August 2020 – August 2021

CASE LAW ON AMERICAN INDIANS

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I. UNITED STATES SUPREME COURT

1. ***U.S. v. Cooley*, 141 S.Ct. 1638 (U.S. June 1, 2021).**
Non-Indian defendant was charged with possession with intent to distribute methamphetamine and possession of a firearm in furtherance of a drug trafficking crime, based on evidence discovered by tribal officer who had detained defendant on public highway that ran across reservation. The United States District Court for the District of Montana, Susan P. Watters, J., 2017 WL 499896, granted defendant's motion to suppress the evidence, and the government appealed. The United States Court of Appeals for the Ninth Circuit, Berzon, Circuit Judge, 919 F.3d 1135, affirmed, and, subsequently, 947 F.3d 1215, rehearing and rehearing en banc were denied. Certiorari was granted. The Supreme Court, Justice Breyer, held that: 1 tribal police officer has authority to detain temporarily and to search non-Indians traveling on public rights-of-way running through a reservation for potential violations of state or federal law, and 2 existence of federal cross-deputization statutes, which granted Indian tribes degree of authority to enforce federal law, did not show that Congress sought to deny tribes this authority. Vacated and remanded. Justice Alito filed a concurring opinion.

2. ***Yellen v. Confederated Tribes of the Chehalis Reservation*, 141 S. Ct. 2434. 21 Cal. Daily Op. Serv. 6218 (U.S. June 25, 2021).** Federally recognized Indian tribes brought actions challenging Treasury Secretary's announcement that Alaska Native regional and village corporations (ANC) were eligible for emergency aid set aside for tribal governments under Coronavirus Aid, Relief, and Economic Security (CARES) Act. After cases were consolidated, the United States District Court for the District of Columbia, Amit P. Mehta, J., granted summary judgment to government and ANCs. Tribes appealed. The United States Court of Appeals for the District of Columbia Circuit, Katsas, Circuit Judge, 976 F.3d 15, reversed. Certiorari was granted. Holding: The Supreme Court, Justice Sotomayor, held that while ANCs are not federally recognized tribes in a sovereign political sense, they are "Indian tribes" under plain definition in Indian Self-Determination and Education Assistance Act (ISDA), and thus, they are eligible to receive monetary relief under the CARES Act. Reversed and remanded. Justice Gorsuch filed a dissenting opinion, in which Justices Thomas and Kagan joined.

II. OTHER COURTS

A. *Administrative Law*

3. ***Singer v. Office of Navajo and Hopi Indian Reservation*, 2020 WL 4530477 (D. Ariz. Aug 06, 2020).**
Plaintiff Bernaleen Singer seeks judicial review of the administrative decision by the Office of Navajo and Hopi Indian Relocation ("ONHIR") denying her application for relocation benefits under the Navajo-Hopi Settlement Act. At issue are the parties' cross-motions for summary judgment, which are fully briefed. For the following reasons, the Court will grant Ms. Singer's motion, deny ONHIR's motion, and remand ONHIR's decision for further proceedings consistent with this decision. Congress passed the

Navajo-Hopi Settlement Act in 1974, which authorized the district court to make a final partition of the reservation after federally mandated mediation efforts between the nations failed. See Sekaquaptewa v. MacDonald, 626 F.2d 113, 115 (9th Cir. 1980). The Act also directed creation of ONHIR's predecessor, the Navajo-Hopi Relocation Commission, to provide services and benefits to help relocate residents located on lands that the partition allocated to the other nation. See Bedoni, 878 F.2d at 1121-22; 25 U.S.C. § 640d-11. To be eligible for relocation benefits, a Navajo applicant bears the burden of demonstrating that he or she was (1) a legal resident on the Hopi Partitioned Lands ("HPL") on December 22, 1974, and (2) a head of household on or before July 7, 1986. 25 C.F.R. § 700.147. The Court remands this case to the IHO to decide whether Ms. Singer was a party to a valid common law marriage, thereby giving her head of household status, prior to July 7, 1986. It Is Ordered that Ms. Singer's motion for summary judgment, insofar as it requests remand for further proceedings, is Granted. ONHIR's motion for summary judgment is denied. The matter is remanded for further proceedings consistent with this decision.

4. ***Alegre v. United States,* 2020 WL 4673099 (S.D. Cal. Aug 12, 2020).**
Presently before the Court is Defendants United States of America, Department of the Interior, and Individual Defendants Michael Black, Weldon Loudermilk, Amy Dutschke, and Javin Moore's (sued in their official capacities) (collectively, "Federal Defendants") motion to dismiss for lack of jurisdiction Plaintiffs' third cause of action in Plaintiffs' Fourth Amended Complaint. For the reasons set forth below, the Court Grants Federal Defendants' motion to dismiss. Plaintiffs are the descendants of Jose Juan Martinez, Guadalupe Martinez, and their daughter Modesta Martinez Contreras (collectively, "Martinez Ancestors"). Plaintiffs are split into Groups A and B. Group A Plaintiffs include Plaintiffs who are: residents of San Diego County, "direct lineal descendants of Jose Juan Martinez and Guadalupe Martinez," and "direct lineal descendants of Modesta Contreras." Group A Plaintiffs are enrolled in the San Pasqual Band of Mission Indians ("the Band") but are not federally recognized as Band members by the Bureau of Indian Affairs ("BIA"). Group B Plaintiffs are also San Diego County residents, are enrolled in the Band, and are federally recognized by the BIA as Band members. Group A Plaintiffs assert each of the Martinez Ancestors were full blood San Pasqual Indians. In 2005, Group A Plaintiffs submitted their applications to the Enrollment Committee for enrollment with the Band. The Enrollment Committee unanimously voted that Plaintiffs had established they were qualified for enrollment. Id. This determination "was predicated on a finding that Plaintiffs' ancestor Modesta's blood degree should be increased from 3/4 to 4/4" because "both of Modesta's parents were full blood San Pasqual Indians, based upon the totality of the documentary evidence." The Band's General Council then unanimously agreed with the Enrollment Committee on April 10, 2005. Later, on September 12, 2005, the Band's Business Committee concurred with both the General Council and the Enrollment Committee and sent its findings to former Superintendent of the Southern California Agency, James Fletcher ("Fletcher"). Group A Plaintiffs allege that under federal law and the Tribal Constitution, they were eligible to be enrolled and federal recognized as San Pasqual Indians, and that Federal Defendants were required to accept the Tribal recommendations unless the recommendation was "clearly erroneous." Id. On September 22, 2005, the Enrollment Committee—in a

separate proceeding—requested the BIA increase Modesta's blood degree from 3/4 to 4/4-degree San Pasqual blood. Plaintiffs filed suit, alleging that Federal Defendants' failure to add the Group A Plaintiffs to the Band and instead enrolling non-San Pasqual individuals into the Tribe constituted a violation of Group A Plaintiffs' Fifth Amendment right to equal protection under the law. As background, the Band's Constitution gives the Secretary of the Interior final authority over tribal enrollment decisions. See Alto v. Black, 738 F.3d 1111, 1116 (9th Cir. 2013). The Band's Constitution also "expressly incorporates federal regulations, adopted in 1960 and formerly codified at 25 C.F.R. §§ 48.1–48.15 ("the 1960 Regulations"), which addressed tribal enrollment criteria, the process for completing an initial membership roll, the procedures for keeping the membership roll current, and the purposes for which the roll was to be used." Id; see also 25 Fed. Reg. 1829 (Mar. 2, 1960) (codified at 25 C.F.R. pt. 48) (providing the content of the 1960 Regulations). But the 1960 Regulations are of no help to Plaintiffs. Here, Plaintiffs point solely to the Fifth Amendment and 25 C.F.R. § 48 as the source of law creating specific fiduciary duties to which monetary damages may be inferred. Even if Plaintiffs could clear the hurdle of jurisdiction, as explained above, the Ninth Circuit has already held that the Fifth Amendment does not provide for monetary relief, and the Fifth Amendment due process clause may not be interpreted as mandating monetary damages. Munns, 782 F.3d at 413. And as already explicated above, 25 C.F.R. § 48 is no longer in existence and is of no help to Plaintiffs in their argument that the regulation demonstrates fiduciary obligations. Alto, 738 F.3d at 1116 n.1. Thus, for the reasons stated herein, the Court grants Federal Defendants' motion to dismiss Plaintiffs' third cause of action.

5. ***George v. Office of Navajo Nation and Hopi Indian Relocation,*** **825 Fed.Appx.419, 2020 WL 5015850 (9th Cir. Aug 25, 2020)**.
Hearing officer was required under Navajo-Hopi Land Settlement Act to evaluate documented proof of income of approximately $1,100 that claimant made. Navajo woman who was forced to relocate from her home on reservation after land was court-partitioned brought action against Office of Navajo and Hopi Indian Relocation under Navajo-Hopi Land Settlement Act to obtain relocation benefits. The United States District Court for the District of Arizona, Douglas L. Rayes, J., 2019 WL 4081144, granted summary judgment in favor of Office of Navajo and Hopi Indian Relocation. Claimant appealed. The Court of Appeals held that hearing officer was required to evaluate documented proof of income of approximately $1,100 claimant made from January to July 7, 1986, even though it was few hundred dollars shy of $1,300 threshold. Vacated and remanded.

6. ***Daw v. Office of Navajo and Hopi Indian Relocation,*** **2020 WL 5632121 (D. Ariz. Sep 21, 2020).**
Pending before the Court is Plaintiff's Motion for Summary Judgment, and Defendant Office of Navajo and Hopi Indian Relocation's ("ONHIR") Cross-Motion for Summary Judgment. This is a Navajo-Hopi Land Settlement Act case in which Plaintiff Eugene Daw asks this Court find that the Independent Hearing Officer's ("IHO's") final decision denying his eligibility for relocation benefits was "unsupported by evidence or arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" (citing 5 U.S.C. § 706 (2)(A), (E)). Because the evidence before the IHO was sufficient to find that

the Plaintiff's family ceased to use Hopi Partitioned Land (The "HPL") for grazing after the erection of the partition fence in 1975, this Court denies the Plaintiff's Motion for Summary Judgment, and grants the Defendant's Cross-Motion for Summary Judgement upholding the IHO's decision. Mr. Daw first applied for relocation benefits on August 31, 2010, and was denied by ONHIR on April 5, 2013. Mr. Daw timely noted his administrative appeal to ONHIR on June 14, 2013, and the Agency accepted his appeal on June 27, 2013. The IHO denied Mr. Daw's administrative appeal finding any regular use of the HPL land had ceased at the time the partition fence was erected and that testimony to the contrary was not credible. Eugene Daw has appealed the decision of the IHO to this Court. Plaintiff's claim is based on the Navajo-Hopi Land Settlement Act. The Settlement Act divided land formerly referred to as the "Joint Use Area" into the Hopi Partitioned Lands ("HPL") and Navajo Partitioned Lands ("NPL") given to each tribe. Clinton v. Babbitt, 180 F.3d 1081, 1084 (9th Cir. 1999). The Plaintiff argues denial of his relocation benefits was arbitrary and capricious and seeks a summary judgment from this Court to that effect. The evidence in the Administrative Record adequately supports the IHO's findings. Because of this, the Court cannot conclude the IHO's conclusions to be arbitrary and capricious and will not disturb these finding on review. The IHO's findings establishing that the Plaintiff relocated from the HPL well before becoming a "head of household" are adequately supported by the evidence. Accordingly, It Is Ordered that the Plaintiff's Motion for Summary Judgment, is denied and ONHIR's Cross-Motion for Summary Judgment, is granted.

7. ***Confederated Tribes of the Chehalis Reservation v. Mnuchin,*** **976 F.3d 15, 2020 WL 5742075 (D.C. Cir. Sep 25, 2020).**
Alaska Native regional and village corporations (ANC) were not eligible for emergency aid under CARES Act. Federally recognized Indian tribes brought actions challenging Treasury Secretary's announcement that Alaska Native regional and village corporations (ANC) were eligible for emergency aid set aside for "Tribal governments" under Coronavirus Aid, Relief, and Economic Security (CARES) Act. After cases were consolidated, the United States District Court for the District of Columbia, Amit P. Mehta, J., entered summary judgment in government's favor, and tribes appealed. The Court of Appeals, Katsas, Circuit Judge, held that: 1) Treasury Secretary's determination was subject to judicial review, and 2) ANCs were not eligible for emergency aid under CARES Act. Reversed.

8. ***Hardwick v. United States,*** **2020 WL 6700466 (N.D. Cal. Nov 13, 2020).**
The Buena Vista Rancheria of Me-Wuk Indians ("the Tribe") has moved the Court for an order requiring the Bureau of Indian Affairs (BIA) to take restored Rancheria lands into trust pursuant to the 1983 Stipulated Judgment. For the reasons stated below, the Court now grants the Tribe's motion to enforce the 1983 Stipulated Judgment. Ancestors of the Buena Vista Rancheria of Me-Wuk Indians have occupied the land throughout Amador County and its surrounding environs for thousands of years. In 1958, Congress enacted the California Rancheria Act ("Rancheria Act"), which disestablished many California Rancherias (including the Buena Vista Rancheria) and prescribed a procedure for the distribution of the land and other assets to eligible Indians in fee simple. After termination, the lands became subject to state and federal taxes and the distributees and

their dependents lost their special federal status as Indians. Id. In 1979, the Indian residents of seventeen terminated Rancherias joined in a class action lawsuit against the United States, seeking to restore the reservations status of the affected lands. The suit culminated in a court-approved Stipulated Judgment in 1983 between the individual distributees of the terminated Rancherias and the United States. There are three mandatory trust provisions in the Stipulated Judgment which benefit the enumerated Rancherias. In plain terms, class members could invoke the mandatory trust election provisions to restore the enumerated rancherias to trust status (i.e., to the same federal recognition they enjoyed before the Rancheria Act was passed in 1958) and to avail themselves of the accompanying tax benefits. The BIA's final decision, issued in October 2020, repeats earlier rationales for denying the Tribe's request (i.e., that the BIA lacks authority under the Stipulated Judgment and that the Tribe's request should be processed as a discretionary acquisition under the Part 151 process). The issue in this case turns on the interpretation of the 1983 Judgment. The Tribe is a successor in interest, as defined therein, and has standing to invoke the mandatory trust election provision of paragraph 8.2 For the foregoing reasons, the Court Grants the Tribe's Motion to Enforce the 1983 Tillie Hardwick Stipulated Judgment.

9. ***Shawnee Tribe v. Mnuchin,*** **984 F.3d 94, 2021 WL 28207 (D.C. Cir. Jan 05, 2021).** CARES Act provided sufficiently manageable standard against which to judge Treasury Secretary's allocation of funds to tribal governments. Indian tribe brought action under Administrative Procedure Act (APA) challenging Treasury Secretary's decision to use tribal population data used by Department of Housing and Urban Development (HUD) in connection with Indian Housing Block Grant (IHBG) program to allocate and distribute funds set aside for tribal governments under Coronavirus Aid, Relief, and Economic Security Act (CARES Act). After transfer, 2020 WL 4334908, the United States District Court for the District of Columbia, Amit P. Mehta, J., denied tribe's motion for preliminary injunction, 2020 WL 4816461, and dismissed complaint, 2020 WL 5440552. Tribe appealed. The Court of Appeals, Tatel, Circuit Judge, held that: 1) action was not moot; 2) CARES Act provided sufficiently manageable standard against which to judge Treasury Secretary's allocation of funds to permit judicial review under ADA; 3) remand was warranted for district court to consider tribe's claim in first instance; and 4) tribe was likely to succeed on merits of its claim. Reversed and remanded.

10. ***Chinook Indian Nation v. Zinke,*** **2021 WL 211534 (W.D. Wash. Jan 21, 2021).** This matter comes before the Court on Defendants' Motion for Partial Summary Judgment. The Court Grants in part and Denies in part Defendants' Motion for Partial Summary Judgment and Denies Defendants' Motion to Strike. Plaintiffs are the Chinook Indian Nation, the Confederated Lower Chinook Tribes and Bands, and Anthony A. Johnson, individually and as chairman of the Chinook Indian Nation. Through their due process claims (Claims VII and VIII), Plaintiffs allege that Defendants have "forfeit[ed] the monies previously appropriated by Congress and upheld by the Courts for the Chinook and/or its members" which has "deprived the Chinook of a protected property interest to which the Fifth Amendment's Due Process protection applies." The money to which Plaintiffs refer is a $48,692.05 judgment awarded by the Indian Claims Commission ("ICC") in 1970 to "the Chinook Tribe and Band of Indians" "for and on

behalf of the Lower Band of Chinook and Clatsop Indians." The Court refers to this as the Docket 234 Judgment and to the petitioner as the Docket 234 Petitioner. Defendants seek summary judgment on Plaintiffs' due process claims. Defendants' Motion raises three areas of factual disagreement: (1) whether Plaintiffs are the successors in interest to the Docket 234 Petitioner; (2) whether Plaintiffs have a property interest in the Docket 234 Judgment; and (3) whether Plaintiffs have been deprived of their rights to the Docket 234 Judgment. As to the first and second issues, Plaintiffs rely primarily on a new declaration of the Chairman of the Chinook Indian Nation, Plaintiff Anthony A. Johnson. He explains that the Chinook Indian Nation's Tribal Counsel created Plaintiff Confederated Lower Chinook Tribes and Bands, a Washington non-profit entity, to succeed an earlier non-profit the Tribal Counsel created called the Chinook Indian Tribe, Inc. According to Johnson the Department of Interior treated these entities, including the Chinook Indian Nation as the representatives of the Chinook interest in the Docket 234 Judgment for over 40 years until it ceased sending trust statements. Plaintiffs have raised a genuine dispute of material fact as to whether they are the successors in interest to the Docket 234 Petitioner. A genuine issue of material fact also remains as to whether Plaintiffs have a property interest in the Docket 234 Judgment. In ruling on the Docket 234 Petition, the ICC recognized that even though the Petitioner was formed in 1951 as the Chinook Nation, it "ha[d] the capacity to prosecute this action for and on behalf of the Clatsop and Chinook (proper) Indians." Ultimately the ICC awarded the Petitioner a judgment in its favor. Defendants seek summary judgment on the theory that Plaintiffs cannot show a deprivation of any right or interest in the Docket 234 Judgment. Plaintiffs point to new evidence that the Department of Interior's national policy denies non-recognized tribes such as the Chinook Indian Nation access to any ICC judgment funds. As the former Regional Trust Administrator for the Department of Interior, Rugen testified that "[a] non-recognized tribe is not considered a beneficiary; therefore, in my experience, since they are not a beneficiary, they cannot receive statements nor funds." Taken together and construed in Plaintiffs' favor, Rugen's testimony and letter evidence an act of deprivation of Plaintiffs' right to the Docket 234 Judgment. The Court finds this sufficient evidence to show a dispute of fact as to a deprivation of the right to the Docket 234 Judgment. As alternative relief, Defendants asks the Court to invoke the primary jurisdiction doctrine and refer the issue to the Department of Interior to make an initial determination. The Court agrees. The Department of Interior has created administrative regulations setting out the process make these determinations, which requires some degree of its expertise in these matters. See 25 C.F.R. Part 87. The Court thus finds that the primary jurisdiction considerations are satisfied here. See General Dynamics, 828 F.2d at 1362. The Court remains acutely aware of the fact that the Department of Interior should have long ago identified the beneficiaries and come up with a plan of distribution for the Docket 234 Judgment. But notwithstanding these concerns, the Court finds the Department of Interior should make the preliminary determination on the issues raised by Plaintiffs' Claims VII and VIII. The Court therefore Grants the Motion for Partial Summary Judgment on this alternative relief and Stays this matter pending the Department of Interior's determination of Plaintiffs' status as a successor in interest to the Docket 234 Petitioner and beneficiary to the Docket 234 Judgment.

11. ***Doucette v. U.S. Department of the Interior*, Fed.Appx., 2021 WL 915378 (9th Cir. Mar 10, 2021).**

Department of Interior's recognition of tribal council after special election for vacant seats was not made with improper influence. Unsuccessful candidates for vacant seats on tribal council of Nooksack Tribe brought action under Administrative Procedure Act (APA) against Department of Interior (DOI), alleging that DOI's recognition of tribal council after a special election to fill the vacancies was arbitrary and capricious. The United States District Court for the Western District of Washington, Thomas S. Zilly, Senior District Judge, 2019 WL 3804118, granted summary judgment for DOI. Candidates appealed. The Court of Appeals held that: 1) Tribe was not indispensable party; 2) DOI's decision to recognize tribal council did not violate an enforceable agency rule or requirement; 3) DOI's recognition decision was not made with improper influence, special meetings, and without proper procedure; and 4) DOI's actions comported with its duty to balance Tribe's right to self-determination and obligation to ensure Tribe followed its Constitution. Affirmed in part and dismissed in part.

12. ***Hudson v. Haaland*, Fed.Appx., 2021 WL 1439794 (D.C. Cir. Apr 06, 2021).**

Charles Hudson is a Native American and a member of the federally recognized Three Affiliated Tribes of the Fort Berthold Reservation in North Dakota. The Indian Reorganization Act of 1934, 25 U.S.C. § 5101 et seq., which applies to the Three Tribes, provides for self-government by tribes through the adoption of their own constitutions and bylaws, id. § 5123. In 2013, Hudson voted in an election to determine whether the Three Tribes' Constitution should be amended (i) to expand the number of members of the Tribal Business Council, (ii) to require the Business Council to vote on the removal of any member convicted of a felony, and (iii) to allow members of the Three Tribes to recall sitting members of the Business Council. Pursuant to the Reorganization Act, that election was conducted by the Secretary of the Interior in what is known as a "Secretarial election." See 25 U.S.C. § 5123. Importantly, Secretarial elections under the Reorganization Act "are federal—not tribal—elections," as the Reorganization Act "explicitly reserves to the federal government the power to hold and approve the elections that adopt or alter tribal constitutions." Thomas v. United States, 189 F.3d 662, 667 (7th Cir. 1999). As only 5.5 percent of adult members voted in the election, Hudson contended that certification of the election violated the Act. Interior took the position that the 30 percent quorum requirement was satisfied because a quorum may be computed based on the (smaller) number of registered voters in the Three Tribes. Hudson sought judicial review in the United States District Court for the District of Columbia, alleging that Interior's decision was arbitrary, capricious, and contrary to law, in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). The district court awarded summary judgment to Hudson on the ground that the Three Tribes' Constitution set the quorum requirement at 30 percent of all adult members of the Three Tribes. Interior filed a timely notice of appeal. Because Hudson lacks standing to press his APA challenges, we cannot address the merits of his claims and must dismiss the appeal. Hudson lacks standing because he has not suffered a cognizable injury-in-fact. He provides no explanation as to how the certification of the 2013 election harmed him in a concrete and particularized manner. The only injury asserted by Hudson is the supposed "diminishment of his vote" opposing the amendments. But that injury is shared by all those who voted against the

amendments. It is a byproduct of the voting scheme; it is not an injury particularized to Hudson. Cf. Wood, 981 F.3d at 1314–1315. We vacate the judgment of the district court and remand with instructions to dismiss the case.

13. ***Eastern Band of Cherokee Indians and The Cherokee Nation v. United States Department of the Interior and The Catawba Indian Nation*, 2021 WL 1518379 (D.D.C. Apr 16, 2021).**

"Las Vegas is the only place I know where money really talks — it says, 'Goodbye.' " So says Frank Sinatra's character in the 1957 film The Joker is Wild. Put differently: it's good to be in the casino business. The Catawba Indian Nation are eager to get into that business. To that end, in 2018 the Tribe asked the Bureau of Indian Affairs to take a 16-acre parcel of land in North Carolina into trust so that the Tribe could build a casino and entertainment complex there. On March 12, 2020, the agency formally agreed. Within days, Plaintiff Eastern Band of Cherokee Indians (EBCI), which has its own casinos in North Carolina, filed this action under the Administrative Procedure Act, asserting that BIA's decision violated a host of federal statutes and regulations. The Catawba quickly intervened as Defendants to protect their project. Concerned that the construction of the complex would destroy Cherokee historical artifacts or human remains — or perhaps pose a competitive gambling threat — Plaintiff then moved to preliminarily enjoin the transfer of land to the federal government. This Court denied that motion, finding that because EBCI had not "shown that it is likely that Cherokee historical artifacts even exist at the [development] site," the Tribe had not established the requisite irreparable harm. Plaintiffs raise several close and complex questions of statutory and regulatory construction, and the Court certainly cannot fault them for rolling the dice here. In the end, though, they come up with snake eyes, as on each claim they either lack standing or lose on the merits. The Court will thus enter summary judgment for Defendants. In considering the Tribe's discretionary application, Interior undertook a lengthy project analysis aimed at satisfying the myriad statutory prerequisites to federal action, including those imposed by the National Environmental Policy Act and National Historic Preservation Act. Like the parties, the Court will begin with the thorniest questions presented here, which correspond to the first three claims set forth above: (1) whether the Catawba are generally eligible to game under IGRA; (2) whether the Catawba are eligible to benefit from Interior's land-into-trust authority under the IRA; and (3) whether the Kings Mountain Site is suitable for gaming under IGRA and its implementing regulations. The intent of the Settlement Agreement seems to have been to establish a specific regime for Catawba gambling in South Carolina that would supersede IGRA's more Tribe-friendly framework — hence the need to clarify that an otherwise preemptive federal law, IGRA, would not apply. Put differently, the Settlement Agreement made clear that IGRA would not apply to the Tribe because tribal gambling would instead be covered by specific rules set out in the Settlement Agreement and/or state law. Under that reading, the Agreement has nothing to say about whether the Tribe would be permitted to game under IGRA outside of South Carolina. That is unsurprising, as the Agreement is exclusively between South Carolina and the Tribe. Here, Interior concluded that the Kings Mountain Site fits under the "restored lands" exception, which exempts "lands ... taken into trust as part of ... the restoration of lands for an Indian tribe that is restored to Federal recognition." Id. § 2719(b)(1)(B)(iii); see Decision Letter at 3. Interior did not

violate the Settlement Act or IGRA by taking the Kings Mountain parcel into trust for the Catawba; the agency properly applied its IGRA regulations; it did not act arbitrarily by failing to consider the background of Wallace Cheves; Plaintiffs lack standing to press their NHPA claims and those NEPA claims that overlap; and their remaining NEPA claims fail. The Court will accordingly enter summary judgment on all counts for the Defendants.

***14. Stand Up for California! v. United States Department of the Interior*, F.3d, 2021 WL 1437196 (D.C. Cir. Apr 16, 2021).**

Court-approved settlement agreement was sufficient to restore status of tribe as federally-recognized. Nonprofit organization and individuals brought action challenging decision of the United States Department of the Interior and its Bureau of Indian Affairs (BIA) to acquire land in trust for Native American tribe to build casino, alleging that defendants' actions did not comply with relevant statutes. The United States District Court for the District of Columbia, Trevor N. McFadden, J., 410 F.Supp.3d 39, granted summary judgment in favor of defendants. Plaintiffs appealed. The Court of Appeals, Wilkins, Circuit Judge, held that: 1) principal deputy assistant Secretary of Indian Affairs was not precluded from approving Department's record of decision acquiring land in trust for tribe to build casino; 2) court-approved settlement agreement was sufficient to restore status of tribe as federally recognized; and 3) EIS for casino site complied with National Environmental Policy Act (NEPA). Affirmed.

B. Child Welfare Law And ICWA

***15. Matter of Dependency of Z.J.G.,* 196 Wash.2d 152, 471 P.3d 853 (Wash. Sep 03, 2020).**

Court has reason to know child is an "Indian child" under ICWA and WICWA when participant in proceeding indicates that the child has tribal heritage. After minor children were removed from the care of their parents, Department of Children, Youth, and Families filed dependency petitions for children, which asserted Department knew or had reason to know children were Indian children under the Indian Child Welfare Act (ICWA) and the Washington State Indian Child Welfare Act (WICWA). Following shelter care hearing, the Superior Court, King County, Patrick Oishi, J., initially determined ICWA and WICWA did not apply and placed children in foster care, but after Indian tribe successfully intervened in the case and children were determined to be tribally enrolled members, subsequently entered dependency order as to father's parental rights and applied ICWA and WICWA. Father moved for discretionary review of shelter care order, which was granted. The Court of Appeals, 10 Wash.App.2d 446, 448 P.3d 175, affirmed. Father petitioned for review, which was granted. The Supreme Court, Montoya-Lewis, J., held that: 1) court has reason to know child is an "Indian child" under ICWA and WICWA when any participant in the proceeding indicates that the child has tribal heritage; 2) WICWA is an independent basis to find that a court has reason to know a child is or may be an Indian child when a participant in the proceeding indicates that the child has tribal heritage; and 3) trial court had clear reason to know that children were

Indian children under ICWA and WICWA at shelter care hearing. Reversed and remanded.

16. ***In re N.S.*, 55 Cal.App.5th 816, 269 Cal.Rptr.3d 732 (Cal. Ct. App. Sep 17, 2020).**
Tribe's selection of guardianship as best permanent plan option for Indian child did not preempt the trial court's permanent plan preference. In child protection proceedings involving Indian child, the Superior Court, San Diego County, No. NJ14703, Michael J. Imhoff, Commissioner, terminated mother's parental rights and referred child to county agency for adoptive placement with child's maternal grandmother. Mother appealed. The Court of Appeal, Aaron, J., held that: 1) tribe's selection of guardianship as the best permanent plan option for Indian child did not preempt the trial court's permanent plan preference; 2) mother was not prejudiced by any failure of counsel to investigate what tribal benefits would be available to child if parental rights were not terminated; 3) evidence supported finding that termination of parental rights would not substantially interfere with child's connection to tribe; 4) termination of parental rights was in best interests of child; 5) evidence supported finding that continued custody of the child by the parent or Indian custodian was likely to result in serious emotional or physical damage to the child; and 6) evidence supported finding that relationship between mother and child was not a parent-child relationship, thus precluding application of parental benefit exception. Affirmed.

17. ***In re N.R.*, 2020 WL 5889363 (W.Va. Oct 02, 2020).**
Petitioners, Mother A.R.-2, and Father A.R.-3, appeal the Circuit Court of Ohio County's January 27, 2020, order terminating their parental rights to N.R., A.R.-1, and A.W. On appeal, petitioners argue that the circuit court erred in denying their respective motions to transfer the proceedings to the Indian Tribal Court. The Court finds that the circuit court erred in denying petitioners' motions on the basis that they did not have standing. The circuit court "entered a final dispositional order ... pursuant to West Virginia Code § 49-4-604(b)(5) (2016), placing the children ... in the legal and physical custody of the [DHHR] upon finding that the abusing parents were presently unable to adequately care for their children." Id. at ——, 836 S.E.2d at 802. The parents appealed and argued that the circuit court failed to comply with the Indian Child Welfare Act ("ICWA"), 25 U.S.C. §§ 1901 to -1923, and sought to dismiss the case. On remand, Petitioners argue that the circuit court incorrectly denied these motions on the basis of standing. At the time that the circuit court denied their motions, they had standing under the ICWA to move for the transfer of the proceedings. We agree. According to the relevant federal regulations, "[e]ither parent, the Indian custodian, or the Indian child's tribe may request, at any time, orally on the record or in writing, that the State court transfer a foster-care or termination-of-parental-rights proceeding to the jurisdiction of the child's Tribe." 25 C.F.R. § 23.115. Petitioners had standing to bring a motion to transfer the proceedings to the Indian tribal court. For the foregoing reasons, we vacate the circuit court's orders denying petitioners' respective motions to transfer the proceedings to the Indian tribal court and remand the matter to the circuit court for an adjudication of these motions on the merits. If a circuit court, or another party, asserts that good cause to deny the transfer exists, then all parties must be granted an opportunity to provide their views on the matter. Vacated and remanded.

***18. In re Porphir,* 2020 WL 6111811 (Mich. Ct. App. Oct 15, 2020).**

In these consolidated appeals, respondent-mother and respondent-father appeal as of right the trial court's order terminating their respective parental rights to the minor children under MCL 712A.19b(3)(c)(i) and (j). For the reasons stated in this opinion, we conditionally reverse and remand for further proceedings. The Department of Health and Human Services (DHHS) petitioned for the removal of the minor children DP and BP from the care and custody of respondents because both had substance abuse problems and housing issues. The trial court authorized the amended petition, and the children were removed from the home and placed in foster care following a preliminary hearing. During the hearing the trial court inquired regarding possible Native American heritage. Respondent-father indicated that he might have such heritage and the trial court ordered the DHHS to investigate the matter. The trial court terminated both respondents' parental rights. They now appeal. Respondent-mother argues first that the trial court erred in finding statutory grounds for termination of her parental rights. We disagree. Termination of parental rights under MCL 712A.19b(3)(c) is proper when "182 or more days" have elapsed since the trial court issued its first dispositional order. MCL 712A.19b(3)(c). Additionally, termination of parental rights under MCL 712A.19b(3)(c)(i) is proper when "[t]he conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age." In this case, clear and convincing evidence established grounds for terminating respondent-mother's parental rights. The trial court did not err in finding that clear and convincing evidence established statutory grounds for termination under MCL 712A.19b(3)(c)(i). Respondent-mother argues next that the trial court erred by finding that termination of her parental rights served the children's best interests. We disagree. In this case, the trial court held that even if the children had a bond with respondent-mother, the other best-interest factors weighed in favor of termination. Respondent-father's sole argument on appeal is that the DHHS and the trial court failed to comply with the notice provisions of the Indian Child Welfare Act (ICWA), 25 USC 1901 et seq., and the Michigan Indian Family Preservation Act (MIFPA), MCL 712B.1 et seq. The DHHS concedes respondent-father's claim. In this case, at the preliminary hearing, respondent-father informed the trial court and the DHHS that his biological brother was a member of the Cherokee tribe. He stated that he may also be eligible for membership. The trial court ordered the DHHS to investigate respondent-father's claim. The DHHS concedes that despite being directed by the trial court to investigate the matter no further action was taken by either the trial court or the DHHS. The record, therefore, indicates that the trial court and the DHHS failed to comply with ICWA and MIFPA. Therefore, we must conditionally reverse the trial court's termination order regarding her parental rights because "a parent cannot waive a child's status as an Indian child or any right of the tribe that is guaranteed by ICWA." Morris, 491 Mich. at 111. On remand, the trial court and the DHHS shall comply with the notification requirements in the ICWA and MIFPA. Conditionally reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

***19. Matter of M.T.,* 401 Mont. 518, 474 P.3d 820 (Mont. Oct 20, 2020).**

Court violated ICWA when it terminated parental rights without first obtaining conclusive tribal determination of children's tribal eligibility. Department of Public Health and Human Services filed petition to terminate mother's parental rights to two children. The District Court of the Second Judicial District, County of Butte/Silver Bow, Robert Whelan, J., entered judgment terminating parental rights. Mother appealed. The Supreme Court, Rice, J., held that: 1) trial court violated requirements of the Indian Child Welfare Act (ICWA) when it terminated mother's parental rights without first obtaining a conclusive tribal determination of children's tribal membership status and enrollment eligibility in particular federally recognized tribe; 2) Department made reasonable efforts to reunite mother with her children; and 3) sufficient evidence supported trial court's findings that the conduct or condition that rendered mother unfit, unable, or unwilling to parent was unlikely to change within a reasonable time, and that continued relationship between mother and children would result in further abuse or neglect. Reversed and remanded.

***20. Interest of X.E.V.,* 2020 WL 6867068 (Tex. App. Nov 23, 2020).**

Appellant X.Y. (Mother) has appealed a judgment terminating her parental rights to child X.E.V. The parties agree that X.E.V. is an Indian child for purposes of the Indian Child Welfare Act and that X.E.V. is of purported Cherokee and Ketchikan ancestry. Mother raises seven issues on appeal. Four issues concern alleged ICWA procedural violations. As is relevant to this appeal, the ICWA requires the parental rights termination movant—here, the Texas Department of Family and Protective Services—to notify relevant tribal authorities when it seeks to terminate the parental rights in the case of a known or suspected Indian child: In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: Provided, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding. 25 U.S.C.A. § 1912(a). In its Appellee's Brief, the Department has conceded there is reversible error because the record does not indicate that required ICWA notices were ever sent to Cherokee and Ketchikan tribal authorities, meaning that the trial court's judgment must be reversed and a final termination judgment withheld until notice is given to Cherokee and Ketchikan authorities and those authorities determine whether X.E.V. meets membership eligibility requirements under internal tribal law and whether intervention in these proceedings is necessary. In accordance with our previous decision in In the Interest of S.J.H., 594 S.W.3d at 691-92, we reverse the trial court's judgment based on the failure to notify relevant tribal authorities under the ICWA and remand for further proceedings consistent with this opinion.

21. ***Pamiuqtuuq C. v. Department of Health & Social Services, Office of Children's Services,*** **2020 WL 6940433 (Alaska Nov 25, 2020).**

These consolidated appeals arise from the superior court's orders terminating parental rights to three Indian children. The appeals focus on the court's denial of the parents' motions to continue the termination trial and on related admissions of expert witness testimony. The Office of Children's Services (OCS) petitioned to terminate the parents' rights in June 2019, asserting that the children were in need of aid on grounds of physical harm, mental injury, parental neglect, and parental substance abuse. On September 16 OCS gave notice that it intended to rely on certified business records reflecting relevant services provided to the parents and children. By the October 30 pretrial conference OCS still had not filed or served a witness list or any information about potential expert witnesses for trial. On Monday, November 4 the parties convened for trial. OCS indicated that it wanted to be certain the parents had notice of the expert witnesses and would not ask for a continuance the next morning. When court convened the next morning, the mother again requested a continuance due to the late expert witness disclosures. The superior court responded that generally a service provider can testify as a hybrid expert; that absence of an expert's resume or report is not a critical issue; and that "[w]hat really is going to be critical is whether somebody's been surprised." The mother asserted in written closing arguments that OCS "failed to present the expert testimony necessary for the termination of parental rights." Quoting our case law, the father asserted in written closing arguments that OCS also violated ICWA's requirements by failing to provide an expert to testify about the "prevailing social and cultural standards of the Indian child's Tribe." The transcript also is clear that OCS offered no hybrid expert to testify as an expert about the existence or cause of the children's alleged mental injuries or about whether returning the children to the parents' custody likely would cause the children serious physical or emotional harm. And the transcript is clear that the superior court never qualified any hybrid expert witness to testify to the existence and cause of the children's alleged mental injuries or to the likelihood of serious physical or emotional harm if the children were returned to their parents. We vacate the termination orders and remand for a new trial.

22. ***In re T.G.,*** **58 Cal.App.5th 275, 272 Cal.Rptr.3d 381 (Cal. Ct. App. Dec 08, 2020).**

Mother's statement that she believed she had Native American ancestry triggered affirmative duty for child protective agency to make further inquiry. Child protective agency filed dependency petition with respect to children with possible Native American ancestry, seeking removal of children from parental custody and placement of children with nonrelated extended family members. The Superior Court, Los Angeles County, Nos. 17CCJP02322B-D, 17CCJP02322A, Emma Castro, Juvenile Court Referee, granted petition without mentioning Indian Child Welfare Act (ICWA), and granted guardianship, appointed legal guardians, and terminated its jurisdiction. Mother and biological father of one child separately appealed. The Court of Appeal, Perluss, Presiding Justice, held that: 1) biological father, whose paternity was established by DNA testing and confirmed by the juvenile court, had standing as a parent under ICWA to appeal juvenile court's order; 2) statements by mother that she believed she had Cherokee ancestry on maternal side and possible Native American ancestry through her paternal grandfather triggered affirmative duty for agency to make further inquiry; and 3) remand

to juvenile court was required for agency's failure to comply with juvenile court's order to provide notice and juvenile court's failure to make required findings regarding applicability of ICWA to proceedings. Reversed and remanded.

***23. Matter of Dependency of A.L.K.,* P.3d, 2020 WL 7650454 (Wash. Dec 24, 2020).**
The Department of Children, Youth, and Families failed to engage in active efforts to prevent the breakup of the American Indian family. Native American children were removed from mother's care for allegations of abandonment. The Superior Court, Douglas County, John Hotchkiss, J., found the children to be dependent. Mother appealed. The Court of Appeals, Pennell, C.J., 12 Wash.App.2d 1074, 2020 WL 1649834, affirmed. Mother appealed. The Supreme Court, Whitener, J., held that: 1) the invited error doctrine did not apply to deprive mother of the right to challenge the Department's failure to provide services as required by statute; 2) the Department failed to engage in active efforts to prevent the breakup of the American Indian family; and 3) remand was warranted for a determination as to whether returning Native American children to their mother's care would subject them to substantial and immediate danger or threat of danger. Affirmed in part, vacated in part, and remanded. Montoya-Lewis, J., filed concurring opinion.

***24. In re Nesbitt,* 2021 WL 527387 (Mich. Ct. App. Feb 11, 2021).**
In these consolidated appeals, respondents appeal the trial court's order terminating their parental rights to their child, KN, under MCL 712A.19b(3)(c)(i) (conditions that led to adjudication continue to exist), (c)(ii) (other conditions continue to exist), (g) (failure to provide proper care or custody), and (j) (reasonable likelihood of harm if returned to parent). We conditionally reverse and remand for further proceedings consistent with this opinion. After observing that KN had previously been identified as having Indian heritage, the trial court sua sponte questioned whether notice was ever given under the Indian Child Welfare Act, 25 USC 1901 et seq., and the Michigan Indian Family Preservation Act ("MIFPA"), MCL 712B.1 et seq. Finding that it was not, the trial court dismissed the termination petition and ordered petitioner to comply with the statutory-notice provisions. Several months later, the trial court found compliance with ICWA and MIFPA and proceeded with the termination hearing in February 2020. The trial court found that statutory grounds to terminate respondents' parental rights had been established by clear and convincing evidence and found that termination of respondents' parental rights was in KN's best interests. These appeals followed. Respondent-father argues that petitioner and the trial court did not make sufficient efforts under ICWA and MIFPA to determine KN's Native American heritage. We agree that the lower court record is insufficient to establish statutory compliance. The record contains no copies of the actual notices purportedly sent. Furthermore, there is no postal return receipt indicating whether notice was received and, if so, by whom. There is no compelling evidence that the trial court actually had the documents before it to assess compliance with the statutes. Accordingly we conditionally reverse the trial court's order terminating respondents' parental rights and remand for further proceedings.

***25. Jumping Eagle v. Warren*, 2021 WL 462644 (D.S.D. Feb 09, 2021).**

Plaintiff Irving D. Jumping Eagle filed a pro se Petition to invalidate the state court guardianship proceedings involving his child, I.L.J.E. He brought the Petition pursuant to 25 U.S.C. § 1914 of the Indian Child Welfare Act, 25 U.S.C. §§ 1901 et seq., seeking to invalidate an order entered by the Third Judicial Circuit Court in Brookings County, South Dakota, appointing the child's uncle and the child's aunt guardians of I.L.J.E. Defendants moved for summary judgment. Jumping Eagle is the biological father of I.L.J.E. Alicia Rhae Jumping Eagle, now deceased, was the biological mother of I.L.J.E. Defendants are the maternal aunt and uncle of I.L.J.E. I.L.J.E. was born on December 22, 2014. I.L.J.E. is an Indian child as defined in ICWA. I.L.J.E. is an enrolled member of the Oglala Sioux Tribe. On or about April 3, 2017, Jumping Eagle killed Alicia by stabbing her. On April 6, 2017, Defendants filed a Petition for Temporary Guardianship in the Circuit Court of the Third Judicial Circuit in Brookings County, South Dakota, seeking temporary guardianship of I.L.J.E. In an affidavit attached to the petition, Defendants explained that they were the child's maternal aunt and uncle, and no other close relative was available to care for the child. On April 7, 2017, the state trial court entered an Order Appointing Temporary Guardian and Conservator Pursuant to SDCL 29A-5-210, appointing Defendants as temporary co-guardians of I.L.J.E. Neither of the Defendants are Indians. On June 16, 2017, Defendants filed a Petition for Appointment of Co-Guardians and Co-Conservators in state court, seeking permanent guardianship of I.L.J.E. On July 6, 2017, Defendants filed a Proof of Notice to the Oglala Sioux Tribe and Child Protective Services ("CPS") in the state court guardianship proceedings. On July 12, 2017, Jumping Eagle asked the state trial court to accept his April 20, 2017, Power of Attorney indicating his intent to give custody of I.L.J.E. to his sister, Dr. Sara Jumping Eagle. The state trial court asked if this was an ICWA case, and Jumping Eagle's lawyer responded that ICWA did not apply to this case. The Tribe participated in the proceedings, but it did not object to the guardianship or request transfer to tribal court under ICWA. Defendants argue that res judicata or claim preclusion bar this Court from reconsidering claims already decided by the South Dakota Supreme Court. To the extent that the Tenth Circuit holds that federal courts are always precluded by full faith and credit and res judicata from reviewing any and all alleged violations of ICWA, this Court is unpersuaded. This Court concludes that § 1914 is an implied exception to the Full Faith and Credit Act in § 1738, allowing a federal court to refuse to give a judgment the preclusive effect to which it is otherwise entitled under state law if a procedural requirement of §§ 1911, 1912, or 1913 of ICWA was violated. Because the South Dakota Supreme Court's judgment satisfies the requirements of South Dakota's res judicata law, the Full Faith and Credit provision in § 1738 requires this Court to give that decision the same preclusive effect as it would have under South Dakota law. Therefore, Jumping Eagle's claim that his due process rights were violated by being required to appear by ITV at the hearing on October 6, 2017 is barred by res judicata. For the reasons set forth above, Defendants' motion for summary judgment is granted.

26. ***People In Interest of My.K.M.,*** **P.3d, 2021 COA 33, 2021 WL 922746 (Colo. App. March 11, 2021)**.

Mother, V.K.L., and father, T.A.M., appeal the juvenile court's judgment terminating their parent-child legal relationships with My.K.M. and Ma.K.M. Mother's appeal presents an issue of first impression in Colorado: whether enrollment in a tribe, or merely

tribal membership even absent enrollment, determines whether a child is an Indian child under the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901-1963. We conclude that tribal membership, not enrollment, determines ICWA's applicability. The juvenile court ultimately recognized that ICWA applied to this case, in which the children are tribal members but not eligible for enrollment. However, we conclude that the juvenile court erroneously found that the Denver Department of Human Services (the Department) provided active efforts for mother as required by ICWA. Thus, we reverse the termination of mother's parent-child legal relationships with the children and remand the case for further proceedings as to her.

27. ***Clark J. v. Department of Health & Social Services*, *Office of Children's Services*, P.3d, 2021 WL 1232066 (Alaska Apr 02, 2021).**
Office of Children's Services (OCS) failed to make active efforts to reunify father with children, as required by Indian Child Welfare Act (ICWA). Father appealed after the Superior Court, Third Judicial District, Glennallen, Rachel Ahrens, J., terminated his parental rights, arguing that Office of Children's Services (OCS) of Department of Health & Social Services failed to make active efforts to reunify him with his children, as required by Indian Child Welfare Act (ICWA). The Supreme Court, Carney, J., held that: 1) trial court erred in relying upon mother's stipulation that OCS made active and reasonable efforts to reunify parents with children; 2) OCS made active efforts to reunify father with children during first two years of four-year period preceding termination of parental rights proceeding; and 3) OCS failed to make active efforts to reunify father with children during last two years of period preceding termination of parental rights proceeding. Reversed and remanded.

28. ***Brackeen v. Haaland*, F.3d, 2021 WL 1263721 (5th Cir. Apr 06, 2021)(en banc)**
Foster and adoptive parents and states of Texas, Louisiana, and Indiana brought action against United States, United States Department of the Interior and its Secretary, Bureau of Indian Affairs (BIA) and its Director, BIA Principal Assistant Secretary for Indian Affairs, Department of Health and Human Services (HHS) and its Secretary for declaration that Indian Child Welfare Act (ICWA) was unconstitutional. Several tribes intervened as defendants. The United States District Court for the Northern District of Texas, Reed O'Connor, J., 338 F.Supp.3d 514, partially granted plaintiffs' motions for summary judgment. Defendants appealed. The Court of Appeals, 937 F.3d 406, affirmed. Rehearing en banc was granted. The Court of Appeals held that: 1) ongoing injury of increased regulatory burdens satisfied injury-in-fact requirement for standing; 2) causation and redressability requirements were satisfied; 3) States challenging Department of Interior rule on placement preferences of Indian Child Welfare Act (ICWA) were entitled to special solicitude in standing inquiry; 4) Congress had authority under Indian Commerce Clause to provide minimum protections for Indian children and families in child custody proceedings under ICWA; 5) ICWA provisions regarding placement preferences are invalid, and active-efforts provision, expert witness requirements, and recordkeeping requirements commandeered state actors in violation of Tenth Amendment; 6) ICWA "Indian child" classification did not violate equal protection; and 7) administrative rules implementing ICWA did not violate

Administrative Procedure Act (APA) except as to those implementing unconstitutional provisions. Affirmed in part and reversed in part.

29. ***Kari M. v. Department of Child Safety, B.M., Muscogee Creek Nation*, 2021 WL 1696849 (Ariz. Ct. App. Apr 29, 2021).**
Kari M. appeals the juvenile court's order granting guardianship of her son, B.M., to his grandparents. Mother has disabilities affecting her cognitive functioning, judgment, speech, and balance; she is considered a vulnerable adult by Adult Protective Services and has night blindness. B.M. is an Indian child under the Indian Child Welfare Act ("ICWA"). After B.M.'s birth, Mother and B.M. resided with the boy's maternal grandparents for six years, and Grandparents assisted with B.M.'s care during that time. In November 2016, Mother moved into an assisted-living home with B.M. and allowed the in-home providers to babysit B.M., which caused him to be fearful. Law enforcement eventually investigated, and Mother and B.M. moved back in with Grandparents. When Mother moved out again around April 2017, Grandparents obtained temporary sole legal decision-making for B.M. through the family court. In December 2017, B.M.'s best-interests attorney in the family court matter filed a dependency petition in the juvenile court alleging Mother was unable to independently care for B.M. Shortly after the Department of Child Safety filed an amended guardianship motion that included the required ICWA allegations, the juvenile court dismissed the dependency and appointed Grandparents as B.M.'s permanent guardians. The court's order made the findings required under both ICWA and state law but did not identify the burden of proof the court applied. Mother timely appealed. The record raises serious doubt whether the juvenile court held DCS to the correct burden—proof beyond a reasonable doubt—when it ruled DCS had established the requirements for a guardianship. The parties' reiterations of the incorrect burden and the juvenile court's failure to express the correct burden at trial or in its initial order make it impossible to conclude the result of the guardianship proceeding complied with the law. Although the order contains the legal conclusions required for a guardianship, it does not rectify any previous error on the burden of proof. Due process ensures the movant is held to the proper burden of proof in the first instance. We vacate the guardianship order and remand to the juvenile court so it may determine whether DCS satisfied its burden to prove beyond a reasonable doubt the elements required under A.R.S. § 8-871(A), § 8-872(G), and ICWA, and if not, for further proceedings consistent with this decision.

30. ***Department of Human Services v. H.C.W.*, P.3d, 311 Or. App. 102, 2021 WL 1774500, (Or. Ct. App. May 5, 2021).**
In juvenile dependency case, the Circuit Court, Josephine County, Sarah E. McGlaughlin, J., entered order finding that child was not an Indian child and thus that the Indian Child Welfare Act (ICWA) did not apply. Mother appealed. The Court of Appeals, Lagesen, J., held that child was an Indian child, and thus ICWA applied to proceeding. Reversed and remanded. On Appeal; Neglect and Dependency Petition.

31. ***The People of the State of Colorado v. K.C. and L.C.*, P.3d 2021 CO33, 2021 WL 2069727 (Colo. May 24, 2021).**

This is a termination of parental rights proceeding involving two children who are eligible for enrollment as members of the Chickasaw Nation ("the Nation") but who are not Indian children, as defined by the Indian Child Welfare Act ("ICWA"), 25 U.S.C. § 1903(4) (2018). The court of appeals division below reversed a district court order terminating mother D.C.'s ("mother's") parental rights and ordered the district court on remand to conduct an enrollment hearing to determine whether the children's best interests mandate enrollment as citizens of the Nation. The Logan County Department of Human Services (the "Department") then petitioned for certiorari, the guardian ad litem ("GAL") cross-petitioned, and we granted those petitions. In their petitions, the parties asked us to address whether (1) ICWA requires a district court to hold an enrollment hearing in circumstances like those present here as a prerequisite to the termination of parental rights; (2) a district court can order the Department to enroll children over a parent's objection; and (3) the division below erred in reversing the district court's judgment rather than ordering a limited remand. All of the parties before us, and the Nation itself, agree that the division erred in requiring an enrollment hearing. Because we perceive no statutory basis for such a hearing, and because such a hearing conflicts with the Nation's exclusive right to determine who is an enrolled citizen, we agree that the division erred in requiring such a hearing. With respect to the second issue presented, we note that neither parent objected to the children's enrollment. Accordingly, the issue as presented in the petition for certiorari is not properly before us. In their briefs, however, the parties appear to construe the question presented more broadly, namely, as asking us to decide whether the Department has an obligation to assist children who are eligible for enrollment in becoming enrolled citizens of a tribal nation. Although the issue is an important one and may call for legislative action, we conclude that under current law, the Department has no such obligation. In certain circumstances, however, it might well be the better practice for the Department to advise on and perhaps assist with the enrollment process. For these reasons, we reverse the judgment of the division below and need not reach the issue of whether a limited remand would have been appropriate. Accordingly, we conclude that the Department is under no legal obligation to enroll (or to assist in enrolling) an eligible child in a nation prior to the termination of parental rights. That said, we hasten to add that we in no way intend to foreclose a human services department from providing such assistance or from advising respondent parents as to the ramifications (and potential benefits) of their children's enrollment in a tribal nation. Indeed, in a given case, it might well be the best practice to do so. See 2016 Guidelines, at 22 ("It is thus a recommended practice for the social worker (or party seeking placement in a voluntary adoption) to facilitate the child becoming a member, such as by assisting with the filing of a Tribal membership application or otherwise.").We need not attempt to elucidate here, however, what might be best practices in a given case. For present purposes, it suffices for us to note that nothing in this opinion should be read to prohibit the Department from, as appropriate, assisting respondent parents in enrolling their eligible children in a tribal nation. In light of our foregoing disposition, we need not consider whether the division should have ordered a limited remand in this case. For these reasons, we conclude that ICWA does not require the district court to hold a tribal enrollment hearing to determine whether it is in the children's best interest to become Indian children, as a prerequisite to the termination of parental rights. We further conclude that neither federal nor Colorado law obligates the Department to assist with or

facilitate the children's enrollment in a tribal nation, although in a given case, it might be the better practice for the Department to do so. Accordingly, we reverse the judgment of the division below and reinstate the judgment of the district court terminating the parent-child legal relationships.

32. ***Interest of Z.K.*** **2021 WL 2453102 (Iowa Ct. App. June 16, 2021).**
The mother and the father separately appeal the termination of their parental rights to Z.K., born in November 2016. The juvenile court adjudicated Z.K. a child in need of assistance (CINA) on February 2, 2020. A termination hearing was held November 18 and December 3. The court issued the termination order on February 25, 2021. The juvenile court determined the Indian Child Welfare Act (ICWA) does not apply to this proceeding because the record does not show the child is an Indian child under ICWA. There is no dispute that no tribe claimed the child or the parents as members of its community at the time of the termination hearing. Consistent with the court's duty to identify ICWA issues "at the commencement of the proceeding," the State filed a motion to determine the applicability of ICWA at the same time it filed a motion for CINA adjudication, and notices were mailed to the relevant authorities. See id. § 23.107(a). An October 2, 2019, letter from the Standing Rock Sioux Tribe and an October 21, 2019, letter from the Oglala Sioux Tribe both state the child is not a member of the respective tribe and is not eligible for enrollment. These letters confirmed the child is not an "Indian child." See id. § 23.107(b)(1). Nevertheless, the ICWA director for the Oglala Sioux Tribe testified at the termination hearing, stating he believed the child was eligible for enrollment with the Tribe based on the mother's ancestry and the Tribe intended to intervene in the proceeding. The ICWA director's testimony on the eve of termination is simply not enough to overcome the specific written statements from the tribes already in the record. We agree with the district court that the record available at the time of the termination hearing does not establish the child is an "Indian child." See Iowa Code § 232B.3(6). Therefore, ICWA does not apply to this proceeding. We note our decision does not preclude a tribe from intervening in the child's future placement. Therefore, we affirm the termination of both parents' parental rights.

33. ***Matter of I.T.S.*****, P.3d. 2021 OK 38. 2021 WL 2547931 (Okla. June 22, 2021).**
State petitioned to terminate mother's parental rights for failure to correct conditions which led to prior adjudication of deprived children. The trial court entered judgment, upon jury verdict, terminating mother's parental rights. Mother appealed. The Court of Civil Appeals, Powers, J., affirmed. Mother petitioned for certiorari, which was granted. The Supreme Court, Rowe, J., held that: 1 as a matter of first impression, federal Indian Child Welfare Act (ICWA) required court-appointed counsel for the parent at all stages of the deprived child proceeding, including period between the conclusion of the disposition hearing and the filing of the petition to terminate parental rights, and 2 termination of parental rights was required to be vacated.

34. ***In the Matter of Dependency of G.J.A.*****, P.3d, 2021 WL 2584117 (Wash. June 24, 2021).**
Department of Children, Youth, and Families filed termination petitions for five children, all of whom were affiliated with Blackfeet Nation and were Indian children for the

purposes of the Indian Child Welfare Act (ICWA) and the Washington State Indian Child Welfare Act (WICWA). Following hearing, the Superior Court, Spokane County, Michelle Szambelan, J., determined that the Department had engaged in active efforts to prevent the breakup of the Indian family as required by ICWA and WICWA. Children's mother appealed. Mother moved to modify ruling and for discretionary review. The Supreme Court granted motion. The Supreme Court, Montoya-Lewis, J., held that: 1 Department failed to provide active efforts to prevent breakup of mother and children, as required by ICWA and WICWA, abrogating Matter of D.J.S., 456 P.3d 820; 2 the futility doctrine does not apply to cases governed by ICWA and WICWA; 3 under ICWA and WICWA, the Department bears the burden to demonstrate active efforts to prevent the breakup of an Indian family, and the dependency court has the responsibility to evaluate those efforts at every dependency proceeding where the child is placed out of the home; 4 dependency court failed to competently evaluate Department's provision of active efforts to prevent breakup of mother and children and improperly applied futility doctrine; 5 WICWA provided independent basis to conclude that dependency court failed to properly evaluate Department's provision of active efforts; and 6 remand so that dependency court could order Department to provide active efforts and give mother additional time to complete services was proper remedy. Reversed and remanded.

35. ***People in Interest of C.H.*, N.W. 2d, 2021 S.D. 41, 2021 WL 2961481 (S.D. July 14, 2021).**

Background: Department of Social Services (DSS), after filing an abuse and neglect petition, sought termination of mother's parental rights to child, who was eligible for enrollment in the Lower Brule Sioux Tribe. The Circuit Court, Third Judicial Circuit, Beadle County, Jon R. Erickson, J., entered an order terminating mother's parental rights to child. Mother, an enrolled member of the Lower Brule Sioux Tribe, appealed.
Holdings: The Supreme Court, DeVaney, J., held that: 1 DSS failed to provide active efforts to prevent the breakup of the Indian family, as required under the Indian Child Welfare Act (ICWA) to terminate mother's parental rights to child; 2 trial court was statutorily required appoint counsel for child, who was alleged to have been abused or neglected, in termination-of-parental-rights proceeding; and 3 clear and convincing evidence failed to support trial court's determination that termination of mother's parental rights to child was the least restrictive alternative commensurate with child's best interests under state law. Reversed and remanded.

36. ***State ex rel. Children, Youth & Families Department v. Ruben C.*, 2021 WL 3240372 (N.M. Ct. App. July 29, 2021).**

Ruben C. (Father) and Maisie Y. (Mother) are the parents of Jupiter C., Jayden C., Jovian C., and Jaizie C. (collectively, Children). Children are eligible for enrollment with Father's tribe, the Choctaw Nation (the Nation), and are thus Indian children for purposes of the Indian Child Welfare Act of 1978 (ICWA).1 {2} Upon petition by the Children, Youth and Families Department (CYFD), Children were adjudicated abused and neglected by Father and Mother. CYFD thereafter moved to terminate Father and Mother's parental rights. At the conclusion of concurrent termination of parental rights (TPR) trials, the district court terminated both Father and Mother's parental rights to Children. {3} On appeal, both parents separately challenged the district court's

application of ICWA. We addressed Mother's appeal in State ex rel. Children, Youth & Families Department v. Maisie Y., 2021-NMCA-023, 489 P.3d 964. Although this Court reversed and remanded Mother's case for a new TPR trial on other grounds, we clarified New Mexico law regarding standards of proof in termination of parental rights cases subject to ICWA. In light of our holdings in Maisie Y., this appeal presents a number of novel issues including: (1) whether the presumption of retroactivity in civil cases applies to cases under the Abuse and Neglect Act (ANA) and if so, whether that presumption has been overcome here; (2) whether an exception to the requirement that issues be adequately preserved for review applies to the issues presented in Father's appeal; (3) whether our holdings in Maisie Y. require us to reverse the termination of Father's parental rights, despite Father's failure to preserve these claims of error; and finally, (4) if reversal is required, what remedy is appropriate on remand. {5} For the reasons discussed below, we conclude that (1) the presumption of retroactivity in civil cases applies to cases under the ANA, and that the presumption is not overcome in this instance; (2) the nature of the fundamental rights at stake in this case, viewed in the context of ICWA, compel us to exercise our discretion to review Father's claims despite his failure to preserve the claims of error; (3) Maisie Y. requires reversal; and (4) the district court must hold a new TPR trial on remand.*2. At the conclusion of the TPR trials, the district court issued its findings of fact and conclusions of law, and ordered Father and Mother's parental rights terminated in September 2019. Father and Mother both appealed the termination of their parental rights. {12} As stated, we resolved Mother's appeal earlier this year in Maisie Y., 2021-NMCA-023, 489 P.3d 964. Father raises two arguments on appeal. First, Father argues that the district court refused to apply the appropriate burden of proof under ICWA to terminate his parental rights. Second, Father argues that because CYFD failed to provide him a reasonable accommodation under the Americans with Disabilities Act (ADA), it did not meet ICWA's active efforts requirement. Based on the importance of the especially significant interests at stake for children and parents in cases involving the ANA, as well as the need to eliminate disparate outcomes in such cases simply by virtue of the position of a case on our judicial docket, we hold that the presumption of retroactivity in ordinary civil cases also applies to abuse and neglect cases. Lastly, the facts of this case further support application of the fundamental rights exception in this instance. The termination of parental rights to Children presents a unique situation in which both Mother and Father had their rights terminated after concurrent TPR trials, but raised different issues on appeal. Having decided Mother's case first, were we to not apply those holdings to Father's case, we would be left with a fundamentally unfair outcome—that is, the standards of proof applied on remand to Mother's case would be higher than those applied to Father's case here on appeal. Such a disparate outcome is untenable. Considering the interests at stake, including Father's fundamental right to parent Children and the remedial character of ICWA; the nature of the error here; and the inequity that would result in this case were we not to apply an exception to our appellate rules governing preservation of issues, we exercise our discretion to review Father's appeal. For the foregoing reasons, the district court's order terminating Father's parental rights is reversed, and we remand the case to the district court for a new TPR trial in which the standards of proof set forth in Maisie Y. are to be applied.

***37. Matter of N.T.*, 2021 NCCOA 412, 2021 WL 3354987 (N.C. Ct. App. August 3, 2021).**

Respondents appeal the trial court's permanency planning order awarding guardianship of Nate, Kennedy, and Ava1 to Nate's paternal grandparents and ceasing reunification efforts with Respondents. Respondent-Father argues that the trial court failed to fulfill its duties under the Indian Child Welfare Act with respect to Nate because, despite information in the record indicating that Father reported Cherokee heritage in his family, the trial court did not take any action to address whether Nate qualified as an "Indian child" under the Act. Following a July 2020 permanency planning hearing, the trial court entered an order in August 2020 awarding guardianship of all three children to Nate's paternal grandparents, ceasing reunification efforts with Respondents, eliminating reunification as a secondary plan, and waiving further scheduled review hearings. Father first argues that the trial court erred by failing to fulfill its statutory duties under the Indian Child Welfare Act as to Nate. Father contends that, because the record unequivocally indicates that he informed DSS and the trial court of possible Cherokee heritage in his family, the trial court was required to conduct an inquiry into whether Nate qualifies as an "Indian child" under the Act before proceeding with guardianship. We are constrained by precedent to accept this argument, vacate the trial court's order, and remand for further proceedings. The issue of whether a trial court complied with the requirements of the Indian Child Welfare Act is reviewed de novo. For the reasons explained above, we vacate the trial court's permanency planning order and remand for further proceedings consistent with this opinion.

38. ***Matter of A.L.*, S. E. 2d, 2021 NCSC 92, 2021 WL 38223683 (N.C. August 27, 2021).** Respondent appeals from an order terminating her parental rights in A.L. (Arden). Respondent does not challenge the trial court's determination that it was in Arden's best interests that respondent's parental rights be terminated. However. Respondent contends the trial court erred in failing to comply with its statutory duties under the Indian Child Welfare Act (ICWA). ¶ 26 We recently addressed an argument to this effect in In re M.L.B., 2021-NCSC-51, 377 N.C. 335, 857 S.E.2d 101. This Court recognized that for all child custody proceedings occurring after 12 December 2016, the ICWA imposes a duty on the trial court to "ask each participant ... whether the participant knows or has reason to know that the child is an Indian child. In this matter, as in In re M.L.B., nothing in the record reflects the trial court making this inquiry or the participants' responses. Therefore, the trial court did not comply with 25 C.F.R. § 23.107(a). Because the trial court did not comply with 25 C.F.R. § 23.107(a), the trial court could not comply with other requirements in the ICWA and could not determine whether the trial court had reason to know Arden is an Indian child. DSS and the Guardian ad Litem argue that the ICWA does not apply in this case as the ICWA addresses federally recognized tribes of which the Lumbee tribe in Robeson County is not. We disagree in part. The ICWA imposes a duty on the trial court to inquire of participants as set forth in 25 C.F.R. § 23.107(a) in all child-custody cases, but whether the other provisions of the ICWA apply are triggered by whether the trial court has reason to know that the child is an Indian child as defined in the ICWA. See 25 C.F.R. § 23.107. The ICWA defines Indian child to only include those eligible for membership in a tribe recognized for services by the Secretary of the Bureau of Indian Affairs of the United States. 25 U.S.C. § 1903(4), (8). DSS and the Guardian ad Litem are correct that the Lumbee tribe is not a tribe recognized for services by the Secretary of the Bureau of Indian Affairs of the United States. Thus,

the trial court's non-compliance with 25 C.F.R. § 23.107(a) would not be prejudicial if Arden is only eligible for membership in the Lumbee tribe, which is a state-recognized but not a federally recognized tribe. ¶ 28 As the determination of whether there is reason to know that Arden is an Indian child cannot be made on the record before us, we remand to the trial court. On remand the trial court "must ask each participant ... whether the participant knows or has reason to know that [Arden] is an Indian child" on the record and receive the participants' response on the record. See 25 C.F.R. § 23.107(a). If there is reason to know that Arden is an Indian child, the trial court must comply with 25 C.F.R. § 23.107(b) and conduct a new hearing on termination of respondent's parental rights. DSS must also comply with 25 U.S.C. § 1912(a) and 25 C.F.R. § 23.111(d) as the party seeking termination of parental rights. If there is not a reason to know that Arden is an Indian child, such as if Arden is only eligible for membership in the Lumbee tribe, then the trial court should enter an order to this effect and the termination of respondent's parental rights order to Arden signed February 25, 2020, remains undisturbed. *6 ¶ 29 Accordingly, while we reject respondent's challenge to the termination-of-parental-rights order as the findings of fact support the conclusion of law that a ground for termination of parental rights exist, we hold that this case, given the inadequacy in the record, should be remanded to the trial court for compliance with the ICWA. Affirmed in part and remanded.

C. *Contracting*

39. San Carlos Apache Tribe v. Azar, F.Supp.3d, 2020 WL 5111109 (D. Ariz. Aug 31, 2020).

Tribe could not recover contract support costs for expenditure of third-party revenue under Indian Self-Determination and Education Assistance Act. Apache Tribe filed suit against United States Department of Health and Human Services (DHHS), Secretary of DHHS, Indian Health Service (IHS), the IHS principal deputy director, and the United States, alleging, inter alia, that the Secretary violated the Indian Self-Determination and Education Assistance Act (ISDEAA), by failing to pay the Tribe indirect contract support costs (CSC) associated with the income it received from third-party payors such as Medicare and Medicaid. Defendants moved to dismiss the claim. The District Court, Neil V. Wake, Senior District Judge, held that provisions of ISDEAA generally entitling Tribe to receive CSC funding on expenditures of funds received under contracts with IHS did not entitle Tribe to receive CSC funds associated with third-party revenue. Motion granted.

40. Afraid v. United States, 2020 WL 6947716 (D. Mont. Sep 08, 2020).

Plaintiffs Leroy Not Afraid and Ginger Goes Ahead filed this action against the United States of America, and Louise Zokan-Delos Reyes and Jo-Ellen Cree, alleging various causes of action relating to their termination from the Tribal Court of the Crow Tribe of Indians in late 2018. For the following reasons, the Court recommends the United States' motion be Granted, and the Individual Defendants' motion be Granted with respect to Count I of the Amended Complaint. Pursuant to the Indian Self-Determination and Education Assistance Act ("ISDEAA"), the Crow Tribe entered into a "638" or "self-

determination" contract ("Contract") with the Department of Interior ("DOI"), Bureau of Indian Affairs ("BIA"), effective October 1, 2011. At issue here is the review for fiscal year 2017. After the Individual Defendants completed their review, they compiled the Awarding Official's Technical Representative Report. In forwarding the Report, LaCounte summarized the non-compliance with the Contract, as well as with Crow Tribe Personnel Policies and Procedures, relating to deficiencies in hiring, payroll, salaries, and work environment. Plaintiffs allege that BIA officials subsequently instructed the Chairman to terminate Plaintiffs, threatening the loss of the Contract if the terminations did not occur. The Ethics Board recommended Plaintiffs removal. The Crow Tribal Legislature accepted the recommendation, and Plaintiffs were terminated from their positions with the Crow Tribal Court. The Court recommends dismissal of Counts II - VIII against the United States for lack of subject matter jurisdiction under the FTCA's intentional torts exception. The Court also finds that Plaintiffs claims against the United States fail under the FTCA's discretionary function exception. As to the first step, the United States argues that as representatives of the DOI, the Individual Defendants' duties in carrying out the annual audit necessarily involved substantial discretion and professional judgment or choice. Plaintiffs do not raise an argument that any law or policy exists that would render the Individual Defendants' conduct non-discretionary. Thus, the Court finds the first prong of the discretionary function exception is met. With respect to the second step, the United States argues that because the Individual Defendants' duties required them to "assess whether government funds were being used and accounted for in compliance with federal regulations and the terms of the contract," the review necessarily involved considerations of public and economic policy and are thus protected by the discretionary function exception. The Individual Defendants move to dismiss Plaintiffs' Bivens claim in Count I of the Amended Complaint. Plaintiffs allege the Individual Defendants violated Plaintiffs' constitutional rights under the First Amendment, as well as deprived them of their property interest in employment and procedural due process under the Fifth Amendment. Specifically, Plaintiffs claim the Individual Defendants retaliated against them for raising a question as to whether the BIA was failing to protect Crow children and prisoners—an expression of Free Speech. However, subjecting auditors of those programs to personal liability suits may well have a chilling effect on their willingness or ability to candidly assess a tribe's performance of the contracts. In addition, the Supreme Court also emphasized that there are many economic and governmental concerns to consider in determining whether to extend a Biven's remedy. Abbasi, 137 S.Ct. at 1856. The Court made clear that the "decision to recognize a damages remedy requires an assessment of its impact on governmental operations systemwide." Id. at 1858. These concerns are particularly applicable here. The time and costs to the government and individual employees who administer those contracts in defense and indemnification of claims by tribal employees would undoubtedly be burdensome. Finally, it should be noted that Congress did not provide an individual remedy under ISDEAA. In this case, Congress established a comprehensive legislative scheme for the creation and implementation of tribal programs for services previously performed by the federal government. As part of the legislation, Congress provided for a civil action for damages or injunctive relief by Indian Tribes or tribal organizations against the Secretary of the Interior based on any action by an officer or employee of the United States or any agency thereof. 25 U.S.C. § 5331; see also

Demontiney v. U.S. ex rel. Dept of Interior, Bureau of Indian Affairs, 255 F.3d 801, 805 (9th Cir. 2001). But Congress did not similarly find it appropriate to establish a remedy for employees of tribes or tribal organizations based on the actions of officers and employees of the United States. Allowing a Bivens remedy here would make the remedy available for similar claims by any tribal employee operating under a self-determination contract who disagrees with findings from a federal audit. ISDEAA does not contain any language suggesting a private remedy for employees of tribes or tribal organizations for alleged wrongful conduct. Therefore, the Court finds that, even when viewing the allegations in the light most favorable to Plaintiffs, special factors counsel against expanding Bivens here. Therefore, IT IS Recommended that the United States' Motion to Dismiss should be Granted, and the Individual Defendants' Motion to Dismiss should be Granted as to Count I.

41. ***Jamestown S'Klallam Tribe v. Azar,*** **F.Supp.3d, 2020 WL 5505156 (D.D.C. Sep 11, 2020).**
Native American tribe was not entitled to unreasonable amount of lease compensation. Native American tribe brought action challenging Indian Health Service's (IHS) rejection of tribe's reimbursement request related to health facility whose patients were majority non-Native Americans alleging Indian Self-Determination and Education Assistance Act (ISDEAA) entitled tribe to compensation for certain costs such as including depreciation, interest, and maintenance associated with use of entire facility. Parties filed cross-motions for summary judgment. The District Court, James E. Boasberg, J., held that tribe was not entitled to unreasonable amount of lease compensation. Government's motion granted.

42. ***Grondal v. United States,*** **F.Supp.3d, 2021 WL 183408 (E.D. Wash. Jan 19, 2021).**
Members of recreational-vehicle resort brought action against United States, lessee of land on which resort was located, and American Indian tribe, alleging that United States held land in trust for benefit of certain individuals, that authority to administer land was delegated to Bureau of Indian Affairs, that Bureau leased land to lessee for 25 years, that lessee sublet portion of land to Indian tribe, and that tribe opened casino on land. Lessee crossclaimed against United States and tribe for declaratory relief, ejectment and/or wrongful detainer, overpayment under master lease, underpayment under casino sublease, and partition, and sought attorney fees and costs. United States moved to dismiss crossclaims, tribe moved to dismiss crossclaims, and lessee moved for transfer or for partial summary judgment on crossclaims. The District Court, Rosanna Malouf Peterson, J., held that: 1) casino corporation's waiver of tribal sovereign immunity in casino sublease between corporation and lessee did not waive tribe's sovereign immunity; 2) tribe's participation in litigation concerning lease of land was not sufficiently clear litigation conduct constituting waiver of tribe's sovereign immunity; 3) United States Court of Federal Claims could not have exercised jurisdiction over lessee's claim for overpayments, framed as breach-of-contract issue, at time action was filed, and thus claim could not be transferred to that Court to cure want of jurisdiction; 4) lessee failed to provide relevant substantive law which imposed specific fiduciary duty on United States to ensure accurate payments under lease agreement, as required to state litigable breach of trust claim against United States under Indian Tucker Act; 5) statute conferring on

district court jurisdiction over civil actions involving person "in whole or in part of Indian blood or descent" did not apply; 6) Little Tucker Act did not grant district court subject-matter jurisdiction over lessee's claims; and 7) lessee failed to assert independent basis for jurisdiction and failed to state cognizable claim for relief, and thus was not entitled to declaration that replacement lease between Bureau and other lessees was void ab initio because of lessee's exclusion from acceptance process. Motions to dismiss granted; motion for transfer or partial summary judgment denied.

***43. Welter v. United States,* 2021 WL 963567 (D.S.D. Mar 15, 2021).**

Defendant United States of America filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1). Plaintiff's complaint centers around the collision between plaintiff's bicycle and an automobile being driven by Jennifer Her Many Horses on August 8, 2019. As a result of the collision, plaintiff alleges she was seriously injured and seeks money damages from the United States under the Federal Tort Claims Act, 28 U.S.C. § 2671 et. seq. ("FTCA"). The government seeks dismissal because Ms. Her Many Horses was "not a federal employee." Instead, the government asserts she was "the Nutrition Manager of the OLC [Oglala Lakota College] Head Start Program." In that capacity, the government contends Ms. "Her Many Horses was not carrying out a function authorized by a BIA 638 contract." Ms. Stevens is the "Self-Determination Officer/Advisor for the Great Plains Regional Office of the Bureau of Indian Affairs ("BIA")." In her capacity with the BIA, Ms. Stevens' declaration included copies of the three 638 contracts which the BIA has with OLC. In light of these contracts, Ms. Stevens concludes that "[t]he OLC Head Start Program does not fall within the scope of any of the BIA's 638 contracts with OLC." The government submits that "a tribal employee must be acting within the scope of their employment and carrying out functions authorized in or under a 638 contract to be considered a federal employee for FTCA purposes." The plaintiff contends Ms. Her Many Horses was driving "an Oglala Lakota College ... vehicle" as an "Oglala Lakota College/Oglala Lakota College Head Start Program employee[.]" The uncontested facts are that Ms. Her Many Horses was an employee of the OLC Head Start Program, which was administered through the HHS Office of Head Start. Plaintiff points to no language in any of the three 638 contracts between the United States and OLC which would provide a basis to find that Ms. Her Many Horses was an employee covered by or acting within those contracts and thus a federal employee for FTCA purposes. Defendant's motion to dismiss is granted.

***44. Mendenhall v. United States*, 2021 WL 1032276 (D. Alaska Mar 17, 2021).**

Before the Court is Defendant United States' Motion to Dismiss. Plaintiff initiated this action in state court, alleging that he was assaulted and battered by John Ireton, a security guard employed by the Alaska Native Tribal Health Consortium ("ANTHC"). Pursuant to the Federal Tort Claims Act ("FTCA"), Defendant United States removed the action to federal court and substituted itself as the defendant. Defendant contends that Mr. Ireton, an employee of ANTHC, was acting within the scope of his employment at the time of the incident and, therefore, he is "deemed" a federal employee for FTCA purposes pursuant to the ISDEAA. According to Defendant, the Court lacks subject matter jurisdiction because Plaintiff did not exhaust his administrative remedies as required by the FTCA and, alternatively, because there is no relevant waiver of sovereign immunity

pursuant to the intentional torts exception. When removing this civil action from state to federal court, the U.S. Attorney certified that Mr. Ireton "was acting within the scope of his office or employment." That certification "is prima facie evidence that [Mr. Ireton] was acting in the scope of [his] employment at the time of the incident." The Court will address the relevant factors under Alaska law to determine whether Plaintiff has proven by a preponderance of the evidence that Mr. Ireton was not acting within the scope of his employment at the time of the incident. Mr. Ireton's alleged actions during the incident appear consistent with the type of work he was hired to perform. The Court finds that Plaintiff has not disproven the U.S. Attorney's scope of employment certification by a preponderance of the evidence. Mr. Ireton is therefore "deemed" a federal employee for FTCA purposes pursuant to the ISDEAA. Accordingly, the FTCA is Plaintiff's exclusive remedy. Because the FTCA applies here, Plaintiff must have exhausted his administrative remedies before pursuing this claim in federal court. The Court finds that Plaintiff did not exhaust his administrative remedies and therefore lacks subject matter jurisdiction over Plaintiff's claims. Defendant's Motion to Dismiss is Granted.

***45.* S*winomish Indian Tribal Community v. Becerra,* F.3d, 2021 WL 1376986 (D.C. Cir. Apr 13, 2021).**

ISDEAA did not require Indian Health Service (IHS) to pay tribe for contract support costs on money it received from sources other than IHS. Indian tribe brought action against Indian Health Service (IHS) under Contract Disputes Act and Declaratory Judgment Act to recover direct and indirect contract support costs under Indian Self Determination and Education Assistance Act (ISDEAA). The United States District Court for the District of Columbia, Dabney L. Friedrich, J., 406 F.Supp.3d 18, entered summary judgment in IHS's favor, and tribe appealed. The Court of Appeals, Walker, Circuit Judge, held that ISDEAA did not require IHS to pay tribe for contract support costs on money it received from sources other than IHS. Affirmed.

***46. Mohawk Gaming Enterprises, LLC v. Affiliated FM Insurance Co.*, F.Supp.3d, 2021 WL 1419782 (N.D.N.Y. Apr 15, 2021).**

This is a contract dispute between plaintiff Mohawk Gaming Enterprises, LLC and defendant Affiliated FM Insurance Company over coverage for loss caused by a business interruption at the Akwesasne Mohawk Casino Resort. In early March of 2020, the Saint Regis Mohawk Tribe closed the Casino to the public following news of a COVID-19 exposure incident at St. Lawrence College, which is located just a few miles away. Thereafter, Mohawk Gaming sought coverage for the business interruption from Affiliated FM under the terms of an insurance contract in effect at the time of the closure order. However, as the policy's deadline for the investigation and settlement of the claim neared, plaintiff came to believe that defendant planned to deny coverage, in bad faith and otherwise. On June 23, 2021, Mohawk Gaming filed this four-count complaint alleging claims for declaratory judgment, breach of contract, a violation of New York General Business Law § 349, and fraud. Upon review of the relevant Policy language, Affiliated FM's motion for a judgment on the pleadings must be granted. Mohawk Gaming's claim for coverage under the Policy is grounded in the Civil Authority provision. Thus, the initial burden is on plaintiff to allege facts that would plausibly establish that the business interruption it suffered is "the direct result of physical damage

of the type insured," either at the Casino or perhaps at the nearby College, which is within the five-mile radius contemplated by the Policy. To that end, Mohawk Gaming alleged that the Tribe issued the closure order to prevent the spread of the novel coronavirus after it was detected at the nearby College in Kingston, Ontario. However, as other courts have explained, the inclusion of the modifier "physical" in a phrase such as "direct result of physical damage" clearly imposes a requirement that the damage actually be tangible in nature; i.e., this language unambiguously requires some form of physical harm to the location (or to a location within five miles). Mohawk Gaming has only alleged "actual not suspected" exposure at the College, not at the Casino or at another "described location" listed as insured under the Policy. In short, Mohawk Gaming has failed to plausibly allege an entitlement to coverage under the provisions of the Policy identified in the complaint. Therefore, it is Ordered that Defendant Affiliated FM Insurance Company's cross-motion for judgment on the pleadings is Granted.

***47. Paul Grondal v. United States*, 2021 WL 2069727 (E.D. Wash. May 17, 2021).**
A bench trial was held in the above-captioned case on March 30–31, 2021, via videoconferencing pursuant to the parties' stipulation and consent to the same. On July 9, 2020, the Court granted the Federal Defendants' motion for summary judgment which sought to eject Plaintiffs Paul Grondal and Mill Bay Members Association, Inc., from property known as MA-8, and an award of damages for Plaintiffs' occupation of MA-8. See 25 C.F.R. § 162.023 ("If an individual or entity takes possession of, or uses, Indian land without a lease and a lease is required, the unauthorized use is a trespass."). The Court expressly found that "Plaintiffs have had no right to occupy any portion of MA-8 after February 2, 2009." This dispute concerns Moses Allotment No. 8 ("MA-8"), which is fractionated allotment land near the banks of Lake Chelan in Washington State, held in trust by the United States Government for individual Indian allottee landowners and the Confederated Tribes of the Colville Reservation (the "Tribes"). Plaintiffs and Counterclaim Defendants in this case are Paul Grondal and Mill Bay Members Association, Inc. (collectively "Mill Bay") who are non-Indians who purchased, or represent a group of individuals who purchased, camping memberships to use 23.52 acres of MA-8 for recreational purposes. These memberships were represented to be effective through 2034. Plaintiffs purchased these camping memberships from companies owned or controlled by William Evans Jr. ("Evans"), who was an Indian allottee landowner holding a beneficial ownership interest in MA-8. Evans had leased MA-8 from the other individual Indian allottee landowners who held a beneficial ownership interest in MA-8 in accordance with federal regulations in 1984 (the "Master Lease"). The Master Lease granted use of MA-8 to Evans for a period of twenty-five years, beginning in 1984 and ending on February 2, 2009. The Master Lease had an initial twenty five-year term with an option to renew for another twenty-five years. If renewed, the Master Lease would have extended to 2034. However, the "option to renew the Lease was not effectively exercised by Evans, or later by Wapato, and [ ] the Lease terminated upon the last day of its 25-year term." Wapato Heritage, L.L.C. v. United States, 637 F.3d 1033, 1040 (9th Cir. 2011). Thus, the Master Lease expired on February 2, 2009. The Court does not find that the award of trespass damages should be reduced under the doctrines of offset or recoupment based on payments made to Wapato Heritage. The Court finds it inappropriate to apply an equitable doctrine, such as offset or recoupment, to reduce

trespass damages where the monies at issue were tendered under a separate contractual relationship and the payments or a percentage portion of those payments were not paid to the individual allottee landowners. However, nothing in this Order shall prohibit Mill Bay from seeking recourse from Wapato Heritage in a separate action. The Court also concludes that the damages awarded to the Federal Defendants should not be offset by 23.8 percent representing Wapato Heritage's life estate interest. Accordingly, it is hereby ordered: Judgment shall be entered in favor of the United States and against Plaintiffs Paul Grondal and Mill Bay Members Association, Inc., severally liable, in the amount of $1,411,702.00 with post-judgment interest running from the date of the entry of judgment until paid, and set at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment pursuant to 28 U.S.C. § 1961(a).

48. ***Paskenta Band of Nomlaki Indians v. Cornerstone Community Bank*, Fed. Appx. 2021 2623419 (9th Cir. June 25, 2021).**
These two appeals involve disputes over the district court's award of attorneys' fees and costs. We have jurisdiction under 28 U.S.C. § 1291, and review de novo whether an "application for attorneys' fees was proper under state law and the contractual provisions." By filing a complaint seeking attorneys' fees, Paskenta expressly waived sovereign immunity with respect to that issue, and also consented to the court's authority to consider Cornerstone's and Umpqua's motions for attorneys' fees. See Confederated Tribes of the Colville Rsrv. Tribal Credit v. White (In re White), 139 F.3d 1268, 1271 (9th Cir. 1998). 3. Award of Attorneys' Fees to Cornerstone The unambiguous language of the attorneys' fees provision in the indemnity agreement between Paskenta and Cornerstone (Indemnity Agreement) provides for a fee award to the prevailing party when either party brings "any action to enforce or interpret the terms" of the agreement. Once Paskenta filed this action asserting claims that had been released by the Indemnity Agreement, the action necessarily implicated the enforcement and interpretation of the Indemnity Agreement. Accordingly, we affirm the district court's award of attorneys' fees to Cornerstone.4. Denial of Umpqua's Motion for Attorneys' Fees Paskenta's bank account terms with Umpqua (Account Terms) provides that Paskenta will "be liable ... for [Umpqua's] reasonable attorneys' fees ... whether incurred as a result of collection or in any other dispute involving your account." The district court erred by denying Umpqua's motion for attorneys' fees based on the heading of the Account Terms: "Liability for Overdrafts." Accordingly, we reverse and remand for the district court to calculate the fee award in the first instance.

49. ***Northern Arapaho Tribe v. Cochran*, 2021 WL 3121490 (D. Wyo. July 7, 2021).**
The Northern Arapaho Tribe brings this case against the Government for violation of law and breach of contract by the Indian Health Service ("IHS") in failing to pay full funding of contract support costs ("CSC") for the operation of its federal health program under a Contract and Annual Funding Agreement authorized by the Indian Self-Determination and Education Assistance Act (ISDEAA), 25 U.S.C. § 5301 et seq. The Court concludes that the ISDEAA and the Tribe's contract entitle the Tribe to receive CSC funding on expenditures of funds received under the contract with the IHS, which does not include expenditures of third-party income. Therefore, the Court grants Defendants' motion to

dismiss. The Tribe alleges that it is required by law and contract to collect third-party revenues in order to assure that the Indian health program is a payer of last resort. Id. at ¶ 20; 25 U.S.C. § 1623(b). The third-party revenues (or program income) must be expended on PFSAs included in the Tribe's Annual Funding Agreement, thus the expenditures from third-party program income must be included in the base for calculation and payment of CSC. 25 U.S.C. § 5325(m). Defendant disagrees, arguing it paid the Tribe's full CSC on expenditures from the Secretarial amount that was transferred and funded by IHS, but that neither the ISDEAA nor the contract requires or allows the IHS to pay CSC on the Tribe's expenditure of its earned program income received from third parties. *4 The requirement to pay and the definition of CSC is in 25 U.S.C. § 5325(a)(2). This statute speaks only of the reasonable costs for activities which "must be carried on" by the Tribe "as a contractor to ensure compliance with the terms of the contract and prudent management [emphasis added]." The statute refers to "the contract" which is limited to the one contract between the Tribe and IHS.5 Section 5325(a)(2) does not mention activities carried on by the Tribe in the expenditure of third-party program income received from Medicaid, Medicare, private insurers and others. Even though these expenditures "further the general purposes of the contract" (25 U.S.C. § 5325(m)), neither the ISDEAA nor the IHS contract suggests that, in spending third-party program income, the Tribe is acting "as a contractor" for IHS. See Swinomish Indian Tribal Community v. Becerra, 993 F.3d 917, 920 (D.C. Cir. 2021) ("[t]he scope of [CSC] is thus limited to those under one "contract" — the one between a "contractor" (the tribe) and the contracting agency [IHS]"). Consequently, the ISDEAA repeatedly reinforces the limited scope for CSC and does not mention or include the Tribe's earned program income received from third-party payers. There is no mention of third-party reimbursements in the contract, which makes sense as these resources are not "provided by the Indian Health Service." Id. Rather, this income is "earned by an Indian tribe" and is "treated as supplemental funding to that negotiated in the funding agreement." 25 U.S.C. § 5388(j). There also is no contractual requirement to collect third-party program income. Accordingly, Defendants' motion is granted.

***50. Fort McDermitt Paiute and Shoshone Tribe v. Becerra*, F. 4th, 2021 WL 3120766 (D.C. July 23, 2021).**

Indian tribe brought action challenging Indian Health Service's (IHS) refusal to fund medical clinic at level requested. The United States District Court for the District of Columbia, Timothy J. Kelly, J., 2019 WL 4711401, entered summary judgment in tribe's favor, and government appealed. Holdings: The Court of Appeals, Katsas, Circuit Judge, held that: 1 tribe was entitled to all funding that IHS would have spent to operate clinic absent self-governance compact, and 2 IHS was not required to pay to tribe value of Medicare and Medicaid reimbursements that IHS previously had collected on tribe's behalf. Affirmed in part, reversed in part, and remanded.

D. *Employment*

***51. Jim v. Shiprock Associated Schools,* Fed.Appx., 2020 WL 6580139 (10th Cir. Nov 10, 2020).**

Ms. Kim Jim sued her employer (Shiprock Associated Schools, Inc.) for discrimination under Title VII, which contains an exception for Indian tribes. 42 U.S.C. § 2000e(b). But what is an Indian tribe? Sometimes the existence of a tribe is obvious. But what about a private corporation serving a tribe? The issue arises here because Ms. Jim's employer was a private corporation that served an Indian tribe (the Navajo Nation). The district court granted summary judgment to the corporation, regarding it an Indian tribe under the exception in Title VII. Ms. Jim appeals, and we affirm. The corporation here was created under the auspices of the Navajo Nation. For example, the Navajo Nation's statutes authorize chapters to establish local school boards. Navajo Nation Code Ann. tit. 10, § 201. Given this authority, the Navajo Nation's Board of Education empowered the corporation to operate educational programs. The corporation operates these educational programs under the Tribally Controlled Schools Act. 25 U.S.C. §§ 2501–11. Under the Code, every board member must be enrolled in the Navajo Nation. See id.; Navajo Nation Code Ann. tit. 11, § 8(D)(4)(b). The Navajo Nation supplies not only the board members, but also most of the students and employees. Despite the heavy involvement of tribal members, Ms. Jim observes that (1) some students and employees are not members of an Indian tribe and (2) the corporation was formed under state law. But these observations do little to diminish the role of the Navajo Nation. Though roughly 80% of the employees are tribal members, Ms. Jim contends that all of the employees are considered federal employees for purposes of the Federal Tort Claims Act. But an employee's status as a federal employee under the Federal Tort Claims Act does not affect characterization of the corporation as an Indian tribe. We conclude that the corporation constitutes an "Indian tribe" under Title VII. The corporation serves the Navajo community, obtains its governing board from the Navajo Nation, follows Navajo law, oversees schools populated by Navajo students and staffed by Navajo members, and receives federal funding because of the corporation's service to the Navajo community. So we affirm the dismissal.

***52. Pilant v. Caesars Enterprise Services, LLC,* 2020 WL 7043607 (S.D. Cal. Dec 01, 2020).**

This matter is before the Court on a motion by specially appearing Defendants Caesars Enterprise Services, LLC ("CES") and Caesars Entertainment, Inc. ("CEI") to dismiss the complaint for failure to join an indispensable party and for lack of personal jurisdiction. As discussed below, the motion to dismiss for failure to join an indispensable party is denied and the motion to dismiss for lack of personal jurisdiction is granted in part and denied in part. On August 31, 2020, Plaintiff Darrell Pilant filed this lawsuit in San Diego County Superior Court. The complaint alleges that Defendants jointly employed Pilant as senior vice president and general manager of Harrah's Resort SoCal hotel/casino (the "Resort"), which is owned by The Rincon Band of Luiseño Indians (the "Rincon Band"), until Pilant's resignation in May 2020. In early May 2020, Rincon Band Tribal Chairman Bo Mazzetti informed Pilant that San Diego tribes intended to inform California Governor Gavin Newsom that they planned to reopen their respective casino resorts on or after May 18, 2020. On May 15, 2020, Governor Newsom responded to a letter from San Diego tribal leaders and strongly advised that casinos not be reopened. The Resort ultimately reopened on May 22, 2020. The complaint names CES and CEI (along with 20 "Does") as defendants and asserts four causes of action: (1) wrongful termination in

violation of public policy; (2) violation of California Labor Code § 6310; (3) violation of California Labor Code § 1102.1; and (4) breach of a written employment agreement. The complaint alleges that Defendants constructively terminated Pilant because he opposed the decision to reopen the Resort as endangering the health and safety of employees and the public due to the COVID-19 pandemic. On October 16, 2020, Defendants removed the case to this court, alleging the existence of subject matter jurisdiction on the basis of a federal question under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 et seq., and diversity. Defendants now move to dismiss the complaint. Here, Plaintiff seeks only monetary damages, costs and fees from Defendants, his alleged former employers. He does not ask the Court to award any compensation from the Rincon Band. This court can accord the relief Plaintiff seeks in the Rincon Band's absence. Accordingly, the Rincon Band is not a necessary or required party under Rule 19(a)(1)(A). Any judgment in favor of Pilant in this case will not impact the Rincon Band's sovereignty or its ability or right to operate the Resort—it will merely require Defendants to pay money to Pilant. As discussed above, Pilant is not seeking to attack any contract or seeking a holding that any action by the Rincon Band violated any laws. Defendants could pay Pilant while still honoring their agreements with the Rincon Band related to the Resort. A financial stake in the outcome of the litigation is not a legally protected interest giving rise to § 19(a)(2) necessity. (citing Makah Indian Tribe, 910 F.2d at 558). In sum, the Rincon Band is not a necessary or required party to this case under Rule 19(a). It is therefore not an indispensable party who cannot be joined. Defendants also move to dismiss the complaint for lack of personal jurisdiction. Here, the motion itself acknowledges that CES has an employment agreement with Pilant, a California resident, that required Pilant to serve as general manager of the Resort, which is located in California. This lawsuit arises out of that employment agreement and out of CES's alleged violation of California employment law with respect to Pilant's employment by CES at the Resort. Accordingly, the motion to dismiss for lack of personal jurisdiction over CES is denied. Because the Rincon Band is not an indispensable party, there does not appear to be subject matter jurisdiction due to a federal question related to the IGRA. If federal question jurisdiction was the only ground for removal, the Court would be forced to remand this case. The notice of removal also asserts jurisdiction based on diversity. The allegations supporting diversity, however, are deficient. With respect to personal jurisdiction over Defendants, CES is subject to specific personal jurisdiction in California for Plaintiff's claims, so the motion to dismiss the claims against CES under Rule 12(b)(2) is denied. However, Plaintiff has not satisfied his burden to establish personal jurisdiction over CEI. Accordingly, the motion to dismiss the claims against CEI under Rule 12(b)(2) is granted. Finally, Defendants are Ordered to Show Cause why this case should not be remanded for lack of subject matter jurisdiction.

***53. Weaver v. Gregory*, 2021 WL 1010947 (D. Or. Mar 16, 2021)**.

Plaintiff Eric Weaver brings this civil rights and tort action against Defendants Ron Gregory, Carmen Smith, and Alyssa Macy. This matter comes before the Court on Defendants' Motion to Dismiss. Plaintiff was a tribal police officer for the Warm Springs Police Department from April 2016 until he was terminated in September 2019. At all times relevant, Defendant Ron Gregory was the Acting Chief of Police for the Warm Springs Police Department; Defendant Carmen Smith was the Manager of Public Safety for the Confederated Tribes of Warm Springs ("CTWS"); and Defendant Alyssa Macy

was the Chief Operations Officer for the CTWS, Plaintiff alleges that, beginning in 2018, he witnessed and was subjected to sexual, racial, and derogatory comments and offensive and unwanted touching during his employment for the Warm Springs Police Department. Plaintiff reported this conduct to multiple supervisors in his chain of command, and his complaints were passed on to Defendant Gregory. Plaintiff alleges Defendants retaliated against him for reporting the harassment and discrimination issues and ultimately terminated him based on the findings of an investigation. Plaintiff brings four Claims for Relief against Defendants based on actions taken in their "individual" and "official" capacities: (1) Constitutional violation under 42 U.S.C. § 1983 ("Liberty Interest Deprivation"); (2) Constitutional violation under 42 U.S.C. § 1983 ("Retaliation for Free Speech (First Amendment)"); (3) Whistleblower retaliation in violation of Oregon Revised Statute § ("O.R.S.") 659A.199; and (4) Intentional infliction of emotional distress. Defendants move to dismiss pursuant to Federal Rule of Civil Procedure ("Rule") 12(b)(1) and 12(b)(6). Plaintiff does not contend that Congress has abrogated CTWS's sovereign immunity, and, for its part, the CTWS has consented to be sued "only in the Tribal Court[.]" WSTC § 205.004. As Judge Sullivan previously concluded, WSTC § 205.001 is a limited waiver for tort actions in Tribal Court, and is not a waiver of immunity for all purposes. Accordingly, the Court grants Defendants' motion and dismisses Plaintiff's § 1983 claims for lack of state action. Because Plaintiff's federal claims have been dismissed, the Court must determine whether it should exercise supplemental jurisdiction over his state law claims. The Court declines to exercise supplemental jurisdiction over Plaintiff's remaining state law claims. The Court Grants Defendants' Motion to Dismiss. If Plaintiff does not timely renew his request for leave to amend, the Court will enter judgment in favor of Defendants.

***54. Miller v. United States,* F.3d, 2021 WL 1152310 (9th Cir. Mar 26, 2021).**
Discretionary function exception barred tribal employee's FTCA claims he was terminated in retaliation for discrimination and harassment complaints. Former police officer with federally recognized Native American tribe, which managed its police force through contract with Bureau of Indian Affairs (BIA), brought action against United States under Federal Tort Claims Act (FTCA) alleging he was wrongfully terminated from his position. The United States District Court for the District of Nevada, Miranda Du, Chief Judge, 2018 WL 6179494, granted the government's motion to dismiss for lack of subject matter jurisdiction and denied officer's motion for leave to amend his complaint. Officer appealed. The Court of Appeals, Collins, Circuit Judge, held that: 1) former officer's claims alleging he was terminated in retaliation for his complaints about workplace discrimination and harassment were barred by discretionary function exception to FTCA's waiver of sovereign immunity; 2) discretionary function exception barred former officer's claim for tortious discharge; and 3) discretionary function exception did not bar former officer's claims alleging Tribe was negligent and grossly negligent in terminating him. Affirmed in part, reversed in part, and remanded.

***55. Butler v. Leech Lake Band of Ojibwe*, 2021 WL 2651981 (D. Minn. June 28, 2021).**
This matter is before the court upon the motion to dismiss by defendants Leech Lake Band of Ojibwe, Faron Jackson, Arthur LaRose, and Robert Whipple. For the following reasons, the motion is granted. This employment dispute arises from plaintiff Frances

Butler's employment with the Leech Lake Band of Ojibwe (Band). The individually defendants have management roles within the Band. Butler worked as a director for the Band from June 5, 2018, to March 31, 2020. Id. at 4. In January 2020, Butler reprimanded a receptionist – Jackson's niece – for "inappropriate text messages and creating a 'Hostile Work Environment.' " Butler alleges that defendants thereafter subjected her to retaliation and harassment. She specifically alleges that she was given large projects with short deadlines, isolated from the tribal council and management events, demoted, and ultimately fired. On March 16, 2020, Butler filed a grievance against Jackson, Band chairman. Id. Whipple, the Band's human resources manager, responded that the Band would terminate her employment if she pursued the grievance. Id. Butler then filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) alleging age discrimination, wage theft, retaliation, and harassment. Id. On August 12, 2020, the EEOC dismissed the charge and issued a right to sue letter. Indian tribes such as the Band are "distinct, independent political communities, retaining their original natural rights in matters of local self-government." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978) (internal quotation marks and citation omitted). Here, the Band has not waived immunity and the statutes on which Butler bases her claim - the ADEA, EPA, and Title VII – lack Congressional abrogation of the Band's sovereign immunity. As such, the Band is immune from suit. Even if the Band were not immune from suit, Butler cannot establish that the court has jurisdiction over the subject matter of this action. Butler's claims arise under three federal statutes – the ADEA, the EPA, and Title VII. None of those statutes applies to Indian tribes when the matters at issue are purely internal, as here. The case is dismissed without prejudice.

***56. Manzano v. Southern Indian Health Council, Inc*, 2021 WL 2826072 (S.D. Cal. July 7, 2021).**

Plaintiff Carolina Manzano ("Plaintiff") brings this action alleging harassment and wrongful termination while she was employed by Defendant Southern Indian Health Council, Inc. Defendant moves to dismiss the action on the bases that SIHC is entitled to tribal sovereign immunity, divesting this Court of subject matter jurisdiction and, alternatively, that Plaintiff has failed to state claims upon which relief can be granted. For the reasons stated below, the Court grants the Motion to Dismiss for lack of subject matter jurisdiction. SIHC was formed by seven tribes—the Barona Band of Mission Indians, the Campo Band of Mission Indians, the Ewiiaapaayp Band of Kumeyaay Indians, the Jamul Indian Village of California, the La Pasta Band of Mission Indians, the Manzanita Band of the Kumeyaay Nation, and the Viejas Band of Kumeyaay Indians ("Member Tribes")—to provide health care to American Indians and other residents of its service area. It incorporated as a nonprofit corporation in 1982 and moved to the Barona Reservation. (Id.) In 1987, SIHC's Board of Directors acquired private land in Alpine, California, which was placed into a federal trust and serves as the entity's permanent location. In 2014, SIHC entered into a Compact with IHS, in which IHS transferred authority to SIHC pursuant to Title V of the Indian Self-Determination and Education Assistance Act ("ISDEAA") "to decide how federal programs, services, functions and activities...shall be funded and carried out" and to "promote[ ] the autonomy of the Tribes in the field of health care." (Compact § 1.2.1.) Under the Compact, SIHC is authorized "to plan, conduct, consolidate, administer, and receive full tribal shares of funding for all

programs, services, functions and activities...that are carried out for the benefit of American Indians....” (Id. at 2.) SIHC entered the Compact on behalf of the Member Tribes. Here, the main contention is whether SIHC, as a tribal organization but not a tribe itself, is entitled to sovereign immunity at all. The Court finds that it is. The Court further finds that Congress has not expressly authorized suit against tribes under either federal statute at issue here—the False Claims Act (“FCA”) and USERRA—and that SIHC has not waived its immunity. Tribal sovereign immunity “extends to business activities of the tribe, not merely to governmental activities.” Allen v. Gold Country Casino, 464 F.3d 1044, 1046 (9th Cir. 2006). “When the tribe establishes an entity to conduct certain activities, the entity is immune if it functions as an arm of the tribe.” Id.; see also Marceau, 455 F.3d at 978 (noting that tribal immunity “extends to agencies and subdivisions of the tribe”). To determine whether an entity is an “arm of the tribe,” courts examine the following factors: (1) the method of creation of the [entity]; (2) [its] purpose; (3) [its] structure, ownership, and management, including the amount of control the tribe has over the entit[y]; (4) the tribe's intent with respect to the sharing of its sovereign immunity; and (5) the financial relationship between the tribe and the entit[y].” White, 765 F.3d at 1025. The Court grants Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction.

E. *Environmental Regulations*

***57. Chilkat Indian Village of Klukwan v. Bureau of Land Management,* 825 Fed.Appx. 425, 2020 WL 5090460 (9th Cir. Aug 28, 2020).**

Failure to examine environmental impacts of future mine on mining exploration projects did not violate National Environmental Policy Act (NEPA). Environmental organizations and Chilkat Indian tribe brought action challenging Bureau of Land Management's (BLM) approval of mining companies' operation plans for hard rock mineral exploration on large parcel of public land. The United States District Court for the District of Alaska, Timothy M. Burgess, Chief Judge, 399 F.Supp.3d 888, granted summary judgment in favor of BLM. Organizations and tribe appealed. The Court of Appeals held that: 1) BLM did not violate National Environmental Policy Act's (NEPA) timeliness provisions by failing to examine the environmental impacts of future mine on mining exploration projects; 2) BLM did not act arbitrarily by failing to consider impacts of future mining activity on mining exploration projects as “cumulative” to those examined in its environmental assessment (EA); and 3) organizations and tribe did not demonstrate that mining exploration plans would not have taken place without future development of mine, and thus, BLM did not act arbitrarily by failing to consider those future impacts within single EA. Affirmed.

***58. Rosebud Sioux Tribe v. Trump,* F.Supp.3d, 2020 WL 6119319 (D. Mont. Oct 16, 2020).**

Presidential permit for construction of oil pipeline segment did not violate tribal mineral and jurisdictional rights under treaties. Rosebud Sioux Tribe and Fort Belknap Indian Community brought action against President and federal agencies and agents, challenging

issuance of presidential permit and other permits to energy companies to construct oil pipeline segment at international border. Energy companies intervened as defendants. Tribes moved for preliminary injunction and temporary restraining order. Defendants moved and tribes cross-moved for summary judgment. The District Court, Brian M. Morris, Chief Judge, held that: 1) tribes failed to establish likelihood of success on merits; 2) irreparable injury would not arise as result of permits; 3) public interest and balance of equities did not clearly weigh in favor of granting preliminary injunction; 4) presidential permit did not violate treaty mineral and jurisdictional rights; and 5) allowing amendment of complaint to assert challenge against Bureau of Land Management (BLM) record of decision (ROD) was unwarranted. Plaintiffs' motions denied in part; defendants' motions granted in part.

***59. La Posta Band of Diegueno Mission Indians of La Post Reservation v. Trump,* 828 Fed.Appx. 489 (9th Cir. Nov 04, 2020).**

This appeal presents a challenge by a federally recognized tribe, the La Posta Band of Diegueño Mission Indians, to the federal government's funding and construction of border-barrier projects in San Diego and Imperial Counties, California. La Posta appeals the district court's denial of a preliminary injunction. La Posta contends that our recent decisions in California v. Trump, 963 F.3d 926 (9th Cir. 2020), and Sierra Club v. Trump, 963 F.3d 874 (9th Cir. 2020) ("Sierra Club II"), cert. granted, *490 Trump v. Sierra Club, No. 20-138, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2020 WL 6121565 (Oct. 19, 2020), establish both an ultra vires cause of action and a cause of action under the Administrative Procedure Act to challenge the Department of Defense's "reprogramming" of funds for border-barrier construction pursuant to section 8005 of the Consolidated Appropriations Act. See Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, div. A, § 8005, 133 Stat. 2317 (2019). But assuming for now that La Posta has a cause of action to challenge the funding transfers, we cannot conclude that the district court abused its discretion in denying La Posta a preliminary injunction because the district court permissibly determined that La Posta had not made a sufficient showing of irreparable harm. La Posta asserted that absent an injunction the Tribe would be harmed by the government's disturbance of its ancestral burial grounds and its members' inability to practice religious ceremonies at sacred sites. The government responded that burial grounds have not previously been documented in the construction area or discovered during construction, and the Tribe's sacred sites are still accessible because they are located outside the construction area. The district court acted within its discretion in concluding that factual disputes undermined La Posta's showing of these asserted harms. And while the environmental harm we recognized in Sierra Club II is indeed generally irreparable, All. for the Wild Rockies, 632 F.3d at 1135, La Posta did not plead or brief this type of harm in the district court. Therefore, the district court did not abuse its discretion in denying injunctive relief. Affirmed.

***60. Pit River Tribe v. Bureau of Land Management,* 2021 WL 107228 (E.D. Cal. Jan 12, 2021).**

This matter is before the Court on the Bureau of Land Management's and Calpine Corporation's Motions to Dismiss. After consideration of the parties' written arguments on the motions and relevant legal authority, the Court Denies Federal Defendant's Motion

to Dismiss and Grants in part and Denies in part Calpine's Motion to Dismiss. Plaintiffs include the Pit River Tribe and several regional nonprofit organizations with an interest in the Medicine Lake Highlands area. Plaintiffs challenge the continued existence of federal Geothermal Resources Lease No. CA12372, issued by BLM pursuant to their statutory authority under the Geothermal Steam Act ("GSA"), which is currently held by Defendant Calpine Corporation. Plaintiffs also challenge the continuance of the BLM-managed Glass Mountain Unit, which Calpine operates and exclusively leases. This action is the latest in a series of suits brought by Pit River concerning the area. Plaintiffs now challenge the continuing validity of Lease CA12372 and the Glass Mountain Unit. Specifically, Plaintiffs allege that GSA § 1005(g)-(h) and BLM's current "production extension" regulations impose ongoing requirements on lessees that Calpine has failed to satisfy, mandating termination. Because both claims allege a legal duty to perform a discrete agency action and a failure to perform that action, the Court finds Plaintiffs have stated a claim under 706(1). Title 28 United States Code, section 2401(a) provides a six-year statute of limitations to civil action commenced against the United States. 28 U.S.C. § 2401(a). This limitation applies to cases brought under the APA. Hells Canyon Pres. Council v. United States Forest Serv., 593 F.3d 923 (9th Cir. 2010). The Ninth Circuit has suggested, without specifically addressing the issue, that § 2401(a) may not be applicable in 706(1) failure to act claims under the APA. See id. at 933. Defendants argue that Plaintiffs' claims are barred by the six-year statute of limitations because "all the events that purportedly give rise to Plaintiff's claims occurred in the 1980's and 1990's." Plaintiffs contend that because they allege Defendants have not complied with their ongoing duty to act under the GSA, the statute of limitations does not bar their claims as "BLM's ongoing failure to satisfy its legal obligations under the GSA accrues continually until the agency complies with the law." The Court agrees with Plaintiffs, that the statute of limitations does not bar their claims. Plaintiffs allege that BLM has an ongoing obligation to ensure diligent efforts are being made on the Lease and the Unit and that BLM is not currently fulfilling this obligation. For the reasons set forth above, the Court Denies Federal Defendant's Motion to Dismiss and Grants in part and Denies in part Calpine's Motion to Dismiss.

***61. Standing Rock Sioux Tribe v. United States Army Corps of Engineers,* 985 F.3d 1032, 2021 WL 244862 (D.C. Cir. Jan 26, 2021).**

Tribes' criticisms of leak detection system for Dakota Access Pipeline presented an unresolved controversy requiring preparation of an EIS. Indian tribes brought action against United States Army Corps of Engineers (USACE), challenging its issuance of an easement for oil pipeline to cross beneath federally regulated reservoir on Indian reservation that provided tribes with water resources without preparing and environmental impact statement (EIS) under National Environmental Policy Act (NEPA). The United States District Court for the District of Columbia, James E. Boasberg, J., 255 F.Supp.3d 101, concluded that USACE's decision not to issue EIS violated NEPA, and remanded to agency. Following remand, the District Court, Boasberg, J., 440 F.Supp.3d 1, again remanded to the agency to complete an EIS, and subsequently vacated the easement, 471 F.Supp.3d 71. USACE and intervenor pipeline owner appealed. The Court of Appeals, Tatel, Circuit Judge, held that: 1 tribes' criticism of USACE's consideration of leak detection system for pipeline presented an unresolved controversy requiring

preparation of an EIS; 2 district court did not abuse its discretion in requiring USACE) to prepare an EIS; 3 district court did not abuse its discretion in vacating easement; and 4 injunction requiring pipeline to be shut down and emptied of oil was improper. Affirmed in part and reversed in part.

62. ***Confederated Tribes and Bands of Yakama Nation v. Okanogan County,*** **2021 WL 347346 (Wash. Ct. App. Feb 02, 2021).**

The Confederated Tribes and Bands of the Yakama Nation (Yakama Nation) agreed to dismiss a lawsuit against Okanogan County, and, in return, the county agreed to adopt, by December 31, 2018, a new comprehensive plan and zoning ordinance that hopefully addressed the concerns the Nation had about the county's current plan and ordinance. When Okanogan County failed to adopt a new plan and ordinance by December 31, 2018 and thereby violated the court order, the Yakama Nation moved to vacate the order of dismissal. Because the order of dismissal without prejudice imposed numerous obligations on Okanogan County, some of which it has disobeyed, we rule that the motion to vacate should have been granted. First, may a court vacate a voluntary order of dismissal? Second, has the Yakama Nation presented sufficient grounds for vacature under CR 60? We answer both in the affirmative. The Yakama Nation wished to challenge the current comprehensive plan and zoning ordinance of Okanogan County when it filed its 2016 suit. The Nation would not have dismissed its suit without the county agreeing to vacate the plan and ordinance and adopt a new plan and ordinance, with input from the Nation. Compliance with the court order was a condition to dismissing the suit. Because Okanogan County violated the terms of a court order, the trial court could have and should have vindicated its authority and required compliance with its lawful order by vacating the portion of the order dismissing lawsuit claims. We remand to the superior court to vacate the 2017 order of dismissal and to enforce the terms of the order.

63. ***Trout Unlimited v. Pirzadeh*****, 1 F.4th 738, 21 Cal. Daily Op. Serv. 5953 (9th Cir. June 17, 2021).**

Industry, tribal, and environmental groups brought actions challenging Environmental Protection Agency's (EPA) withdrawal of its proposed action under Clean Water Act (CWA) to prohibit Army Corps of Engineers from issuing dredge-and-fill permit to allow development of mine. Actions were consolidated. The United States District Court for the District of Alaska, Sharon L. Gleason, J., 454 F.Supp.3d 892, dismissed action. Groups appealed. Holdings: The Court of Appeals, Graber, Circuit Judge, held that: 1 de novo review applied to issue of whether EPA's withdrawal of its proposed determination to exercise its authority under CWA was reviewable; 2 EPA's withdrawal of its proposed determination to exercise its authority under CWA constituted “final agency action”; 3 Court of Appeals did not have jurisdiction over challenge to decision by Regional Administrator, without referencing its implementing regulations, to not take action; 4 agency intended mandatory legal standard to apply specifically and directly to decisions to withdraw proposed determination; and 5 Regional Administrator had to base his or her withdrawal decision on likelihood of unacceptable effects, not on “allocation of resources” or on “agency policies and priorities.” Affirmed in part, reversed in part, and remanded. Bress, Circuit Judge, filed dissenting opinion.

***64. Pasqua Yaqui Tribe v. EPA,* F.Supp.3d, 2021 WL 3855977 (D. Ariz. August 30, 2021).**

Plaintiffs Pascua Yaqui Tribe, Quinault Indian Nation, Fond du Lac Band of Lake Superior Chippewa, Menominee Indian Tribe of Wisconsin, Tohono O'Odham Nation, and Bad River Band of Lake Superior Chippewa ("Plaintiffs") challenge two final rules promulgated by the United States Environmental Protection Agency ("EPA") and the United States Army Corps of Engineers ("Corps of Engineers") (collectively, "Agencies"). The first, entitled "Definition of 'Waters of the United States'—Recodification of Pre-Existing Rules," 84 Fed. Reg. 56,626 (Oct. 22, 2019) ("2019 Repeal Rule"), repealed the 2015 "Clean Water Rule." The second, entitled "The Navigable Waters Protection Rule: Definition of 'Waters of the United States,' " 85 Fed. Reg. 22,250 (Apr. 21, 2020) ("NWPR"), established a new definition of the phrase "waters of the United States" in the Clean Water Act ("CWA"). Plaintiffs moved for summary judgment on May 11, 2021. In lieu of filing a response to Plaintiffs' Motion for Summary Judgment, Defendants EPA, EPA Administrator Michael Regan, Corps of Engineers, and Acting Assistant Secretary of the Army Jaime Pinkham (collectively, "Agency Defendants") filed a Motion for Voluntary Remand of the NWPR Without Vacatur and Motion for Abeyance of Briefing on the 2019 Rule Claims. Plaintiffs do not oppose remand of the NWPR but argue that remand should include vacatur. The Sacketts oppose the request to the extent it seeks remand of the "adjacent wetlands" provision of the NWPR. Courts generally grant a voluntarily requested remand unless "the agency's request is frivolous or made in bad faith." Here, there is no indication in the record that the Agency Defendants' request for voluntary remand is frivolous or made in bad faith. The Sacketts argue that the Agencies have no discretion to revise the NWPR's definition of "adjacent wetlands," because that definition is required by the four-justice plurality opinion in Rapanos, which the Sacketts assert is controlling under Supreme Court and Ninth Circuit precedent for interpreting fractured decisions. The Ninth Circuit recently rejected the Sacketts' argument that the Rapanos plurality opinion is controlling, re-affirming Healdsburg's holding that Justice Kennedy's concurrence is the controlling opinion from Rapanos. Sackett v. EPA, No. 19-35469, 2021 WL 3611779, at *9-12, __ F.4th __ (9th Cir. Aug. 16, 2021). Impacts to ephemeral streams, wetlands, and other aquatic resources could have "cascading and cumulative downstream effects," and the Agencies "have heard concerns from a broad array of stakeholders ... that the reduction in the jurisdictional scope of the CWA is resulting in significant, actual environmental harms." The seriousness of the Agencies' errors in enacting the NWPR, the likelihood that the Agencies will alter the NWPR's definition of "waters of the United States," and the possibility of serious environmental harm if the NWPR remains in place upon remand, all weigh in favor of remand with vacatur. The pre-2015 regulatory regime is familiar to the Agencies and industry alike, and the Agencies have expressed an intent to repeal the NWPR and return to the pre-2015 regulatory regime while working on a new definition of "waters of the United States." The consequences of an interim change do not support the unusual remedy of remand without vacatur. C. Conclusion *6 Because equity does not demand the atypical remedy of remand without vacatur, see Pollinator Stewardship Council, 806 F.3d at 532, the Court will vacate and remand the NWPR. Plaintiffs' Complaint will be dismissed to the extent it challenges the NWPR.

F. Fisheries, Water, FERC, BOR

***65. United States v. Washington,* 2020 WL 5249498 (W.D. Wash. Sep 02, 2020).**
The Skokomish Tribe ("Skokomish") initiated this subproceeding to resolve disputes with Gold Coast Oyster, LLC ("Gold Coast") under the Revised Shellfish Implementation Plan ("SIP"). Skokomish alleged that Gold Coast had violated the SIP by failing to disclose information, imposing 'access controls' on tidelands, improperly rejecting survey and population estimates of shellfish, and failing to develop harvest plans. Because of overlapping usual and accustomed fishing grounds, Skokomish also joined the Jamestown S'Klallam Tribe and Port Gamble S'Klallam Tribe (collectively, "S'Klallam"), the Lower Elwha Klallam Tribe ("Lower Elwha"), and the Suquamish Tribe ("Suquamish") as affected tribes. Judge Christel found that Gold Coast had violated the SIP by providing deficient notice of activities taken to enhance natural beds and establish artificial beds. This, combined with actions to interfere with the tribes' right of access, prevented the tribes from having the opportunity to establish the natural bed population and harvest their tribal share. Thus, the Tribes have shown, by a preponderance of the evidence, that Gold Coast did not provide the Tribes with adequate opportunities to inspect and/or survey the Disputed Tidelands and, thus, impeded the Tribes' abilities to exercise their Treaty Rights. Judge Christel awarded the tribes injunctive relief assuring that Gold Coast would not continue to impede the tribes' exercise of their treaty rights in the future. However, Judge Christel rejected S'Klallam's argument that a "loss of opportunity" required an award of compensatory damages and found that the tribes had presented insufficient evidence upon which to award compensatory damages. S'Klallam now seeks review. Judge Christel found that on the evidence presented "the Tribes have not shown Gold Coast harvested the Tribes' treaty share of shellfish." S'Klallam, however, argues that the failure of its evidence was a result of Gold Coast's control and manipulation of the necessary evidence. Requiring the tribes to prove that Gold Coast harvested more than 50% of the natural beds' "sustainable harvest yield," S'Klallam maintains, shifted the burden of proof from the grower to the tribes. The Court does not find any error and agrees with Judge Christel's analysis. Judge Christel did not conclude that compensatory damages could not be awarded. This was not error, but a failure of proof. Putting aside the legal question, S'Klallam's argument collapses because S'Klallam never sought any such negative inference and has not objected to any portion of the record where Judge Christel denied such a request. Perhaps tellingly, S'Klallam never provides an explanation of what compensation should have been provided. S'Klallam's objection is with Judge Christel's weighing of the evidence presented. But the Court's de novo review leads it to the same reasoned conclusions as Judge Christel. The Court adopts Judge Christel's analysis. This matter remains Referred to Judge Christel for resolution of any remaining issues.

***66. Mineral County v. Lyon County,* 473 P.3d 418, 2020 WL 5849506 (Nev. Sep 17, 2020).**
The public trust doctrine does not permit reallocating water rights already adjudicated and settled under the doctrine of prior appropriation. Walker River Paiute Tribe and United States brought action against River Irrigation District, seeking recognition of

Tribe's right to a certain additional amount of water from river under decree adjudicating water rights in river basin. County intervened as plaintiff, requesting that decree court reopen and modify the final decree to recognize rights of county and public to have minimum levels of water to maintain viability of lake in the county. The United States District Court for the District of Nevada, Robert C. Jones, J., 2015 WL 3439122, dismissed action. County appealed. The Court of Appeals for the Ninth Circuit, Bybee, Circuit Judge, 900 F.3d 1027, certified question of whether, and to what extent, public trust doctrine applied to water rights already adjudicated and settled under the doctrine of prior appropriation and, if so, to what extent, was appropriate. The Supreme Court, Stiglich, J., held that: 1) the public trust doctrine applies to rights already adjudicated and settled under the doctrine of prior appropriation; 2) the public trust doctrine applies to all waters within the state, whether navigable or nonnavigable; and 3) the public trust doctrine does not permit reallocating water rights already adjudicated and settled under the doctrine of prior appropriation. Question answered.

***67. Klamath Irrigation District v. United States Bureau of Reclamation,* F.Supp.3d, 2020 WL 5751560 (D. Or. Sep 25, 2020).**

Bureau of Reclamation would not adequately represent interests of tribes, as unjoined required parties, in treaty rights and sovereignty. Irrigation districts and others brought actions against United States Bureau of Reclamation, seeking declarations that Reclamation must operate water basin project in manner that fulfilled water delivery obligations to plaintiffs prior to fulfilling obligations arising under Endangered Species Act (ESA) or tribal treaties. Actions were consolidated. Klamath Tribes and Hoopa Valley Tribe intervened as defendants, then moved to dismiss for failure to join required parties. The District Court, Michael J. McShane, J., adopted findings and recommendation of Mark D. Clarke, United States Magistrate Judge, which held that: 1) plaintiffs' claims, if successful, would significantly impair tribes' legally protected water and fishing rights; 2) plaintiffs' claims, if successful, would expose Reclamation to substantial risk of incurring inconsistent water distribution obligations; 3) tribes' interests would not be adequately represented by existing parties; 4) tribes' sovereign immunity precluded their joinder; 5) equity and good conscience required dismissal of action for failure to join required parties; and 6) public rights exception to rules of joinder did not permit action to proceed in tribes' absence. Motions granted.

***68. United States v. Abouselman,* 976 F.3d 1146, 2020 WL 5792100 (10th Cir. Sep 29, 2020).**

Extinguishing aboriginal rights requires an affirmative act. In ongoing litigation between Pueblos, the United States, coalition of water users, and New Mexico, to allocate water rights in river in New Mexico, the parties asked the court to address whether Pueblos had ever possessed aboriginal water rights in connection with their grant or trust lands, and if so, whether they had been modified or extinguished. The United States District Court for the District of New Mexico, adopted the proposed findings and recommended disposition of William P. Lynch, United States Magistrate Judge, 2016 WL 9776586, and determined that Pueblos had aboriginal water rights, but that such rights were extinguished by Spain's assertion of sovereignty over the region. Issue was certified for interlocutory appeal. The Court of Appeals, Ebel, Senior Circuit Judge, held that: 1) a sovereign must affirmatively

take an action to exercise complete dominion in a manner adverse to American Indians' right of occupancy, in order to extinguish aboriginal title, and 2) there was no indication, let alone a clear and plain indication, that Spain intended to extinguish any aboriginal rights of Pueblos. Reversed and remanded.

69. ***Scalia v. Red Lake Nation Fisheries, Inc.,*** **982 F.3d 533, 2020 WL 7083327 (8th Cir. Dec 04, 2020).**

Fishery owned by and consisting only of tribe members was not subject to citation for OSHA regulations violations with respect to capsized boat. Secretary of Labor filed petition for review of determination by the Occupational Safety and Health Review Commission dismissing citations issued to fishery organized under tribal law and comprised exclusively of tribe members for violations of Occupational Safety and Health Act (OSHA) regulations. The Court of Appeals, Benton, Circuit Judge, held that OSHA regulations did not apply to fishery. Petition for review denied.

70. ***TPC, LLC v. Oregon Water Resources Department,*** **P.3d, 308 Or.App. 177, 2020 WL 7978395 (Or. Ct. App. Dec 30, 2020).**

This case involves final orders issued in 2016 and 2017 by an Oregon Water Resources Department (OWRD) watermaster which curtailed petitioners' use of their surface water right in the Williamson River, which is located in the Klamath Basin, in favor of senior water rights held by the Klamath Tribes and the United States as trustee for the Klamath Tribes. The parties' water rights were established as determined claims in a 2013 OWRD final order that adjudicated water right claims in the Klamath Basin. To settle contests to petitioners' water right claim brought by the United States and the Klamath Tribes in that adjudication, petitioners, the United States, and the Klamath Tribes entered into a stipulation, which OWRD also signed (the Hyde Agreement). The OWRD adjudicator incorporated part of the Hyde Agreement into the 2013 adjudication order. In 2016 and 2017, the Klamath Tribes made a call for water to the district watermaster, which led to the orders at issue in this case that curtailed petitioners' use of their water right. Marion County Circuit Court permitted the Tribes to intervene but denied the Tribes' motion to dismiss and, on cross-motions for summary judgment by petitioners and OWRD, concluded that OWRD was subject to the provision in the Hyde Agreement, as urged by petitioners, and remanded the curtailment orders. OWRD appeals from that judgment, arguing that it is not bound by the Hyde Agreement. The Klamath Tribes also appeal, arguing that Marion County Circuit Court erred in denying their motion to dismiss. Additionally, the United States filed an amicus brief on appeal. We conclude that Marion County Circuit Court did not have subject matter jurisdiction over petitioners' claim and, thus, reverse and remand with instructions to Marion County Circuit Court to dismiss the petitions. In 2005, petitioners, the United States, the Klamath Tribes, and OWRD signed a stipulation to settle contests to petitioners' claim—the Hyde Agreement. The Hyde Agreement was a filed document in that contested case. Thus, the KBA order established petitioners' water right as described in the Hyde Agreement in B.1.(a) and with the limitation set out in B.1.(b), which was incorporated into the determined water right as a "further limitation." However, none of the other paragraphs in section B.1. were incorporated into any water right established under the KBA order. The exceptions to the KBA order are currently being litigated in Klamath County Circuit Court. Whether the

no-call provision of the Hyde Agreement is a required limitation on the United States' and the Klamath Tribes' water rights claims, as part of the stipulation to settle contests, is currently part of the ongoing KBA litigation, and it is subject to Klamath County Circuit Court's exclusive jurisdiction under ORS chapter 539. By seeking to have Marion County Circuit Court instead treat the Hyde Agreement as separately enforceable under ORS 540.150 or otherwise, petitioners sought to have Marion County Circuit Court interject itself into that ongoing litigation and decide for itself whether the Hyde Agreement limited the United States' and Klamath Tribes' determined claims. Because Marion County Circuit Court lacked subject matter jurisdiction over the claim brought by petitioners, we reverse and remand with instructions to dismiss the petitions for judicial review.

71. ***United States v. Walker River Irrigation District,*** **F.3d, 2021 WL 287912 (9th Cir. Jan 28, 2021).**

Three-year period for county to challenge river decree that adjudicated and settled water rights began to run when the water rights were adjudicated. Walker River Paiute Tribe and United States brought action against River Irrigation District, seeking recognition of Tribe's right to a certain additional amount of water from river under decree adjudicating water rights in river basin. County intervened as plaintiff, requesting that decree court reopen and modify the final decree to recognize rights of county and public to have minimum levels of water to maintain viability of lake in the county. The United States District Court for the District of Nevada, Robert C. Jones, J., 2015 WL 3439122, dismissed action. County appealed. The Court of Appeals for the Ninth Circuit, Bybee, Circuit Judge, 900 F.3d 1027, certified question of whether, and to what extent, public trust doctrine applied to water rights already adjudicated and settled under the doctrine of prior appropriation and, if so, to what extent, was appropriate. The Supreme Court of Nevada, Stiglich, J., 473 P.3d 418, answered, holding that Nevada's "public trust doctrine applies to rights already adjudicated and settled under the doctrine of prior appropriation," but that the public trust doctrine does not permit reallocating water rights already adjudicated and settled under the doctrine of prior appropriation. In light of the Nevada Supreme Court's decision, the Court of Appeals, Tashima, Senior Circuit Judge, held that: 1) the three-year period for county to challenge river decree that adjudicated and settled water rights in river basin under the doctrine of prior appropriation began to run when the water rights at issue were adjudicated, but 2) remand was warranted to allow county to pursue its public trust claim to the extent it sought remedies that would not have involved a reallocation of water rights already adjudicated and settled under the doctrine of prior appropriation. Affirmed in part, vacated in part, and remanded.

72. ***People v. Caswell,*** **N.W.2d, 2021 WL 519712 (Mich. Ct. App. Feb 11, 2021).**

Indian tribe's nonrecognition status had no bearing on whether it was entitled to exercise treaty fishing rights. Defendant, a member of Indian tribe not recognized by federal government, was cited for spear fishing in a closed stream in violation of state statute. The district court granted defendant's motion to dismiss charges on the ground that he was a member of an Indian tribe granted hunting and fishing rights by treaties with United States federal government. State appealed. The Circuit Court, Mackinac County, William W. Carmody, C.J., reversed and reinstated charges. Defendant appealed. The

Court of Appeals held that: 1) as a matter of first impression, Indian tribe's nonrecognition status had no bearing on whether it was entitled to exercise treaty fishing rights, and 2) Indian tribe that was not federally-recognized did not necessarily possess treaty rights merely because some of its members were descended from signatory tribes of relevant treaty granting rights to fish and hunt. Vacated and remanded.

73. Matter of Reissuance of an NPDES/SDS Permit to United States Steel Corporation, **N.W.2d, 2021 WL 485340 (Minn. Feb 10, 2021).**

Groundwater was a Class 1 water such that MPCA properly applied Class 1 secondary drinking water standards to steel company's NPDES permit. Steel company filed certiorari appeals challenging groundwater conditions of National Pollutant Discharge Elimination Systems (NPDES) permit and denial by Minnesota Pollution Control Agency (MPCA) of company's request for permit-related contested-case hearing and variance from groundwater-quality standards. Environmental non-profit group and Indian tribe filed separate appeals challenging MPCA's determination that Clean Water Act (CWA) did not regulate discharges from company's tailings basin to groundwater and challenging surface-water conditions in permit. Appeals were consolidated. The Court of Appeals, 937 N.W.2d 770, reversed and remanded. The Supreme Court granted review. The Supreme Court, Thissen, J., held that groundwater was a Class 1 water such that MPCA properly applied Class 1 secondary drinking water standards to steel company's NPDES permit. Reversed and remanded.

74. Shopbell v. Washington State Department of Fish and Wildlife, **2021 WL 633636 (W.D. Wash. Feb 18, 2021).**

Plaintiffs originally filed this case in King County Superior Court against the Washington State Department of Fish and Wildlife and a number of WDFW officers involved in an investigation of Plaintiffs Hazen Shopbell and Anthony Paul. Plaintiffs' claims for false arrest and false imprisonment challenge the sufficiency of probable cause underlying this arrest. In its previous order on summary judgment, the Court denied the request of Defendants Vincent, Jaros, and Myers for qualified immunity. In this second attempt to establish that they had reasonable probable cause and are therefore entitled to qualified immunity from Plaintiffs' false arrest claims, Defendants submit declarations containing crucial details missing from the declarations supporting their first motion. Because the existence of probable cause entitles Defendants to qualified immunity from Plaintiffs' § 1983 false arrest and false imprisonment claims, the Court hereby dismisses these claims.

75. Metlakatla Indian Community v. Dunleavy, **2021 WL 960648 (D. Alaska Feb 17, 2021).**

Defendants, Michael J. Dunleavy, Governor of the State of Alaska; Doug Vincent-Lang, Commissioner of the Alaska Department of Fish and Game; and Amanda Price, Commissioner of the Alaska Department of Public Safety, move to dismiss the Metlakatla Indian Community's amended complaint, which seeks declaratory and injunctive relief in relation to the State's limited entry permit program for commercial fishing in state waters. MIC is a federally recognized Indian tribe that occupies land on the Annette Islands Reserve in Southeast Alaska. MIC is unique in that it occupies the only federal Indian reservation in the State of Alaska. The fact that the Metlakatlans are

fish-reliant people and the fact that the Annette Islands are proximate to fishing grounds are not sufficient grounds from which to find special implied off-reservation fishing rights. The Court disagrees that Congress' goal of encouraging a self-sufficient settlement means that Congress intended to grant the Community extended fishing rights in the area or otherwise understood that such rights necessarily would be appurtenant to the reservation itself. Implied off-reservation fishing rights have been found based on circumstances involving more than just a tribe's historical reliance on fishing and an intent to encourage self-sufficiency. The Metlakatlans voluntarily emigrated to the United States a few short years before the creation of the reservation; they were not forcefully relocated and had no land claim to settle with the United States. They did not engage in negotiations from which some additional or implied intent could be inferred or understood. Such a right simply cannot be implied from the language of the 1891 statute, the congressional record associated with its passage, and the history of the Community's relocation to the Annette Islands. This Court agrees with the State's position that the failure of the federal government to regulate or limit the Metlakatlans off-reservation fishing was not due to some recognized right granted to the Community in 1891, but rather due to the minimal regulation of the area's fisheries in general. Based on the preceding discussion, the State's motion to dismiss is Granted.

76. ***Hawkins v. Haaland,*** **F.3d, 2021 WL 1044979 (D.C. Cir. Mar 19, 2021).**

Ranchers with irrigation water rights in Upper Klamath Basin did not establish causation or redressability necessary for standing. Landowners brought action against Bureau of Indian Affairs (BIA) officials and Department of Interior, seeking declaratory and injunctive relief to prevent enforcement of Native American tribes' reserved water rights. The United States District Court for the District of Columbia, Beryl A. Howell, Chief Judge, 436 F.Supp.3d 241, dismissed action. Landowners appealed. The Court of Appeals, Rogers, Circuit Judge, held that landowners did not establish causation or redressability necessary for standing. Affirmed.

77. ***Navajo Nation v. U.S. Department of the Interior*****, F.3d, 2021 WL 1655885 (9th Cir. Apr 28, 2021).**

Jurisdiction could be exercised over tribe's claim that government breached its trust obligation to assert and protect tribe's reserved water rights. Indian tribe filed suit against Department of Interior (DOI), Secretary of Interior, Bureau of Reclamation (BOR), Bureau of Indian Affairs (BIA), and water districts, claiming that United States breached its trust obligation to assert and protect tribe's reserved water rights and violated National Environmental Policy Act (NEPA) and Administrative Procedure Act (APA) by failing to consider tribe's as-yet-unquantified water rights in managing Colorado River in issuing DOI's guidelines clarifying how it determined whether there would be sufficient water to satisfy amount budgeted among Lower Basin states and whether and how much surplus water would be available. Arizona, Nevada, and various state water, irrigation, and agricultural districts and authorities intervened. The United States District Court for the District of Arizona, No. 3:03-cv-00507-GMS, G. Murray Snow, J., 34 F.Supp.3d 1019, granted government's motion to dismiss for lack of subject matter jurisdiction, and, 2014 WL 12796200, denied tribe's motion for relief from judgment. Tribe appealed. The Court of Appeals, Berzon, Circuit Judge, 876 F.3d 1144, affirmed in part, reversed in part, and

remanded. On remand, the District Court, Snow, J., 2018 WL 6506957 and 2019 WL 3997370, denied tribe's motion and renewed motion for leave to file third amended complaint. Tribe appealed. The Court of Appeals, Gould, Circuit Judge, held that: 1) jurisdiction could be exercised over breach of trust claim; 2) breach of trust claim was not barred by res judicata; and 3) proposed amended complaint adequately stated breach of trust claim. Reversed and remanded with instructions. Lee, Circuit Judge, filed concurring opinion.

***78. State v. Towessnute,* P.3d, 2021 WL 1842835 (Wash. Apr 26, 2021).**

On May 15, 1915, the State charged Alec Towessnute, a Yakama tribal member, with multiple fishing crimes. These criminal charges stemmed from the fact that he was fishing in the usual and accustomed waters of the Yakama tribe the day before. The charging document filed in Benton County stated that Mr. Towessnute was fishing with a "gaff hook in the Yakima river ... more than five miles distant from any Indian Reservation." On June 10, 1915, Benton County Superior Court Judge Bert Linn entered a final judgment in the matter, dismissing all the charges against Mr. Towessnute. The prosecutor filed a notice of appeal to this court. This court issued the opinion that gives rise to this matter now before the court: State v. Towessnute, 89 Wash. 478, 154 P. 805 (1916). In that opinion, the court reversed the trial court's decision to dismiss the charges, mandated that the criminal charges be reinstated, and overruled Mr. Towessnute's objections. In 2015, the descendants of Mr. Towessnute, represented by attorney Jack Fiander and supported by the Washington State attorney general, sought vacation of any record of conviction against Mr. Towessnute. Mr. Fiander brought this matter to our court's attention again in 2020, seeking remedial action to right the injustice against Mr. Towessnute and the Yakama Nation. The opinion in State v. Towessnute is an example of the racial injustice described in this court's June 4, 2020 letter, and it fundamentally misunderstood the nature of treaties and their guarantees, as well as the concept of tribal sovereignty. For example, that old opinion claimed, "The premise of Indian sovereignty we reject. ... Only that title [to land] was esteemed which came from white men, and the rights of these have always been ascribed by the highest authority to lawful discovery of lands occupied, to be sure, but not owned, by any one before." Id. at 482, 154 P. 805. And that old opinion rejected the arguments of Mr. Towessnute and the United States that treaties are the supreme law of the land. It also rejected the Yakama Treaty's assurance of the tribal members' right to fish in the usual and accustomed waters, in the usual and accustomed manner, as the tribe had done from time immemorial. This court characterized the Native people of this nation as "a dangerous child," who "squander[ed] vast areas of fertile land before our eyes." Today, we take the opportunity to repudiate this case; its language; its conclusions; and its mischaracterization of the Yakama people, who continue the customs, traditions, and responsibilities that include the fishing and conservation of the salmon in the Yakima River. Under the Rules of Appellate Procedure (RAP) 1.2(c), this court may act and waive any of the RAP "to serve the ends of justice." We do so today. We cannot forget our own history, and we cannot change it. We can, however, forge a new path forward, committing to justice as we do so. Therefore, it is hereby ordered: That the mandate issued by this court in 1916 is recalled and any conviction existing then or now against Mr. Towessnute is vacated.

***79. Lower Elwha Klallam Indian Tribe v. Lummi Nation*, 849 Fed. Appx. 216 (Mem) (9th Cir. June 3, 2021).**

The parties appeal the district court's application of our opinion and remand in United States v. Lummi Nation, 876 F.3d 1004 (9th Cir. 2017) ("Lummi III"). We held in Lummi III that the "waters west of Whidbey Island" are encompassed in the Lummi Nation's "usual and accustomed" fishing grounds ("U&A"). We equated the phrase "waters west of Whidbey Island" with the phrase "the waters contested here." Therefore, in stating that the "waters west of Whidbey Island" are part of the Lummi Nation's U&A, we held that the "waters contested here" are part of the Lummi Nation's U&A. The "waters contested here," in turn, are the waters "northeasterly of a line running from Trial Island near Victoria, British Columbia, to Point Wilson on the westerly opening of Admiralty Inlet, bounded on the east by Admiralty Inlet and Whidbey Island, and bounded on the north by Rosario Strait, the San Juan Islands, and Haro Strait." Lummi III held that these waters are part of the Lummi Nation's U&A, In holding that the waters east of the Trial Island line are included in the Lummi Nation's U&A, we relied on the geographic fact that those waters lie between "the waters surrounding the San Juan islands" and "Admiralty Inlet" and the general evidence of travel between those two areas. Lummi III, 876 F.3d at 1009. Under the logic of Lummi III, the waters to the west of the Trial Island line are not part of the Lummi Nation's U&A, because those waters do not similarly lie between "the waters surrounding the San Juan islands" and "Admiralty Inlet." Finally, by declining to determine the outer bounds of the Strait of Juan de Fuca, which is excluded from the Lummi Nation U&A, we held that the Lummi Nation U&A and the Strait of Juan de Fuca do not necessarily share a boundary. Id. at 1011. Because the district court interpreted Lummi III to hold only that the Lummi Nation has the right to fish in some portion of the contested waters, we reverse and remand for the purpose of entering judgment in favor of the Lummi Nation on the ground that the Lummi Nation U&A includes the entirety of the area contested in this subproceeding, e.g. the waters "northeasterly of a line running from Trial Island near Victoria, British Columbia, to Point Wilson on the westerly opening of Admiralty Inlet, bounded on the east by Admiralty Inlet and Whidbey Island, and bounded on the north by Rosario Strait, the San Juan Islands, and Haro Strait." The Lummi Nation's fishing rights in the waters east of the Trial Island line were resolved by Lummi III, and the rights in the waters west of the Trial Island line are not presently contested. Reversed with respect to the district court's interpretation of Lummi III.

***80. American Whitewater v. Electron Hydro*, LLC. 2021 WL 2530384 (W.D. Wash. June 18, 2021).**

This matter comes before the Court on Plaintiff Puyallup Tribe of Indians' ("Puyallup Tribe") and Plaintiffs American Whitewater and American Rivers, Inc.'s ("Conservation Groups") motions for a preliminary injunction. The Court hereby grants the Puyallup Tribe's motion and denies the Conservation Groups' motion. The Conservation Groups were the first to bring suit in this matter. In 2016, they alleged that Defendants were violating the Endangered Species Act ("ESA"), 16 U.S.C. § 1538(a)(1)(B), by operating a hydroelectric dam located along the Puyallup River that took Chinook salmon, steelhead trout, and bull trout ("listed species") without an ESA Section 10(a)(1) incidental take permit. Based on subsequent negotiations, the parties jointly moved to

postpone proceedings in the matter while Defendants worked on drafting a Habitat Conservation Plan ("HCP"), a prerequisite to receiving an incidental take permit, and modified the dam's intake structure to reduce or eliminate the incidental take. The Puyallup Tribe filed its own ESA suit seeking an injunction barring Defendants from opening up the intake without an incidental take permit. Plaintiffs now move for a preliminary injunction barring Defendants from again diverting water to the power generation facility prior to acquiring an incidental take permit. The Puyallup Tribe also presents substantial evidence demonstrating that the resulting deposition of listed species into the forebay harms those species, thereby supporting its assertion that this is a take. Moreover, the Tribe presents unrebutted evidence suggesting that Defendants' planned diversion of water from the Puyallup River into the flume, without first acquiring an incidental take permit, represents a threat to the recovery of the entirety of the Puyallup Chinook salmon population. Accordingly, the Court finds that the Puyallup Tribe has demonstrated both a likelihood of success on the merits and that irreparable injury is likely in the absence of a preliminary injunction barring Defendants from diverting the Puyallup River into its power generation facility. Based on this finding, the Conservation Groups' motion is moot.

***81. Ak-Chin Indian Community v. Maricopa-Stanfield Irrigation & Drainage District*, 2021 WL 2805609 (Ariz. Ct. App. July 6, 2021**).

At issue is Plaintiff and Counter-Defendant Ak-Chin Indian Community's Motion to Dismiss. For the following reasons, the Court will grant both Ak-Chin's Motion to Dismiss as well as the United States's Motion to Dismiss. Plaintiff Ak-Chin is a federally recognized Indian tribe and the beneficial owner and occupant of a 22,000-acre reservation within Pinal County. CAIDD and MSIDD are irrigation and drainage districts and Arizona municipal corporations that deliver irrigation water to lands within their respective service areas. The United States established Plaintiff's reservation in 1912. In 1978, Congress approved the 1978 Settlement Act, a settlement between Plaintiff and the United States in which the government agreed to provide Ak-Chin 85,000 acre-feet ("AF") of water suitable for irrigation on a permanent, annual basis. In 1984, the United States and Ak-Chin amended the terms of the 1978 Settlement Act. Under the 1984 Settlement Act, Ak-Chin is entitled to a permanent water supply of not less than 75,000 AF of surface water "suitable for agricultural use" delivered "from the main project works of the Central Arizona Project." The 1984 Settlement Act requires the United States to "design, construct, operate, maintain, and replace" all necessary facilities for conveying the water. Plaintiff frequently receives water that is higher in sodium and other constituents than CAP water diverted from the Colorado River. This water has negatively impacted Plaintiff's farming by causing soil salinization, reducing quality and quantity of crop yields, preventing the farming of certain salt-sensitive crops, and requiring more water and resources to stabilize the soil. Plaintiff alleges Defendants' continued pumping of groundwater into the Canal will reduce its ability to sustain farming operations and ultimately affect its sovereignty and economic well-being. Ak-Chin now moves, pursuant to Federal Rule of Civil Procedure 12(b)(1) to dismiss the counterclaim on the basis of tribal sovereign immunity. A tribe may only waive its right to sovereign immunity through "unequivocal waiver." Id. at 1099. While the filing of a lawsuit may indicate such unequivocal waiver, "a tribe does not waive its sovereign immunity from actions

that could not otherwise be brought against it merely because those actions were pleaded in a counterclaim to an action filed by the tribe." Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 509 (1991). Here, Ak-Chin moved to enjoin CAIDD from taking actions that allegedly degrade the water quality. The Court grants Ak-Chin's Motion to Dismiss CAIDD's counterclaim for unjust enrichment with prejudice, and grants the United States's Motion to Dismiss CAIDD's crossclaim for declaratory relief.

***82. Penobscot Nation v. Frey*, 3 F.4th 484 (1st Cir. July 8, 2021).**

American Indian tribe brought action against State of Maine and various state officials, in response to opinion of Maine Attorney General regarding regulatory jurisdiction of tribe and State related to hunting and fishing on stretch of river, seeking declaratory judgment clarifying boundaries of tribe's reservation and tribal fishing rights on river. United States intervened on its own behalf and as trustee for tribe, and private interests, towns and other political entities intervened in support of state defendants. The United States District Court for the District of Maine, George Z. Singal, J., 151 F.Supp.3d 181, ruled that tribe's reservation included river's islands but not its waters, and sustenance fishing rights provided in reservation's implementing statute allowed tribe to take fish for sustenance in entirety of relevant stretch of river, and issued declaratory relief as to both points. Parties cross-appealed. The Court of Appeals, 954 F.3d 453, affirmed in part and vacated in part. Petition for rehearing en banc was granted. The Court of Appeals, Lynch, Circuit Judge, held that: 1 term, "Penobscot Indian Reservation," in Maine Indian Claims Settlement Acts, included only specified islands and not Main Stem of Penobscot River or its submerged lands; 2 tribe did not suffer actual or imminent injury-in-fact with regard to claim over sustenance tribal fishing rights, as required to have Article III standing; 3 fitness prong of ripeness inquiry had not been met; and 4 hardship prong of ripeness inquiry had not been met. Affirmed in part and vacated in part. Barron, Circuit Judge, filed opinion concurring in part and dissenting in part, in which, Thompson, Circuit Judge, joined.

***83. Scudero v. State*, P. 3d, 2021 WL 3123069 (Alaska July 23, 2021).**

Defendant, a member of Indian tribe, was convicted in the District Court, First Judicial District, Ketchikan, Kevin G. Miller, J., of several commercial fishing violations. Defendant appealed. The Court of Appeals asked the Supreme Court to take jurisdiction of the appeal, which it did. Holdings: The Supreme Court, Maassen, J., held that: 1 defendant's aboriginal fishing rights did not preclude enforcement of State commercial fishing laws; 2 the trial court's exclusion of testimony from defendant, a member of Indian tribe, about his claimed aboriginal fishing rights and the historical underpinnings of his intent to "protest fish," was not an abuse of discretion; 3 trial court's admission of defendant's past convictions for commercial fishing in State waters without a permit was not an abuse of discretion; 4 fine of $20,000 for three commercial fishing violation offenses was not excessive; and 5 the trial court erred when it included a one-year probationary term in the written judgment. Affirmed; remanded.

***84. Snoqualmie Indian Tribe v. Washington*, F.4th, 2021 WL 3439659 (9th Cir August 6, 2021).**

The panel affirmed the district court's dismissal, on the ground of issue preclusion, of the Snoqualmie Indian Tribe's complaint seeking a declaration that it is a signatory to the Treaty of Point Elliott and that its reserved off-reservation hunting and gathering rights under the Treaty continue. The panel held that it was within the district court's discretion to dismiss on the ground of issue preclusion without first establishing subject matter jurisdiction because the dismissal was a non-merits dismissal, and it was reasonable for the district court to conclude that dismissal on the ground of issue preclusion was the less burdensome course. The panel affirmed the district court's conclusion that the determination in United States v. Washington ("Washington II"), 476 F. Supp. 1101 (W.D. Wash. 1979), aff'd, 641 F.2d 1368 (9th Cir. 1981), that the Snoqualmie has no fishing rights under the Treaty precluded a finding that the Tribe has any hunting and gathering rights under the same Treaty. The panel concluded that in Washington II, the Snoqualmie actually litigated the identical issue of treaty-tribe status. Further, United States v. Washington ("Washington IV"), 593 F.3d 790 (9th Cir. 2010) (en banc), did not create an exception to issue preclusion, and no other exception applied. Restatement (Second) of Judgments § 28 (1982) notes some exceptions. The Snoqualmie's claim to the first of these exceptions fails for the simple reason that the issue the Snoqualmie seeks to relitigate is a factual issue, and this exception applies only to issues of law. Also, for reasons we have already articulated, Washington IV did not announce an exception to issue preclusion for newly recognized tribes, and thus the applicable legal context remains unchanged. The Snoqualmie also unsuccessfully stakes its claim to this exception in the decision of the Assistant Secretary of Indian Affairs to take land into trust on its behalf. See U.S. Dep't of Interior, Fee-to-Trust Decision (Mar. 18, 2020), https://www.bia.gov/sites/bia.gov/files/assets/as-ia/ots/pdf/Snoqualmie_Indian_Tribe.pdf (last visited June 24, 2021). This decision recognizes that the Snoqualmie was a signatory to the Treaty and that the Treaty "remains in effect today." See id. at 36, 39. It further recognizes that "the Snoqualmie Tribe was clearly identified as derived from the treaty-signatory Snoqualmie." Id. at 39. This argument fails because it is simply a repackaged attempt to give administrative rulings effect in subsequent treaty rights litigation, which Washington IV explicitly forbids. The Snoqualmie's claim to the second exception is grounded in the allegedly questionable quality and extensiveness of the procedures employed in Washington II to determine the factual issue of the Tribe's treaty-tribe status. But as we pointed out in Washington IV, the factual finding that lies at the heart of this appeal was "made by a special master after a five-day trial, and ... again by the district judge de novo after an evidentiary hearing." 593 F.3d at 799. And the Samish—and, by extension, the Snoqualmie, too—had no reason "to hold back any evidence" at those hearings, nor did they lack incentive "to present in Washington II all of [their] evidence supporting [their] right to successor treaty status." We affirm the district court's issue preclusion dismissal because the issue the Snoqualmie now seeks to litigate—its treaty-tribe status under the Treaty of Point Elliott—is identical to the issue actually litigated and decided in Washington II, and no issue preclusion exception applies.

G. *Gaming*

85. United Auburn Indian Community of Auburn Rancheria v. Newsom, 10 Cal.5th 538, 472 P.3d 1064 (Cal. Aug 31, 2020).

Governor had implied authority to concur with Interior Secretary's determination to allow class III gaming to occur on Indian lands. Owner of existing Indian casino filed petition for writ of mandate and complaint for injunctive relief challenging Governor's concurrence with Interior Secretary's determination under Indian Gaming Regulatory Act (IGRA) that parcel of land acquired after IGRA was enacted was suitable for proposed competing Indian casino. The Superior Court, Sacramento County, dismissed and plaintiff appealed. The Court of Appeal, 4 Cal.App.5th 36, 208 Cal.Rptr.3d 487, affirmed. Certiorari was granted. The Supreme Court, Cuellar, J., held that: 1) ballot initiative permitting class III gaming by Indian tribes "on Indian lands" and "on tribal lands" permitted gaming on land taken into trust after IGRA's enactment; 2) initiative gave Governor implied authority to concur to allow class III gaming to occur on those lands, abrogating Stand Up for California! v. State of California, 6 Cal.App.5th 686, 705, 211 Cal.Rptr.3d 490; 3) separation of powers doctrine did not preclude Governor from concurring to allow class III gaming; and 4) Governor did not exceed his authority in conducting negotiations regarding parcel that had not yet become Indian land. Affirmed.

***86. Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation v. California,* 973 F.3d 953, 2020 WL 5225700 (9th Cir. Sep 02, 2020).**

California negotiated new tribal-state gaming compact in good faith under Indian Gaming Regulatory Act. Pauma Luiseno Band of Mission Indians filed suit against State of California and Governor, claiming violation of Indian Gaming Regulatory Act (IGRA) by allegedly failing to negotiate new tribal-state gaming compact in good faith. The United States District Court for the Southern District of California, Cynthia Bashant, J., 343 F.Supp.3d 952, granted state partial summary judgment. Tribe appealed. The Court of Appeals, Bade, Circuit Judge, held that: 1) district court did not create impasse defense to tribe's bad faith claims; 2) state did not engage in bad faith by surface bargaining; 3) state did not negotiate in bad faith by protecting state lottery revenues; 4) state did not negotiate in bad faith regarding on-track horse racing and wagering; 5) state did not negotiate in bad faith for specific types of additional lottery games; 6) state did not negotiate in bad faith as to substantiating its bargaining position; 7) state's minor delay in negotiations did not constitute bad faith; 8) state did not negotiate in bad faith by circulating proposed draft compact; 9) state did not negotiate in bad faith due to draft's allegedly unduly harsh language; and 1)0 state negotiated compact in good faith. Affirmed.

***87. Jamul Action Committee v. Simermeyer,* 974 F.3d 984, 2020 WL 5361652 (9th Cir. Sep 08, 2020).**

Indian tribe was real party in interest to suit to enjoin construction of Indian casino. Action was brought to enjoin the construction of Indian casino, on theory that the Indian tribe constructing it was not a federally recognized tribe and that its land did not qualify as "Indian land" eligible for gaming under the Indian Gaming Regulatory Act (IGRA). The United States District Court for the Eastern District of California, No. 2:13-cv-01920, Kimberly J. Mueller, J., 200 F.Supp.3d 1042, entered order dismissing lawsuit for failure to join a required party, and plaintiffs appealed. The Court of Appeals, William A. Fletcher, Circuit Judge, held that: 1) tribe that was recognized by the Bureau of Indian Affairs (BIA) nearly four decades earlier, and that had since appeared on every list of

federally recognized tribes, was a tribe protected by sovereign tribal immunity; 2) Indian tribe was real party in interest to suit brought against individual tribal officers to enjoin the construction of Indian casino, and thus suit was barred based on the tribe's sovereign immunity; 3) tribe was a required party, which had to be joined if feasible to lawsuit brought to enjoin the construction of Indian casino on theory that tribe was not federally recognized Indian tribe and that its land did not qualify as "Indian land"; and 4) lawsuit had to be dismissed based on plaintiffs' inability to join a required party. Affirmed.

***88. Scotts Valley Band of Pomo Indians v. United States Department of the Interior,* F.R.D., 2020 WL 5763583 (D.D.C. Sep. 28, 2020).**

Neighboring tribe could not intervene as of right in other tribe's action challenging DOI's decision to allow it to conduct gaming on parcel of land. Tribe brought action against United States Department of the Interior (DOI), alleging that DOI's decision finding that tribe did not have requisite historical connections to parcel of land to conduct gaming activities there under restored lands exception of the Indian Gaming Regulatory Act (IGRA) was arbitrary and capricious in violation of the Administrative Procedure Act (APA). Neighboring tribe, which claimed that land at issue was exclusive territory of its ancestors, moved to intervene. The District Court, Amy Berman Jackson, J., held that: 1) neighboring tribe lacked standing to intervene, and 2) record did not support motion to intervene as of right. Motion denied.

***89. Dotson v. Tunica-Biloxa Gaming Commission,* Fed.Appx., 2020 WL 6386877 (5th Cir. Oct 28, 2020).**

Patron of casino operated by Native American tribe brought pro se action against tribe's gaming commission and others arising out of their refusal to pay him a $20,500,000 jackpot that he alleged he had won. The United States District Court for the Western District of Louisiana, Dee D. Drell, Senior District Judge, adopted the report and recommendation of Joseph H. L. Perez-Montes, United States Magistrate Judge, 2020 WL 1493028, and granted the motions to dismiss filed by gaming commission and two casino employees. Patron appealed. The Court of Appeals held that: 1) gaming commission was entitled to sovereign immunity from patron's claims, and 2) district court did not abuse its discretion by dismissing the claims against the employees based on patron's failure to effect timely service of process. Affirmed.

***90. Yocha Dehe Wintun Nation v. Newsom,* 830 Fed.Appx. 549 (9th Cir. Dec 03, 2020).**

The Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701 et seq., allows tribes to offer gaming in Indian country. Class III gaming, consisting of the types of "high-stakes games usually associated with Nevada-style gambling," is permitted pursuant to a compact with the state encompassing the tribe's territory. In re Indian Gaming Related Cases, 331 F.3d 1094, 1097 (9th Cir. 2003); see 25 U.S.C. § 2710(d). This action by the Yocha Dehe Wintun Nation, the Viejas Band of Kumeyaay Indians, and the Sycuan Band of the Kumeyaay Nation against the State of California alleges breaches of gaming compacts that purportedly grant the Tribes exclusive rights to operate banked card games. The Tribes allege the State has violated the compacts, its duty of good faith and fair dealing, and article IV, section 19(f) of the California Constitution ("Proposition 1A"), by failing to prevent non-Indian cardrooms from also conducting banked card games. The

district court granted the State's motion to dismiss for failure to state a claim. Reviewing de novo, we affirm. The State contends that the compacts merely recognize, but do not grant, the Tribes' exclusive rights under Proposition 1A to operate legal banked card games. Nothing in the compacts purports to impose on the State the obligation to enforce its laws against non-Indian cardrooms, and nothing in the contracts suggests the Tribes may seek that remedy based on an alleged breach of any exclusivity guarantee. We would also be reluctant to read such an extraordinary remedy into the compacts because California law does not permit the State to contract away its right to exercise the police power. Nothing in the compacts suggests we can order the State to turn its law enforcement priorities towards certain lawbreakers, as individual law enforcement decisions are particularly ill-suited to judicial review. Affirmed.

***91. Unite Here Local 30 v. Sycuan Band of the Kumeyaay Nation,* 2020 WL 7260672 (S.D. Cal. Dec 10, 2020).**

Pending before this Court are Plaintiff UNITE HERE Local 30's ("the Union") motion to dismiss Defendant Sycuan Band of Kumeyaay Nation's ("the Tribe") counterclaim for declaratory relief and motion for judgment on the pleadings. For the reasons that follow, the Union's motions are hereby Granted. The Tribe owns and operates the Sycuan Casino Resort. The Union is a labor organization seeking to represent the Sycuan Casino Resort employees. Pursuant to the Indian Gaming Regulatory Act ("IGRA"), the Tribe entered into a Compact with the State of California regarding where and how it will operate its casino. Section 12.10 of the Compact requires the Tribe to adopt and maintain a Tribal Labor Relations Ordinance ("TLRO") in order for gaming activities to continue. The TLRO sets out procedures for organizing casino employees into a union. The TLRO requires the Tribe to enter into a contract with a union if certain conditions are met. The Union alleges that it has a contract with the tribe because it made a Section 7 offer to the Tribe by delivering a letter to the Tribe's top elected official and the TLRO contains the Tribe's automatic acceptance of such an offer. The Tribe denies that it has entered into a contract with the Union. In response to the Union's demand for arbitration, the Tribe declared that "[it]'s legal position is that the TLRO is preempted by the National Labor Relations Act (NLRA) and is therefore null and void; and the Tribe has no obligation to comply with it." On June 1, 2020, the Union filed its Complaint seeking an order compelling arbitration. The Tribe timely filed both an Answer and a Counterclaim. The counterclaim seeks a declaratory judgment stating that federal law preempts and invalidates California's requirement that the Tribe enter into a contract with the Union. Now before the Court are the Union's motion to dismiss the counterclaim and its subsequent motion for judgment on the pleadings. The Tribe admits it adopted the TLRO and continues to maintain it. The Tribe admits the text of the TLRO. The Tribe admits it received the Union's offer described by Section 7 of the TLRO. Thus, a contract was formed in which the Tribe and the Union agreed to comply with the TLRO's terms. Having determined the formation of a contract, the Court declines to exercise supplemental jurisdiction over the Tribe's counterclaim, which requests a declaration that the contract is void due to preemption of the TLRO by the NLRA. Doing so would interfere with the arbitrator's authority. See 28 U.S.C. § 1367(c)(4). In a challenge involving a contract with an arbitration clause, the issue of a contract's validity as a whole

is to be considered by the arbitrator, not the court. Based on the foregoing, the court Grants the motion to dismiss and the motion for judgment on the pleadings.

***92. Nguyen v. Cache Creek Casino Report,* 2021 WL 22434 (E.D. Cal. Jan 04, 2021).**
Plaintiff Hung M. Nguyen, proceeding pro se, asserts various federal- and state-law claims against defendant Cache Creek Casino Resort concerning Nguyen's detention on the Casino's premises. Cache Creek argues that as an enterprise wholly owned by a sovereign tribal entity, the court has no power to rule on Nguyen's claims. Plaintiff Nguyen is a recipient of SSI disability. Defendant Cache Creek Casino Resort is an enterprise controlled by the Yocha Dehe Wintun Nation, (the "Tribe") which entered a tribal-state compact with California (as approved by the Secretary of the Interior). On June 29, 2020, Cache Creek's security team detained Nguyen at the Cache Creek Casino because the casino had previously determined Nguyen was not permitted to reenter. The team handcuffed Nguyen and called for the Yolo Sheriff's Office to eject Nguyen from the premises. Nguyen was charged by the county with trespass, but these charges were dropped. In October 2019, Nguyen filed an administrative tort claim with the Tribe, as prescribed by the tribal-state compact and the Tribe's Tort Ordinance. A "risk compliance officer" reviewed and rejected Nguyen's claim and advised him of his right to appeal, as per the Tort Ordinance. In March 2020, Nguyen filed a case against Cache Creek in California Superior Court, Solano County, for "Gross Negligence, Intentional Infliction of Emotional Distress, and False Imprisonment." This case was dismissed on jurisdictional grounds on July 24, 2020. On August 31, 2020, Nguyen filed the instant action, alleging discrimination claims under 42 U.S.C. § 12101 and 42 U.S.C. § 2000a, as well as various claims under California state law (including claims asserted in the Solano County case). However, Cache Creek argues that the court lacks subject-matter jurisdiction to hear these claims because of the Tribe's sovereign immunity. Without an unequivocal waiver of sovereign immunity from a tribe or an authorization from Congress, federal courts lack the requisite subject-matter jurisdiction to rule on matters involving tribes. The Tort Claims Ordinance provided Nguyen with the exclusive remedy for the claims asserted in this suit, and Nguyen has submitted no evidence that the Tribe has "unequivocally expressed" an intent to waive its immunity to suit in a federal court. Therefore, the Tribe's immunity remains intact, the court lacks subject-matter jurisdiction, and Nguyen's claims must be dismissed.

***93. Treat v. Stitt,* P.3d, 2021 WL 246250 (Okla. Jan 26, 2021).**
New tribal gaming compacts were invalid under State law. Petitioners brought action seeking declaratory relief that the Executive branch did not validly enter into new tribal gaming compacts. The Supreme Court, Winchester, J., held that new tribal gaming compacts were invalid under State law. Ordered accordingly. Rowe, J., filed opinion concurring in the result.

***94. Aquinnah/gay Head Community Association, Inc. v. Wampanoag Tribe of Gay Head (Aquinnah),* F.3d, 2021 WL 733081 (1st Cir. Feb 25, 2021).**
Indian tribe waived issue of whether it was required to obtain building permit from town before constructing gaming facility. Commonwealth of Massachusetts brought action in Commonwealth court, asserting claim for breach of contract, and requesting declaratory

judgment that Indian Land Claims Settlement Act of 1987 (Massachusetts Settlement Act) allowed it to prohibit federally recognized Indian tribe from conducting gaming on Settlement lands in town. Following removal, town and community association intervened and tribe filed counterclaims. After entering preliminary injunction prohibiting tribe from undertaking any further construction on casino, the United States District Court for the District of Massachusetts, F. Dennis Saylor, Chief Judge, 144 F.Supp.3d 152, entered summary judgment for Commonwealth and intervenors. Tribe appealed. The Court of Appeals, 853 F.3d 618, reversed in part and remanded for entry of final judgment. On remand, the District Court, Saylor, J., 390 F.Supp.3d 183, entered amended final judgment in tribe's favor as to gaming issue but against tribe as to permitting issue. Tribe appealed. The Court of Appeals, Thompson, Circuit Judge, held that: 1) tribe waived issue of whether it was required to obtain building permit from town; 2) tribe waived its tribal immunity through its litigation conduct; and 3) district court's ruling on remand was not so unreasonable or obviously wrong to preclude application of law of the case doctrine. Affirmed.

***95. Seneca Nation of Indians v. New York,* F.3d, 2021 WL 667557 (2nd Cir. Feb 22, 2021).**

Arbitration award requiring Indian tribe to continue making payments to state under gaming compact did not manifestly disregard IGRA. Indian tribe filed petition, under Federal Arbitration Act (FAA), seeking to vacate arbitration award in favor of State of New York, on grounds that arbitration panel manifestly disregarded Indian Gaming Regulatory Act (IGRA) and usurped authority of Secretary of Interior by requiring tribe to continue making payments to State during renewal period beyond 14-year initial term of their gambling compact, and alternatively, requesting referral to Department of Interior (DOI) pursuant to primary jurisdiction doctrine. State cross-petitioned to confirm arbitration award under FAA. The United States District Court for the Western District of New York, William M. Skretny, Senior District Judge, 420 F.Supp.3d 89, denied tribe's petition and granted State's cross-petition. Tribe appealed. The Court of Appeals, Pooler, Circuit Judge, held that: 1) arbitration panel did not manifestly disregard IGRA, and 2) primary jurisdiction doctrine did not apply to require referral to DOI. Affirmed.

***96. Jllj Development, LLC v. Kewadin Casinos Gaming Authority*, 2021 WL 1186228 (W.D. Mich. Mar 30, 2021).**

This case arises out of two casino development contractual disputes between JLLJ Development, LLC, and Lansing Future Development II, LLC and the Kewadin Casinos Gaming Authority. The purpose of the contracts was the development of two new tribal casinos on two new parcels in Michigan's Lower Peninsula. Nearly a decade after entering into the contracts, there is no new casino on either parcel and each side blames the other for the failures. The Developers initiated this action seeking a declaratory judgment and alleging nine state law contract, quasi-contract, and tort claims. The Gaming Authority filed a motion to dismiss based on tribal sovereign immunity. The Sault Ste. Marie Tribe of Chippewa Indians, a federally recognized tribe, created the Gaming Authority as a separate entity to run the Tribe's casino and gaming operation. To assist in the development, financing, and construction of new casinos, the Gaming

Authority entered into separate, but nearly identical, casino development agreements with the Developers. The Turn-Key Agreements provided that the Gaming Authority "intend[ed] to develop, operate and maintain a licensed gaming establishment... on mutually acceptable real estate... on Indian lands pursuant to and in accordance with the terms and provisions of the Indian Gaming Regulatory Act (IGRA)." The parties did not intend for the Turn-Key Agreements to be considered management contracts, and the Developers did not have any proprietary interest in the gaming facilities. In the event of default, the Turn-Key Agreements outlined the rights and remedies of the parties. The parties agreed to litigate any dispute arising from the agreements in the United States District Court for the Western District of Michigan. The claims here all arise under state law. They rest primarily on factual allegations (1) that the Gaming Authority refused to comply with the budgeting provisions of the Turn-Key Agreements and overspent; and (2) that the Gaming Authority failed to complete the process of obtaining the land and transferring into trust so the casinos could be built and begin to operate. After considering the supplemental briefing and argument of the parties, the Court is satisfied that it lacks subject matter jurisdiction and must therefore dismiss the case. Here, the parties agree that diversity jurisdiction does not apply because Indian tribes are not considered a citizen of any State. Here, the Developers did not assert any cause of action created by a federal statute.

***97. Chicken Ranch Rancheria of Me-Wuk Indians v. Gavin Newsom*, 2021 WL 1212712 (E.D. Cal. March 31, 2021).**

In 2014, the Tribal Plaintiffs joined several other Indian tribes who have 1999 Compacts to form the Compact Tribes Steering Committee ("CTSC"). In 2015, the CTSC and California started to negotiate the terms of a new agreement on class III gaming to replace the 1999 Compacts which were coming to the end of their terms. Negotiations took place over the next few years. Dissatisfied with the negotiations, Tribal Plaintiffs filed suit against The State of California and Governor Gavin Newsom ("State Defendants") on January 4, 2019. The Tribal Defendants withdrew from the CTSC on September 26, 2019. The Tribal Plaintiffs and State Defendants have filed cross motions for summary judgment which cover the same subject matter. The parties agree on the nature of the dispute. The State Defendants note that the Plaintiff Tribes allege that during class III gaming compact negotiations the State Defendants insisted that they agree to include subjects in their new compacts that violate IGRA. The good faith negotiation requirement of IGRA is not without teeth. Sections 2710(d)(7)(B)(i)-(vii) provide a detailed remedial scheme designed to prevent a State from seeking to wrongfully inhibit an Indian tribe from engaging in class III gaming activity. Importantly for the case at hand, IGRA sets out the provisions that may be contained in a compact governing class III gaming (25 U.S.C. § 2710(d)(3)(C)(i-vii)) and what courts may consider in determining whether a state negotiated in good faith (25 U.S.C. § 2710(d)(7)(B)(iii)(I) and (II)). A compact may contain provisions relating to: (i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity; (ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations; (iii) the assessment by the State of such activities in such amounts as are necessary to defray the

costs of regulating such activity; (iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities; (v) remedies for breach of contract; (vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and (vii) any other subjects that are directly related to the operation of gaming activities. 25 U.S.C. § 2710(d)(3)(C). The Ninth Circuit reasoned that "it is clear from the legislative history that by limiting the proper topics for compact negotiations to those that bear a direct relationship to the operation of gaming activities, Congress intended to prevent compacts from being used as subterfuge for imposing State jurisdiction on tribes concerning issues unrelated to gaming." Coyote Valley Band of Pomo Indians v. Cal. (In re Indian Gaming Related Cases Chemehuevi Indian Tribe), 331 F.3d 1094, 1111 (9th Cir. 2003) ("Coyote Valley II"). An attempt to negotiate (or refusal to negotiate based on) topics not enumerated in Section 2710(d)(3)(C) violates a state's duty to negotiate in good faith. The Tribal Plaintiffs have identified (1) state tort laws, (2) state environmental laws, (3) subjecting the Tribal Plaintiffs to the jurisdiction of local governments, (4) recognition and enforcement of state spousal and child support orders, (5) state minimum wage laws, (6) anti-discrimination laws, and (7) labor laws as the topics the State Defendants tried to negotiate over that were not permitted by IGRA. As discussed above, Coyote Valley II permitted the negotiation of labor representation over support staff jobs in addition to workers directly performing gaming functions; the language covered "Class III Gaming Employees and other employees associated with the Tribe's Class III gaming enterprise, such as food and beverage, housekeeping, cleaning, bell and door services, and laundry employees at the Gaming Facility or any related facility, the only significant purpose of which is to facilitate patronage at the Gaming Facility. Nevertheless other disputed issues lack the required direct relationship. The Tribal Plaintiffs' motion for summary judgment is granted. The State Defendants' motion for summary judgment is denied. Accordingly, the parties are hereby ordered to proceed pursuant to the remedial process set forth in the IGRA.

***98. United States of America v. Kunich, et al.,* 2021 WL 1326670 (W.D. Mich. Apr 09, 2021).**

The Government charged Defendants McKayla Kunick and Christopher Pearce with theft from an Indian gaming establishment, and aiding and abetting such theft, in violation of 18 U.S.C. §§ 1167(a) and 2(a). Pursuant to a stipulation, the parties agreed to facts that satisfy every element of this except for one element: the requirement that the Government prove beyond a reasonable doubt that the stolen money, funds, or property belonged to the Indian gaming establishment. Kunick's trial brief stated, in relevant part, that she is not guilty of the charge "because she did not abstract, purloin, willfully misapply or take and carry away with the intent to steal property belonging to a gaming establishment ran by an Indian tribe." Through the free play credits process, Kunick and Pearce obtained and used a total of $682.00 worth of credits. The Ninth Circuit defined the phrase in the context of a similar statue, 18 U.S.C. § 1163, which criminalizes theft from an Indian Tribal organization. In United States v. Aubrey, the Ninth Circuit noted that " '[b]elong' is commonly defined as 'to be the property of a person or thing.' 800 F.3d at 1125. The Ninth Circuit concluded that to show that funds continue to belong to the Indian tribe, the Government must show that "the tribe maintains 'title to, possession of, or control over

them.' " Id. at 1126. Defendants argued that the free play credits they stole were essentially gifts to the legitimate Players Club card holders and, accordingly, that the free play credits did not belong to the Casino. The Court disagrees with this assertion. For the above reasons, the Court finds that the Government has proven beyond a reasonable doubt that the stolen free play credits on the Players Club cards belonged to the Ojibwa Casino.

***99. Johnson v. AGS CJ Corporation,* Fed.Appx., 2021 WL 1561464 (2nd Cir. Apr 21, 2021).**

Plaintiffs-Appellants Roy Johnson and James Breslo appeal from an April 7, 2020 grant of summary judgment in favor of Defendant-Appellee AGS CJ Corporation, formerly known as Amaya Americas Corporation. Johnson and Breslo argue that they are entitled to $7 million that was held back from a 2013 Stock Purchase Agreement under which Amaya agreed to purchase Diamond Game Enterprises. Diamond Game leased gaming equipment to the Ysleta del Sur Pueblo Tribe, also known as the Tigua Tribe of Texas. Prior to the closing of the sale pursuant to the SPA, Diamond Game was named as a defendant in a contempt motion instituted in a long-running lawsuit brought by the State of Texas against the Tribe for alleged illegal "sweepstakes" gaming activities. As a result, in 2014, Amaya negotiated with Johnson and Breslo a $7 million holdback of the purchase price. The $7 million would be held back until, among other conditions, a "Texas Clearance Event" occurred. Since at least 2009, the Tribe had been required to seek pre-approval of specific gaming activities from the U.S. District Court for the Western District of Texas to determine their permissibility under Texas law. When it decided the contempt motion, the Texas Court issued an order holding that "the Tribe would no longer be required to seek pre-approval of proposed gaming activities" because such a process runs afoul of the Restoration Act, Pub. L. No. 100-89, 101 Stat. 666 (1989), and the federal courts lack jurisdiction to issue advisory opinions. It declared that the Tribe's "sweepstakes" proposal was illegal under Texas law, but declined to consider whether bingo could be pre-approved as permissible in light of its decision to terminate the pre-approval process. The essence of this case is the meaning of the word "permits." The District Court found that "no Texas Clearance Event occurred because the Texas Court did not 'permit' the continued operation of the Texas Equipment"; instead, the 2016 Order merely found the sweepstakes activities to be unlawful, and expressly declined to " 'opine' on the 'permissib[ility]' of bingo." We agree with the District Court that the word "permits" as used in the Amended SPA required the Texas Court to affirmatively permit gaming activities that could utilize the equipment. Black's Law Dictionary defines "permit" as "[t]o consent to formally; to allow (something) to happen, esp. by an official ruling, decision, or law." (11th ed. 2019). We decline to find that the Texas Court "permitted" the Tribe to use the machines for bingo, considering that the Texas Court expressly declined to opine on that activity's legality in the 2016 Order, and has since declared bingo unlawful, as affirmed by the Fifth Circuit. Texas v. Ysleta Del Sur Pueblo, 955 F.3d 408, 415-16 (5th Cir. 2020). For the foregoing reasons, we affirm.

***100. Stand Up for California! v. State*, Cal.Rptr.3d, 2021 WL 1933336 (Cal. Ct. App. May 13, 2021).**

Interest group filed complaint against Indian tribe, Governor, California Attorney General, California Gambling Control Commission, California Bureau of Gambling Control, and State of California, challenging Governor's authority to concur in decision of United States Secretary of the Interior to take land into trust for tribe for purpose of operating casino for class III gaming. The Superior Court, Madera County, No. MCV062850, Michael J. Jurkovich, J., sustained demurrers and dismissed complaint. Interest group appealed. The Fifth District Court of Appeal, 6 Cal.App.5th 686, 211 Cal.Rptr.3d 490, reversed and remanded. The Supreme Court granted review, then transferred action back to Court of Appeal with directions to vacate and reconsider in light of intervening decision. The Court of Appeal, Smith, J., held that: 1 the people retained authority to retroactively annul governor's concurrence; 2 referendum was appropriate mechanism by which to annul governor's concurrence; and 3 referendum reflected voters' intent to annul governor's concurrence. Reversed.

101. ***Kalispel Tribe of Indians v. US Department of Interior*****, 999 F.3d 683, 21 Cal. Daily Op. Serv. 5241, 2021 Daily Journal D.A.R. 5246, (9th Cir. June 1, 2021).**

Indian tribe brought action challenging Interior Secretary's decision that another tribe's proposed gaming establishment on newly acquired off-reservation land would not be detrimental to surrounding community. The United States District Court for the Eastern District of Washington, Wm Fremming Nielsen, Senior District Judge, 2019 WL 3037048, entered summary judgment in government's favor, and tribe appealed. The Court of Appeals, Christen, Circuit Judge, held that: 1 Secretary adequately considered economic detriment that tribe would suffer if anew gaming establishment was built, and 2 Secretary did not breach government's trust duty to tribe. Affirmed.

102. ***In re Musel*****, 70 Bankr.Ct.Dec. 122, 2021 WL 2843847 (Bankr. Minn. July 7, 2021).**

This chapter 7 case came before the Court on the chapter 7 trustee's motion for turnover (ECF No. 10). Pursuant to the Federal Indian Gaming Regulatory Act of 1988, 25 U.S.C. §§ 2701, et seq. ("IGRA"), the Pokagon Band enacted a Gaming Revenue Allocation Plan ("RAP"). Under the RAP, the Pokagon Band's citizens receive an apportioned monthly payment of the Band's net gaming revenues on a per capita basis. Since the payments are tied to the net gaming revenues, their dollar amount varies from month to month. On the record before the Court, the debtor has received monthly per capita payments from the Pokagon Band under the RAP since at least January 2019. The trustee seeks turnover of all per capita payments the debtor has received since filing, along with any and all future per capita payments the debtor receives from the Band. In arguing that the per capita payments are not property of the estate, the debtor cites to the following language in the RAP: "[n]othing in this Code shall be construed to give any person a vested property right or interest in Band gaming revenues. All Band gaming revenues shall be held by the Band until disbursed pursuant to Band law and this Code." The debtor argues that the per capita payments should be equated with employee bonuses, granted at the discretion of the employer. In the available decisions, the crux of this determination has been whether the relevant tribal nation's ordinance has addressed the issue of per capita payments in the context of property rights, and generally, how a court

has or has not considered that language in characterizing the per capita payments. Crucially, "when the property in question falls outside of state commercial codes by virtue of the federal interest or the nature of the property, federal law provides the rule of decision. In such instances, if a federal statute speaks to the issue directly, the court will look no further." Airadigm Commc'ns, Inc. v. Federal Commc'ns Comm'n (In re Airadigm Commc'ns, Inc.), 519 F.3d 640, 650 (7th Cir. 2008). Additionally: The tribal interest in regulating distribution of tribal assets to tribal members is a type of internal regulation within tribal sovereignty upon which state law is usually not permitted to intrude ... assessing whether state law can alter tribal law requires balancing of the federal and tribal interests in tribal sovereignty and self-governance with state interest in enforcing its laws. However, the Nation's interest in controlling the distribution of its revenue far outweighs [the state's] interest in enforcing its commercial code. The right of the Nation to distribute its own assets as it sees fit is central to self-governance; [the state's] interest in uniform treatment of creditors is minimal by comparison. The language of the RAP speaks for itself: until payment occurs, Band members do not have a vested right or interest in the gaming revenues. Although – as the trustee points out – the Pokagon Band's RAP language is not as expansive as the language in agreements considered in other cases, including Barth, 485 B.R. at 921-22, it does enough to definitively define the contours of the property right; "less expansive" language does not necessarily equate to "less effective" language. Federal law provides that tribal law applies, and the Pokagon Band's RAP, by its explicit language, prevents the creation of a vested property right. Therefore, the concept of a "right to payment" being a property interest in itself might apply in some situations, but it does not apply here given the plain language of the relevant law. Where the property right does not exist to begin with, it may not be included in the bankruptcy estate under § 541. The chapter 7 trustee's motion for turnover is denied. The debtor is not required to turn over payments made to her by the Pokagon Band during the pendency of this case, nor is she required to turn over any future per capita payments she receives from the Pokagon Band.

***100. Yocha Dehe v. United States Department of the Interior*, 3 F. 4th 427 (D.C. Cir July 6, 2021).**

Indian tribe filed suit challenging Department of Interior's (DOI) opinion that parcel of land on which tribe would someday like to develop casino did not qualify for restored-lands exception, under Indian Gaming Regulatory Act (IGRA). The United States District Court for the District of Columbia, Amy Berman Jackson, J., 337 F.R.D. 19, denied neighboring tribe's motion to intervene as defendant and, 2020 WL 8182061, denied reconsideration. Neighboring tribe appealed. The underlying litigation concerns the Department's Indian Lands Opinion that a parcel on which Scotts Valley would someday like to develop a casino does not qualify for the "restored-lands exception" under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq. Yocha Dehe joined others in objecting to Scotts Valley's request for the Indian Lands Opinion. To qualify for this "restored-lands exception," "a tribe that has regained its federal recognition must prove (among other things) that it has 'a significant historical connection to the land' at issue." Butte Cnty., 887 F.3d at 504 (quoting 25 C.F.R. § 292.12(b)). In February 2019, the Department issued an Indian Lands Opinion in which it concluded that Scotts Valley had been restored to Federal recognition and that the Tribe had demonstrated the required

"modern" and "temporal" connections to the parcel, but that it failed to demonstrate the requisite "significant historical connection to the land" as required by 25 C.F.R. § 292.12(b). Scotts Valley then filed a complaint in the district court, challenging the Department's decision under the Administrative Procedure Act. Yocha Dehe maintained the proposed casino would interfere with its duty (shared with two sister Patwin tribes) to "protect[ ] sacred sites and cultural resources buried throughout the county of Solano" — the "ancestral territory of the Patwin people" — because "the very site Scotts Valley seeks to develop holds cultural resources affiliated with [Yocha Dehe's] Patwin ancestors." The district court denied Yocha Dehe's motion to intervene. Yocha Dehe maintains that it has standing to intervene because it is injured in the same way as Crossroads inasmuch as it benefits from the Department's Indian Lands Opinion, which has been judicially challenged, and an unfavorable decision would eliminate that benefit. Yocha Dehe describes the benefit it derives from the Indian Lands Opinion as a shield against harm to its "governmental, cultural, and economic interests." But the circumstances of Crossroads are not present, and neither Crossroads nor the opinions on which this court relied there and Yocha Dehe relies here offers sufficient support for an extension of Crossroads to these circumstances. 788 F.3d at 318. Here, neither Yocha Dehe nor its property is the direct subject of the Indian Lands Opinion. Additionally, that opinion is too many steps removed from Yocha Dehe's claimed threat of future harm from Scotts Valley's casino project for that harm to be imminent. Because Yocha Dehe does not currently satisfy the *432 injury requirement of Article III standing, it lacks standing to intervene. Accordingly, we affirm the judgment of the district court

***101. Cayuga Nation v. Tanner*, F. 4th, 2021 WL 3160077 (2d. Cir. July 27, 2021).** Indian tribe brought action seeking declaratory judgment that Indian Gaming Regulatory Act (IGRA) preempted application of village's games-of-chance ordinance to tribal property in village. The United States District Court for the Northern District of New York, David N. Hurd, J., 448 F.Supp.3d 217, entered summary judgment in tribe's favor, and village appealed. Holdings: The Court of Appeals, Lynch, Senior Circuit Judge, held that: 1 tribe was not collaterally estopped from contending that parcel sat on "Indian lands" within meaning of IGRA; 2 doctrine of claim preclusion did not bar Indian tribe's action; and 3 parcel in village that tribe had purchased on open market qualified as "Indian lands" under IGRA. Affirmed.

H. Jurisdiction, Federal

***103. Lezmond Charles Mitchell v. United States of America,* 971 F.3d 1081 (9th Cir. 2020).** Petitioner Lezmond Mitchell filed two motions: a motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255, or, in the alternative, for relief under 28 U.S.C. § 2241. Mr. Mitchell was sentenced to death in this district in United States v. Mitchell, CR 01-1062-001-PCT-DGC. He was confined at the United States Penitentiary in Terre Haute, Indiana and his execution was scheduled for the following week. The Court denied the motions. The victims, a sixty-three-year-old grandmother and her nine-year-old granddaughter, were also Navajos, and the crimes occurred on the Navajo Indian reservation in Arizona. Id. Mr. Mitchell faced capital punishment under the Federal

Death Penalty Act ("FDPA"), based on his conviction for carjacking resulting in death. Under the Major Crimes Act, 18 U.S.C. § 1153(a), the federal government may prosecute serious crimes such as murder and manslaughter involving intra-Indian offenses committed in Indian country. The FDPA eliminated the death penalty for federal prosecutions of Indian defendants under the Major Crimes Act, subject to being reinstated at the election of a tribe's governing body – the "opt-in" provision. 18 U.S.C. § 3598. The Navajo Nation declined to opt into the federal death penalty. "[T]he Navajo Nation opposes the death penalty on cultural and religious grounds," and the Attorney General of the Navajo Nation expressed the Navajo Nation's opposition to the United States seeking capital punishment in Mr. Mitchell's case in a letter to the United States Attorney for the District of Arizona. As a result, when the United States prosecuted Mr. Mitchell it could not seek the death penalty on the two murder charges. Instead, it pursued a death sentence by charging Mr. Mitchell with carjacking resulting in death, a crime of nationwide applicability not covered by the opt-in requirement. Mr. Mitchell was given a death sentence on the carjacking count in accordance with the jury's unanimous verdict. On appeal, Mr. Mitchell argued, inter alia, that because the Navajo Nation never opted in to the federal capital punishment scheme, the death sentence violated tribal sovereignty. The Ninth Circuit considered Mr. Mitchell's claims in detail and issued an opinion on September 5, 2007, affirming his conviction and sentence. United States v. Mitchell, 502 F.3d 931 (9th Cir. 2007). On June 9, 2008, the Supreme Court denied Mr. Mitchell's petition for certiorari. Mr. Mitchell argued that the United States violated the sovereignty of the Navajo Nation by seeking the death penalty. He also argued that his rights to due process and a fair trial were violated by alleged collusion between the United States government and tribal law enforcement, ineffective assistance of counsel, and decisions of the federal courts in his habeas proceedings. Mr. Mitchell has not come close to showing that decisions of the IACHR (the Inter-American Commission on Human Rights—an organization formed under the auspices of the Organization of American States) on criminal cases pending in U.S. courts are binding as a matter of law on those courts. The Court accordingly will deny his motion and his stay request.

***104. Goodface v. Lower Brule Sioux Tribe 2020 Election Board,* 2020 WL 5017352 (D.S.D. Aug 25, 2020).**

Plaintiff Fely Goodface, proceeding pro se, filed this lawsuit against the Lower Brule Sioux Tribe 2020 Election Board (Election Board) and several of the Board's members. Goodface alleges that the Election Board denied her petition to be a candidate for the September 1, 2020 Tribal Council Election even though she met the eligibility requirements in the Lower Brule Sioux Tribe's Constitution and Bylaws. According to Goodface, the Election Board, tribal attorney, and some members of the Tribal Council have conspired to disqualify eligible candidates from the tribal election. Assuming Goodface's allegations are true, she has some legitimate complaints against the Election Board. These complaints, however, are not the kind that may be resolved by a federal court. Federal courts have limited jurisdiction and may only decide those cases which the Constitution and statutes authorize them to decide. Goodface alleges that this Court has federal question jurisdiction over her complaint under the Indian Civil Rights Act (ICRA). In Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), however, the Supreme

Court held that ICRA did not create a cause of action to enforce its civil rights guarantees. Instead, the only federal relief available under ICRA is the habeas corpus provision of 25 U.S.C. § 1303. Runs After v. United States, 766 F.2d 347, 353 (8th Cir. 1985) And while Goodface's complaint refers to her Constitutional rights to due process and equal protection, the Equal Protection and Due Process Clauses do not apply to tribal governments and cannot provide federal question jurisdiction for Goodface's complaint. Because it is evident that this Court lacks jurisdiction over Goodface's complaint, dismissal under Rule 12(h)(3) is appropriate.

***105. United States v. Smith,* F.Supp.3d, 2020 WL 5084128 (D.N.M. Aug 27, 2020).**
Congress had authority to enact legislation clarifying that Indian land included privately owned land in pueblo. Defendant, a non-Indian, was charged with unlawfully killing of Indian, with malice aforethought, in Indian Country, and he filed motion to dismiss for lack of federal jurisdiction. The District Court, Judith C. Herrera, Senior District Judge, held that: 1) Pueblo Lands Act (PLA) was enacted merely to quiet title to property within the Pueblo previously conveyed to non-Indians and did not have purpose of diminishing tribal and federal authority and jurisdiction over the privately owned lands within the Pueblo, and 2) Congress had authority to enact legislation clarifying that crimes against Indians on Indian land, the prosecution of which was within jurisdiction of federal courts, included crimes committed against Indians on privately owned land within a reservation or pueblo. Motion denied.

***106. Seneca Nation v. Cuomo,* F.Supp.3d, 2020 WL 5248467 (W.D.N.Y. Sep 03, 2020).**
Seneca Nation's suit requiring State officers to obtain valid easement could proceed under exception to State's sovereign immunity. Seneca Nation brought action against New York State officers and New York State Thruway Authority, seeking an injunction requiring that the officers and Thruway Authority obtain valid easement for portion of Thruway on which a toll road was built or, in the alternative, an order enjoining officers and Thruway from collecting tolls for the portion of Nation's reservation on which the Thruway was situated. The United States District Court for the Western District of New York, Hugh B. Scott, United States Magistrate Judge, 2018 WL 6682265, recommended granting motion to dismiss brought by officers and Thruway. Nation objected to the recommendation. The District Court, Lawrence J. Vilardo, J., held that: 1) collateral estoppel did not bar Nation's action, and 2) suit was based on an ongoing violation of federal law, and thus could proceed under Ex parte Young exception to State's sovereign immunity. Motion denied.

***107. Hackford v. Utah,* 827 Fed.Appx. 808, 2020 WL 5415812 (10th Cir. Sep 10, 2020).**
State could, pursuant to Ute Partition Act, prosecute motorist, who claimed Native American ancestry, for speeding while on an Indian reservation. Motorist brought action for declaratory and injunctive relief against the State of Utah, its Governor and Attorney General, and county prosecutors, alleging he was immune from state prosecution for speeding due to his Native American ancestry and the location of his offense on an Indian reservation. The United States District Court for the District of Utah, Clark Waddoups, Senior District Judge, 2019 WL 8128485, granted defendants' motion to dismiss. Motorist appealed. The Court of Appeals, Phillips, Circuit Judge, held that: 1) issue

preclusion did not bar motorist from relitigating district court's finding in a prior lawsuit that he was not an Indian for purposes of federal criminal jurisdiction, but 2) State could, pursuant to Ute Partition Act, apply its traffic laws to prosecute motorist. Affirmed. See also 845 F.3d 1325.

***108. United States v. Begay,* 974 F.3d 1172, 2020 WL 5493743 (10th Cir. Sep 11, 2020)**. Court could not consider federal/state sentencing disparities in prosecution of Native American for assault on Indian land. Defendant was convicted, on guilty plea entered in the United States District Court for the District of New Mexico, Judith C. Herrera, Senior District Judge, of two counts of assault with a dangerous weapon and one count of assault resulting in serious bodily injury, and he appealed from sentence imposed. The Court of Appeals, Lucero, Circuit Judge, held that in imposing sentence, court could not consider disparities that allegedly existed between sentences imposed on Native Americans subject to prosecution in federal court for assaults committed on Indian land and sentences imposed on state court defendants convicted of like assaults. Affirmed.

***109. Largent v. Nunn,* 2020 WL 6734673 (W.D. Okla. Oct 20, 2020).**
Petitioner seeks a writ of habeas corpus under 28 U.S.C. § 2254. United States District Judge Bernard M. Jones referred the matter to the undersigned Magistrate Judge for proceedings consistent with 28 U.S.C. § 636(b)(1)(B), (C). The undersigned recommends granting Respondent's Motion to Dismiss arguing Petitioner did not exhaust state court remedies, and dismissing the Petition without prejudice. The State of Oklahoma charged Petitioner in Cleveland County, Case No. CF-2006-968, with three counts of sexual abuse of a child, one count of solicitation of a minor for indecent exposure, one count of possession of child pornography, one count of solicitation of a minor for exhibition, and one count of engaging in a pattern of criminal offenses. Petitioner pleaded guilty on April 14, 2008. The trial court sentenced Petitioner to ten years' imprisonment for possession of child pornography and life imprisonment on the remaining counts, to be served concurrently with each other, but consecutively to Case No. CF-99-901. Id. In August 2020, Petitioner moved to vacate the judgment and sentence, but it remains pending. In his petition, Petitioner contends that because he is an enrolled member of the Choctaw Nation and the offenses occurred within the boundaries of the Chickasaw Nation, jurisdiction to prosecute the crimes lies exclusively with the federal courts. Respondent argues Petitioner did not exhaust state remedies and that the petition is untimely. Petitioner only responded to the timeliness argument. AEDPA prohibits federal courts from granting habeas relief to state prisoners who have not exhausted available state remedies. Petitioner contends he did not exhaust his state remedies because: Law Defining “Indian Country” Was Unsettled Until August, 2018. The Court liberally construes Petitioner's reliance on Murphy, 875 F.3d 896 (10th Cir. 2017), as arguing he did not exhaust because he believes the state lacked jurisdiction to prosecute him. But the Section 2254 exhaustion requirement contains no exception for jurisdictional claims. Thus, Petitioner must exhaust his state court remedies before proceeding in habeas corpus. Ellis, 872 F.3d at 1076. Thus, this Court should dismiss for failure to exhaust.

110. ***Debraska v. Oneida Business Committee,*** **2020 WL 6204320 (E.D. Wis. Oct 22, 2020).** On August 27, 2020, Plaintiffs Michael T. Debraska, Nancy A. Dallas, Gladys D. Dallas, Linda S. Dallas, Nadine A. Dallas, Margaret R. Fermanich, Tkaaunak Green, Lisa M. Hill, Cathy L. Metoxen, and Dorothy A. Skenandore, enrolled members of the Oneida Nation, sued Defendants Oneida Business Committee, Oneida Election Board, and Oneida Tribe of Indians of Wisconsin for actions they took in relation to the 2020 Oneida Nation Primary Election. Defendants filed a motion to dismiss on September 24, 2020. Plaintiffs' failure to respond to Defendants' motion to dismiss is itself grounds to grant the motion. See Civil L. R. 7(d) For these reasons, Defendants' motion to dismiss will be granted. Even on the merits, however, the result is the same. Plaintiffs assert that Defendants violated their rights when Defendants canceled the 2020 Oneida Nation Primary Election during the COVID-19 pandemic. Even though the Primary Election was canceled, the 2020 General Election still occurred. Plaintiffs claim that the cancelation of the 2020 Primary Election violated their rights under the Oneida Constitution; their rights under the First Amendment, Fourteenth Amendment, and Due Process Clause of the United States Constitution; and their rights under the Indian Civil Rights Act (ICRA). Defendants assert the complaint must be dismissed for lack of federal jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Defendants assert that the First and Fourteenth Amendments of the United States Constitution do not provide a basis for jurisdiction. The court agrees. The First and Fourteenth Amendments do not apply to the Nation and its officials. Therefore, the First and Fourteenth Amendments do not provide a basis for federal question jurisdiction. The ICRA also does not provide a basis for federal jurisdiction. In addition, Plaintiffs cannot obtain relief under 42 U.S.C. § 1983. Defendants were acting under color of tribal law in deciding to cancel the primary election. Therefore, § 1983 does not provide a basis for federal jurisdiction. Finally, the court lacks jurisdiction over Plaintiffs' claims based upon tribal law. See Runs After v. United States, 766 F.2d 347, 352 (8th Cir. 1985). Any claims based on tribal law are within the jurisdiction of the tribal courts. See Talton v. Mayes, 163 U.S. 376, 385 (1896). Accordingly, Plaintiffs' claims under Oneida law do not provide a basis for federal jurisdiction. Plaintiffs have failed to establish a basis for federal jurisdiction in this case. It Is Therefore Ordered that Defendants' motion to dismiss is Granted.

111. ***United States v. Denezpi,*** **979 F.3d 777, 2020 WL 6304288 (10th Cir. Oct 28, 2020).** Prosecution in federal District Court after defendant was prosecuted for same conduct in Court of Indian Offenses did not violate double jeopardy. Following denial of his motion to dismiss the indictment, 2019 WL 295670, defendant was convicted in the United States District Court for the District of Colorado, James M. Candelaria, United States Magistrate Judge, of aggravated sexual abuse in Indian Country. Defendant appealed. The Court of Appeals, Seymour, Senior Circuit Judge, held that: 1) prosecution in federal District Court after defendant was prosecuted for same criminal conduct in the Court of Indian Offenses did not violate double jeopardy, and 2) admission of victim's testimony about defendant's prior incarceration and his alleged abuse of his girlfriend was harmless error. Affirmed.

112. ***Navajo Nation v. United States Department of the Interior,*** **2020 WL 6869449 (D. Ariz. Nov 23, 2020).**

At issue is Defendants' Motion to Dismiss to which Plaintiffs Navajo Nation and Navajo Nation Gaming Enterprise (the "Enterprise") filed an Opposition and Defendants filed a Reply. For the reasons that follow, the Court grants Defendants' Motion. Navajo Nation is a federally recognized Indian tribe with its reservation located predominantly in northeastern Arizona. Navajo Nation created the Enterprise under its laws for the primary purpose of conducting gaming and related business activities. On August 16, 2010, the Enterprise purchased 435 acres of land just east of Flagstaff, Arizona, where it planned to construct what is now the Twin Arrows Casino Resort. That same day, to allow access to the casino from Interstate 40, the Enterprise entered into an easement agreement with Steven and Patsy Drye. The agreement expressly granted a perpetual nonexclusive right in a 500-foot easement over the Dryes' property to the Enterprise and the public. The agreement further stated that the easement "shall run with the land" and be "governed" by Arizona law. On June 11, 2012, the Hopi Tribe purchased land from the Dryes, including the land underlying the Enterprise's easement. The special warranty deed that conveyed the land to the Hopi Tribe ("Hopi Fee Deed") subjected the land to "matters of record in the Official Records of the Coconino County Recorder's Office." Additionally, the Hopi Fee Deed explicitly acknowledged the Enterprise's easement. On August 22, 2012, the Hopi Tribe submitted a fee-to-trust application to the Western Regional Director of the Bureau of Indian Affairs ("BIA"), which is a federal agency within the Department of the Interior ("DOI"). The Western Regional Director issued a Letter Decision approving the application. In May 2015, the Hopi Tribe "asserted that it had jurisdiction" over the easement, and the Enterprise disagreed. However, a lack of explicit reference to the easement alone is not sufficient to demonstrate that the Hopi Trust Deed extinguished any rights Plaintiffs had in the easement. Plaintiffs entered into an agreement with the Dryes that stated that the easement "shall run with the land" and be "governed" by Arizona law. Plaintiffs have not established that their property interest in the easement was somehow extinguished or otherwise adversely affected, and the Hopi Tribe's mere "assert[ion]" of jurisdiction does not rise to the level of a recognizable legal harm. Furthermore, by Plaintiffs' own admission, Plaintiffs have a "continuing interest in a public road ... overlaying [the] easement." As recounted above, Plaintiffs have failed to allege a concrete and particularized injury that is fairly traceable to Defendants' actions. Plaintiffs thus have not established Article III standing to sue. Defendants' motion to dismiss is granted.

***113. Mitchell v. Bailey,* 982 F.3d 937, 2020 WL 7329219 (5th Cir. Dec 14, 2020).**

District Court lacked federal-question jurisdiction over action against tribe, alleging state-law claims for negligence and breach of contract. Firefighter who was injured while working for disaster relief project in Texas brought action against Native American tribe and disaster relief organization created by tribe, alleging state-law claims for negligence and breach of contract. The United States District Court for the Western District of Texas, David A. Ezra, Senior District Judge, 2019 WL 11340109, dismissed action. Plaintiff appealed. The Court of Appeals, King, Circuit Judge, held that: 1) District Court lacked federal-question jurisdiction over action, and 2) as a matter of apparent first impression, federally-recognized Native American tribe was stateless entity when determining whether there was complete diversity for diversity jurisdiction. Affirmed in part, vacated in part, reversed in part, and remanded.

***114. Skull Valley Band of Goshute Indians of Utah v. U.S. Bank National Association,* 2020 WL 7490113 (S.D.N.Y. Dec 21, 2020).**

Plaintiffs Skull Valley Band of Goshute Indians of Utah, a federal recognized Native American tribe, and sixteen limited liability companies owned solely by the tribe, bring this action against Defendant U.S. Bank National Association ("U.S. Bank") for breach of contract. After Defendant removed this case to federal court, Plaintiffs filed a motion to remand the case to state court. For the reasons that follow, Plaintiffs' motion is granted. The Skull Valley Band of Goshutes is a federally recognized Native American tribe and the sole member and owner of the numerous LLC plaintiffs in the case. The Tribe owns a number of residual securities in trusts for which U.S. Bank is trustee. The trusts are governed by separate trust agreements, which incorporate standard trust provisions and a glossary. The agreements distinguish between holders of "regular securities" and "residual securities," the latter of which are owned entirely by the Tribe for the trusts at issue. Regular security holders' interests are guaranteed by Ginnie Mae, while residual security holders' payments are not. The Tribe alleges that U.S. Bank effected impermissible, self-serving "clean up calls" when it terminated multiple trusts in which the Tribe held residual securities, keeping the excess value — over $50 million — for itself. The Tribe filed suit in New York state court on January 28, 2020, asserting only a breach of contract claim. On February 26, 2020, U.S. Bank filed a Notice of Removal seeking to remove this action to federal court under 28 U.S.C. § 1331. The Tribe now seeks remand. U.S. Bank argues that the Tribe's breach-of-contract claim, despite being brought under state law, implicates federal issues and therefore falls within the Court's subject-matter jurisdiction. Here, as the Tribe alleges a typical state-law contract claim, there are no applicable "laws of the United States." Rather, New York contract law applies. This case turns on the sort of contractual analysis that state courts regularly conduct. A federal issue this is not. Fundamentally, district courts in this Circuit require that resolution of cases involve a federal rule of decision to establish jurisdiction. Qatar v. First Abu Dhabi Bank PJSC, 432 F.Supp.3d 401, 415 (S.D.N.Y. 2020). U.S. Bank has not made such a showing. And, as was the case in McVeigh, in which the Supreme Court declined to find federal-question jurisdiction, the Tribe's state-law cause of action was not "triggered ... by the action of any federal department, agency, or service." Nor are U.S. Bank's other allegations of a federal interest in the case availing. While Ginnie Mae is a guarantor of the trusts at issue, if the Tribe is successful in its claim, Ginnie Mae will bear no damages liability. Moreover, Ginnie Mae's guarantor status does not extend to residual securities. Additionally, Ginnie Mae's status as a third-party beneficiary to the trust agreements, without more, is insufficient to establish jurisdiction. Such an allegation does not bear on any federal rule of decision or suppose a violation of federal law. U.S. Bank fails to establish federal jurisdiction. For the foregoing reasons, the motion for remand filed by Plaintiffs is granted and this case is remanded to New York Supreme Court, New York County, pursuant to 28 U.S.C. § 1447(c).

***115. Southcentral Foundation v. Alaska Native Tribal Health Consortium,* 983 F.3d 411, 2020 WL 7502063 (9th Cir. Dec 21, 2020).**

Tribal organization's allegation of injury was sufficient to support standing for challenge to Alaska Native Tribal Health Consortium governance. Tribal health organization

brought declaratory judgment action against Alaska Native Tribal Health Consortium (ANTHC), alleging violations of federal law arising from creation of executive committee for governance of ANTHC. The United States District Court for the District of Alaska, No. 3:17-cv-00018-TMB, Timothy M. Burgess, Chief District Judge, dismissed action. Organization appealed. On denial of rehearing en banc, the Court of Appeals, Murguia, Circuit Judge, held that: 1) organization's allegation of injury to governance and participation rights was sufficient to support Article III standing for challenge to creation of executive committee; 2) amendment of bylaws for executive committee created to govern ANTHC did not render moot organization's claim asserting that creation of committee violated federal law, and 3) organization's allegation of informational injury was sufficient to support Article III standing for challenge to amendments of ANTHC board's code of conduct and disclosure policy. Reversed and remanded. Opinion, 975 F.3d 831, superseded.

***116. Deerleader v. Crow,* 2021 WL 150014 (N.D. Okla. Jan 15, 2021)**

Before the Court is the 28 U.S.C. § 2254 petition for writ of habeas corpus filed by Petitioner Farron Robert Deerleader, a state inmate appearing pro se. On review of the petition, the limited response, and applicable law, the Court finds that Deerleader is entitled to federal habeas relief on his claim that the State of Oklahoma lacked jurisdiction to enter a criminal judgment against him in the District Court of Creek County, Case No. CF-2016-319, because he is Native American and he committed the crimes for which he was convicted within the boundaries of the Muscogee (Creek) Nation Reservation. The Court therefore grants the petition, in part, as to claim four, dismisses the petition, in part, as to the remaining claims, and directs Respondent to immediately release Deerleader from state custody. Following a trial, the jury found Deerleader guilty of second-degree burglary and larceny of an automobile, both after former conviction of two or more felonies, and recommended a 45-year prison sentence for each conviction, a $10,000 fine for the burglary conviction, and a $50,000 fine for the larceny conviction. On May 25, 2017, the trial court sentenced Deerleader to 90 years' imprisonment. Proceeding pro se, Deerleader applied for postconviction relief in state district court on July 2, 2019. Deerleader claimed (1) the State of Oklahoma lacked jurisdiction over his criminal prosecution because he is Native American and a member and citizen of the Muscogee (Creek) Nation and he committed his crimes of conviction within the historical boundaries of the Muscogee (Creek) Nation Reservation, (2) trial counsel rendered ineffective assistance, and (3) appellate counsel rendered ineffective assistance. The state district court denied Deerleader's application for postconviction relief on November 18, 2019. Deerleader, appearing pro se, filed the instant federal habeas petition on April 27, 2020. He claims the State of Oklahoma lacked jurisdiction to prosecute him for crimes he committed within the boundaries of the Muscogee (Creek) Nation Reservation. In July 2020, the United States Supreme Court issued decisions in two cases relevant to Deerleader's claim four—McGirt v. Oklahoma, 140 S. Ct. 2452 (2020), and Sharp v. Murphy, 140 S. Ct. 2412 (2020) (“Murphy II”). The McGirt Court held that because Congress did not disestablish the Muscogee (Creek) Nation Reservation the land within the historical boundaries of that reservation is “Indian country,” as defined in 18 U.S.C. § 1151(a), and, as a result, the federal government has exclusive jurisdiction to prosecute certain crimes committed within those boundaries if those

crimes are committed by or against Native Americans. The Court finds ample support for Respondent's position that Deerleader is entitled to federal habeas relief on claim four. As Deerleader contends, because he is Native American and he was an "Indian" within the meaning of federal law in 2015, the State lacked jurisdiction to prosecute him for crimes he committed in Creek County, i.e., in "Indian country," in 2015. The Court therefore finds that petitioner is entitled to federal habeas relief as to claim four. Deerleader's judgment and sentence, in the District Court of Creek County, Case No. CF-2016-319, is invalid because the State of Oklahoma lacked jurisdiction to prosecute him for crimes he committed in "Indian country." The Court finds that the appropriate remedy is to grant the petition for writ of habeas corpus, as to claim four, and issue an unconditional writ setting aside the invalid judgment and sentence, barring retrial in state court on the underlying charges, and directing Respondent to immediately release Deerleader from state custody.

***117. State v. Cummings,* N.W.2d, 2021 WL 280526 (S.D. Jan 27, 2021)**

Special agent did not violate any jurisdictional principles by entering Indian country to investigate crimes that occurred outside Indian country. Defendant, a Native American, was indicted for third-degree burglary, grand theft, and intentional damage to property. The Circuit Court, Sixth Judicial Circuit, Bennett County, Bobbi J. Rank, J., granted defendant's motion to suppress statements he made to state officer, determining officer lacked authority to investigate crimes in Indian country. The State petitioned for intermediate appeal. The Supreme Court, Jensen, J., held that: 1 state officer did not violate any jurisdictional principles by entering Indian country to investigate crimes that occurred outside Indian country, abrogating State v. Spotted Horse, 462 N.W.2d 463 and State v. Cummings, 2004 S.D. 56, 679 N.W.2d 484, and 2 officers' encounter with defendant at his home in Indian country was consensual, and thus, did not constitute a seizure for purposes of the Fourth Amendment. Reversed and remanded.

***118. United States v. Hump,* F.Supp.3d, 2021 WL 274436 (D.S.D. Jan 27, 2021).** United States was not required to exhaust its remedies in tribal court before bringing action to foreclose on Indian trust land. United States brought lawsuit against Indian borrowers seeking to foreclose on Indian trust land located within Indian reservation. United States moved for summary judgment. The District Court, Roberto Lange, Chief Judge, held that: 1) United States was not required to exhaust its remedies in tribal court before bringing suit; 2) United States was entitled to foreclose on property; 3) borrowers were not entitled to redeem property; and 4) borrowers waived their right to claim homestead exemption. Motion granted.

***119. Newtok Village v. Patrick,* 2021 WL 735644 (D. Alaska Feb 25, 2021).** On April 21, 2015, Plaintiffs filed a Petition for Injunctive Relief against Defendants. Plaintiffs included Newtok Village, a Federally recognized Indian Tribe, and the Newtok Village Council, the current governing body of Newtok Village. Defendants were three individuals who resided in the community of Newtok, who were previous members of the Council. In late 2012, "a tribal election dispute arose, out of which two groups emerged each claiming to be the bona fide tribal governing body of the Tribe." The Bureau of Indian Affairs ("BIA") got involved in late 2012 when it became apparent that, in

connection with several contracts arising under the Indian Self-Determination Act ("ISDA"), the BIA received "various emails and documents relating to the conflict," and determined that it had "a duty to determine the authorized representatives of the governing body of Newtok." The Newtok Village Council filed this Complaint for injunctive relief, seeking to enjoin Defendants from misrepresenting that they were the legitimate governing body, and directing Defendants to turn over all records, equipment, and property owned by Newtok Village to the Newtok Village Council. This Court entered Default Judgment and a permanent injunction on November 4, 2015. The sole issue now before this Court is whether the Tribe's recognized governing body's request for an injunction against individuals falsely asserting tribal authority in the matter of government contracts is a "matter in controversy aris[ing] under the Constitution, laws, or treaties of the United States," pursuant to 28 U.S.C. § 1362.It is apparent that a suit against Defendants allegedly impersonating a recognized tribal governing body potentially falls under a variety of federal statutes, particularly in light of the fact that such misrepresentation interferes with federal government contracts. The citation of the ISDA, in conjunction with the allegations that Defendants have interfered with contracts between the Tribe's legitimate governing body and the federal government, is adequate to establish federal question jurisdiction. The Default Judgment therefore was justified and will not now be vacated.

***120. United States v. Osage Wind, LLC*, 2021 WL 879051 (N.D. Okla. Mar 09, 2021)**.
This matter comes before the court on the Motion for Judgment on the Pleadings of intervenor-plaintiff Osage Minerals Council (OMC). For the reasons set forth below, the motion is granted. This case, filed in 2014, presented the question of whether a large-scale excavation project undertaken by Osage Wind during the installation of eighty-four (84) wind turbines in Osage County, Oklahoma constituted "mining" under regulations governing development of minerals in the Osage Mineral Estate and therefore required a lease approved by the Secretary of Interior. United States District Judge James H. Payne said "no" but the Tenth Circuit reversed the district court, and held that, pursuant to 25 C.F.R. § 214, defendants' "extraction, sorting, crushing, and use of minerals as part of its excavation work constituted 'mineral development,' thereby requiring a federally approved lease which Osage Wind failed to obtain." In the Answer to OMC's Amended Complaint in Intervention, Osage Wind asserted seventeen (17) separate affirmative defenses. OMC now seeks judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) relative to five of Osage Wind's affirmative defenses: (1) estoppel, (2) laches, (3) waiver, (4) unclean hands, and (5) in pari delicto. The court first considers laches. Here, the Tenth Circuit has decided the issue of laches. Specifically, the Tenth Circuit concluded that the United States commenced this action within a reasonable time and therefore declined to dispose of this action based on laches. Nor are Indian land claims subject to state-law affirmative defenses based on the tribe's own conduct, including waiver, unclean hands, or in pari delicto. For the foregoing reasons, Osage Wind is precluded from asserting the equitable defenses of estoppel, laches, waiver, unclean hands, and in pari delicto, and the OMC's motion for judgment on the pleadings is granted.

***121. Bosse v. State*, P.3d, 2021 WL 958372 (Okla. Crim. App. Mar 11, 2021)**.

State did not have concurrent jurisdiction to prosecute a non Native American for crimes in the Chickasaw Nation Reservation against Native Americans. Defendant filed a successive petition for post-conviction relief from his conviction in the District Court, McClain County, Leah Edwards, J., of three counts of first-degree murder and one count of first-degree arson, and his sentence of death on the murder counts and to 35 years imprisonment and a $25,000 fine for the arson count, affirmed on appeal, 400 P.3d 834, and denial of his first application for post-conviction relief. The Court of Criminal Appeals, Kuehn, P.J., held that: 1) District Court judge made appropriate findings on remand that victims had some Native American blood; 2) defendant did not waive his challenge to the court's jurisdiction; and 3) state did not have concurrent jurisdiction to prosecute defendant. Petition granted.

***122. Muscogee (Creek) Nation v. Poarch Band of Creek Indians,* F.Supp.3d, 2021 WL 961743 (M.D. Ala. Mar 15, 2021).**

This dispute concerns the use and ownership of a 34-acre tract of land south of Wetumpka, Alabama. The land sits at Hickory Ground, the last capital of the Creek Nation before the Tribe was forced from the eastern United States in the 1830s, an exodus known as the Trail of Tears. Burial sites and ceremonial grounds dot the area, which in 1980 was placed on the National Register of Historic Places as a site of national significance. Today the land is held by the United States Department of the Interior in trust for Poarch Band of Creek Indians ("PBCI"), and it is the location of PBCI's Wind Creek Wetumpka casino and hotel. The excavation of the land and the construction and operation of the Wind Creek Wetumpka are the subject of this litigation. The three plaintiffs who bring this suit are the Muscogee (Creek) Nation; the Hickory Ground Tribal Town, which is now located in Oklahoma; and George Thompson, the chief, or "Mekko," of the tribal town. The second amended complaint raises eleven claims, most of them alleging violations of federal statutes: the Indian Reorganization Act, or IRA, 25 U.S.C. § 5101; the Native American Graves Protection and Repatriation Act, or NAGPRA, 25 U.S.C. § 3001; the Archaeological Resources Protection Act, or ARPA, 16 U.S.C. § 470aa; the Religious Land Use and Institutionalized Persons Act, or RLUIPA, 42 U.S.C. § 2000cc; the Religious Freedom Restoration Act, or RFRA, 42 U.S.C. § 2000bb; and the National Historic Preservation Act, or NHPA, 54 U.S.C. § 300101. With these claims, the plaintiffs seek, inter alia, to have Hickory Ground taken out of trust for PBCI and placed in a constructive trust for them, to have federal preservation grants to PBCI for the site ceased, to prevent the Tribal and Federal Defendants from undertaking any further clearing or construction on the Hickory Ground site, and to require that the Tribal Defendants "cause the Hickory Ground Site to be returned to the condition it was in prior to the construction of the casino resort." This case is now before the court on the separate motions of the Federal Defendants, the Tribal Defendants, and the Individual Defendants to dismiss the plaintiffs' claims under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. The court finds that the Tribal Defendants, including the tribal officials named in their official capacities, are immune from this suit and must be dismissed. Without the Tribal Defendants present, the remaining claims cannot be adjudicated under the precepts of Rule 19 of the Federal Rules of Civil Procedure. All the court now finds is that the sweeping relief sought here implicates so deeply the sovereign interests of PBCI that the claims against the Tribe and its officials may not proceed

without PBCI's consent, and that this litigation cannot proceed without PBCI's presence or the presence of its representatives. The Tribal Defendants' motion to dismiss is accordingly granted and this suit is dismissed.

***123. Spears v. State*, P.3d, 2021 WL 1231542 (Okla. Crim. App. Apr 01, 2021).**
Murder by Native American on Cherokee reservation fit squarely within Major Crimes Act and its exclusive federal jurisdiction, not state jurisdiction. Defendant who was member of Cherokee Nation was convicted in the District Court, Rogers County, Sheila A. Condren, J., of first degree murder for allegedly committing act within Cherokee reservation and was sentenced to life imprisonment with possibility of parole. Defendant appealed. The Court of Criminal Appeals, Rowland, V.P.J., held that prosecution was within exclusive jurisdiction of federal government, not jurisdiction of state. Vacated and remanded.

***124. Sizemore v. State*, P.3d, 2021 OK CR 6, 2021 WL 1231493 (Okla. Crim. App. Apr 01, 2021).**
Defendant, who was enrolled member of Choctaw Nation, was convicted in the District Court, Pittsburg County, Timothy E. Mills, J., of first degree murder and battery/assault and battery on a police officer. Defendant appealed. During pendency of appeal, the Court of Criminal Appeals remanded for an evidentiary hearing. On remand, the District Court, Mills, J., entered findings of fact and conclusions of law relevant to determining whether area of land where offenses occurred was "Indian country" under federal criminal jurisdiction statutes. The Court of Criminal Appeals, Rowland, V.P.J., held that State of Oklahoma did not have jurisdiction to prosecute defendant. Vacated and remanded with instructions.

***125. Grayson v. State*, P.3d, 2021 WL 1231591 (Okla. Crim. App. Apr 01, 2021).**
Trial court lacked jurisdiction to prosecute defendant who was a member of an Indian tribe for crime that allegedly took place on an Indian reservation. Defendant was convicted in the District Court, Seminole County, George W. Butner, J., of first degree murder and possession of a firearm by a felon. Defendant appealed. On remand, the District Court held an evidentiary hearing and filed findings of fact and conclusions of law, regarding defendant's membership in the Seminole Nation, and boundaries of the reservation for the Seminole Nation of Oklahoma. The Court of Criminal Appeals, Kuehn, V.P.J., held that defendant's status as a member of the Seminole Nation and fact that crime was committed on Indian reservation deprived trial court of jurisdiction to prosecute defendant. Vacated and remanded.

***126. Bench v. State*, P. 3d, 2021 WL 1836466, (Okla. Crim. App May 6, 2021).**
1 Miles Sterling Bench was tried by jury and convicted of First Degree Murder in the District Court of Stephens County, Case No. CF-2012-172. In accordance with the jury's verdict, the Honorable G. Brent Russell sentenced Petitioner to death. Petitioner appealed his conviction in Case No. D-2015-462 and this Court denied relief. Bench v. State, 2018 OK CR 31, 431 P.3d 929. Petitioner sought post-conviction relief, filing the instant post-conviction application. Petitioner seeks post-conviction relief from this conviction and sentence, challenging the jurisdiction of Stephens County to try him for B.H.'s heinous

murder at the Teepee Totem convenience store in Velma, Oklahoma. In his first proposition, Petitioner claims the District Court of Stephens County lacked jurisdiction to try him. Petitioner argues he had some quantum of Indian blood and the murder occurred within the boundaries of the Chickasaw Nation. ¶3 Pursuant to McGirt v. Oklahoma, 591 U.S. ——, 140 S. Ct. 2452, 207 L.Ed.2d 985 (2020), Petitioner's claim raises two separate questions: (a) his Indian status and (b) whether the crime occurred in Indian Country. Because these issues require fact-finding, we remanded this case to the District Court of Stephens County for an evidentiary hearing. The District Court's Findings of Fact and Conclusions of Law set forth that the State of Oklahoma and Petitioner "stipulated that Petitioner, Miles Sterling Bench, has 1/64 Choctaw blood" and "was an enrolled member of the federally recognized Choctaw Nation at the time of the crime." The Findings of Fact and Conclusions of Law further state, regarding whether the crime occurred in Indian Country, that the State of Oklahoma and Petitioner stipulated that the crime occurred "in Stephens County, Oklahoma, at the Teepee Totem gas station located at 407 North Main Street in Velma, Oklahoma" and "that the above — described address is within the historical geographic area of the Chickasaw Nation, as set forth in the 1855 and 1866 treaties between the Chickasaw Nation, the Choctaw Nation, and the United States." We find that under the law and the evidence relief is warranted. The State stipulated to Petitioner's status as an Indian, but presented no argument regarding the existence of the Chickasaw Reservation and whether it has been disestablished. This Court is left with only the District Court's Findings of Fact and Conclusions of Law to review for an abuse of discretion. Based upon the record before us, the District Court's Findings of Fact and Conclusions of Law regarding Petitioner's Indian status and the continued existence of a Chickasaw Reservation are supported by the evidence presented at the evidentiary hearing. We therefore find Petitioner has met his burden of establishing his status as an Indian, having 1/64 Choctaw blood quantum and being an enrolled member of the Choctaw Nation. We also find the District Court appropriately applied McGirt to determine that Congress did establish a Chickasaw Reservation and that no evidence was presented showing that Congress explicitly erased or disestablished the boundaries of the Chickasaw Nation. We further find the District Court abused its discretion in concluding Petitioner's jurisdictional claim is procedurally barred. Petitioner is an Indian and this despicable crime occurred in Indian Country. The State of Oklahoma did not have jurisdiction to prosecute Petitioner. Petitioner's first proposition is granted. The Judgment and Sentence of the District Court of Stephens County is reversed and the case is remanded with instructions to dismiss.

***127. Hinton v. United States*, 2021 WL 1783190, (D. Arizona 5, 2021).**

Derrick Hinton was sentenced to federal prison for aggravated sexual abuse in Case No. CR-18-00720-PHX-DGC. He brought this civil action seeking to vacate the sentence under 28 U.S.C. § 2255. Magistrate Judge Michael Morrissey has issued a report recommending that Hinton's § 2255 motion be denied ("R&R"). Hinton has filed an objection to which the government has responded. For reasons stated below, the Court will accept the R&R and deny the motion. On May 31, 2013, Hinton assaulted and sexually abused a mentally challenged woman on the San Carlos Apache Indian Reservation. At the time of the crimes, Hinton was an Indian and a member of the San Carlos Apache Tribe. In August 2014, a jury convicted Hinton of aggravated battery,

kidnapping, and sexual assault in San Carlos Apache Tribal Court. He was sentenced to 150 days custody followed by one year of probation. Id. A federal grand jury indicted Hinton for the crimes in May 2018, charging him with aggravated sexual abuse (counts one and two) and kidnapping (count 3) under the Major Crimes Act, 18 U.S.C. § 1153, which permits the federal government to prosecute Indians in federal court for a limited number of enumerated offenses committed within Indian country. Hinton pled guilty to count one in November 2018. On February 14, 2019, the Court sentenced him to 224 months in prison followed by 10 years of supervised release. Hinton is confined at the United States Penitentiary in Tucson, Arizona. Hinton asserts a single ineffective assistance of counsel claim, arguing that his counsel erroneously failed to object to the indictment on double jeopardy grounds. Judge Morrissey concluded that Hinton's counsel did not render ineffective assistance because any challenge to the indictment on double jeopardy grounds would have been futile. Hinton is correct that Congress possesses broad authority to legislate Indian affairs. See Lara, 541 U.S. at 194. The Major Crimes Act – under which Hinton was prosecuted in this case– "stands as the leading example of an effort by Congress to legislate Indian affairs." United States v. Scott, No. CR 19-29-GF-BMM, 2020 WL 2126694, at *3 (D. Mont. May 4, 2020). The Major Crimes Act specifically authorizes the federal government to prosecute Indians in federal court for kidnapping and sexual abuse committed in Indian country. 18 U.S.C. 1153(a); see United States v. Torres, 733 F.2d 449, 453 (7th Cir. 1984). The Supreme Court provided this explanation as to why Indian tribes are separate sovereigns under the Double Jeopardy Clause: Originally, as the Court has noted, the tribes were self-governing sovereign political communities, possessing (among other capacities) the inherent power to prescribe laws for their members and to punish infractions of those laws. After the formation of the United States, the tribes became "domestic dependent nations," subject to plenary control by Congress – so hardly "sovereign" in one common sense. But unless and until Congress withdraws a tribal power – including the power to prosecute – the Indian community retains that authority in its earliest form. The ultimate source of a tribe's power to punish tribal offenders thus lies in its "primeval" or, at any rate, "pre-existing" sovereignty: A tribal prosecution, like a State's, is attributable in no way to any delegation of federal authority. And that alone is what matters for the double jeopardy inquiry. Hinton cites no authority suggesting that Congress has withdrawn the San Carlos Apache Tribe's inherent sovereign power to prosecute its members for crimes committed on the reservation. Cf. Wheeler, 435 U.S. at 322. A certificate of appealability is denied.

***128. Commander v. Dowling*, 2021 WL 2457173 (E.D. Okla. June 16, 2021).**

This action is before the Court on Respondent's motion to dismiss Petitioner's petition for a writ of habeas corpus Petitioner is a pro se prisoner in the custody of the Oklahoma Department of Corrections who is incarcerated at Dick Conner Correctional Center in Hominy, Oklahoma. He is attacking his conviction and sentence in Muskogee County District Court Case No. CRF-82-82. He raises several grounds for relief, including that the State of Oklahoma lacked jurisdiction, because Petitioner's crimes occurred within Indian Country and under the Major Crimes Act. Respondent has filed a motion to dismiss, alleging among other things, that Petitioner has not exhausted the state court remedies for his claims. The record shows that Petitioner filed a direct appeal to the Oklahoma Court of Criminal Appeals (OCCA) in Case No. F-84-607. Commander v.

State, 734 P.2d 313 (Okla. Crim. App. 1987). The OCCA found no merit in Petitioner's claims for relief and affirmed his Judgment and Sentence. Id. He did not pursue post-conviction relief, however, in 2015 and 2016, he made two unsuccessful attempts to obtain his trial transcripts "A threshold question that must be addressed in every habeas case is that of exhaustion." Harris v. Champion, 15 F.3d 1538, 1554 (10th Cir. 1994). The Court must dismiss a state prisoner's habeas petition if he has not exhausted the available state court remedies as to his federal claims. See Coleman v. Thompson, 501 U.S. 722, 731 (1991). In federal habeas corpus actions, the petitioner bears the burden of showing he has exhausted his state court remedies as required by 28 U.S.C. § 2254(b). To satisfy the exhaustion requirement, a claim must be presented to the State's highest court through a direct appeal or a post-conviction proceeding. Here, the Court finds Petitioner has not raised the claims in his habeas corpus petition to the trial court or the OCCA. Therefore, Respondent's motion to dismiss unexhausted petition is granted, and this action is dismissed without prejudice.

***129. Big Sandy Rancheria Enterprises v. Bonta*, 1 F.4th 710, 21 Cal. Daily Op. Serv. 5886, 21 Cal. Daily Op. Serv. 5886. (9th Cir. June 16, 2021).**

Federally chartered tribal corporation, a tobacco distribution enterprise that was wholly owned by a federally recognized Indian tribe, Big Sandy Rancheria of Western Mono Indians, brought action against Attorney General for the state of California and the director of the California Department of Tax and Fee Administration (CDTFA), seeking declaration that California's Complementary Statute, Licensing Act, and Cigarette Tax Law were preempted by federal law and tribal sovereignty, and an injunction against defendants from enforcing, applying, or implementing such laws against it. The United States District Court for the Eastern District of California, Dale A. Drozd, J., 395 F.Supp.3d 1314, granted defendants' motion to dismiss for failure to state a claim and for lack of subject matter jurisdiction. Plaintiff appealed. Holdings: The Court of Appeals, Thomas, Chief Judge, held that: 1 corporation was not an "Indian tribe or band" within the meaning of exception to Tax Injunction Act conferring federal jurisdiction over claims brought by any Indian tribe or band; 2 corporation failed to state claim that tribal sovereignty principles preempted California from regulating corporation's intertribal wholesale cigarette sales off-reservation; 3 corporation failed to state claim that Indian Trader Statutes preempted California from regulating corporation's intertribal wholesale cigarette sales under Tobacco Directory Law; 4 corporation failed to state claim that Indian Trader Statutes preempted California's licensing, recordkeeping, and reporting requirements; 5 corporation failed to state claim that California's licensing, recordkeeping, and reporting requirements were generally incompatible with the federal regulation of trade with Indians in Indian country. Affirmed. Berzon, Circuit Judge, filed opinion concurring in part and acquiescing dubitante in part.

***130. JW Gaming Development, LLC v. James*, 2021 WL 2531087 (N.D. Cal. June 21., 2021).**

Plaintiff JW Gaming Development, LLC ("JW Gaming") obtained a judgment in this Court that defendant Pinoleville Pomo Nation ("PPN"), a federally recognized tribe, and an associated entity were liable for breaching a loan agreement by failing to pay. The matter is now on appeal and JW Gaming is attempting to enforce its judgment. JW

Gaming now seeks to enjoin a case that PPN has launched in its own Tribal Court. Shortly after judgment was entered in this case, PPN constituted its Tribal Court for the first time. Days after the newly appointed judge issued standing orders, PPN filed a civil complaint in that Tribal Court that seeks to (1) declare the judgment issued in this case invalid, (2) limit and control—indeed, vitiate—the scope of enforcement of that judgment, and (3) impose roughly eleven million dollars in liability on JW Gaming for alleged fraud stemming from the same loan agreement here. The lawsuit names not only JW Gaming but its attorneys in this matter and the bank at which PPN maintains accounts that was recently subpoenaed in the course of enforcement of the judgment. It is the first (and, as far as the record shows, only) case brought in the Tribal Court. Remarkably, up until the eve of the hearing on a temporary restraining order ("TRO") against the proceeding, JW Gaming could not find publicly available information about how appear in that proceeding (despite being served with a summons), who the judge was, or what the rules were. To the extent the lawsuit seeks to invalidate the judgment or interfere with enforcement, it is unquestionably meritless: a tribal court lacks authority to invalidate a federal court's judgments or to dictate the scope of executing that those judgments. JW Gaming has shown it is entitled to a preliminary injunction to the extent that the Tribal Court proceedings attempts to invalidate, interfere with, or thwart the judgment entered here. I possess jurisdiction to enter this injunction to protect and effectuate the judgment. The doctrine of tribal court exhaustion does not apply because PPN exercised its sovereign power to clearly, expressly, and unequivocally waive it. The Tribal Court proceeding also seeks to hold JW Gaming liable for fraudulently inducing PPN to enter into the contract at the heart of this dispute. I will not today enjoin the Tribal Court proceeding to the extent it seeks to litigate that claim because it is not an attempt to invalidate the judgment or thwart enforcement. Although the fraud claim is clearly related and likely improper, I do not possess jurisdiction now to enjoin it on that basis. As I previously found when it came to PPN's sovereign immunity, PPN expressly, clearly, and unequivocally waived reliance on exhaustion of tribal court remedies. The Promissory Note at the heart of this dispute provides: "Waiver of Exhaustion of Tribal Remedies. In connection with any Claim, the Tribe expressly waives the application of doctrines of exhaustion of tribal remedies, abstention, or comity and all other rights of any Tribal Party that might otherwise require that a Claim be heard in a tribal court or other dispute resolution forum of the Tribe, whether now existing or hereafter created." This case long predated the Tribal Court Action; the complaint here did not (and could not) reference any tribal court proceeding because none existed. As the Supreme Court has explained, "[w]ithout jurisdiction to enforce a judgment entered by a federal court, the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution." Peacock v. Thomas, 516 U.S. 349, 356 (1996). The Supreme Court has held that "[t]he filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 58 (1982). But, as here, "[a] district court may retain jurisdiction [under the divestiture rule] when it has a duty to supervise the status quo during the pendency of an appeal, Hoffman v. Beer Drivers, 536 F.2d 1268, 1276 (9th Cir. 1976), or in aid of execution of a judgment that has not been superseded. The attempt here to invalidate this federal judgment is not subtle or masked. As explained in detail

above, the express terms of the complaint in the Tribal Court Action ask for declaratory relief that the writ of execution and abstract of judgment are invalid because the judgment itself is invalid. It also seeks to interfere with the execution proceedings by limiting what can be executed upon and imposing liability for going beyond that. The individuals and entities identified are preliminarily enjoined, in the civil case filed against JW Gaming and others in the Tribal Court (captioned Pinoleville Pomo Nation v. JW Gaming Development, LLC et al., Case No, PPNTC-CIV-21-0001), from taking or attempting to take any action in furtherance of the following: (1) invalidating or purporting to invalidate the judgment or orders entered in this suit; (2), interfering with enforcement of that judgment; (3) limiting, controlling, or purporting to limit or control the scope or conduct of the enforcement of that judgment; (4) enjoining or restraining any person or entity from attempting to enforce or enforcing the judgment; (5) enjoining or restraining any person or entity from attempting to comply or complying with court orders or subpoenas issued to enforce the judgment; and (6) punishing any person or entity for enforcing or complying with the judgment and orders enforcing it.

***131. Temple v. Langdeau*, 2021 WL 2662295 (D.S.D. June 29, 2021).**

Plaintiff Temple, an enrolled member of the Oglala Sioux Tribe, filed his complaint against two individuals, Mr. Langdeau and Mr. Richards, seeking injunctive relief and damages. Mr. Temple's ranch land where the actions giving rise to his claims allegedly occurred is located within the boundaries of the Pine Ridge Indian Reservation, in Indian country. However, Mr. Temple "does not contend that resolution of this suit revolves around any particular disputed issue of federal law." Schwarting, 894 F. Supp. 2d at 1201 (emphasis omitted). In fact, he asserts the "round up and forced sale" of his cattle "without a lawful notice of trespassing or notice of impoundment" violates an Oglala Sioux Tribe livestock ordinance. Furthermore, all three causes of action alleged by Mr. Temple in his complaint—fraud and deceit, trespass, and conversion—are common law tort claims. Because it is well established "[t]here is no federal general common law," to the extent any of Mr. Temple's claims are viable, they arise under tribal law, not federal law. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). Finally, having not identified any state or federal action underlying any of his claims, Mr. Temple's bare assertion that federal question subject matter jurisdiction exists because his "federal due process rights have been violated" cannot salvage his complaint in federal court. "In sum, the outcome of this case would not be controlled or conditioned by federal law," but rather tribal law. Schwarting, 894 F. Supp. 2d at 1202. Therefore, the court finds it does not have federal question subject matter jurisdiction over this case. See Runs After v. U.S., 766 F.2d 347, 352 (8th Cir. 1985) (affirming that the "resolution of ... disputes involving questions of interpretation of ... tribal law is not within the jurisdiction of the district court"). Accordingly, the complaint in this case is dismissed without prejudice for lack of subject matter jurisdiction.

***132. State by Malcom v. Southwest School of Dance, LLC*, 2021 WL 2794654 (Minn. Ct. App. July 6, 2021).**

In this appeal from a civil contempt judgment and the underlying temporary injunction requiring compliance with the governor's COVID-19 executive order restricting restaurant service, appellant-restaurant argues that enforcement of the executive order

violates appellant's constitutional right to equal protection in that restaurants located on Indian reservations in the state were exempted from the order. Because we conclude that the executive order does not violate appellant's constitutional right to equal protection, we affirm. On March 13, 2020, Minnesota Governor Tim Walz issued Emergency Executive Order No. 20-1 declaring a peacetime emergency due to the spread of the infectious disease COVID-19 and the resulting pandemic. Emerg. Exec. Order No. 20-01, Declaring a Peacetime Emergency & Coordinating Minnesota's Strategy to Protect Minnesotans from COVID-19 (Mar. 13, 2020) (EEO 20-1). In EEO 20-1, Governor Walz ordered the Minnesota Department of Health to lead the coordination of Minnesota's response to COVID-19 in consultation with tribal nations, among others. A subsequent order, EEO 20-99, contained the following exemption for tribal activities and lands: "Activities by tribal members within the boundaries of their tribal reservations are exempt from the restrictions in this Executive Order but may be subject to restrictions by tribal authorities." On December 11, 2020, the state by its commissioner of health filed a civil complaint, along with a motion for a temporary restraining order (TRO) and a temporary injunction against appellant. Appellant filed a responsive memorandum opposing the state's motion for a temporary injunction, arguing that EEO 20-99 violated its constitutional right to equal protection by discriminating in favor of tribal restaurants. Appellant now appeals the district court's civil contempt judgment and the underlying temporary injunction. Tribes not only enjoy the authority to exercise control within the boundaries of their lands, but they also possess the inherent "power of regulating their internal and social relations." United States v. Mazurie, 419 U.S. 544, 557, 95 S. Ct. 710 (1975) (quotation omitted). This "unique legal status of Indian tribes ... permits the Federal Government to enact legislation singling out tribal Indians," even where that legislation "might otherwise be constitutionally offensive." Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463, 500–501, 99 S. Ct. 740, 761 (1979). Nonetheless, appellant argues that EEO 20-99 violates the Equal Protection Clauses of both the Minnesota and the United States Constitutions by discriminating in favor of tribal restaurants, and that the district court therefore erred by enforcing it by issuing a temporary injunction against appellant and finding appellant in constructive civil contempt. The United States Supreme Court has consistently rejected claims that laws treating tribal members as a distinct class violate equal protection. This extensive precedent allows us to decide this case without great difficulty by determining and applying the same degree of scrutiny applied in those cases, and we therefore need not determine whether Havens Garden is similarly situated to restaurants located on tribal reservations. Recognizing the unique legal status of tribes, the United States Supreme Court has repeatedly upheld legislation that singles out Indians for particular and special treatment. In Mancari, the Supreme Court rejected an equal-protection challenge to a statutory hiring preference for Indians in the Bureau of Indian Affairs (BIA) after applying rational basis review. 417 U.S. at 555, 94 S. Ct. at 2485. Relying upon the "unique legal status" of tribal members, the Court held that statutory preferences favoring Indians over non-Indians were not unconstitutional classifications and that laws affording Indians special treatment are constitutional, "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians ...." Id. at 555, 94 S. Ct. at 2485. The Court also explained that statutory preferences for [ ] Indians are not racial but political when the preferences apply to members of federally recognized

tribes. Id. at 553 n.24, 94 S. Ct. at 2484 n.24. "State action for the benefit of Indians can also fall under the trust doctrine and therefore be protected from challenge under the equal protection clause or civil rights statutes." Greene v. Comm'r of Human Servs., 733 N.W.2d 490, 497 (Minn. App. 2008), aff'd, 755 N.W.2d 713 (Minn. 2008). Thus, classifications based on tribal membership in state laws that promote the Congressional policy of tribal self-governance, benefit tribal members, or implement or reflect federal laws are subject to rational-basis review. Because EEO 20-99 exempts activities by tribal members on reservations, and therefore classifies restaurants based on tribal membership, we must uphold the emergency executive order under the United States Constitution "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." Therefore, the district court did not err by issuing a temporary injunction against appellant and finding appellant in constructive civil contempt. Affirmed.

I. *Religious Freedom*

133. Guardado v. Nevada, 2020 WL 5909794 (D. Nev. Oct 06, 2020).

Pending before the Court is the Motion for Summary Judgment filed by pro se Plaintiff Ernest Jord Guardado. Plaintiff is a prisoner in the custody of the Nevada Department of Corrections (NDOC), and currently housed at High Desert State Prison (HDSP). On April 5, 2017, Plaintiff sent kites to Defendants NDOC Director James Dzurenda, Warden Brian Williams, Assistant Warden Jennifer Nash, and Chaplain Julio Calderin regarding access to the Native American grounds and the denial of his chosen religion. More specifically, Plaintiff, who is not of Native American race or ethnicity, sought to practice the Native American religion. Relevant here, AR 810.3 states that inmates eligible to participate in Native American sweat lodge ceremonies include inmates who meet certain standards. On February 2, 2018, Plaintiff filed a civil rights complaint pursuant to 42 U.S.C. § 1983 alleging violations of the First Amendment Free Exercise Clause, Fourteenth Amendment Equal Protection Clause, and Religious Land Use and Institutionalized Persons Act. Additionally, Plaintiff filed a Motion for Preliminary Injunction. The Court partly granted the motion, ordering NDOC to allow Plaintiff to participate in Native American religious ceremonies with Native American practitioners including sweat lodge, prayer circle, drum circle, smudging, sacred pipe, and access to the Native Indian grounds. Plaintiff and Defendants have now filed summary judgment motions. While there may be a dispute as to the sincerity of Plaintiff's religious beliefs, it is certainly not a "genuine" dispute. Although Defendants suggest that Plaintiff's requested accommodation is likely based on "an ulterior motive," there is no evidence to support this. Accordingly, Defendants are hereby enjoined from prohibiting Plaintiff from accessing the Native American grounds or participating in Native American ceremonies available to other inmates, solely on the basis of Plaintiff's lack of Native American race or tribal membership. As discussed above, Plaintiff has established the absence of a genuine issue of fact regarding Plaintiff's sincerely held religious beliefs and the burden AR 810.3 imposes on his religious exercise. The issue before the Court is whether regulation is reasonably related to legitimate penological interests. Here, Plaintiff offers nothing to demonstrate that the regulation at issue is not reasonably related to a penological interest and thus invalid. Accordingly, the Court grants summary judgment in

favor of Defendants on Plaintiff's First Amendment claim. The Equal Protection Clause indisputably protects prisoners from arbitrary racial discrimination, see Turner, 482 U.S. at 84. In this case, Defendants indicate there is no genuine issue of material fact that Defendants did not act with an intent to discriminate against Plaintiff based on his membership in a protected class. The Court disagrees. Indeed, the language in AR 810.3 draws an explicit racial distinction. Inmates seeking to participate in sweat lodge ceremonies must provide evidence of their Native American heritage. Because Defendants intentionally discriminated against Plaintiff on the basis of his race, Defendants violated Plaintiff's right to equal protection of the law. The next step in the analysis requires the Court to determine whether the disparity in treatment based on Plaintiff's race was rationally related to a legitimate penological interest. Defendants have provided some evidence of legitimate penological interests and their rational relation to AR 810.3. Accordingly, the Court grants summary judgment in favor of Defendants as to the Fourteenth Amendment claim. It Is hereby Ordered that Plaintiff's Motion for Summary Judgment is Granted in part and Denied in part. Plaintiff is entitled to summary judgment as to his RLUIPA claim for injunctive relief against Defendants. Accordingly, Defendants are Hereby Enjoined from prohibiting Plaintiff Ernest Guardado from accessing the Native American grounds or participating in Native American ceremonies available to other inmates, solely on the basis of Plaintiff's lack of Native American race or tribal membership. It Is Further Ordered that Defendants' Motion for Summary Judgment is Granted in part and Denied in part. Defendants are entitled to summary judgment with respect to Plaintiff's First and Fourteenth Amendment claims.

***134. La Posta Band of Diegueno Mission Indians of La Posta Reservation v. Trump,* 2020 WL 7398763 (S.D. Cal. Dec 16, 2020).**

Presently before the Court are: (1) the La Posta Band of the Diegueño Mission Indians' motions to seal; (2) La Posta's second motion for a temporary restraining order ("TRO"); and (3) Defendants Donald J. Trump, Mark T. Esper, Chad F. Wolf, and Todd T. Semonite's ex parte motion for leave to file a sur-reply. For the reasons set forth below, the Court (1) Grants La Posta's motions to seal,; (2) Denies La Posta's second motion for TRO; and (3) Denies Defendants' ex parte motion for leave to file a sur-reply. La Posta's traditional territory, which encompasses the areas impacted by barrier construction within eastern San Diego and Imperial Counties ("Project Area"), is sacred to the Tribe. Thomas Holm, the director of the Kumeyaay Historic Preservation Council, "recently discovered that the El Centro section of the border wall cuts directly through a sacred site in Davies Valley." On November 10, 2020, a Kumeyaay group attempted to visit and pray at the site but Customs and Border Patrol ("CBP") officers did not allow access. The site allegedly contains numerous "ceramic sherds indicative of cremation vessels within the site." On November 17, 2020, CBP notified various Kumeyaay-affiliated tribes of an "unanticipated discovery" in the El Centro Project site when a tribal cultural monitor identified a Kumeyaay archaeological site adjacent to the newly constructed border wall in a "laydown yard." CBP identified three discoveries at this location: two "small fire pits or roasting features" and one "possible cremation site." Tribal experts later visited the location and identified 18 separate fire features "approximately 100m north of the wall and extending south into the road adjacent to the border wall, indicating other features have already been destroyed and obscured by construction." La Posta first commenced

this action on August 11, 2020. The action was accompanied by an ex parte motion for TRO and preliminary injunction. The Court denied both motions on August 27, 2020. La Posta subsequently appealed the Court's decision to deny the preliminary injunction to the Ninth Circuit. On November 4, 2020, the Ninth Circuit affirmed this Court's denial of La Posta's first motion for a preliminary injunction. On November 24, 2020, La Posta filed their second motion for TRO and preliminary injunction and accompanying motions to seal. The Court will first address La Posta's motions to seal declarations filed in connection with La Posta's second motion for TRO and preliminary injunction. The sealing of the records is appropriate to protect the integrity of La Posta's cultural and sacred sites. In their renewed motion for TRO, the Tribe asserts new allegations of harm associated with recent discoveries of cultural sites and items in the El Centro A Project Area. Upon close review of these new allegations, the Court concludes that La Posta has not met their high burden for the extraordinary relief of a TRO. Against the backdrop of this evidence and Defendants' mitigation procedures, the Tribe has not met their burden of establishing irreparable injury in the absence of an immediate injunction. Unable to meet this requirement, the Court need not address the other three factors for a TRO. Based on all the reasons stated above, the Court (1) Grants La Posta's motions to seal; and (2) Denies La Posta's second motion for TRO.

135. ***Priest v. Holbrook*, Fed.Appx., 2021 WL 914086 (9th Cir. Mar 10, 2021)**.
Plaintiff/Appellant David Priest, a registered member of the Colville Indian Tribe, appeals the district court's grant of summary judgment in favor of various Washington State Penitentiary (WSP) employees that he claims violated his constitutional and statutory rights by stealing or destroying his sacred golden eagle feathers after he was transferred from his single-person cell to segregation. We affirm. 1) The district court correctly dismissed Priest's constitutional claims based on his failure to present evidence of Defendants' integral participation in the taking or desecrating of his golden eagle feathers. With respect to Defendants allegedly present at the scene, Priest's testimony establishes that Brewer, Duncan, and Barreras-Miranda were working the third shift, during which Priest was transferred from his single-person cell to segregation and COs packed up his personal property. Our precedent, however, squarely forbids a jury from inferring liability from presence alone. Affirmed.

136. ***Kindred v. Price*, 2021 WL 2443768 (E.D. Cal. June 15, 2021)**
Plaintiff Richard Scott Kindred ("Plaintiff") is a civil detainee proceeding pro se and in forma pauperis in this civil rights action filed pursuant to 42 U.S.C. § 1983. This case proceeds on Plaintiff's Third Amended Complaint ("TAC") alleging claims for violation of Plaintiff's Fourth Amendment right against unreasonable search and seizure; against Defendants J. Corona and Jorge Lopez for violation of Plaintiff's First Amendment right to freely exercise his religion. For the reasons that follow, the Court will recommend that Defendants' motion for summary judgment be granted in part and denied in part. Defendant Brandon Price, Executive Director of DSH-Coalinga, ordered staff to conduct unit to unit searches pursuant to an emergency regulation deeming certain electronic devices as contraband. Plaintiff's personal property items, including an electric razor, battery-operated alarm clock, and down pillows, were taken during these searches. Plaintiff also alleges that, on May 29, 2018, Plaintiff's religious and non-religious

personal property items, including a ceremonial ribbon shirt, ceremonial deer skin trousers, spiritual blanket, large black duffel bag, small leather/suede duffel bag, rechargeable batteries, and 24" Samsung television, were taken during a search of his living area. Defendants argue that Plaintiff cannot establish that any of the items confiscated during the May 2018 search are mandated by his faith or that deprivation of these items substantially burdens Plaintiff's religious practice. The Court will recommend that Defendants Corona and Lopez be granted summary judgment as to Plaintiff's Fourth Amendment claim arising out of the seizure of Plaintiff's ribbon shirt and deer skin trousers and that summary judgment be denied as to the remainder of Plaintiff's Fourth Amendment claims regarding the June 2018 search and seizures. While the Court recognizes the substantial undertaking involved in running a secure facility, Defendants do not explain how, if at all, allowing Plaintiff to possess the ribbon shirt, deer skin trousers, spiritual blanket, and black duffel bag would affect these concerns or create a "ripple effect." The Court gives deference to the institution's assessment of the burden on operations, but it cannot accept Defendants' conclusion that accommodation would be disruptive without specific support for that argument. See Shakur, 514 F.3d at 887 (finding that the third Turner factor did not weigh in defendants favor where there were no detailed findings in the record to support defendants' assertions). The Court finds that Defendants Corona and Lopez are not entitled to qualified immunity to the extent Plaintiff seeks injunctive relief for his Free Exercise Clause claim arising out of the seizure of his ribbon shirt and deer skin trousers. Therefore, the Court will recommend that summary judgment be granted only as to Plaintiff's First Amendment claim for damages for seizure of the ribbon shirt and deer skin trousers. It is so ordered.

J. Sovereign Immunity

137. ***Eglise Baptiste Bethanie De Ft. Lauderdale v. Seminole Tribe of Florida*, Fed.Appx, 2020 WL 4581439 (11th Cir. Aug 10, 2020).**

Before the district court, Eglise Baptise Bethanie De Ft. Lauderdale, Inc., and Andy Saint-Remy (plaintiffs) sued the Seminole Tribe of Florida and Aide Auguste (defendants), alleging various causes of action including claims under 18 U.S.C. § 248. The Tribe moved for dismissal under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction, arguing that, because it is a federally recognized Indian tribe, it was entitled to tribal sovereign immunity. Auguste sought dismissal as well and argued, in part, that the plaintiffs' allegations involved non-justiciable questions of internal church governance. The district court agreed with the defendants and dismissed the action. This appeal followed. We affirm the district court. That the plaintiffs allege criminal violations under § 248 cannot change our conclusion; where tribal sovereign immunity applies, it "bars actions against tribes regardless of the type of relief sought." Freemanville Water Sys., Inc. v. Poarch Band of Creek Indians, 563 F.3d 1205, 1208 (11th Cir. 2009). Also unavailing is the plaintiffs' contention that tribal sovereign immunity is inapplicable here because the alleged conduct occurred off-reservation. Seminole Tribe is entitled to tribal sovereign immunity and was appropriately dismissed from this suit. Next, we turn to the plaintiffs' claims against Auguste. Before reaching the plaintiffs' § 248 claim, a court would need to determine whether Auguste was the rightful successor to the church's leadership and, if she was, whether Auguste had the authority to

exclude the plaintiffs from the church's property. Answering these questions would require us to inquire into church rules, policies, and decision-making and questions of church governance are manifestly ecclesiastical. See Id. at 717, 96 S.Ct. 2372 ("[Q]uestions of church discipline and the composition of the church hierarchy are at the core of ecclesiastical concern."). Auguste's decision to exclude the plaintiffs from church property and the related events are part and parcel of ecclesiastical concerns (e.g., matters of church governance, administration, and membership). The adjudication of these issues would "excessively entangl[e] [us] in questions of ecclesiastical doctrine or belief"—the very types of questions we are commanded to avoid. See Crowder, 828 F.2d at 722 (footnote omitted). Summed up, the district court correctly determined that it could not adjudicate the claim against Auguste because the dispute was "strictly and purely ecclesiastical in its character." The claim against Auguste was appropriately dismissed. We therefore Affirm the district court's dismissal of the plaintiffs' complaint.

***138. In re Internet Lending Cases,* Cal.Rptr.3d, 2020 WL 4745994 (Cal. Ct. App. Aug 17, 2020).**

This appeal, before us for the second time, involves a representative action brought by plaintiff and appellant Kathrine Rosas against various defendants for their alleged participation in illegal internet payday loan practices. Defendant and Respondent in this matter, AMG Services, Inc. (AMG), is a wholly owned tribal corporation of former defendant Miami Tribe of Oklahoma (Tribe), a federally recognized Indigenous American tribe. AMG's motion to dismiss for lack of personal jurisdiction was granted by the trial court on the basis of tribal sovereign immunity—a ruling that Rosas herein challenges as erroneous as a matter of both law and fact. In her previous appeal, we reversed and remanded for further proceedings in light of a then recent California Supreme Court decision, People v. Miami Nation Enterprises (2016) 2 Cal.5th 222, 211 Cal.Rptr.3d 837, 386 P.3d 357 (Miami Nation). In Miami Nation, the defendants, like AMG, included several tribal business entities affiliated with two federally recognized tribes, defendants Miami Tribe of Oklahoma and Santee Sioux Nation, that were allegedly involved in illegal lending practices. (Miami Nation, supra, 2 Cal.5th at p. 230, 211 Cal.Rptr.3d 837, 386 P.3d 357.) The California Supreme Court held that these affiliated entities were not immune from suit as "arms of the tribe" under a newly devised five-factor test that "takes into account both formal and functional aspects of the relationship between the tribes and their affiliated entities" and places the burden of proof on the entity claiming immunity. Accordingly, in Rosas I, in light of this new standard, we issued the following mandate when remanding the matter back to the trial court. Applying new facts to the Miami Nation test, the court found AMG entitled to immunity as an arm of the tribe. For reasons discussed below, we now affirm the trial court's order to dismiss AMG from this case. Under tribal control, AMG worked to settle the enforcement actions pending against it in both federal and California courts. As part of these settlements, AMG agreed to terms that included permanently ceasing all of its payday loan operations and forfeiting many millions of dollars, including $21 million to the Federal Trade Commission (FTC) in connection with its enforcement action. Based on cases discussing the doctrine of immunity in related contexts, we uphold the trial court's legal finding that whether AMG enjoys tribal sovereign immunity in this case should be assessed as of the time of the hearing on its motion to dismiss. As the United

States Supreme Court aptly explained when discussing foreign sovereign immunity, "such immunity reflects current political realities and relationships, and aims to give foreign states and their instrumentalities some present 'protection from the inconvenience of suit as a gesture of comity.' " (Republic of Austria v. Altmann (2004) 541 U.S. 677, 696). The order to dismiss AMG from this case is affirmed.

***139. Genskow v. Prevost,* 825 Fed.Appx. 388, 2020 WL 5259710 (7th Cir. Sep 03, 2020).**

Tribe, rather than tribal police officers, was the real party in interest in excessive force claim, and thus claim was barred by sovereign immunity. A 77-year old tribal elder brought action against tribal police officers, alleging violation of right to participate in governing body meeting on tribal lands and for using excessive force to remove her from meeting after she voiced opinion that scheduled agenda was not being followed. The United States District Court for the Eastern District of Wisconsin, William C. Griesbach, Senior District Judge, 2020 WL 1676960, granted defendants' motion to dismiss on grounds of sovereign immunity. Elder appealed. The Court of Appeals held that: 1) tribe did not waive its sovereign immunity and thereby consent to suits in federal court; 2) tribe, rather than tribal police officers, was the real party in interest, and thus claim was barred by sovereign immunity; and 3) tribal sovereign immunity barred tribal elder's claims against individual officers. Affirmed.

***140. In re Coughlin, B.R.,* 2020 WL 6140388 (D. Mass. Oct 19, 2020).**

Court addresses issue of first impression as to abrogation of tribal immunity for alleged stay violations. Chapter 13 debtor filed motion to recover for alleged violations of automatic stay, and the defendants, an Indian tribe and its admitted arms, moved to dismiss for lack of subject matter jurisdiction. The Bankruptcy Court, Frank J. Bailey, J., held that, as matter of first impression, bankruptcy statute abrogating the sovereign immunity of "other foreign or domestic government[s]" in proceedings to recover for violations of automatic stay did not clearly and unequivocally abrogate sovereign immunity of Indian tribe. Dismissed.

***141. Cayuga Indian Nation of New York v. Seneca County, New York,* 978 F.3d 829 (2nd Cir. Oct 23, 2020).**

Exception to sovereign immunity for lawsuits concerning immovable property did not apply to foreclosure proceedings. Cayuga tribe brought action challenging county's ability to impose and collect ad valorem property taxes on parcels of real estate tribe owned, and seeking to enjoin foreclosure proceedings. The United States District Court for the Western District of New York, Charles J. Siragusa, Senior District Judge, 354 F.Supp.3d 281, granted summary judgment in favor of tribe and permanently enjoined county from foreclosing on tribe's real property for nonpayment of taxes. County appealed. The Court of Appeals, Carney, Circuit Judge, held that: 1) prior preliminary injunction did not preclude reexamination on motion for summary judgment of issue of county's ability to impose and collect taxes from tribe, and 2) the federal common law exception to sovereign immunity for lawsuits concerning immovable property did not apply to foreclosure proceedings. Affirmed.

***142. South Dakota v. Frazier,* 2020 WL 6262103 (D.S.D. Oct 23, 2020).**

The State of South Dakota (the State) filed a lawsuit against the Cheyenne River Sioux Tribe (the Tribe) and the Tribe's Chairman Harold Frazier in both his individual and official capacity. As a part of its suit, the State sought a preliminary injunction against the Tribe and Chairman Frazier. Defendants responded with a motion to dismiss based on a lack of subject matter jurisdiction and sovereign immunity. Located within the Cheyenne River Sioux Indian Reservation is the community of La Plant, South Dakota. Because La Plant is in a very rural area, the speed limit on U.S. Highway 212 is 65 miles per hour (mph) for vehicles approaching La Plant. On August 14, 2020, the Tribe opened on the south side of U.S. Highway 212 the La Plant Thrifty Mart, a tribally owned and operated convenience store and gas station. The Tribal Council passed a resolution to lower the speed limit on U.S. Highway 212 at La Plant to 45 mph. Shortly after the opening of the La Plant Thrifty Mart, Chairman Frazier instructed tribal road employees to replace the 55 mph speed limit signs with 45 mph speed limit signs. The Tribe changed the speed limit unilaterally without notifying the State or to the federal authorities. When the Tribe did not change the speed limit signs from 45 mph to 55 mph, the SDDOT changed the signs back themselves. The State then filed this suit. Because the State's Complaint raises a federal question, the Defendants' motion to dismiss for lack of subject matter jurisdiction is denied. The claim against Chairman Frazier for injunctive relief is not barred by sovereign immunity, and Chairman Frazier may be sued in his official capacity to the extent that injunctive relief is sought. Kodiak Oil & Gas (USA) Inc., 932 F.3d at 1131 (quoting Bay Mills Indian Co., 572 U.S. at 796). The State's motion for preliminary injunction seeks to enjoin the Tribe or Chairman Frazier from modifying, removing, or replacing any of the speed limit signage on any highway within the jurisdiction of the SDDOT. In this case, the federal government, as trustee for the Tribe, has granted the SDDOT the necessary easements for the construction of U.S. Highway 212 through La Plant, South Dakota. The State has started the process to reevaluate the speed limit on U.S. Highway 212 as it bisects La Plant in front of the new Thrifty Mart. At the hearing, the State vowed to consider reducing the speed limit below 55 mph on that portion of the highway running through La Plant. In short, this Court grants the preliminary injunction, principally because of the State's likelihood of success on the merits and because an orderly process to entertain and determine a reduction of the speed limit serves the public interest. The scope of the preliminary injunction extends to prohibit Chairman Frazier from directing any tribal agency or employee thereof from altering any signage that the State has posted on U.S. Highway 212 in or near La Plant or replacing such state signage with any new signage, whether temporary or permanent, without the prior permission of the appropriate state authority. It is also ordered that Defendants' motion to dismiss is granted to the extent the Plaintiff's claims against the Cheyenne River Sioux Tribe are barred by sovereign immunity; otherwise it is denied.

143. Ledford v. Eastern Band of Cherokee Indians, 2020 WL 6693133 (W.D.N.C. Nov 12, 2020).

This Matter is before the Court on the Defendant's Motion to Dismiss Plaintiff's Amended Complaint. On January 6, 2020, April Ledford (the "Plaintiff"), proceeding pro se, filed a Complaint asserting a claim against the Eastern Band of Cherokee Indians (the "Defendant") under the Indian Civil Rights Act of 1968 ("ICRA"), 25 U.S.C. §§ 1301-04, for allegedly violating her due process rights by terminating a life estate she held in

Cherokee, North Carolina. The Defendant's Motion to Dismiss argues that the Court lacks subject-matter jurisdiction over the Plaintiff's claims against the Defendant under the ICRA."[T]he Eastern Band of Cherokee Indians is an Indian tribe within the meaning of the Constitution and laws of the United States." Toineeta v. Andrus, 503 F. Supp. 605, 608 (W.D.N.C. 1980). The Court lacks subject-matter jurisdiction over suits against Indian tribes unless "Congress has authorized the suit or the tribe has waived its immunity." Because Santa Clara Pueblo only permits civil actions under the ICRA that seek habeas corpus as a remedy, the Court lacks subject-matter jurisdiction over the Plaintiff's claims. It Is, Therefore, Ordered that the Defendant's Motion to Dismiss Granted.

***144. Howshar v. Caesars Entertainment Corporation,* 2020 WL 6889178 (S.D. Cal. Nov 24, 2020).**

Specially appearing Defendants, the Rincon Band of Luiseno Indians ("the Rincon Band"), and Defendants Caesars Entertainment Corporation and Caesars License Company, LLC, move to dismiss Plaintiff's Complaint. The Rincon Band states they were erroneously sued as Harrah's Resort Southern California, which is not a legal entity. The Rincon Band is a federally recognized sovereign Indian Tribe that is situated on a permanent Indian Reservation located within the State of California. Harrah's Resort Southern California is located on the reservation and is owned, operated, and controlled by the Rincon Band. On May 26, 2020, Plaintiff filed claims in the Superior Court of California, County of San Diego, for general negligence and premises liability. Plaintiff alleges that on or about April 25, 2018, Plaintiff was walking on the floor of Harrah's Resort past the slot machines with his leashed dog when another patron's Rottweiler on a thin leash charged and bit Plaintiff on the hand and knocked him to the ground. The Rincon Band subsequently removed the case to federal court based on federal question jurisdiction, then moved to dismiss the case. In the notice of removal, the specially appearing Rincon Band states that a federal question exists as to whether the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-21, completely preempts Plaintiff's state law claims. However, district courts have consistently found in highly analogous cases that the IGRA did not present a federal question because, as required by the IGRA's preemption provision, the state law tort claims did not potentially infringe on the Rincon Band's governance of gaming. Here, however, the motion is unopposed. In these situations, courts have dismissed the case rather than remand it. Accordingly, the case is Dismissed without prejudice.

***145. Galloway v. Williams,* 2020 WL 7482191 (E.D. Va. Dec 18, 2020).**

This matter is before the Court on Plaintiff's Motion For Final Approval Of Class Action Settlement. The Plaintiffs request that the Court enter an order: (1) confirming the certification of the proposed Settlement Class; (2) approving the proposed Settlement, including (a) Class Counsel's request for $2,871,000 in fees inclusive of costs, and (b) $5,000 in service awards for each Named Plaintiff; and (3) finding that the notice sent to class members satisfies due process. For the reasons set forth below, the Motion for Final Approval will be granted in part and denied in part. This matter arises out of what Plaintiffs' described as a "rent-a-tribe scheme" in which a "payday lender - which does most of its lending over the internet - affiliates with a Native American tribe to attempt to

insulate itself from federal and state" consumer financial protection laws "by purporting to piggy-back on the tribe's sovereign legal status and its general immunity from suit under federal and state laws." In particular, Plaintiffs' alleged that several lending entities, nominally run by the Lac Vieux Desert Band of Lake Superior Chippewa Indians ("LVD"), were, in practice, created and operated by Matt Martorello– a Chicago entrepreneur with no lineage to the LVD. Plaintiffs' alleged that these LVD-affiliated lending entities were charging usurious interest rates in violation of state and federal laws. The settlement proposed by the parties would resolve claims asserted in nine cases, in this district and throughout the country, against 25 different defendants. Settlement was reached after several years of "contentious litigation." The Court finds that the Settlement Agreement was the product of an adversarial, arm's-length negotiation process conducted once discovery had reached a stage where both parties had a clear sense of the strengths and weaknesses of their arguments. Accordingly, the Settlement Agreement was sufficiently "fair" under Federal Rule of Civil Procedure 23(e) (2). Here, all relevant adequacy factors suggest that the result achieved for the class and the other terms of the settlement agreement are adequate. In perspective of the relief sought and the challenges of continuing with litigation in this case, the benefits the Settlement provides to class members are significant and valuable. For all the foregoing reasons, the Motion for Final Approval should be granted. It is so Ordered.

146. ***Self v. Cher-Ae Heights Indian Community of Trinidad Rancheria,*** **Cal.Rptr.3d, 2021 WL 248813 (Cal. Ct. App. Jan 26, 2021).**

Tribal immunity barred action against Indian tribe to quiet title to public easement for coastal access on tribal property. Plaintiffs brought action against Indian tribe to quiet title to public easement for coastal access on tribal property. The Superior Court, Humboldt County, No. DR190353, Kelly L. Neel, J., granted tribe's motion to quash service of process and to dismiss complaint, and plaintiffs appealed. The Court of Appeal, Burns, J., held that tribal immunity barred action. Affirmed.

147. ***State by and through Workforce Safety and Insurance v. Cherokee Services Group, LLC,*** **N.W.2nd, 2021 WL 630357 (N.D. Feb 18, 2021).**

Court would adopt six-factor test for determination of whether economic entities are acting as arm of tribe, as could support extension of immunity. Workforce Safety and Insurance (WSI) appealed decision of administrative law judge (ALJ) finding in favor of business entities owned by federally-recognized Native American tribe as to administrative proceedings initiated by WSI against entities. The District Court, Burleigh County, David E. Reich, J., reversed. Business entities and their executive general manager appealed. The Supreme Court, VandeWalle, J., held that: 1) six-factor test applies to determination of whether economic entities are acting as an arm of a tribe, as could support extension of tribal sovereign immunity to entities, and 2) WSI's authority to issue cease and desist orders to employers when they operate without workers compensation coverage or are in an uninsured status does not extend to ordering insurance companies to cease and desist from writing coverage. Reversed and remanded.

148. ***Engasser v. Tetra Tech, Inc.,*** **2021 WL 911887 (C.D. Cal. Feb 09, 2021).**

Before the Court is Third-Party Defendant Mechoopda Cultural Resource Preservation Enterprise's Motion to Dismiss for lack of jurisdiction. In February 2019, Tetra Tech, Inc. entered into an agreement with the California Department of Resources Recycling and Recovery to coordinate the abatement and removal of debris resulting from California's Camp Fire in Butte County. Much of the property burned by the Camp Fire included the ancestral land of the Mechoopda Indian Tribe of Chico Rancheria, California. Accordingly, in March 2019, Tetra Tech entered into a Professional Services Agreement with Mechoopda Cultural Resource Preservation Enterprise to provide tribal monitoring for the cleanup. Mechoopda is a wholly owned, unincorporated entity of the Tribe whose purpose is to protect tribal cultural resources and further the economic operation and resources of the Tribe. Under the PSA, tribal monitors provided protection and treatment of tribal cultural resources and artifacts unearthed during the cleanup. Tetra Tech asserts that, under the PSA, Mechoopda had sole responsibility for tribal monitors and Tetra Tech had no ability to control the pay and work conditions of Mechoopda's employees. The PSA expressly acknowledges that Mechoopda is an instrumentality of the Tribe, which is federally recognized and a sovereign government. The PSA states, "Nothing herein shall be construed as a waiver of sovereign immunity." Plaintiff George Engasser performed work as tribal monitor employed by Mechoopda under the PSA. On September 13, 2019, Engasser filed this action solely against Tetra Tech, on behalf of himself and a putative class of tribal monitors. He asserts wage-and-hour violations under the Fair Labor Standards Act and California law. Tetra Tech demanded that Mechoopda defend and indemnify Tetra Tech against Engasser's suit. When Mechoopda failed to agree, Tetra Tech filed a Third-Party Complaint against Mechoopda seeking indemnity, contribution, and restitution. Mechoopda now moves to dismiss Tetra Tech's Third-Party Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of jurisdiction on the grounds that Mechoopda has not waived its tribal sovereign immunity and is therefore immune from Tetra Tech's suit. Tetra Tech argues Mechoopda waived its immunity by executing the PSA, specifically the Dispute Resolution provision. The parties do not dispute that Mechoopda is entitled to tribal sovereign immunity as an arm of the Tribe. Thus, Mechoopda is immune from suit absent waiver. Mechoopda expressly retained its sovereign immunity in the PSA. Just two lines above the Dispute Resolution provision, the PSA states unequivocally, "Nothing herein shall be construed as a waiver of sovereign immunity." The Court may not "resolve any ambiguity" as Tetra Tech suggests—a waiver of sovereign immunity must be clear and unequivocal. Kiowa, 523 U.S. at 58–59; Maxwell, 708 F.3d at 1087; Miller, 705 F.3d at 923. Mechoopda's express retention of immunity in the PSA clearly indicates that Mechoopda did not waive its sovereign immunity when it executed the PSA. The Court finds Mechoopda is immune from Tetra Tech's suit and the Court lacks jurisdiction. For the reasons discussed above, the Court Grants Mechoopda's Motion to Dismiss.

***149. Citizens Bank, N.A. v. Palermo,* 247 A.3d 131, 2021 WL 1080907 (R.I. Mar 22, 2021).** Student loan borrower, who was member of Native American tribe, was not entitled to sovereign immunity in action brought by lender. Student loan lender brought action against borrower, seeking damages for remaining amounts due on loan following lender's alleged default. The Superior Court, Providence County, Melissa Darigan, J., denied borrower's motion to dismiss on jurisdictional grounds arising from tribal

membership and entered summary judgment in favor of lender. Borrower appealed. The Supreme Court, Lynch Prata, J., held that: 1) lender sufficiently demonstrated that it acquired loans from original lender through merger; 2) lender provided borrower with offset from loan balance; and 3) borrower was not entitled to sovereign immunity. Affirmed.

***150. Jensen v. Burdreau*, 2021 WL 1546055 (W.D. Wis. Apr 20, 2021).**

Plaintiff Tristan Jensen filed this lawsuit under 42 U.S.C. § 1983, alleging that defendants violated her rights under the Fourth and Fourteenth Amendments by not providing her access to medical care or allowing her to rinse her eyes, wash her face or drink water for 40 minutes after she had been sprayed twice with pepper spray during the course of her arrest. Plaintiff Tristan Jensen is an adult resident of Bayfield County, Wisconsin. Defendant Red Cliff Band of Lake Superior Chippewa is a tribal nation located in Bayfield County. Defendant Eric Swan is a patrol officer for the Red Cliff police department. On or about February 25, 2019, defendant Swan responded to a domestic dispute at plaintiff's house in Bayfield, Wisconsin. Soon after arriving on the scene, Swan deployed two separate blasts of oleoresin capsicum pepper spray at plaintiff. Swan then forcibly escorted plaintiff from her basement to the entryway of her house, where he held her to the ground, applied handcuffs and placed her under arrest. Neither Swan nor Budreau provided plaintiff access to any medical attention or allowed her to drink any water until after she arrived at the Bayfield County jail. The parties agree that the tribe is a federally-recognized Indian tribe, and plaintiff does not contend that Congress abrogated the tribe's sovereign immunity with respect to § 1983. Rather, plaintiff argues that the tribe has waived its sovereign immunity pursuant to Wis. Stat. §§ 165.92(3) and (3m). According to plaintiff, defendants' attorney has tendered a claim to the tribe's insurance company, which plaintiff interprets as meaning either that the tribe has waived its sovereign immunity or is violating § 165.92(3m) by not maintaining a policy that provides that the insurer will waive the sovereign immunity. Although it is not clear whether the tribe waived its sovereign immunity under the state statute, it is not necessary to allow further discovery on this issue because any concession that the tribe may have made to the state does not affect its sovereign immunity as to plaintiff's § 1983 claim. At most, the tribe has consented to liability in state court. I conclude that defendant Red Cliff Band of Lake Superior Chippewa has not waived its sovereign immunity with respect to plaintiff's § 1983 claims against it in this court. Because claims brought against employees in their official capacity are considered claims against the entity of which the employee is an agent, Lewis v. Clarke, 137 S. Ct. 1285, 1290-91 (2017), plaintiff's official capacity claim against defendant Swan also will be dismissed. On the other hand, "officers sued in their personal capacity come to court as individuals," Hafer v. Melo, 502 U.S. 21, 27 (1991), and the real party in interest is the individual, not the sovereign." Lewis, 137 S. Ct. at 1291. Plaintiff's allegations that the tribe and county were engaged in a joint law enforcement plan, that all defendants were acting under state law and that plaintiff was transported to and booked in the Bayfield County jail are sufficient to suggest that defendant Swan was acting under state and not tribal law during the incident in question. Accordingly, defendants' motion will be denied to the extent that it seeks to dismiss plaintiff's individual capacity claim against defendant Swan for failure to state a claim upon which relief may be granted. It Is Ordered that the motion to dismiss filed by

defendants Eric Swan and Red Cliff Band of Lake Superior Chippewa is Granted in part and Denied in part: 1) Plaintiff's claims against defendant Red Cliff and plaintiff's official capacity claims against defendant Swan are Dismissed for plaintiff's failure to state a claim upon which relief may be granted. Defendant Red Cliff is Dismissed. 2) Defendants' motion is Denied in all other respects.

***151. Great Plains Lending, LLC v. Department of Banking*, A.3d, 2021 WL 2021823 (Conn. May 20, 2021).**

This appeal presents three significant issues of first impression with respect to whether a business entity shares an Indian tribe's sovereign immunity as an "arm of the tribe," as we consider (1) which party bears the burden of proving the entity's status as an arm of the tribe, (2) the legal standard governing that inquiry, and (3) the extent to which a tribal officer shares in that immunity for his or her actions in connection with the business entity. The plaintiffs, Great Plains Lending, LLC (Great Plains), American Web Loan, Inc., doing business as Clear Creek Lending (Clear Creek) (collectively, entities), and John R. Shotton, chairman of the Otoe-Missouria Tribe of Indians (tribe), a federally recognized tribe, appeal1 from the judgment of the trial court sustaining their administrative appeal and remanding this case to the defendant Commissioner of Banking (commissioner) for further proceedings with respect to the plaintiffs' entitlement to tribal sovereign immunity in administrative proceedings. We conclude that the entity claiming arm of the tribe status bears the burden of proving its entitlement to that status under the test articulated by the United States Court of Appeals for the Tenth Circuit in Breakthrough Management Group, Inc. v. Chukchansi Gold Casino & Resort, 629 F.3d 1173, 1187 (10th Cir. 2010) (Breakthrough), cert. dismissed, 564 U.S. 1061, 132 S. Ct. 64, 180 L. Ed. 2d 932 (2011). We further conclude, as a matter of law, that Great Plains is an arm of the tribe and that Shotton, with respect to his capacity as an officer of Great Plains and the tribe, is entitled to tribal sovereign immunity from civil penalties but not injunctive relief. We also conclude, however, that there is insufficient evidence to support a conclusion that Clear Creek is an arm of the tribe as a matter of law, which requires a remand to the commissioner for further administrative proceedings. Accordingly, we reverse in part the judgment of the trial court. Although the United States Supreme Court has recognized that wholly owned tribal corporations may be considered arms of the tribe, that court has not yet articulated a framework for how to make such a determination. See Williams v. Big Picture Loans, LLC, 929 F.3d 170, 176 (4th Cir. 2019), citing Inyo County v. Paiute Shoshone Indians of the Bishop Community of the Bishop Colony, 538 U.S. 701, 704, 705 n.1, 123 S. Ct. 1887, 155 L. Ed. 2d 933 (2003). Determining the proper framework for the arm of the tribe inquiry is similarly an issue of first impression in Connecticut and is the central issue in this appeal. Accordingly, like the Fourth, Ninth, and Tenth Circuits, we adopt the first five Breakthrough factors to analyze, in light of federal Indian law and policy, whether the entities constitute arms of the tribe for purposes of tribal sovereign immunity. See Williams v. Big Picture Loans, LLC, supra, 929 F.3d at 177. The plaintiffs bear the burden of establishing their arm of the tribe status, and, without further description or documentation linking the entity's stated purpose to the furtherance of tribal economic development, we conclude that there is insufficient evidence for this factor to weigh in favor of finding Clear Creek to be an arm of the tribe. Although there is no allegation or evidence that the profits generated by

Clear Creek are being directed anywhere other than to the tribe, the record is less descriptive of any financial relationship between Clear Creek and the tribe because it does not include articles of incorporation, bylaws, or any other legal documents governing the structure and operation of Clear Creek. With respect to Shotton's individual immunity, we conclude that the trial court correctly determined that the tribe is the real party in interest, rendering Shotton immune from the civil penalties imposed by the department but not its order of prospective injunctive relief in regard to his actions as an official of Great Plains. We further hold that the trial court correctly concluded that further proceedings are required to determine whether Clear Creek is an arm of the tribe and, therefore, entitled to immunity from the order imposing civil money penalties against that entity, and also to determine whether Shotton is entitled to tribal sovereign immunity in regard to his actions taken as an official of Clear Creek. The judgment is reversed insofar as the trial court concluded that further proceedings were required to determine whether Great Plains is an arm of the tribe and insofar as the trial court upheld the imposition of civil penalties against Shotton in his capacity as an officer of Great Plains, and the case is remanded with direction to render judgment sustaining the administrative appeal in part and directing the commissioner to dismiss the administrative proceedings against Great Plains, to vacate the imposition of civil penalties against Shotton in his capacity as an officer of Great Plains, and to remand the case to the commissioner for further proceedings to determine, in accordance with this opinion, whether Clear Creek is an arm of the tribe and whether Shotton is entitled to tribal sovereign immunity in regard to his actions taken as an official of Clear Creek; the judgment is affirmed in all other respects.

152. ***Deschutes River Alliance v. Portland General Electric Company*, 1 F.4th 1153, 21 Cal. Daily Op. Serv. 6314 (9th Cir. June 23, 2021).**

Nonprofit advocacy organization brought action against utility company that co-owned and co-operated hydroelectric project with Confederated Tribes of Warm Springs (tribe), alleging that project's discharges into river were in violation of Clean Water Act (CWA), and seeking injunctive relief. Following denial of company's motion to dismiss for failure to join tribe as a required party and concluding that Congress abrogated tribal immunity in the CWA, and organization's filing of an amended complaint to join tribe as an additional defendant, organization moved for partial summary judgment on defendants' liability under the CWA and defendants cross-moved for summary judgment. The United States District Court for the District of Oregon, Michael H. Simon, J., 331 F.Supp.3d 1187, denied plaintiff's motion and granted defendants' motion. Parties cross-appealed. Holdings: The Court of Appeals, Fletcher, Circuit Judge, held that: 1 plaintiff satisfied burden to demonstrate redressability to establish Article III standing; 2 tribe's agreement not to assert sovereign immunity from a suit brought by a party to the hydroelectric project's implementation agreement did not waive sovereign immunity as to claim by organization, a non-party to agreement; 3 suits against tribe under CWA were barred by sovereign immunity; 4 tribe was a required party; and 5 failure to join tribe as a required party warranted dismissal of suit. Reversed and remanded. Bea, Senior Circuit Judge, filed opinion dissenting in part and concurring in part.

K. Sovereignty, Tribal Inherent

153. Ute Indian Tribe of the Uintah and Ouray Reservation v. McKee, **F.Supp.3d, 2020 WL 5095277 (D. Utah Aug 28, 2020).**

Ute Indian Tribe lacked plenary regulatory power over non-members' diversion of disputed water based on the tribe's power to exclude. The Ute Indian Tribe of the Uintah and Ouray Indian Reservation sued non-members, who owned land on reservation that was not owned or held by the tribe, to enforce the Tribal Court's judgment, which found non-members had not proved their right to use water the United States owned in trust for the tribe and awarded the tribe $142,718 in damages for water misappropriated over 16 years. The tribe and non-members both moved for summary judgment. The District Court, Howard C. Nielson, J., held that: 1) district court had subject matter jurisdiction pursuant to statute governing federal question jurisdiction over the tribe's action to enforce a tribal court order; 2) tribe lacked plenary regulatory power over non-members' diversion of disputed water based on the tribe's power to exclude; 3) rights reserved by patent did not establish a consensual relationship between non-members and the tribe, and thus tribe could not regulate non-members' conduct of diverting water; 4) non-members' lease of a different parcel of land from the tribe did not give tribe authority to regulate non-members diversion of water under exception that allowed tribe to regulate activities of non-members who entered consensual relationships with the tribe or its members; 5) non-members' diversion of $142,718 worth of water over the course of 16 years did not constitute conduct that was catastrophic for tribal self-government, and thus tribe could not exercise civil authority over non-members' water diversion conduct; and 6) tribe's motion for leave to amend its complaint was futile. Non-members' motion for summary judgment granted; tribe's motion for leave to clarify granted and motion for leave to amend denied.

154. Cross v. Fox, **F.Supp.3d, 2020 WL 6576152 (D.N.D. Oct 28, 2020).**

Tribe members were required to exhaust remedies in tribal court before bringing action in federal court challenging rule requiring non-residents of reservation to vote in person. Members of the Mandan, Hidatsa, and Arikara Native American tribes, who were diagnosed with health problems, brought action against tribal officials, alleging that rule requiring non-residents of the tribal reservation to return to the reservation to vote, while permitting residents of the reservation to vote by absentee ballot impermissibly burdened their ability to vote, in violation of the Indian Civil Rights Act (ICRA) and the Voting Rights Act (VRA). Officials moved to dismiss and members moved for preliminary injunction. The District Court, Daniel M. Traynor, J., held that: 1) tribe members were required to exhaust their remedies in tribal court before bringing action in federal court, and 2) District Courts lacked subject matter jurisdiction over VRA claims. Officials' motion granted, and members' motion denied.

155. Adams v. Elfo, **2020 WL 6484399 (W.D. Wash. Nov 04, 2020).**

This matter comes before the Court on Petitioner Elile Adams' motion for reconsideration of the Court's order dismissing Ms. Adams' objections to United States Magistrate Judge Michelle L. Peterson's second Report and Recommendation ("R&R") regarding Ms. Adams' second amended petition for a writ of habeas corpus. In her motion for reconsideration, Petitioner argues the Court committed manifest error when it overlooked Petitioner's objection to the Report and Recommendation regarding

application of the bad faith exception to the tribal exhaustion doctrine and when the Court concluded that the Nooksack Tribe's "jurisdictional rights to trust lands before Public Law 280 would, indeed, survive Public Law 280." The Court previously overruled Ms. Adams' objections to Judge Peterson's recommendation regarding Ms. Adams' application of the bad faith exception. However, the Court does find that additional consideration of Ms. Adams' argument that her failure to exhaust was excused based on futility—namely that the Nooksack Tribal Court plainly lacked jurisdiction over her because she was arrested on off-reservation allotted lands—is warranted. Ms. Adams alleges that Public Law 280 predates the United States' recognition of the Nooksack Tribe. Therefore, the import of Public Law 280 and related authority in considering the Nooksack Tribal Court's jurisdiction over the off-reservation Suchanon allotment where Ms. Adams was arrested requires further consideration. The Court Remands the R&R in accordance with Federal Rule of Civil Procedure 72(b)(3). On remand, the magistrate judge must consider whether the fact that Public Law 280 predates federal recognition of the Nooksack Tribe impacts its determination that the Nooksack Tribal Court did not plainly lack jurisdiction over the Suchanon allotment at the time of Ms. Adams' arrest.

156. ***Dunn v. Global Trust Management, LLC,*** **F.Supp.3d, 2020 WL 7260771 (M.D. Fla. Dec 10, 2020).**

Delegation clause in arbitration agreement between borrowers who defaulted on payments to lender allegedly owned by tribe and lender was unworkable. Borrowers who defaulted on payments to online lender allegedly owned by Native American tribe brought action against debt collection company that had purchased borrowers' accounts and its chief operations officer alleging collection efforts violated Fair Debt Collection Practices Act (FDCPA) and Florida Consumer Collection Practices Act (FCCPA). Defendants filed motion to compel arbitration or, in the alternative, for judgment on the pleadings, and borrowers filed motion in limine to exclude allegedly unauthenticated copies of account terms that defendants produced to support arbitration. The District Court, William Jung, J., held that: 1) borrowers directly challenged delegation clause in arbitration agreement; 2) clause was unworkable; 3) Florida contract law governed formation of arbitration agreement; 4) company and officer sufficiently proved existence of arbitration agreements; 5) arbitration agreements were procedurally unconscionable; 6) election in arbitration agreements was invalid, 7) arbitration agreements locked in invalid choice-of-law provision and excluded outside judicial review; and 8) arbitration agreements were unconscionable. Motions granted in part and denied in part.

157. ***Mille Lacs Band of Ojibwe v. County of Mille Lacs, Minnesota,*** **2020 WL 7489475 (D. Minn. Dec 21, 2020).**

This matter comes before the Court on Plaintiffs' Motion for Summary Judgment. For the reasons set forth below, Plaintiffs' Motion for Summary Judgment on Standing, Ripeness, and Mootness is Granted. The present motions address: (1) this Court's subject matter jurisdiction; (2) threshold justiciability issues, including standing, ripeness, and mootness; and (3) certain defenses of immunity. The Plaintiffs are the Mille Lacs Band of Ojibwe (the "Band"), a federally recognized Indian tribe; Sara Rice, the Chief of Police of the Band; and Derrick Naumann, a Sergeant in the Band's Police Department (collectively, "Plaintiffs"). The Defendants are the County of Mille Lacs (the "County");

Joseph Walsh, the Mille Lacs County Attorney; and Don Lorge, the Mille Lacs County Sheriff. Article 2 of the 1855 Treaty between the Minnesota Chippewa Tribe and the United States established the Mille Lacs Indian Reservation, which comprises about 61,000 acres of land. In Plaintiffs' view, the Reservation established by the 1855 Treaty has never been diminished or disestablished. Within the Reservation, there are approximately 3,600 acres that the United States holds in trust for the benefit of the Band, the Minnesota Chippewa Tribe, or individual Band members. The Band owns in fee simple about 6,000 acres of the Reservation, and individual Band members own in fee simple about 100 acres of the Reservation. In Defendants' view, the Reservation established by the 1855 Treaty was diminished or disestablished by way of subsequent federal treaties, statutes, and agreements. On June 21, 2016, the County terminated the 2008 law enforcement agreement ("2008 Agreement") it had with the Band and County Sheriff. The 2008 Agreement allowed Band officers to exercise concurrent jurisdiction with the Mille Lacs County Sheriff's Department to enforce Minnesota state law, as provided in Minn. Stat. § 626.90. On July 18, 2016, County Attorney Walsh issued the "Mille Lacs County Attorney's Office Opinion on the Mille Lacs Band's Law Enforcement Authority." In general, the Opinion outlines Walsh's views regarding the scope of the Band's law enforcement authority after the termination of the 2008 Agreement. The Opinion concludes, inter alia, that the Band's "[i]nherent tribal jurisdiction is limited to 'Indian Country,' " which "is limited to tribal trust lands." Under the Protocol, in Mille Lacs County, Band officers have certain arrest powers, but "must turn over arrested persons without delay to a Mille Lacs County peace officer so an investigation admissible in state court may be conducted." There is no evidence in the record that compliance with the Opinion and Protocol was voluntary. After Walsh issued the Opinion and Protocol, then-Sheriff Lindgren "instructed [his] staff and deputies to follow the County Attorney's Opinion and Protocol." Further, the Sheriffs' deputies monitored Band officers' compliance with the Protocol and tracked violations. Lindgren made clear that the Opinion and Protocol would be enforced. After Rice became the Band's Police Chief, she continued to ensure that Band officers followed the Protocol because she did not want to jeopardize the career of any Band officer and feared that Band officers would "go to jail." According to Naumann, the Opinion "in not so many words [said Walsh] was going to threaten to arrest and prosecute our officers for doing our jobs. It was insulting, demeaning, threatening .... [and] terrible." Gardner testified that "[s]everal [Band] officers left their department. I know of at least a handful that went to completely different agencies because they were not allowed to be police officers, and that's what they wanted their career to be." The Court finds that the Band has a legally protected interest in exercising its inherent sovereign law enforcement authority. The evidence in the record reveals numerous actual, concrete, and particularized incidents in which the Band's police officers have been restricted from carrying out their law enforcement duties pursuant to the Opinion and Protocol. Those injuries in fact are actual, concrete, and particularized and therefore confer standing on the Band to challenge the County's conduct. The Court [also] finds that Plaintiffs' injuries are fairly traceable to Defendants' challenged conduct. The record is replete with evidence that County law enforcement and Band officials alike understood that compliance with the Opinion and Protocol was mandatory. Accordingly, the Court finds that Plaintiffs' injuries are "fairly traceable" to Defendants' alleged unlawful conduct. In this case, the

declaratory and injunctive relief sought is specifically designed to do just that—to recognize and restore the Band's sovereign law enforcement authority. Accordingly, the Court finds that Plaintiffs have met their burden of establishing standing to pursue these claims. Walsh and Lorge's defense of immunity based on their prosecutorial discretion under the Tenth Amendment fails. Defendants' motion for summary judgment based on the Younger abstention doctrine is denied. Here, Plaintiffs do not seek money damages—they seek only declaratory and injunctive relief. Accordingly, Walsh and Lorge are not entitled to dismissal from this suit on the ground of absolute prosecutorial immunity. Based on the foregoing, and the entire file and proceedings herein, It Is Hereby Ordered that: 1) Plaintiffs' Motion for Summary Judgment on Standing, Ripeness, and Mootness is Granted; 2) Defendants Walsh and Lorge's Motion for Summary Judgment is Denied.

***158. Big Horn County Electric Cooperative, Inc. v. Alden Big Man,* 2021 WL 754143 (D. Mont. Feb 26, 2021).**

Plaintiff Big Horn County Electric Cooperative ("BHCEC") filed this action against Big Man and several Judges and Justices of the Crow Tribal Courts and Unknown Members of the Crow Tribal Health Board seeking declaratory and injunctive relief in response to a civil action Big Man brought against BHCEC in Crow Tribal Court. Big Man sued BHCEC in Tribal Court for terminating his electrical service in January 2012, alleging that BHCEC's actions violated Title 20 of the Crow Law and Order Code, which bars winter termination of electrical service except with notice and approval by the Tribal Health Board. Judge Cavan recommended that BHCEC's motion for summary judgment be denied, Tribal Defendant's motion for summary judgment be granted, and Big Man's motion for summary judgment on the issue of whether his membership agreement waived the Crow Tribe's power to regulate BHCEC be granted. Under the General Allotment Act of 1887 and the Crow Allotment Act of 1920, Congress authorized certain divisions and conversions of tribal land into fee and then, eventually, alienation of Reservation land to non-Indians. This created a patchwork of ownership, with portions of the Reservation owned by the federal government in trust for the Tribe and its members, as well as fee land owned by tribal members and non-tribal members. The primary question governing each of BHCEC's objections is whether the Crow Tribe has legislative and adjudicative authority over BHCEC, a non-Indian entity, and its conduct on Big Man's land. If the Tribe has retained the right to exclude, then it may regulate BHCEC's conduct. If the Tribe has been divested of its right to exclude BHCEC on Big Man's land, then it may only regulate BHCEC under the narrow Montana exceptions. To determine whether land has been alienated from tribal control, the first step is to look to the fee-status of the land. Judge Cavan determined, relying on Bureau of Indian Affairs ("BIA") documents, including the Title Status Report, that Big Man's homesite is designated tribal trust land owned by the Crow Tribe and held in trust by the United States. Even if Big Man's homesite is considered alienated, the Tribe would still possess jurisdiction. BHCEC objects to both findings. Judge Cavan concluded that termination of electric service during the winter months has a direct effect on the health and welfare of the Tribe and therefore satisfies the second Montana exception. The Court finds no error in Judge Cavan's analysis on the issue and adopts those findings. Tribal Defendants' motion for summary judgment is Granted.

***159. Unkechaug Indian Nation v. Treadwell,* N.Y.3d, 2021 N.Y. Slip Op. 01286, 2021 WL 799811 (N.Y. App. Div. March 03, 2021).**

The plaintiff, Unkechaug Indian Nation, is an Indian tribe recognized by the State of New York, which occupies the Poospatuck Reservation in Suffolk County. In this action, the Nation seeks a declaratory judgment and a permanent injunction enforcing the Tribal Council's April 12, 2018 decision and order confirming the right of the defendant Curtis C. Treadwell, Sr., a blood-right member of the Nation, to possess the whole of certain real property known as 194 and 198 Poospatuck Lane. The Supreme Court determined, inter alia, that, notwithstanding the Nation's amendment of its complaint, by seeking declarations as to the defendants' possessory rights in its initial complaint, the Nation had waived its sovereign immunity with respect to the inverse declarations sought by Danielle in her counterclaims. Thereafter, a majority of the voting members present at a Special Meeting voted to determine that Danielle was an "undesirable person." The Tribal Council then adopted a resolution and directives, which resolved that occupancy of the disputed portion of the subject property be withheld from Danielle and directed that she "cease and desist" from occupying, using, and possessing the disputed portion of the subject property. Thereafter, the defendants moved for a preliminary injunction against the Nation. The Nation moved for summary judgment with respect to the defendants' counterclaims, in effect, declaring that Danielle had no rights in or to the disputed portion of the subject property. The Supreme Court correctly determined that in light of the 2019 undesirability determination, it lacked subject matter jurisdiction over the dispute, and that any determination regarding Danielle's rights to the disputed portion of the subject property was rendered academic. Here, since the Nation merely apprised the court of the 2019 undesirability determination without asking the State court to review or enforce it, the issue of whether to grant comity to that determination was not placed before the court. For the same reasons, there was no basis for the court to address the defendants' contentions that the 2019 undesirability determination was obtained in violation of the Tribal Rules and the Indian Civil Rights Act. As previously set forth, the court determined that the 2019 undesirability determination was an exercise of the Nation's sovereign authority. Affirmed.

***160. Moyant v. Petit,* A.3d, 2021 WL 1096367, 2021 ME 13 (Me. Mar 23, 2021).**

John P. Moyant appeals from the judgment dismissing his complaint for lack of subject matter jurisdiction entered by the Superior Court. See M.R. Civ. P. 12(b). On appeal, Moyant argues that the court erred in determining that his dispute with Regina Petit and the Passamaquoddy Tribe was an "internal tribal matter." On November 1, 1983, Harry Fry, who is not a member of the Tribe, entered into a one-year "Campsite Lease" with the Tribe. The camp was on Junior Lake, which is located on tribal land. In 2011, Fry transferred his lease to Regina Petit, a member of the Tribe, and stated that he had no future interest in the property. In 2012, the Tribe formally approved this transfer. In 2015, Fry died. John Moyant, a resident of Florida who is not a member of the Tribe, visited the property, made improvements to the property, and stored personal belongings at the property beginning while Fry was alive and continuing through June 2017. At some point Petit told Moyant that he was not allowed back on the property. In May 2017, Moyant wrote Petit a letter stating that he would break into the camp if he was unable to get into the camp. In June 2017, Petit contacted the Chief of Police for the Passamaquoddy Tribe

and caused Moyant to be served with a no-trespass notice. On February 8, 2019, Moyant filed a complaint in the Superior Court against Petit and the Tribe. Petit and the Tribe filed an answer alleging lack of subject matter jurisdiction because it was an "internal tribal matter," and for Moyant's failure to exhaust the tribal remedies. The Maine Indian Claims Settlement Act, Pub. L. No. 96-420, 94 Stat. 1785, and the Maine Indian Claims Settlement Implementing Act, 30 M.R.S. §§ 6201-6214 (2020), resulted from a settlement between the Passamaquoddy Tribe, the Penobscot Nation, and the State of Maine that, among other provisions, delineates areas of authority over Indian affairs. Section 6206(1) of the Maine Implementing Act provides that if a dispute is an "internal tribal matter," then it is within the tribal court's jurisdiction. 30 M.R.S. § 6206(1). We agree with the trial court that this matter does not fit squarely within the "right to reside" on tribal land or any of the other examples in section 6206(1)'s list. We now determine whether the Akins factors apply to this dispute. When the Akins factors are applied here, almost all of them support the determination that this dispute is an "internal tribal matter." Tribal jurisdiction does not disappear simply because a person who is not a member of the Tribe is involved in a dispute, especially when the action is against the Tribe and a tribal member concerning tribal land. The Superior Court did not err by determining that it lacked subject matter jurisdiction because the dispute was an "internal tribal matter." Judgment affirmed.

***161. Becker v. Ute Indian Tribe*, F.4th, 2021 WL 3361545 (10th Cir. August 3, 2021).**
Non-Indian contractor brought action to enjoin tribal court action seeking declaration of invalidity of parties' independent contractor agreement. The United States District Court for the District of Utah, Clark Waddoups, Senior District Judge, 311 F.Supp.3d 1284, entered order granting contractor's motion for preliminary injunction enjoining parties from proceeding in tribal court action and from tribal court's orders having preclusive effect in other proceedings. Tribe filed interlocutory appeals. The Court of Appeals, Briscoe, Circuit Judge, held that questions regarding contract's validity and tribal court's jurisdiction over dispute had to be resolved in first instance by tribal court. Reversed and remanded.

L. Tax

***162. Perkins v. Commissioner of Internal Revenue*, F.3d, 2020 WL 4644984 (2nd Cir. Aug 12, 2020).**
Married taxpayers petitioned for redetermination of income tax deficiency arising from disallowance of exemption for income earned from selling gravel mined from land of Seneca Nation of Indians, of which wife was enrolled member. The Tax Court, Holmes, J., 150 T.C. 119, entered summary judgment in part for government, determining two treaties between United States and Seneca Nation did not create exemption from federal income taxes. Taxpayers appealed. The Court of Appeals, Wesley, Senior Circuit Judge, held that: 1) in a matter of first impression, the Canandaigua Treaty did not exempt taxpayers' income from taxation, and 2) in a matter of first impression, the 1842 Treaty with the Seneca did not exempt taxpayer's income from federal taxation. Affirmed.

163. ***Samish Indian Nation v. Washington Department of Licensing,*** **14 Wash.App.2d 437, 471 P.3d 261 (Wash. Ct. App. Aug 31, 2020).**

Tribe with tribal trust land but no formal reservation was "located on a reservation" within meaning of fuel tax agreement statute. American Indian tribe sought judicial review of determination by Department of Licensing (DOL) denying tribe's request to negotiate fuel tax agreement. The Superior Court, Skagit County, No. 18-2-00876-2, Dave Needy, J., affirmed. Tribe appealed. The Court of Appeals, Verellen, J., held that tribe with trust land but no formal reservation was "located on a reservation" within meaning of fuel tax agreement statute. Reversed.

164. ***Flandreau Santee Sioux Tribe v. Terwilliger,*** **F.Supp.3d, 2020 WL 6158920 (D.S.D. Oct 21, 2020).**

Plaintiff, Flandreau Santee Sioux Tribe, filed this action against defendants, Richard L. Sattgast, Andy Gerlach, and Dennis Daugaard seeking a judicial declaration that, under federal law, the State of South Dakota does not have the authority to impose the South Dakota excise tax in connection with services performed by non-Indian contractors on the Tribe's on-reservation construction project. In 2018, this court granted the Tribe's motion for summary judgment on cross-motions for summary judgment and entered judgment for the Tribe. The court granted the Tribe's motion and entered judgment on the Tribe's federal preemption claim under the Indian Gaming Regulatory Act (IGRA). Defendants filed a timely appeal to the Eighth Circuit Court of Appeals. On September 6, 2019, the Eighth Circuit reversed and remanded. See Flandreau Santee Sioux Tribe v. Haeder, 938 F.3d 941 (8th Cir. 2019). In its opinion, the Eighth Circuit concluded that this court erred in ruling that the imposition of the South Dakota excise tax was expressly preempted under IGRA. The Eighth Circuit also held that based on the evidence before the court at the summary judgment stage, this court erred in concluding that the Bracker balancing factors tipped in favor of preempting the State excise tax. The Tribe first opened the Casino in 1990 and relocated it to the present building in 1997. Haeder, 938 F.3d at 943. The Tribe decided to invest over $18 million into the renovation and expansion of the Casino. Certain construction projects within Indian country are exempt from the contractor's excise tax. The South Dakota Department of Revenue requires contractors to complete a "Request for consideration of Indian Use Only Projects" form to receive an exemption from the tax. The Department of Revenue said the requests here were denied because the Department does not grant exemptions for work on commercial projects within Indian country. The court finds the State is not categorically barred from imposing its tax and the tax is not per se invalid. The Supreme Court has identified two independent but related "barriers" to a state's exercise of regulatory authority to tax non-Indian on-reservation activity. "First, the exercise of such authority may be pre-empted by federal law." Bracker, 448 U.S. at 142, 100 S.Ct. 2578. "Second, [the exercise of state authority] may unlawfully infringe 'on the right of reservation Indians to make their own laws and be ruled by them.' " Id. The court finds that although not comprehensive, IGRA is extensive in its regulation of Indian gaming. The court finds that there is a strong federal interest in ensuring the quality and safety of Indian gaming facilities while simultaneously advancing tribal self-sufficiency and self-governance. The statutory scheme of IGRA allows tribes to manage the construction and renovation of gaming facilities, while also ensuring the safety and health of Indian gaming patrons and

facilities. Here, both federal regulation under IGRA and tribal regulation under the Tribe's laws of the Casino renovation were substantial and extensive, especially when compared to the lack of State regulation. The evidence showed a scheme of federal and tribal regulation of Indian gaming facilities that leaves a minimal role for State oversight of the renovation project. Thus, the court finds there is a strong federal interest in the construction and maintenance of the Casino in a manner that adequately protects the environment and public health and safety as well as a strong federal interest in promoting tribal self-sufficiency and tribal government as articulated in IGRA. See 25 U.S.C. § 2702. Thus, the court finds that the State excise tax significantly impedes the federal interest of protecting gaming as a means of general tribal revenue. The court concludes that the State excise tax has a significant effect on federal interests in Indian gaming. See 25 U.S.C. § 2702. Additionally, because Congress has not said otherwise, Indian Trader Statutes expressly preempt the contractor's excise tax. In the alternative, even if the Indian Trader Statutes do not expressly preempt the State tax, after considering the federal, tribal, and state interests under the Bracker balancing test, the court finds that the tax interferes with federal and tribal interests reflected in the Indian Trader Statutes. This outweighs the State's minimal interests. Thus, the State tax is preempted under the Indian Trader Statutes. Because the State's interests do not outweigh the strong federal and tribal interests under IGRA or the Indian Trader Statutes, the State contractor's excise tax is preempted under federal law. Thus, it is Ordered that judgment will be entered in favor of plaintiff, Flandreau Santee Sioux Tribe.

***165. Pickerel Lake Outlet Association v. Day County,* N.W.2d, 2020 WL 7635840 (S.D. Dec 22, 2020).**

Indian Reorganization Act did not preempt county from assessing ad valorem taxes on trust land leased from Bureau of Indian Affairs. Taxpayers, a lake association that leased trust land from Bureau of Indian Affairs (BIA) and sub-lessees who were non-Indian owners of permanent improvements around lake, filed declaratory judgment action challenging ad valorem property taxes that county assessed against them, alleging that federal law preempted taxation because their structures were on land held in trust for Indians. The Circuit Court, Fifth Judicial Circuit, Day County, Jon S. Flemmer, J., upheld taxes. Taxpayers appealed. The Supreme Court, Kern, J., held that: 1) taxpayers had standing; 2) Indian Reorganization Act of 1934 (IRA) did not expressly preempt county from assessing ad valorem taxes; 3) state constitutional provision requiring state to provide disclaimer of title to and jurisdiction over Indian lands did not expressly preempt county from assessing taxes; and 4) IRA and BIA regulations did not impliedly preempt county from assessing taxes. Affirmed.

***166. Warehouse Market Inc. v. State ex rel. Oklahoma Tax Association,* P.3d, 2021 WL 345414 (Okla. Feb 02, 2021).**

Sublessee of building on restricted Indian land was required to exhaust administrative remedies before bringing tax protest as to sales tax payments. Sublessee of commercial building on restricted Indian land brought interpleader action, seeking determination as to whether sales tax was owed to Oklahoma Tax Commission (OTC) or the Tribe, and deposited tax monies with the court. The District Court, Okmulgee County, Ken Adair, J., dismissed Tribe on sovereign immunity grounds, and thereafter granted summary

judgment in part for sublessee, determining that the OTC could not be entitled to the sales tax unless and until the dispute between the OTC and the Tribe was resolved in another forum or tribunal. OTC appealed, and the Supreme Court retained the appeal. The Supreme Court, Kauger, J., held that: 1) in light of dismissal of Tribe, substance of action was a tax protest; 2) sublessee was required to exhaust administrative remedies before bringing tax protest; and 3) OTC was entitled to deposited monies. Reversed and remanded with instructions.

***167. Clay v. Commissioner of Internal Revenue*, F.3d, 2021 WL 968621 (11th Cir. Mar 16, 2021).**

Miccosukee Settlement Act did not exempt from income taxation per capita tribal casino revenue payments that taxpayers received from tribe. Taxpayers, who were members of Miccosukee Native American tribe, appealed after the United States Tax Court, Cary Douglas Pugh, J., 152 T.C. 223, sustained income tax deficiency determination that had been issued against them, arising from unreported income received from per capita tribal casino revenue payments. The Court of Appeals, Grant, Circuit Judge, held that: 1) Miccosukee Settlement Act did not exempt payments from taxation, and 2) payments were not exempt as land lease payments. Affirmed.

***168. Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. Evers, et al.,* 2021 WL 1341819 (W.D. Wis. Apr 09, 2021).**

The plaintiffs are four Ojibwe tribes with reservations in northern Wisconsin. Those reservations were established by the 1854 Treaty of La Pointe, which included a provision, common in treaties of the era, by which the President of the United States could allot parcels of reservation land to private ownership by individual Indians. Whether Wisconsin and its municipalities may tax those allotted parcels is the central issue in this case. The parties agree that reservation property allotted before 1887 is not taxable. The State of Wisconsin contends that any property allotted after 1887 is taxable by virtue of the federal General Allotment Act, enacted that year. And all agree that reservation property allotted under the General Allotment Act is taxable, as the Supreme Court held in County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation, 502 U.S. 251 (1992). But the tribes contend that the General Allotment Act does not apply to property on their reservations. Instead, the tribes say that even after 1887 reservation land was allotted pursuant to the 1854 treaty, under which Indian-owned land on the plaintiffs' four reservations is not taxable. Congress has the authority to repudiate an Indian treaty, and it has the authority to tax Indian-owned reservation property. But to do either, it must express its intent in unmistakably clear terms. The historical record shows that land in the tribes' reservations was allotted pursuant to the 1854 treaty, and the General Allotment Act does not express Congress's intent to usurp rights granted to the tribes under the 1854 treaty, and certainly not in unmistakably clear terms. The court concludes that, generally, Indian-owned property on the plaintiff tribes' reservation is not taxable, following the reasoning of Keweenaw Bay Indian Community v. Naftaly, 452 F.3d 514 (6th Cir. 2006), which also addresses taxation of property allotted under the 1854 Treaty of La Pointe. But any property that has been transferred to non-Indian ownership is now taxable, even if it has subsequently returned to Indian ownership. That result is required under Cass County, Minnesota v. Leech Lake Band of Chippewa

Indians, 524 U.S. 103 (1998). The state is entitled to summary judgment that reservation land is taxable once it passes to non-Indian ownership, even if it subsequently returns to Indian ownership. Plaintiffs' motion for summary judgment is Granted in part and Denied in part against all remaining defendants as provided in the opinion. All remaining defendants and their assigns, employees, and agents are enjoined from assessing, collecting, or enforcing Wisconsin property taxes on Indian-owned reservation property, unless that property has previously been in non-Indian ownership.

***169. South Point Energy Center LLC v. Arizona Department of Revenue*, P.3d, 2021 WL 1623343 (Ariz. Ct. App. Apr 27, 2021).**

South Point Energy Center, LLC appeals the tax court's grant of summary judgment to the Arizona Department of Revenue and Mohave County. For the following reasons, we vacate the judgment and remand to the tax court for further proceedings. Taxpayer is a non-Indian entity that owns and operates an electrical generating plant in Mohave County on land it leases from the Fort Mojave Indian Tribe. Under the lease, Taxpayer owns "[t]he Facility and all Improvements," but at the end of the term, it will have to "remove any and all above ground Improvements and personal property from the Leased Land," except for certain roads, foundations, and underground piping and equipment. In 2013 and 2014, Taxpayer sued ADOR to recover property taxes paid on the Facility for the property tax years 2010-2013. The court granted summary judgment to ADOR, holding that under White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 151, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980), tribal sovereignty does not preempt taxation of the Facility. Taxpayer timely appealed. Taxpayer argues the tax court erred by (1) rejecting its contention that 25 U.S.C. § 5108 categorically preempts state and local property taxes on permanent improvements on leased tribal land; (2) ruling based on state law, and without briefing or hearing evidence, that the entirety of the Facility is personal property rather than permanent improvements; and (3) erroneously applying the Bracker interest-balancing analysis to the Facility. We conclude the tax court erred by disregarding § 5108 and categorizing the Facility as personal property without conducting the proper analysis. We therefore vacate the judgment and remand for further proceedings consistent with this Opinion.

***170. Keweenaw Bay Indian Community v. Khouri*, 2021 WL 2936439 (W.D. Mich. July 13, 2021).**

Michigan collects sales taxes, use taxes, and tobacco taxes from transactions involving members of the Keweenaw Bay Indian Community and Keweenaw Bay Indian Community itself. Unlike many other federally recognized Indian tribes in Michigan, Keweenaw Bay Indian Community (KBIC) has not negotiated a tax agreement with Michigan. As a result, Michigan requires KBIC and its members to submit forms requesting exemptions and refunds from the various state taxes. Sometimes, Michigan grants the requested refunds. Using the results of the requested refunds as exemplary claims, KBIC filed this lawsuit, its third, seeking declaratory and injunctive relief and damages. KBIC contends the enforcement and collection of state taxes violates federal law. KBIC alleges that Michigan's sale tax, as applied to KBIC and its members for products and services used exclusively within their Indian country, is per se unconstitutional. Specifically, KBIC contends that Michigan cannot collect a sales tax on

a transaction (purchase, lease, or rental of personal tangible property) between a non-Indian retailer and an Indian when the personal tangible property is used exclusively in Indian country. KBIC succinctly summarizes its reasoning: "For purposes of applying this federal immunity, vendors making sales to Indians within their Indian country qualify as Indian traders regardless of whether the vendors have Indian trader licenses or places of business within Indian country." KBIC contends that the Supreme Court applies a per se rule. Defendants disagree. Because this dispute does not rest on any factual dispute, the Court concludes Defendants are entitled to summary judgment and dismissal of Count 1. Under Michigan law, the burden of the sales tax falls on the retailer. In this lawsuit, the retailers are non-Indian entities. The Supreme Court has expressly rejected any categorical bar or per se rule which would prevent the collection of sales tax in these circumstances. See Chickashaw Nation, 515 U.S. at 459 ("But if the legal incidence of the tax rests on non-Indians, no categorical bar prevents enforcement of the tax; ...."). KBIC's authority does not support the conclusion that a per se rule prohibits the application of state sales taxes to retailers simply because the sale, lease or rental of tangible personal property is made to a member of an Indian tribe or the Tribe itself and because the transaction occurred within KBIC's Indian country. In Count 2, KBIC asserts that federal and tribal interests outweigh Michigan's interests relevant to the assessment of Michigan's sales tax on non-Indian retail sellers for goods sold to KBIC and its members and used by KBIC and its members in KBIC's Indian country. Both parties have requested summary judgment on Count 2. KBIC has not demonstrated that Michigan's general interests are insufficiently related to the transactions such that the Court should preclude Michigan from collecting the tax. In both Bracker and Ramah, the Supreme Court found that the state's general interest in raising revenue was insufficient to allow the state to levy the tax. Ramah, 458 U.S. at 845; Bracker, 448 U.S. at 150. But, weighing against that general interest in both Bracker and Ramah were comprehensive federal regulatory programs covering the very activity subject to the state's tax, something not present in this dispute. Weighing the interests of the federal government, KBIC, and Michigan, the Court concludes that the balance of interests does not result in federal preemption. None of the federal statutes and regulations identified by KBIC so thoroughly permeate the federal relationship with KBIC that Michigan's sales tax would impermissibly interfere with the situation. KBIC has not identified any historical tradition of sovereignty concerning the purchase of ordinary goods used in daily life and in commercial enterprises. And, while Michigan has only a general interest in raising revenue, the counterbalancing interests are insufficient for this Court to conclude that the sales tax should be preempted. Accordingly, Defendants are entitled to summary judgment on Count 2. In Count 5, KBIC alleges that when the legal incidence of a state's use tax falls on a tribe or its members for activities occurring within their Indian country, the tax violates the Supremacy Clause. And, when the tribe and its members use the property both on and off their Indian country, the State must have some mechanism for apportioning the use tax. KBIC argues "Defendants are absolutely precluded from imposing the Michigan use tax upon the Community or its members with respect to their use, storage, or consumption of tangible personal property or services within the Reservation—regardless of whether it is also used outside the Reservation." KBIC relies on Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation, 425 U.S. 463 (1976), Washington v. Confederated Tribes of Colville Indian Reservation, 477 U.S. 134

(1980), Oklahoma Tax Commission v. Sac & Fox Nation, 508 U.S. 114 (1980), and Oklahoma Tax Commission v. Chickasaw Nation, 515 U.S. 450 (1995). All four cases involved, in relevant part, state taxes on motor vehicles or motor fuels. And, in all four cases, the Court found problems with the manner in which the state taxes were enforced. In Chickashaw Nation, 515 U.S. at 462, the Court concluded, as the statue was written, it could not be enforced because the legal incidence of the tax fell on a tribe or tribal members for sales made inside Indian country and there was no clear congressional authorization allowing the tax. See id. at 458-60. Defendants attempt to distinguish Michigan's use tax from the taxes involved KBIC's authority. First, Michigan's use tax is an excise tax levied on the exercise of a privilege, such as the buying or selling the property, and is not a tax on the property itself. See Sullivan v. United States, 395 U.S. 169, 175 (1969); Market Place v. City of Ann Arbor, 351 N.W.2d 607, 611-12 (Mich. Ct. App. 1984) (citations omitted). UTA provides that the tax is "for the privilege of using, storing, or consuming tangible personal property in this state...." Mich. Comp. Laws § 205.93(1). Second, the use tax does not resemble a property tax because it is calculated on the sale price not the value of the vehicle and it is assessed once, not annually. Finally, Michigan does not assume the vehicle will be used on state roads. Michigan's UTA does not apportion the tax based on any off-reservation use, a feature the Supreme Court has consistently considered when Tribes have successfully challenged state taxes on vehicles. The statute precludes apportionment. When tangible property is acquired for tax exempt uses and the property is subsequently put to a taxable use, the tax is levied. Mich. Comp. Laws § 205.93(1). And, when tangible personal property is converted to a taxable use the tax is levied without regard to any subsequent tax-exempt use. Id. 2. In its complaint, KBIC alleges that Michigan denies the claims for use taxes on items leased from out-of-state lessors. KBIC contends the lessor is not using the items and the lessor is not located in Michigan. (Id.) KBIC also contends the denial of these claims violates the per se rule that a state cannot tax Indian traders in Indian country. For example, KBIC paid a use tax on the rental of a dish washing machine for use on its reservation, submitted a claim for a refund, which was denied. Under Michigan law, a business that acquires tangible personal property for the purpose of leasing the property may elect to pay use tax on the rental receipts rather than the sales tax on the initial purchase. Section 205.104b outlines the responsibilities of the seller (lessor) and the purchaser (lessee) for claiming exemptions and refunds for use taxes. Although it is not clear that KBIC has a pled a distinct claim relating to use taxes for leases, KBIC would be entitled to summary judgment on the claim. Defendants concede that KBIC is exempt from use taxes on leases and rentals when the items are used exclusively in Indian country. The legal incidence of the State's use tax falls on the consumer (the lessee), although the tax is remitted to Michigan by the lessor. Accordingly, KBIC is entitled to an injunction against enforcement of the use tax as it is presently interpreted by Michigan. The Court will issue an Order contemporaneous with this Opinion.

M. Trust Breach & Claims

***171. Lee v. United States,* 2020 WL 6573258 (D. Ariz. Sep 18, 2020).**

Plaintiff Gloria Lee, as Administrator for the Estate of Vincent Lee, brought this action, through counsel, pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2671, et.

seq. Defendant the United States of America has filed a Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Plaintiff and Defendant Burton Reifler, M.D. ("Dr. Reifler") oppose the Motion. The Court will grant the Motion to Dismiss. Plaintiff brought this action against Defendants the United States and U.S. employee or contractor Dr. Reifler on behalf of the estate of Plaintiff's deceased brother Vincent Lee. This action arises from Vincent's death by suicide while confined in the Navajo Nation Chinle Correctional Facility while under the supervision and psychiatric care of the Government and its agents and employees, including "federal employee or contractor" Defendant Dr. Reifler. In her four-count Second Amended Complaint, Plaintiff asserts claims of Negligence (Count One), Negligent Operation, Maintenance, Control, Supervision, Direction, and Training (Count Two), Medical Negligence (Count Three), and Wrongful Death (Count Four). In its Motion to Dismiss, the Government argues that Plaintiff's wrongful death claim must be dismissed because, under Arizona law, an estate may only recover economic losses—such as medical expenses—that the decedent himself suffered from the time of the alleged wrongful conduct until his death, and Plaintiff does not allege that Vincent incurred any such economic losses. The Government further argues, to the extent Plaintiff seeks damages for alleged injuries to herself or other individuals stemming from Vincent's alleged negligent treatment and death, only statutory beneficiaries—meaning the decedents' parents or children—may recover damages based on their own suffering, and as Vincent's sister, Plaintiff is not a statutory beneficiary; nor has she alleged that she represents any statutory beneficiaries in this action. The Government also argues that, to the extent Plaintiff attempts to bring direct liability claims against the Government and the BIA based on institutional negligence, these claims are improper under the FTCA, which only subjects the Government to liability for the tortious acts of its employees, meaning natural persons, not entities or organizations. Plaintiff's claim in Count One is based on the alleged negligence of "the employees, contractors, officials and agents of the Defendant United States" who had a duty "to operate and/or maintain the [Chinle Jail] in a safe condition for the benefit of detainees housed there, including Vincent Lee." To the extent Plaintiff appears to seek to sue the Government and/or the BIA for its own alleged negligence or based on its purported vicarious liability as an employer, this claim fails as a matter of law for lack of subject matter jurisdiction. Nowhere in Count One or in the allegations incorporated therein does the Second Amended Complaint set forth the alleged acts or omissions of specific federal employees for which the Government could be held liable "if a private person" under Arizona law. Based on the above, the Court will dismiss Plaintiff's negligence claim against the Government in Count One with prejudice based on lack of subject matter jurisdiction and will dismiss Plaintiff's implied FTCA claim in this Count for failure to state a claim. Plaintiff's claim in Count Two is based on the Government's alleged failure to carry out its statutory and contractual duties for the operation of the Chinle Jail and the CCHCF. Plaintiff alleges that the Government had a duty, through its contractors, "to properly screen, hire, control, direct, train, monitor, supervise and/or discipline employees, terminate, or otherwise take remedial action against its agents and contractors." Plaintiff's claim in Count Two suffers from the same deficiencies already noted in Count One. Namely, Plaintiff appears to seek to sue the Government for negligence directly, rather than to allege negligent acts or omissions of individual federal employees, for whom the Government must assume liability for

negligence under the FTCA. As already discussed, Plaintiff's attempt to sue the Government directly fails for lack of subject matter jurisdiction because the Government is immune to suits for damages, and that immunity has not been waived. Additionally, to the extent Plaintiff also attempts to assert an FTCA claim, the Government's statutory waiver of sovereign immunity under the FTCA is limited. The FTCA does not cover the acts of independent contractors; generally, the Government may not be held liable for employees of a party with whom it contracts for a specified performance. Logue v. United States, 412 U.S. 521, 531 (1973). A court may, however, determine a party to be an employee of the Government for the purposes of the FTCA if the Government enjoys the power to control the detailed physical performance of the contractor or supervises the day-to-day operations of the contractor. It Is Ordered: (1) The United States' Motion to Dismiss is granted; the state law negligence claims against the United States in Counts One and Two and the FTCA claim against the United States in Count Three are dismissed with prejudice for lack of subject matter jurisdiction; the implied FTCA claims against the United States in Counts One and Two are dismissed without prejudice for failure to state a claim. (2) Plaintiff will have 30 days from the date of this Order to file a Third Amended Complaint.

***172. Chemehuevi Indian Tribe v. United States,* 150 Fed.Cl.181, 2020 WL 5807578 (Fed. Cl. Sep 29, 2020).**

Chemehuevi tribe's claims against United States for mismanagement of trust funds were untimely. Chemehuevi tribe brought action against United States seeking accounting and damages for alleged mismanagement of funds paid as compensation for loss of lands taken in connection with dam project, funds awarded by Indian Claims Commission (ICC) concerning separate taking, funds for mismanagement of shoreline and suspense accounts, and alleging uncompensated taking and mismanagement of tribal water rights, and failure to provide accounting of tribe's trust funds. United States moved to dismiss. The Court of Federal Claims, Matthew H. Solomson, J., held that: 1) tribe could not obtain accounting of trust funds from Court for Federal Claims for purposes of obtaining facts prior to stating claim; 2) United States' alleged failure to render proper accounting of trust funds in and of itself did not breach its fiduciary duties in manner that gave rise to claim for money damages; 3) tribe's claims against United States for mismanagement of trust funds were untimely; 4) tribe's takings claim was untimely; 5) tribe's decision not to attend meeting at which reconciliation reports were explained did not demonstrate excusable ignorance sufficient to toll statute of limitations; 6) tribe failed to establish its entitlement to unclaimed per capita payments from ICC judgment trust; 7) United States did not effect taking tribe's water rights; and 8) United States did not effect unlawful taking of tribe's Colorado River shoreline. Motion granted.

***173. Dinger v. Wishkeno,* 2020 WL 7027608 (N.D. Ill. Nov 30, 2020).**

In 2009, Candace Wishkeno killed Darren Dinger in a highway motorcycle crash in Riley County, Kansas. Darren Dinger's widow, Tammy Dinger ("Dinger"), won a civil judgment against Wishkeno and subsequently filed a garnishment summons in the Circuit Court of Cook County, Illinois against St. Paul Fire and Marine Insurance Co. ("St. Paul"). St. Paul removed the matter to this Court based on diversity of citizenship. At issue is whether Wishkeno's judgment was covered by an insurance policy issued by St.

Paul and held by the Kickapoo Tribe in Kansas. Because Wishkeno was not covered by the insurance policy at the time of the accident, the Court grants St. Paul's motion for summary judgment and denies Dinger's motion for summary judgment. Dinger initiated this case with a summons for garnishment in the Circuit Court of Cook County, seeking payment from St. Paul to satisfy a $1.66 million judgment she holds against Wishkeno. The relevant facts are undisputed. On July 23, 2009, Wishkeno drove her car into the path of Darren Dinger, who was riding a motorcycle and was killed in the resulting accident. At the time of the accident, Wishkeno was driving her personal vehicle in the course of her employment with the Kickapoo Tribe, transporting tribal youth. The Kansas court granted summary judgment in favor of the Kickapoo Tribe on the basis of sovereign immunity. Wishkeno, who was defended by her personal insurer, paid Dinger $100,000 in partial satisfaction of Dinger's claims. Under the settlement, Dinger agreed not to execute against Wishkeno's assets and to hold Wishkeno harmless as to any judgment entered in the underlying case. On July 8, 2014, Dinger was awarded a judgment for $1,662,628.39 against Wishkeno following a trial where Wishkeno was represented by counsel. The Kickapoo Tribe held an insurance policy ("Policy") issued by St. Paul that provided "Auto Liability Protection" of up to $1,000,000 per accident and "Umbrella Excess Liability Protection" in the same amount. In a dispute with Wishkeno's personal insurer, Safeco Insurance Company (which defended Wishkeno in the underlying litigation), St. Paul denied coverage to Wishkeno based on a Federal Tort Claims Act ("FTCA") exemption to the Policy. Ultimately, however, it was revealed that Wishkeno was not working under a contract that required her to seek relief under the FTCA. On February 18, 2011, an attorney for the Kickapoo Tribe informed St. Paul that the FTCA did not apply to the accident because Wishkeno was working under a government grant, not a contract. The record does not indicate that St. Paul ever communicated directly to Wishkeno or Dinger any other basis for denying coverage. On November 4, 2011, counsel for the Kickapoo Tribe informed Dinger's counsel that St. Paul had determined that Wishkeno was not a "protected person" under the Policy—a new basis for denial of coverage, distinct from the FTCA exclusion. The Court next turns to the crux of the parties' dispute: whether Wishkeno was covered as a "protected person" under the Policy. Dinger contends that the Policy is ambiguous on this point and so must be construed in favor of coverage. But her position ignores the fact that the Policy provides coverage only for "protected persons" while unambiguously stating that employees driving their own vehicles are not protected persons. Thus, an employee of the Kickapoo Tribe is not a protected person under this clause when driving a "covered auto" that the employee owns. For the foregoing reasons, the Court grants St. Paul's motion for summary judgment and denies Dinger's motion for summary judgment.The Court further finds that St. Paul is entitled to a declaratory judgment to the effect that St. Paul has no duty to pay any part of the judgment entered in favor of Tammy Dinger against Candace Wishkeno by the District Court of Riley County, Kansas.

***174. Teller v. United States,* 2020 WL 7123029 (D. Ariz. Dec 04, 2020).**

Before the Court is Defendant's Partial Motion to Dismiss filed pursuant to Federal Rule of Civil Procedure ("Rule") 12(b)(1) and 28 U.S.C. §§ 2401(b), 2675(a)—the Federal Tort Claims Act ("FTCA"). This case is a medical malpractice suit brought under the FTCA based on the conduct of a doctor and physician's assistant who worked in Tuba

City Regional Hospital's emergency room. The physician's assistant, Kathleen Pocock, and the doctor, Zachary Stamile, treated Plaintiff Edward Teller for hypoglycemia on or about November 25th, 2017. Plaintiffs allege the treatment resulted in Compartment Syndrome in Mr. Teller's leg, which allegedly caused disfigurement, pain, and suffering. Mr. Teller brings claims against the United States for medical malpractice based on the actions of the medical providers and for negligent training and supervision. Defendant now moves to dismiss the medical malpractice claims as they arise out of the actions of Ms. Pocock. Defendant alleges that Ms. Pocock is an independent contractor and thus her actions cannot give rise to FTCA liability for the United States. Here, Plaintiffs argue that Ms. Pocock is an employee for FTCA purposes because she was an employee of Tuba City Regional Health Care Corporation ("TCRHCC"), which has a contract with the Indian Health Service ("IHS"), a federal agency. The contract governing the relationship states that the FTCA applies to TCRHCC employees. Defendant argues that Ms. Pocock is an employee of CHG Healthcare Services, a staffing agency that provided independent contractors to TCRH, part of TCRHCC, but not an employee of TCRHCC. TCRH is a tribal healthcare facility operating under a self-determination contract under the ISDEAA. Here, it is not disputed that Ms. Pocock was an independent contractor of a tribal healthcare facility. It is also not disputed that she provided medical or related services to Mr. Teller. Further, it appears at some point TCRHCC considered Ms. Pocock a covered medical provider for purposes of the FTCA, based on emails TCRHCC's counsel sent to Plaintiffs' counsel. Therefore, Mr. Teller's claims against the United States based on Ms. Pocock's actions may move forward under the FTCA. Having reviewed the Motion, its accompanying papers, and applicable federal statutes and case law, the Court concludes that Ms. Pocock is an employee for FTCA purposes. The Court also concludes that Mrs. Teller failed to exhaust her administrative remedies under 28 U.S.C. §§ 2401(b) and 2675(a). Therefore, Mr. Teller met his burden of proving subject matter jurisdiction exists over his claims arising from Ms. Pocock's actions, but Mrs. Teller failed to meet her burden as to her loss of consortium claim. Accordingly, It Is Ordered that Defendant's Partial Motion to Dismiss filed pursuant to Rule 12(b)(1) is granted in part and denied in part.

175. Fletcher v. United States, **Fed.Cl., 2020 WL 7222751 (Fed. Cl. Dec 07, 2020).**

Osage tribal members' request for an expanded accounting of royalty income from oil and gas reserves held in tribal trust fund by federal government was barred by issue preclusion. Osage tribal members brought an action against federal government seeking monetary restitution for federal government's allegedly gross mismanagement of tribal trust fund, containing royalty income from oil and gas reserves. Government moved to dismiss for lack of standing and moved to strike. The Court of Federal Claims, Loren A. Smith, Senior Judge, held that: 1) declarations made by former Principal Chief of the Osage Nation and lead counsel for the Osage Nation would be stricken; 2) members failed to demonstrate that they suffered an injury-in-fact, as required for standing to sue government; 3) members were not an "identifiable group of American Indians," under the Indian Tucker Act; 4) Court of Federal Claims lacked subject matter jurisdiction over members' claims under the Tucker Act; and 5) members' request for an expanded accounting was barred by issue preclusion. Motions granted.

176. ***Sampson v. United States Department of Interior,*** **2020 WL 7211199 (D.S.D. Dec 07, 2020).**

Plaintiffs filed a complaint for a declaratory judgment that a settlement agreement entered into on June 23, 2011, in 1:08-cv-01019-CBK, is valid and enforceable and for an order summarily enforcing the terms and conditions of the settlement. Plaintiffs further seek a writ of mandamus directing the Bureau of Indian Affairs to distribute $637,500 plus interest to the estate of Maynard Bernard. Maynard Bernard and his wife Florine. Bernard filed suit against the United States Department of the Interior and Grady Renville alleging that, on April 15, 2004, Renville, with the help of the Bureau of Indian Affairs Realty Officer, secured a gift deed for 45.5 acres of Indian trust land from Maynard Bernard to Maynard Bernard and Grady Renville as joint tenants through undue influence, fraud, and misrepresentation, at a time when Bernard was 76 years old and incompetent. Florine Bernard was required to sign the gift deed because she was the spouse of Maynard Bernard. In June 2004, the Bernards received a copy of the gift deed to Renville and, in July 2004, the Bernards sought an administrative declaration from the Superintendent of the Sisseton Agency of the Bureau of Indian Affairs that the gift deed was void. On October 16, 2007, over three years after the Bernards initially challenged the gift deed, the Board affirmed the Director's decision. The Bernards thereafter filed an administrative appeal under the Administrative Appeals Act, 5 U.S.C.§§ 701-706, together with claims of breach of fiduciary duty and trust responsibility against the Department of the Interior and claims of fraud and misrepresentation against Renville. No agreement was made with the Department of the Interior as to the Bernards' breach of fiduciary claims against the Department or as to the appeal. The parties agreed that 28.2 acres of the land subject to the gift deed would be deeded back to the Bernards. The written settlement agreement provided that 28.2 acres would be deeded back to the Bernards, that 17.3 acres would be sold and the proceeds of the sale would be divided 51% to the Bernards and 49% to Renville. Renville agreed that the $197,000 in bills and expenses he claimed during the mediation session that he had incurred in developing the land would be his sole responsibility and that no part of the Bernards' 51% interest in the sale would be used to pay any of Renville's claimed previous expenses in developing the land. On June 8, 2018, the Sisseton Wahpeton Oyate Tribe purchased the 17.3 acres for the sum of $1,250,000. Renville received $612,500 as agreed to in the settlement agreement. The remaining $637,500 was deposited in a special escrow account with the Bureau of Indian Affairs for the benefit of the heirs pending the final order of distribution of the estate of Maynard Bernard. Renville deeded the 17.3 acres to the Tribe and acknowledged that the $637,500 was to be placed in escrow with the BIA. On May 23, 2019, a BIA Administrative Law Judge issued an order for the distribution of the estate of Maynard Bernard, including the $637,500 held in the special escrow account. Renville filed a petition for rehearing before the Department of Interior Office of Hearings and Appeals. Renville asserted that the $637,500 was his and should not be part of the Bernard estate. The Office of Hearings and Appeals regarded Renville's claim as an inventory challenge and remanded the matter back to the BIA for resolution. On August 12, 2020, the personal representatives of the estate of Maynard Bernard filed the instant declaratory judgment action. This litigation has gone on far too long. The settlement agreement was the basis for this Court's decision to dismiss the claims against Renville in the prior case. I find that Renville has played "fast and loose" with this Court and the

Court of Appeals. He continues to do so. The portion of the opinion quoted and emphasized above is the "law of the case." This Court further has jurisdiction pursuant to 28 U.S.C. § 1361 to issue mandamus to compel an officer of an agency of the United States to perform an official duty. Finally, this Court has ancillary jurisdiction to enforce the settlement agreement entered in 1:08-cv-01019-CBK. It Is ordered as follows: 1. The settlement agreement entered into June 23, 2011, in 1:08-cv-01019-CBK, is valid and enforceable against Grady Renville. 2. The $637,500, plus interest, held by the United States Department of Interior, Bureau of Indian Affairs, in a special account belongs to the estate of Maynard Bernard. 3. The United States Department of Interior, Bureau of Indian Affairs is directed to forthwith distribute the $637,500 held in trust, plus all accrued interest, to the estate of Maynard Bernard. 4. Defendant Renville shall pay to plaintiffs $64,017.04, representing additional prejudgment interest. 5. Defendant Grady Renville is held in contempt of court. He shall pay to plaintiffs, as a sanction, plaintiffs' attorneys fees and expenses in the amount of $16,958.61.

***177. Cheyenne & Arapaho Tribes v. United States,* Fed.Cl., 2020 WL 7251080 (Fed. Cl. Dec 09, 2020).**

Native American tribe failed to assert quasi-sovereign interest, as necessary to utilize parens patriae doctrine to litigate rights of members. Native American tribe brought action against United States, asserting "bad men" claim as result of wrongful acts of corporate pharmaceutical opioid manufacturers, distributors, and their agents and seeking compensation for damages sustained by tribes. United States moved to dismiss. The Court of Federal Claims, Loren A. Smith, Senior Judge, held that: 1) provision of treaties that required United States to arrest and punish "bad men" who committed any wrong upon person or property of Native Americans and to reimburse injured person for loss sustained created cause of action for individuals, not tribal governments; 2) tribe lacked prudential standing; 3) tribe failed to assert quasi-sovereign interest, as necessary to utilize parens patriae doctrine; and 4) tribe failed to plead cognizable "bad men" claim. Motion granted.

***178. Fasthorse v. United States*, 2021 WL 841489 (Fed. Cl. March 04, 2021).**

Plaintiffs Lavern C. Fasthorse and Jerry Jay have brought suit seeking injunctive relief for an alleged taking of property by the United States. Plaintiffs allege that their real property has been "[o]ccupied [b]y [t]he [d]efendant since 1848," and ask the court for "[j]ust [c]ompensation" as well as "a decision to reinstate aboriginal [t]itle" to this property. Plaintiffs cite the Tucker Act, the Fifth Amendment to the United States Constitution, various treaties, and judicial decisions concerning those treaties as grounds for jurisdiction in this court. Pending before the court is the United States' motion to dismiss plaintiffs' complaint pursuant to Rules 12(b)(1) and (6) of the Rules of the Court of Federal Claims ("RCFC"). In its motion to dismiss, the government asserts that "[t]he complaint fails to allege any basis for jurisdiction," as it "does not allege the existence of a contract with the Federal Government[,] ... [n]or does it identify a money-mandating statute or regulation." Plaintiffs allege that Mr. Fasthorse is a member of the Oglala Sioux Tribe and that Mr. Jay is a member of the Navajo Tribe. Plaintiffs have thus failed to "identify a separate source of substantive law that creates the right to money damages."

Fisher, 402 F.3d at 1172. For the reasons stated, the government's motion to dismiss is Granted.

***179. Little Traverse Bay Bands of Odawa Indians v. Whitmer*, F. 3d, 2021 WL 1976623 (6th Cir. May 18, 2021).**

Band of Odawa Indians sued Governor of Michigan, claiming that United States entered treaty in 1855 with tribe's predecessors that created Indian reservation spanning more than 300 miles in Michigan, and seeking declaration that claimed reservation continued to exist and had not been diminished or disestablished by any government action. Following intervention by counties and cities as defendant-intervenors, the United States District Court for the Western District of Michigan, Paul L. Maloney, J., 398 F.Supp.3d 201, denied defendant-intervenors judgment on pleadings, but granted all defendants summary judgment. Indian band appealed, and defendant-intervenors cross-appealed. The Court of Appeals, Clay, Circuit Judge, held that: 1 treaty did not provide land for Indian reservation purposes, and 2 treaty did not create system of federal superintendence sufficient to establish Indian reservation. Affirmed. On Appeal; Motion for Summary Judgment; Motion for Judgment on the Pleadings.

***180. Ohlsen v. United States*, 998 F.3d 1143 (10th Cir. June 3, 2021).**

Following forest fire that resulted from forest thinning and masticating work performed by crewmembers from Native American tribe, pursuant to agreement with United States Forest Service, and rejection by Department of Agriculture of administrative claims filed by insurance companies and owners of property destroyed by fire, companies and property owners brought action against United States, alleging negligence under the Federal Tort Claims Act (FTCA). The United States District Court for the District of New Mexico, James O. Browning, J., 399 F.Supp.3d 1052, granted summary judgment in favor of United States. Insurance companies and property owners appealed. The Court of Appeals, Phillips, Circuit Judge, held that: 1 as issue of first impression, CFDA simply permits government and cooperators to agree that cooperators' employees shall be deemed federal employees under the FTCA, but it does not mandate it; 2 agreement between Forest Service and tribe indicated intention for crewmembers to be independent contractors; 3 extent to which Forest Service controlled only end result of forest thinning and mastication project weighed in favor of finding that crewmembers were independent contractors; 4 any negligence claims arising from "slash" discarded vegetation were attributable to tribe; 5 Forest Service's decisions about ensuring compliance with vegetation height limits were matter of choice; 6 Forest Service's decisions regarding where to park water trucks or post fire guards were matter of choice; and 7 Forest Service's judgment regarding whether to have fire truck at area of thinning and where to post fire guards was type of judgment that discretionary function exception was designed to shield. Affirmed.

181. Wilhite v. Littlelight, 2021 WL 3007541 (D. Mont. June 29, 2021).

Plaintiff Tammy Wilhite ("Wilhite") brings this action against Defendants Paul Littlelight, Lana Three Irons, Henry Pretty on Top, Shannon Bradley and Carla Catolster ("Defendants"), alleging a civil RICO claim following her termination from the Awe Kualawaache Care Center ("Care Center") where she worked as a registered nurse.

Presently before the Court are Defendants' Motion to Stay Proceedings Pending Resolution of Petition for FTCA Certification and Defendants' Petition for FTCA Certification Pursuant to the Westfall Act. The Court finds both Defendants' Motion to Stay and Defendants' Petition for FTCA Certification Pursuant to the Westfall Act should denied. Wilhite was employed as a registered nurse at the Care Center in Crow Agency, Montana. The Care Center is an entity owned by the Crow Tribe of Indians. It is a long-term nursing facility that provides 24-hour medical services exclusively to members of the Crow and Northern Cheyenne Tribes. The Care Center operates under what is known as a 638 contract, which is a contract between the Tribe and the federal government that provides for tribal administration of programs previously operated by the Bureau of Indian Affairs. While working at the Care Center, a patient told Wilhite that he had been molested while being transported. Wilhite reported the incident to Defendant Catolster, who was her immediate supervisor. When it appeared that no action was being taken, Wilhite reported the incident to law enforcement. The Montana Department of Public Health and Human Services investigated in March 2018, and the Centers for Medicare and Medicaid Services made a report substantiating the allegations of patient abuse. After being told of the results of the investigation, Catolster informed Wilhite's landlord that she was no longer employed by the Care Center and directed the landlord to lock Wilhite out of her apartment. The landlord did as directed, but allowed Wilhite to retrieve her personal belongings and her car. Wilhite brought suit in this district, alleging she was entitled to damages under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, et seq. ("RICO"). Wilhite v. Awe Kualawaache Care Ctr, et al., Case No. 18-cv-80-SPW (D. Mont. May 9, 2018) ("Wilhite I"). Judge Watters dismissed the case, finding Wilhite's claim was barred by tribal sovereign immunity. Judge Watters found Wilhite could not recover from the Care Center for the official acts of its board of directors. Thereafter, on February 22, 2019, Wilhite filed this lawsuit, re-alleging her civil RICO claim against only the board of directors in their individual capacities. The United States denied Defendants' request for certification. Defendants now petition the Court to certify that they were acting within the course and scope of their employment, and to substitute the United States as the sole defendant for all of Plaintiff's claims. Defendants argue Wilhite's claim relates to actions they took within the course and scope of their employment under the 638 contract, and they are thus deemed to be federal employees for purposes of the FTCA and entitled to immunity under the FTCA and Westfall Act. The United States concedes that Defendants were acting within the course and scope of their employment, but argue certification is not authorized under the federal statutory claim exception to immunity under the Westfall Act. In short, "[t]he FTCA immunizes federal employees from individual liability for an 'action [that] is properly against the United States under the FTCA.' " Beebe v. United States, 721 F.3d 1079, 1084 (9th Cir. 2013) (quoting Meridian Int'l Logistics, Inc. v. United States, 929 F.2d 740, 743 n. 1 (9th Cir. 1991)). In general, tribal employees providing services under a 638 contract are deemed to be employees of the government while acting within the scope of their employment in carrying out the contract. 25 U.S.C. § 5321(d). Further, any civil action brought against a tribal employee covered by this provision is "deemed to be an action against the United States and will be defended by the Attorney General and be afforded the full protection and coverage of the Federal Tort Claims Act." 25 U.S.C. 5321 note. Under the Westfall Act, upon certification by the Attorney General that a

federal employee was acting within the course and scope of their employment at the time of the event giving rise to a civil claim, the United States is substituted as a party and the employee dismissed from the action. There are two exceptions to the immunity provided under the Westfall Act. By its express terms, the Act does not provide immunity from a civil action: (1) "which is brought for a violation of the Constitution of the United States," or (2) "which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized." 28 U.S.C. § 2679(b)(2); Saleh v. Bush, 848 F.3d 880, 888-89 (9th Cir. 2017). Here, Wilhite has brought a federal civil RICO claim against Defendants. As a federal statutory cause of action, the RICO claim is expressly excepted from Westfall Act immunity. 28 U.S.C. § 2679(b)(2)(B). Defendants have not cited, and the Court has not found, any authority for the proposition that the Court may recast a federal statutory cause of action as one sounding in tort in order to extend Westfall Act immunity for the claim. The Westfall Act expressly and unambiguously excludes immunity for civil actions brought for (1) violation of the Constitution or (2) violation of a federal statute which otherwise provides for such an action against an individual. Defendants' Petition for FTCA Certification Pursuant to the Westfall Act is denied.

N. Miscellaneous

***182. Pueblo of Jemez v. United States,* F.Supp.3d, 2020 WL 5238734 (D.N.M. Sep 02, 2020).**

Indian tribe was not entitled to aboriginal title to sub-area that it had historically farmed and occupied in Valles Caldera National Preserve. Pueblo of Jemez, as federally recognized Indian tribe, sued United States, under federal common law and Quiet Title Act (QTA), claiming that tribe had exclusive right to use, occupy, and possess lands of Valles Caldera National Preserve, consisting of 90,000 acres within and surrounding volcanic crater in center of Jemez Mountains in New Mexico, pursuant to tribe's continuing aboriginal title to such lands. The District Court, Robert C. Strack, J., 2013 WL 11325229, dismissed for lack of subject matter jurisdiction. Tribe appealed. The Court of Appeals, Seymour, Circuit Judge, 790 F.3d 1143, reversed and remanded. On remand and after bench trial, the District Court, James O. Browning, J., 430 F.Supp.3d 943, entered judgment for United States. Tribe moved to reconsider and alter final judgment. The District Court, Browning, J., held that: 1) tribe was barred from seeking aboriginal title to sub-areas with one exception; 2) tribe could not establish aboriginal title to sub-areas without proving title to surrounding areas; 3) tribe was not entitled to aboriginal title to Valle San Antonio; 4) tribe was not entitled to aboriginal title to Redondo Meadows; 5) tribe was not entitled to aboriginal title to geothermal project area; and 6) tribe was not entitled to aboriginal title to Banco Bonito. Motion granted in part and denied in part.

***183. Hotch v. Chilkat Indian Village (Klukwan),* 2020 WL 6158088 (Alaska Oct 21, 2020).**

This appeal arises from a 1978 settlement of a 1976 lawsuit about the ownership and disposition of Tlingit artifacts. In that litigation Chilkat Indian Village (Klukwan), referred to here as the Tribe, and three of its members, putatively acting as class representatives of the Frog House members of the Tribe, sued other members of the Frog

House to stop them from selling the artifacts. The parties entered into a settlement agreement providing, in relevant part, that the artifacts: (1) belong "to all of the members of the Frog House, Ganaxtedih Clan, of Klukwan" and thereafter would be "under the direct control of the elder Frog House members living in or in close proximity to Klukwan"; (2) ultimately would be "moved to Haines or Klukwan for suitable, safe storage and use by all Frog House members"; and (3) could not otherwise be sold or transferred "except with the unanimous consent of all Frog House members." The settlement agreement also provided that the artifacts would be delivered to the Alaska State Museum in Juneau "for temporary custody." In 2018 the Tribe requested that the State Museum transfer the artifacts to Klukwan's recently completed Cultural Heritage Center. In January 2019 Rosemarie Hotch, a self-represented descendant of one of the 1970s litigation's plaintiffs, filed motions in the long-closed case seeking on an expedited basis to block the artifacts' move to Klukwan. The superior court ultimately concluded that the law of the case doctrine precluded Hotch's claims. The court vacated the temporary restraining order and directed the State Museum to transfer the artifacts to Klukwan's Heritage Center. Hotch appeals. We will assume Hotch has standing and address only the merits of the court's decisions that: (1) the law of the case doctrine barred Hotch's claims; (2) there was no basis to reopen the 1978 settlement and judgment; and (3) the proposed artifacts move was consistent with and authorized by the 1978 settlement. 5)The law of the case doctrine provides that issues previously adjudicated be reconsidered only when there exist " 'exceptional circumstances' presenting a 'clear error constituting a manifest injustice.'" Hotch demonstrated no exceptional circumstances or clear error constituting a manifest injustice if the settlement were left in place. We conclude that the court did not abuse its discretion by determining that the law of the case doctrine prevents reconsideration of the 1978 settlement agreement's language 40 years later. The superior court's decision is Affirmed.

184. ***Smith v. Landrum,*** **N.W.2d, 2020 WL 6370477 (Mich. Ct. App. Oct 29, 2020).**
State court had jurisdiction over easement dispute between non-Indian parties involving land located on Indian reservation but owned by non-Indian. Plaintiffs, who were not American Indians, brought quiet title action seeking a prescriptive easement over land located on Indian reservation and owned by non-Indian defendant. The Circuit Court, Baraga County, granted defendant's motion for summary disposition on ground that it lacked subject matter jurisdiction. Plaintiffs appealed. As matter of first impression, the Court of Appeals, Murray, J., held that exercise of state jurisdiction would not interfere with Indian tribe's power to control and govern its members and internal affairs, and thus circuit court had subject matter jurisdiction. Reversed and remanded.

185. ***Oneida Indian Nation v. Phillips,*** **981 F.3d 157, 2020 WL 6878441 (2nd Cir. Nov 24, 2020).**
Treaty between state and tribe did not effect any transfer of land to subset of tribe. Native American tribe brought action against purported owner of parcel of tribal reservation land, seeking declaratory and injunctive relief arising out of purported owner's assertion of rights over parcel of land, and purported owner asserted counterclaim for declaratory and injunctive relief. The United States District Court for the Northern District of New York, Glenn T. Suddaby, Chief Judge, granted tribe's motion for judgment on the

pleadings and dismissed purported owner's counterclaim. Purported owner appealed. The Court of Appeals, Cabranes, Circuit Judge, held that: 1) treaty providing for payment by United States to chiefs of purported faction of tribe residing on parcel of reservation land, and for chiefs to make arrangements with state governor for the purchase of their lands after chiefs removed to different territory, did not effect any transfer of reservation land to that purported faction; 2) treaty by which New York State purchased portion of tribe's land, providing for payment to certain members of tribe described as a particular "party" of tribe, did not effect any transfer of ownership of particular parcel of unceded land from tribe to party of tribe; 3) purported owner failed to establish federal common law equitable defense to tribe's claim of ownership of disputed parcel; 4) even if an immovable property exception could apply to tribal sovereign immunity, exception did not apply in instant case; and 5) supplemental jurisdiction existed over purported owner's counterclaim. Affirmed.

***186. Oppenheimer v. ACL LLCT,* 2020 WL 7060971 (W.D.N.C. Dec 02, 2020).**

This Matter comes before the Court upon Plaintiff's Motion for Summary Judgment, which was filed on March 23, 2020. This copyright infringement case was brought by Plaintiff David Oppenheimer on January 17, 2019 against Defendants William Stacey Moore and the ACL LLC ("ACL"). The Copyrighted Work is a photograph framing the event center lobby of Harrah's Cherokee Casino Resort. Without having licensed to use, obtained authorization, or in any way compensated Plaintiff for its use of the Copyrighted Work, Defendant ACL used the Copyrighted Work on its website to promote the 2016 Championship of Bags. Plaintiff attests that his copyrighted photographs display his copyright management information ("CMI") when first published, and the Copyrighted Work displayed his CMI when first published. Because Defendants were on notice or should have been on notice for copyrights, Plaintiff sued Defendants for violating federal copyright law. Plaintiff is moving for summary judgment as to: (1) Defendants' liability for direct copyright infringement and (2) five of Defendants' affirmative defenses, including fair use, unclean hands, de minimis use, implied license, and failure to mitigate damages. Plaintiff sets forth that he holds a certificate of copyright registration for the Copyrighted Work issued by the United States Copyright Office. Defendants make no attempt to dispute the validity of the copyrights for the Copyrighted Work. Nevertheless, Defendants argue there could be an issue of material fact as to whether the photograph was provided to Defendants by an act of a sovereign state, the Eastern Band of Cherokee Indians and its tribal entities ("the Tribe"), which could bar Plaintiff's claims. According to Defendants, if the Tribe provided the photo to Defendants, granting Plaintiff summary judgment would be an indirect attack on the Tribe's sovereignty. The Court disagrees. The Court finds that the act of state doctrine should not be invoked here, and Defendants have offered no evidence to dispute the validity of the copyrights or to dispute their acts in copying the Copyrighted Work. Defendants have raised these affirmative defenses without providing any supporting facts and have failed to offer any theory whatsoever about why the Court should not grant summary judgment upon these matters. The Court finds that, because Defendants failed to provide evidence supporting these affirmative defenses, or even explain what evidence could support these affirmative defenses, Plaintiff is entitled to summary judgment as to these three affirmative defenses. For the aforementioned reasons, the Court finds that Plaintiff's Motion for Summary Judgment

should be Granted in Part. It Is Therefore Ordered that: 1) Plaintiff's Motion for Summary Judgment as to Defendant ACL's liability for direct copyright infringement is Granted; 2) Plaintiff's Motion for Summary Judgment as to Defendant Moore's liability for direct copyright infringement is Granted; 3. Plaintiff's Motion for Summary Judgment as to the affirmative defenses of de minimis use, implied license, and failure to mitigate is Granted; and 4) Plaintiff's Motion for Summary Judgment as to Defendants' affirmative defenses of fair use and unclean hands is Denied. So Ordered.

***187. Noka v. Town of Charlestown*, F.Supp.3d, 2021 WL 858526 (D.R.I. Mar 08, 2021)**.
Municipality did not deny police services to plaintiff based on her Native American status, precluding her § 1983 claim regarding equal protection. Plaintiff brought 1983 action against municipality for declaratory and injunctive relief and damages, alleging that municipality deprived her of equal protection and committed negligent infliction of emotional distress by arbitrarily denying her police services based on her status as a Native American. Municipality filed motion for summary judgment. The District Court, Mary S. McElroy, J., held that: 1) municipality did not deny police services to plaintiff, and 2) claim of negligent infliction of emotional distress was precluded under Rhode Island law. Motion granted.

***188. Ahtna, Inc. v. Department of Natural Resources*, P.3d, 2021 WL 938371 (Alaska Mar 12, 2021)**.
Native corporation's aboriginal title did not prevent State from acquiring right of way over land under statute providing for construction of highways over public land. Alaska Native corporation brought action against State of Alaska, seeking declaratory judgment and injunction regarding State's alleged trespass on its land to clear a road under right-of-way State claimed was granted by Revised Statute 2477. The Superior Court, Third Judicial District, Anchorage, Andrew Guidi, J., 2016 WL 11620511, granted Native corporation's motion for partial summary judgment on issue of rights granted under right of way, and denied Native corporation's motion for partial summary judgment on issue of existence of right of way, 2018 WL 9515275. Native corporation appealed and State cross appealed. The Supreme Court, Carney, J., held that: 1) Native corporation's aboriginal title to land at issue did not prevent State from acquiring a right of way over land under statute that provided for construction of public highways over public land, and 2) State exceeded the scope of its right of way when it cleared 100 feet of land along road to accommodate recreational uses. Affirmed.

***189. Metropolitan Life Insurance Company v. Lynch*, 2021 WL 1102213 (D. Ariz. Mar 23, 2021).**
At issue is Cross-Claimant Florinda Lynch's Motion for Summary Judgment. In this interpleader action, Lynch and Martin, Jr. both claim they are the rightful beneficiaries to a life insurance benefit from Interpleader Plaintiff Metropolitan Life Insurance Company in the amount of $135,869.86 arising from Royal Martin, Sr.’s death. The evidence shows the following: Decedent was employed by the Navajo Nation and a participant in the Navajo Nation Benefit Plan issued by MetLife, which included a group life insurance policy. The plan allowed participants to designate beneficiaries, and on June 21, 1995, Decedent designated Martin, Jr., his son, as sole beneficiary to plan benefits by way of an

Employee Enrollment Form. On May 4, 1999, Decedent completed an Application for Coverage Update designating Lynch as the sole beneficiary to plan benefits and identifying her as "spouse common law." Upon his death in 2017, the New Mexico death certificate indicated that Decedent remained married to Naomi Platero; they married in 1983 and later separated but, according to Martin, Jr.'s brief, they never divorced. After Decedent's death, Lynch submitted a claim for the plan benefits and identified herself as Decedent's "former spouse." Upon inquiry, she informed MetLife that she and Decedent were married and had separated but, because it was a common law marriage, there was no divorce decree. Because Arizona law provides that a divorce ordinarily revokes a beneficiary designation to the former spouse, A.R.S. § 14-2804(1)(a), but neither a marriage certificate nor divorce decree exist to formalize the relationship of Decedent and Lynch, MetLife filed this interpleader action for resolution of the question whether Lynch or Martin, Jr. is entitled to the plan benefits. Both Decedent and Lynch explicitly held themselves out to be married under common law to MetLife, and Lynch has also so claimed to this Court. While Arizona does not give legal effect to a common law marriage entered into in Arizona, A.R.S. § 25-111, it does recognize common law marriages entered into in a state or nation where such marriages are valid, A.R.S. § 25-112(B). The Navajo Nation, in which Decedent lived, allows common law marriages. 9 N.N.C. § 3(E), and Arizona generally recognizes and gives effect to Navajo Nation law, see Leon v. Numkena, 689 P.2d 566, 570 (Ariz. Ct. App. 1984). Navajo Nation law permits contracts for marriage only between unmarried people, 9 N.N.C. § 4(A), so if Decedent was still married to Platero, he could not have also been married to Lynch. But it is clear that Decedent and Lynch held themselves out to be married under Navajo Nation law. See 9 N.N.C. § 3(E)(4). Decedent explicitly indicated as such on the Coverage Update. Because Lynch averred that the common law marriage between her and Decedent ended—there is no divorce decree simply because there was no marriage certificate associated with a common law marriage to begin with—MetLife questioned the validity of the designation of Lynch as beneficiary at the time of Decedent's death. Because the beneficiary designation to Lynch is not enforceable in either scenario, the Court must give effect to the prior beneficiary designation at the time of Decedent's death, namely, to Decedent's son, Martin, Jr. It Is therefore ordered denying Cross-Claimant Florinda Lynch's Motion for Summary Judgment. It Is Further Ordered granting summary judgment to Cross-Defendant Royal Martin, Jr.

TABLE OF CASES