). (From the Opinion) "This appeal presents issues of constitutional and prudential standing. The issue of constitutional standing is whether Hollywood Mobile Estates Limited alleged an injury fairly traceable to the Secretary of the Interior or redressable by the district court in a complaint that alleged that the Seminole Tribe of Florida had threatened to repossess tribal property in violation of a lease between Hollywood and the Tribe. After the Tribe repossessed the leased property, the district court denied, as futile, the motion of Hollywood for leave to amend the complaint to request injunctive relief against the Secretary under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* That decision raises an issue of prudential standing: whether the interests of Hollywood are within the zone of interests protected by the Indian Long-Term Leasing Act, 25 U.S.C. § 415, and its accompanying regulations. Because we conclude that Hollywood lacked constitutional standing to maintain its complaint, we vacate in part the judgment entered by the district court and remand with instructions to dismiss for lack of subject matter jurisdiction. Because we also conclude that Hollywood lacked prudential standing to sue the Secretary, we affirm the denial of the motion for leave to amend the complaint as futile."

**14.** *City of Yreka v. Salazar*, No 2:10–1734, 2011 WL 2433660 (E.D. Cal. June 14, 2011). Plaintiffs City of Yreka (City) and City Council of the City of Yreka (City Council) brought this action pursuant to the Administrative Procedures Act (APA), against defendants Ken Salazar, in his official capacity as Secretary of the Department of the Interior (Secretary) and other federal and state officials, arising from the Secretary's decision to acquire approximately 0.90 acres of land to be held in trust by the United States for the Karuk Tribe of California (Karuk), pursuant to the Indian Reorganization Act (IRA). The BIA issued a “Notice of Off Reservation Land Acquisition Application (Non–Gaming).” The City acknowledged that the current use is consistent with zoning, but raised concerns that future uses would be inconsistent or that encroachments on setback limitations would occur. Plaintiffs in this action, filed an appeal of the regional director's decision to the Interior Board of Indian Appeals (IBIA), arguing that (1) there is no statutory authority for the acquisition because the land is not within or adjacent to the exterior boundaries of the tribe's reservation or within a tribal consolidation area and the tribe does not have a sufficient interest in the land to support the acquisition, (2) the regional director's discussion of the proposed land use was based on erroneous facts, and (3) the land would possibly be put to uses that do not conform to the City's zoning and general plan, such as gaming uses, and would possibly increase conflicts between the tribe and City and City Council. The court found that the administrative record reveals that the regional director reasonably applied the policy on land acquisition and considered the relevant factors for off-reservation land acquisitions. The Secretary's decision was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The court granted defendants’ motion for summary judgment and denied plaintiffs’ motion for summary judgment.

**15.** *Sandy Lake Band of Mississippi Chippewa v. U.S.*, Civil No. 10–3801, 2011 WL 2601840 (D. Minn. Jul. 1, 2011). Plaintiff Sandy Lake Band of Mississippi Chippewa (Band) describes itself as “a federally recognized Indian tribe that has never been lawfully terminated by an Act of Congress.” Between 1825 and 1867, the United States entered into ten (10) treaties that included the Sandy Lake Band. In addition to those treaties, in 1915 President Woodrow Wilson issued Executive Order No. 2144, which created the Sandy Lake Reservation “for the use and occupancy of a band of Chippewa Indians, now living thereon, and for such other Indians as the Secretary of the Interior may see fit to settle thereon.” On July 20, 1936, a majority of the tribes and bands of Chippewa Indians residing on various Indian reservations in Minnesota organized a single tribal government under a written constitution, the Constitution of the Minnesota Chippewa Tribe (MCT Constitution). Article XI of the MCT Constitution provides that “[e]ach reservation and district or community may govern itself in local matters in accordance with its customs and may obtain, if it so desires, from the Tribal Executive Committee a charter setting forth its organization and powers.” On February 16, 1939, the Chippewa Indians of the Mille Lacs Reservation, pursuant to Article XI, ratified and accepted the Charter of Organization of the Mille Lacs Band of Chippewa Indians (MLB Charter). The MLB Charter defines membership in the Mille Lacs Band of Chippewa Indians as consisting of [a]ll Chippewa Indians permanently residing on the Mille Lacs Reservation and at, or near, the Villages of Isle, Danbury, East Lake and Sandy Lake, Minnesota, on the adoption of this Charter, and their descendants, whose names appear on the approved roll of the Minnesota Chippewa Tribe. On May 29, 1980, a Field Solicitor for the United States Department of the Interior, in response to a request from the Bureau of Indian Affairs (BIA) for an opinion regarding the jurisdictional status of the Sandy Lake Reservation, stated that “the Chippewas residing at Sandy Lake have been considered Chippewa of the Mississippi and part of the group known as the



Mille Lacs Band” and that “the Mille Lacs Band is the political successor of the historic Sandy Lake Band.” On June 24, 1988, the Chief of the Division of Tribal Government Services sent a letter to Clifford Skinaway, Jr., who had submitted an incomplete and uncertified petition for acknowledgment as an Indian tribe for Sandy Lake. That letter provided instruction regarding the federal acknowledgment process, which is codified at 25 C.F.R. § 83, and stated that “[i]n order to officially place your group on our priority register, we will need a formal expression from the group's governing body which states specifically that the group is petitioning for Federal acknowledgment and that the action is authorized by the group's governing body.” The Sandy Lake Band initiated this action on September 1, 2010, asserting claims for Violation of the Federally Recognized List Act of 1994; Violation of the IRA; Violation of the Administrative Procedures Act; Violation of the Fifth Amendment; and Breach of Trust, List Act, and IRA.FN2 The Sandy Lake Band characterizes these claims as “seek[ing] review of the Federal Defendants' Decision denying the Tribe's request for an IRA Election” and as “aris[ing] from the Federal Defendants' denial of the Tribe's Request for an IRA Election.” The Defendants moved to dismiss, arguing that the Sandy Lake Band is not eligible to request an IRA election, the Court lacks subject matter distinction because the Sandy Lake Band failed to exhaust administrative remedies, the United States has not waived sovereign immunity, and that the Minnesota Chippewa Tribe and the Mille Lacs Band are indispensable parties. The court granted Defendants' Motion to Dismiss and dismissed without prejudice Plaintiff's Complaint.

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

**16. *In the Matter of M.R.L., E.Y.L., Y.I.L., A.J.L., M.L.L., and S.E.L. v. N.L. and B.Z.L.***, Nos. 00389604, 00389606, 00389607, 00389609, 00389611, 00389613, A143877, 2010 WL 3419696 (Or. Ct. App. Sept. 1, 2010). Father and mother appealed from a juvenile court judgment taking jurisdiction over their six children. In July 2009, DHS was awarded protective custody of the children. In a subsequent shelter order entered later that month, the juvenile court determined that the children were Indian children under ORS 419A.004(13), which defines “Indian child” as a child who either (a) is a member of a tribe or (b) is eligible for membership and is the biological child of a member of a tribe. Father is a member of the Choctaw Nation of Oklahoma, and the court found by clear and convincing evidence that the children were enrolled or eligible for enrollment. The court further found, by clear and convincing evidence, that removal from the home was in the children’s best interest because the parents’ continued custody was likely to result in serious emotional or physical damage to the children and that, under the circumstances, no efforts would have prevented the need for removal or made possible the return of the children. The appellate court concluded that the juvenile court lacked authority to amend the judgment as it did; that father’s trial counsel performed inadequately by misstating the law concerning the applicability of the Indian Child Welfare Act (ICWA); that, as to the juvenile court’s finding of medical neglect, father suffered no prejudice as a result of counsel’s performance; and that, as to additional findings required by ICWA, father did suffer prejudice. Because the jurisdictional/dispositional judgment did not comply with ICWA as to evidence and findings required under ORS 419B.340, the appellate court reversed and remanded.

**17. *In re Interest of Jamyia M.***, No. A-10-208, 2010 WL 4840483 (Neb. Ct. App. Nov. 30, 2010). This case involved the termination of the parental rights of the parents of an Indian child, Jamyia M., following the child's removal from the home at two months of age after what doctors described as a nonaccidental injury resulting in serious physical and developmental delays to the child. The natural mother appealed and the natural father has cross-appealed the termination of their parental rights. The appellate court found that because there is no exemption to the "active efforts" requirement of the Nebraska Indian Child Welfare Act (NICWA), which is based on the federal Indian Child Welfare Act (ICWA), and that the juvenile court erred in finding "active efforts" were made in this case, and reversed the court's order terminating the parental rights of the natural mother and father and remanded the cause for further proceedings.

**18. *In re Beach***, No. 28728-9-III, 246 P.3d 845 (Wash. App. Jan. 27, 2011). Biological mother's former boyfriend petitioned for primary residential custody of child who was born out of wedlock when former boyfriend and biological mother were still living together, claiming status as a "de facto" parent due to the fact that he had raised child as his own. The Superior Court denied the petition upon finding that, although former boyfriend was child's "de facto" parent, he did not stand in parity with biological mother and, moreover, was not entitled to visitation. Former boyfriend appealed and biological mother cross-appealed. The appellate court held that: (1) biological mother's former boyfriend lacked standing to seek primary residential custody of child under Indian Child Welfare Act (ICWA); (2) Congress did not exceed its power under the commerce clause by enacting ICWA; and (3) ICWA did not deny child equal protection or substantive due process. Affirmed.

**19. *In re Jack C., III***, Nos. D057034, D057499, 192 Cal.App.4th 967, \_\_ Cal. Rptr. 3d \_\_, 2011 WL 504052 (Cal. App. Feb. 15, 2011). In dependency proceedings regarding three children, father petitioned to transfer jurisdiction to tribal court. The superior court, No. J516832A,B,C, denied the petition, terminated parental rights as to one child, and ordered long-term foster care as to the others. Father and mother appealed. The appellate court held that: (1) the children were Indian children under Indian Child Welfare Act (ICWA); (2) juvenile court was required to proceed as if the children were Indian children even if their status was not clear; (3) father's petition to transfer proceeding to tribal court was timely filed; (4) no evidence supported finding that tribal court could not mitigate hardship caused by distance; (5) juvenile court failed to hold hearings on good cause to deny transfer as to two children; and (6) juvenile court's error was jurisdictional. Reversed with directions.

**20. *State v. Native Village of Tanana***, No. S-13332, \_\_ P.3d \_\_, 2011 WL 745848 (Alaska Mar. 4, 2011). Native tribes brought declaratory judgment action against State, seeking declaration that tribes possessed inherent and concurrent jurisdiction to adjudicate children's proceedings and issue tribal court decrees. The Superior Court granted summary judgment in favor of tribes. State appealed. The Supreme Court held that: (1) issue of native tribal inherent sovereign jurisdiction, concurrent with State, to initiate Indian Child Welfare Act (ICWA) child custody proceedings was ripe for adjudication; (2) federally recognized Alaska Native tribes that have not reassumed exclusive jurisdiction under the ICWA still have concurrent jurisdiction to initiate ICWA-defined child custody proceedings, both inside and outside of Indian country; and (3) federally recognized Alaska Native tribes are entitled, under the ICWA, to full faith and credit with respect to ICWA-defined child custody orders. Affirmed in part and vacated in part.

**21. *Nielson v. Ketchum***, Nos. 09–4113, 09–4129, \_\_ F.3d \_\_, 2011 WL 1238429 (10th Cir. Apr. 5, 2011). Biological mother brought action under Indian Child Welfare Act (ICWA) against the adoptive parents of child, seeking the invalidation of her termination of her parental rights over child on the ground that ICWA procedural requirements were not met because biological mother consented to termination of her parental rights less than ten days after child’s birth. Indian tribe intervened. Biological mother and adoptive parents moved for summary judgment. The district court granted biological mother’s motion in part and denied adoptive parents’ motion. Adoptive parents appealed. The appellate court held that adopted child was not a “member of an Indian tribe” at time of adoption and thus was not an “Indian child” under ICWA, and termination of parental rights was not therefore invalid. Reversed.

**22. *In re S.M.J.C.***, No. 10CA0889, \_\_ P. 3d \_\_, 2011 WL 1420505 (Colo. Ct. App. Apr. 14, 2011). In this allocation of parental rights proceeding, the Oglala Sioux Tribe (the Tribe), acting through the Oglala Nation Tiospaye Resource Advocacy Center (ONTRAC), appealed from the order denying its motion to dismiss the proceeding pursuant to 25 U.S.C. § 1911(a), or, in the alternative, transfer the proceeding to the Tribe's tribal court pursuant to 25 U.S.C. § 1911(b). The appellate court concluded that the record does not support the trial court's finding that the child had been abandoned, and thus, the record does not support the court's determination that the child's domicile was that of his caregiver rather than that of his custodial parent. Accordingly, the appellate court vacated the order and remanded the case to the trial court for further proceedings.

**23. *In re Welfare of C.L.***, Nos. A10–1929, A10–1991, 2011 WL 1466481 (Minn. App. Apr. 19, 2011). Appellants Traverse County and the guardian ad litem of O.L. challenged the district court's transfer of jurisdiction over this termination-of-parental-rights (TPR) proceeding to the Sisseton–Wahpeton Oyate Tribal Court, pursuant to the Indian Child Welfare Act (ICWA). Appellants argued that res judicata barred the tribe's motion to transfer jurisdiction. Alternatively, appellants contended that the “advanced stage” of the proceeding constituted “good cause” to deny the transfer. Because res judicata did not apply and because the proceeding was not at an “advanced stage,” the appellate court affirmed.

**24. *Yvonne v. Arizona Department of Economic Security***, No. 1 CA-JV 10-0233, 2011 WL 2419857 (Ariz. Ct. App. June 16, 2011). Yvonne L. appealed from the superior court’s order severing her parental rights to E.L., L.L., and D.L. Because the children are members of the Tohono O’Odham Nation, the proceedings were subject to the Indian Child Welfare Act (ICWA). In addition to the Arizona Department of Economic Security (ADES), the Nation was a party to the termination proceedings and requested leave to file a brief in this appeal. We granted that request. The appellate court affirmed the judgment and the superior court’s conclusion that clear and convincing evidence is the standard of proof for finding that ADES had made “active efforts” to prevent the breakup of the Indian family as required by ICWA.”

**25. *Guardianship of H.C., Z.B. et al.***, No. A126914, 2011 WL 3506420 (Cal. Ct. App. Aug. 9, 2011). (From the opinion) “The probate court appointed 16-year-old H.C.’s brother and sister-in-law as her guardians over the objection of her mother, L.B. L.B. contends the court committed constitutional error when it declined her requests for appointed counsel. She also asserts the guardianship is not supported by substantial evidence and that the court

failed to obtain a statutorily required report and comply with the notice requirements of the Indian Child Welfare Act (ICWA). In the published portion of this opinion, we conclude L.B. was not entitled to appointed counsel. In the unpublished portion we conclude that only the ICWA claim has merit. We therefore order a limited reversal for compliance with the ICWA, and otherwise affirm the judgment.”

### C. CONTRACTING

**26. *Bates Associates, L.L.C. v. 132 Associates, L.L.C. and Sault Ste. Marie Tribe of Chippewa Indians***, No. 288826, 2010 WL 3564848 (Mich. Ct. App. Sept. 14, 2010). This dispute arose from the purchase of a parking garage located near the Greektown Casino in Detroit. The trial court granted summary disposition to Bates. In its appeal, the Tribe argued that the purported waivers of sovereign immunity and tribal court jurisdiction in a settlement agreement were invalid because they were not supported by a resolution of the Tribe’s Board of Directors as required under § 44.105 and § 44.109 of the Tribe’s Code. The appellate court found that the circumstances of the case support the trial court’s determination that the Tribe waived its sovereign immunity and tribal court jurisdiction and that the conduct of the parties both during the settlement agreement negotiations and after the agreement was executed support this conclusion. The settlement agreement itself contains waivers of sovereign immunity and tribal court jurisdiction and incorporates by reference such clear and unequivocal waivers set forth in the agreement of sale, which the Tribe conceded was supported by a valid resolution. The appellate court found that the trial court correctly ruled that the Tribe waived its sovereign immunity and tribal court jurisdiction, and correctly granted summary disposition for Bates and entered judgment in its favor. Affirmed.

**27. *Arctic Slope Native Ass’n, Ltd. v. Sebelius***, No. 2010-1013, \_\_ F.3d \_\_, 2010 WL 5129708 (Fed. Cir. Dec. 15, 2010). Association of Native-American tribes, which provided health care services to its members under self-determination contracts entered pursuant to the Indian Self-Determination and Education Assistance Act (ISDA), brought action against the Secretary of the Department of Health and Human Services (HHS), alleging breach of contract related to government’s failure to pay association’s contract support costs shortfall for two fiscal years. The Civilian Board of Contract Appeals granted summary judgment in favor of HHS. Association appealed. The appellate court held that: (1) “not to exceed” language in appropriations acts imposed statutory cap on HHS’s obligations; (2) availability of funds provision in contract, coupled with appropriations acts, limited HHS’s obligations to appropriated amounts; and (3) contract expressly warned association of risk that funding would be inadequate to fully fund HHS’s obligations. Affirmed.

**28. *Inglish Interests, LLC v. Seminole Tribe of Florida, Inc.***, No. 2:10-cv-367, 2011 WL 208289 (M.D. Fla. Jan. 21, 2011). This matter was before the court on Defendant Seminole Tribe of Florida Inc.’s Motion to Dismiss for Lack of Subject Matter Jurisdiction, Failure to State a Claim, and Failure to Join an Indispensable Party. Plaintiff Inglish Interests, LLC alleged the following facts in the Complaint: Defendant, Seminole Tribe of Florida, Inc. owns a citrus grove located on the Big Cypress and Brighton reservations (the Grove Property). Inglish sought to lease the Grove Property from STOFI in order to harvest the crops and market them for profit.

The parties signed a letter of intent (LOI) which memorialized their preliminary agreement regarding an anticipated ten-year property lease. While the parties intended to enter into a formal lease agreement, one was never executed. Instead, the parties operated pursuant to the LOI for approximately fifteen months. The LOI contains eight short paragraphs and makes no mention of tribal sovereign immunity. A dispute ensued, and plaintiff filed a Complaint alleging state law claims for breach of contract, imposition of a crop lien pursuant to Fla. Stat. § 713.59, a right to emblements, and unjust enrichment. Federal jurisdiction was premised on diversity of citizenship under 28 U.S.C. § 1332, and it was alleged that STOFI consented to the jurisdiction of the court by virtue of its Corporate Charter, Art. VI, Sec. 9. STOFI filed a motion to dismiss asserting, among other things that sovereign immunity precludes subject matter jurisdiction over the case. In response, plaintiff asserted that STOFI is a corporation separate and distinct from the Seminole Tribe of Florida itself, and although the Seminole Tribe of Florida may enjoy sovereign immunity, STOFI does not. The court granted Defendant Seminole Tribe of Florida Inc.'s Motion to Dismiss for Lack of Subject Matter Jurisdiction based upon Indian sovereign immunity, and dismissed the case without prejudice.

**29. *Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Florida*, No. 10–60483, 2011 WL 1303163 (S.D. Fla. Mar. 31, 2011).** This matter was before the Court on the Motions Of Defendants, Seminole Tribe Of Florida and Mitchell Cypress, To Dismiss as to Amended Complaint. This cause of action arose out of a contractual dispute between the Seminole Tribe of Florida and the Contour Spa At The Hard Rock, Inc., a spa facility located inside the Hard Rock Hotel and Casino Hollywood. Plaintiff's Amended Complaint alleged two federal Counts and five state law Counts, including declaratory, injunctive, and other relief against all Defendants under the Indian Civil Rights Act, 25 U.S.C. § 1301, et seq.; declaratory, injunctive and other relief against all Defendants pursuant to the Indian Long Term Leasing Act, 25 U.S.C. § 415, and its accompanying regulations, 25 C.F.R. Parts 2 and 162; and damages against certain Defendants for various state law causes of action including Wrongful Eviction, Unlawful Entry, Fraud, Promissory Estoppel, and Unjust Enrichment. After leasing its premises to the Spa for over six years, the Tribe declared the lease void and locked out the Spa Owner and employees. Plaintiff then brought suit in state court, and Defendant Seminole Tribe of Florida removed to federal court. Plaintiff Contour Spa at the Hard Rock, Inc. (Contour Spa) is a Florida corporation that owned and operated a spa facility located inside the Hard Rock via a long term lease agreement (lease) with Defendant Seminole Tribe from July 18, 2003, until March 17, 2010. Signed in November 2003, the lease called for an initial term of ten years followed by four renewal terms of five years each. By the lease, Defendant Seminole Tribe agreed to waive its sovereign immunity as to certain lawsuits that Plaintiff might bring. However, the lease's validity was expressly conditioned upon the Secretary of the Interior approving the lease. The contract assigned the Chairman of the Seminole Tribal Council, Mitchell Cypress, the duty of submitting an application for lease approval to the Interior Secretary. This much he did, but that application was never approved. The Court found that Defendant Seminole Tribe never validly waived its sovereign immunity, granted Defendant Seminole Tribe's Motion To Dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). For the same reason, the Court also granted Defendant Mitchell Cypress's Motion To Dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), or in the alternative, under Fed. R. Civ. P. 12(b)(6). The Court remanded the remaining state law claims to state court.

**30. *State v. Hester***, No. A09–1784, \_\_\_ N.W. 2d \_\_\_, 2011 WL 1563683 (Minn. Apr. 27, 2011). The question presented in this case was whether a Lower Sioux Indian Community (Lower Sioux) police officer is a peace officer authorized to invoke the implied-consent law and request that a person suspected of driving while impaired submit to a chemical test for the presence of alcohol or controlled substances. The court concluded that the Lower Sioux must have liability insurance limits in the amounts required by statute in order for a Lower Sioux police officer to qualify as a peace officer under Minn. Stat. § 169A.03, subd. 18(3) (2010). Because those limits were not in place at the time appellant was arrested for driving while impaired, the court reversed.

**31. *Ramah Navajo Chapter v. Salazar***, No. 08–2262, \_\_\_ F.3d \_\_\_, 2011 WL 1746138 (10th Cir. May 9, 2011). Several tribes and tribal organizations brought suit against Secretary of the Interior, seeking to collect promised, but unappropriated contract support costs (CSCs) for activities that to be carried on by a tribal organization as contractor to ensure compliance with terms of self-determination contracts under Indian Self-Determination and Education Assistance Act (ISDA). The district court granted summary judgment in favor the government, and plaintiffs appealed. The appellate court held that although amount of lump sum appropriation was insufficient to fund all ISDA contracts, “subject to the availability of appropriations” clause of ISDA was satisfied with respect to certain ISDA contracts because Congress appropriated enough funds to pay CSCs on any individual contract. Reversed and remanded.

**32. *Blatchford v. Alaska Native Tribal Health Consortium***, No. 10–35785, \_\_\_ F.3d \_\_\_, 2011 WL 1886390 (9th Cir. May 19, 2011). Plaintiff suffered serious injuries in a car accident and received extensive health care services from Defendant Alaska Native Tribal Health Consortium (Consortium). Pursuant to the Indian Health Care Improvement Act, the Consortium did not charge Plaintiff for those services because she is a Native American; but the Consortium filed a lien under Alaska law against any money that Plaintiff receives from third parties related to the injuries for which it treated her. Plaintiff received a settlement from her insurer, and her lawyer disbursed all the settlement funds except for the amount subject to the Consortium’s liens. Thereafter Plaintiff filed an action in Alaska state court, seeking a declaratory judgment to the effect that the Consortium’s liens are not valid, in whole or in part. The Consortium removed the action to federal court and filed a counterclaim asserting that, under 25 U.S.C. § 1621e, Plaintiff must remit the remaining funds to it. The district court granted summary judgment to the Consortium because it “has a right to recover the money spent on Plaintiff’s medical care under 25 U.S.C. § 1621e.” The appellate court reversed, finding that 25 U.S.C. § 1621e does not apply here.

**33. *Village of Hobart v. Brown County***, No. 2010AP561, 2011 WL 2535540 (Wis. App. Jun. 28, 2011). The Village of Hobart appealed a judgment declaring that Brown County may designate the law enforcement arm of the Oneida Tribe as the primary responsive agency to 911 calls originating within a 1,700–acre area of the Village. The Village contended that the designation is contrary to the statute establishing the statewide emergency number, Wis. Stat. § 256.35, and violates the Village’s mandatory obligation to provide police services under Wis. Stat. § 61.65(1)(a). The appellate court concluded that neither Wis. Stat. §§ 256.35 nor 61.65 prohibits the County from designating tribal police as the primary responsive law enforcement agency. It further concluded that by permitting county-tribal law enforcement programs, see Wis. Stat. §§ 59.54(12) and 165.90, the legislature intended to encourage law enforcement

coordination between counties and tribes. Because the selection of a responsive law enforcement agency is one aspect of that coordination, the court affirmed.

**34. *California Parking Services, Inc. v. Soboba Band of Luiseno Indians*, No. E050306, \_\_ Cal. Rptr. 3d \_\_, 2011 WL 2853218 (Cal. App. 4 Dist. Jul. 20, 2011).** Plaintiff and appellant California Parking Services, Inc. (CPS) appealed the denial of its petition to compel arbitration of a dispute with defendant and respondent Soboba Band of Luiseno Indians (Soboba Band) arising out of a contract to provide parking services at the Soboba Casino on the Soboba Band's reservation. The appellate court affirmed the denial of CPS's petition to compel arbitration because it agreed with the trial court that the Soboba Band did not waive its sovereign immunity through the arbitration clause.

**35. *Lummi Tribe of Lummi Reservation v. U.S.*, No. 08–848C, \_\_ Fed. Cl. \_\_, 2011 WL 3417092 (Fed. Cl. Aug. 4, 2011).** (From the opinion.) This action is one of a dozen or more law suits currently pending before both this court and the United States District Court for the District of Colorado brought by various Indian tribes and tribal housing authorities to challenge actions by the United States Department of Housing and Urban Development (HUD) in calculating and seeking the repayment of grant funds paid to the tribes pursuant to the Native American Housing Assistance and Self–Determination Act of 1996 (NAHASDA), as amended, 25 U.S.C. §§ 4101–4212 (2006). In particular, plaintiffs in this case contend that HUD improperly determined that certain of plaintiffs' housing units could not be included in their grant calculations, thereby depriving plaintiffs of funding to which they allegedly were entitled both under the payment mandates of NAHASDA and under their annual funding agreements. Defendant moved to dismiss the complaint for lack of subject matter 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 as follows: (1) the claims of plaintiff Fort Peck Housing Authority are dismissed for lack of jurisdiction on the basis of 28 U.S.C. § 1500; and (2) regarding the claims of the remaining plaintiffs, (i) the first claim for relief alleging unlawful recapture of grant funds affecting fiscal years 1998 through 2002 is dismissed for lack of jurisdiction on the basis of 28 U.S.C. § 2501 (the remainder of the first claim for relief, involving fiscal years 2003 through 2008, represents a claim over which this court has jurisdiction). In concluding that we possess jurisdiction over this matter, we offer no opinion as to the ultimate merit of plaintiffs' claims. Whether plaintiffs are correct that 24 C.F.R. § 1000.318 violates NAHASDA is a question of law, one that will presumably be resolved on cross-motions for summary judgment.

#### **D. EMPLOYMENT**

**36. *Pena v. Inn of the Mountain Gods Resort and Casino*, No. 29,799, 2011 WL 704478 (N.M. App. Jan. 21, 2011).** Eric Pena (Worker) alleged he was injured while fulfilling his duties as a terrain park supervisor at Ski Apache, near Ruidoso, New Mexico. Ski Apache is a commercial enterprise operated by Inn of the Mountain Gods Resort and Casino and insured by Tribal First (collectively Employers). After his injury, Worker filed a claim with the New Mexico Workers' Compensation Administration (WCA), and Employers, which are an unincorporated enterprise of the Mescalero Apache Tribe, filed a motion to dismiss on the basis of tribal sovereign immunity. The workers' compensation judge (WCJ) granted Employers'

motion, and Worker appealed. Worker contended (1) sovereign immunity does not apply to state workers' compensation claims involving off-reservation injuries; (2) the state Workers' Compensation Act does not exempt Indian tribes from coverage and therefore applies to them; (3) Employers waived sovereign immunity by participating in state workers' compensation proceedings; and (4) the gaming compact between the tribe and the state gives the WCA jurisdiction over the dispute. The court affirmed the order of the WCJ and dismissed the case.

**37. *Nanomantube v. Kickapoo Tribe in Kansas***, No. 09-3347, 631 F.3d 1150 (10th Cir. Jan. 31, 2011). Former tribal employee brought Title VII employment discrimination action against Indian tribe, as well as against tribe's governing body and unincorporated tribal casino at which employee worked. The district court dismissed action based on tribal sovereign immunity, and employee appealed. The appellate court held that: (1) Congress did not abrogate tribal immunity with regard to Title VII, and (2) tribe's agreement to comply with Title VII, contained in single sentence in casino employee handbook, did not unequivocally waive tribal sovereign immunity. Affirmed.

**38. *Swenson v. Nickaboine***, No. A10-380, 793 N.W.2d 738 (Minn. Feb. 2, 2011). Workers' compensation claimant sought benefits from subcontractor for whom he worked on casino expansion project located on land held in trust by the federal government for an Indian tribe after he allegedly sustained a work-related back injury. Subcontractor and its workers' compensation insurer filed motion to dismiss claim, arguing that the Office of Administrative Hearings (OAH), Workers' Compensation Section, lacked jurisdiction. Claim was dismissed by Compensation Judge. Claimant appealed. The Workers' Compensation Court of Appeals, 2010 WL 431914, reversed. Insurer sought certiorari review. The Supreme Court held that: (1) OAH, Workers' Compensation Section has authority under Minnesota Workers' Compensation Act to hear claim arising out of an injury to a non-tribal employee occurring on land either held directly by an Indian tribe or held by the federal government in trust for an Indian tribe; (2) agreement between Indian tribe and its prime contractor for casino expansion project to subject all disputes arising out of the contract to the tribe's jurisdiction did not affect the state's jurisdiction over the workers' compensation claim of a subcontractor's non-tribal employee; and (3) Minnesota was authorized to adjudicate claim pursuant to statute extending state workers' compensation laws to buildings, works, and property of the federal government. Affirmed.

**39. *Dilliner v. Seneca-Cayuga Tribe***, No. 109085, 2011 WL 2557022 (Okla. Jun. 28, 2011). Plaintiffs sued Seneca-Cayuga Tribe of Oklahoma for breach of employment contracts. The contracts contained a limited waiver of sovereign immunity. Tribal law requires that waiver of sovereign immunity must be consented to by the Business Committee of the Tribe by resolution. The resolutions adopted by the Business Committee of the Tribe did not waive the Tribe's sovereign immunity or consent to waiver of sovereign immunity. The trial judge, on motion for reconsideration, granted the Tribe's motion to dismiss for lack of subject matter jurisdiction and dismissed the case. Affirmed.

**40. *Morrison v. Viejas Enterprises***, No. 11cv97, 2011 WL 3203107 (S.D. Cal. Jul. 26, 2011). Before the court was defendant's Motion to Dismiss For Lack of Subject Matter Jurisdiction. Plaintiff was initially hired by Defendants to work as a senior executive assistant and was promoted to the slot operations department. Plaintiff's work in the slot operations



department was “mostly sedentary.” “Due to her knee disability” Plaintiff underwent surgery in May 2009 and when she returned to work she was informed that her job duties had changed to slot operations machine maintenance files. The new position was “more physically demanding” than her previous position. Plaintiff was unable to perform the physical demands of the new position and her “physician put her back out on protected medical leave.” Plaintiff returned to work and requested an accommodation for her disability. Defendants refused to accommodate her and told her that she would have thirty-days to find another position within Viejas or she would be deemed to have voluntarily resigned. Plaintiff received no assistance in locating another position and was terminated. Plaintiff asserted a claim for violation of the Family Medical Leave Act, 29 U.S.C. § 2601 *et seq.*, and a California tort claim for wrongful adverse action and termination in violation of the public policies of the California Fair Employment and Housing Act, the Americans with Disabilities Act, the California Family Rights Act, and the Federal Family Medical Leave Act. Plaintiff sought monetary damages, an injunction that Defendants refrain from “unlawful practices, policies, usages and customs,” and reinstatement to the “position from which [Plaintiff] was wrongfully terminated or a comparable position.” This Court found that Defendants Viejas Enterprises and Viejas Casino operate as an arm of the tribe; that the tribal sovereign immunity enjoyed by Defendant Viejas Band of Kumeyaay Indians from Plaintiff’s claim for violation of the Family Medical Leave Act extends to Defendants Viejas Enterprises and Viejas Casino; and concluded that Plaintiff failed to show that subject matter jurisdiction exists over Plaintiff’s claim against Defendants Viejas Enterprises and Viejas Casino. The court granted Defendants’ Motion to Dismiss.

## **E. ENVIRONMENTAL REGULATIONS**

**41.** *The Quapaw Tribe of Oklahoma v. Blue Tree Corp.*, No. 03-CV-0846, 2010 WL 3368701 (D. Okla. Aug. 20, 2010). The Quapaw Tribe of Oklahoma (Tribe) and individual tribal members filed this lawsuit alleging claims of public nuisance, private nuisance, trespass, unjust enrichment, strict liability, and deceit against the successor entities of mining companies that operated in the former Tri-State Mining District. The Tribe requested damages for (1) the cost to restore, replace, or acquire the equivalent of such natural resources, (2) the compensable value of lost services resulting from the injury to natural resources, and (3) the reasonable cost of assessing injury to the natural resources and the resulting damages. The case was stayed for almost two years while plaintiffs pursued an interlocutory appeal to the Tenth Circuit Court of Appeals regarding tribal sovereign immunity from counterclaims of recoupment. The Tenth Circuit affirmed the former assigned judge’s decision to allow defendants to proceed with counterclaims for recoupment. Before the Court was defendants’ Motion to Dismiss for Failure to Join Required Parties. Defendants Blue Tree Corp. and Gold Fields Mining, LLC argued that the state of Oklahoma is a necessary and indispensable party to the Tribe’s claims for natural resources damages (NRD), that joinder of this party is not feasible, and that the Tribe’s NRD claims should be dismissed. The court ordered that defendants’ Motion to Dismiss for Failure to Join Required Parties and Brief in Support Thereof was denied in part and moot in part. The motion was denied as to dismissal of plaintiff’s claims for NRD for terrestrial plant life on Tribal lands and moot as to the Tribe’s former claims for NRD for aquatic resources and wildlife and the claims of the individual plaintiffs.

**42. *South Fork Band v. United States Department of Interior***, No. 3:08-CV-00616, 2010 WL 3419181 (D. Nev. Aug. 25, 2010). Before the court was Plaintiffs South Fork Band Council of Western Shoshone of Nevada, Timbisha Shoshone Tribe, Te-Moak Tribe, Western Shoshone Defense Project, and Great Basin Resource Watch's Motion for Summary Judgment. Barrick, a subsidiary of Barrick Gold U.S., Inc. and Barrick Gold Corporation, Inc., sought to construct and operate the Cortez Hills Expansion Project, a gold mining and processing operation, on and around Mt. Tenabo in Lander County, Nevada. The Project will include the development of new facilities, as well as an expansion of an existing open-pit gold mining and processing operation at the Cortez Gold Mines Operations Area. After nearly three years of public comment and review, the BLM published a Final Environmental Impact Statement (EIS) Notice of Availability for the Project in the Federal Register. Shortly after the BLM issued the Project's Record of Decision Plaintiffs initiated this action pursuant to the Administrative Procedures Act (APA), 5 U.S.C. §§ 701-706, for judicial review of the BLM's approval of the Project. Plaintiffs contended that the BLM's approval violated the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701-1787, and the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370. The court found that, to the extent that the Ninth Circuit's decision cannot be considered a final determination of Plaintiffs' NEPA claims for declaratory relief relating to mine dewatering and offsite ore transportation and processing, summary judgment on these claims in Plaintiffs' favor was appropriate. For the remaining NEPA claims and Plaintiffs' sacred site FLPMA claim, the court granted summary judgment in favor of Barrick and the federal defendants. As to Plaintiffs' FLPMA-based mine dewatering claim, because it is yet to be seen whether the dewatering will cause unnecessary and undue degradation, the court denied summary judgment to all parties.

**43. *Confederated Tribes and Bands of the Yakama Nation v. U.S. Department of Agriculture***, No. CV-10-3050, 2010 WL 3434091 (E.D. Wash. Aug. 30, 2010). Prior to 2006, federal regulations barred the shipment of Hawaiian garbage for dumping in the continental United States (mainland). Then, in 2006, the United States Department of Agriculture (USDA) Animal and Plant Health Inspection Service (APHIS) proposed amending the regulations to allow for shipment of certain garbage to the mainland, 71 Fed. Reg. 20,030 (April 19, 2006), and ultimately determined such was appropriate in accordance with 7 C.F.R. §§ 330.402-403. APHIS began assessing the environmental and pest risks associated with hauling garbage, which would be baled and then wrapped in plastic, from Hawaii to the Roosevelt Regional Landfill located near the Columbia River and the Yakama Nation reservation in Washington. APHIS prepared an environmental assessment (EA), which concluded that Hawaiian Waste Systems' (HWS) proposed shipment of Hawaiian garbage to the Roosevelt Landfill would have no significant environment impacts. APHIS issued a Finding of No Significant Impact (FONSI). Each of the Plaintiffs submitted comments in response to the FONSI; however, it is unclear whether APHIS considered the Yakama Nation's comments. After obtaining a temporary restraining order, Plaintiffs sought a preliminary injunction barring the USDA from authorizing shipments of Hawaiian municipal waste into the mainland. The court granted the motions issued a preliminary injunction.

**44. *Miccosukee Tribe of Indians of Florida v. U.S. Army Corps of Engineers***, Nos. 09-14194, 09-14539, \_\_\_ F.3d \_\_\_, 2010 WL 3581910 (11th Cir. Sept. 15, 2010). Indian tribe brought action against United States, alleging that planned replacement of section of roadway with bridge, in order to increase flow of water into Everglades National Park, violated National

Environmental Policy Act (NEPA) and Federal Advisory Committee Act (FACA). The district court, No. 08-21747-CV-UU, 650 F.Supp.2d 1235, granted United States' motion to dismiss. Tribe appealed. Tribe brought separate action against United States, alleging that planned replacement of roadway with bridge violated Endangered Species Act (ESA). The district court granted United States' motion to dismiss. Tribe appealed. Appeals were consolidated. The appellate court held that appropriations act repealed NEPA, FACA, and ESA for purposes of tribe's suits, and thus deprived federal courts of subject matter jurisdiction over suits. Affirmed

**45. *Akiak Native Community v. U.S. E.P.A.***, No. 08-74872, \_\_\_ F.3d \_\_\_, 2010 WL 4345677 (9th Cir. Nov. 4, 2010). Akiak Native Community and other petitioners and intervenors petitioned for review of decision of Environmental Protection Agency (EPA) approving Alaska's application to assume responsibility for administration of portions of National Pollutant Discharge Elimination System (NPDES). The appellate court held that: (1) Alaska provided for adequate judicial review; (2) Alaska had adequate enforcement remedies; and (3) transfer of NPDES program to Alaska did not trigger subsistence evaluation under Alaskan National Interest Lands Conservation Act. Petition denied.

**46. *Prairie Band Pottawatomie Nation v. Federal Highway Admin.***, No. 08-2534, \_\_\_ F. Supp. 2d \_\_\_, 2010 WL 4622181 (D. Kan. Nov. 5, 2010). Indian tribe and environmental organizations brought action against the Federal Highway Administration (FHWA) and the Kansas Department of Transportation, seeking judicial review of the FHWA's record of decision which selected route for proposed highway project which affected historic site, and asserting violations of the National Environmental Policy Act (NEPA), National Historic Preservation Act (NHPA), and the Department of Transportation Act. FHWA moved to strike plaintiffs' exhibits. The district court held that: (1) conceptual alternative route alignment was not a reasonable alternative that required discussion in final environmental impact statement (FEIS); (2) decision not to issue supplemental environmental impact statement (SEIS) under NEPA was not arbitrary and capricious; (3) FHWA violated NEPA noise study regulations; (4) FHWA's non-compliance with NEPA noise study regulations did rise to level of prejudicial error which would require reversal of route selection; (5) FHWA's cost estimate was clearly erroneous; (6) FHWA's finding that selected route would provide a net benefit to historic site which alternative did not provide was not arbitrary or capricious; and (7) FHWA reasonably believed that alternative route was imprudent as an alternative to selected route under Department of Transportation Act. Record of decision affirmed; motion to strike sustained in part and overruled in part.

**47. *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dept. of Interior***, No. 10cv2241, \_\_\_ F. Supp. 2d \_\_\_, 2010 WL 5113197 (S.D. Cal. Dec. 15, 2010). Indian tribe filed action against Department of Interior, alleging that decision to approve solar energy project violated various provisions of federal law, and seeking preliminary injunction enjoining project. Developer intervened as defendant. The district court held that: (1) tribe was likely to prevail on claim that it was not adequately consulted under NHPA before solar energy project was approved; (2) tribe was likely to suffer irreparable harm absent preliminary injunction; (3) balance of equities weighed in favor of granting preliminary injunction; and (4) preliminary injunction was in public interest. Motion granted.

**48. *The Wilderness Society v. U.S. Forest Service***, No. 09-35200, \_\_\_ F.3d \_\_\_, 2011 WL 117627 (9th Cir. Jan. 14, 2011). Conservation groups filed action alleging that Forest Service had violated National Environmental Policy Act (NEPA) by, among other things, not preparing environmental impact statement and not considering reasonable alternatives to travel plan that designated roads and trails for use by motorized vehicles in Minidoka Ranger District of Idaho's Sawtooth National Forest. The district court, 2009 WL 453764 and 2009 WL 1033711, refused to allow groups representing recreation interests to intervene. Recreational groups appealed. The appellate court held that private parties and state and local governments were not categorically prohibited from intervening of right on merits of claims brought under NEPA; abrogating *Churchill County v. Babbitt*, 150 F.3d 1072, *Portland Audubon Society v. Hodel*, 866 F.2d 302, *Sierra Club v. EPA*, 995 F.2d 1478, *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, and *Wetlands Action Network v. U.S. Army Corps of Eng'rs*, 222 F.3d 1105. Reversed and remanded.

**49. *Organized Village of Kake v. U.S. Dept. of Agriculture***, No. 1:09-cv-00023, \_\_\_ F. Supp. 2d \_\_\_, 2011 WL 833242 (D. Alaska Mar. 4, 2011). Before the court were Plaintiffs Organized Village of Kake, et al., motion for summary judgment setting aside the Tongass Exemption, reinstating the Roadless Rule, and vacating approved timber sales in conflict with the Roadless Rule; Intervenor-defendants State of Alaska and Alaska Forest Association oppositions; and the United States Department of Agriculture (USDA) and United States Forest Service (Forest Service) (Forest Service) opposition and cross-motion for summary judgment dismissing plaintiffs' claims. This action challenged a Forest Service rule exempting the Tongass National Forest (Tongass) from the Roadless Area Conservation Rule (Roadless Rule). The Tongass in southeast Alaska includes 16.8 million acres and is the largest national forest. The Forest Service manages the National Forest System under several federal statutes, including the National Forest Management Act (NFMA), which requires the Forest Service to develop and periodically revise a land and resource management plan, commonly known as a "forest plan," for each unit of the National Forest System. Each forest plan must "provide for multiple use and sustained yield of the products and services obtained" from the forest unit pursuant to the Multiple Use Sustained Yield Act of 1960, and coordinate "outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness." The court granted plaintiffs' motion for summary judgment insofar as it seeks to vacate the Tongass Exemption and reinstate the Roadless Rule's application to the Tongass, and denied the motion for summary judgment without prejudice insofar as it seeks an order vacating the Scratchings Timber Sale ROD II, and portions of the Iyouktug Timber Sales ROD and Kuiu Timber Sale Area ROD. The court denied defendants' cross-motion for summary judgment.

**50. *Center for Biological Diversity v. Salazar***, No. 09-1684, \_\_\_ F. Supp. 2d \_\_\_, 2011 WL 891821 (D.D.C. Mar. 16, 2011). Environmental group brought action against Secretary of the Interior and Indian tribe, pursuant to Endangered Species Act (ESA), challenging Secretary's decision not to designate area around southwestern tip of Florida Everglades containing sub-population A of the Cape Sable seaside sparrow as critical habitat. Defendants moved for summary judgment. The district court held that secretary's decision not to include area as critical habitat was not arbitrary or capricious. Motion granted.

**51. *El Paso Natural Gas Co. v. U.S.***, Civil No. 07–905, \_\_ F. Supp. 2d \_\_, 2011 WL 1119640 (D.D.C. Mar. 27, 2011). Intervenor-plaintiff Navajo Nation brought suit against the United States in connection with a former uranium mill located on the Navajo Nation Reservation near Tuba City, Arizona, alleging violations of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901, *et seq.*, the Administrative Procedure Act (APA), 5 U.S.C. §§ 701, *et seq.*, the Uranium Mill Tailing Radiation Control Act (UMTRCA), 42 U.S.C. §§ 7901, *et seq.*, the American Indian Agriculture Resources Management Act (AIARMA), 25 U.S.C. §§ 3701, *et seq.*, the Indian Lands Open Dump Cleanup Act (ILODCA), 25 U.S.C. §§ 3901, *et seq.*, the federal Clean Water Act (CWA), 33 U.S.C. §§ 1251, *et seq.*, various Navajo Nation laws, and the United States’ trust duty to the Navajo Nation. On March 30, 2010, the Tribe, which alleged, inter alia, the same violations raised by EPNG’s APA/UMTRCA claims, joined EPNG in appealing this Court’s March 31, 2009 decision. Remaining are two additional claims brought under UMTRCA, as well as various other claims brought under federal and tribal law. The Tribe argued that these statutory obligations, together with various Navajo tribal laws made applicable through AIARMA and defendant’s general trust duty owed to the Navajo Nation create enforceable duties, which defendant has failed to fulfill. In response, defendant argues that: (1) the Tribe has waived its right to sue under UMTRCA; (2) none of the federal statutes invoked by the Tribe create a right of action or waive defendant’s sovereign immunity; (3) the Tribe cannot bring any of its claims under the APA as it has failed to allege any final agency action; and (4) the Tribe has failed to identify a specific trust duty that defendant has failed to fulfill. The court granted defendant’s motion to dismiss.

**52. *Karuk Tribe of California v. U.S. Forest Service***, No. 05–16801, \_\_ F.3d \_\_, 2011 WL 1312564 (9th Cir. Apr. 7, 2011). Indian tribe brought action for declaratory and injunctive relief, alleging improper management of suction dredge and other mining operations in waterways and riparian areas within Klamath National Forest, in violation of National Forest Management Act (NFMA), National Environmental Policy Act (NEPA) and Endangered Species Act (ESA). The District Court granted summary judgment for defendants. Plaintiff appealed. The appellate court held that: (1) internal decision of United States Forest Service (USFS) to not require plan of operations after receiving Notice of Intent (NOI) from miners did not constitute “agency action” under ESA and (2) ESA consultation obligation was not triggered by park ranger’s discretionary authority to provide advice to proposed miner about what additional information was needed for him to evaluate NOI, and how miner could alter his operations to avoid filing plan of operations. Affirmed.

**53. *U.S. v. Questar Gas Management Co.***, No. 2:08–CV–167, 2011 WL 1793164 (D. Utah May 11, 2011). This matter was before the Court on Plaintiff’s Motion for Summary Judgment on EPA’s Regulatory Authority and Defendant’s Twenty–Fourth Affirmative Defense. The government brought this action against Defendant alleging violations of the Clean Air Act (CAA) at five natural gas compressor facilities Defendant owns and operates in the Uintah basin. Plaintiff’s Complaint alleged violations of the CAA’s Prevention of Significant Deterioration (PSD), National Emission Standard for Hazardous Air Pollutants (NESHAP), and Title V programs. The Facilities are all “located within the historic boundaries of that portion of the Uintah and Ouray Indian Reservation known as the Uncompahgre Reservation.” In its Twenty–Fourth Affirmative Defense Defendant alleges that Plaintiff’s claims are barred or limited because it and the Ute Tribe disclaimed regulatory authority over some or all of the lands at issue in this case in 1998 in favor of the State of Utah, and, therefore, Plaintiff lacks jurisdictional

authority to bring claims under the federal provisions of the Clean Air Act against some or all of the facilities at issue in this case. The Tribe's Disclaimer provides: "[T]he tribe hereby disclaims all civil and/or regulatory authority over land determined to be part of the Reservation and "Indian country", as defined by 18 U.S.C. § 1151, under the decision of the United States Court of Appeals for the Tenth Circuit in the case of *Ute Indian Tribe v. Utah*, 114 F.3d 1513 (1997), which is owned by persons who are not members of federally recognized Indian tribes. This disclaimer includes any right that the Tribe might otherwise assert to . . . regulate activities thereon from the standpoint of their environmental effects." The government sought summary judgment on this affirmative defense arguing: (1) that only the EPA can approve Tribes or States to implement Clean Air Act (CAA) Programs, that the EPA has not approved the Tribe or the State to implement CAA on the reservation, therefore EPA has regulatory authority over the five facilities; (2) the EPA is not bound by the Disclaimer because the former Superintendent of the Uintah and Ouray Agency for the Bureau of Indian Affairs (BIA) did not have the authority to bind the EPA or the entire United States when he approved the disclaimer; and (3) the Disclaimer does not apply to the Uncompahgre Reservation where the facilities are located. The court found that summary judgment is appropriate because the authority to administer CAA programs on the Reservation lies with the EPA and granted Plaintiff's Motion for Summary Judgment.

**54. *Center for Biological Diversity v. Salazar*, No. CV-09-8207, 2011 WL 2117607 (D. Ariz. May 27, 2011).** This action was brought against the Bureau of Land Management (BLM) and the Secretary of the Interior by three environmental groups and two Indian tribes whose reservations are located at or near the Grand Canyon, the Kaibab Band of Paiute Indians and the Havasupai Tribe. The case arose from the renewed operation of a uranium mine (Arizona 1) near Grand Canyon National Park. Plaintiffs alleged that the Bureau of Land Management violated mining and environmental laws when it allowed the mine to resume operations. The Court denied Plaintiffs' motion for a preliminary injunction, a decision affirmed on appeal. Plaintiffs sought declaratory and injunctive relief under the Administrative Procedure Act (APA). The third amended complaint asserted five claims for relief: (1) that the plan of operations approved by BLM in 1988 became ineffective when operations at Arizona 1 ceased in 1992, and that BLM violated the Federal Land Policy and Management Act (FLPMA), the General Mining Law of 1872, and the implementing regulations for those statutes when it allowed operation of the mine to resume in 2009 without a new plan of operations; (2) that if the 1988 plan of operations is effective, then BLM violated the National Environmental Policy Act (NEPA) by failing to supplement the environmental analysis performed in 1988; (3) that BLM is in violation of the FLPMA by failing to prevent unnecessary and undue degradation of public lands; (4) that BLM violated NEPA by providing Mohave County with a free use permit to excavate gravel without performing adequate NEPA analysis; and (5) that BLM erroneously failed to perform required NEPA analysis before approving an updated reclamation bond at Arizona 1. The Court concluded that BLM's decision to allow operations at Arizona 1 under the 1988 plan of operations was based on a permissible interpretation of the regulations; that Plaintiffs have not shown BLM's decision to be arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law; and that Plaintiffs have not shown that BLM has a mandatory duty to require approval of a new plan of operations to prevent unnecessary and undue degradation of public lands. The court granted summary judgment in favor of Defendants.

**55. *Karuk Tribe v. Kelley***, No. C 10–02039, 2011 WL 2444668 (N.D. Cal. June 13, 2011). This action was filed in May 2010, requesting judicial review of Forest Service and Forest Supervisor actions taken in conjunction with the Orleans project. The complaint alleged seven claims for relief: two counts for violation of the Healthy Forest Restoration Act (HFRA), four counts for violation of the National Environmental Policy Act (NEPA), and one count for violation of the National Historic Preservation Act (NHPA). The Orleans project was “designed to treat approximately 2,698 acres of forest lands by thinning and/or pruning, hand piling and burning, jackpot burning, yarding tops, and/or understory burning to increase wildfire suppression effectiveness in and around the community of Orleans.” Portions of the project area overlap with portions of the Panamnik World Renewal Ceremonial District, which has cultural and spiritual significance to the Karuk Tribe. The Panamnik district was nominated for listing in the National Register of Historic Places in 1987 and has been determined eligible for listing in the Register. A Karuk spiritual trail called the Medicine Man Trail, which is regularly used by the Karuk Tribe, runs through the Panamnik district. The court denied plaintiffs’ motion regarding all three NEPA claims and granted defendants’ motion (counts 2–4 in the complaint); as to the NHPA claim (count 1 in the complaint), both motions were Granted-in-part and Denied-in-part; regarding the theory that defendants violated the NHPA by failing to adequately implement preventative mitigation measures, plaintiffs’ motion was Granted and defendants’ motion was Denied; and regarding all other NHPA violation theories, plaintiffs’ motion is Denied and defendants’ motion is Granted. The court found that defendants violated the National Historic Preservation Act, and enjoined Defendants from conducting further implementation of the Orleans Community Fuels Reduction and Forest Health Project until appropriate remedial measures are established to bring the project into compliance.

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

**56. *Hoopa Valley Tribe v. F.E.R.C.***, No. 09-1134, \_\_\_ F.3d \_\_\_, 2010 WL 5298885 (D.C. Cir. Dec 28, 2010). Indian tribe requested that Federal Energy Regulatory Commission (FERC) impose conditions on annual licenses given to power company that operated Klamath Hydroelectric Project so as to preserve Klamath River’s trout fishery. FERC declined to do so, 2008 WL 4962542 and 2009 WL 725027. Tribe petitioned for judicial review. The appellate court held that: (1) FERC applied “unanticipated, serious impacts” standard; (2) FERC reasonably applied “unanticipated, serious impacts” standard; (3) adoption of “unanticipated, serious impacts” standard was consistent with regulation; and (4) substantial evidence supported decision by FERC. Petition denied.

**57. *Klamath Tribe Claims v. United States***, No. 09-75L, 2011 WL 490502 (Fed. Cl. Feb. 11, 2011). Tribe claimed committee brought action alleging that Interior Department failed to disburse funds owed to tribal members and to safeguard treaty-based water rights associated with dam. Department moved to dismiss. The Court of Federal Claims held that: (1) tribes’ claim arising from Interior Department’s failure to reimburse them pursuant to Klamath Termination Act was untimely; (2) tribes’ claims relating to transfer of dam and its associated water storage were untimely; and (3) tribes were necessary parties. Motion granted in part.

**58. *Southern Ute Indian Tribe v. King Consolidated Ditch Company***, No. 09SA374, 250 P.3d 1226 (Colo. Mar. 14, 2011). Ditch companies filed application seeking a water court determination that two prior decrees adjudicating companies' water rights to river included priorities for year-round stockwatering and domestic uses incidental to the appropriation and use of water for agricultural purposes, including wintertime use. Indian tribe filed motions to intervene and opposing application. The district court, Water Division 7, Water Court, Case No. 09CW22, disallowed tribe's statement of opposition as untimely filed, denied motion for intervention, and subsequently determined that ditch companies' water rights included the wintertime stock watering right use. Tribe appealed. The Supreme Court held that: (1) application was for a determination of a water right, governed by rules providing for resume notice by publication; (2) tribe was not entitled to personal service of notice; (3) time limit for tribe to file opposition began to run on date of original application, not on date of companies' belated-filed verification; and (4) tribe was not entitled to intervene. Affirmed.

**59. *San Carlos Apache Tribe v. United States***, No. 2010-5102, 2011 WL 1532148 (Fed. Cir. Apr. 25, 2011). San Carlos Apache Tribe filed action against United States alleging breach of fiduciary duty relating to water rights in Gila River. The Court of Federal Claims dismissed tribe's monetary damages claim. Tribe appealed. The appellate court held that Tribe should have known that terms of consent decree precluded it from seeking additional Gila River water rights upon entry of decree. Affirmed.

**60. *New York v. Smith***, No. 09 CV 2221, 2011 WL 2470065 (D.N.Y. June 17, 2011). Before the Court was a motion by plaintiff, the People of the State of New York, seeking to remand the action to its original forum. Defendant Jonathan K. Smith, a member of the Shinnecock Indian Nation who resides on the Shinnecock Indian Nation Reservation, removed this action from the Criminal Court of the City of New York, Bronx County to federal district court pursuant to 28 U.S.C. § 1443(1). The removal was based upon Defendant's allegations that Plaintiff violated his "federally protected" fishing rights under the following: (1) the doctrine of sovereign immunity, (2) the Fort Albany Treaty of 1664, (3) Wyandanch's Deed, (4) the Contract Clause, (5) the Indian Commerce Clause, (6) Congressional Indian Policy, (7) Federal Trust, (8) United Nations' International Convention on the Elimination of All Forms of Racial Discrimination (CERD), and (9) the United Nations Declaration on the Rights of Indigenous Peoples. Plaintiff argued that the case should be remanded because Defendant "has not shown that this criminal action is removable under 28 U.S.C. § 1443(1)." The court granted Plaintiff's motion to remand.

**61. *Confederated Tribes of Siletz Indians of Oregon v. Fish and Wildlife Com'n***, No. A138947, \_\_\_ P.3d \_\_\_, 2011 WL 3117880 (Or. Ct. App. Jul. 27, 2011). Pursuant to ORS 183.400, petitioner Confederated Tribes of Siletz Indians of Oregon challenged OAR 635-043-0120, a rule promulgated by the Fish and Wildlife Commission (FWC) authorizing the issuance of ceremonial hunting permits for the Confederated Tribes of the Grand Ronde Community of Oregon (Grand Ronde Tribes or "the tribe") and establishing requirements for the use of those permits. Petitioner contended that the rule is invalid because it exceeds FWC's statutory authority and because its adoption violates "separation of powers provisions of the Oregon Constitution." The appellate court rejected without discussion petitioner's constitutional challenge to the rule and wrote only to discuss its assertion that the rule exceeds the statutory



authority of the agency. Based on the Court's review of OAR 635-043-0120 and the pertinent statutes, the Court concluded that the rule is valid.

**62. *National Wildlife Federation v. National Marine Fisheries Service***, No. CV 01-00640, 2011 WL 3322793 (D. Or. Aug 2, 2011). This Opinion and Order addresses the validity of the 2008 and 2010 Biological Opinions (2008/2010 BiOp) issued by NOAA Fisheries to the U.S. Army Corps of Engineers (Corps), and the U.S. Bureau of Reclamation (BOR) (collectively, "Federal Defendants") under Section 7 of the Endangered Species Act (ESA), 16 U.S.C. § 1536. Section 7 requires Federal Defendants to "insure" that the operation of the Federal Columbia River Power System (FCRPS), which is comprised of 14 sets of hydroelectric dams, powerhouses, and associated reservoirs, "is not likely to jeopardize the continued existence" of any species listed under the Act. NOAA Fisheries concluded that through 2018, FCRPS operations are not likely to jeopardize the continued existence of any listed species, based on measures to be implemented by Federal Defendants to mitigate for the significant salmon mortality caused by the existence and operation of the hydroelectric power system. Federal Defendants have failed, however, to identify specific mitigation plans to be implemented beyond 2013. Because the 2008/2010 BiOp's no jeopardy conclusion is based on unidentified habitat mitigation measures, NOAA Fisheries' opinion that FCRPS operations after 2013 will not jeopardize listed species is arbitrary and capricious. The court granted in part, and denied in part, NWF's Motion for Summary Judgment, and Supplemental Motion for Summary Judgment, and Oregon's Motion for Summary Judgment, and Supplemental Motion for Summary Judgment. The court remanded the 2008/2010 BiOp to NOAA Fisheries to reevaluate the Federal Defendants' reliance on unidentified mitigation measures. Because the 2008/2010 BiOp does, however, identify specific and beneficial mitigation measures through the end of 2013, this BiOp and the accompanying incidental take statement shall stay in place until then. No later than January 1, 2014, NOAA Fisheries shall produce a new or supplemental BiOp that relies only on identified mitigation measures that are reasonably certain to occur.

## **G. GAMING.**

**63. *City of Vancouver v. Skibine***, No. 08-35954, 2010 WL 3448563 (9th Cir. Aug. 31, 2010). Not selected for publication in the Federal Reporter. The City of Vancouver appealed the district court's dismissal, on standing grounds, of its action challenging the National Indian Gaming Commission's (NIGC) approval of an amendment to a tribal gaming ordinance enacted by the Cowlitz Indian Tribe. The City did not challenge the substance of the amendment to the gaming ordinance; it objected only to the timing of the approval, contending that the Commission violated a procedural rule by acting before the Department of the Interior had made a final decision on the Tribe's fee-to-trust application. It is undisputed that the Tribe cannot conduct the gaming operations contemplated by the gaming ordinance before the Department approves its fee-to-trust application. The court found that although the City asserted that the Commission's approval could influence the Department to adopt the Restored Lands Opinion on which the Commission relied, it points to no statutory or regulatory authority requiring the Department to consider the Commission's Opinion on that matter, or to regard the Opinion as dispositive. The Department must make a determination regarding the applicability of Section 20 of IGRA, 25 U.S.C. § 2719, as part of the fee-to-trust approval process. Moreover, as

conceded by the City at oral argument, regardless of whether the Department relies on the Commission's Restored Lands Opinion in making its Section 20 determination, the City will have an opportunity to challenge the substance of that determination-including any restored lands decision, however arrived at-when and if the Department issues a final decision approving the Tribe's fee-to-trust application. The appellate court affirmed.

**64. *United States v. Livingston***, No. CR-F-09-273, 2010 WL 3463887 (E.D. Cal. Sept. 1, 2010). Defendant Jeff Livingston (Livingston) who was charged with two counts of violating 18 U.S.C. § 1168(b), entitled "theft by an officer or employee of a gaming establishment on Indian lands" moved to dismiss the indictment against him on the grounds that, as a matter of law, the government cannot establish an essential element of the offense; to wit, that the gaming establishment, the Chuckchansi Gold Resort and Casino (Casino), was operated pursuant to an ordinance approved by the National Indian Gaming Commission (NIGC). Each count alleged that Livingston was an employee of a gaming establishment operated by an Indian tribe, the Picayune Rancheria of the Chukchansi Indians (Tribe), pursuant to an ordinance approved by the NIGC, and that Livingston stole from the Casino. Livingston argued the California Rancheria Act terminated the status of the land in 1958, and it was never restored to "Indian land" status during the relevant time period. The government contended that stipulated judgments and the agency opinion letters establish that the Casino operated on "Indian land" during the relevant time period. The Court found that Livingston failed to meet his burden to prove that the government cannot, as a matter of law, establish an essential element of the crime. Accordingly, the Court denied the motion to dismiss.

**65. *Big Lagoon Rancheria v. State of California***, No. 09-01471, 2010 WL 4916416 (N.D. Cal. Nov. 22, 2010). Over the past several years, Plaintiff Big Lagoon Rancheria has sought to enter into a tribal-state compact with defendant state of California that permits it to conduct Class III gaming. The Tribe alleged that the State has negotiated in bad faith. Big Lagoon moved for summary judgment and an order directing the State to negotiate in good faith, under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701, *et seq.* The State opposed the motion and cross-moved for summary judgment. The Court granted Big Lagoon's motion and denied the State's cross-motion.

**66. *Gila River Indian Community v. U.S.***, Nos. CV-10-1993, CV-10-2017, and CV-10-2138, \_\_ F. Supp. 2d \_\_, 2011 WL 826282 (D. Ariz. Mar. 3, 2011). This case concerned a decision by the United States Department of the Interior to accept in trust for the benefit of the Tohono O'odham Nation a parcel of unincorporated land surrounded by the City of Glendale, Arizona. The Nation plans to build a Las Vegas style casino and resort on the property – plans that have evoked vigorous opposition by Glendale, Arizona legislative and executive branch leaders, and another Indian tribe. Plaintiffs asked the Court to set aside the Department's decision as invalid under statutes dealing with Indian lands and gaming, as well as the United States Constitution. Before the court were the parties' motions for summary judgment. The Nation purchased a parcel of land in Maricopa County. The purchase was made through a corporation wholly-owned by the Nation. The land is part of an unincorporated county island surrounded by the City of Glendale. The Nation announced plans to use the land for gaming purposes and filed with the Department of the Interior (DOI) an application to have the land taken into trust under the Gila Bend Act. The Nation claimed that the land would be taken into trust as part of "a settlement of a land claim" for purposes of the Indian Gaming Regulatory Act

(IGRA) and therefore would be excepted from IGRA's general prohibition against gaming on reservation lands acquired after October 17, 1988. DOI issued its decision concluding that the legal requirements under the Gila Bend Act for taking the land into trust had been satisfied (Trust Decision). The questions the Court had to decide were "narrow and legal": was the Department's decision to take the land into trust for the benefit of the Nation "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" under the Administrative Procedure Act, U.S.C. § 706(2)(A), and did it violate the United States Constitution or the Indian Gaming Regulatory Act? The court found that the Trust Decision does not violate the APA or run afoul of the Tenth Amendment, the Indian Commerce Clause, or IGRA and the Court has no legal basis for setting aside the Trust Decision. The court denied Plaintiffs' motions for summary judgment and granted Defendants' cross-motions for summary judgment.

**67.** *Marshall Investments Corp. v. Harrah's Operating Co., Inc.*, 918 N.Y.S.2d 451 (N.Y. App. Div. Mar. 15, 2011). Bankruptcy trustee for lender, loan servicer, and banks which owned loan participation interests brought action alleging, inter alia, claim for tortious interference with pledge agreement which required Indian tribe to pay into escrow account certain amounts that tribe owed to borrower under management agreement for development of casino on tribe's reservation. Alleged tortfeasors moved for summary judgment. The Supreme Court, 2009 WL 2440285, granted motion. Plaintiffs appealed. The Supreme Court, Appellate Division, held that pledge agreement was void for lack of approval by National Indian Gaming Commission. Affirmed.

**68.** *Neighbors of Casino San Pablo v. Salazar*, No. 09-2384, 2011 WL 1238720 (D.D.C. Mar. 30, 2011). Before the court was Defendant's Motion to Dismiss. Plaintiff, Neighbors of Casino San Pablo, are an "unincorporated association comprised of residents, property owners and others who live, work, and/or own businesses . . . or who frequent the area around" property on which the Lytton Band of Pomo Indians operates a casino on land which the United States government holds in trust for the tribe's benefit. Defendants brought an action against various officials in the United States Department of the Interior and the National Indian Gaming Commission (NIGC) alleging that the NIGC failed its statutory evaluation and enforcement duties with respect to the Lyttons, and that the NIGC acted arbitrarily and capriciously in the determinations it did make about the tribe's gaming, in violation of the Administrative Procedure Act, 5 U.S.C. s 701, *et seq.* Plaintiffs sought declaratory relief under 5 U.S.C. §§ 701-706 and 28 U.S.C. § 2201. The court granted defendants' motion to dismiss.

**69.** *Amador County v. Salazar*, No. 10-5240, 2011 WL 1706962 (D.D.C. May 6, 2011). County brought action against Secretary of the Interior, challenging Secretary's 'no-action' approval of a compact between Indian tribe and state of California allowing gaming on tribal land. The district court, 592 F.Supp.2d 101, and 723 F.Supp.2d 67, determined that county lacked standing, and dismissed the suit. County appealed. The appellate court held that: (1) county had standing to challenge 'no-action' approval, and (2) Administrative Procedure Act (APA) did not preclude judicial review of 'no-action' approval. Reversed and remanded.

**70.** *Texas v. Ysleta Del Sur Pueblo*, No. 10-50804, 2011 WL 2583615 (5th Cir. Jun. 30, 2011). (From the opinion.) “Defendant-Appellant Ysleta del Sur Pueblo has been locked in litigation with the State of Texas for many years over gaming activities conducted at the Tribe’s casino. In this appeal — the third in a series of related appeals spanning almost twenty years — the Tribe contests a contempt order issued by the district court. The Tribe asserts that the contempt order is improper because (1) it is criminal in nature, but the district court treated it as a civil contempt order, and (2) the district court exceeded its authority when it granted state agents monthly access to the Tribe’s gaming records. Disagreeing with the Tribe and concluding that the contempt order was properly issued and is valid, we affirm that order and dismiss the Tribe’s appeal.”

**71.** *Tohono O’odham Nation v. City of Glendale*, No. CV-11-279, 2011 WL 2650205 (D. Ariz. Jun. 30, 2011). Before the Court were the parties’ Motions for Summary Judgment. The Tohono O’odham Nation purchased unincorporated land surrounded by the City of Glendale, asked the Department of the Interior to take the land into trust, and announced plans to construct and operate a major casino on the property. In response, the Arizona Legislature passed House Bill 2534 on February 1, 2011. The bill authorizes cities and towns within Arizona’s three largest counties, which would include the City of Glendale, to use an expedited procedure to annex land surrounded or nearly surrounded by the city or town if the owner of the land has asked the federal government to take ownership of the land or to take the land into trust. In this lawsuit, the Nation asked the Court to declare H.B. 2534 invalid and enjoin Glendale from using it to annex the Nation’s land. The court held that H.B. 2534 is preempted by federal law.

**72.** *Knox v. U.S. Dept. of Interior*, No. 4:09–CV–162, 2011 WL 2837219 (D. Idaho Jul 9, 2011). Before the court were (1) two motions filed by the Tribes seeking amicus status, and (2) plaintiffs’ motion to strike. In this lawsuit, plaintiffs challenged the Secretary’s decision to approve gaming compacts between Idaho and several tribes. The Tribes are not parties to this action, having invoked their sovereign immunity from suit. In an earlier decision, the Court refused to dismiss the action, rejecting a claim, among others, that the Tribes were indispensable parties who could not be joined. The Court held that the Tribes were adequately represented by the Secretary. The Secretary filed a Motion For Reconsideration. The Tribes then filed a motion for leave to file an amicus brief in support of the Secretary’s motion. The court granted the Tribes’ motions to file amicus briefs, authorized the Tribes to file a single amicus brief in response to the Government’s motion to reconsider and denied plaintiffs’ motion to strike.

## **H. LAND CLAIMS**

**73.** *Nahno-Lopez v. Houser*, No. 09-6258, 2010 WL 4456989 (10th Cir. Nov. 9, 2010). Two groups of Native American plaintiffs, consisting of the alleged owners of an allotment of land and the alleged leaseholders for a portion of that allotment, brought action, under federal and Oklahoma law, against the Tribal Council of a different tribe, that tribe’s manager, and the tribe’s casino, alleging that a portion of the allotment was trespassed upon by the casino. The district court, 627 F.Supp.2d 1269, granted in part and denied in part defendants’ motion to dismiss, and subsequently granted defendants’ motion for summary judgment on remaining claims. Plaintiffs appealed. Holdings: The appellate court held that: (1) plaintiffs’

complaint could be fairly construed to articulate viable claim for federal common-law trespass for which allotment statute provided jurisdiction, but (2) plaintiffs' consent to tribe's presence on allotment precluded recovery for trespass. Affirmed.

**74.** *Navajo Nation v. United States*, No. 2010-5036, \_\_\_ F.3d \_\_\_, 2011 WL 62825 (Fed. Cl. Jan. 10, 2011). The Navajo Nation appealed a judgment of the United States Court of Federal Claims denying its claim seeking damages for an alleged Fifth Amendment taking of its right to develop land granted to it by the United States in 1934. *See Navajo Nation v. United States*, No. 88-CV-508 (Fed. Cl. July 13, 2009). The appellate court concluded that the claim was barred by the six-year statute of limitations set out in 28 U.S.C. s 2501, vacated the judgment of the Court of Federal Claims, and remanded with instructions to dismiss for lack of jurisdiction.

**75.** *Paiute-Shoshone Indians of Bishop Community of Bishop Colony, Cal. v. City of Los Angeles*, No. 07-16727, \_\_\_ F.3d \_\_\_, 2011 WL 855856 (9th Cir. Mar. 14, 2011). Federally recognized Indian tribe brought action against city, seeking order restoring tribe to possession of land previously acquired by city in deal with United States. The District Court, 2007 WL 521403, dismissed on grounds that United States was required party that could not be joined, and, 2007 WL 2202242, certified order for immediate appeal. Tribe requested interlocutory appeal, which was granted. The appellate court held that: (1) United States was required party in action; (2) tribe's failure to assert its claim before statute of limitations under Indian Claims Commission Act (ICCA) expired deprived district court of jurisdiction over tribe's claim against United States; and (3) action could not, in equity and good conscience, proceed without United States, warranting dismissal. Affirmed.

## **I. RELIGIOUS FREEDOM**

**76.** *Quechan Indian Tribe v. U.S.*, Civil No. 02cv1096, 2010 WL 3895055 (S.D. Cal. Sept. 29, 2010). Before the Court was Defendant's motion to dismiss for lack of jurisdiction, or in the alternative, motion for clarification of the Court's ruling on the parties' motions for summary judgment. Plaintiff sued in its own capacity and as *parens patriae* on behalf of its members alleging certain individuals knowingly drove vehicles over and permanently scarred numerous cultural sites on the Fort Yuma Reservation during power pole replacement along the Gila-Knob power line. The parties both filed motions for partial summary judgment on the issue of land ownership and interests in right-of-way lands, and as to liability for negligence, gross negligence, negligence per se, trespass, and private and public nuisance. The Court issued an extensive order addressing all the issues, granting in part and denying in part the parties' motions for summary judgment upon finding Plaintiff did not have beneficial title or ownership interest in the right-of-way lands, but had an interest in cultural resources within the right-of-way lands. The Court also granted in part and denied in part the motions and made specific findings as to Defendant's duty and the private right of action under state law. The court denied Defendant's motion to dismiss and denied Defendant's motion for clarification which it construed as a motion for reconsideration

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

**77. *Shirk v. United States***, No. CV-09-01786, 2010 WL 3419757 (D. Ariz. Aug. 27, 2010). Plaintiffs Loren Shirk and Jennifer Rose sought damages from the United States under the Federal Tort Claims Act (FTCA) for the allegedly negligent actions of two Gila River Indian Community (GRIC) police officers. Before the Court was the United States Motion to Dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Detective Michael Lancaster and Sergeant Hilario Tanakeyowma, two GRIC police officers, were traveling on State Route 587 in a GRIC Police Department vehicle. At the time, both officers were Arizona Peace Officer Standards Training (AZ POST) certified. In addition, Tanakeyowma was carrying a Special Law Enforcement Commission from the BIA. The officers observed a vehicle driving erratically and began to pursue it. The driver of the vehicle was later determined to be Leshedrick Sanford, a paroled felon. When Sanford came to a stop first in line at a red light the officers pulled up behind him. As Lancaster exited the police vehicle to “make contact” with Sanford, Sanford accelerated and drove through the red light into the intersection, where he collided with Plaintiff Loren Shirk, who was traveling eastbound on a motorcycle. Shirk, who was thrown from his motorcycle, sustained serious physical injuries as a result of the collision. He initially sued Lancaster, Tanakeyowma, and the City of Chandler for damages in the Maricopa County Superior Court, but the court dismissed the case as to the officers on grounds of sovereign immunity and as to the City of Chandler under A.R.S. § 13-3874(B), which immunizes the state and its political subdivisions from liability for the acts of tribal police officers appointed by the BIA or the governing body of an Indian tribe. Shirk and his wife, Jennifer Rose, then sought damages in the District Court from the United States under the FTCA. The court granted the United States Motion to Dismiss for lack of subject matter jurisdiction.

**78. *Seminole Tribe of Florida v Ariz***, No. 2D10-1335, 2010 WL 3419819 (Fla. Dist. Ct. App. Sept. 1, 2010). The Seminole Tribe of Florida (Tribe) sought (1) a writ of certiorari to review a non-final order of the trial court continuing the hearing on the Tribe’s motion to dismiss a wrongful death action for lack of subject matter jurisdiction and allowing Victoria Velasquez, as the “presumptive personal representative” of the estate of Roselindo Velasquez, to conduct discovery on jurisdictional issues and (2) a writ of prohibition barring further proceedings by Velasquez and the trial court. An employee of the Seminole Gaming and Seminole Indian Casino-Immokalee struck and killed Roselindo Velasquez with his car as the decedent attempted to walk across CR 846 in Immokalee, Florida. Victoria Velasquez, as the “presumptive personal representative” and wife of the decedent, filed a civil action seeking damages for the wrongful death of her husband, naming the Tribe as a defendant, claiming the Tribe was vicariously liable for her husband’s death. The Tribe filed a motion to dismiss for lack of subject matter jurisdiction based upon the doctrine of tribal sovereign immunity. The appellate court denied the petition for writ of certiorari but granted the petition for writ of prohibition barring further proceedings, finding that the trial court lacks subject matter jurisdiction.

**79. *State of Washington v. Abrahamson***, No. 62699-0-I, 2010 WL 3489988 (Wash. Ct. App. Sept. 7, 2010). Under RCW 37.12.010, the state of Washington assumed criminal and civil jurisdiction over Indians on Indian lands for eight specific areas of law, including the “[o]peration of motor vehicles upon the public streets, alleys, roads and highways.” As a member of the Spokane Indian Tribe, Manuel S. Abrahamson asserted the state court did

not have jurisdiction to convict him of the crimes of driving while under the influence, attempting to elude, and driving while license revoked, committed on the Tulalip Indian Reservation. Abrahamson claims the State's assumption of jurisdiction over Indians on an Indian reservation for the operation of motor vehicles does not apply to criminal offenses. The appellate court held that under the plain and unambiguous language of RCW 37.12.010 the State assumed jurisdiction over all criminal offenses committed by Indians while operating a motor vehicle on public roads on an Indian reservation, and affirmed.

**80. *United States v. Begay***, Nos. 09-10249, 09-10258, \_\_\_ F.3d \_\_\_, 2010 WL 3619942 (9th Cir. Sept. 20, 2010). Defendants-Appellants Brandon Dineshu Begay and Ozzy Carl Watchman (collectively, "Defendants") are convicted sex offenders. They initially registered as sex offenders with the State of Arizona pursuant to the Sex Offender Registration and Notification Act (SORNA), but did not update their registration information when they moved to a different Arizona address within the territory of the Navajo Nation, a federally recognized Indian tribe. Defendants were indicted for failing to update their registration, in violation of 18 U.S.C. § 2250(a) and 42 U.S.C. §§ 16911 and 16913, and they moved to dismiss their indictments. The district court denied their motions, and Defendants now appeal that decision. Defendants argued that SORNA did not require them to update their registration with the State of Arizona while they were residing in the Navajo Nation, and that they could not update their registration with the Navajo Nation because it had not yet established a sex offender registry. Based on these premises, they invoked SORNA's affirmative defense, which applies when "uncontrollable circumstances prevent[ ] the individual from complying" with SORNA. 18 U.S.C. § 2250(b)(1). Alternatively, they argue that if SORNA did require them to update their registration with Arizona, SORNA violates the Due Process Clause of the Fifth Amendment and the Ex Post Facto Clause. The appellate court held that SORNA required Defendants to update their registration with Arizona, and because nothing prevented them from doing so, no "uncontrollable circumstances prevented [them] from complying" with SORNA. Moreover, we hold that this application of SORNA violates neither the Due Process Clause nor the Ex Post Facto Clause. Thus, we affirm the district court's denial of Defendants' motions to dismiss their indictments.

**81. *Muhammad v. Comanche Nation Casino***, No. CIV-09-968, \_\_\_ F. Supp. 2d \_\_\_, 2010 WL 3824171 (W.D. Okla. Sept. 28, 2010). Patron brought state-court slip-and-fall action against Comanche Nation Casino. Casino removed action to federal court, and patron moved to remand action to state court. The district court held that patron failed to plead federal question that was essential element of her state-law action, and thus district court's exercise of federal jurisdiction was warranted. Motion denied.

**82. *U.S. v. George***, No. 08-30339, \_\_\_ F.3d \_\_\_, 2010 WL 3768047 (9th Cir. Sept. 29, 2010). Defendant-Appellant Phillip William George (George) was convicted of the federal crime of sexual abuse of a minor on an Indian reservation in violation of 18 U.S.C. §§ 2243(a) and 1153. He served his sentence for that offense, but then he failed to register as a sex offender in violation of the Sex Offender Registration and Notification Act (SORNA), 18 U.S.C. § 2250. He was convicted of that offense in 2008, pursuant to a conditional guilty plea, and appealed that conviction. He contended his conviction is invalid because the state where he was required to register, Washington, had not implemented SORNA. He also argued SORNA's registration requirement is an invalid exercise of congressional power and violates the Ex Post Facto Clause

of the Constitution. The court found that there is no clear direction from Congress instructing that an individual's obligation to register is dependent on a state's implementation of SORNA, and that without regard to whether SORNA is implemented by Washington or any other state, registration under it is required. The appellate court found that the district court correctly denied George's motion to dismiss the indictment; that the registration requirement under SORNA required him to register as a sex offender in the State of Washington, even though Washington had not implemented the statute; and that SORNA's registration requirements are a valid exercise of congressional power, and do not violate the ex post facto clause of the Constitution. Affirmed.

**83.** *U.S. v. Saupitty*, No. 09-6186, 2010 WL 3995979 (10th Cir. Oct. 13, 2010). Defendant Emily Anne Saupitty, an enrolled member of the Apache Tribe of Oklahoma (Tribe), was convicted of thirty-three counts of embezzlement from an Indian tribal organization in violation of 18 U.S.C. § 1163. While serving as the Tax Commissioner of the Tribe, Ms. Saupitty diverted tribal tax revenues to a bank account she established without the Tribe's knowledge and that she solely controlled. Over a two-year period, she withdrew all of the Tribe's funds from that account, more than \$100,000, which she used to pay for personal expenses, among other things. She was sentenced to twenty-seven months' imprisonment, followed by two years of supervised release, restitution of \$107,627.65, and 104 hours of community service. On appeal, Ms. Saupitty contended that there was insufficient evidence that she possessed the requisite intent to commit the charged embezzlement. The appellate court found that there was sufficient evidence presented for a rational juror to find that Ms. Saupitty knowingly, willfully, and intentionally embezzled the Tribe's tax revenues in violation of 18 U.S.C. § 1163 and affirmed the judgment of the district court.

**84.** *Saroli v. Agua Caliente Band of Cahuilla Indians*, No. 10-CV-1748, 2010 WL 4788570 (S.D. Cal. Nov. 17, 2010). Before the Court was Defendant Agua Caliente Band of Cahuilla Indians' (Defendant's) motion to dismiss for lack of jurisdiction (Motion). This action arose from an accident at Defendant's casino and resort (Resort). Plaintiff alleged that, he was a guest of the Resort and noticed mechanical problems with the drain and lever of the Jacuzzi tub in his room. The Court found that jurisdiction exists over Plaintiff's claim to enforce his right to arbitration, but not over Plaintiff's enumerated, negligence-based claims. Accordingly, the Court granted Defendant's Motion as it relates to Plaintiff's claims for premises liability, negligence and negligent hiring, training, supervision and retention, but denied the Motion as it relates to Plaintiff's claim to compel arbitration.

**85.** *Cash Advance and Preferred Cash Loans v. State of Colorado*, No. 08SC639, 2010 WL 4840428 (Colo. Nov. 30, 2010). State Attorney General brought action to enforce investigative subpoenas issued against two Internet lending businesses to determine whether their lending practices violated Uniform Commercial Credit Code (UCCC) and the Colorado Consumer Protection Act (CCPA). Purported owners of businesses moved to dismiss, and two corporations formed by tribal nations, claiming to own the businesses, joined the motion, asserting tribal sovereign immunity. The district court denied motion. Tribal nations appealed. The appellate court, 205 P.3d 389, reversed. State and tribal nations cross-petitioned for writ of certiorari. The Supreme Court held that: (1) tribal sovereign immunity applies to judicial enforcement of state investigatory actions; (2) "arms of the tribe" analysis factors are used to determine whether tribe-owned entities are entitled to immunity; (3) tribal officers are not



automatically entitled to immunity; but (4) tribal nations waived immunity with respect to information directly relevant to any entitlement to immunity. Affirmed.

**86. *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino and Resort***, Nos. 08-1298, 08-1305, 08-1317, \_\_\_ F. 3d \_\_\_, 2010 WL 5263143 (10th Cir. Dec. 27, 2010). Provider of business management training and consulting services brought action against tribe's Economic Development Authority and its Casino, alleging that defendants paid for single-person license for one of provider's online training programs and then recorded and used portions of program without permission to train more than one employee. The district court, 2007 WL 2701995, granted dismissal in part and, 2008 WL 3211286, denied reconsideration. Casino and its owner and operator appealed. The appellate court held that: (1) district court did not abuse its discretion in denying provider's request for limited jurisdictional discovery to resolve issue of tribal sovereign immunity; (2) district court did not abuse its discretion in preventing provider from calling what it deemed to be necessary witnesses to resolve issue of tribal sovereign immunity at evidentiary hearing; (3) method of creation of Authority and Casino weighed in favor of conclusion that entities were subordinate economic entities which shared in tribe's sovereign immunity; (4) purpose of Authority and Casino weighed in favor of granting entities tribal sovereign immunity; (5) structure, ownership, and management of Authority and Casino weighed both for and against conclusion that entities were subordinate economic entities which shared in tribe's sovereign immunity; (6) tribe clearly intended for Authority and Casino to share in tribal sovereign immunity; (7) financial relationship between tribe, Authority and Casino weighed in favor of entities' tribal sovereign immunity; and (8) overall purposes of immunity would be served by conclusion that Authority and Casino shared in tribe's sovereign immunity. Reversed and remanded.

**87. *U.S. v. Otter***, No. 2:09cr25, 2011 WL 148266 (W.D.N.C. Jan. 18, 2011). The Defendant pled guilty to charges of assault resulting in serious bodily injury and committing a crime of violence resulting in serious bodily injury and was sentenced to 64 months imprisonment. The Defendant was ordered to pay restitution to his victim and the North Carolina Victims compensation Services totaling \$12,358.31. 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 filed a motion to quash the application for a writ, arguing 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 Tribe. The Court denied the motion to quash the writ of garnishment and entered a Final Order of Continuing Garnishment in the amount of \$12,558.31.

**88. *Bowen v. Mescalero Apache Tribe***, No. 29,625, 2011 WL 704468 (N.M. App. Jan. 27, 2011). Plaintiff Bowen played cards at Defendant's Travel Center Gaming Casino. Defendant's employee, Michael Gray, was the card dealer who dealt cards to Plaintiff. Over the course of the evening, Plaintiff won approximately \$11,000. After the Casino closed, Plaintiff accepted a ride home from Gray. who returned to Plaintiff's home the following evening, viciously beat Plaintiff, and stole his gaming winnings. Plaintiff filed a complaint in district court against Defendant, alleging that Defendant was negligent in its hiring and retention of Gray. Defendant filed a motion to dismiss for lack of subject matter jurisdiction based on sovereign immunity and a motion for summary judgment on the absence of duty and proximate cause. The district court granted both motions. Plaintiff appealed, arguing that Defendant

expressly waived sovereign immunity with respect to the allegations in his complaint and that the district court erred in granting summary judgment on Plaintiff's negligent retention claim. The appellate court concluded that the district court erred in finding that Defendant's sovereign immunity was not waived for Plaintiff's claim. Nevertheless, it affirmed the grant of summary judgment because Defendant had no duty to protect Plaintiff from Gray's criminal acts when those acts were unforeseeable.

**89. *Specialty House of Creation, Inc. v. Quapaw Tribe***, No. 10-CV-371, 2011 WL 308903 (N.D. Okla. Jan. 27, 2011). This was an action for patent infringement and false marking of a United States Design Patent. Specialty House is the owner of Design Patent No. D486,531 (531 Patent), which is entitled "Slot Machine Card Holder." Defendant owns and operates the Downstream Casino Resort in Quapaw, Oklahoma, and the Quapaw Casino in Miami, Oklahoma. Before the court was Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction. Specialty House argued that the Quapaw Tribe waived any sovereign immunity it possessed in the Tribal-State Gaming Compact Between the Quapaw Tribe of Oklahoma and the State of Oklahoma (Gaming Compact). Under the Gaming Compact, the Quapaw Tribe "consents to suit on a limited basis with respect to tort claims subject to the limitations set forth [in the Gaming Compact]." The Gaming Compact defines the scope of its waiver to be for "tort claim[s] for personal injury or property damage against the enterprise arising out of incidents occurring at a facility." ( *Id.* at Part 6.A.). Nowhere in the Gaming Compact does the Quapaw Tribe indicate an intention to waive its immunity from suit with respect to torts generally, or for patent infringement particularly. Patent infringement claims are not claims for "personal injury or property damage" that arose "out of incidents occurring at a facility" and therefore the Gaming Compact does not waive the Tribe's immunity from such suits. The court concluded that the Quapaw Tribe is immune from private suits brought under the federal patent law, and that the Tribe had not waived its immunity with regard to this suit. The court granted Defendant's motion to dismiss.

**90. *Amerind Risk Management Corp. v. Malaterre***, No. 08-3949, 633 F.3d 680 (8th Cir. Feb. 5, 2011). Administrator of self-insurance risk pool that insured federally subsidized Native-American housing owned and operated by tribes brought action against tribe members, seeking declaratory judgment that administrator was not subject to direct action, and seeking to enjoin tribe members from proceeding with underlying wrongful death and personal injury action in tribal court against administrator. The district court granted summary judgment in favor of tribe members. Administrator appealed. The appellate court held that: (1) administrator was entitled to tribal sovereign immunity, and (2) administrator did not waive that immunity. Reversed and remanded.

**91. *In re Howley***, No. 10-20713, \_\_ B.R. \_\_, 2011 WL 721541 (Bkrcty. D. Kan. Feb. 23, 2011). Chapter 7 trustee objected to exemption claimed by debtor in her right, as enrolled member of Indian tribe, to receive per capita payments from tribal gaming revenues. The Bankruptcy Court, 439 B.R. 535, sustained objection. Debtor filed motion to alter or amend. The Bankruptcy Court held that: (1) judicial economy warranted consideration of motion on its merits, and (2) debtor's contingent interest in future per capita payments from tribal gaming revenues was estate property. Motion denied.

**92. *Hollywood Mobile Estates Limited v. Cypress***, No. 10-10304, 2011 WL 661370 (11th Cir. Feb. 24, 2011). Not selected for publication in the Federal Reporter. Limited partnership brought action against various officials of a Native American tribe, seeking an injunction compelling them to restore possession of certain leased premises and for relief compelling tribal officials to return rents collected from subleases. The district court dismissed the lawsuit for lack of jurisdiction. Plaintiff appealed. The appellate court held that: (1) request for restitutionary relief compelling tribal officials to return collected rents was not prospective in nature, so as to come within sovereign immunity doctrine, and (2) request for injunction was a request for prospective relief, but did not implicate special sovereignty interests, so as to warrant application of sovereign immunity. Affirmed in part, reversed in part, and remanded.

**93. *Lantry v. Walker River Paiute Tribe Tribal Police***, No. 3:06-cv-600, 2011 WL 769974 (D. Nev. Feb. 25, 2011). Before the Court were Walker River Paiute Tribe Tribal Police's (Tribal Police or Defendant) Motion to Dismiss. Plaintiff, a non-tribal member, drove an unregistered agricultural vehicle on Tribal property and the Tribal Police cited him into the Mineral County Justice Court. Plaintiff appeared in court but was told that a judge was unavailable and that he should check back in a week for a new court date. Nearly one year later three tribal police officers forcibly removed Plaintiff from his residence located on private property, not subject to tribal authority, and took him into custody. The officers took Plaintiff to the Mineral County Jail where he was booked on a warrant based upon the earlier citation. Plaintiff's complaint alleged the following claims against Defendant: (1) excessive force under 42 U.S.C. § 1983; (2) custom and policy under § 1983; (3) supervisory liability under 42 U.S.C. §§ 1983, 1985(3), and 1986; (4) negligent supervision under §§ 1983, 1985(3), and 1986; (5) false arrest and imprisonment under Nevada law; (6) oppression under color of office under Nevada law; (7) intentional infliction of emotional distress; and (8) punitive damages. Defendant filed the current motion to dismiss based on lack of subject-matter jurisdiction and for failure to state a claim. Defendant asserted that it was an agency of the Walker River Paiute Tribe and that the Tribe's sovereign immunity from suit extended to the Tribe's agencies, including its police department. The jurisdictional issue in this case is independent of the issues presented by Plaintiff and may be examined through this motion to dismiss. The instant motion challenged the existence of jurisdiction based on tribal sovereign immunity. The affidavit of Lorren Sammaripa, the Chairman of the Walker River Paiute Tribe explicitly stated that the Tribe's police department's operational control was completely local and vested in the Tribal Council. As such, the Tribal Police is an administrative arm of the Tribe and is entitled to the benefit of the Tribe's sovereign immunity. Moreover, Plaintiff does not allege that the Tribe waived its sovereign immunity with respect to the Tribal Police. The Court granted Defendant's motion to dismiss for lack of subject-matter jurisdiction.

**94. *U.S. v. Schrader***, No. 10-2706, 2011 WL 679342 (8th Cir. Feb. 28, 2011). Defendant, who was member of Indian tribe, was convicted of distributing marijuana, following jury trial in the district court. Defendant appealed. The appellate court held that "bad men" provision of Fort Laramie Treaty of 1868 did not impose upon United States the obligation to give notice to Indian tribe before government could prosecute defendant. Affirmed.

**95. *Seneca Telephone Co. v. Miami Tribe of Oklahoma***, Nos. 107,431, 107,432, 107,433, 107,434, \_\_ P.3d \_\_, 2011 WL 796552 (Okla. Mar. 8, 2011). Telephone company brought four separate suits against tribe under Underground Facilities Damage Prevention Act (UFDPA) for damages to its underground telephone lines allegedly caused by tribe members performing excavation of property owned in fee or in trust by tribe. The trial court entered judgments in favor of company totaling \$13,648.93, with \$600 in costs, plus attorney fees. Tribe appealed. The Court of Civil Appeals affirmed. Tribe's request for certiorari review was granted. The Supreme Court held that tribe was immune from suit brought under UFDPA. Judgment of the Court of Civil Appeals vacated; judgment of the trial court reversed and remanded with instructions to dismiss.

**96. *State v. Yallup***, No. 28040-3-III, 248 P.3d 1095, 2011 WL 839682 (Wash. Ct. App. Mar.10, 2011). Defendant, a member of Yakima tribe, was convicted in the Superior Court, Yakima County, of felony driving while under influence (DUI) and other motor vehicle crimes. Defendant appealed. The appellate court held that: (1) trial court had jurisdiction over charges against defendant for traffic offenses committed on state highway located on reservation, and (2) statutes requiring motorists to be licensed and which prohibited driving while under influence of drugs or alcohol did not impede defendant's right under treaty to travel. Affirmed.

**97. *StoreVisions, Inc. v. Omaha Tribe of Nebraska***, No. S-10-280, 281 Neb. 238, \_\_ N.W. 2d \_\_, 2011 WL 1088143 (Neb. Mar. 25, 2011). General contractor brought action against Indian tribe for breach of contract. The District Court denied tribe's motion to dismiss for lack of subject matter jurisdiction, which alleged that tribe had not waived its sovereign immunity. Tribe appealed. The Supreme Court held that: (1) order denying tribe's motion to dismiss was not a final, appealable order; (2) the denial of a motion to dismiss does not occur within a special proceeding under statute defining a final, appealable order; (3) order denying tribe's motion to dismiss was reviewable under the collateral order doctrine; and (4) tribe's council chairman and vice chairman had apparent authority to waive tribe's sovereign immunity. Affirmed.

**98. *Merit Management Group v. Ponca Tribe of Indians Oklahoma***, No. 08 C 825, \_\_ F. Supp. 2d \_\_, 2011 WL 1485492 (N.D. Ill. Apr. 19, 2011). Defendant Ponca Tribe of Indians of Oklahoma (Tribe) moved pursuant to Fed. R. Civ. P. 60(b)(4) to vacate the default judgment entered against it. In January 2005, plaintiff Merit Management Group (Merit) agreed to loan the Tribe \$122,500. When the Tribe allegedly failed to repay the amount due under the terms of the agreement, Merit filed suit for breach of contract, invoking the court's diversity jurisdiction. Despite being served with process and receiving notice of the proceedings, the Tribe never answered or responded to the suit. In September 2008, the court entered a default judgment against the Tribe in the amount of \$158,896.10 (plus additional amounts for legal fees and costs). In February 2011, after Merit filed an action in Western District of Oklahoma to enforce the judgment, the Tribe filed its motion seeking to vacate the judgment, claiming that the judgment is void because subject-matter jurisdiction was lacking over Merit's suit. The court found that the Tribe had shown that the default judgment entered against it was void for lack of subject-matter jurisdiction, granted the Tribe's motion to vacate, and dismissed the case.

**99. *Mendoza v. Tamaya Enterprises, Inc.***, No. 32,447, \_\_ P.3d \_\_, 2011 WL 3111922 (N.M. Jun. 27, 2011). Personal representatives of decedents brought wrongful death action against tribal casino, alleging that casino sold alcohol to decedents at a social function despite their intoxication and, as a result of casino's negligence, they were killed on their way home in a single-vehicle automobile accident. The District Court dismissed the action for failure to state a claim. Representatives appealed. The appellate court, 238 P.3d 903, reversed and remanded. Certiorari was granted. The Supreme Court held that: (1) tribe's gaming compact constituted consent to jurisdiction in state court; (2) statutory codification of dram shop liability with respect to liquor licensees did not preempt common-law third-party dram shop claims against non-licensees, such as a tribal casino licensed by a tribe to serve liquor; and (3) modern public policy supported a common-law patron claim against a non-licensed tavernkeeper, including a tribal casino, which claim would require proof of gross negligence. Court of Appeals affirmed.

**100. *United States v. Cavanaugh***, No. 10-1154, 643 F.3d 592 (8th Cir. Jul. 6, 2011). Defendant was charged with domestic assault by habitual offender, based on prior convictions in Native American Tribal Courts. The district court, 680 F.Supp.2d 1062, dismissed indictment. Government appealed. The appellate court held that, as matter of first impression defendant's uncounselled prior convictions in Tribal Court could be used to enhance federal charge. Reversed and remanded.

**101. *Furry v. Miccosukee Tribe of Indians of Florida***, No. 10-24524, 2011 WL 2747666 (S.D. Fla. Jul. 13, 2011). Before the court was the Miccosukee Tribe's Motion to Dismiss Plaintiff's Complaint. Plaintiff brought the action as Personal Representative of the Estate of Tatiana Furry, who died in a car crash after being sold substantial amounts of alcohol on Tribal property on multiple occasions such that Defendants knew that she was habitually addicted to alcohol. Plaintiff's eight count Complaint alleges: (1) a violation of 18 U.S.C. § 1161 against all Defendants, except the Miccosukee Police Department; (2) a violation of Florida Statute § 768.125 (Florida's Dram Shop Act) against all Defendants, except the Miccosukee Police Department; (3) negligence against all Defendants, except the Miccosukee Police Department; (4) negligence against the Miccosukee Police Department for its investigation of the accident; (5) negligent hiring and retention against all Defendants; (6) negligent training and supervision against all Defendants; (7) punitive damages; and (8) declaratory relief under 28 U.S.C. § 2201, *et seq.* Defendants sought to dismiss the Complaint based on tribal sovereign immunity. The court found that because Defendants' sovereign immunity was not waived, by Congress or by Defendants, Plaintiff's claims were barred by sovereign immunity and granted Defendants' Motion to Dismiss.

**102. *In re Johnson***, Nos. A09-2225, A09-2226, \_\_ N.W. 2d \_\_, 2011 WL 2848729 (Minn. Jul. 20, 2011). 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, 782 N.W.2d 274, affirmed. Tribe members petitioned for review. The Supreme Court held that: (1) public Law 280, which granted Minnesota limited civil jurisdiction over specifically provided for state enforcement of civil laws in Indian country within the state, granted the state courts subject-matter jurisdiction to civilly commit an enrolled member of federally recognized Indian tribe as a

SDP, and (2) state court had subject-matter jurisdiction 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.

**103. *Owen v. Weber***, No. 10-3330, 2011 WL 3112004 (8th Cir. Jul. 27, 2011). Petitioner, a Native American who was convicted in state court of first degree murder and aggravated assault, 729 N.W.2d 356, sought federal habeas relief. The district court denied petition, and petitioner appealed. The appellate court held that tribal housing complex at which petitioner stabbed two victims was not a "dependent Indian community," in determining whether resulting murder and assault charges were within federal courts' exclusive jurisdiction. Affirmed.

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

**104. *Attorney's Process and Investigation Services, Inc. v. Sac & Fox Tribe of the Mississippi in Iowa***, Case No. 09-2605, 609 F.3d 927 (8th Cir. July 7, 2010). After Attorney's Process and Investigation Services, Inc. (API), a Wisconsin corporation which provides security and consulting services to casino operators, was sued in tribal court by the Sac and Fox Tribe of the Mississippi in Iowa (the Tribe), API brought this action seeking a declaratory judgment that the tribal court lacked jurisdiction and an order compelling arbitration. The Tribe's lawsuit in tribal court alleged that API committed torts while seizing control of tribal facilities on the Sac and Fox reservation under a contract signed by Alex Walker, Jr., the former Chairman of the Tribal Council. The district court required API first to exhaust its remedies in tribal court in accord with *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985). After API returned to federal court, the district court concluded that the tribal courts did have jurisdiction over the Tribe's claims under federal law, that the validity of the API contract was a question of tribal law, and that it should accordingly defer to the tribal court finding that Walker had not had authority to bind the Tribe. The district court therefore denied API's motion for summary judgment and granted the Tribe's motion to dismiss. API appealed. The appellate court affirmed the judgment of the district court insofar as it held that the courts of the Sac and Fox Tribe may exercise adjudicatory jurisdiction over the Tribe's claims against API for trespass to land, trespass to chattels, and conversion of tribal trade secrets. It also affirmed the judgment of the district court dismissing API's claim for an order compelling arbitration. The appellate court reversed and vacated only that portion of the judgment which concluded that the Tribal Court has jurisdiction under the second Montana exception over the Tribe's claim for conversion of tribal funds, and remanded to the district court the question of whether tribal court jurisdiction exists over that claim under the first Montana exception.

**105. *Town Pump, Inc. v. LaPlante***, No. 10-35090, 2010 WL 3469578 (9th Cir. Sept. 3, 2010). Judith LaPlante, an enrolled member of the Blackfeet Nation, appealed the district court's grant of summary judgment and permanent injunction of her further prosecution of claims in Blackfeet Tribal Court against Town Pump, Inc., and Major Brands Distributing Imports, Inc. (together, Town Pump). LaPlante alleged personal injury by toxic discharges from a Town Pump gas station within the exterior boundaries of the Blackfeet Indian Reservation. The court found that LaPlante satisfied neither of Montana's exceptions for tribal court

jurisdiction over nonmembers; that LaPlante's reliance on Town Pump's prior litigation in tribal court – against different parties and with respect to different claims – is also unavailing; and that Town Pump's prior suit against its insurer in tribal court does not provide a basis for judicial estoppel. The appellate court affirmed.

**106. *Red Mesa Unified School Dist. v. Yellowhair***, No. CV-09-8071, 2010 WL 3855183 (D. Ariz. Sept. 28, 2010). Before the Court were Plaintiffs' Motion for Summary Judgment and Navajo Nation Labor Commission Defendants' Cross-Motion for Summary Judgment, both of which relate to the issue of whether the Navajo Nation has regulatory and adjudicatory authority over personnel decisions made by the plaintiff public school districts. Plaintiffs Red Mesa Unified School District (Red Mesa) and the Cedar Unified School District (Cedar) are Arizona political subdivisions that operate public schools within the exterior boundaries of the Navajo and/or Hopi reservations on tribal trust land leased from the Navajo Nation. Defendants Sara Yellowhair, Helena Hasgood, Harvey Hasgood, and Letitia Pete are members of the Navajo Nation. Yellowhair, who had an employment contract with Red Mesa for the 2003-2004 school year as its business manager, was terminated by Red Mesa's governing board in May, 2004. The Hasgoods and Pete, who had employment contracts with Cedar for the 2002-2003 school year, were terminated by Cedar's governing board in November, 2002. Instead of appealing the terminations pursuant to the judicial process mandated by Arizona law, Yellowhair, the Hasgoods, and Pete (the employee defendants) filed charges in 2005 with the Office of Navajo Labor Relations (ONLR), a Navajo administrative tribunal, alleging that they were wrongfully terminated in violation of the Navajo Preference in Employment Act (NPEA), a Navajo tribal statute that in relevant part requires employers to provide “just cause” when terminating employees. Red Mesa and Cedar filed separate writs of prohibition with the Navajo Nation Supreme Court, asking the court to prevent the Trial Administration Tribunal (NNLC) from proceeding with the administrative hearings because the termination issues were governed by Arizona law and had already been decided via a due process termination procedure mandated by Arizona law. The Navajo Nation Supreme Court ruled that the NNLC had jurisdiction to apply the NPEA to Red Mesa and Cedar. The Court concluded as a matter of law that the Navajo Nation has no regulatory or adjudicative jurisdiction over Red Mesa and Cedar's employment-related decisions underlying the action. Since tribal jurisdiction is lacking, the Court agreed with Red Mesa and Cedar that the employee defendants should be barred from further prosecuting their termination-related claims before the NNLC or the Navajo Nation Supreme Court and that the NNLC defendants should be barred from any further adjudication of those claims. The court granted Plaintiffs' Motion for Summary Judgment; and ordered that defendants Sara Yellowhair, Helena Hasgood, Harvey Hasgood, and Letitia Pete are enjoined from any further prosecution of their employment termination-related claims before the Navajo Nation Labor Commission or the Navajo Nation Supreme Court or any other Navajo Nation tribal court or administrative tribunal.

**107. *State v. Eriksen***, No. 80653-5, \_\_\_ P.3d \_\_\_, 2010 WL 4008887 (Wash. Oct. 14, 2010). Defendant, a non-Indian, was convicted in the Superior Court of driving under the influence (DUI) in connection with an incident in which she was detained by a tribal police officer who pursued her beyond the reservation border after observing alleged traffic infractions. Defendant moved for discretionary review. The Supreme Court, as matter of first impression, held that tribal officers have authority to continue fresh pursuit of motorists who break traffic

laws on reservation and subsequently drive beyond reservation boundaries, and to detain such individuals until authorities with jurisdiction arrive. Affirmed.

**108.** *State v. Kurtz*, Nos. CC 05FE0031; CA A132184; SC S058346, \_\_ P.3d \_\_, 2011 WL 1086474 (Or. Mar. 25, 2011). Defendant, whose vehicle 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 fleeing or attempting to elude a police officer and resisting arrest by a peace officer. Defendant appealed. The appellate court, 233 Or. App. 573, 228 P.3d 583, reversed. State filed petition for review. Following grant of petition, the Supreme Court held that: (1) Indian tribal police officer was a “police officer,” for purposes of offense of fleeing or attempting to elude a police officer, and (2) Indian tribal police officer was a “peace officer” for purposes of offense of resisting arrest by a peace officer. Court of Appeals’ decision reversed; Circuit Court decision affirmed.

**109.** *Estate of Big Spring*, No. DA 10–0099, \_\_ P.3d \_\_, 2011 WL 2162990 (Mont. May 19, 2011). After personal representative of Blackfeet Indian tribe member closed member’s estate, daughter of member brought petition for determination of testacy and heirs, and challenged personal representative’s handling of estate. The District Court denied second daughter and son’s motion to dismiss for lack of jurisdiction. Second daughter and son appealed. The Supreme Court held that: (1) daughter of member was an enrolled member of tribe for purposes of analysis of district court’s subject matter jurisdiction over probate of estate; (2) proper jurisdictional analysis in both regulatory and adjudicatory actions involving tribal members or lands is to ask whether the exercise of jurisdiction by a state court or regulatory body is preempted by federal law or, if not, whether it infringes on tribal self government; overruling *In re Marriage of Skillen*, 287 Mont. 399, 956 P.2d 1; and (3) district court could not exercise jurisdiction over probate of member’s estate. Reversed and remanded with instructions.

**110.** *City of Wolf Point v. Mail*, No. CV–10–72, 2011 WL 2117270 (D. Mont. May 24, 2011). This action, alleging jurisdiction under 28 U.S.C. § 1331, was brought by the City of Wolf Point, Mayor DeWayne Jager, and Troy Melum (collectively “City”) against Julianne Mail (Mail) and Alyssa Eagle Boy (Eagle Boy). It was filed on the heels of commencement of suit by Mail and Eagle Boy in Fort Peck Tribal Court against the Plaintiffs here, seeking compensatory damages, punitive damages, legal fees, and costs for claims under tribal law arising from an alleged altercation between Mail, Eagle Boy, and Troy Melum, who is characterized as a City of Wolf Point Animal Control Officer. Plaintiffs sought a judgment of dismissal of the pending tribal court case on subject matter jurisdiction grounds. The Defendants in the tribal court proceedings, and who are the Plaintiffs here, appeared in tribal court and raised the issue of lack of subject matter jurisdiction by motion. Ruling on the motion has yet to be made. No answer has been filed. The tribal court case remains pending and unresolved. Defendants Mail and Eagle Boy were served with summons in this case. Neither appeared. On motion of Plaintiffs, the default of each was entered. The court found that numerous questions were raised by the pleadings in the tribal court action that may bear directly upon whether that forum has jurisdiction over the matter before it; that those questions cannot appropriately be addressed short of full and final resolution of all issues in that case; and that further proceedings in this Court would be premature absent exhaustion of tribal court remedies. The court denied the City’s Motion for Default Judgment and dismissed the case without prejudice for failure to exhaust tribal court remedies.



**111. *Crowe & Dunlevy, P.C. v. Stidham***, No. 09–5071, \_\_\_ F.3d \_\_\_, 2011 WL 2084203 (10th Cir. May 27, 2011). Law firm that represented Indian tribe in tribal court brought action against tribal court judge, seeking a declaratory judgment that tribal court did not have jurisdiction over firm, did not have jurisdiction over tribe’s expenditure of its governmental funds to firm, did not have jurisdiction over agreements entered between tribe and firm, and did not have jurisdiction to order firm to return all attorney’s fees paid from tribal treasury. Law firm moved for preliminary injunction, and judge moved to dismiss. The district court, 609 F.Supp.2d 1211, granted firm’s motion and denied judge’s motion. Judge appealed. The appellate court held that: (1) Court of Appeals lacked jurisdiction to review district court’s determination that tribal judiciary was not required party; (2) law firm’s consensual relationship with tribe based on membership in tribe’s bar association and practice before tribal court did not provide tribal court with jurisdiction to order law firm to return fees; (3) in a matter of first impression, ex parte Young doctrine applied to tribal sovereign immunity; (4) ex parte Young permitted firm’s action against tribal court judge; and (5) firm demonstrated irreparable harm as a result of lost attorney’s fees in the absence of preliminary injunction. Affirmed.

**112. *Kroner v. Oneida Seven Generations Corp.***, No. 2010AP2533, 2011 WL 2135681 (Wis. Ct. App. June 1, 2011). John Kroner appealed an order transferring his civil suit to the Oneida Tribal Judicial System pursuant to Wis. Stat. § 801.54, discretionary transfer of civil actions to tribal court. Kroner argued the circuit court erred because the record did not support its determination that the tribal court had concurrent jurisdiction. Kroner further contended the court failed to properly consider the statutory discretion factors. The appellate court concluded that the record supports the circuit court’s exercise of discretion, and affirmed.

**113. *Water Wheel Camp Recreational Area, Inc. v. Larance***, Nos. 09-17349, 09-17357, 2011 WL 2279188 (9th Cir. June 10, 2011). Non-Indian closely held corporation and its non-Indian owner filed a complaint seeking declaratory and injunctive relief against a tribal court’s exercise of jurisdiction over them in an unlawful detainer action for breach of a lease of tribal lands and trespass. The district court, 2009 WL 3089216, entered jurisdictional rulings from which both sides appealed. The appellate court held that tribe had adjudicative jurisdiction over both non-Indian closely held corporation and its non-Indian owner. Judgment affirmed in part and reversed in part; order vacated and remanded.

**114. *Otter Tail Power Company v. Leech Lake Band of Ojibwe***, No. 11-1070, 2011 WL 2490820 (D. Minn. Jun. 22, 2011). This matter was before the court on a Motion for Temporary Restraining Order and Immediate Preliminary Injunctive Relief brought by Plaintiffs (the “Utilities”). The Utilities sought a declaration that Defendants Leech Lake Band of Ojibwe, its Reservation Business Committee, and Reservation Business Committee Members (collectively, the “Tribe”) lack the authority to regulate or prohibit the Utilities’ high-voltage transmission line construction project from Bemidji to Grand Rapids, Minnesota (the “Project”), and that the Utilities are not required to obtain the Tribe’s consent to proceed with the Project. The district court granted the Utilities’ motion.

**115. *Quitiquit v. Robinson Rancheria Citizens Business Council***, No. C 11–0983, 2011 WL 2607172 (N.D. Cal. Jul. 1, 2011). Before the court was respondents' motion for an order dismissing the petition for writ of habeas corpus. This action was initiated by the filing of a petition for habeas corpus, pursuant to the Indian Civil Rights Act, 25 U.S.C. § 1302.

Petitioners Luwana Quitquit, Robert Quitquit, Karen Ramos, Inez Sands, and Reuben Want are tenants of housing located on land under the control of the Robinson Rancheria of Pomo Indians of California (Tribe). Title to the property is held by the United States in trust for the Tribe. The Robinson Rancheria Housing Department (RRHD) is a governmental entity and an arm of the Tribe. Petitioners currently reside in houses they contracted to purchase through a federally-funded low-income Indian housing program (the Mutual Help Homeownership Opportunity Program, or “MHOP”) when they were enrolled members of the Tribe. Petitioners agreed to rent the premises in a 25–year tenancy, with an option to purchase the home. Petitioners were also required to pay a monthly administration fee. In July 2009, the Tribe issued notices of delinquency to petitioners, stating that they owed back rent, and that the notice constituted the final demand for payment of all amounts in arrears. The Tribe then brought unlawful detainer actions against petitioners, which were tried separately. The Tribal Court judge issued an opinion, decision, and order finding in favor of the Tribe, and directing counsel for the Tribe to submit a proposed form of judgment and conclusions of law and fact for each case. The Tribal Court judge signed the proposed judgments as to each of the petitioners, finding petitioners “guilty of unlawful detainer,” and ordering payment of amounts ranging from approximately \$6,000 to \$10,000 each, plus an additional \$25 per day until the premises were vacated. In addition, the court found that the Tribe was entitled to forfeiture of the leases, and ordered petitioners to vacate the premises (or risk being removed by the Robinson Rancheria Law Enforcement Department). Finally, the court ordered that petitioners not return to the Robinson Rancheria without the written approval of the Tribal Council; and stated that failure to be in possession of such written authorization would be grounds for arrest for criminal trespass and for contempt of court. Petitioners filed the present action asserting that their evictions and effective “banishment” violated the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1302. Petitioners sought an order prohibiting respondents from evicting them from their homes for non-payment of rent. Respondents sought an order dismissing the petition, for lack of subject matter jurisdiction. The court granted the motion to dismiss the petition for habeas corpus for lack of subject matter jurisdiction.

**116. *S.P. ex rel. Parks v. Native Village of Minto***, No. 10–35000, 2011 WL 2783828 (9th Cir. Jul. 15, 2011). Plaintiffs–Appellants S.P., Edward Parks, and Evelyn Parks appealed an order of the district court dismissing the case under the abstention doctrine established by *Younger v. Harris*, 401 U.S. 37 (1971). Appellants argued that Defendant–Appellee Native Village of Minto (Minto) and its tribal court lacked jurisdiction to make a custody determination concerning his child. The district court abstained under *Younger*, citing ongoing custody proceedings in Alaska state court. The appellate court affirmed, but did not address whether the Alaska court's decision affects appellants' reservation of certain federal questions under *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), nor did it address whether the appellants were required to exhaust their remedies before the Minto Tribal Court. Affirmed.

**117. *Attorney's Process and Investigation Services, Inc. v. Sac & Fox Tribe of the Mississippi in Iowa***, No. 05–CV–168, 2011 WL 3648551 (N.D. Iowa Aug. 9, 2011). This matter was before the court on remand from the Eighth Circuit Court of Appeals. See *Attorney's Process Investigation Servs., Inc. v. Sac & Fox Tribe of the Miss. in Iowa (API)*, 609 F.3d 927 (8th Cir.2010), *cert. denied*, 131 S. Ct. 1003 (2011). The sole issue is whether the Court of the Sac & Fox Tribe of the Mississippi in Iowa (Tribal Court) has jurisdiction over the Sac & Fox Tribe of the Mississippi in Iowa's (Tribe) claim against Attorney's Process and Investigation

Services, Inc. (API) for conversion of tribal funds. The Tribal Court concluded that it had subject matter and personal jurisdiction. It also held that Walker and his council had been removed from office before June of 2003 and, therefore, lacked authority to bind the Tribe to the contract he signed with API. The Eighth Circuit affirmed that the Tribal Court could exercise jurisdiction over the Tribe's trespass and trade secret claims. *API*, 609 F.3d at 946. However, the Eighth Circuit reversed and vacated “only that portion of the judgment which concluded that the Tribal Court has jurisdiction under the second Montana exception over the Tribe's claim for conversion of tribal funds.” *Id.* Accordingly, the Eighth Circuit remanded “the question of whether tribal court jurisdiction exists over that claim under the first Montana exception.” The court concluded that the Tribal Court may not exercise jurisdiction over the Tribe's claim against API for conversion of tribal funds. Because the Tribe's claim seeks to regulate API's unauthorized receipt and retention of tribal funds, without any allegation that this conduct occurred within the Meskwaki Settlement (Reservation), the Tribe has failed to satisfy a necessary condition for tribal jurisdiction. Accordingly, the Tribe's Motion was DENIED and API's Motion was granted.

**118.** *Gustafson v. Estate of Poitra*, No. 20100277, 2011 WL 3484437 (N.D. Aug. 10, 2011). Commercial tenant, a nonmember of tribe, brought action seeking declaratory judgment regarding his interest under lease, for which portion of land that was subject to lease was tribe-owned and located partially within tribe reservation boundary. The district court entered default judgment in tenant's favor, and personal representative of estate appealed. The Supreme Court held that: (1) Supreme Court would exercise jurisdiction over personal representative's appeal from entry of default judgment, even though personal representative did not file motion for relief from default, and (2) district court lacked subject matter jurisdiction to resolve claim over property that was tribe-owned and situated within tribe reservation's boundary. Vacated.

**119.** *Miranda v. Anchando*, No. 10-15308, Westlaw not yet available (9th Cir. Aug. 17, 2011). (From the Opinion) In these consolidated appeals, Respondents Vincent Anchando and Tracy Nielsen appeal the district court's order granting Petitioner Beatrice Miranda's amended petition for writ of habeas corpus. The Pascua Yaqui Tribal Court convicted Petitioner of eight criminal violations arising from a single criminal transaction. The tribal court sentenced her to two consecutive one-year terms, two consecutive ninety-day terms, and four lesser concurrent terms, for a total term of 910 days' imprisonment. On habeas review, the district court concluded that the Indian Civil Rights Act, 25 U.S.C. § 1302(7) (2009),<sup>1</sup> prohibited the tribal court from imposing consecutive sentences cumulatively exceeding one year for multiple criminal violations arising from a single criminal transaction. Respectfully, we disagree with the district court and hold that § 1302(7) unambiguously permits tribal courts to impose up to a one-year term of imprisonment for each discrete criminal violation. We reverse.

## L. TAX

**120. *BGA, LLC and the Western Mohegan Tribe & Nation of the State of New York v. Ulster County, New York***, No. 1:08-cv-149, 2010 WL 3338958 (D.N.Y. Aug. 24, 2010). Plaintiff Tribe is a group of American Indians that calls itself the “Western Mohegan Tribe and Nation of the State of New York.” The Tribe entered into an agreement with defendant Ulster County to purchase a parcel of land known as the “Tamarack property.” The County conveyed the property in consideration for, inter alia, the settlement of the Tribe’s pending land claims against the County, as well as the payment of \$900,000 in satisfaction of past real estate tax liens on the property, which plaintiff BGA advanced on the Tribe’s behalf. The agreement was authorized by the Ulster County Legislature in Resolution Number 376. Plaintiffs BGA, LLC and The Western Mohegan Tribe and Nation of the State of New York brought this action against Ulster County, New York, alleging breach of contract and a violation of the Nonintercourse Act, and seeking damages, specific performance, and declaratory and injunctive relief. Before the court were the County’s motion to dismiss plaintiffs’ complaint pursuant to Fed. R. Civ. P. 12(b)(1) and for summary judgment pursuant to Fed. R. Civ. P. 56(c). The court denied the County’s motion to dismiss, but granted its motion for summary judgment.

**121. *Nisqually Indian Tribe v. Gregoire***, No. 09-35725, \_\_\_ F.3d \_\_\_, 2010 WL 3835226 (9th Cir. Oct. 4, 2010). Indian tribe located in federally-created Indian community brought action against Indian community, community tenant and others, alleging that second tribe’s sale of cigarettes in community violated state and federal law. Parties moved for summary judgment. The district court, 649 F.Supp.2d 1203, granted defendants’ motion, and Indian tribe appealed. The appellate court held that: (1) tribe did not have implied right of action under federal law to challenge second tribe’s cigarette tax agreement with state; (2) tribe did not have implied right of action under state law to challenge second tribe’s cigarette tax agreement with state; and (3) addendum to second tribe’s contract with state regarding cigarette sales did not violate tribe’s tobacco tax contract with state. Affirmed.

**122. *Seneca Nation of Indians v. Paterson***, No. 10-CV-687, 2010 WL 4027796 (W.D. N.Y. Oct. 14, 2010). The Seneca Nation of Indians (SNI) commenced this action seeking to enjoin implementation of certain amendments to the New York State tax law relating to the taxation of cigarettes sold by reservation retailers. Along with the complaint, SNI filed a motion for a temporary restraining order and a preliminary injunction. The Court issued a temporary restraining order and enjoined implementation of the tax law amendments pending a hearing on the preliminary injunction motion. The court found that the Nation’s right of tribal sovereignty is not unconstitutionally burdened by implementation of the tax law amendments. The court found that SNI failed to demonstrate a likelihood of success on the merits of its claims and denied the motion for a preliminary injunction.

**123. *Oneida Tribe of Indians of Wisconsin v. Village of Hobart***, No. 10-C-137, 2011 WL 1467622 (E.D. Wis. Apr. 18, 2011). In this action, Plaintiff Oneida Tribe of Indians of Wisconsin sought declaratory and injunctive relief precluding the Village of Hobart from assessing a utility fee for land in the Village owned by the United States and held in trust for the Tribe. In 2007 the Village of Hobart began enforcing a village ordinance that imposes a storm water run-off fee on property located within the Village. The Village stated that it was forced by federal law to charge such fees in an effort to abate pollution. Within the Village, the United

States owns roughly 1420 acres of land, which it holds in trust for the Tribe. The Village ordinance applies to both the Tribe's trust land as well as the land the Tribe owned in fee. The Tribe contested these charges but ultimately paid the money it was charged for its trust land into an escrow account subject to further proceedings to determine the legitimacy of the water charges. The Tribe applied to the Bureau of Indian Affairs for relief, and the regional director agreed with the Tribe. He deemed the fee an improper tax, directed the Village to remove the Tribe's trust property from the tax certificate list, and ordered the Village to cease any efforts to collect the fee. The Village filed a third-party complaint against the United States, including the United States Department of Interior and its Secretary Kenneth Salazar, in which it alleged that the Clean Water Act requires the United States to pay the Village's storm water fees to the extent the Oneida are not liable for such fees. The complaint also argued that a federal regulation exempting tribal trust land from property laws is illegal under the Administrative Procedure Act (APA) and provisions of the Constitution. Before the Court was the motion to dismiss filed by the United States in which the government argued that the Village's claims are barred by sovereign immunity. The Government further argued that any claims under the APA are not ripe because the Village has not appealed the decision of a Bureau of Indian Affairs official that it now challenges. The Court granted the motion to dismiss.

**124. *Seneca Nation of Indians v. Cuomo***, Docket Nos. 10–4265, 10–4272, 10–4598, 10–4758, 10–4477, 10–4976, 10–4981, \_\_ F.3d \_\_, 2011 WL 1745008 (2nd Cir. May 9, 2011). Indian tribes brought actions to enjoin amendments to New York's tax law designed to tax on-reservation cigarette sales to non-member purchasers. The district court, 752 F.Supp.2d 320, 2010 WL 4027796, denied two tribes' motions for preliminary injunction, and tribes appealed. The district court, 2010 WL 4053080, granted another tribe's motion for preliminary injunction, and state appealed. Appeals were consolidated. The appellate court held that: (1) to prevail on merits of their claim that law requiring wholesalers to prepay cigarette tax and affix tax stamps on all cigarette packs imposed categorically impermissible direct tax on tribal retailers, and (2) tribes were not likely to prevail on merits of their claim that law providing means for tribes to obtain limited quantity of tax-exempt cigarettes failed to adequately ensure members' access to tax-free cigarettes and threatened tribal self-government. Affirmed in part, vacated in part, and remanded.

**125. *Florida Dept. of Revenue v. Seminole Tribe of Florida***, No. 4D10–456, \_\_ So.3d \_\_, 2011 WL 2462710 (Fla. Ct. App. June 22, 2011). The Florida Department of Revenue (DOR) appealed a final summary judgment for the Seminole Tribe of Florida, declaring motor fuel taxes imposed on the Tribe for purchases of fuel off the reservations and trust lands, but used on tribal lands, invalid and directing the State to refund those taxes. The Seminole Tribe filed a two-count complaint against the Florida Department of Revenue. Count I sought a refund of sales and excise taxes paid between January 1, 2004, and February 28, 2006, for fuel purchased off the reservations and tribal lands, but used for the performance of the Tribe's functions as a sovereign government, pursuant to §§ 206.41 and 212.08(6), Florida Statutes (2004). The second count sought a declaration that the Tribe was exempt under §§ 206.41(4)(d) and 212.08(6), Florida Statutes (2004). The Tribe moved for summary judgment and attached an affidavit attesting to the amounts of money spent in payment of these taxes for fuel purchased off the reservations and tribal lands, but used for the transport of persons and cargo on the reservations and tribal lands. The trial court granted the Tribe's motion for summary judgment, and denied the DOR's motion for summary judgment. In its order and final judgment, the trial

court found that the Indian Commerce Clause of the United States Constitution prohibited the State of Florida from taxing any fuel used or consumed by the Tribe on its reservations or tribal lands. The appellate court reversed and remanded the case for entry of summary judgment for the Department of Revenue.

**126. *People ex rel. Brown v. Black Hawk Tobacco, Inc.***, No. E051027, 2011 WL 2713806 (Cal. Ct. App. Jul. 13, 2011). The superior court granted a preliminary injunction, prohibiting defendants and appellants Black Hawk Tobacco, Inc. (Black Hawk) and Frederick Allen McAllister (McAllister) from selling cigarettes to non-Indians in violation of state and federal laws. Black Hawk and McAllister appealed from the order granting the injunction. McAllister is an enrolled member of the Sac and Fox Nation, a federally-recognized Indian tribe of Oklahoma. McAllister is the sole owner of Black Hawk, a California corporation. Black Hawk was also incorporated in June 2008 under the laws of the Sac and Fox Nation. On appeal, defendants argued that the State of California cannot regulate defendants' sale of cigarettes to non-Indians because defendants are operating stores located on trust lands held by the United States for the Agua Caliente Band of Cahuilla Indians (the Band), a federally-recognized tribe. The appellate court rejected the argument and held the superior court did not abuse its discretion in granting the preliminary injunction against defendants.

**127. *California v. Huber***, No. C 11–1985, 2011 WL 2976824 (N.D. Cal. Jul 22, 2011). Defendant Ardith Huber, a member of the Wiyot Tribe, is a cigarette retailer who operates in the state of California. Huber operates Huber Enterprises out of her home, which is located on the Wiyot Reservation. California sought damages and injunctive relief, pursuant to three legal theories: (1) Huber violated the Tobacco Directory Law, Cal. Rev. & Tax Code § 30165.1, by selling cigarette brands which have never qualified for listing on California's Tobacco Directory; (2) Huber violated the Cigarette Fire Safety and Firefighter Protection Act, Cal. Health & Saf. Code § 14950, by selling cigarettes that have not undergone testing required by the Code; and (3) the conduct amounts to unfair competition, pursuant to Cal. Bus. & Prof. Code § 17200. Huber removed this matter from the Superior Court. Plaintiff, the People of the State of California (California), moved to remand, insisting that its complaint relies solely on state law, and does not raise a substantial federal question necessary to resolution of the claims and argued there are no grounds to support removal. Defendant countered first that, absent authorization under federal law, California lacks regulatory authority over a member of an Indian Tribe, like Huber, for actions taken within the boundaries of her Tribe's reservation. The question for decision here is whether, as plaintiff argues, defendant's argument operates merely as an anticipated defense to plaintiff's state law claims or if it instead constitutes a “substantial issue of federal law” necessarily raised in the underlying claims. The weight of authority supports California's view that Huber has introduced no more than an anticipated defense. Removal therefore was improper and the matter must be remanded to the Superior Court for Humboldt County. California's request for an award of attorney's fees and costs associated with this motion will be denied.

**128. *Ute Mountain Ute Tribe v. Rodriguez***, No. 09–2276, \_\_\_ F.3d \_\_\_, 2011 WL 3134838 (10th Cir. Jul. 27, 2011). Indian tribe filed complaint against New Mexico's Secretary of Taxation and Revenue Department alleging that imposition of state taxes on their land and on oil and gas production equipment violated tribal members' constitutional rights. The district court, 2009 WL 7809263, enjoined State of New Mexico from further imposing taxes on non-

Indian lessees operating on Ute Reservation. Defendant appealed. The appellate court held that federal law did not preempt New Mexico's assertion of jurisdiction to tax non-Indians' severance of oil and gas on Ute Mountain Reservation in New Mexico. Reversed and remanded.

**129. *Blue Lake Rancheria v. United States***, No. 10-15519, 2011 WL 3506092 (9th Cir. Aug. 11, 2011). Indian tribe sought refund of Federal Unemployment Tax Act (FUTA) taxes paid by employee leasing company wholly owned by Tribe. The district court, 2010 WL 144989, granted summary judgment for government. Tribe appealed. The appellate court held that: (1) services performed “in the employ of an Indian tribe” were excepted from definition of “employment” in FUTA only where tribe or its instrumentality was common-law employer of worker performing services and (2) employee leasing company wholly owned by Indian tribe was common-law employer of its leased employees, and thus was not required to pay FUTA taxes with respect to those employees. Reversed and remanded.

**130. *Fond Du Lac Band of Lake Superior Chippewa v. Frans***, No. 10-1236, 2011 WL 3518182 (8th Cir. Aug. 12, 2011). Indian band sued the Commissioner of the Minnesota Department of Revenue to prevent taxation of the out-of-state pension income of band members. The district court entered judgment for the Commissioner, and band appealed. The appellate court held that: (1) taxation of the out-of-state pension income did not violate due process, and (2) federal law did not preempt such taxation. Affirmed.

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

**131. *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.

**132. *Oenga v. U.S.***, No. 06-491, \_\_\_ Fed. Cl. \_\_\_, 2011 WL 446728 (Fed. Cl. Feb. 8, 2011). Owners of Alaska Native allotment brought action against federal government, alleging that government breached its trust obligations in connection with lease allowing oil company possession and use of allotment for oil production-related activities. Company intervened as defendant. Following trial, the court determined that plaintiffs were entitled to damages for government's breach of trust, measured as the fair annual rental for unauthorized uses, as calculated using cost savings methodology presented by plaintiff's expert. Parties submitted their proposed damages calculations and moved for reconsideration, and defendant-intervenors also moved for clarification. The court held that: (1) company's alternative cost of building bypass road was appropriate measure of cost savings; (2) real, rather than nominal, discount rate of seven percent applied when calculating damages; (3) upper end of company's price range estimate for cost of bypass road alternative was appropriately used in calculating damages; (4) amortization period of 16 years was appropriate; (5) only company's past unauthorized use was covered by damages award; (6) damages would not be offset by amount of rent previously paid by company for authorized use of allotment; and (7) amount of \$4,924,000 was the appropriate damages award. Ordered accordingly.

**133. *Osage Tribe of Indians of Oklahoma v. U.S.***, Nos. 99-550 L, 00-169, \_\_\_ Fed. Cl. \_\_\_, 2011 WL 673922 (Fed. Cl. Feb. 24, 2011). Native-American 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. The Court of Federal Claims, 2011 WL 477042, granted government's motion for partial reconsideration of its prior order, 2010 WL 5397226, as to calculating damages, and parties thereby filed statements to explain basis of their disagreement of damages calculation. Holding: The Court of Federal Claims, Hewitt, Chief Judge, held that damages award of \$330,735,185.55 was warranted.

**134. *Williams v. Naswood***, No. CV-10-8080, 2011 WL 867520 (D. Ariz. Mar. 14, 2011). Before the court was defendant United States' motion to dismiss. This action was filed by Darlene Williams on behalf of herself and the estate of her deceased son, Brett Williams. The complaint alleges that defendant Elroy Naswood, a tribal officer with the Navajo Police Department, responded to a domestic disturbance call at the Williams' home. When Officer Naswood arrived at the scene a fight ensued between Officer Naswood and Brett Williams, which ended in Officer Naswood shooting and killing Mr. Williams. Plaintiffs filed this wrongful death action against Officer Naswood and the United States pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680. It is well settled that the United States is immune from lawsuits except to the extent that it consents to be sued. *FDIC v. Meyer*, 510 U.S. 471, 475, 114 S.Ct. 996, 1000, 127 L.Ed.2d 308 (1994). The FTCA waives the United States' sovereign immunity with respect to certain intentional torts of federal law enforcement officers. 28 U.S.C. § 2680(h). The Act defines a federal law enforcement officer as "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." *Id.* The parties agree a tribal police officer is not a "federal law enforcement officer" for purposes of the FTCA unless the officer was commissioned by the Secretary of the Interior with a Special Law Enforcement Commission (SLEC) under the Indian Law Enforcement Reform Act, 25 U.S.C. § 2804. The United States submitted a declaration from Dan Breuninger, the special agent in charge of issuing SLECs on behalf of the Bureau of Indian Affairs, attesting that Tribal Officer Naswood did not have an



SLEC at the time of the incident and was not authorized to execute searches, to seize evidence, or to make arrests for violations of federal law. In deciding an unenumerated Rule 12(b), Fed. R. Civ., motion based on the affirmative defense of immunity, we may look to evidence beyond the complaint without converting the motion into one for summary judgment. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir.2000). A review of the Breuninger declaration establishes that Officer Naswood did not hold an SLEC at the time of the incident. Therefore, he was not a federal law enforcement officer within the meaning of the FTCA. See 28 U.S.C. § 2680(h). Accordingly, there is no applicable waiver of sovereign immunity. IT IS ORDERED GRANTING the United States' motion to dismiss. Because the undisputed facts preclude liability, the dismissal of the case against the United States is with prejudice.

**135.** *Nayokpuk v. U.S.*, No. 2:09-cv-0009, 2011 WL 1164107 (D. Alaska Mar. 25, 2011). Before the court was Plaintiff Nayokpuk's motion for a ruling on the law of the case and the United States' opposition. Plaintiff Diana Nayokpuk filed a complaint against the government pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2674, alleging in pertinent part that medical personnel employed by the Alaska Native Medical Center (ANMC) and the Norton Sound Regional Hospital (NSRH) "breached the applicable standards of care and were negligent in providing medical care to plaintiff Ashley Nayokpuk," Ms. Nayokpuk's minor daughter. The complaint further alleged that the "negligence of these care providers includes . . . the failure to timely transport and medivac Ashley, the failure to diagnose and treat her illnesses, and the failure to coordinate and manage her care, which proximately caused her catastrophic damages." Ms. Nayokpuk requests the court for a ruling that: (1) pursuant to AS 09.55.549(f), "the caps on noneconomic damages contained in AS 09.55.549 will not apply if Plaintiffs prove that their damages resulted from an act or omission that constitutes reckless or intentional misconduct," (2) Alaska law determines what constitutes reckless or intentional conduct for purposes of AS 09.55.549; and (3) plaintiffs' burden of proof is a preponderance of the evidence. The government opposed Ms. Nayokpuk's request for the above rulings of law on the grounds that application of AS 09.55.549(f) is "punitive in nature" and punitive damages may not be awarded against the government in a FTCA action. The court declined to decide Ms. Nayokpuk's request for a ruling of law because her complaint does not contain any allegations to support a claim of reckless or intentional misconduct. The complaint alleges only that the involved medical personnel were negligent in providing medical care to plaintiff Ashley Nayokpuk. The court denied without prejudice plaintiff's motion.

**136.** *Pablo v. U.S.*, No. 10-427C, \_\_ Fed. Cl. \_\_, 2011 WL 1505173 (Fed. Cl. Apr. 21, 2011). This case arose out of an incident involving sexual abuse of a young Indian girl, F.C. by a police officer, Daniel Kettell (Officer Kettell). The plaintiff, Jennifer Pablo, is the mother and guardian ad litem of F.C. The plaintiff's amended complaint alleges that the attack on F.C. by Officer Kettell falls under the terms of the first "bad men" clause of Article I of the Fort Sumner Treaty of June 1, 1868 between the Navajo Nation and the United States, 15 Stat. 667 (Fort Sumner Treaty). Article I provides, in part, "If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will . . . reimburse the injured persons for the loss sustained." The plaintiff sought compensatory damages from the defendant, the United States, in the amount of \$2,000,000 for various injuries stemming from the attack that the plaintiff alleges will require future medical, rehabilitative, and psychological counseling, treatment, and therapy. The plaintiff also sought costs, attorney's fees, and all other damages

permitted by the Fort Sumner Treaty. The government moved for summary judgment in its favor pursuant to Rule 56 of the Rules of the United States Court of Federal Claims (RCFC). The government argued that F.C. was not residing or located in the Navajo Reservation at the time of the attack and therefore under Article XIII of the Fort Sumner Treaty she was not entitled to any of the privileges or rights conferred by the treaty at the time of the attack, including the protections of the “bad men” clause. The court granted the government’s motion for summary judgment.

**137. *Siegfried v. Bureau of Indian Affairs***, No. 1:05–cv–055. 2011 WL 1841078 (D.N.D. May 13, 2011). Plaintiff Siegfried, a tribal law enforcement officer employed by the Standing Rock Indian Reservation, initiated this action against the defendants Bureau of Indian Affairs (BIA) and the United States (collectively the “government”) pursuant to the Federal Tort Claims Act (FTCA) seeking damages for injuries he sustained during a vehicle collision between a BIA law enforcement vehicle in which he was a passenger and a pickup stolen by Curtis Feather (Feather). Siegfried’s complaint set forth two causes of action: (1) that the BIA was negligent in failing to properly maintain the passenger seat belt in the BIA vehicle; and (2) that the government should be required to provide compensation under North Dakota’s underinsured motorist laws given that Feather was uninsured. The government filed a Motion for Summary Judgment on the grounds that (1) the action was barred by the exclusive remedy provisions of the Federal Employees’ Compensation Act (FECA); (2) it was immune from suit; and (3) that the court lacked subject matter jurisdiction. The court granted the government’s motion in part concluding that Siegfried’s claim for uninsured motorist benefits lacked merit. In addition, the court determined there was a substantial question with respect to FECA coverage and that FECA benefits would be Siegfried’s exclusive remedy if the Secretary of Labor determined that he was eligible. As a consequence, the court ordered that the action be stayed to allow for the filing and consideration of a FECA claim by the Department of Labor. Several years of delay ensued while Siegfried pursued FECA coverage. The court believed that at least part of the delay was due to bureaucratic bumbling by the Department of Labor. Because the government’s exclusive-remedy FECA defense was necessarily premised upon there being coverage for a person in Siegfried’s situation and based on the Department of Labor’s determination that he was not eligible based on the facts of what had occurred, the court ordered that the stay be lifted and the case scheduled for trial. The court concluded that Siegfried failed to prove by a preponderance of the evidence that the government was negligent, which finding is necessary in order to hold the government liable under the FTCA and dismissed Siegfried’s complaint with prejudice.

**138. *Round Valley Indian Tribes v. U.S.***, No. 06–900, \_\_ Fed. Cl. \_\_, 2011 WL 2154004 (Fed. Cl. May 27, 2011). Plaintiff filed a Motion For Leave To Amend Complaint, seeking “to clarify and supplement its claims for breach of trust duties.” Plaintiff sought leave to amend, in part, to bring the complaint into conformity with the arguments and the relief requested in [Plaintiff’s October 2, 2009 Motion For Partial Summary Judgment. Plaintiff would like to “clarify that it seeks damages for the losses caused by the [G]overnment’s failure to adequately maintain its records relative to [Plaintiff’s] trust funds and trust property and damages caused by the [G]overnment’s failure to account to [Plaintiff].” The Government argued that the proposed amendment is futile, because “Plaintiff seeks leave to assert claims over which this [c]ourt lacks subject-matter jurisdiction.” The Government also argued that Plaintiff has unduly delayed the filing of this amendment, since this case was filed over four years ago, the parties

have undertaken significant discovery, and briefing has been submitted on partially dispositive motions. The court determined that the proposed Amended Complaint does not raise a new claim for relief, but rather is a clarification of the scope of the previously alleged claim for breach of trust duty and that Plaintiff's Motion is timely. The court granted Plaintiff's Motion For Leave To Amend Complaint.

**139. *Richard v. U.S.***, No. 10-503 C, \_\_ Fed. Cl. \_\_, 2011 WL 1227777 (Fed. Cl. Mar. 31, 2011). Before the court was defendant's motion to dismiss. In this case, plaintiffs, the purported personal representatives of the estates of Calonne D. Randall and Robert J. Whirlwind Horse, invoke the relevant "bad men" clause contained in Article I of the Fort Laramie Treaty of April 29, 1868 (Fort Laramie Treaty) and seek money damages stemming from the deaths of their adult children. Ms. Randall and Mr. Whirlwind Horse were members of the Oglala Sioux Tribe. They were struck and killed by a vehicle while walking along a highway within the Pine Ridge Indian Reservation in Shannon County, South Dakota. The driver of the vehicle, a "non-Indian," Timothy Hotz, was intoxicated at the time of the incident. He pled guilty to involuntary manslaughter in the district court has been serving a fifty-one month prison sentence. Defendant moved to dismiss the complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Rules of the United States Court of Federal Claims (RCFC), contending that plaintiffs failed to allege that the individual responsible for their children's deaths was an agent or employee of the United States. Alternatively, defendant moved to dismiss the complaint for failure to state a claim upon which relief can be granted pursuant to RCFC 12(b)(6) because, it argues, the "wrong" that occurred in this case falls outside the type of "wrong" contemplated by the "bad men" clause. The court found that it lacked subject matter jurisdiction over the complaint and granted defendant's motion to dismiss pursuant to RCFC 12(b)(1).

**140. *Jachetta v. United States***, No. 10-35175, \_\_ F.3d \_\_, 2011 WL 3250450 (9th Cir. Aug. 1, 2011). Native American granted allotment by Bureau of Land Management (BLM) brought action against BLM, State of Alaska, and pipeline service company, alleging inverse condemnation, injunctive relief, nuisance, breach of fiduciary duties, and civil rights violations. BLM and Alaska moved to dismiss on basis of sovereign immunity. The district court granted motions. Native American appealed. The appellate court held that: (1) Federal Tort Claims Act (FTCA) did not provide waiver of immunity for causes of action for inverse condemnation, injunctive relief to prevent future unconstitutional takings, and violations of federal civil rights statutes; (2) FTCA could provide a waiver of sovereign immunity for nuisance and breach of fiduciary duty claims; (3) Eleventh Amendment barred Fifth Amendment inverse condemnation claim in federal court; and (4) Eleventh Amendment immunity exception for suits in which a plaintiff asserted a claim for return of his property did not apply. Affirmed in part, reversed in part, and remanded.

**141. *Different Horse v. Salazar***, No. CIV 09-4049, 2011 WL 3422842 (D.S.D. Aug. 4, 2011). This Complaint arose from the extensive litigation between the Sioux Nation and the United States regarding the payment for land taken by the Fort Laramie Treaty of 1868 and the unlawful taking of the Black Hills and hunting rights to other lands by legislation enacted in 1877. This litigation is commonly referred to as "Docket 74-A and Docket 74-B." The Sioux Tribe claimed both damages for loss of land ceded under the Fort Laramie Treaty of April 29, 1868 (Docket 74-A) and a 5th Amendment violation by the taking of the Black Hills resulting from the Act of February 28, 1877 (Docket 74-B). The suit for Docket 74 was brought in 1950

by the eight present-day Sioux Reservation Tribes in a representative capacity on behalf of the Sioux Tribe of Indians. In Docket 74–A, the Indian Claims Commission found that the Sioux Tribe of Indians had been paid an inadequate amount of money for the land it ceded to the United States under the 1868 Treaty. In Docket 74–B, the Court of Claims affirmed the order of the Indian Claims Commission that the 1877 enactment, which took the Black Hills while claiming to implement an “agreement” whereby it was claimed the Sioux relinquished their rights to the Black Hills. The “agreement” was ratified by less than ten percent of the adult tribal males although the 1868 treaty required that three-fourths consent. *Sioux Nation of Indians v. United States*, 601 F.2d 1157, 1161 (Ct.Cl.1979). The Supreme Court affirmed the decision of the Court of Claims and held that for the unconstitutional taking the Sioux Nation was entitled to interest dating from 1877 on the principal sum of \$17.1 million, ultimately resulting in an award of \$105,994,430.52, including interest then accrued, to the Sioux Nation. *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980); *Sioux Nation of Indians v. United States*, 650 F.2d 244, 227 Ct. Cl. 404 (1981); *Sioux Nation v. United States*, 33 Ind. Cl. Comm 151 (1974). The amount has been stated to subsequently exceed \$650 million. Frank R. Pommersheim, *Broken Landscape: Indians, Indian Tribes, and the Constitution* 343 n. 142 (2009). This is a suit by individual Indians, not the eight present-day Sioux tribes. If there is to be any result other than the current stalemate, then it must come from tribal government and the Congress of the United States. Plaintiffs' claims are dismissed without prejudice. All other pending motions are dismissed without prejudice as moot.

## N. MISCELLANEOUS

**142.** *Bank of America, N.A. v. Swanson*, No. 08-16146, 2010 WL 4025788 (9th Cir. Oct. 14, 2010). Appellants-William Bills and the Winnemucca Colony Council and its Chairman Linda Ayer (Bills Group) appealed from the district court's grant of summary judgment in favor of Appellees-Sharon Wasson and the Winnemucca Indian Colony Council (Wasson Group) awarding the approximately \$400,000.00 held in a Bank of America account to Appellees. This case began when Winnemucca Indian Colony Council Chairman Glenn Wasson was murdered in 2000. Subsequently, Bank of America filed a complaint in interpleader pursuant to Rule 22 of the Federal Rules of Civil Procedure to resolve a dispute between the tribal factions as to who had authority to use a bank account opened in the name of “Winnemucca Indian Colony.” Years of protracted litigation ensued in tribal and federal courts. The parties eventually stipulated to the appointment of a special appellate panel to hear argument and to issue a binding, non-appealable decision. The special appellate panel found that the valid tribal council included members supported by the Wasson Group. The Wasson Group moved for summary judgment based on the special appellate panel order. The district court denied the Wasson Group's motion without prejudice and afforded the Bills Group almost five years to further exhaust tribal remedies. The district court eventually granted the Wasson Group's motion for summary judgment and denied the Bills Group's cross motion. The Bills Group appealed. The appellate court concluded that the parties exhausted their tribal remedies and that the parties had been afforded more than due process in both tribal and federal court. The appellate court affirmed the district court's judgment recognizing the special appellate panel order. Affirmed.

**143. *Spirit Lake Tribe v. Benson County, N.D.***, No. 2:10-cv-095, 2010 WL 4226614 (D.N.D. Oct. 21, 2010). Before the Court was a Motion for Preliminary Injunction filed by Plaintiffs. In an effort to move towards a more cost-effective mail-in voting process, the Benson County Board of Commissioners voted to close seven of eight voting places. The remaining voting place is located at the Benson County Courthouse in Minnewauken, North Dakota. Benson County conducted the June, 2010 primary election in a manner consistent with the approved vote by mail plan and did not receive any complaints from either the tribal chair or its enrolled members. On October 8, 2010, the Spirit Lake Tribe (Tribe) filed a complaint asserting that the defendants (County) violated their rights under Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973; 42 U.S.C. § 1983; the Indian Citizenship Act; and the 14th and 15th Amendments. The Tribe asserted that Minnewauken is too remote for members of the Spirit Lake Tribe to get to on Election Day. The County asserted that there is no disenfranchisement because every identifiable household and voter has been sent an application for a mail-in ballot. The Tribe disputes that the County's efforts are effective, pointing to various members of the Tribe who report that they never received an application for a mail-in ballot. The Tribe therefore sought a preliminary injunction to prevent the County from closing voting places located in Fort Totten, Warwick, and Oberon. Fort Totten and Warwick are located on the Spirit Lake Reservation. Oberon, while adjacent to the Reservation, is not within the current boundaries of the Spirit Lake Reservation. The court granted in part and denied in part Plaintiff's Motion for a Preliminary Injunction, ordering that the voting places located in Fort Totten and Warwick shall remain open to the public and shall be run in the same manner as the 2008 election.

**144. *Native American Arts, Inc. v. Contract Specialties, Inc.***, No. 10-106, 2010 WL 4823688 (D.R.I. Nov. 29, 2010). Before the court was defendant's motion to dismiss. Plaintiff Native American Arts, Inc. (NAA) is a wholly Indian-owned organization that manufactures and sells Indian arts and crafts. Defendant Contract Specialties, Inc. (Specialties) is a Rhode Island corporation that sells arts and crafts, including those made in an Indian style. NAA sued Specialties for violations of the Indian Arts and Crafts Act of 1990 and the Indian Arts and Crafts Enforcement Act of 2000 (IACA), 25 U.S.C. § 305 *et seq.*, which forbids the offer or sale of a good in a manner that falsely suggests it is an Indian-made product. The single-count complaint alleged that from March 15, 2006 onward, Specialties advertised, marketed, and sold its non-Indian-made products nationwide in a manner that falsely suggests they are Indian-made. According to the complaint, Specialties falsely suggested that its non-Indian-made products were in fact Indian-made by, among other things, advertising them using the label "Indian" and names of tribes such as "Apache," "Navajo," "Kiowa," and "Cree." These terms were used without qualifiers or disclaimers to alert potential buyers that the goods were not made by Indians or members of these tribes. According to the complaint, NAA and Specialties compete for the sale of similar products made in an Indian style-NAA's being authentic and Specialties' fake-such that NAA "has suffered competitive injuries as a result of" Specialties' activities. Specifically, Specialties' marketing and sales of its fake Indian-made products have allegedly eaten away at NAA's sales, driven down the price of NAA's products, and damaged NAA's goodwill and reputation. NAA contends that these actions violate the IACA, and seeks injunctive relief and statutory damages. Specialties moved to dismiss the complaint because (1) NAA lacks standing to sue; (2) NAA has not stated a claim, with requisite particularity, for a violation of the IACA; (3) the IACA runs afoul of the First Amendment; and (4) the IACA contravenes the equal protection clause of the Fifth Amendment. Specialties also disputed

NAA's calculation of damages, and argued that the damages provision in the IACA violates due process. The court denied Specialties' motion to dismiss.

**145. *Karuk Tribe of California v. Tri-County Metropolitan Transp. Dist. of Oregon***, No. 080202663; A139375, \_\_ P.3d \_\_, 2011 WL 891647 (Or. App. Mar. 16, 2011). Tri-County Metropolitan Transportation District of Oregon (TriMet) appealed a general judgment entered on writ of review that reversed and annulled TriMet's decision to decline publishing on TriMet vehicles a display proposed by petitioners. Petitioners Karuk Tribe of California (Tribe) and Friends of the River Foundation (Friends) offered to pay TriMet for displaying a message about salmon restoration efforts. TriMet refused that offer based upon its advertising policy to accept only certain types of commercial advertisements and public service announcements for display. The reviewing court concluded that TriMet's decision violated Article I, section 8, of the Oregon Constitution because the advertising policy classified acceptable displays on the basis of their subject matter and transgressed the First Amendment to the United States Constitution because the advertising policy was not applied in a viewpoint neutral way. On appeal, TriMet contended that, in the context of a challenge to a government policy on the use of its property, where the government is acting in its proprietary capacity, Article I, section 8, should be interpreted consistently with the First Amendment. In that case, both constitutional provisions should be construed to allow content-based regulation of expression, so long as that regulation is reasonable and viewpoint neutral. The appellate court found that the trial court did not err in concluding that TriMet's advertising policy violated Article I, section 8, to the extent that it classified speech on the basis of its content, notwithstanding that the policy regulated the use of government property. Affirmed.

**146. *Wapato Heritage LLC v. Evans***, Nos. 10-35237, 10-35288, 10-35348, 2011 WL 1227832 (9th Cir. Mar. 31, 2011). Not selected for publication in the Federal Reporter. William Wapato Evans' heirs settled their dispute over his estate by executing a Settlement and Release Agreement (Settlement Agreement), which required, among other things, that his daughter Sandra Evans (Sandra) make payments from her Individual Indian Money (IIM) account in the form of a loan to a corporation owned by her nephews called Wapato Heritage, LLC. Sandra expected that the payments would require oversight and approval by the Bureau of Indian Affairs (BIA), and when the BIA said that she was free to authorize the payments without its approval, Sandra refused to authorize the payments. Wapato Heritage then sued her for breach of contract and sued her financial advisor, Dan Gargan (Gargan), for tortious interference with contract. The district court denied Sandra's motion to dismiss for lack of subject-matter jurisdiction, and entered summary judgment in favor of Gargan on the tortious interference claim and in favor of Wapato Heritage on the contract claim. Sandra appealed the denial of her motion to dismiss and the entry of summary judgment in favor of Wapato Heritage; Wapato Heritage appealed the entry of summary judgment in favor of Gargan; and Gargan appealed the denial of his motion for attorneys' fees. Affirmed.

**147. *U.S. v. Sandoval County, N.M.***, No. 88-CV-1457, \_\_ F. Supp. 2d \_\_, 2011 WL 2729043 (D.N.M. Jul. 6, 2011). (From the opinion.) In enacting § 203 of the Voting Rights Act (VRA), 42 U.S.C. § 1973aa-1a, Congress intended that "language minority populations have substantive access to the ballot." H.R. Rep. No. 655, 102d Cong., 2d Sess. at 5 (1992), reprinted in 1992 U.S.C.C.A.N. 766, 769. In the case of historically unwritten Native American languages, a jurisdiction covered under § 203 "must furnish oral instruction, assistance, or other

information relating to registration and voting.” 42 U.S.C. § 1973aa–1a(c). As relevant here, the United States initiated this action against Sandoval County, New Mexico, its Board of County Commissioners, and its County Clerk (collectively “Sandoval County”) in December 1988, alleging a violation of § 203 of the VRA. The action arose from the lack of election practices and procedures in Sandoval County designed to enfranchise Native Americans who speak historically unwritten languages. Presently before the Court is the parties “Joint Motion for and Memorandum in Support of Order Entering Limited Consent Decree.” Therein, the United States and Sandoval County agree that after two decades the latter has not yet come into sufficient compliance with the VRA. So they once again ask us to extend federal court oversight of this matter in the modified form of a consent decree we originally entered on September 9, 1994. We previously extended that decree, as amended, through additional election cycles on November 5, 2004, November 28, 2007, and March 3, 2009. This time the parties ask us to extend the decree, through another federal election cycle, or until March 15, 2013. Specifically, the parties ask us to authorize the appointment of (1) the county attorney (in the county clerk's stead) to supervise the county's Native American Voting Rights Program (NAVRP) and (2) federal election observers to monitor elections at Native American polling places in the county. We grant the extension.

**148.** *Native American Arts, Inc. v. Bud K Worldwide, Inc.*, No. 7:10–CV–124, 2011 WL 2692962 (M.D. Ga. Jul. 11, 2011). This case was before the Court on Defendant's Motion to Dismiss for Lack of Article III Standing. Plaintiff Native American Arts, Inc. (NAA) is an Indian-owned arts and crafts organization composed of members of the Ho–Chunk Nation. NAA produces and distributes Indian-made products, including tomahawks, knives, belts, blankets, and artwork. Defendant Bud K Worldwide, Inc. (Bud K) operates an online and mail order catalog store where it sells cutlery, knives, swords, and other Indian-style merchandise. NAA filed a complaint under the Indian Arts and Crafts Enforcement Act of 2000 (IACEA), 25 U.S.C. § 305, *et seq.*, alleging that Bud K violated the IACEA by directly or indirectly, offering or displaying for sale or selling goods in a manner that falsely suggested that they were Indian produced, Indian products, or the products of a particular Indian tribe or Indian arts and crafts organization. NAA sought compensatory damages and injunctive relief. Bud K filed its Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1), arguing that NAA did not have constitutional or prudential standing to bring its claims. The Court treated Bud K's attack on subject matter jurisdiction as a factual attack that challenged “the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered.” (Quoting *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir.1990)). Of course, finding that NAA has standing certainly does not mean NAA will ultimately win at trial, or even get past summary judgment. But at this point, NAA's case will move forward. Bud K's Motion to Dismiss is denied

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