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CASE LAW ON AMERICAN INDIANS

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I. UNITED STATES SUPREME COURT

***1. Ysleta Del Sur Pueblo v. Texas,* 142 S.Ct. 1929, No. 20-493 (U.S. June 15, 2022).**
Attorney General, on behalf of the State of Texas, brought action against Ysleta del Sur Pueblo, a federally recognized tribe, seeking to enjoin the tribe from offering bingo within its entertainment center located on tribe's reservation. The United States District Court for the Western District of Texas, Philip R. Martinez, J., 2019 WL 639971, granted State's motion for summary judgment and permanent injunction, 2019 WL 5026895, denied tribe's motion for reconsideration, and, 2019 WL 5589051, granted tribe's motion to stay the injunction pending appeal. Tribe appealed. The United States Court of Appeals for the Fifth Circuit, Willett, Circuit Judge, 955 F.3d 408, affirmed. Certiorari was granted. The Supreme Court, Justice Gorsuch, held that Ysleta del Sur and Alabama and Coushatta Indian Tribes of Texas Restoration Act bans as a matter of federal law on tribal lands only those gaming activities also banned in Texas, abrogating Ysleta del Sur Pueblo v. Texas, 36 F. 3d 1325. Vacated and remanded. Chief Justice Roberts, with whom Justice Thomas, Justice Alito, and Justice Kavanaugh joined, filed dissenting opinion.

***2. Denezpi v. United States*, 142 S.Ct. 1838, No. 20-7622 (U.S. June 13, 2022).**
Following denial of defendant's motion to dismiss the indictment on the ground he had previously been convicted in the Court of Indian Offences for the same conduct, 2019 WL 295670, defendant was convicted in the United States District Court for the District of Colorado, Robert E. Blackburn, Senior District Judge, of aggravated sexual abuse in Indian Country. Defendant appealed. The United States Court of Appeals for the Tenth Circuit, Seymour, Senior Circuit Judge, 979 F.3d 777, affirmed. Certiorari was granted. The Supreme Court, Justice Barrett, held that defendant's prosecution under federal law did not offend Double Jeopardy Clause even if Federal Government had earlier prosecuted defendant under tribal law for same conduct. Affirmed. Justice Gorsuch filed a dissenting opinion, in which Justice Sotomayor and Justice Kagan joined in part.

***3. Oklahoma v. Castro-Huerta,* 142 S.Ct. 2486, No. 21-429 (U.S. June 29, 2022).**
Defendant, a non-Indian, was convicted in the Oklahoma District Court, Tulsa County, William D. LaFortune, J., of neglecting his stepdaughter, a member of the Cherokee Tribe, and he appealed. After portion of Oklahoma was recognized as Indian country, the Court of Criminal Appeals of Oklahoma, Rowland, V.P.J., 2021 WL 8971915, vacated defendant's conviction on the basis that the State did not have concurrent jurisdiction to prosecute crimes committed by non-Indians in Indian country. While state appellate proceedings were ongoing, federal grand jury indicted defendant for same conduct, and defendant accepted plea agreement. Certiorari was granted. Holdings: The Supreme Court, Justice Kavanaugh, held that: 1 General Crimes Act does not preempt state jurisdiction over crimes committed by non-Indians against Indians in Indian country; 2 Public Law 280, which affirmatively grants certain States broad jurisdiction to prosecute state-law offenses committed in Indian country, does not preempt state authority to prosecute crimes committed by non-Indians against Indians in Indian country; 3 Oklahoma Enabling Act did not preempt Oklahoma's authority to prosecute non-Indian for child neglect, a crime that was committed against member of Cherokee Tribe in

Indian country; and 4 Federal Government and the State have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country, abrogating Roth v. State, 499 P. 3d 23. Reversed and remanded. Justice Gorsuch, with whom Justice Breyer, Justice Sotomayor, and Justice Kagan joined, filed dissenting opinion.

II. OTHER COURTS

A. Administrative Law

***4. Chase v. Andeavor Logistics, L.P.*, No. 20-1747, 12 F.4th 864 (8th Cir. September 13, 2021).**

Allottees of Native American lands brought action against operator of oil pipeline, alleging claims including trespass, breach of easement agreement, and unjust enrichment. The United States District Court for the District of North Dakota, Daniel M. Traynor, J., 2020 WL 6231891, dismissed action. Allottees appealed. The Court of Appeals, Loken, Circuit Judge, held that: 1 allottees were not required to exhaust administrative remedies under Bureau of Indian Affairs (BIA) regulations setting out procedures for right-of-way grantee holdover situations before bringing action, but 2 Court of Appeals would invoke the discretionary judicial doctrine of primary jurisdiction and stay action pending exercise of jurisdiction that BIA had asserted. Reversed and remanded.

***5. Alegre v. United States*, Case No.: 16-cv-2442-AJB-KSC, 2021 WL 5920095, Case No. 16-cv-2442-(S.D. Cal. December 14, 2021).**

Plaintiffs are the descendants of Jose Juan Martinez, Guadalupe Martinez, and their daughter Modesta Martinez Contreras (collectively, "Martinez Ancestors"). Plaintiffs are enrolled in the San Pasqual Band of Mission Indians ("Band") but are not federally recognized as Band members by the Bureau of Indian Affairs ("BIA"). Plaintiffs filed suit, alleging that Defendants violated the Administrative Procedures Act by failing to provide Plaintiffs with legally sufficient notice of their decisions not to increase Modesta's blood degree and negative determination of Plaintiffs' enrollment requests. Plaintiffs further assert that Defendants' decisions were arbitrary and capricious. Plaintiffs request this Court to issue an order and/or mandate: (1) directing Defendants to adjudicate Plaintiffs' enrollment applications; and (2) directing Defendants to properly review Plaintiffs' applications for federal recognition in the Band. The Court finds Plaintiffs have adequately alleged they lacked actual notice of the final agency action. However, Defendants correctly assert that Plaintiffs should have known or could reasonably have discovered within six years of April 7, 2006, of the denial to increase Ms. Contreras' blood degree and enroll Plaintiffs in the Band. Indeed, facial challenges to agency actions must be raised within six years of promulgation because "[t]he grounds for such challenges will usually be apparent to any interested citizen within a six-year period following promulgation of the decision." Wind River Mining Corp., 946 F.2d at 715. Plaintiffs here had six years in which to inquire about the status of their request to increase Ms. Contreras' blood degree and enroll in the Band and to bring their lawsuit. Plaintiffs have failed to make any showing that attempts were made to pursue their rights.

Equitable tolling is therefore not appropriate. Defendants' motion for summary judgment is granted. Dismissed.

***6. Cavazos v. Haaland*, Civil Action No. 20-2942 (CKK), 2022 WL 94040 (D.D.C. January 20, 2022).**

This administrative law case centers on a U.S. Department of the Interior's ("Interior") decision ("AS-IA Decision"), after an informal adjudication, to decline to intervene in tribal disenrollment proceedings by the Saginaw Chippewa Indian Tribe of Michigan ("Tribe"). Plaintiffs are former members of the Tribe who have since been disenrolled by Tribal leadership. Plaintiffs charge that a federal statute particular to the Tribe, the Judgment Funds Act, PL 99-346, 100 Stat. 674 (1986) ("JFA"), required Interior to intervene in and put a stop to Tribal disenrollment proceedings. Plaintiffs argue that Interior's inaction was arbitrary and/or capricious within the meaning of the Administrative Procedures Act, 5 U.S.C. §§ 500 et seq. ("APA"). As a remedy, Plaintiffs seek not just a remand back to the agency, but an order from this Court mandating Interior's intervention to reverse the Tribe's disenrollment proceedings. Ultimately, the Court agrees with Interior1 that the plain meaning of the JFA: (1) does not classify disenrollment as discrimination and (2) grants Interior broad discretion to intervene in Tribal disputes related to the JFA. However, the Court holds that Interior incorrectly read the JFA to bar discrimination only against enrolled members of the Tribe. Because the JFA also bars the Tribe from discriminating against disenrolled members in access to benefits and services funded by the JFA, the Court shall remand the matter to Interior to reconsider whether it should exercise its discretionary authority to intervene in the alleged inequitable provision of such benefits and services. The heart of this case is a dispute over tribal disenrollment, i.e., who qualifies as a member of the Tribe. Although the Tribe is one legal entity today, historically it was a collection of many tribes throughout what is now the State of Michigan. After the Tribe's federal recognition in 1934, the disaster in reservation allotment created, in essence, two classes of Tribal members. Although the Tribe's draft constitution classified as members "[a]ll persons of Indian blood belonging to" to the tribal forebears of the Tribe, the federal government insisted that the Tribe's constitution instead extend membership only to those who resided on reservation lands. From 1937 onwards, this change in tribal membership has divided those lineal and collateral descendants. The 1973 Indian Judgment Funds Distribution Act, codified at 25 U.S.C. § 1403, provided non-reservation Tribal descendants an opportunity to lobby the federal government for assistance in Tribal recognition and membership. In 1976, the Bureau of Indian Affairs ("BIA") and Congress elected to equally distribute on a per capita basis one of those judgments to all descendants of the Tribes, regardless of whether they were enrolled members of the tribe. For present purposes, there are three key provisions of the JFA: (1) the Enrollment Provision, (2) the Nondiscrimination Provision, and (3) the Enforcement Provision. The Enrollment Provision works across two statutory sections. First, in section 5, it conditions the release of funds upon a constitutional amendment permitting the enrollment of collateral descendants: The Secretary [of the Interior] shall transfer the funds ... after the date on which the Secretary receives written notice of the adoption by the Tribal Council ... if the amendments to the constitution of the [T]ribe referred to in section 4(a) are adopted and ratified[.] JFA § 5(a). Next, section 4(a) defines that amendment as "any amendments to

the constitution of the [T]ribe which were approved by the Tribal Council on April 15, 1985, in resolution L and O-03-85." The Tribe passed the constitutional amendment broadening membership to nonresident Tribal descendants and, as a result, subsequently received the funds delineated in the JFA. After 1986, the Tribe began to enroll nonresident Tribal members pursuant to the statutory enrollment period. Out of 3,000 applications from nonresident descendants, the Tribe enrolled around 800 new nonresident members between 1986 and 1996. The Court concludes at the outset that the only relief it may grant to Plaintiffs is a remand to Interior for further proceedings. The facts in this case are quite like those in Forest Cty. Potawatomi Cmty. v. United States, 330 F. Supp. 3d 269 (D.D.C. 2018) (CKK). The Court concludes that the plain language of the Enforcement Provision neither makes perpetual enrollment a requirement of the JFA nor requires Interior's intervention in this case. The Court finds that Interior did not arbitrarily or capriciously change its position without sufficient explanation. In this APA challenge, the agency below determined the right outcome—for mostly the right reasons. The AS-IA erred only to the extent that it read the JFA to provide no protections for disenrolled members of the Tribe. Because the AS-IA relied, in part, on that incorrect reading to determine that it cannot (and should not) exercise its discretionary authority to intervene in matters related to JFA, the Court grants in part and denies in part Federal Defendants' Cross-Motion for Summary Judgment and grants in part and denies in part Plaintiffs' Motion for Summary Judgment. The Court further vacates the Assistant Secretary for Indian Affairs' January 30, 2020, Decision and remands this case to the Assistant Secretary consider further whether, the U.S. Department of the Interior should exercise its discretionary authority to intervene in alleged inequitable provision of services and benefits funded by the JFA.

7. S*ault Ste. Marie Tribe of Chippewa Indians v. Haaland*, No. 20-5123, 25 F.4th 12 (D.C. Cir. February 4, 2022).

Sault Ste. Marie Tribe of Chippewa Indians brought action alleging that Interior Department's denial of its request to take certain parcels of land into trust for use as casino violated Administrative Procedure Act (APA). Commercial casinos intervened. The United States District Court for the District of Columbia, Trevor N. McFadden, J., 442 F.Supp.3d 53, entered summary judgment in tribe's favor, and government and intervenors appealed. The Court of Appeals, Rao, Circuit Judge, held that: Interior had authority to determine whether parcels had been lawfully acquired under Michigan Indian Land Claims Settlement Act before taking them into trust, and mere acquisition of separate parcel of real property did not constitute "enhancement of tribal lands" required under Act. Reversed and remanded.

8. Stephen C. by and through Frank C. v. Bureau of Indian Education, 2022 WL 808141 (9th Cir. App. March 16, 2022).

Plaintiffs, former and current students ("Student Plaintiffs") at Havasupai Elementary School ("HES") and Native American Disability Law Center ("NADLC"), bring suit against Defendants the Bureau of Indian Education ("BIE"), the U.S. Department of Interior, and several individual defendants in their official capacities for their alleged failures to provide educational services at HES. Plaintiffs appeal the district court's order granting summary judgment in favor of Defendants on Plaintiffs' claim under the

Administrative Procedure Act, 5 U.S.C. § 706(1). Plaintiffs also appeal the district court's decision to dismiss Plaintiffs Stephen C. and Durell P. on the basis that their claims are moot. The district court erred when it held that Defendants were entitled to summary judgment on Plaintiffs' § 706(1) claim. A party has a cause of action under the APA if the party is "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. Section 706(1) of the APA provides that a court "shall compel agency action unlawfully withheld or unreasonably delayed." Id. § 706(1). "A court can compel agency action under this section only if there is 'a specific, unequivocal command' placed on the agency to take a 'discrete agency action,' and the agency has failed to take that action." Viet. Veterans of Am. v. CIA (VVA), 811 F.3d 1068, 1075 (9th Cir. 2016) (citing Norton v. S. Utah Wilderness All. (SUWA), 542 U.S. 55, 63–64 (2004)). Plaintiffs identify thirteen regulations under the Indian Education Act that Defendants have "unlawfully withheld or unreasonably delayed" at HES. 5 U.S.C. § 706(1); 25 C.F.R. Pt. 36. The regulations contain mandatory language, such as "shall" and "required." Therefore, Plaintiffs allege "both a legal duty to perform a discrete agency action and a failure to perform that action." VVA, 811 F.3d at 1079 *2 The district court erred when it held that summary judgment was warranted because "Plaintiffs' challenges, when aggregated, rise to the level of an impermissible, systematic challenge under the APA that should not be resolved by the courts." The district court's reliance on Lujan v. National Wildlife Federation, 497 U.S. 871 (1990), is misplaced. Lujan did not foreclose judicial intervention whenever such intervention might result in sweeping changes to an agency program. Therefore, the district court erred when it granted summary judgment in favor of Defendants on this claim. The district court also erred when it dismissed Stephen C. and Durell P., two Student Plaintiffs who no longer attend HES, on the ground that their claims are moot. REVERSED and REMANDED for additional proceedings.

9. Cayuga Nation, v. United States, 2022 WL 910295, Case No. 1:20-cv-3179-RCL (D. D.C. March 29, 2022).

The Cayuga Nation, under the Halftown Council's leadership, established the Cayuga Nation Police Department. The Nation PD then applied to the Federal Bureau of Investigations for an Originating Agency Identification Number ("ORI"), which would allow the Nation PD to access FBI-administered criminal databases. Under the Tribal Law and Order Act of 2010 ("TLOA"), the FBI must treat "tribal justice official[s] serving an Indian tribe with criminal jurisdiction over Indian country" as law enforcement officials and grant them access to federal criminal information databases. 34 U.S.C. § 41107(3); 28 U.S.C. § 534(d). But the FBI declined to grant the Nation PD an ORI, citing the potential leadership dispute in the Nation. The Nation filed this action to challenge that decision under the Administrative Procedure Act ("APA"). Of particular relevance here, an agency decision is inconsistent with Congress's delegation of authority—and thus arbitrary and capricious—when "the agency has relied on factors which Congress has not intended it to consider." *State Farm*, 463 U.S. at 43. Here, the FBI's determination relies heavily on factors that Congress did not intend it consider. Even if those considerations could influence whether the Nation PD met the TLOA's three criteria, the FBI fails to rationally connect its reasoning to the statutory criteria. Because the FBI went far afield from the strict instructions of Congress, its decision was

arbitrary and capricious. Congress gave the FBI strict instructions, clear criteria, and a duty. Instead of following those instructions, the FBI made its determination based on the surfeit of extraneous factors above. Congress did not mandate that the FBI shall grant an ORI only to a tribal law enforcement agency that operates harmoniously with other governments in the area. It did not instruct the FBI to grant an ORI only to tribes that have FBI-approved "Tribal laws protecting its members." AR 950. It did not grant the FBI the authority to deny a tribal law enforcement agency's application based on an "unwillingness" to use restraint. *Id.* Still, the FBI denied the application based on the abovementioned factors—factors manifestly different from the narrow criteria Congress provided. Accordingly, the Court will vacate and set aside the FBI's denial of the ORI application as arbitrary and capricious, and remand to the FBI for additional explanation and investigation.

***10. Friends of Alaska Wildlife National Refugees v. Haaland,* No. 20-35721, No. 20-35727, No. 20-357282022 WL 793023 (9th Cir. March 16, 2022).**

Several environmental organizations challenge a land-exchange agreement between the Secretary of the Interior and King Cove Corporation, an Alaska Native village corporation. King Cove Corporation wishes to use the land it will obtain in the exchange to build a road through the Izembek National Wildlife Refuge to allow access to the city of Cold Bay. The district court set aside the agreement. We reverse and remand. According to the district court, section 3101(d) does not mean "that one of the purposes of ANILCA is to further the economic and social needs of Alaska and its people." Instead, the court read that provision as "an acknowledgement that, in passing ANILCA, Congress has achieved the proper balance between conservation needs and economic and social needs." But to say that Congress struck a "balance" between two sets of objectives is to say that, to the extent possible, it sought to achieve both of them. The Secretary's land-exchange authority is one way Congress did that: Providing the Secretary with authority to exchange lands obviates the need for continued congressional intervention to maintain the balance struck in ANILCA. It therefore would make little sense to say that the Secretary may not use that authority to satisfy the economic and social needs of Alaskans. To the contrary, by using the word "adequate," Congress gave the Secretary discretion to strike an appropriate balance between environmental interests and "economic and social needs." 16 U.S.C. § 3101(d). Secretary Bernhardt exercised that discretion when he found that, without a road, the economic and social needs of the people of King Cove would not be adequately met. Further, even if we considered it necessary to review Secretary Bernhardt's assessment of the facts, we would not agree with the district court that Secretary Bernhardt arbitrarily contradicted Secretary Jewell's factual findings. Finally, because the agreement was not executed under an "applicable law," within the meaning of ANILCA,and does not purport to authorize a "transportation system," it is not subject to Title XI's requirements. Reversed.

***11. Karam v. Haaland,* 2022 WL 231552, No. 21-1690 (D.C. June 28, 2022).**

Plaintiffs, the Pilchuck Nation and its chairman, Kurt Kanam ("Kanam"), ask this Court to compel the Secretary of the Interior to extend federal recognition to the Pilchuck Nation despite their failure to comply with the regulations governing the recognition process. Because Kanam has failed to exhaust the administrative remedies available to

him and therefore cannot state a claim on which relief could be granted, I grant defendants' motion to dismiss, deny plaintiffs' motions to amend as futile, deny as moot plaintiffs' remaining and dismiss the case. Federal acknowledgement of Indian tribes "[i]s a prerequisite to the protection, services, and benefits of the Federal Government available to those that qualify as Indian tribes and possess a government-to-government relationship with the United States." 25 C.F.R. § 83.2(a). Federal courts defer to Congress and the President in determining whether a particular group is recognized as a tribe. United States v. Holliday, 70 U.S. 407, 419 (1865). Congress, in turn, has delegated to the Executive Branch, and in particular the Secretary of the Interior, the authority to establish regulations governing the relationship between tribes and the federal government. See 25 U.S.C. §§ 2, 9; 43 U.S.C. § 1457. Acting under that authority, the Secretary has promulgated regulations "establishing procedures and criteria for the Department to use to determine whether a petitioner is an Indian tribe eligible for" federal recognition. 25 C.F.R. § 83.2. These procedures are contained in Part 83, Title 25 of the Code of Federal Regulations. See generally 25 C.F.R. Part 83. The Pilchuck Nation is a tribe located in the state of Washington. Kanam is its Chairman. In 2012, the Karluk Tribal Court1 issued a Declaratory Order declaring "Pilchuck Nation to be a Treaty Tribe, and not[ing] that the Federal District Court is obliged to register" that order. Two years later, in 2014, Kanam sent that order to the Assistant Secretary of the Interior for Indian Affairs and requested that the Pilchuck Nation receive federal recognition. Having received no response, Kanam, proceeding pro se, filed a 2018 lawsuit in this District seeking to compel the Secretary to recognize the Pilchuck Nation. That lawsuit was dismissed after Kanam failed to respond to the Government's motion to dismiss. Undeterred, Kanam made a second request to the Department in March 2021, again predicated on the Karluk Tribal Court order. At no time did Kanam or the Pilchuck Nation seek recognition through the process established by the Department in 25 C.F.R. Part 83. In fact, as Kanam acknowledges, the Department did not act on the Pilchuck Nation's request "because they wished to conduct proceedings only under" Part 83. Kanam filed this case in June 2021 seeking, for the fourth time, federal recognition of the Pilchuck Nation. Kanam claims that the Secretary's failure to recognize the Pilchuck Nation violated the Administrative Procedure Act and deprived plaintiffs of due process under the Fifth Amendment. The Government has moved to dismiss. Exhaustion of administrative remedies is a prerequisite to filing suit if Congress has delegated an initial administrative decision to the executive branch. Avocados Plus, Inc. v. Veneman, 370 F.3d 1243, 1247 (D.C. Cir. 2004). Whether failure to exhaust administrative remedies should be resolved as a jurisdictional defect via a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) or as a failure to state a claim under Rule 12(b)(6) depends on the underlying statute. Id. at 1247–48. Kanam's failure to exhaust the Part 83 procedures does not bar this Court's jurisdiction over his complaint. Congress has directed the Secretary of the Interior to publish a list of all federally recognized tribes on an annual basis. 25 U.S.C. § 5131. And the President, acting through the Secretary, is authorized to establish regulations "carrying into effect the various provisions of any act relating to Indian affairs," including the determination whether to extend recognition to a particular tribe. 25 U.S.C. § 9; see also James, 824 F.2d at 1137. But the statute contains no "sweeping and direct statutory language" divesting federal courts of jurisdiction if the tribes have not complied with the processes established by regulation. Avocados Plus,

370 F.3d at 1248. In the absence of such language, this Court will treat the alleged failure to exhaust administrative remedies as a failure to state a claim under Rule 12(b)(6). Assuming all well-pleaded allegations in the Complaint to be true, the Pilchuck Nation has failed to exhaust its administrative remedies. Indeed, the Secretary argues, and Kanam concedes, that the Pilchuck Nation has not even attempted to comply with the procedural requirements established in Part 83. Having established that the Pilchuck Nation has failed to exhaust its administrative remedies, the Court must assure itself that application of the exhaustion doctrine is consistent with the underlying principle of the doctrine before dismissing the complaint. See James, 842 F.2d at 1137–38. It is. Id. As our Circuit Court has long held, requiring prospective tribes to exhaust their administrative remedies under Part 83 before filing suit to compel recognition is appropriate because it is consistent with congressional direction, leverages agency expertise, creates an administrative record ripe for judicial review, and allows for the possibility that the matter will be resolved administratively without need for judicial intervention. Kanam's arguments to the contrary are unavailing. Nor does the Karluk Tribal Court exempt the Pilchuck Nation from this process, as Kanam argues. As an initial matter, the Karluk Tribal Court exceeded any authority it may hold in issuing that order. And, even if valid, the tribal court's order is not binding on this Court. In short, Kanam offers no theory as to why that order would preempt our Circuit Court's binding precedent requiring compliance with Part 83. The case will be dismissed.

B. Child Welfare Law And ICWA

12. Matter of N.T., 2021 NCCOA 412, No. COA20-891, 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.

***13. Matter of A.L.*, S. E. 2d, 2021 NCSC 92, No. 370A20, 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.

***14. People in Interest of O.S.-H.*, P.3d, 2021 COA 130, Court of Appeals No. 18CA1391 (Colo. App. October 28, 2021).**

In this dependency and neglect proceeding, M.S.C. (biological father) appeals the juvenile court's judgment adjudicating S.W. (stepfather) to be the legal father of O.S-H. (the child). To resolve biological father's appeal, we must first decide an unanswered question in Colorado: Does a paternity adjudication within a dependency and neglect proceeding constitute a child-custody proceeding under the Indian Child Welfare Act of 1978 (ICWA)? We answer yes and conclude that the record does not show compliance with ICWA's inquiry provisions. While the record shows that biological father was named on the child's birth certificate and had previously been subject to a dependency and neglect case involving the child, the court did not determine whether these circumstances constituted prior paternity determinations before it decided who should be declared the child's father. In 2017, the Washington County Department of Human Services (Department) obtained temporary custody of the child and initiated a dependency and neglect case. The Department asserted that the child's mother was deceased, biological father was in prison, and stepfather did not have appropriate housing for the child. The juvenile court adjudicated the child dependent and neglected as to stepfather. And it granted the Department's request for genetic testing to determine whether biological father was the child's biological parent. It also adopted a treatment plan for stepfather and placed the child in his care. Testing later confirmed biological father's genetic relationship to the child. In a proceeding in which ICWA may apply, tribes must have a meaningful opportunity to participate in determining whether the child is an Indian child and to be heard on the issue of ICWA's applicability. B.H., 138 P.3d at 303. ¶ 10 To determine whether ICWA applies to a case, the juvenile court must answer two fundamental questions. First, is the proceeding a child-custody proceeding as defined by ICWA? Second, is the child an Indian child?. Was the Paternity Adjudication a Child-Custody Proceeding? ¶ 16 The Department and GAL argue that ICWA does not apply because biological father is appealing from a paternity adjudication, which is not part of a child-custody proceeding. We disagree. ¶ 17 As discussed above, ICWA applies to a child-custody proceeding. As pertinent here, a child-custody proceeding includes actions for foster care placement and termination of parental rights. 25 U.S.C. § 1903(1). This includes any action that may result in foster care placement. K.G., ¶ 14; 25 C.F.R. § 23.2 (2020). A foster care placement is defined as any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated[.] 25 U.S.C. § 1903(1)(i); see also M.V., ¶ 33. ¶ 18 And placing a child in the care of a nonbiological parent constitutes a foster care placement under ICWA because ICWA defines a parent as “any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom.” 25 U.S.C. § 1903(9). Also, this case originated as, and continues to be, a dependency and neglect case. Dependency and neglect cases are child-custody proceedings under ICWA. § 19-1-126(1). The judgment is reversed and the case is remanded to the juvenile court. On remand, before the juvenile court may again adjudicate paternity, it shall direct the Department to procure biological father's

appearance, if possible, so the court may make an ICWA-compliant inquiry of him on the record. If the inquiry provides reason to know that the child is an Indian child, the court should proceed in accordance with ICWA's provisions, including the requirement to provide notice of the proceeding to the applicable tribe or tribes.

15. In re Josiah T., 71 Cal.App.5th 388, 286 Cal.Rptr.3d 267, 21 Cal. Daily Op. Serv. 11,338, 2021 Daily Journal D.A.R. 11, 603B311213, (Cal. Ct. App. November 8, 2021).

Department of Children and Family Services (DCFS) petitioned to terminate mother's parental rights to child. The Superior Court, Los Angeles County, No. 17CCJP00277D, Kristen Byrdsong, Judge Pro Tempore, terminated mother's parental rights, and she appealed. The Court of Appeal, Stratton, J., held that: DCFS did not make adequate initial inquiry into child's Indian ancestry; paternal grandmother's representation of her Cherokee ancestry triggered the duty to make further inquiry into child's Indian ancestry; paternal grandmother's subsequent denial of Indian ancestry did not excuse duty to make further inquiry into child's Indian ancestry; and DCFS's inadequate inquiry and reporting deprived court of evidence needed to rule on ICWA applicability. Reversed and remanded with directions.

16. Interest of C.C., No. 20-1716, 2021 WL 5458046 (Iowa. Ct. App. November 23, 2021).

The Iowa Indian Child Welfare Act (ICWA)1 imposes special requirements that must be met before a court may terminate parental rights to an Indian child. See, e.g., Iowa Code § 232B.6(6)(a), .10(2). In this case, the juvenile court terminated a mother's parental rights to an Indian child. But we conclude ICWA's requirements were not met. So we must reverse the termination. I. Background Facts & Proceedings This case is about C.C. (the child), born in 2008. The child's mother is enrolled in the Rosebud Sioux Tribe (the Tribe). The child is also eligible for enrollment in the Tribe. The parties agree the child is an "Indian child" for purposes of ICWA. In 2019, the child's father commenced this action to terminate the mother's parental rights under Iowa Code chapter 600A, our private termination statute. The Tribe intervened. A representative of the Tribe appeared at trial. The Tribe opposed termination of the mother's parental rights. Following trial, the court concluded the father had met the requirements of both chapter 600A and ICWA. So the court terminated the mother's parental rights. The mother appeals. We review private termination proceedings de novo. In re B.H.A., 938 N.W.2d 227, 232 (Iowa 2020). But we review statutory interpretation issues for correction of errors at law. In re C.A.V., 787 N.W.2d 96, 99 (Iowa Ct. App. 2010). We begin with the mother's argument that the father failed to satisfy ICWA's qualified-expert-witness requirement. When a court is "considering whether to ... terminate the parental rights of the parent of an Indian child," section 232B.10(2) obligates ("shall") the court to require that qualified expert witnesses with specific knowledge of the child's Indian tribe testify regarding that tribe's family organization and child-rearing practices, and regarding whether the tribe's culture, customs, and laws would support the ... termination of parental rights on the grounds that continued custody of the child by the parent ... is likely to result in serious emotional or physical damage to the child. See also Iowa Code § 232B.14(2)(g) (requiring "[a] court of competent jurisdiction" to "vacate a court order and remand the case for appropriate

disposition" if there is a "[f]ailure to provide the testimony of qualified expert witnesses as required by this chapter"). In this case, the father did not designate his own "qualified expert witnesses with specific knowledge of the child's Indian tribe." See id. § 232B.10(2). Instead, the father relied on the testimony of the Tribe's representative, Shirley Bad Wound. And it appears undisputed that Bad Wound is a "qualified expert witness" for purposes of ICWA. See id. § 232B.10 (defining "qualified expert witness" for purposes of ICWA). It also appears undisputed that Bad Wound—the Tribe's representative—had "specific knowledge of the child's Indian tribe." See id. § 232B.10(2). Instead, the dispute centers on the content of Bad Wound's testimony. To be sure, Bad Wound testified about "th[e] [T]ribe's family organization and child-rearing practices" as well as other aspects of the Tribe's culture. See id. But Bad Wound did not testify as to "whether"—in the words of section 232B.10(2)—"the [T]ribe's culture, customs, and laws would support the ... termination of parental rights on the grounds that continued custody of the child by the parent ... is likely to result in serious emotional or physical damage to the child." Indeed, the juvenile court expressly found that Bad Wound "did not give an opinion as to whether not terminating [the mother's] parental rights would cause severe emotional or physical damage to" the child. And the father's brief acknowledges that Bad Wound "decline[d] to give an opinion of whether continued custody of [the child] by [the mother] would result in serious emotional or physical damage."3 So it appears section 232B.10(2) was not satisfied and, therefore, termination was improper. Even so, we have carefully considered the father's counterarguments. We think they boil down to four points: The purpose of ICWA's qualified-expert-testimony requirement "is to provide the court with knowledge of the social and cultural aspects of Indian life to diminish the risk of any cultural bias." See In re L.N.W., 457 N.W.2d 17, 18 (Iowa Ct. App. 1990) (citation omitted). Bad Wound provided the court with information about "the tribe's culture, customs, and laws." See Iowa Code § 232B.10(2). The juvenile court expressly found "that no cultural bias against" the mother "as an Indian parent [was] present, either explicitly or implicitly, in the decision as to whether or not to terminate" the mother's rights. 4. Therefore, ICWA's qualified-expert-testimony requirement was fulfilled even though Bad Wound did not testify as to whether "the tribe's culture, customs, and laws would support the ... termination of parental rights on the grounds that continued custody of the child by the [mother] is likely to result in serious emotional or physical damage to the child," as section 232B.10(2) appears to require. We disagree. As D.S. acknowledged, the words of section 232B.10(2) plainly require qualified-expert testimony as to "whether the tribe's culture, customs, and laws would support the ... termination of parental rights on the grounds that continued custody of the child by the parent ... is likely to result in serious emotional or physical damage to the child." See 806 N.W.2d at 469. We cannot ignore these words or the requirements they create. Rather, our duty is to enforce them. See Holland v. State, 115 N.W.2d 161, 164 (Iowa 1962). It is true our decisions have often said or implied that the purpose of ICWA's qualified-expert-testimony requirement "is to provide the court with knowledge of the social and cultural aspects of Indian life to diminish the risk of any cultural bias." D.S., 806 N.W.2d at 470 (citation omitted). But those general observations do not—they cannot—change the specific requirements imposed by the words of section 232B.10(2). Cf. Scalia & Garner, Reading Law, at 56–57 (noting that statutory purpose "must be derived from the text" and "cannot be used to contradict text or supplement it"). So those

observations do not mean section 232B.10(2) was satisfied just because Bad Wound provided the juvenile court with some information about the tribe's culture and customs. Nor do they mean section 232B.10(2) was satisfied just because the juvenile court found that "no cultural bias against" the mother "is present." Rather, as the legislature's words make clear, section 232B.10(2) cannot be satisfied unless there is qualified-expert-witness testimony about "whether the tribe's culture, customs, and laws would support the ... termination of parental rights on the grounds that continued custody of the child by the parent ... is likely to result in serious emotional or physical damage to the child." Because that testimony was not presented here, section 232B.10(2) was not satisfied. So we must reverse.4 Cf. D.W., 2001 WL 710205, at *5 (reversing termination order where "[t]he State ... failed to meet the requirements of [the federal Indian Child Welfare Act] because it did not present the testimony of a qualified expert witness 'that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child' " (quoting 25 U.S.C. § 1912(f))). REVERSED AND REMANDED.

***17. In the Interest of D.H.*, No. 123,745, 2021 WL 6068714 (Kansas Ct. App. December 23, 2021).**

Act (ICWA), 25 U.S.C. § 1901 et seq. (2018), has a long and tortured history, which we need to describe in some detail in order to provide context for the ongoing issue throughout these proceedings. Shortly after the commencement of these proceedings, Grandmother submitted an affidavit stating that while she was not enrolled as a member of a federally recognized Indian tribe, the Child was eligible for enrollment. She identified the tribe "with which the child may be associated" as the Cherokee tribe. Thereafter, the State sent a form notice of the proceedings to the Cherokee Nation in Tahlequah, Oklahoma and to the Bureau of Indian Affairs area director in Anadarko, Oklahoma. The Cherokee Nation stated that it needed full information about the Child's direct biological lineage to determine if he was eligible for tribal membership. In addressing Mother's claim, this court found that the State made no effort to supply the Cherokee Nation with the missing information about the Child's Grandmother, even though the information was readily available because the Child was living with Grandmother during the pendency of these proceedings. The ICWA requires specific notice of the proceedings to the applicable Indian nations or tribes or to the Bureau of Indian Affairs so that an interested nation or tribe may intervene in the proceedings. A tribal court has concurrent jurisdiction with state courts over involuntary child custody proceedings involving children not domiciled on a reservation. Nevertheless, the search for the Child's possible Indian heritage need not extend beyond the Cherokee tribes based on Mother's belated contention in 2018 that she "believes she may have some Indian heritage. Reversed and remanded with directions.

***18. Interest of A.M.,* No. 02-21-00313-CV, 2022 WL 325473 (App. Tex. February 3, 2022).**

Appellants T.B. (mother) and B.B. (father) appeal the trial court's final order terminating their parental rights to A.B. (Alan) and appointing Appellee the Texas Department of Family and Protective Services as permanent managing conservator. T.B. and B.B. both argue that the trial court erred by failing to comply with the mandatory notice provisions

of the Indian Child Welfare Act (ICWA). This court and the Department agree. Because the trial court here had reason to know that Alan might be subject to the ICWA, specific statutory notices containing specific statutorily defined information were required to be sent to specific individuals. And although the Department sent out some notices, those notices did not comply with the statutory requisites. Moreover, the Department neglected to send out other required notices. Accordingly, we will abate this appeal and remand this case to the trial court so that proper notice may be provided to the proper individuals and so that, after such notice, the trial court may conduct a hearing and make a determination as to whether Alan is an Indian child under the ICWA. The Department's notice lists the Cherokee Nation, Eastern Band of Cherokee Indians, and United Keetoowah Band of Cherokee Indians in Oklahoma. And the notice contains a certificate of service. The notice, however, is silent with respect to the manner of service. Moreover, the record does not reflect that the Department served the required notice upon any of the three federally recognized Shawnee tribal entities. See BIA Indian Entities Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs, 86 Fed. Reg. 7554-01 (Jan., 29, 2021). We agree with T.B., B.B., and the Department that the trial court failed to satisfy the ICWA's mandatory notice requirements when it had reason to know that Alan may be subject to the ICWA, and thus, that it erred in signing the termination order. 25 U.S.C.A. § 1912. We further direct the trial court to enter findings of fact and conclusions of law regarding whether Alan is subject to the ICWA and to include them in a supplemental clerk's record to be filed with the clerk of this court.

***19. In re H.V.,* Cal.Rptr.3d, 75 Cal.App.5th 433, B312153, 2022 WL (Cal. Ct. App. February 18, 2022).**

County department of children and family services filed petition alleging that mother had engaged in a violent altercation with a female companion in child's presence, and that mother's violent conduct endangered child's safety and placed child at risk of harm. After jurisdictional and dispositional hearing at which it did not order notice under the Indian Child Welfare Act of 1978 (ICWA), the Superior Court, Los Angeles County, No. 20CCJP06436A, Debra L. Losnick, J., sustained the petition. Mother appealed. The Court of Appeal, Kim, J., held that: 1 department's questioning of child's mother about child's possible Indian ancestry, but none of child's extended family or others who had an interest in child, did not fulfill its first-step inquiry duty under the ICWA and state law, and 2 department's failure to discharge its first-step inquiry duty was prejudicial and reversible. Conditionally affirmed and remanded.

***20. In re Antonio R.,* Cal.Rptr.3d, 22 Cal. Daily Op. Ser. 2874, 2022 Daily Journal D.A.R. 2704, B314389, 2022 WL 794843 (Cal. Ct. App. March 16, 2022).**

Mother appealed from decision of the Superior Court, Los Angeles County, terminating her parental rights. The Court of Appeal, Feuer, J., held that: 1 state law required the Department of Children and Family Services to inquire of child's extended family members regarding his possible Indian ancestry; 2 Department erred when it failed to inquire of child's extended family members regarding his possible Indian ancestry; 3 juvenile court erred in failing to ensure that Department satisfied its duty of inquiry under state law as to child's Indian ancestry and in finding that Indian Child Welfare Act (ICWA) did not apply absent an adequate inquiry; and 4 Department's error in failing to

inquire, as required by state law, of child's maternal extended family members as to whether child was Indian child for purposes of ICWA was prejudicial. Conditionally affirmed and remanded with directions.

***21. In re J.C.,* Cal.Rptr.3d., 77 Cal.App.5th 70, 2022 WL 1011784 (Cal. Ct. App. April 4, 2022).**

Background: Mother's and father's parental rights were terminated by the Superior Court, Los Angeles County, No. 18CCJP05161A, Stacy Wiese, J., and they appealed. Holdings: The Court of Appeal, Segal, J., held that: 1 county department of children and family services did not comply with its mandatory obligations to conduct initial and continuing inquiry into whether child was or might be Indian child, in accordance with Indian Child Welfare Act (ICWA) and California law; 2 juvenile court failed to comply with its mandatory obligations to ensure that department conducted adequate investigation into whether was or might be Indian child and show efforts undertaken to make such determination, before concluding that ICWA did not apply; 3 fact that neither mother nor father was adopted was insufficient to show that their forms stating that they either had no Indian ancestry, or had no reason to believe they had Indian ancestry, relieved department and juvenile court of mandatory obligations under ICWA and California law; and 4 department's and juvenile court's noncompliance with their mandatory obligations was not harmless. Conditionally affirmed; remanded.

***22. Jerome S. v. Department of Health & Social Services, Office of Children's Services,* Supreme Court No. S-18084, 2022 WL 1022032 (Alaska April 6, 2022).**

The Office of Children's Services (OCS) took custody of a boy when he was almost two years old. His mother struggled with substance abuse, and his father was incarcerated for significant periods of time. OCS primarily directed its efforts toward the mother and did not meaningfully involve the father in case planning or maintain contact with him. After the mother died, OCS petitioned to terminate the father's parental rights. The superior court granted OCS's petition and the father appeals, arguing that OCS failed to make active efforts to reunify him with his child and that termination was not in the child's best interests. We agree that OCS failed to make active efforts to reunify the family, given the very meager efforts directed at the father throughout the duration of the case, and we therefore vacate the superior court's order terminating the father's parental rights. Jordan is an "Indian child" as defined by the Indian Child Welfare Act (ICWA). "As opposed to passive efforts such as simply developing a plan for the parent to follow, active efforts require that the [S]tate actually help the parent develop the skills required to keep custody of the children." Jerome argues that OCS did not make active efforts because it "failed to maintain sufficient contact with [him], communicate the expectations of his case plans, or offer him adequate contact with Jordan." We REVERSE the superior court's active efforts conclusion, VACATE the order terminating Jerome's parental rights to Jordan, and REMAND this case for further proceedings consistent with this decision.

***23. In re I.F.,* Cal.Rptr.3d, 77 Cal.App.5th 152, H049207, 2022 WL 1038380 (Cal. Ct. App. April 6, 2022).**

County department of family and children's services filed dependency petitions on behalf of children. The Superior Court, Santa Clara County, Nos. 19-JD-026208, 20-JD-026455,

Frederick S. Chung, J., sustained petitions. Mother appealed. The Court of Appeal, Grover, J., held that: 1 social worker's initial inquiry established reason to believe that children were Indian children under Indian Child Welfare Act (ICWA) thus triggering duty of further inquiry;2 duty of further inquiry under ICWA is not satisfied by a continuing initial inquiry; and 3 further inquiry would not have been futile. Affirmed in part, vacated in part, and remanded.

***24. In re J.M.W.,* 514 P.3d 186, No. 99481-1 (U.S. July 21, 2022).**

Father filed discretionary interlocutory appeal from decision of the Superior Court, Snohomish County, Millie M. Judge, J., placing child who was member of Oglala Sioux Tribe with a family member in emergency shelter care hearing in dependency action. The Supreme Court, González, C.J., held that: Washington Indian Child Welfare Act (WICWA) required the State to take active efforts to prevent the breakup of child's family before taking him into emergency foster care; active efforts to prevent breakup of "Indian" child's family are required in involuntary foster care placements under WICWA; Department of Children, Youth, and Families had an obligation to at least begin active efforts to avoid breaking up child's family, and trial court had obligation to consider whether active efforts had been taken at shelter care hearings; since Department did not establish that it had made active efforts to prevent breakup of family, child should have been returned to his parents, and trial court erred in the shelter care hearing, in context of dependency action, by not requiring Department to show active efforts had been made; overruling In re Dependency of Z.J.G., 10 Wash. App. 2d 446, 448 P.3d 175; and trial court was required to make finding on the record at interim shelter care hearing that out-of-home placement of child was necessary to prevent imminent physical damage or harm to child. Remanded. Stephens, J., dissented and filed opinion in which Johnson, Associate C.J., Madsen, J., and Owens, J., joined.

***25. Matter of Dependency of A.W.,* P.3d., 2022 WL 3151841, No. 82799 (Wash. Ct. App. August 8, 2022).**

Department of Child, Youth, and Families filed dependency petition shortly after child was born and sought ex parte pick-up order allowing Department to take child into custody. The Superior Court, Snohomish County, Joseph P. Wilson, J., entered pick-up order without holding hearing, and subsequently denied mother's motion to vacate pick-up order, but dismissed dependency action after finding shelter care was no longer necessary. Mother sought discretionary review of order denying motion to vacate pick-up order, which was granted. The Court of Appeals, Andrus, C.J., held that: mother's due process rights were not violated when trial court issued ex parte pick-up order without conducting hearing, and trial court had reason to know, at shelter care hearing, that child was an Indian child under Indian Child Welfare Act (ICWA) and Washington State Indian Child Welfare Act (WICWA). Reversed.

***26. In the matter of the Dependency of A.H., G.H., D.H., I.H.,* 2022 WL 11485596 (Ct. App. Wash. October 20, 2022).**

At issue are dependency and disposition orders for the four named children, all of whom are Indian children for purposes of the Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963 (ICWA) and the Washington State Indian Child Welfare Act, chapter 13.38 RCW

(WICWA).1 Their mother appeals, challenging (1) the sufficiency of the evidence to support finding her children dependent, (2) the trial court's findings in support of continued foster care placement, and (3) a contact and reporting obligation imposed on appellate counsel by the trial court.
We affirm the dependency finding, reverse the finding of active efforts and the dispositional order's foster care placement, and direct the trial court to strike unauthorized provisions of the order of indigency. We remand for further proceedings consistent with this opinion. Child Protective Services (CPS) received an intake from the Vanessa Behan center that scratches and marks were observed on the back of then five-year-old Garrett, which he had not been able to explain. Shelby Yada, a CPS investigator, traveled to the home of Garrett's mother to ask about the injuries. Ms. Yada was told by Garrett's mother that the injuries resulted when a plastic bin in which her children had been playing broke. Ms. Yada became aware during her investigation that the mother was experiencing difficulty with transportation and ensuring the children's attendance at school and remedial programs. She offered the mother gas vouchers, bus passes, and day care referrals. It was determined that Abby and Garrett were overdue for well-child exams, which Ms. Yada requested be completed. The mother saw that they were. Washington courts treat the parallel provisions of ICWA and WICWA as coextensive unless they differ, in which case whichever "law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child ... shall apply." 25 U.S.C. § 1921; In re Welfare of A.L.C., 8 Wn. App. 2d 864, 872-73, 439 P.3d 694 (2019). While our commissioner agreed that the mother's challenges to the shelter care orders were technically moot, she held that the "active efforts" issue, at a minimum, presented an issue of substantial and continuing public interest that, if not addressed, would escape review. For the same reason, the Washington Supreme Court granted discretionary review of these issues in In re Dependency of J.M.W., which it decided on July 21, 2022. Although recognizing that WICWA's discussion of active efforts in the context of foster care placements "are not models of clarity," the court concluded that shelter care hearings are child custody hearings under RCW 13.38.040(3) and foster care placements under RCW 13.38.040(1)(a) and (3)(a), and, "read as a whole," WICWA requires active efforts in foster care placements. J.M.W., 199 Wn.2d at 847. The court nevertheless construed WICWA as allowing law enforcement and the Department to take children into protective custody under some emergency circumstances where prior active efforts are not possible or required. The record does not support the trial court's finding that the Department engaged in the required active efforts We affirm the trial court's finding of dependency, vacate the dispositional order's foster care placement, and remand for further proceedings consistent with this opinion.

C. Contracting

27. Brice v. Haynes Investments, LLC, F.4th, 2021 Daily Journal D.A.R. 9672, No. 19-15707, 2021 WL 4203337 (9th Cir. September 16, 2021).

Borrowers of payday loans brought putative class action lenders that were owned by the Chippewa Cree and Otoe-Missiouria Tribes, asserting claims for violations of Racketeer Influenced and Corrupt Organizations Act (RICO), unjust enrichment, and violation of

California's usury laws. The United States District Court for the Northern District of California, William H. Orrick, J., 372 F.Supp.3d 955, denied lenders' motions to compel arbitration. Lenders appealed. Holdings: The Court of Appeals, VanDyke, Circuit Judge, held that: 1 as a matter of first impression, where a delegation provision exists, courts first must focus on the enforceability of that specific provision, not the enforceability of the arbitration agreement as a whole, and 2 delegation provision in the arbitration agreement was not unenforceable as a prospective waiver under federal law. Reversed and remanded with instructions. Fletcher, Circuit Judge, filed dissenting opinion.

28. Easley v. WLCC II,* Civil Action 1:21-00049-KD-MU 2021 WL 4228876 *(*D. Alaska September 16, 2021*).

This matter is before the Court on Plaintiff's petition or motion to confirm arbitration award embedded in her Complaint (Doc. 1-2); and Defendant's motion to dismiss for improper venue and to compel arbitration. This action stems from an individual payday loan case that was fully and finally arbitrated and which resulted in an October 8, 2020 award in favor of Plaintiff Lillian Easley (Easley) and against Defendant WLCC II, d/b/a Arrowhead Advance (WLCC). Specifically, from August 9, 2018 to November 26, 2019, Easley obtained 10 individual small loans online (in varying amounts ($200 to $950) and interest rates (596% to 650%) from WLCC. Easley executed contracts for each loan. Each of the loan contracts that Easley signed contained an arbitration agreement designating the American Arbitration Association (AAA) as the arbitral forum, as well as the following terms and conditions: Agreement to Arbitrate. You agree that any Dispute (defined below) will be resolved by arbitration as described below and in accordance with any applicable Oglala Sioux tribal law. A Dispute includes any claim arising from, related to or based upon marketing or solicitations to obtain the loan and the handling or servicing of your account whether such Dispute is based on a tribal, federal or state constitution, statute, ordinance, regulation, or common law, and including any issue concerning the validity, enforceability, or scope of this loan or the Agreement to Arbitrate. On March 25, 2020, Easley initiated an arbitration proceeding against WLCC before the AAA. On October 8, 2000, the arbitrator rendered the full and final arbitration award declaring each of the WLCC loan contracts that Easley executed with WLCC void ab initio. Specifically, the arbitration award ruled that WLCC had waived any sovereign immunity, the transactions involved off-reservation commercial activities to which sovereign immunity does not apply, and because each of the loans was extended without a license under the ALSA, the loan contracts were void in their entirety and ab initio. WLCC did not seek to vacate or appeal the award. Thereafter, on December 16, 2020, Easley, on behalf of herself and all others similarly situated, filed a Complaint in the Circuit Court for Mobile County, Alabama against Defendant WLCC II, d/b/a Arrowhead Advance (WLCC)3 asserting two (2) counts: 1) Count I -- relief on behalf of a putative class of Alabama consumers alleging that WLCC has violated the Alabama Small Loans Act (ALSA), Ala. Code § 5-18-1, et seq. by extending loans without a license; and 2) Count II -- requesting confirmation of the arbitration award that Easley obtained against WLCC and issuance of an order confirming the award and directing the Clerk to promptly enter same as final judgment. WLCC removed the case asserting this Court has original jurisdiction per 28 U.S.C. § 1332(d) (Class Action Fairness Act (CAFA)) as this is a purported class action with at least 100 putative class members, there is diversity of

citizenship,6 and the aggregate amount in controversy exceeds $5,000,000. In Count II Easley requests issuance of an order confirming the October 8, 2020 arbitration award and directing the Clerk to promptly enter same as final judgment, as the Complaint was filed in state court - Mobile County Circuit Court). WLCC does not object to confirmation of the award. Section 9 of the Federal Arbitration Act ("FAA") (9 U.S.C. § 1, et seq.), governs confirmation of an arbitrator's award and provides: If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. 9 U.S.C. § 9 (emphasis added). Under the FAA, a federal court's authority to vacate or to modify an arbitration award is limited. Gherardi v. Citigroup Global Mkts., Inc., 975 F.3d 1232, 1236 (11th Cir. 2020). Federal courts may vacate an award only in the four "very unusual circumstances" set forth in 9 U.S.C. § 10(a). Id. The four (4) Section 10 "very unusual circumstances" are as follows: 1) the award was procured by corruption, fraud, or undue means; 2) there was evident partiality or corruption in the arbitrators, or either of them; 3) the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or 4) the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. 9 U.S.C. § 10(a)(1-4). When parties agree to arbitrate their disputes, they "opt out of the court system" and thus, have limited avenues for relief in federal court. Gherardi, 975 F.3d at 1238. .... "in § 10(a)(4) cases, our review is quasi-jurisdictional: a check to make sure that the arbitration agreement granted the arbitrator authority to reach the issues it resolved." Id.; ..... "Only if the arbitrator acts outside the scope of his contractually delegated authority -- issuing an award that simply reflects his own notions of economic justice rather than drawing its essence from the contract -- may a court overturn his determination." Sutter, 569 U.S. at 569. In this case, both parties seek confirmation of the arbitration award, there are no unusual circumstances prohibiting same, and no party seeks to vacate, modify, or correct the award. There is also no challenge to the arbitration award, much less a Section 10(a)(4) challenge. This means that this Court cannot look behind the arbitrator's ruling and reopen the case on the merits, but rather, must in a more routine or summary fashion, confirm the award. The FAA "imposes a heavy presumption in favor of confirming arbitration awards." Gianelli, 146 F.3d 1309, 1312 As a result, a court's confirmation of an arbitration award is usually routine or summary. Cullen v. Paine, Webber, Jackson, & Curtis, Inc., 863 F.2d 851, 854 (11th Cir. 1989). Thus, it is ordered that Easley's petition or motion for confirmation of the arbitration award (as embedded in Easley's Complaint at Count II) is granted, and the October 8, 2020 arbitration award is confirmed. This action is dismissed and Easley's Count I is compelled to arbitration.

***29. Navajo v. U.S. Department of Interior*, No. 20-cv-1093 (DLF), 2021 WL 4243405 (D.D.C. September 16, 2021).**

Before the Court are the plaintiff's Motion for Summary Judgment and the government's Cross-Motion for Summary Judgment. For the reasons below, the Court will grant the plaintiff's motion and deny the government's motion. "Congress enacted the Indian Self-Determination and Education Assistance Act ("ISDEAA") to help Indian tribes assume responsibility for programs or services that a federal agency would otherwise provide to the tribes' members." Navajo Nation v. U.S. Dep't of Interior, 852 F.3d 1124, 1126 (D.C. Cir. 2017). Under that Act, Indian tribes may enter "self-determination contract[s] ... to plan, conduct, and administer programs" that the Secretary of the Interior operates for their benefit. 25 U.S.C. § 5321(a)(1). To form such a contract, a tribe must first propose terms to the Secretary. Id. § 5321(a)(2). From there, "the Secretary shall ... approve the proposal" within ninety days "unless" he "clearly demonstrates," or supports with "controlling legal authority," one of the five showings listed in § 5321(a)(2). On September 28, 2019, the Nation submitted a proposed SAFA for contract year 2020, which requested $737,745 to cover direct program expenses. Compl. Ex. A at 33, Dkt. 1-1. The SAFA also proposed modifying which forest management functions the contract covers. See id. at 22–26. Under its terms, the Nation would be permitted to "operate a woodlot to produce firewood for sale to the public" and would be exempt from several reporting requirements that were contained in the 2019 SAFA. Id. at 25. On December 19, 2019, the Secretary denied the Nation's proposed SAFA. See Compl. Ex. B, Dkt. 1-2. To support that denial, the Secretary found that the Nation requested funding "in excess of the ... funding level" available under the parties' contract. Id. at 3 (citing 25 C.F.R. § 900.22(d)). He also found that the SAFA's subject matter could not "be properly completed or maintained by the proposed contract," 25 U.S.C. § 5321(a)(2)(C). Id. at 2–3. On January 7, 2020, the Nation requested the review of that decision in an informal conference. See Compl. Ex. C at 3, Dkt. 1-3. Following that conference, the Secretary's representative directed that the Nation receive $717,736.77 for direct program expenses under its contract. Id. at 4. The representative also found that the 2020 SAFA was not "substantially different" from the 2019 SAFA, which required approving its terms irrespective of the declination criteria in 25 U.S.C. § 5321(a)(2). Id. at 7. Having explained those findings, the representative then directed the parties to "convene and make a good faith effort, on a government-to-government basis, to develop a CY2020 SAFA that complies with the statutory requirements at" 25 U.S.C. § 5329. Id. at 6. In the meantime, the representative ordered, the 2019 SAFA would remain in place. Id. Because the Nation did not appeal the representative's decision within thirty days, it became final on March 30, 2020. 25 C.F.R. § 900.157. On April 4, 2020, the Nation filed the instant Complaint, which alleged that the Secretary had "not complied with the Decision of the Secretary's Designated Representative." In the Nation's memorandum supporting its motion, the tribe acknowledges that the dispute over its funding level is now "moot," on account of the Secretary's June 10 award. Pl.'s Mot. at 1; see also Pl.'s Mem. in Supp. of Summ. J. at 8 ("there is no longer any issue as to the amount of funding to be provided pursuant to the 2020 SAFA"). As such, the only issue remaining in this case is whether the Secretary must approve the Nation's proposed language for the 2020 SAFA. Here, the Secretary denied the Tribe's 2020 SAFA on the grounds that its terms could not be "properly completed" under the contract, 25 U.S.C. § 5321(a)(2)(C), and that the Nation

requested funds over "the applicable funding level," id. § 5321(a)(2)(D). But a representative of the Secretary reached contrary conclusions on both issues, which became final for the agency in March 2020. See 25 C.F.R. § 900.157. And even now, the Secretary does not argue that its initial denial either "clearly demonstrated" its factual basis or adequately "supported" its legal conclusions, as § 5321(a)(2) and its regulations mandate. Instead, the Secretary disputes whether § 5321(a)(2) applies at all in these circumstances, and if it does, whether its remedies apply. Thereafter, § 5331(a) of ISDEAA authorizes the review of recommended decisions in federal court. See 25 U.S.C. § 5331(a) (allowing judicial review of any "claim against the ... Secretary arising under" ISDEAA); see also id. § 5321(b)(3) (emphasizing that a tribe "may, in lieu of filing [an administrative] appeal, exercise the option to [immediately] initiate an action in a Federal district court"). Nothing in this familiar scheme bars the Nation's complaint, which properly challenges the Recommended Decision pursuant to § 5331(a). Because § 5321(a)(1) requires that the Nation's 2020 Successor Annual Funding Agreement be approved, the Secretary shall approve it. For the above reasons, the plaintiff's Motion for Summary Judgment, is granted and the government's Cross-Motion for Summary Judgment, is denied.

30. Brice v. Plain Green, LLC, 13 F.4th 823,No. 19-15707 (9th Cir. September 16, 2021).

Plaintiffs obtained short-term, high-interest loans from either Plain Green, LLC, or Great Plains Lending, LLC, which were owned by the Chippewa Cree Tribe of the Rocky Boy's Indian Reservation and the Otoe-Missouri Tribe of Indians. These "Tribal Lenders'" standard loan contracts contained an agreement to arbitrate any dispute arising under the contract. The contracts also included a delegation provision requiring an arbitrator—not a court—to decide "any issue concerning the validity, enforceability, or scope of [the loan] agreement or [arbitration agreement]." The contracts stated that they were governed by tribal law and that an arbitrator must apply tribal law. Plaintiffs filed class-action complaints against the Tribal Lenders and other defendants that they alleged were the owners and investors of Think Finance, LLC, which operated a payday loan enterprise via the Tribal Lenders. The district court denied defendants' motion to compel arbitration on the ground that the arbitration agreement as a whole in each contract was unenforceable because it prospectively waived plaintiffs' right to pursue federal statutory claims by requiring arbitrators to apply tribal law. The district court concluded that each delegation provision was unenforceable for the same reason. The panel concluded that, rather than asking first whether the arbitration agreement was enforceable as a whole, it must consider first the enforceability of the delegation provision specifically. The panel concluded that the parties' delegation provision was enforceable because it did not preclude plaintiffs from arguing to an arbitrator that the arbitration agreement was unenforceable under the prospective-waiver doctrine and, therefore, this general enforceability issue must be decided by an arbitrator. The panel reversed the district court's order denying defendants' motion to compel arbitration in a RICO action and remanded with instructions to stay the case and compel the parties to proceed with arbitration.

31. Flandreau Santee Sioux Tribe v. United States, 2021 WL 4482602, 4:20-CV-4142 (D. South Dakota September 30, 2021).

Plaintiff Flandreau Santee Sioux has filed a lawsuit against Defendants United States of America; Alex M. Azar II, in his official capacity as Secretary of the United States Department of Health and Human Service; and David Bernhart in his official capacity as Secretary of the United States Department of Interior (collectively, "Defendants"). In its Complaint, the Tribe alleges that Defendants failed to pay the full amount of contract support costs due to it in violation of their obligations under the Tribe's Indian Self Determination Education and Assistance Act ("ISDEAA") contracts for fiscal years 2011 through 2013 and in violation of the ISDEAA. Pending before the Court is Defendants' Motion to Dismiss Counts II, III, and VI of the Tribe's Complaint for lack of subject matter jurisdiction. For the following reasons, Defendants' Motion to Dismiss Counts II and III is granted and is granted in part and denied in part as to Count VI. The Tribe alleged the following claims: 1) Count I – breach of contract (underpayment of direct and indirect support costs) for $1,705 and $1,169,394 in damages; 2) Count II – breach of contract (failure to pay indirect contract support costs associated with third-party revenues-funded portion of the program for $835,998 in damages; 3) Count III – breach of contract (lost third-party revenues) for $349,657 in damages3; 4) Count IV – breach of contract (lost indirect csc funding on unpaid direct csc funding for $737 in damages; 5) Count V – breach of contract (wrongful carryforward adjustment) for $26,578 in damages; 6) Count VI – breach of statutory right for $2,383,332 in damages. Although the Tribe presented the factual and legal basis for its third-party revenues-based claims to the contracting officer as Claim 7 in its fiscal year 2012 and 2013 Dispute Calculation and Information forms,13 the Tribe did not submit a sum certain for these claims to the contracting officer and thus they failed to constitute a valid claim under the CDA. The Court concludes that the Tribe failed to submit to the contracting officer for a final decision its claims for lost third party revenues and for unpaid contract support costs on the third-party revenue-funded portion of the Tribe's operations. Accordingly, the Court concludes that it lacks jurisdiction over these claims whether they be based on a breach of contract or a breach of a statutory duty to pay contract support costs. Dismissed in part and denied in part as to Claim VI.

32. United States v. Jefferson, Case No. C19-0211-JCC 2021 WL 4709898 (W.D.Wash. October 8, 2021).

This matter comes before the Court on Plaintiff's motion for summary judgment. Having thoroughly considered the briefing and the relevant record, and finding oral argument unnecessary, the Court hereby grants the motion for the reasons explained herein. Plaintiff brought this action to obtain an in rem money judgment and foreclose a deed of trust on real property1 owned by Defendant. According to the complaint, the United States Department of Housing and Urban Development ("HUD") guaranteed repayment of Defendant's note to the original lender, M & T Bank, based on an Indian Loan Guarantee Certificate. Defendant first defaulted on the note in 2008, shortly after M & T made the loan. Following a 2009 loan modification agreement between Defendant and M & T, Defendant again defaulted. After the Lummi Tribe declined to exercise its right of first refusal to acquire the delinquent debt, M & T submitted a claim to HUD for insurance benefits. HUD paid M & T the principal and accrued interest outstanding at the

time, $226,863.09, and M & T assigned the promissory note and deed of trust to HUD. The Department of Justice undertook collection efforts on HUD's behalf without success. (Id.) Defendant declared bankruptcy in 2015, which automatically stayed collection actions. The bankruptcy action resolved in December 2015. It resulted in a discharge of Defendant's in personal liability but had no impact on HUD's in rem rights to the note and deed of trust. (Id.) The Court awards to Plaintiff the following in rem relief against the property: A money judgment in the amount of $226,863.09, plus interest after the date of judgment at the statutory rate prescribed by 28 U.S.C. § 1961 until paid in full; 2. Payment of the United States' reasonable attorney's fees and costs in this action and expenses of any nature whether incurred in or out of court, including but not limited to costs for any foreclosure report or sale and all other expenses incurred by the United States from time to time which are necessary and proper in connection with the administration, supervision, preservation, protection of, or realization upon, the property described in the deed of trust. After the automatic stay of proceedings to enforce a judgment, the United States may present a motion for order of sale.

***33. Gibbs v. Elevate Credit, Inc.*, Civil Action No. 3:20cv632, 2021 WL 4851066 (E.D.Va. October 17, 2021).**

This matter comes before the Court on two motions: (1) Defendant Elevate Credit, Inc.'s ("Elevate") Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(2) (the "Rule 12(b)(2) Motion"), and, (2) Elevate's Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6) (the "Rule 12(b)(6) Motion. For the reasons that follow, the Court will deny the Rule 12(b)(2) Motion. This controversy arises from Elevate's alleged involvement in an unlawful lending operation. At the heart of this case sits nonparty Think Finance, LLC, from which Defendant Elevate separated on May 1, 2014. According to Plaintiffs, Elevate conspired with Think Finance to collect unlawful debts in violation of RICO. The lending operation developed and perpetuated by Think Finance, which Plaintiffs describe as a "rent-a-tribe" scheme, offered loans to Plaintiffs with unlawful interest rates ranging from 118% to 448%. Under this improper tribal lending business model, actors establish entities to originate internet-based high interest loans to evade state and federal usury and lending laws. To effectuate the scheme, a non-tribal entity and a Native American tribe agree to establish a lending company in the tribe's name. According to Plaintiffs, the Native American tribe nominally establishes the lending company to extend its tribal sovereign immunity to the newly formed business entity. The tribal lending company, however, receives capital from a different, non-tribal person or company who seeks to use the tribal lending companies to cloak the unlawful high-interest internet loans with sovereign immunity. The non-tribal entity retains almost all the profits and controls the tribal lending entity, from major business decisions to day-to-day operations. According to Plaintiffs, the interest rates charged on Think Finance's "standard loan agreements" ranged between 118% and 448%, exceeding the statutory maximum allowable in Virginia (12% per annum),11 Florida (18% per annum),12 and California (10% per annum). The named plaintiffs here took out loans whose interest rates ranged from 139% to 448%. Neither Think Finance nor any other participant in the tribal lending scheme obtained or attempted to obtain a consumer finance license permitting them to charge interest rates above the statutory maximum in Virginia and Florida. Because the Fourth Circuit in ESAB held that § 1965(d) controls when a court

may exercise personal jurisdiction under RICO, this Court's controlling Circuit has commented on the issue for which Elevate requests interlocutory appeal. 126 F.3d at 626–27; see also Thermcor, 173 F. Supp. 3d at 323. No substantial ground for difference of opinion therefore exists, meaning this issue does not merit certification of an interlocutory appeal. Id.; 28 U.S.C. § 1292(b). Because this Court has jurisdiction over Elevate, the Court turns next to the Rule 12(b)(6) Motion. In that motion, Elevate seeks dismissal of Counts I and II. In Count II, the collection of an unlawful debt claim under RICO, Elevate argues that Plaintiffs fail to plausibly allege that Elevate participated in the Think Finance tribal lending enterprise, and that Elevate's conduct caused Plaintiffs RICO injuries. In Count I, the RICO conspiracy claim, Elevate contends that this claim must fail because of Plaintiffs' failure to state a claim under § 1962(a), (b), or (c). (Id. 25–28.) Even if Plaintiffs did state a claim under § 1962(c), Elevate maintains the implausibility of the RICO conspiracy claim in Count I because Plaintiffs allege no facts showing Elevate agreed to participate in the collection of unlawful debts. (Id. 25–28.) For the reasons that follow, the Court will deny Elevate's Rule 12(b)(6) Motion, finding that Plaintiffs state a claim in both counts. Because the Amended Complaint states a claim that Elevate knowingly agreed to aid, abet, or facilitate the Think Finance tribal lending enterprise, a RICO conspiracy claim under § 1962(d) stands before this Court. For the foregoing reasons, the Court will deny the Rule 12(b)(2) Motion as well as the Rule 12(b)(6) Motion.

***34. Caremark LLC v. Choctaw Nation, No.* CV-21-01554-PHX-SMB, 2022 WL 768098 (D. Ariz. March 14, 2022).**

Pending before the Court is Petitioners' Petition for Order to Compel Arbitration (the "Petition"). The Court has considered the briefing and relevant law and will grant Caremark's Petition. On April 26, 2021, the Choctaw Nation filed a complaint in the Eastern District of Oklahoma (the "Oklahoma Action") against eleven defendants, including all the named petitioners in this action. The Choctaw Nation's complaint in that case seeks redress under the Recovery Act, 25 U.S.C. § 1621e, which provides tribes with the statutory right to recoup costs of covered medical services provided to tribal members from applicable insurance coverage. The complaint alleges that "[D]efendants violated its rights under the Recovery Act by improperly denying claims for reimbursement and by wrongfully applying insurance discounts that force tribal pharmacies to operate at a loss." Caremark filed their Petition with this Court on September 10, 2021. In the Petition, Caremark moved the Court to compel the Choctaw Nation and related parties to submit their dispute to an arbitrator under the Federal Arbitration Act, 9 U.S.C. § 1, et seq. (the "FAA"), and pursuant to alleged governing agreements. The Petition alleges that Choctaw Nation pharmacies participate in multiple pharmacy networks operated by Caremark and entered into contracts with Caremark referred to as a "Provider Agreements." In the Provider Agreements, the Choctaw Nation and related entities agreed that all disputes "in connection with, arising out of or relating in any way to" the Provider Agreements "[would] be exclusively settled by arbitration before an arbitrator in accordance with the rules of the American Arbitration Association." Here, the Choctaw Nation pharmacies clearly and unequivocally waived sovereign immunity when they signed contracts with an express arbitration provision. As explained above, the Nation's pharmacies clearly agreed to the Provider Agreements by

signing the agreements as early as 2004. Supra § III(a). The Provider Agreements incorporated by reference the Provider Manual, which contained an arbitration clause. For the reasons discussed above, the Court will grant Caremark's Motion and compel arbitration between the parties under § 4 of the FAA.

***35. Navajo Nation v. US Department of Interior,* Civil Action No. 17-cv-0513-TSC2022 WL 834143 (D.C. March 21, 2022).**

In six consolidated cases (Navajo Nation II – VII),1 Plaintiff Navajo Nation ("the Nation") alleges that the Bureau of Indian Affairs ("BIA"), an agency within the United States Department of the Interior ("DOI"), violated the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 et seq. (the "ISDEAA"), by partially declining the Nation's annual funding requests for operations of its Judicial Branch for the years 2015–2020. The Nation also alleges that the BIA unlawfully removed provisions from the Nation's 2019 and 2020 proposed Annual Funding Agreements ("AFAs"). The parties have each moved for summary judgment. Upon consideration of the parties' pleadings, and for the reasons set forth below, the court will GRANT IN PART and DENY IN PART the parties' motions. Specifically, the Nation's claims focus on two AFAs incorporated into the 2012 contract, the 2015 and 2016 AFAs, and four AFAs incorporated into the 2017 contract, the 2017, 2018, 2019, and 2020 AFAs. Each AFA must provide funds to a tribe at the same level that the agency "would have otherwise provided for the operation of the programs" if the agency had continued to provide the service itself. Id. § 5325(a)(1). This is commonly referred to as the "Secretarial amount," which equates to a funding floor. See Navajo Nation v. U.S. Dep't of Interior, 852 F.3d 1124, 1130 (D.C. Cir. 2017). An agency may decline an annual proposal when the amount proposed exceeds the Secretarial amount. See 25 U.S.C. § 5321(a)(2)(D). These cases follow from Navajo Nation v. Dep't of Interior, et al., No. 1:14-cv-01909-TSC (D.D.C. Nov. 12, 2014) ("Navajo Nation I"), which involved a dispute over the amount of contract funding for the Nation's judicial system for 2014. The D.C. Circuit held that equitable estoppel did not bar the Nation's claims, that the BIA received the Nation's proposal on the date it was hand-delivered, and that the BIA's partial declination was thus untimely. Navajo Nation, 852 F.3d at 1130. While the Navajo Nation I litigation was playing out, the parties continued to negotiate AFAs pursuant to their 2012 self-determination contract and its successor 2017 contract. Prior to each successive year—2015 through 2020—the Nation sent a proposed AFA to the BIA that sought at least the same amount sought in the 2014 proposal, $17,055,517. The BIA issued a timely declination letter pursuant to 25 C.F.R. § 900.22, explaining that the amount sought by the Nation far exceeded the applicable funding level for the respective contract and, thus, the Secretarial amount. The Nation argues that because the 2014 AFA was deemed approved, the amount of funding the Nation ultimately obtained for 2014—$17,055,517 ($1,292,532 approved by the BIA plus $15,762,985 obtained by court order in the form of damages)—set the new Secretarial amount, i.e., the funding floor, for all subsequent years. The Nation argues that the BIA's refusal to provide annual funding at that level from 2015 to 2020 was unlawful, and it seeks damages amounting to the additional funding that it should have received in each of those years. Unlike in Navajo Nation I, there is no dispute that the BIA timely issued its partial declination decisions on each of the proposed AFAs at issue. Instead, the dispute centers on whether those partial

declinations were legally authorized where they approved AFAs less than the amount awarded for 2014. The court finds that the Secretarial amount in 2014 did not go below that funding floor and did not run afoul of 25 U.S.C. § 5325(a)(1). The Nation's second argument, however, which focuses on DOI regulations, fares better than its first. The Nation argues that the 2015 through 2020 AFAs were substantially the same as the 2014 AFA, and thus, DOI regulation 25 C.F.R. § 900.32 required BIA to grant those subsequent proposals. That regulation states: Can the Secretary decline an Indian tribe or tribal organization's proposed successor annual funding agreement? No. If it is substantially the same as the prior annual funding agreement (except for funding increases included in appropriations acts or funding reductions as provided in section 106(b) of the Act) and the contract is with DHHS or the BIA, the Secretary shall approve and add to the contract the full amount of funds to which the contractor is entitled, and may not decline, any portion of a successor annual funding agreement. The D.C. Circuit has explained that "a regulation must be interpreted so as to harmonize with and further and not to conflict with the objective of the statute it implements. Courts must construe regulations in light of the statutes they implement, keeping in mind that where there is an interpretation of an ambiguous regulation which is reasonable and consistent with the statute, that interpretation is to be preferred." Sec'y of Lab., Mine Safety & Health Admin. v. W. Fuels-Utah, Inc., 900 F.2d 318, 320 (D.C. Cir. 1990) (internal marks omitted). Here, "the statutory scheme restricts the Secretary's ability to reduce funding from one year to the next. The Secretary may not decline 'any portion of a successor annual funding agreement,' if 'it is substantially the same as the prior annual funding agreement.' " Seneca Nation of Indians v. U.S. Dep't of Health & Hum. Servs., 144 F. Supp. 3d 115, 117 (D.D.C. 2015). Section 900.32's import, however, extends only to "successor funding agreements" entered into under the same "contract." See 25 C.F.R. § 900.32; see also 25 U.S.C. § 5329(c) (annual funding agreements are incorporated by reference into the effective self-determination contract). As previously noted, the six consolidated cases straddle two successive self-determination contracts. The first was effective from 2012 through 2016, and the second from 2017 through 2021. Navajo Nation II and III concern partial declinations of the Nation's 2015 and 2016 proposed AFAs, each of which succeeded the 2014 AFA as part of the 2012 contract. Navajo Nation IV, V, VI, and VII, on the other hand, concern partial declinations incorporated into the 2017 renewed contract, and thus the court finds that the 2017 through 2020 AFAs are not "successor funding agreements" to the 2014 AFA. Because the ISDEAA specifically provides for both injunctive and mandamus relief to remedy violations of the Act, a tribe need not demonstrate the traditional equitable grounds for obtaining that relief. See Navajo Health Found.-Sage Mem'l Hosp., 220 F. Supp. 3d at 1222-23.The court will GRANT the Nation's motion and DENY Defendants' cross-motion as to the Nation's claims in Navajo Nation II and III that Defendants unlawfully declined funding in the 2015 and 2016 AFAs and will award declaratory judgment that the BIA could not decline the Nation's proposed 2015 and 2016 AFAs to the extent they sought the amount deemed approved for 2014 for substantially the same purpose. The court will award damages for breach of contract in the amount of $15,759,069 plus interest in Navajo Nation II, and $15,619,176 plus interest in Navajo Nation III. However, the court will deny the Nation's motion and grant Defendants' cross-motion as to the Nation's claims in

Navajo Nation IV, V, VI, and VII that Defendants' unlawfully declined funding in the 2017, 2018, 2019, and 2020 AFAs.

***36. Navajo Health Foundation v. Razaghi Development Company*, Case No. 2:19-cv-00329-GMN-EJY 2022 WL 960109 (D. Nev. March 30, 2022).**

Pending before the Court is the Motion to Dismiss Plaintiff's Second Amended Complaint, filed by Defendants Tausif Hasan ("Hasan"), Ahmad R. Razaghi ("Razaghi"), and Razaghi Development Company, LLC ("RDC") (collectively, "Defendants"). For the reasons discussed below, the Court grants in part and denies in part the Motion to Dismiss. This case arises from Defendants' alleged scheme to defraud Sage of over $10.8 million through Defendants' deceptive acquisition and invocation of a lucrative termination payment provision in the hospital management agreement between RDC and Sage (the "Management Services Contract"), followed by Defendants' billing for services not rendered. Sage is a federally funded non-profit hospital serving an indigent Navajo Nation community in rural Ganado, Arizona. Principally, Sage alleges that Defendants fraudulently induced Sage's Board of Directors ("BOD") to unwittingly authorize a contractual amendment to the parties' Management Services Contract containing an extremely generous termination payment, which Defendants invoked to siphon $10.8 million from Sage's operating budget. Sometime in 2007, "Razaghi and his brother partnered with a friend, Manuel Morgan ('Morgan'), a member of the Navajo Tribe and former Navajo Nation County Commissioner, to form Morgan & Associates, LLC, a company in which Morgan [held] majority ownership so that the entity could qualify as a Navajo business." Sage alleges that Razaghi, leveraging Morgan's status as a member of the Navajo Nation, persuaded Sage to award Morgan & Associates a management services contract. Under the terms of this contract, Razaghi would serve as Sage's "Contract CEO." Sage claims Razaghi subsequently created business entities, including RDC, to supply Sage with medical personnel at a profit. In 2013, Sage's BOD approved a "First Amendment" of the March 18, 2011 Management Services Contract. "Notably, ... the [First Amendment to the] contract provided that [RDC] could hire, at Sage Memorial's expense, special counsel to represent ... Sage Memorial ... with respect to specific legal matters. In 2014, a group of whistleblowers filed a complaint in the United States District Court for the District of Arizona, alleging Razaghi and others violated the False Claims Act ("FCA"), 31 U.S.C. § 3729. In January 2017, after the United States declined to intervene, the whistleblowers voluntarily dismissed the action. In addition to a disputed Termination Payment Provision, a Second Amendment proposed an increase of Razaghi's base hourly compensation from $175 per hour to $495 per hour and stated that the contract would retroactively become effective from July 6, 2016. (Id. ¶ 42). Sage claims Hoffman recommended the BOD approve the Second Amendment without discussing the Termination Payment Provision or the increase in Razaghi's base hourly rate. The BOD approved the Second Amendment. Razaghi, and Wauneka in his capacity as BOD Chairman, then signed the contract. "To state a civil RICO claim, plaintiffs must allege (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (5) causing injury to plaintiffs' 'business or property.' " Ove v. Gwinn, 264 F.3d 817, 825 (9th Cir. 2001) (citing 18 U.S.C. § 1964(c)). The Ninth Circuit has recognized that the heightened pleading standards applicable to fraud claims under Rule 9(b) apply to a RICO action alleging predicate acts of fraud. Lancaster Cmty. Hosp. v. Antelope Valley

Hosp. Dist., 940 F.2d 397, 405 (9th Cir. 1991). Those standards are met here. The parties dispute when Plaintiff knew or should have known of the breach of covenant claim. Plaintiff alleges that it first discovered Defendants' breach on October 31, 2018 but does not provide any supporting evidence. The Court agrees that there are insufficient facts, at this stage, to determine whether the breach of covenant claim is time barred. Accordingly, the Court finds that Plaintiff plausibly pleads a breach of covenant claim. Here, the Court finds that Plaintiff may be able to cure the deficiencies in its claims. Accordingly, the Court will grant Plaintiff leave to file an amended complaint. It is hereby ordered that the Second Motion to Dismiss isgranted in part and denied in part.

***37. Saginaw Chippewa Indian Tribe of Michigan v. Blue Cross Blue Shield of Michigan,* F.4th, No. 21-1226, 2022 WL 1209026 (6th Cir. April 25, 2022).**

Saginaw Chippewa Indian Tribe of Michigan brought action against administrator of self-funded health insurance policy for tribe members and self-funded plan for tribal employees, alleging that administrator breached its fiduciary duty pursuant to Employee Retirement Income Security Act (ERISA) by paying excess claim amounts to Medicare-participating hospitals for services authorized by tribe, that administrator violated Michigan Health Care False Claims Act (HCFCA) by not seeking Medicare-like rates for eligible claims under the member plan, and that administrator breached its common law fiduciary duty under member plan by not seeking Medicare-like rates for eligible claims. The United States District Court for the Eastern District of Michigan, Thomas L. Ludington, J., 200 F.Supp.3d 697, granted administrator's motion to dismiss, and the Court of Appeals, 748 Fed.Appx. 12, reversed in part and remanded. After discovery, administrator moved for summary judgment. The District Court, Ludington, J., 477 F.Supp.3d 598, granted motion and, 2021 WL 323761, denied tribe's motion to alter or amend judgment. Tribe appealed. The Court of Appeals, Stranch, Circuit Judge, held that "carrying out," understood within context of regulation requiring Medicare-participating hospitals to accept Medicare-like rates as payment in full for care authorized by tribe carrying out contract health services (CHS) program of Indian Health Service (IHS), meant that tribe authorized the care in furtherance of its CHS program, not that tribe's CHS program provided money for the services. Reversed and remanded. Rogers, Senior Circuit Judge, filed opinion concurring in part and in the judgment.

***38. Brown v. Haaland*, 2022 WL 1692934, Case No. 3:21-cv-00344-MMD-CLB (D. Nevada May 26, 2022).**

This action arises from alleged civil rights abuses relating to the performance of a self-determination contract formed under the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 5301, *et seq*. ("ISDEAA"). Plaintiffs, ten individuals who reside on the Winnemucca Indian Colony, brought this action for injunctive relief against Deb Haaland in her official capacity as Secretary of the U.S. Department of the Interior for violations of the ISDEAA, the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.* ("APA"), the Fifth Amendment of the United States Constitution, and the general fiduciary duty owed by the United States to individual Indians. At issue specifically is the self-determination contract the Bureau of Indian Affairs ("BIA") entered into with the Winnemucca Indian Colony that authorized the Colony to manage its own Judicial Services and Law Enforcement Programs. Plaintiffs complained about the administration

of the Programs to the BIA in July 2021 and filed this lawsuit seeking review of the BIA's failure to investigate in August 2021. When the Colony began demolishing Plaintiffs' homes in November 2021, Plaintiffs moved for emergency relief and the Colony ("Intervenor") requested permission to intervene in opposition. After holding a hearing, the Court permitted the Colony to intervene and ultimately denied Plaintiffs' requested emergency relief. Now before the Court are Intervenor's motion to dismiss and the government's motion to dismiss. As explained further below, the Court will deny Intervenor's Motion however, the Court will grant in part and deny in part the government's Motion. This case arises in the context of a longer dispute about the living conditions on and rightful governance of the Winnemucca Indian Colony. Indians have been living on the land now recognized as the Winnemucca Indian Colony for over a century. Since before the Colony's inception, the community living together on the land comprised both Paiute and Shoshone Indians. Although the community desired to organize in the 1930s under the Indian Reorganization Act, the BIA rejected their initial bid to implement a constitution and by-laws because the community was not homogenously one tribe, and because the group included Shoshone Indians while being located wholly within traditional Paiute territory. The community continued to self-govern without a constitution for over 50 years, until they adopted a formal constitution and by-laws in 1970, which the Assistant Secretary of the Interior approved in 1971. In 1986, the Superintendent of the Western Nevada Agency of the BIA noted that most residents were formally enrolled in the Ft. McDermott Paiute Shoshone Tribe. Although the Colony's Constitution did not prohibit dual enrollment, it did provide that anyone "who has received land or money as a result of having been enrolled as a member of some other tribe, band or community of Indians" was ineligible for membership in the Winnemucca Indian Colony. This posed a potential problem, as many residents were eligible to receive payments from a judgement fund as members in the Ft. McDermott tribe. Because it appeared that so many residents—and council members—were potentially ineligible for membership under the Winnemucca Indian Colony's Constitution, the BIA unilaterally denied recognition of the Colony's council government, suspecting that council members were not eligible for Winnemucca Indian Colony tribal membership. The Western Nevada Agency of the BIA took control of the Colony's assets and withdrew its recognition of the tribe's government in 1986. The council that was elected in 1985 continued to carry on operations despite the BIA's findings. When the 1985 Council's term expired in 1987, no formal election was held to replace the council. After two years of informal self-governance, the BIA installed Glenn Wasson as Chairman of the Colony in 1989. After Wasson's death, two factions emerged seeking to govern the Colony—the "Wasson Faction," led by the late Chairman's son, Thomas Wasson, and another group led by Vice Chairman William Bills. The BIA refused to recognize either faction as the rightful government of the Winnemucca Indian Colony. After the Colony held an election, the district court ordered BIA to recognize Judy Rojo, Misty Morning Dawn Rojo Alverez, Katherine Hasbrouck, Eric Magiera, and Thomas Magiera II. Judy Rojo was then substituted for Thomas Wasson as the Chair of the Colony. At the conclusion of tribal court proceedings, the district court acknowledged the rulings from the appointed tribal court, extended comity to those rulings, and dismissed the case. However, the Ninth Circuit then ordered the district court to vacate its prior orders, including those relating to recognition of an interim council and the tribal

election process. As a result, the legality of the decisions made at the direction of the district court appears to remain uncertain. Plaintiffs in this action are ten individuals whose families have resided on the Winnemucca Indian Colony for generations. Despite that Plaintiffs consider the Colony their home, on June 2019, the Rojo Council filed trespass actions against Plaintiffs in the BIA's Court of Indian Offenses ("CFR Court"), seeking to evict and remove them from Colony land. While the Rojo Council's eviction actions against Plaintiffs were pending in the CFR Court, the Rojo Council submitted the following documents to BIA: (1) a withdrawal of the Winnemucca Indian Colony from the jurisdiction of the CFR Court; (2) a request to reprogram the Colony's 2020 Tribal Priority Allocations, which included a line item reference to Tribal Court Services; (3) the Rojo Council's resolution terminating the CFR Court's jurisdiction over the Colony; and (4) an application to contract for Tribal Court Services under a P.L. 93-638 self-determination contract under the ISDEAA. Thereafter, the Rojo Council filed a motion to transfer the cases from the CFR Court to the Colony's own tribal court (the "Winnemucca Tribal Court"). The CFR Court initially denied this motion. The BIA then entered into a settlement agreement with the Rojo Council in which the BIA agreed to enter into a standard form self-determination contract with the Rojo Council that would permit the Winnemucca Indian Colony to fund the Winnemucca Tribal Court and withdraw tribal matters from the CFR Court and Inter-Tribal Court of Appeal's jurisdiction. In 2021, the BIA wrote a letter to "Interested Parties" explaining that it would continue to recognize the Rojo Council as the "interim" government for the purpose of ISDEAA contracting. On November 2, 2021, the Rojo Council began evicting residents on the Colony. That day, Plaintiff Elisa Dick's mobile home was demolished at the direction of the Rojo Council. She and her children are now homeless, and they have received no compensation for their destroyed home or personal possessions. Plaintiffs assert that Dick did not receive prior notice of the planned demolition. Before the demolitions started, Plaintiffs' counsel wrote four letters to BIA officials: first to Bryan Bowker (the BIA Superintendent for the Western Region), then to Glenn Shafer (an agent in the Western Region's Contracting Office), next to Secretary Deb Haaland, and finally to the Office of the Inspector General of the Department of the Interior. Plaintiffs filed their original complaint on August 6, 2021. Plaintiffs' First Amended Complaint sets forth eight claims for relief: (1) BIA violated its ongoing oversight duties under 25 U.S.C. § 5330 and its attendant regulations by failing to monitor, oversee and reassume control over the Judicial Services Program; (2) through this violation, BIA has violated the APA; (3) through this violation, BIA has violated Plaintiffs' Fifth Amendment due process rights; (4) through this violation, BIA has violated its fiduciary duty to Plaintiffs; (5) BIA violated its ongoing oversight duties under 25 U.S.C. § 5330 and its attendant regulations by failing to monitor, oversee and reassume control over the Law Enforcement Program; (6) through this violation, BIA has violated the APA; (7) through this violation, BIA has violated Plaintiffs' Fifth Amendment due process rights; and (8) through this violation, BIA has violated its fiduciary duty to Plaintiffs. Plaintiffs request that the Court: (a) enjoin the Secretary to reassume control over the Judicial Services and Law Enforcement Programs; (b) enjoin the Secretary from entering into any new self-determination contracts with the Rojo Council; (c) enjoin the Secretary to replace all homes and property that the Colony's government had demolished or taken since November 1, 2021; and (d) appoint a special master to oversee the Secretary's actions in

monitoring, overseeing, and reassuming control of the Programs and replacing the destroyed homes and property. The government argues that the Court lacks jurisdiction over Plaintiffs' claims or, alternatively, that Plaintiffs have failed to state a claim upon which relief could be granted. First, the government contends that Plaintiffs have failed to exhaust their administrative remedies as required by the APA. The government argues in the alternative that Plaintiffs are not entitled to relief because the Secretary's decision whether to rescind a valid 638 contract under 25 U.S.C. § 5330 is purely discretionary. As a result, the government argues, the FAC should be dismissed for failing to state a claim upon which relief can be granted. The facts of this case are somewhat extraordinary and, for that reason, pose unique questions when interpreting the ISDEAA. The construction of the ISDEAA focuses the relationship between the federal government and recognized tribes and how power should be balanced when administering services and programs. *See Southcentral Foundation v. Alaska Native Tribal Health Consortium*, 983 F.3d 411, 414 (9th Cir. 2020). The statute also acknowledges that promoting tribal autonomy in program administration is not a goal in and of itself, but rather exists to increase the benefits of services the tribe can provide to individual Indians and Indian communities. *See* 25 U.S.C. § 5301(a)(1). The statute presumes that the tribe operating its programs is acting in the interests of its community, and that services will be rendered in a fair manner for the benefit of all. It follows that reassumption is therefore a narrow power that the Secretary may exercise under only certain circumstances—specifically, when the benefits for individual Indians are jeopardized by the tribe's administration of a services program. Although § 5330 was enacted to limit the Secretary's ability to intervene in affairs committed to tribal governments, the situation before the Court questions under what circumstances the Secretary may be compelled to intervene. The Court is not persuaded that the statutory language in § 5329 alone creates a nondiscretionary duty to monitor a self-determination contract. However, the Court agrees with Plaintiffs that the statutory provisions, when read together, do not grant the Secretary unfettered discretion to do nothing in the face of a potentially emergent situation. Instead, the Court finds that the Secretary has a nondiscretionary duty to consider whether complaints that raise concerns about the safety and welfare of individual Indians warrant the reassumption of a self-determination contract. Although the Court agrees that monitoring visits are contemplated by § 5329, perhaps even presumed, it is not apparent from this section alone that the Secretary has a specific, mandatory duty she must take when monitoring a self-determination contract. The language in § 5329 mandates only that monitoring visits be restricted to "not more than two" visits but does not clearly state that the Secretary is required to make a monitoring visit. *See id.* The statute clearly contemplates that there is some obligation on the parts of both parties to ensure that the terms of the self-determination contract are complied with, but the statute's language allocates the greater share of that burden to the Contractor, not the Secretary. The Court is persuaded by Plaintiffs' argument that, when read together, 25 U.S.C. §§ 5329-5330 confer a mandatory duty on the BIA to (1) consider allegations that the health, safety, and welfare of any persons are being endangered by a tribe's performance under a self-determination contract and (2) determine whether reassumption is warranted. As explained above, § 5329 contemplates that the Secretary would continue some type of "monitoring activities" even after a self-determination contract is finalized. *Id.* at § 5329(c) (Model Contract Provision 1(b)(7)(C)). Moreover, § 5329 anticipates that

a BIA official will "determine[ ]" whether there is "reasonable cause to believe that grounds for reassumption" may exist. *Id.* at § 5329(c) (Model Contract Provision 1(b)(7)(C)(ii)). As explained above, the ISDEAA confers a responsibility on the Secretary to, at a minimum, consider Plaintiffs' interests and determine whether the situation in Plaintiffs' complaint warranted either further investigation or a reassumption of the contract. At this stage, the government has not shown that any agency official discharged that duty. Plaintiffs' have therefore plausibly pleaded that the Secretary failed to perform a nondiscretionary duty that she was obligated to perform. However, it is not clear from the face of the FAC what trust duty Plaintiffs are alleging the Secretary had, and how the inaction violated that duty. The Court will therefore dismiss Plaintiffs' breach of fiduciary duty claims, but will grant Plaintiffs leave to amend the FAC to clarify the basis for their breach of fiduciary duty claims. It is therefore ordered that Defendant-Intervenor Winnemucca Indian Colony's motion to dismiss is denied. It is further ordered that the government's motion to dismiss is granted in part and denied in part. Plaintiffs' APA claims may proceed. Plaintiffs' direct statutory claims are dismissed with prejudice, as amendment would be futile. Plaintiffs' Fifth Amendment and breach of fiduciary duty claims are dismissed without prejudice and with leave to amend.

***39. Fort Defiance Indian Hospital Board, Inc. v. Becerra*, 2022 WL 1690040 (U.S.D.C.N.M. May 26, 2022).**

Plaintiff Fort Defiance Indian Hospital Board, Inc. moves for Injunctive Relief. The Court concludes that: (i) Fort Defiance is not currently entitled to a permanent injunction under 25 U.S.C. § 5331; (ii) Fort Defiance is entitled to a PI requiring the United States to fund fully Fort Defiance in compliance with the parties' renewal contract; and (iii) Fort Defiance does not need to secure a bond. Under the ISDEAA, a federal district court may order permanent injunctive relief. As explained below, Fort Defiance likely will succeed in showing that IHS' partial declination violates the ISDEAA. IHS' partial declination likely violates 25 C.F.R. § 900.33 and 25 U.S.C. § 5325(b). Nevertheless, a permanent injunction under ISDEAA is not appropriate at this time, because a PI can address Fort Defiance's concerns while the factual and legal issues that Cook Inlet Tribal Council, Inc. v. Dotomain, 20 F.4th at 892, creates can be resolved. First, although IHS' partial declination violates 25 C.F.R. § 900.33 and 25 U.S.C. § 5325(b), the D.C. Circuit's decision in Cook Inlet Tribal Council, Inc. v. Dotomain, 20 F.4th at 892, raises two issues that the Court needs to explore more thoroughly. In Cook Inlet Tribal Council, Inc. v. Dotomain, the D.C. Circuit concludes that the ISDEAA "does not require the government to pay contract support costs for expenses Indian Health Service normally pays when it runs a health program" and that "[t]hose expense are eligible for reimbursement only under the secretarial amount." Cook Inlet Tribal Council, Inc. v. Dotomain, 20 F.4th at 894. 25 C.F.R. § 900.33 prohibits IHS from declining a renewal contract that does not propose a "material and substantial change to the scope or funding of a program, functions, services, or activities." 25 C.F.R. § 900.33. 25 U.S.C. § 5325(b) prohibits IHS from reducing "funds required by" 25 U.S.C. § 5325(a) except for in five enumerated circumstances; the parties do not argue that this case fits into any of the enumerated circumstances, and the Court does not, at this stage, see an exception that applies.

U.S.C. § 5325(b).The existing record does not demonstrate unequivocally that none of Fort Defiance's disputed contract support costs are to cover expenses that IHS "normally" would incur. 25 U.S.C. § 5325. While the Court does not agree with the United States' overbroad reading of Cook Inlet Tribal Council, Inc. v. Dotomain, 20 F.4th at 892 an implication of the D.C. Circuit's conclusion is to ask courts -- rather than IHS or Tribes -- to scrutinize more closely the itemized list of funds that IHS supplies under an ISDEAA contract. Consequently, Cook Inlet Tribal Council, Inc. v. Dotomain, 20 F.4th at 892, creates both factual and legal issues that must be resolved before the Court can order an injunction under the ISDEAA. Second, an ISDEAA injunction is unnecessary at this stage of the case. The Court concludes that a PI "can address the large majority of [the Tribe's] concerns." Navajo Health Found. -- Sage Mem'l Hosp. Inc. v. Burwell, 100 F. Supp. 3d at 1168. A PI can remedy Fort Defiance's pressing concerns about funding important healthcare costs but still will permit IHS to "add evidence to the record to support their decision" to decline partially Fort Defiance's FY 2022 contract renewal proposal. Navajo Health Found. -- Sage Mem'l Hosp. Inc. v. Burwell, 100 F. Supp. 3d at 1168. Although Fort Defiance is not entitled to a permanent injunction under the ISDEAA, it is entitled to a PI, because: (i) there is a substantial likelihood that IHS' partial declination violates the ISDEAA; (ii) denying a PI would irreparably harm Fort Defiance's ability to provide healthcare services to the Navajo Nation; (iii) and any harm that the United States would suffer by honoring the proposed FY 2022 self-determination contract and accompanying AFA is minimal. There is a substantial likelihood that Fort Defiance will succeed on the merits, because it is substantially likely that IHS' partial declination violates the ISDEAA. IHS is not permitted to "review the renewal of a term contract for declination issues where no material and substantial change to the scope or funding of a program, function, services, or activities has been proposed by the Indian tribe or tribal organization." 25 C.F.R. § 900.33. In addition, within ninety days of a Tribe's renewal proposal, the IHS must "approve the proposal and award the contract unless the Secretary" notifies the Tribe of a "specific finding that clearly demonstrates" or is supported by a controlling legal authority that statutory requirements are met. Here, IHS' partial declination likely violates the ISDEAA, because Fort Defiance does not propose a "material and substantial," 25 C.F.R. § 900.33, change to its contract, and because IHS does not rely on any of the 25 U.S.C. § 5325(b)(2) criteria in partially declining the contract. A renewal contract that "offers no modifications" to the contract's provisions "that speak to the scope and funding" of the Tribe's self-determination contract is not a material and substantial change under 25 C.F.R. § 900.33. Navajo Health Found. -- Sage Mem'l Hosp., Inc. v. Burwell, 256 F. Supp. 3d at 1235. The ISDEAA does not state that only mature contracts can have terms longer than three years. Rather, the ISDEAA permits non-mature contracts to have terms greater than three years if IHS and the Tribe agree to a longer term. See 25 U.S.C. § 5324(c)(1)(A). While IHS may decide that a fifteen-year term is not "advisable," it may not use the mature-contract provision to justify its declination decision, because 25 U.S.C. § 5324(c)(1) permits non-mature contracts to have terms longer than three years. At the hearing, the United States contended that the Cook Inlet Tribal Council, Inc. v. Dotomain, 20 F.4th at 892, decision

is “in conflict” with the Court's opinion in Navajo Health Found. -- Sage Mem'l Hosp. Inc. v. Burwell, 100 F. Supp. 3d 1122. Tr. at 45:14 (Bell). The United States suggests that, if the Court agrees with its Navajo Health Found. -- Sage Mem'l Hosp. Inc. v. Burwell, 100 F. Supp. 3d 1122, opinion, then “the Government may not succeed here,” but that, if the Court agrees with the D.C. Circuit's decision in Cook Inlet Tribal Council, Inc. v. Dotomain, 20 F.4th at 892, the United States should succeed. Tr. at 49:19 (Bell). The Court's decision is not to pick between its earlier conclusions. In Navajo Health Found. -- Sage Mem'l Hosp. Inc. v. Burwell, the Court concludes that 25 C.F.R. § 900.33 “does not allow” IHS “to consider information beyond a contract renewal proposal's four corners in determining whether to apply” § 5321(a)(2)’s declination criteria. Consequently, 25 C.F.R. § 900.33 likely prohibits IHS' partial declination, and, even if it does not, then the D.C. Circuit's decision in Cook Inlet Tribal Council, Inc. v. Dotomain, 20 F.4th at 89, does not require IHS' partial declination, because § 5325(a) requires the funds at issue. Ordered that: (i) the request in Fort Defiance Indian Hospital Board, Inc.’s Motion for Immediate Injunctive Relief or in the Alternative a Preliminary Injunction with Supporting Memorandum, filed April 1, 2022 (Doc. 29), for an injunction under 25 U.S.C. § 5331 is denied; (ii) the request in Fort Defiance Indian Hospital Board, Inc.’s Motion for Immediate Injunctive Relief or in the Alternative a Preliminary Injunction with Supporting Memorandum, filed April 1, 2022 (Doc. 29), for a preliminary injunction is granted; and (iii) IHS must comply with Fort Defiance's proposed FY 2022 self-determination renewal contract and its accompanying AFA by reimbursing Fort Defiance an additional $16,627,268.00, prorated monthly, for contract support costs for all of FY 2022, and, if necessary, $18,515,007.00, prorated monthly, for FY 2023 and beyond, until this case can be resolved on the merits.

40. Unite Here Local 30 v. Sycuan Band of Kumeyaay Nation, 35 F.4th 695, No. 21-55017 (9th Cir. May 2022).

Labor union brought action against Sycuan Band of the Kumeyaay Nation, a federally recognized Indian tribe, alleging that tribe violated the labor provisions of a contract between the two parties with respect to operation of a casino on tribe's reservation, and seeking to compel arbitration of that dispute pursuant to an arbitration clause contained in the contract. Tribe counterclaimed, seeking a declaratory judgment that federal law preempted labor organizing provisions of agreement. The United States District Court for the Southern District of California, Thomas J. Whelan, Senior District Judge, 2020 WL 7260672, granted union's motion for judgment on the pleadings to compel arbitration and motion to dismiss tribe's counterclaim for declaratory relief. Tribe appealed. The Court of Appeals, Milan D. Smith, Circuit Judge, held that: 1 district court had supplemental jurisdiction over counterclaim; 2 district court did not abuse its discretion in declining to exercise supplemental jurisdiction over counterclaim; 3 counterclaim did not raise a federal question; 4 parties had entered into a contract; 5 validity of contract and preemption argument were for the arbitrator to decide; and 6 tribe waived tribal sovereign immunity. Affirmed.

***41. Southcentral Foundation v. Alaska Native Tribal Health Consortium,* 2022 WL 2834283 (D. Alaska July 20, 2022).**

This matter comes before the Court on Plaintiff Southcentral Foundation's ("SCF") Motion for Summary Judgment (the "Motion"). SCF seeks a court order that provides the following declaratory relief: Defendant Alaska Native Tribal Health Consortium ("ANTHC") violated Section 325 of the Department of the Interior and Related Agencies Appropriation Act of 1998, Pub. L. No. 105-83, 111 Stat. 1543 ("Section 325") when it denied SCF all documents and information that SCF, through its Designated Director, deemed necessary for SCF to exercise effectively its governance and participation rights in ANTHC. This case is a dispute over what information SCF is entitled to receive from ANTHC in order to "exercise effectively the governance and participation rights" created by section 325. ANTHC was created precisely to avoid impasses, such as the one now before this Court. In the 1990s, Congress intervened after years of negotiations during which over 200 recognized tribes, regional tribal entities, and various other organizations failed to arrive at a consensus for how to manage the Alaska Native Medical Center ("ANMC"). As a solution to the gridlock, Senator Ted Stevens proposed the creation of a consortium. So Congress enacted Section 325, and ANTHC was created "to ensure efficient, experienced Alaska Native management and control" of the new ANMC in Anchorage.8 By creating ANTHC, Senator Stevens sought to "ensure[ ] that scarce federal funds will be effectively and efficiently spent on providing high quality health care to Native Alaskans." Section 325 outlines the participation and governance of ANTHC. The Ninth Circuit found that "SCF has alleged an injury in fact sufficient to confer Article III standing to bring its claim." While Section 325 states no express entitlement to information, the Ninth Circuit concluded "the right to govern would be a hollow promise absent the information necessary to exercise that right intelligently." The Ninth Circuit also rejected ANTHC's argument "that Section 325 grants rights of governance only to Directors." Instead, the Ninth Circuit concluded "[h]ad Congress meant, for instance, that [RHEs] were merely 'advisory,' it could have used this alternate language. Instead, Congress endowed each specified [RHE] with the right to have a 'representative' on the Board that stands in the shoes of the designating entity by acting on its behalf." At the heart of the present dispute are three of ANTHC's written policies: the Board's Bylaws, Code of Conduct, and Disclosure Policy. The Bylaws provide that absent a conflict of interest or improper motive, Directors are "entitled at any reasonable time to inspect and copy the books, records, and documents of ANTHC to the extent reasonably related to the performance of the Director's duties as a Director." But the Bylaws do not extend the same "nearly 'absolute' right" to documents and information that the Directors enjoy to the Designating Entities. The Board's Code of Conduct and its Disclosure Policy restrict how Directors may share documents and information with their respective Designating Entity. The ANTHC Code of Conduct provides that each Director owes certain duties to ANTHC, including a duty of confidentiality. Designating Entities are not subject to these same duties. Despite ANTHC's objections, the Court finds that SCF is, in fact, entitled to relief and therefore grants in part and denies in part the Motion. As a general matter, the Court agrees with ANTHC that it cannot categorically find that

any ANTHC's attorney-client privileged information disclosed to SCF is protected by the common-interest doctrine. But the Court does see an argument that certain attorney-client privileged information related to the governance of ANTHC may be protected pursuant to the common-interest doctrine. Even so, as explained below, the Court finds that Section 325 entitles SCF, as an RHE, to all information it needs to effectively exercise its governance and participation rights, even if that information is protected by the attorney-client privilege and even if the common-interest doctrine would not apply to prevent waiver. In light of the Court's entry of Partial Judgment for Southcentral Foundation and the resolution of the Reserved Issues by this Order, the case is dismissed with prejudice.

42. Williams & Cochrane, LLP v. Rosette, 2022 WL 4544711, Case No, 17-CV-1436-RSH-DEB (S.D. Cal. September 27, 2022).

This Order addresses several motions: (1) a motion for summary judgment filed by Defendant Quechan Tribe of the Fort Yuma Indian Reservation (the "Quechan Tribe") (the "Quechan Motion"), (2) a summary judgment motion filed by Plaintiff Williams & Cochrane, LLP ("W&C" or "Plaintiff") against the Quechan Tribe (the "W&C Motion against the Quechan Tribe"), (3) a motion for summary judgment filed by Defendants Robert Rosette ("Rosette"); Rosette & Associates, PC; and Rosette, LLP (collectively, the "Rosette Defendants") (the "Rosette Motion"), and (4) a motion for summary judgment filed by W&C against the Rosette Defendants (the "W&C Motion against the Rosette Defendants").This case arises out of an attorney-client relationship between W&C as attorneys and the Quechan Tribe as client. The representation began in September 2016 and involved work on negotiating a new gaming compact with the State of California. In June 2017, the Quechan Tribe fired W&C and hired a new law firm, the Rosette Defendants, which completed the negotiations with the State at a lower cost to the Quechan Tribe. W&C sued its former client, seeking unpaid attorney's fees, and the Quechan Tribe brought counterclaims against W&C. W&C also sued the replacement law firm, the Rosette Defendants, alleging that the Rosette Defendants had overstated Rosette's past accomplishments, as contained within a single sentence in Rosette's web biography. As set forth below, as to W&C's claims against the Quechan Tribe, the Court denies summary judgment to both sides on W&C's claim for breach of contract, and grants summary judgment to the Quechan Tribe on W&C's claim for breach of implied covenant. As to the Quechan Tribe's counterclaims against W&C, the Court grants summary judgment to W&C on the Quechan Tribe's counterclaims for breach of fiduciary duty and breach of implied covenant and denies summary judgment to W&C on the Quechan Tribe's counterclaims for negligence and breach of contract. As to W&C's claim against the Rosette Defendants under the Lanham Act—the sole federal claim in this case—the Court grants summary judgment to the Rosette Defendants and denies summary judgment to W&C. In the midst of the Pauma Litigation, Williams and Cochrane left Rosette's firm to start their own firm, Plaintiff W&C. The Pauma Band terminated Rosette's firm and hired W&C instead. The Pauma Band was highly successful in that lawsuit. In 1999, the Quechan Tribe entered into its own gaming compact with the State of California. On September 29, 2016, the Quechan Tribe hired W&C, along with its two founding partners, Williams and Cochrane, for legal advice on reducing those compact payments. The Attorney-Client Fee Agreement between the

Quechan Tribe and W&C (the "Fee Agreement") had three different fee provisions: a monthly flat fee, a contingency fee, and—as an alternative to the contingency fee—a "reasonable fee" for services provided. Paragraph 4 of the Fee Agreement required the Quechan Tribe to pay a flat fee of $50,000 per month, without regard to the work performed or results obtained. On October 12, 2016, W&C, acting on behalf of the Quechan Tribe, formally requested that the State of California begin dispute resolution proceedings with the Quechan Tribe and negotiate the Tribe's gaming compact. On December 7, 2016, the Office of the Governor sent W&C a new draft compact that purported to reduce the Quechan Tribe's payment obligations by approximately $4 million annually. By June 2017, W&C believed that negotiations were nearing a conclusion. Months into the representation, the Tribal Council began having concerns about W&C's work and its cost. Shortly after being sworn in in March 2017, the new President of the Tribal Council, Keeny Escalanti, "developed concerns about the ongoing expenses W&C was charging the Tribe for what did not appear to be much work, and the length of time it was taking W&C to complete its contract negotiations with the State of California." In light of its concerns, the Quechan Tribe decided to fire W&C and hire the Rosette Defendants. Rosette's introduction to the Quechan Tribe did not come through W&C. On June 26, 2017, the six-member Quechan Tribal Council unanimously voted to retain the Rosette Defendants and terminated W&C the morning after. Escalanti and White explain that decision as follows: Because the Tribe was impressed with Mr. Rosette's experience in negotiating compacts in California, and because Rosette, LLP was willing to work ... for approximately 20% of the monthly fees Quechan was paying to W&C without any additional contingency fee, the Tribal Council thought it was a good idea to go forward with Rosette. The Tribe did not hire Mr. Rosette based on his litigation experience or based on his involvement in the Pauma Litigation, since no member of the Tribal Council mentioned or discussed litigation or the Pauma Litigation. In late August 2017, the Quechan Tribe, represented by the Rosette Defendants, and the State of California executed a new gaming compact, which "reduce[d] the Tribe's revenue sharing obligations by approximately four million dollars [ ] per year, and simultaneously increase[ed] the Tribe's ability to generate revenues through its Gaming Operation by providing the right to operate additional Gaming Facilities and Gaming Devices." The Tribe also agreed to make a discounted payment of $2 million to resolve approximately $4 million in missed payments under the 2006 Amendment. ECF No. 329-35 § 4.8; see also 4AC There were substantive differences between the executed compact and the draft compact that W&C had sent the State on June 20, 2017. The Tribal Council was satisfied with the Rosette Defendants' work in negotiating the gaming compact for the Quechan Tribe, and has engaged Rosette, LLP as the Quechan Tribe's general counsel, a position that the firm maintains to this day. In January 2018, WilmerHale, the Quechan Tribe's counsel in this litigation, wrote to W&C stating that "it is not clear" whether W&C turned over the entire case file to the Quechan Tribe. W&C responded by questioning whether WilmerHale was in fact the Tribe's counsel because W&C "h[ad] yet to see anything confirming your representation of the Quechan Tribe." Relevant to the pending motions, the First Amended Complaint included claims for breach of contract, breach of implied covenant, and two Lanham Act false advertising claims: the first based on the Pauma Sentence in the Rosette Bio, and the second based on a press release on the firm's website stating that Rosette was responsible for negotiating the contract between the Quechan

Tribe and the State of California. The Court found that the Quechan Tribe's "failure to pay W&C the contingency fee envisioned in Section 5 of the fee agreement was not a breach of contract." The Court found that the statements that Rosette's litigation efforts were "successful" and that they resulted in $100 million in savings for Pauma were sufficiently misleading to plead a violation of the Lanham Act. There is a triable issue of material fact as to what "reasonable fee," if any, W&C has earned under Paragraph 11 beyond that which the Quechan Tribe has already paid. There is also a triable issue of material fact as to whether W&C itself materially breached the Fee Agreement by failing to ever return the client file to the Quechan Tribe, thereby excusing any nonperformance by the Quechan Tribe. Paragraph 12 of the Fee Agreement states that the Tribe "may have access to the Client's case file upon request at any reasonable time," and W&C did not comply. For the foregoing reasons, the Court hereby orders that: The Quechan Motion is granted as to W&C's claim for breach of the implied covenant of good faith and fair dealing and is otherwise denied; The W&C Motion against the Quechan Tribe is granted as to the Quechan Tribe's counterclaims for breach of the implied covenant of good faith and fair dealing, and breach of fiduciary duty, and is otherwise denied; The Rosette Motion is granted; The W&C Motion against the Rosette Defendants is denied.

D. *Employment*

***43. Ute Indian Tribe of the Uintah and Ouray Reservation v. Lawrence,* No. 18-4013, 22 F.4th 892 (10th Cir January 6, 2022).**

After former employee of tribe, a non-Native American, filed suit in Utah court on claims arising out of employment contract and tribe's motion to dismiss was denied, tribe filed suit against employee and state court judge, seeking declaratory relief that state court lacked subject matter jurisdiction to adjudicate claims and preliminary and permanent injunctions to halt state court proceedings. The United States District Court for the District of Utah dismissed complaint for lack of jurisdiction, and tribe appealed. The Court of Appeals, 875 F.3d 539, reversed and remanded. On remand, the District Court, 312 F.Supp.3d 1219, Clark Waddoups, Senior District Judge, denied injunctive relief. Tribe appealed. The Court of Appeals, Moritz, Circuit Judge, held that: conduct that gave rise to claims against tribe occurred substantially within reservation boundary, and thus, Utah court lacked subject matter jurisdiction over claims without congressional authorization; employee did not establish congressional authorization for Utah court's exercise of subject matter jurisdiction over claims; rendering of judgment on merits on tribe's requests for preliminary and permanent injunction, rather than remand for district court to consider requests anew, was warranted; tribe demonstrated that it would suffer irreparable harm if forced to litigate employee's claims in Utah court that lacked subject matter jurisdiction, as required to obtain injunctive relief; injury to tribe if forced to litigate employee's claims in Utah court outweighed harm that injunction might cause to employee, as required for tribe to obtain injunctive relief; permanent injunction against Utah court's exercise of subject matter jurisdiction over employee's claims would not adversely affect public interest; and Court of Appeals would not invoke Anti-Injunction Act (AIA) as basis for barring district court from granting preliminary and permanent injunctions. Reversed and remanded.

E. *Environmental Regulations*

44. Pasqua Yaqui Tribe v. EPA, F.Supp.3d, No. CV-20-00266-TUC-RM, 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.

***45. State of Oklahoma v. U.S. Department of Interior*, Case No. CIV-21-719-F, 2021 WL 6064000 (W.D. Okla. December 22, 2021).**

After the Supreme Court held in McGirt that the Muscogee (Creek) Nation's reservation in eastern Oklahoma had not been disestablished, the Department of the Interior and the Office of Surface Mining and Enforcement informed Oklahoma that it could no longer regulate surface mining on the Nation's Reservation. Now pending before the court is Plaintiffs' Motion for Preliminary Injunction seeking to enjoin defendants from enforcing their decision to strip Oklahoma of its regulatory authority over surface mining on the Creek Reservation. As explained below, Oklahoma has not shown a likelihood of success on the merits of its claims, and it is therefore not entitled to preliminary relief. Like its Title V program, Oklahoma's reclamation program does not apply to Indian land. 70 Fed. Reg. 16941-01. However, as a practical matter, Oklahoma's Title V regulatory program and Title IV reclamation program have historically operated on land that falls within the borders of the Creek Reservation without objection from OSMRE (or, for that matter, the Creek Nation). In McGirt, 140 S.Ct. at 2481, the Supreme Court held that the Creek Reservation had not been disestablished and therefore met the definition of "Indian Country" for purposes of the Major Crimes Act. Relying on McGirt, OSMRE determined that Oklahoma could no longer operate its state regulatory program on the (newly confirmed) Creek Reservation because it qualifies as "Indian land" under SMCRA. Oklahoma argues that it is likely to succeed on its declaratory judgment claim because SMCRA does not give OSMRE exclusive jurisdiction over Indian land in the absence of a tribal regulatory program. Because the plain language of SMCRA says otherwise, the court disagrees. "The Act unambiguously denies the state the power to administer funds on any Indian lands, on or off the reservation." State of Mont. v. Clark, 749 F.2d 740, 747 (D.C. Cir. 1984). Like Title IV, the text of Title V, when read in conjunction with SMCRA's definitions, precludes state regulation of surface mining on Indian land. If the land at issue qualifies as a "reservation under the jurisdiction of the United States" for purposes of the MCA, then it also qualifies as a "Federal Indian reservation" for purposes of SMCRA. See Cayuga Nation v. Tanner, 6 F.4th 361, 379 (2d Cir. 2021). Here, like in Tanner, Oklahoma cannot rely on Sherrill or equitable principles to avoid the consequences of SMCRA. McGirt itself teaches as much. Although recognizing that legal doctrines such as laches may be deployed to protect individuals who have labored under a mistaken understanding of the law, McGirt squarely rejected any notion that reliance interests could undermine the enforcement a federal statute. Accordingly, Plaintiffs' Motion for Preliminary Injunction (doc. no. 17) is denied.

***46. Fallon Paiute-Shoshone Tribe v. U.S. Department of the Interior,* 3:21-cv-00512-RCJ-WGC, 2022 WL 137069 (D. Nev. January 14, 2022).**

Plaintiffs moved the Court for a temporary restraining order and a preliminary injunction to bar construction of an approved geothermal facility. At the hearing on Plaintiffs' motion, the Court granted in part and denied in part. The Court issued an order temporarily restraining and preliminarily enjoining Defendants and Ormat Nevada Inc. ("Ormat") from conducting the work described in the Decision Record for the Dixie

Valley Geothermal Utilization Project ("Project") for 90 days, including implementation of the Aquatic Resources Monitoring and Mitigation Plan ("ARMMP"). By this order, the Court denies Plaintiffs' motion for a preliminary injunction beyond 90 days. The Bureau of Land Management ("BLM") approved Ormat's application to construct the Project in November 2021, finding that the Project would result in no significant impact on the environment and thereby avoiding the need for an Environmental Impact Statement ("EIS"). The Project, which consists of geothermal production and injection wells, a power plant facility, and an electrical transmission line, is to be constructed in Dixie Valley, about 43 miles northeast of Fallon, Nevada. Plaintiffs allege that both the Tribe's religious practice and the Dixie Valley toad would be adversely affected if the operation of the power plant reduces water quantity, quality, or temperature at the springs in Dixie Valley. BLM conducted an Environmental Assessment to analyze whether the Project would have a significant effect on the environment, and specifically on the hot springs. The Court finds that a preliminary injunction beyond 90 days is not appropriate because the Court cannot find that Plaintiffs are likely to succeed on the merits and, after 90 days, the balance of the harms tips sharply to Ormat. Plaintiffs allege that BLM did not comply with the National Environmental Policy Act ("NEPA") and did not adequately consider tribal concerns under the American Indian Religious Freedom Act ("AIRFA"), Religious Freedom Restoration Act ("RFRA"), and associated federal policies. Plaintiffs allege that BLM did not meaningfully consider the impacts of constructing the Project in an area visible from the springs, a sacred site for the Tribe. The record indicates that the area identified by the Tribe as sacred in the consultation process did not include the uplands where the Project will be built. The Court cannot find that Plaintiffs are likely to prevail on the merits of their APA claims based on BLM's sacred site policies because they attempt to elevate non-binding policy statements to the status of law. The APA evaluates agency compliance with "substantive rules," meaning "a 'legislative-type rule,'—as one 'affecting individual rights and obligations.' " Chrysler Corp. v. Brown, 441 U.S. 281, 301-02, 99 S.Ct. 1705, 60 L.Ed.2d 208 (1979) (internal citations omitted). Here, neither the AIRFA, Executive Order 13007, or the November 9, 2021, Inter-agency MOU create binding obligations under the law. And the November 15, 2021, Joint Secretarial Order No. 3403 § 3 only "affirm[s]" various principles of consultation with relevant Tribes, but the Tribe does not contend that BLM's consultation process was inadequate. Plaintiffs have not established that their RFRA claims are likely to succeed. "To establish a prima facie RFRA claim, a plaintiff must present evidence sufficient to allow a trier of fact rationally to find" that "the activities the plaintiff claims are burdened" are an "exercise of religion" and then that "the government action ... 'substantially burden[s]' the plaintiff's exercise of religion." Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1068 (9th Cir. 2008) (en banc) (quoting 42 U.S.C. § 2000bb-1(a)). To demonstrate a "substantial burden," the Tribe must establish that the challenged government action will cause it to "lose a government benefit or face criminal or civil sanctions for practicing their religion." The facts here do not support the merits of Plaintiffs' claim that the Tribe's right to practice its religion will be "substantially burdened" by the alleged impacts of the Project on Dixie Meadows, and the Court cannot find that Plaintiffs are likely to succeed on their RFRA claim. It is hereby ordered that Plaintiffs' Motions for Temporary Restraining Order and Motion for Preliminary

Injunction are granted in part and denied in part. It is further ordered that the Project shall be preliminarily enjoined 90 days from January 4, 2022.

47. Sierra Club v. Pirzadeh, No. C11-1759-BJR, 2022 WL 800900 (W.D.Wash. February 11, 2022).

This matter comes before the Court on a joint motion by the following parties to the proposed consent decree: (1) Plaintiffs Sierra Club and Center for Environmental Law and Policy; (2) Plaintiff-Intervenor Spokane Tribe of Indians; and (3) Defendants United States Environmental Protection Agency (EPA); Michelle Pirzadeh, Acting Regional Administrator of the EPA; and Michael S. Regan, EPA Administrator. The proposed consent decree would resolve this lawsuit, which was filed 11 years ago. To summarize briefly, the proposed decree would require EPA to issue Total Maximum Daily Loads (TMDLs) for polychlorinated biphenyls (PCBs) for certain portions of the Spokane River and adjacent waters by September 30, 2024. Until the EPA issues the PCB TMDLs, the agency would be required to file status reports every 180 days to inform the Court and the parties of EPA's progress and the work it intends to undertake during the next 180-day period. The proposed decree would terminate when the EPA has issued the PCB TMDLs, with the Court retaining jurisdiction over the decree until it is terminated. "A district court should enter a proposed consent judgment if the court decides that it is fair, reasonable and equitable and does not violate the law or public policy." Sierra Club, Inc. v. Elec. Controls Design, Inc., 909 F.2d 1350, 1355 (9th Cir. 1990). A consent decree must come "within the general scope of the case made by the pleadings" and "must further the objectives of the law upon which the complaint was based." Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO v. City of Cleveland, 478 U.S. 501, 525 (1986). The Court also considers whether the proposed consent decree is in the public interest. The Court finds that the proposed consent decree satisfies these requirements. The proposed decree would resolve this longstanding litigation by ensuring that EPA issues PCB TMDLs for the identified segments of the Spokane River and adjacent waters. This result is within the general scope of the pleadings and would further the objectives of the law upon which Plaintiff's complaint and Plaintiff-Intervenor's complaint are based. The proposed decree was reached after many years of contested litigation and following arms-length negotiations by the parties to the decree. Defendant-Intervenors do not oppose entry of the decree, and the Court finds no concerns that the proposed decree would violate the law or public policy. As a result, the Court finds that the proposed consent decree is fair, reasonable, equitable, and in the public interest, and will approve its entry. Therefore, the Court grants the joint, unopposed motion to enter the proposed consent decree The consent decree will serve as a final judgment.

48. Fallon Paiute-Shoshone Tribe v. U.S. Department of the Interior, 2022 WL 3031583, No. 22-15092 (9th Cir. August 1, 2022).

This case involves an ongoing challenge to the development of a geothermal project on federal public land located over forty miles outside of Fallon, Nevada. In 2015, ORNI32, LLC, a subsidiary of Ormat Nevada, Inc. ("Ormat"), applied to the Bureau of Land Management ("BLM") to construct and operate a geothermal project on federal public land located adjacent to the Dixie Meadows hot springs (the "Project"). In November

2021, after several years of environmental and cultural resource review and tribal consultation, BLM granted Ormat's application subject to several conditions, including that the Project be constructed and operated in phases. The Fallon Paiute-Shoshone Tribe (the "Tribe") and the Center for Biological Diversity ("CBD") (collectively, "Plaintiffs") jointly filed suit against BLM alleging violations of the National Environmental Policy Act ("NEPA"), the Religious Freedom Restoration Act ("RFRA"), and the Administrative Procedure Act ("APA")1 and sought a preliminary injunction to stop the Project's construction during the pendency of the litigation, which the parties agreed could be resolved within six months. This case involves two separate appeals, both challenging the district court's order imposing a preliminary injunction halting construction on the Project for a limited period of ninety days from January 4, 2022, but denying preliminary injunctive relief beyond that period of time. The district court reasonably determined that, under the applicable deferential standard and at this stage of the proceedings, Plaintiffs did not demonstrate a likelihood of success on their NEPA claims. First, the district court reasonably found that there was more than sufficient baseline information (i.e., flow test, hydrogeological model, USGS data regarding Dixie Valley toad) available to BLM on the relevant environmental issues in connection with its development of both the EA and the Aquatic Resource Monitoring and Mitigation Plan ("ARMMP"), including water resources and species information. Therefore, the district court properly deferred to "BLM's application of its technical expertise to draw reasonable inferences from the available scientific information." Plaintiffs fail to show that this conclusion amounts to an abuse of discretion, given the level of deference afforded to the agency under the APA. Next, the district court reasonably concluded that BLM's reliance on the ARMMP as part of its finding of no significant impact ("FONSI") was not arbitrary and capricious. BLM was not required to mitigate impacts to zero to justify a FONSI. Under NEPA, proposed mitigation need only be "developed to a reasonable degree. Finally, the Tribe's RFRA claim alleges that the Project substantially burdens its exercise of religion because the geothermal facility will desecrate the site, making its religious exercise "impossible." This claim is foreclosed by Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1063, 1069–70 (9th Cir. 2008) (en banc), which held that "a 'substantial burden' is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a government benefit or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions." Case No. 22-15093 is affirmed, and costs shall be awarded to Ormat on that appeal.

49. In re Gold King Mine Release in San Juan County, Colorado, on August 5, 2015, 2022 WL 4103996, No. 1:18-md-02824-WJ (D.N.M. September 8, 2022).

Weston Solutions, Inc. "moves for judgment on the pleadings to dismiss all claims of negligence per se stated against it." Weston Solutions, Inc.'s Motion for Judgment on the Pleadings to Dismiss Claims of Negligence Per Se at 3, Doc. 1480, filed March 7, 2022. Weston states "the regulations that Plaintiffs rely upon to support their negligence per se claims involve (1) the Occupational Safety and Health Act ("OSHA"), (2) the Federal Mine Safety and Health Act ("MSHA"), (3) the Colorado Water Quality Control Act, (4) the New Mexico Hazardous Waste Act, (5) the Clean Water Act, and (6) the National Contingency Plan." A recent opinion from the Colorado Court of Appeals discusses

negligence per se under Colorado law: “[N]egligence per se provides that certain legislative enactments such as statutes and ordinances can prescribe the standard of conduct of a reasonable person such that a violation of the legislative enactment constitutes negligence.” Lombard v. Colo. Outdoor Educ. Ctr., Inc., 187 P.3d 565, 573 (Colo. 2008). It occurs “when the defendant violates a statute adopted for the public's safety and the violation proximately causes the plaintiff's injury.” Scott v. Matlack, Inc., 39 P.3d 1160, 1166 (Colo. 2002). “To recover, the plaintiff must also demonstrate that the statute was intended to protect against the type of injury she suffered and that she is a member of the group of persons the statute was intended to protect.” Id. To form a basis for a negligence per se claim, a statute or regulation must also indicate an intent to create civil liability: Not every statute or ordinance will be held to establish a duty and a standard of care under the negligence per se doctrine. For example, we declined to hold that a statute requiring the industrial commission to inspect workplaces created a legally cognizable duty to employees. Quintano v. Industrial Comm'n, 178 Colo. 131, 495 P.2d 1137 (1972). Thus, as recognized in Bittle v. Brunetti, supra, 750 P.2d at 59, imposing liability would do violence to people's reasonable expectations. Weston states: “The Navajo Nation and State of New Mexico (“Sovereign Plaintiffs”) do not explicitly make a claim for negligence per se, but their pleadings strongly implicate the theory ... to the extent that Sovereign Plaintiffs contend a violation of OSHA regulations conclusively establish a claim for negligence, these are claims sounding in negligence per se and must be dismissed for the same reasons set forth below.” Plaintiffs concede that OSHA, MSHA, and the NCP are inapplicable as to their negligence per se claims. The Court dismisses the Allen and McDaniel Plaintiffs' claims of negligence per se based on the Occupational Safety and Health Act, the Federal Mine Safety and Health Act, and the National Contingency Plan. Negligence per se Claims based on CWQCA, NMHWA and the CWA The Court dismisses the Allen and McDaniel Plaintiffs' claims of negligence per se based on the Colorado Water Quality Control Act (“CWQCA”), the New Mexico Hazardous Waste Act (“NMHWA”), and the federal Clean Water Act (“CWA”). While the CWQCA, NMHWA and CWA relate to public safety to some extent, their primary purposes are to protect the quality of the water and the environment. The CWQCA, NMHWA and CWA impose an obligation for the benefit of the public at large, rather than for individuals. The CWQCA, NMHWA and CWA do not expressly provide for imposition of civil liability on violators and do not indicate an intent to create civil liability. Consequently, under Colorado law the CWQCA, NMHWA and CWA cannot serve as the basis for negligence per se claims. The Allen and McDaniel Plaintiffs also base their negligence per se claims on the federal Clean Water Act which states: “The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.” 33 U.S.C. § 1251(a). The CWA provides that: any citizen may commence a civil action on his own behalf— (1) against any person ... who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator. The district courts shall have jurisdiction ... to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under

section 1319(d) of this title. 33 U.S.C. § 1365(a). The "primary function of the provision for citizen suits is to enable private parties to assist in enforcement efforts where Federal and State authorities appear unwilling to act." Lockett v. E.P.A., 319 F.3d 678, 684 (5th Cir. 2003). Section 1365 is the Clean Water Act's citizen suit provision and is the sole avenue of relief for private litigants seeking to enforce certain enumerated portions of the statute. See 33 U.S.C. § 1365 (1994). Section 1365 permits private citizens to enforce specified provisions of the CWA by conferring upon them the right to sue parties alleged to be in violation of "(A) an effluent standard or limitation" or "(B) an order issued by the Administrator or a State with respect to such a standard or limitation." 33 U.S.C. § 1365(a); see also id. at § 1365(f) (defining "effluent standard or limitation" as used in subsection (a)). the Supreme Court's decision in Sea Clammers, and this court's decision in Walls v. Waste Resource Corp., 761 F.2d 311 (6th Cir.1985), preclude us from implying a private right of action under any provision of the Clean Water Act other than § 1365, including the provisions cited in plaintiffs' complaint. The Court dismisses the Allen and McDaniel Plaintiffs' negligence per se claims based on the CWA because the primary purpose of the CWA is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters, the CWA does not create a private cause of action and this Court cannot imply a private right of action. (i) The Court grants Weston's Motion to dismiss the negligence per se claims of the Allen and McDaniel Plaintiffs. (ii) The Court denies Weston's Motion to dismiss the negligence per se claims of the Navajo Nation and the State of New Mexico as moot.

F. Fisheries, Water, FERC, BOR

***50. Snoqualmie Indian Tribe v. Washington*, F.4th, No. 20-35346, No. 20-35353, 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.

***51. U.S. v. Washington*, Case No. C70-9213 RSM, 2021 WL 4264340 (W.D. Wash. September 20, 2021).**

This subproceeding is before the Court on cross-motions for summary judgment filed by each of the four tribes actively litigating this matter: the requesting parties the Swinomish Indian Tribal Community ("Swinomish"), the Tulalip Tribes ("Tulalip"), and the Upper Skagit Indian Tribe ("Upper Skagit") (collectively, the "Region 2 East Tribes") and responding party the Lummi Nation ("Lummi"). The Region 2 East Tribes sought judgment determining that "[t]he adjudicated usual and accustomed fishing places of the Lummi Nation do not include" the waters east of Whidbey Island (the "Disputed Waters"). Having reviewed the matter, the Court finds for the Region 2 East Tribes and determines that Judge Boldt intended to exclude the Disputed Waters from his determination of Lummi's usual and accustomed fishing grounds and stations. This subproceeding invokes the Court's continuing jurisdiction under Paragraph 25(a)(1) of Judge Boldt's injunction, as subsequently modified; Boldt Decree, 384 F. Supp. at 419, as modified United States v. Washington, 18 F. Supp. 3d 1172, 1213–1216 (W.D. Wash. 1993). Accordingly, the Court considers whether Lummi fishing within the Disputed Waters would be "in conformity with [the Boldt Decree and] or this injunction." Boldt Decree, 384 F. Supp. at 419. In doing so, the Court interprets Judge Boldt's prior orders and construes the "judgment so as to give effect to the intention of the issuing court." Muckleshoot Tribe v. Lummi Indian Tribe, 141 F.3d 1355, 1358 (9th Cir. 1998) ("Muckleshoot I"). The Court's consideration proceeds under the two-step process established by the Muckleshoot trilogy of cases. First, the party asserting ambiguity must offer "evidence that suggests that [the U&A] is ambiguous or that the court intended

something other than its apparent meaning." United States v. Muckleshoot Indian Tribe, 235 F.3d 429 (9th Cir. 2000) ("Muckleshoot III") (quoting Muckleshoot I, 141 F.3d at 1358) (cleaned up). This is a more searching process than statutory interpretation because "the 'language of the court must be read in the light of the facts before it.' " Muckleshoot III, 235 F.3d at 433 (quoting Julian Petroleum Corp. v. Courtney Petroleum Co., 22 F.2d 360, 362 (9th Cir. 1927)). Accordingly, the mere fact that a geographic term may include the waters at issue does not resolve the matter. Id. Rather, the Court may consider the record before Judge Boldt when he established the U&A and "may also include additional evidence if it sheds light on the understanding that Judge Boldt had of the geography at the time." If Judge Boldt's U&A determinations are ambiguous or mean something other than their apparent meaning, the moving party must then "show that there was no evidence before Judge Boldt that [the responding party] fished [in the disputed waters] or traveled there in route to" other portions of the responding party's U&A. Second, the Ninth Circuit has previously determined that the waters west of Whidbey Island served as the primary thoroughfare for tribes traveling between the Fraser River and the environs of Seattle. The conclusion was premised on the explanation of Dr. Barbara Lane—an expert witness that Judge Boldt relied upon heavily and held in high regard—"that [t]he deeper saltwater areas, the Sound, the straits, and the open sea, served as public thoroughfares, and as such, were used as fishing areas by anyone travelling [sic] through such waters." Tulalip Tribes v. Suquamish Indian Tribe, 794 F.3d 1129, 1135 (9th Cir. 2015) ("Tulalip Tribes") Dr. Lane made clear that "Lummi fisherman were accustomed, at least in historic times, and probably earlier, to visit fisheries as distant as the Fraser River in the north and Puget Sound in the south." Of course, in the previous line of Lummi cases, the Ninth Circuit relied on this general evidence as supporting the reasonable inference that in order to travel from their home territory, north of Anacortes, and the Fraser River to "Puget Sound in the south," Lummi were likely to have traveled and fished on the western side of Whidbey Island. Lummi I, 235 F.3d at 452. Lummi argues that the Disputed Waters east of Whidbey are equally "likely to be a passage through which the Lummi traveled ... to the 'present environs of Seattle.' " The Court finds the argument speculative and will not presume that Judge Boldt seized upon isolated statements in Dr. Lane's more general report on "Political and Economic Aspects of Indian-White Culture Contact in Western Washington in the Mid-19th Century" to reach a conclusion that she herself did not set forth and did not mention in her Lummi-specific report. The record before Judge Boldt does not evidence Lummi travel within the Disputed Waters, let alone fishing. While it is "impossible to compile a complete inventory of any tribe's" U&A, the omission of any geographic anchors in the Disputed Waters is telling, especially in light of the bevy of geographic anchors outside of the Disputed Waters. While the Ninth Circuit has concluded that the waters west of Whidbey Island served as the logical route of travel from Lummi fishing grounds in the north to the present environs of Seattle, the same reasoning does not hold as to the Disputed Waters. The Court concludes that no evidence of Lummi travel or fishing within the Disputed Waters was before Judge Boldt. Swinomish Indian Tribal Community's Motion for Summary Judgment and Permanent Injunctive Relief and those of Upper Skagit Indian Tribe and the Tulalip Tribes are granted in part. Lummi Nation's Motion for Summary Judgment is denied.

***52. U.S. v. Walker River Irrigation District*, Case No. 3:73-cv-00127-MMD-WGC, 2021 WL 4295748 (D. Nev. September 21, 2021).**

This is an approximately 100-year-old case regarding apportionment of the water of the Walker River, which begins in the high eastern Sierra Nevada mountains of California, and ends in Walker Lake in Northern Nevada. See U.S. v. Walker River Irrigation Dist., 890 F.3d 1161, 1165-69 (9th Cir. 2018) ("Walker IV") (reciting the history of this case); see also Google Maps, Walker River, https://goo.gl/maps/jJsuqbBJB7KbrBaW8 (last visited Sept. 20, 2021) (showing the river). Before the Court is Plaintiffs the United States of America ("United States") and the Walker River Paiute Tribe ("Tribe")'s motion for summary judgment on four affirmative defenses asserted in response to Plaintiffs' counterclaims, which essentially seek to reopen a 1936 decree governing water rights in the Walker River to secure increased water rights for the Tribe.1 (ECF No. 2638 ("Motion").) Because the Court finds Plaintiffs are entitled to judgment as a matter of law on these particular affirmative defenses—and as further explained infra—the Court will grant the Motion. Briefly, the parties' rights to use water from the Walker River are governed by a decree entered in 1936, as modified following a Ninth Circuit Court of Appeals remand (the "1936 Decree"). The dispute currently before the Court involves claims filed by the United States as counterclaims in the 1990s to effectively reopen the 1936 Decree to secure additional water rights for the Tribe. Defendants have filed answers to those counterclaims, in which they assert certain affirmative defenses. Slightly over a year ago, on the United States' motion, the Court granted judgment on the pleadings to Plaintiffs on five other asserted affirmative defenses. As the Court explained in its prior order issued last year, the United States asserts Winters rights on behalf of the Tribe in its counterclaims. As Plaintiffs characterize their counterclaims in their Motion, they seek: "(1) a storage water right associated with Weber Reservoir; (2) a groundwater right associated with lands added to the Reservation by executive and congressional action in 1918, 1928, 1936, and 1972; and (3) a groundwater right underlying all lands within the exterior boundaries of the Reservation, some of which have been held in trust by the United States for the Tribe since 1859." The initial complaint in the proceedings culminating with the 1936 Decree only discussed surface water and explained that the purpose of that litigation was to prevent upstream water users from diverting water from the Walker River before it reached the Walker River Reservation—the river was running dry before it hit the reservation. The United States did not seek any adjudication of groundwater rights, or a storage water right regarding water in a reservoir. This understanding persisted through the initial litigation. Defendants' Third Affirmative Defense is that the principles of finality and repose articulated in Arizona v. California, 460 U.S. 605, 619 (1983) ("Arizona II") prelude the Court from reopening the 1936 Decree to recognize the water rights Plaintiffs seek in their counterclaims.5 (ECF No. 2649 at 20.) Plaintiffs argue they are entitled to summary judgment on this affirmative defense because Arizona II's principles of finality and repose only preclude claims that were actually litigated—and their counterclaims were not actually litigated in the initial phase of this case litigated in the 1920s and 30s. As explained further below, Plaintiffs' counterclaims were not actually litigated in the first phase of this case. In Defendants' Seventh Affirmative Defense, they argue that the Tribe does not have a federal reserved water right for lands added to the Walker River Reservation after 1924 if the purpose of those lands can be satisfied by the Tribe's surface water right awarded to them under the

1936 Decree. (ECF No. 2649 at 86-88.) In their Twelfth Affirmative Defense, Defendants argue that the Tribe cannot have a groundwater right that enlarges a surface water right already awarded to it. As further discussed below, the Court agrees with Plaintiffs that they are entitled to summary judgment on both of these affirmative defenses. The Court finds that Agua Caliente largely forecloses Defendants' arguments on both of them. Contrary to Defendants' arguments supporting their assertion of these two affirmative defenses, "the question is not whether water stemming from a federal right is necessary at some selected point in time to maintain the reservation; the question is whether the purpose underlying the reservation envisions water use." Agua Caliente, 849 F.3d at 1269It is therefore ordered that Plaintiffs' motion for summary judgment (ECF No. 2638) is granted. It is further ordered that Plaintiffs are entitled to judgment as a matter of law in their favor as to Defendants' Third, Seventh, Twelfth, and Fourteenth Affirmative Defenses.

53. Fish Northwest v. Thom, C21-570 TSZ, 2021 WL 4744768 (W.D. Wash. October 12, 2021).

This matter comes before the Court on the motion to dismiss, docket no. 46, filed by Defendants United States Department of Commerce, United States Department of Interior, National Marine Fisheries Service ("NMFS"), U.S. Fish and Wildlife Service ("USFWS"), Bureau of Indian Affairs ("BIA"), and various individuals acting in their official capacities (collectively the "Federal Defendants"). Plaintiff Fish Northwest ("FNW") is a Washington non-profit corporation "committed to the conservation and preservation of Puget Sound salmon and restoring and expanding fishing opportunities for Washington's anglers." FNW asserts five claims against the Federal Defendants: (1) NMFS failed to ensure "no jeopardy" of listed species under Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2); (2) the 2020 and 2021 BiOps are arbitrary, capricious, and not in accordance with applicable law under the Administrative Procedure Act ("APA"); (3) BIA is prohibited from consulting with NMFS under Section 7 of the ESA; (4) NMFS and USFWS failed to consult on their own agency actions in 2020 under Section 7 of the ESA; and (5) NMFS failed to enforce the ESA against the Treaty Tribes and the State for conducting unlawful take of listed species under Section 9 of the ESA, 16 U.S.C. § 1538(a)(1)(B). Federal Defendants assert that: (1) FNW failed to plead specific factual allegations to establish standing for all its claims, (2) challenges to the 2020 BiOps and accompanying Incidental Take Statement ("ITS") are moot, (3) BIA cannot be liable for violating the ESA by engaging in consultation in compliance with the ESA, (4) FNW's claim that NMFS and USFWS failed to consult on their agency actions in 2020 is moot as the 2021 BiOps examined the effects of the agencies' Puget Sound fishery funding, and (5) any claim that NMFS failed to enforce the ESA against the Treaty Tribes and the State was not noticed in FNW's sixty-day notice of intent to sue and is not justiciable as NMFS's decision to enforce the ESA is committed to agency discretion. FNW claims that BIA is prohibited from engaging in consultation under Section 7(a)(2) because it does not control the harvest, taking, funding or implementation of salmon fisheries in Washington. Presuming FNW's allegations are true, as the Court does on a motion to dismiss, BIA is not required to engage in formal consultation because its actions are non-discretionary. That BIA engaged in formal consultation concerning alleged non-discretionary action does not establish that BIA and NMFS violated the ESA. Like in Home Builders, if BIA's

actions are truly non-discretionary, BIA's consideration of ESA concerns could result in its liability for violating some other statutory obligation, but it does not result in liability for violating the ESA. If there is no alleged violation of the ESA, it follows that the Court lacks jurisdiction under ESA's citizen-suit provision for alleged violations of the statute. The Court dismisses FNW's third cause of action with prejudice. FNW's Fourth Cause of Action is Moot. FNW alleges that "NMFS and USFWS have failed to consult under Section 7 for the actions of NMFS and USFWS, including but not limited to the funding and approval of fisheries by the State of Washington that result in the taking of listed salmon." The parties agree that the 2021 BiOp analyzed NMFS and USFWS funding of fishery related activities in Puget Sound. Mot. to Dismiss. FNW concedes that "[u]nlike past years, NMFS did consult on its funding of state fisheries this year following Plaintiff's 60-day notice." Resp. to Mot. to Dismiss (docket no. 47 at 15). Here, FNW's claim lost its character as a live controversy when NMFS and USFWS analyzed their actions in the 2021 BiOp, and the Court can no longer grant effective relief concerning this claim.4 Granting leave to amend a moot claim is futile. The Court hereby dismisses with prejudice FNW's fourth cause of action. Because FNW failed to provide sufficient pre-suit notice of this claim, the Court hereby dismisses FNW's fifth cause of action without prejudice.5 Conclusion For the foregoing reason, the Court grants Federal Defendants' motion to dismiss.

***54. U.S. v. Washington*, Case No. C70-9213 RSM, 2021 WL 4972343 (W.D.Wash. October 26, 2021).**

This subproceeding is before the Court on several motions. The requesting party, Upper Skagit Indian Tribe ("Upper Skagit"), initiated this subproceeding to determine whether certain fishing in the Skagit River by the responding party, the Sauk-Suiattle Indian Tribe ("Sauk-Suiattle"), complies with Judge Boldt's decree (the "Boldt Decree") in the underlying case. Upper Skagit now seeks summary judgment in its favor. Sauk-Suiattle has opposed Upper Skagit's efforts at each turn. The Swinomish Indian Tribal Community seeks to withdraw its previous filings recommending that the Court send this matter to mediation. This dispute relates to Sauk-Suiattle fishing in the Skagit River. In his 1974 Decree, Judge Boldt determined that Sauk-Suiattle's usual and accustomed fishing places ("U&A") "included Sauk River, Cascade River, Suiattle River and the following creeks which are tributary to the Suiattle River—Big Creek, Tenas Creek, Buck Creek, Lime Creek, Sulphur Creek, Downey Creek, Straight Creek, and Milk Creek. Bedal Creek, tributary to the Sauk River, was also a Sauk fishing ground." Boldt Decree, 384 F. Supp. 312, 376 (W.D. Wash. 1974). The waters comprising Sauk-Suiattle U&A are all tributary to the Skagit River. As such, fish migrating to Sauk-Suiattle U&A must travel up the Skagit River, fishing grounds for Upper Skagit and Swinomish. Upper Skagit, Swinomish, and Washington State share conservation and management responsibility for salmon in the Skagit River. Central to the dispute is Sauk-Suiattle's position that the downriver tribes should alter their catches so that more fish reach Sauk-Suiattle U&A. The downriver tribes, however, have not agreed with Sauk-Suiattle's position. This subproceeding invokes the Court's continuing jurisdiction under Paragraph 25(a)(1) of Judge Boldt's injunction, as subsequently modified. Dkt. #9 at ¶ 2; Boldt Decree, 384 F. Supp. at 419, as modified United States v. Washington, 18 F. Supp. 3d 1172, 1213–1216 (W.D. Wash. 1993). Accordingly, the Court considers whether Sauk-

Suiattle fishing within the Disputed Waters would be "in conformity with [the Boldt Decree and] or this injunction." Boldt Decree, 384 F. Supp. at 419. In doing so, the Court interprets Judge Boldt's prior orders and construes the "judgment so as to give effect to the intention of the issuing court." Muckleshoot Tribe v. Lummi Indian Tribe, 141 F.3d 1355, 1358 (9th Cir. 1998) ("Muckleshoot I") (quoting Narramore v. United States, 852 F.2d 485, 490 (9th Cir. 1988)) (internal quotation marks omitted). The Court's consideration proceeds under the two-step process established by the Muckleshoot trilogy of cases. First, the party asserting ambiguity must offer "evidence that suggests that [the U&A] is ambiguous or that the court intended something other than its apparent meaning." United States v. Muckleshoot Indian Tribe, 235 F.3d 429 (9th Cir. 2000) ("Muckleshoot III") (quoting Muckleshoot I, 141 F.3d at 1358) (cleaned up). This is a more searching process than statutory interpretation because "the 'language of the court must be read in the light of the facts before it.' " Muckleshoot III, 235 F.3d at 433 (quoting Julian Petroleum Corp. v. Courtney Petroleum Co., 22 F.2d 360, 362 (9th Cir. 1927)). Accordingly, the mere fact that a geographic term may include the waters at issue does not resolve the matter. Id. Rather, the Court may consider the record before Judge Boldt when he established the U&A and "may also include additional evidence if it sheds light on the understanding that Judge Boldt had of the geography at the time." Upper Skagit Indian Tribe v. Washington, 590 F.3d 1020, 1024–25 (9th Cir. 2010) ("Upper Skagit"). Sauk-Suiattle's reliance on Dr. Lane's general descriptions of Sauk-Suiattle U&A in various other reports fails to overcome the specific description set forth in her report on Sauk-Suiattle and adopted without change by Judge Boldt. The Court finds and orders: The Upper Skagit Indian Tribe's Motion for Summary Judgment is granted. The Sauk-Suiattle Indian Tribe's Motion to Dismiss for Lack of Jurisdiction is denied.

***55. Sauk-Suiattle Indian Tribe v. City of Seattle*, No. 2:21-cv-1014, 2021 WL 5200173 (W.D.Wash. November 9, 2021).**

This matter comes before the Court on Plaintiff's Motion for Remand of this case to the Superior Court of the State of Washington for Skagit County, from which Defendants removed it. Plaintiff is the Sauk-Suiattle Indian Tribe, a tribal nation with an address at Darrington, Washington. Plaintiff named as "Respondents" the City of Seattle and a subdivision thereof, Seattle City Light.1 Plaintiff filed a complaint seeking a declaration that the "presence and operation" of the Gorge Dam, a hydroelectric dam owned and operated by Defendants on the Skagit River in Newhalem, Washington, violates the constitutions of Washington and the United States, in addition to state and federal law, by blocking the passage of fish within the Skagit River. For the following reasons, the Court concludes that it has federal subject-matter jurisdiction over Plaintiff's claims and denies Plaintiff's Motion for Remand. The Gorge Dam in Newhalem, Washington is licensed by the Federal Energy Regulatory Commission ("FERC") pursuant to the Federal Power Act ("FPA"), 16 U.S.C. §§ 791a, et seq. In 1927, the dam was granted a 50-year license to operate by FERC's predecessor agency, the Federal Power Commission ("FPC"). Subsequent to expiration of that license in 1977, FERC issued annual licenses under the terms and conditions of the original license. That license is scheduled to expire in 2025, and the reauthorization process has already begun, involving numerous state and federal agencies and other stakeholders, including Plaintiff. The Gorge Dam spans the width of the Skagit River and does not currently allow for the passage of migrating fish. Plaintiff

originally filed its complaint in Skagit County Superior Court, claiming that the "presence and operation" of the dam and in particular, Defendants' failure to provide for fish passage, violate provisions of the United States and Washington Constitutions and state and federal statutes. Plaintiff also claims the dam constitutes a nuisance, and alleges state common law violations. Plaintiff seeks equitable relief, including a declaration that Defendants are in violation of the law, and an injunction requiring Defendants to provide a means for migratory fish species to bypass the dam. Id., Defendants timely removed this action, contending that the Court has subject matter and supplemental jurisdiction over Plaintiff's claims. A defendant may remove to federal court any case filed in state court over which the federal court would have original jurisdiction. 28 U.S.C. § 1441(a). Federal question jurisdiction exists over "civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. "The general rule, referred to as the 'well-pleaded complaint rule,' is that a civil action arises under federal law for purposes of § 1331 when a federal question appears on the face of the complaint." City of Oakland v. BP PLC, 969 F.3d 895, 903 (9th Cir. 2020). As the party asserting federal jurisdiction, the burden is on Defendants to establish they are entitled to remain in federal court. In this case, Plaintiff seeks only declaratory and injunctive relief under RCW 7.24.010, the Washington Declaratory Judgments Act. However, "federal question jurisdiction encompasses more than just federal causes of action. Federal courts have jurisdiction to hear 'cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law.' " Indep. Living Ctr. of S. California, Inc. v. Kent, 909 F.3d 272, 278 (9th Cir. 2018). Defendants argue that Plaintiff's claims for nuisance and violation of Washington common law also "necessarily raise a federal issue under the FPA" and Defendants' FERC license issued thereunder. In this case, the amended complaint, on its face, does indeed raise a number of federal questions. Most obviously, Plaintiff avers under the heading "Claims for Relief" that Defendants' actions "violate[ ] Article VI, ¶ 2 of the United States Constitution providing that the laws of the United States are the Supreme Law of the nation," and seeks a declaration that "the presence and operation of respondent's dam violates the Supremacy Clause of the United States Constitution in that respondent is subject to the prohibitions against dams that block fish migration contained in Congressional Acts binding within what is now the State of Washington." In arguing its complaint does not raise a federal question, Plaintiff fails even to acknowledge its claim that Defendants' actions somehow violate the federal Supremacy Clause, let alone explain how that claim escapes federal jurisdiction. Although the complaint does not reveal the legal theory underpinning the Supremacy Clause claim, that claim is undoubtedly "substantial," judging by its prominent iteration (and reiteration) in the complaint; it forms the basis for one of only four "Claims for Relief" articulated in the complaint, and one of four of the declarations sought. The Court concludes the Supremacy Clause claim raises a substantial and disputed federal issue sufficient to establish this Court's jurisdiction. The face of the complaint reveals another, independent basis for this Court's jurisdiction: the federal statutes on which Plaintiff's claims are based. They include (1) the Act to Establish the Territorial Government of Oregon, ch. 177, 9 Stat. 323 (1848), establishing the Oregon Territory (including an area that would later become Washington), which provides in relevant part that "the rivers and streams of water in said Territory of Oregon in which

salmon are found, or to which they resort, shall not be obstructed by dams or otherwise;" and (2) the Act to Establish the Territorial Government of Washington, ch. 90, 10 Stat. 172 (1853), establishing the Washington Territory. Plaintiff expressly and necessarily asks a court to interpret the text of these statutes; to divine the intent of Congress in passing them; and to determine whether or not they were incorporated into state law, and/or were repealed by subsequent acts of Congress. Indeed, the very basis for Plaintiff's Supremacy Clause claim appears to be that the State is bound by these supreme federal laws. Am. Compl., ¶ 6.C. (dam "violates the Supremacy Clause of the United States Constitution" because "Congressional Acts" of 1848 and 1853 are "binding within what is now the State of Washington."). Under these circumstances, the Court concludes that Plaintiff's federal constitutional and statutory claims—raising not only substantial, but pivotal federal issues apparent on the face of the complaint—provide an adequate basis to assert this Court's jurisdiction. The Court concludes that exercising supplemental jurisdiction over Plaintiff's state-law claims is appropriate in this case. For the foregoing reasons, the Court denies Plaintiff's Motion for Remand.

***56. Sauk-Suiattle Indian Tribe v. City of Seattle*, No. 2:21-cv-1014, 2021 WL 5712163 (W.D. Wash. December 2, 2021).**

This matter comes before the Court on a Motion to Dismiss filed by Defendants City of Seattle and Seattle City Light.1 Plaintiff, the Sauk-Suiattle Indian Tribe, filed a complaint seeking a declaration that the "presence and operation" of the Gorge Dam, a hydroelectric dam owned and operated by Defendants, violate the constitutions of Washington and the United States, in addition to state and federal law, by blocking the passage of fish. For the following reasons, the Court concludes that it lacks jurisdiction over Plaintiff's claims and that Defendants' Motion to Dismiss must therefore be granted. The Gorge Dam in Newhalem, Washington is owned and operated by Defendants. In 1995, FERC issued the "Order Accepting Settlement Agreement, Issuing New License, and Terminating Proceeding." That Relicensing Order, as its title indicates, terminated the fisheries study proceeding and accepted the settlement agreements between Defendants and multiple intervenors in the proceeding, including Plaintiff. The Relicensing Order incorporated provisions of those agreements into issuance of a new license, which authorized operation of the Project for another 30 years. As outlined in the Relicensing Order, those settlement agreements—ten in all—concerned myriad aspects of the Project, and "purport[ed] to resolve all issues related to project operation, fisheries, wildlife, recreation and aesthetics, erosion control, archaeological and historic resources, and traditional cultural properties." Particularly relevant to this lawsuit, the Relicensing Order approved a "Fisheries Settlement Agreement" joined by Defendants and several of the intervenors, including Plaintiff, which agreement "establishe[d] Seattle's obligations relating to fishery resources affected by the project, including numerous provisions to protect resident and migratory fish species." To that end, the settlement incorporated an "Anadromous Fish Flow Plan," which was "intended to mitigate the impacts of daily and seasonal downstream fluctuations." Id. The flow plan prescribed "a filling schedule for Ross Lake reservoir, flows downstream of Gorge powerhouse, flow releases and limits to protect salmon and steelhead spawning and development, requirements for dry water years, advance scheduling of hourly generation," and other measures. Id. The settlement agreement acknowledged, however, that: even with the complete implementation of the

Anadromous Fish Flow Plan, some level of these impacts would continue to occur. Defendants' threshold challenge to this Court's jurisdiction relies on Section 313, the "exclusive jurisdiction" provision of the FPA, which provides, in relevant part: Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part.... Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. 16 U.S.C. § 825l (b). Over 60 years ago, the Supreme Court interpreted Section 313 to mean that appeal to the appropriate federal circuit court is the "the specific, complete and exclusive mode for judicial review of the Commission's orders." City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320, 336 (1958). Because the Court concludes that it lacks jurisdiction to hear any of Plaintiff's claims, all of which "inhere in the controversy" concerning an explicit provision of the 1995 FERC Relicensing Order, the Court need not—indeed, lacks jurisdiction to—determine whether any of Plaintiff's claims would succeed on the merits. For the foregoing reasons, the Court hereby grants Defendants' Motion to Dismiss.

57. U.S. v. Washington, Case No. C70-9213 RSM, 2021 WL 5323092 (W.D. Wash. November 16, 2021).

This matter is before the Court on a motion for reconsideration filed by interested party the Tulalip Tribes ("Tulalip"). The motion requests that the Court reconsider or clarify a single sentence included in its prior order resolving this subproceeding. Id. Specifically, Tulalip takes issue with the final sentence in the following paragraph: If Judge Boldt's U&A[2] determinations are ambiguous or mean something other than their apparent meaning, the moving party must then "show that there was no evidence before Judge Boldt that [the responding party] fished [in the disputed waters] or traveled there in route to" other portions of the responding party's U&A. Upper Skagit, 590 F.3d at 1023; see also United States v. Lummi Nation, 876 F.3d 1004, 1010 (9th Cir. 2017). Conversely, summary judgment in favor of the responding party is appropriate if it can establish that it fished in or traveled through the disputed waters. Tulalip maintains that the inclusion of "traveled through" conflicts with the Boldt Decree's pronouncement that evidence of travel through waters alone did not establish that the waters were within a tribe's U&A.. Tulalip maintains that the inclusion "could lead to increased or additional litigation concerning tribal" U&A because "some parties might seek to claim that the phrase in question alters the prior rulings of the Court." "Motions for reconsideration are disfavored." Consequently, the Court will "ordinarily deny such motions in the absence of a showing of manifest error in the prior ruling or a showing of new facts or legal authority which could not have been brought to [the Court's] attention earlier with reasonable diligence." Id. For several reasons, the Court does not agree with Tulalip that modification or clarification is necessary. First, the Court notes that the sentence does not

cite to any legal authority and does not indicate any intent to modify the Boldt Decree or prior orders of the Court. Second, Tulalip does not establish that the sentence directly conflicts with any prior orders of this Court or binding decisions by the Ninth Circuit Court of Appeals. Third, and as noted by Tulalip, the sentence is not implicated by the Court's resolution of this subproceeding. Fourth, the sentence was included in the Court's order resolving subproceeding 19-01 and Tulalip did not object or seek reconsideration. Accordingly, and having considered the motion and the remainder of the record, the Court finds and orders that Tulalip Tribes Motion for Reconsideration is denied.

58. Northwestern Band of Shoshone Nation v. Idaho, **Case No. 4:21-cv-00252-DCN 2022 WL 170034 (D. Idaho January 19, 2022).**

For the reasons set forth below, the Court grants Idaho's motion to dismiss. The Shoshone people once roamed over eighty million acres in the present states of Wyoming, Colorado, Utah, Idaho, and Nevada. During the Civil War, Congress appropriated money for negotiating a treaty with the Shoshone to secure safe passage for transportation and communication lines through Shoshone territory. Due to the scattered nature and large size of Shoshone territory, the United States government entered a variety of treaties with different Shoshone bands in a piecemeal fashion. The treaty that concerns the Court today is the Fort Bridger Treaty of 1868 (the "1868 Treaty"). In that treaty, Chief Washakie ceded the Shoshone Tribal Territory to the United States in exchange for, among other things, two reservations and certain hunting rights ("Hunting Rights"). The Hunting Rights are codified in Article 4 of the 1868 Treaty and outline that: The Indians herein named agree, when the agency house and other buildings shall be constructed on their reservations named, they will make said reservations their permanent home, and they will make no permanent settlement elsewhere; but they shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts. The plain language of the 1868 Treaty clearly indicates that a necessary condition of receiving Hunting Rights was living on the Fort Hall Reservation or the Wind River Reservation. Consequently, the ability to exercise Hunting Rights is irrevocably tied to the promise to live on the appropriate reservation. As explained above, the term "but" is most seen to express an exception or addition to the language immediately preceding it. "But" rarely is used to combine two distinct ideas that have no relation with each other, which is what the Northwestern Band claims the treaty does. A review of the rest of the 1868 Treaty reinforces this conclusion. The term "but" appears four other times in the 1868 Treaty. Each other time it is referenced (Article 1, Article 5, Article 6, and Article 9), the language following the term "but" is always building upon, elaborating, or distinguishing the language before it. Additionally, Article 4 is the only article in which the Indians promise to live on the reservation. The promise to live on the reservation was the most significant promise made by the Indians in that treaty. It would make little sense to claim that the promise to live on the reservation is only reserved to Article 4 and does not apply to the rest of the treaty. In sum, the promise to live on a reservation was a critical component of the 1868 Treaty, and indeed, was viewed as the solution to the wars between the settlers and the Indians. It would make little sense for the government to grant Hunting Rights but not receive anything in exchange. Based on the plain language, it is unambiguous that the Hunting Rights were inextricably tied to

the promise to live on the reservation, and a tribe cannot receive Hunting Rights without living on one of the appropriate reservations. Construing treaties in a manner in which the Indians understood them at the time of signing is fairly straightforward. However, interpreting ambiguous provisions in the Indians' benefit becomes complicated to apply when Indian tribes are suing each other. As the Court does not see any ambiguities in the language of the 1868 Treaty, the Court does not need to apply a presumption in favor of the Northwestern Band. The Court declines to rule on whether the Northwestern Band has maintained political cohesion with the Shoshone-Bannock Tribes. Treaty rights vest with tribes at the time of treaty signing. State of Or., 29 F.3d at 484. For a tribe to receive treaty rights, they must show "that they maintained political cohesion with the tribal entities created by the treaties." Id. at 485. A cohesion analysis is complex because it looks at a variety of factors to determine "whether a group claiming treaty rights has maintained sufficient political continuity with those who signed the treaty that it may fairly be called the same tribe." State of Or., 43 F.3d at 1284. As one can imagine, such an analysis is very fact driven In this case, there is no need to do cohesion analysis. Because the plain language of the 1868 Treaty clearly indicates that the Northwestern Band does not qualify for Hunting Rights, the instant motion can be disposed of on other grounds, and the Court declines to rule on whether the Northwestern Band has maintained political cohesion with the Shoshone-Bannock Tribes over the last 150 years. Because the parties have not adequately explained how large the unoccupied lands are and what wildlife are in them, it is not clear to the Court at this stage just how significantly the Shoshone-Bannock Tribes would be impacted if the Northwestern Band gained and exercised Hunting Rights. The Court is also mindful of the potentially troublesome precedent of expanding the beneficiaries of the 1868 Treaty without having the main signatories—including the Shoshone-Bannock Tribes—involved. Normally the Court would ask for supplemental briefing to resolve this issue. However, because the Court's ruling on Idaho Defendants' 12(b)(6) Motion to Dismiss disposes of the case, the Court declines to rule on the question of the indispensability of the Shoshone-Bannock Tribe. This case is dismissed with prejudice.

***59. Navajo Nation v. US Department of Interior,* No. 19-1708826, F.4th 794, 2022 Daily Journal D.A.R. (9th Cir. February 17, 2022).**

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. Opinion, 996 F.3d 623, amended and superseded.

***60. Klamath Irrigation District v. U.S. Bureau of Reclamation,* Civ. No. 1:21-cv-00504-AA, 2022 WL 1210946 (D. Or. April 25, 2022).**

This case comes before the Court on an Amended Motion to Remand filed by Plaintiff Klamath Irrigation District ("KID"). For the reasons set forth below, KID's motion is DENIED. The United States Bureau of Reclamation ("Reclamation") operates the Klamath Project (the "Project") to deliver water from Upper Klamath Lake ("UKL") and its tributaries to water users in southern Oregon and northern California. As part of the Project, Reclamation operates dams controlling the flow of water from the UKL. Reclamation holds water rights for the Project acquired in conformity with the requirements of state law. Reclamation also holds federal reserved water rights for the Klamath Tribes for instream fisheries purposes in UKL and the tributaries above UKL in Oregon. These rights are subject to the jurisdiction of the Klamath Basin Adjudication ("KBA"), a comprehensive general stream adjudication in Oregon state court. The comprehensive stream adjudication for the Klamath Basin began in 1975. In February 2014, Oregon entered an Amended and Corrected Findings of Fact and Final Order of Determination ("ACFFOD") in the Klamath County Circuit Court and the determination of rights entered the judicial phase of adjudication, which remains ongoing. While the KBA is pending, the status quo of water rights found in the ACFFOD is enforceable. Reclamation also operates in accordance with the requirements of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-44. The ESA applies with respect to (1) two species of endangered sucker fish with critical habitat in UKL; (2) threated Southern Oregon/North California Coast ("SONCC") coho salmon with critical habitat in the Klamath River, downstream of the Project; and (3) endangered killer whales in the Pacific Ocean that prey on Chinook salmon which, although not listed under the ESA, inhabit the Klamath River downstream of the Project. Reclamation also operates the Project in accordance with the senior downstream federal tribal reserved water rights of the Yurok and Hoopa Valley Tribes in California. Unlike the reserved water rights of the Klamath Tribes of Oregon, the reserved water rights of the Yurok and Hoopa Valley Tribes of California have not been adjudicated in the KBA. However, the Federal Circuit has determined that the water rights of the Yurok and Hoopa Valley Tribes for instream fisheries purposes are senior to the Project's water rights and, although not yet determined in California, are "[a]t a minimum" equal to the amount of water needed under the ESA to avoid jeopardy to the salmon in the Klamath River. Baley v. United States, 942 F.3d 1312, 1337 (Fed. Cir. 2019). KID is a contractor for the Klamath Project and a participant in the KBA. KID asserts that Reclamation has the right to store water in UKL, but that the agency has no authority to release water from UKL for instream uses, such as meeting Reclamation's obligations under the ESA or satisfying the reserved water rights of the Yurok and Hoopa Valley Tribes unless Reclamation first seeks a stay of the ACFFOD and posts a bond. KID filed a motion for a preliminary injunction in the KBA seeking to

enjoin Reclamation from releasing any water stored in the UKL under the Project's storage water rights except to satisfy the irrigation demands of the Project's water users under the Project's state law-based water rights held for beneficial use. Such an injunction would prevent Reclamation from releasing water from UKL to meet its obligations under the ESA or to satisfy the senior downstream rights held by the Yurok and Hoopa Valley Tribes. As noted, Reclamation removed KID's preliminary injunction motion from the KBA to this Court. In this case, KID contends that the United States has waived sovereign immunity under the McCarran Amendment, 43 U.S.C. § 666(a). The Supreme Court has held that, for purposes of the McCarran Amendment, a "river system" is to be "read as one within the particular State's jurisdiction," because "[n]o suit by any State could possibly encompass all of the water rights in the entire Colorado river which runs through or touches many States." United States v. District Court in and for Eagle Cnty., Colo., 401 U.S. 520, 523 (1971); Baley, 942 F.3d at 1341. This is so because unless all of the parties owning or in the process or acquiring water rights on a particular stream can be joined as parties defendant, any subsequent decree would be of little value. The "administration of such rights" in § 666(a)(2) refers to the rights described in § 666(a)(1) "for they are the only ones which in this context 'such' could mean; and as we have seen they are all-inclusive, in terms at least." In determining whether the McCarran Amendment's waiver of immunity applies, courts must examine whether the case before them is the type of adjudication described in the McCarran Amendment—that is, either a suit for adjudication of rights to the use of a water or for the administration of such rights. As the district court observed in San Luis Obispo Coastkeeper, "the purpose of the McCarran Amendment is not to waive sovereign immunity whenever litigation may incidentally relate to water rights administered by the United States. It is for determining substantive water rights by giving courts the ability to enforce those determinations and to permit joinder of the United States where necessary to effectively adjudicate competing claims thereto." San Luis Obispo Coastkeeper, 394 F. Supp.3d at 995.In San Luis Obispo Coastkeeper, the court found that the McCarran Amendment did not apply where the petitioners sought "to enforce state environmental laws requiring sufficient flows of water for Steelhead," because the action was not one to adjudicate or administer a comprehensive state court stream adjudication. Here, KID's motion for preliminary injunction is clearly not a seeking the adjudication of competing water rights under § 666(a)(1). Nor is it in the nature of an action to administer such rights but is instead an enforcement action to block the release of water to satisfy the rights of California tribes which were not adjudicated in the KBA. As the court observed in Klamath Irrigation District, this is an enforcement action, not an action to adjudicate or administer rights. At the very least, Reclamation has demonstrated that it possesses a colorable federal defense, sufficient to permit removal of the preliminary injunction motion to federal court. Accordingly, the Court DENIES KID's motion to remand this case.

61. Yurok Tribe v. US Bureau of Reclamation, Case No. 20-cv-05891-WHO, 2022 WL 1540029 (N.D. Cal. 2022 1540029).

Klamath Irrigation District ("KID") moves to intervene in the stayed litigation between the Yurok Tribe and United States Bureau of Reclamation ("Bureau") over the Bureau's refusal to release water into the Klamath River for the Tribe's 2020 Boat Dance ceremony. KID contends that the government is no longer representing its interests in the

matter and seeks to intervene so that it can file an answer and crossclaim challenging the Bureau's authority to allocate water from Upper Klamath Lake ("UKL") for the Boat Dance. KID's motion is DENIED. Although the Yurok Tribe waived its sovereign immunity by filing this suit, that waiver was limited and does not extend to the issues that KID seeks to interject in this case. The waiver was explicitly and only for the purpose of determining whether the Bureau acted in an arbitrary and capricious manner in refusing to release the water, violating the Administrative Procedure Act ("APA"). KID's proposed answer and crossclaim amount to an adjudication of water rights, an issue beyond the scope of the Tribe's waiver. At issue here is the Yurok Tribe's Boat Dance, part of a traditional religious ceremony (called the "world renewal ceremony") held in late summer in even-numbered years. During the Boat Dance, Yurok religious practitioners travel down the Klamath River, dancing in large, hand-carved canoes. The water must be at a sufficient depth for the Boat Dance to occur; otherwise, the canoes will hit rocks, veer off course, and potentially injure participants. Id. Without the Boat Dance, "the world renewal ceremony cannot be completed." Id. According to the Yurok Tribe, the river flows at the ceremony site must be augmented in order for the Boat Dance to safely occur. Both the 2019-2024 Plan and Interim Plan include the allocation of 7,000 acre-feet of water from UKL in even-numbered years for the Boat Dance. The Yurok Tribe and Bureau are engaged in settlement discussions. On March 18, 2022, KID filed this motion to intervene, seeking permission to file an answer and crossclaim against the Bureau. Federally recognized tribes like the Yurok Tribe possess inherent sovereign authority, derived from their status as "separate sovereigns preexisting the Constitution." See Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 788 (2014) (citations omitted). The dispositive question, for the purposes of KID's motion to intervene, is whether the scope of the Tribe's waiver in bringing suit extends to KID's crossclaims. The Supreme Court has long made clear that a tribe's waiver of sovereign immunity by filing suit does not constitute a waiver for all claims. See Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 509 (1991) (citing United States v. U.S. Fid. & Guar. Co., 309 U.S. 506, 511-13 (1940)). The Ninth Circuit has also affirmed this principle. Yurok contends that the Tribe's waiver was limited: to adjudicate only whether the Bureau violated the APA when it did not provide the water flows for the Boat Dance ceremony. By challenging the Bureau's authority to release water for the Boat Dance ceremony, they argue, KID effectively attempts to adjudicate the Yurok Tribe's water rights—an issue far outside the Tribe's waiver. KID's motion to intervene is denied.

***62. U.S. v. Alaska,* 2022 WL 2274545, 1:22-cv-00054-SLG (D. Alaska June 23, 2022).** Before the Court is Plaintiff United States of America's Motion for Preliminary Injunction. Intervenor-Plaintiff Kuskokwim River Inter-Tribal Fish Commission ("the Commission") joined Plaintiff's motion. Plaintiff seeks a preliminary injunction "to prohibit Defendants from continuing to authorize or implement actions that contravene the rural Alaskan subsistence priority and are preempted by federal law." The state action at issue is Defendants' Emergency Order #3-S-WR-02-22, which Plaintiff describes as "purport[ing] to open the Kuskokwim River within the Yukon Delta National Wildlife Refuge to gillnet fishing by all Alaskans in violation of federal orders issued to effectuate the ANILCA Title VIII rural subsistence priority." The Alaska National Interest Lands Conservation Act (ANILCA) provides that rural subsistence users are given priority to

hunt and fish on federal land and waters within Alaska: "[N]onwasteful subsistence uses of fish and wildlife and other renewable resources shall be the priority consumptive uses of all such resources on the public lands of Alaska when it is necessary to restrict taking in order to assure the continued viability of a fish or wildlife population or the continuation of subsistence uses of such population, the taking of such population for nonwasteful subsistence uses shall be given preference on the public lands over other consumptive uses." Plaintiff construes the relevant question as one of conflict preemption governed by the Supremacy Clause of the United States Constitution.13 Plaintiff maintains that "the State's management actions on the Kuskokwim River within the [Yukon Delta National Wildlife] Refuge contradict federal management efforts and create an obstacle to ANILCA's federal purposes and objectives of prioritizing the subsistence use of Chinook and chum salmon within the Refuge over all other uses." Plaintiff asserts that ANILCA's express policy of protecting and prioritizing rural subsistence users' ability to harvest fish preempts any state action that conflicts with federal law or a federal emergency order. Plaintiff has established that ANILCA's rural subsistence use priority preempts the State's regulatory authority when Plaintiff has determined that restrictions are "necessary to meet tributary and drainage-wide escapement goals while allowing for some harvest by federally qualified subsistence users." Plaintiff and Intervenor-Plaintiff contend that irreparable harm will occur in three ways, each of which Defendants dispute. Plaintiff and Intervenor-Plaintiff have shown "that enforcement of the [State's emergency order] in fact conflicts with federal ... law and its objectives." Promulgating a State emergency order that contradicts ANILCA's rural subsistence use priority violates the Supremacy Clause, and "an alleged constitutional infringement will often alone constitute irreparable harm" even when the constitutional injury is structural, such as a Supremacy Clause violation. Here, irreparable harm would necessarily result from the enforcement of a State emergency order that is likely preempted and in violation of the Supremacy Clause. Uncertainty as to the legality of conflicting emergency orders will cause irreparable harm to federally qualified users. Plaintiff and Intervenor-Plaintiff have met their burden of establishing that the balance of equities tips in their favor and that a preliminary injunction is in the public interest. Moreover, if the State emergency order—for which the Court has found a likelihood of preemption—is in effect, the State's fishing openers would interfere with ANILCA's stated policy of prioritizing rural subsistence uses and would likely cause confusion to both federally qualified subsistence users and non-federally qualified subsistence users. Plaintiff's Motion for Preliminary Injunction is granted. Defendants are enjoined from taking similar actions that authorize gillnet fishing by all Alaskans on the Kuskokwim River within the Yukon Delta National Wildlife Refuge when such action(s) would be contrary to federal orders issued pursuant to Title VIII of the ANILCA.

63. City of Seattle v. Sauk-Suiattle Tribal Court, 2022 WL 2440076, No. 2:22-cv-142 (W.D. Wash. July 5, 2022).

This matter comes before the Court on the Motion to Dismiss filed by Defendants Sauk-Suiattle Tribal Court (the "Tribal Court, and the Sauk-Suiattle Indian Tribe ("Sauk-Suiattle" or the "Tribe"). Defendants seek dismissal of this preliminary injunction action, filed by Plaintiff the City of Seattle (the "City"). Having reviewed the briefs and exhibits filed in support of and opposition to the Motion to Dismiss, and the relevant authority,

the Court finds and rules as follows. On January 7, 2022, the Sauk-Suiattle Indian Tribe filed a civil complaint against the City in the Sauk-Suiattle Tribal Court. See Sauk-Suiattle Indian Tribe v. City of Seattle, Case No. SAU-CIV-01/22-001 (Sauk-Suiattle Tribal Ct. Jan. 18, 2022). The Tribal Court complaint seeks a declaratory judgment concerning salmon "within the territory of the Sauk-Suiattle Indian Tribe." In that lawsuit, the Tribe claims infringement of certain rights stemming from the construction and operation of three dams on the Skagit River by Seattle City Light, which is owned by the City. In particular, the Tribe alleges that the dams block upstream and downstream passage of several species of migratory fish, threatening the Tribe's livelihood and wellbeing. The dams are not located within the boundaries of the Sauk-Suiattle Reservation, but upstream from where the Skagit River meets a tributary, the Sauk River, which does flow through the reservation. In asserting the Tribal Court's jurisdiction over the City, the Tribe stated in its complaint that by operation of the dams, the City's "conduct threatens or imperils the health, welfare, safety and economic security of the Sauk-Tribal [sic] Indian Tribe and such impacts are felt by the Sauk-Suiattle Indian Tribe within the Sauk-Suiattle Reservation and lands and waters within the Ceded Territory of the Sauk-Suiattle Indian Tribe." The Tribe alleges violations of its usufructuary rights under the 1855 Treaty of Point Elliott, and violations of the First, Fourth, and Fourteenth Amendments to the U.S. Constitution, and the American Indian Religious Freedom Act (AIRFA), 42 U.S.C. § 1996. On February 3, 2022, counsel for Seattle appeared in the Tribal Court and filed a motion for dismissal of the civil action for lack of subject-matter jurisdiction. At this time, the motion is presumably still pending. On February 7, 2022, the City filed this action, seeking an injunction preventing the Tribal Court from exercising jurisdiction over it. This Court has jurisdiction to consider whether the Sauk-Suiattle Tribal Court has jurisdiction to review the Tribe's complaint against the City. Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians, 471 U.S. 845, 851–52 (1985). Because "the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions," the Supreme Court has held that "examination should be conducted in the first instance in the Tribal Court itself." Nat'l Farmers, 471 U.S. at 855–56 (exhaustion requirement promotes "a policy of supporting tribal self-government and self-determination," and "the orderly administration of justice in the federal court," by "allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed."). Against the backdrop of these practical and prudential considerations, the Supreme Court has outlined four exceptions to the exhaustion requirement: (1) when an assertion of tribal court jurisdiction is "motivated by a desire to harass or is conducted in bad faith"; (2) when the tribal court action is "patently violative of express jurisdictional prohibitions"; (3) when "exhaustion would be futile because of the lack of an adequate opportunity to challenge the [tribal] court's jurisdiction"; and (4) when it is "plain" that tribal court jurisdiction is lacking, so that the exhaustion requirement "would serve no purpose other than delay." Elliott v. White Mountain Apache Tribal Ct., 566 F.3d 842, 847 (9th Cir. 2009). In this case, the City has argued only that the fourth exception to the exhaustion requirement applies: that jurisdiction is so "plainly lacking," requiring the City to exhaust its remedies would serve

no purpose other than to cause delay. Circuit courts, including the Ninth Circuit, have apparently not articulated precisely "how 'plain' the issue of tribal court jurisdiction needs to be before the exhaustion requirement can be waived." DISH Network, 725 F.3d at 883. The Eighth Circuit in DISH, however, observed that the Supreme Court has indicated "that the bar is quite high." Id. (requirement to exhaust should be waived only when the issue of tribal court jurisdiction is invoked for "no other purpose than delay"). Where the assertion of tribal court jurisdiction is " 'colorable' or 'plausible,' the exception does not apply and exhaustion of tribal court remedies is required." Elliott, 566 F.3d at 848. From a series of "foundational" Supreme Court cases, the Ninth Circuit has "discern[ed] the ground rules governing tribal adjudicatory jurisdiction over nonmembers." Philip Morris, 569 F.3d at 939 (citing, inter alia, Montana v. United States, 450 U.S. 544 (1981)). The "general proposition" is that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." Montana, 450 U.S. at 565. Defendants argue here that the Sauk-Suiattle Tribal Court has jurisdiction over the City under the second Montana exception, which recognizes tribal jurisdiction over "conduct [that] threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 566. The City claims the second exception is inapposite to the facts here, arguing that it applies only to conduct taking place entirely within a reservation, not outside its boundaries. It is true that it "is at least strongly implied" that this exception is only applicable to on-reservation activity. Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians, 746 F.3d 167, 176 (5th Cir. 2014). Nevertheless, according to at least one appellate court, "the Supreme Court has never explicitly held that Indian tribes lack inherent authority to regulate nonmember conduct that takes place outside their reservations." It is appropriate, therefore, that "[t]he precise location of [the] activity or conduct should be evaluated by the tribal court when it applies Montana in the first instance." Jurisdictional questions are notoriously fact-intensive, and the facts of this case may be distinguishable in a number of potentially material ways from the precedent on which the City relies and could at least arguably bring the tribal lawsuit within the ambit of the claimed Montana exception. While the City maintains that "there is no physical on-reservation impact" in this case, the Tribe has alleged that the upstream activities on the Skagit River do in fact have a direct impact on the health of the salmon population downstream, within the reservation. Depending on how the facts in this case develop, this argument may be unfounded or attenuated, and ultimately unpersuasive; but the Court cannot say at this point that it is frivolous. The lawsuit concerns conduct on and affecting rivers, making the jurisdictional inquiry particularly difficult to limit according to geopolitical boundaries. In addition, the tribal lawsuit is based in part on interpretation of Sauk-Suiattle tribal law and Indian treaty rights, which would benefit from the Tribal Court's expertise. See Tidwell v. Harrah's Kansas Casino Corp., 322 F. Supp. 2d 1200, 1206 (D. Kan. 2004) ("If plaintiff's case involved questions of tribal law, the benefit of tribal court expertise would be unquestionable."). The breadth and complexity of these factual and legal issues are well-suited for review—in the first instance, at least—by the Tribal Court. To be clear, the Court is not ruling here that the Tribal Court has jurisdiction, and nothing the Court has said about the plausibility of jurisdictional arguments should be construed as commentary on the relative merit of those arguments. The Court holds only that the Tribe is entitled to make these arguments to the Tribal

Court first. The Tribe has at least a colorable argument that its claims proceeding in Tribal Court are "wholly collateral to a statute's review provisions and outside the agency's expertise," and not, therefore, precluded by Section 313 of the FPA. This question is therefore also subject to the National Farmers exhaustion requirement. "Whether the federal action should be dismissed, or merely held in abeyance pending the development of further Tribal Court proceedings, is a question that should be addressed in the first instance by the District Court." Accordingly, the Court denies Defendants' Motion to Dismiss, but for the foregoing reasons hereby stays until after the Tribal Court has had a full opportunity to determine its own jurisdiction.

***64. Yurok Tribe v. Dowd,* 2022 WL 2441564, Case No. 16-cv-02471-RMI (N.D. Cal. July 5, 2022).**

Now pending before the court is a Motion to Dismiss filed by Defendant Gary Dowd urging dismissal for lack of jurisdiction. Defendant's motion is denied. In May of 2016, the Yurok Tribe (hereafter "the Yurok") filed suit on behalf of itself and its members against the Resighini Rancheria and its members, and also against Gary Mitch Dowd individually and as a member of the Rancheria. The Yurok sought a declaratory judgment to the following effect: (1) that the Rancheria and its members, by declining to merge with the Yurok pursuant to the Hoopa-Yurok Settlement Act (25 U.S.C. § 1300i et seq.) ("HYSA") waived and relinquished any and all rights and interest they may have had in the lands and resources within the Yurok Reservation, including in the Klamath River Indian Fishery, within the Yurok Reservation, without the consent or authorization of the Yurok Tribe or without a license issued by the State of California; and, (2) that Dowd, individually as a member of the Rancheria, and as an officer of the Rancheria, by electing to be paid a cash sum in return for extinguishing any and all rights and interest in the land and resources of the Yurok Tribe, including in the Klamath River Indian Fishery within the Yurok Reservation, has no right to fish within the Yurok Reservation without the consent of the Yurok Tribe, or without a license issued by the State of California. In October of 2017, Defendants filed a motion to dismiss, which the court granted in full. Following a successful appeal by the Yurok, the case was remanded for further proceedings as to the Yurok's individual capacity claim against Dowd – that is, whether Dowd's fishing activities violated the HYSA. Following remand, only one question remains involved in this case – that is, whether Dowd's continued fishing in the waters in question violates the HYSA in light of the assertion that by electing to be paid a cash sum in return for relinquishing any and all rights and interest in the land and resources of the Yurok Tribe, including in those portions of the Klamath River Indian Fishery within the Yurok Reservation, Dowd has no right to fish within the Yurok Reservation without the consent of the Yurok Tribe, or without a license issued by the State of California. Dowd's Motion to Dismiss is attended with a declaration from the Chairperson of the Rancheria stating that the Rancheria's inherent sovereignty includes a federally reserved tribal fishing right and the right to "authorize and regulate the conduct of its members to fish in those portions of the Klamath River that lie within the boundaries of the original Klamath River Reservation," and that "[a]t all times relevant to the ... Yurok Tribe's claims as set forth in its complaint in this case, the [Rancheria] authorized [ ] Gary Dowd[ ] to fish in the Klamath River, both within the boundaries of the Resighini Rancheria's Reservation and within the boundaries of the Klamath River Reservation ..." Dowd's argument hangs

on this declaration – in essence, while Dowd concedes that his acceptance of the $15,000 cash payment under the HYSA extinguished any right he might have claimed to fish in the waters in question pursuant to Yurok authority, Dowd nevertheless claims an independent right to fish in those same waters pursuant to the Rancheria's purportedly concurrent authority (delegated to him as set forth in the Murphy Declaration) to fish in those same waters. To recapitulate: (1) the HYSA gave the Rancheria's members an opportunity to join the Yurok Tribe; (2) Dowd chose to decline that invitation and to receive a cash payment which had the effect of extinguishing any interest or right whatsoever, inter alia, in the tribal resources within or appertaining to the reservation of the Yurok Tribe; (3) the Klamath River, during normal flow, comes (to a small degree) within the boundaries of the Resighini Rancheria Trust on its Eastern and Northwestern sides; (4) Dowd admittedly "sometimes fishes on portions of the River that are not within the boundaries of the Rancheria," (5) Dowd claims that he does so pursuant to a privilege granted to him by the Rancheria; (6) this court previously dismissed the Rancheria from this action due to sovereign immunity and found that the Yurok had waived any official capacity claims against Dowd, leaving only an individual capacity claim against Dowd; (7) as to the resolution of that single individual capacity claim, the undersigned previously held that the resolution of this claim has been rendered impossible due to the failure to join the Rancheria, an indispensable party; and, lastly, (8) the appellate court reversed that last finding and held that this court could indeed adjudicate the Yurok's individual liability claim against Dowd without joinder of the Rancheria because finding that some or all of Dowd's fishing violated the HYSA can be effected without affecting the Rancheria's rights Seeking to take advantage of what appears to be a catch-22, Dowd has advanced the instant motion to dismiss which, in essence, claims that there is no subject matter jurisdiction under the HYSA because Dowd's fishing activities were conducted pursuant to a "privilege" conferred to him by the Rancheria pursuant to their federally reserved fishing "right" – hence, there is no jurisdiction for the court to determine if Dowd's fishing violated the HYSA because Dowd's attached evidence purports to establish that the HYSA has not been violated because Dowd's fishing was conducted pursuant to an independent source of authority. In other words, Dowd's gambit has the effect of pushing the court down an avenue that has been foreclosed by the earlier developments in this case – that is, the dismissal of the Rancheria as immune from suit in this instance, and the appellate court's conclusion that the Yurok's HYSA claim against Dowd can be adjudicated in a manner where "the Resighini Rancheria's interests would not be impaired or impeded if the action against Dowd in his individual capacity proceeds in the Resighini Rancheria's absence ... [and regardless of the outcome] the suit would not impair or impede any claimed interest of the Resighini Rancheria." Dowd is attempting to take advantage of the Rancheria's absence from this suit by using their rights as both a shield and a sword. While it remains to be seen if this tactic can ever gain any traction, one thing is clear: Dowd's jurisdictional argument is deeply intertwined with the merits of the only surviving question in this case, to wit, whether or not the HYSA has been violated on those occasions when "Dowd sometimes fishes on portions of the River that are not within the boundaries of the Rancheria." In a Rule 12(b)(1) motion to dismiss, a district court may, generally speaking, "resolve disputed factual issues bearing upon subject matter jurisdiction ... unless 'the jurisdictional issue and the substantive issues are so intermeshed that the question of jurisdiction is dependent on decision of the merits.' "

Wilkins v. United States, 13 F.4th 791, 796 (9th Cir. 2021). Dowd's argument to the effect that there is no jurisdiction under the HYSA to determine whether his fishing violated the HYSA because he did not violate the HYSA represents exactly such an intermeshing. Accordingly, for the reasons expounded herein, Dowd's Motion is denied.

***65. Silva v. Farrish,* F.4th, 2022 WL 3650689, No. 21-0616 (2nd Cir. August 25, 2022).**

Members of the Shinnecock Indian Nation brought action against New York State Department of Environmental Conservation (DEC) and several DEC officials, alleging that certain colonial-era deeds established members' right to fish in the waters of a certain bay, that the application of state fishing regulations to members violated those fishing rights, and that DEC's continued enforcement of the regulations amounted to continuing pattern of discrimination based on members' race as Native Americans, and seeking declaratory and injunctive relief. The United States District Court for the Eastern District of New York, Steven I. Locke, United States Magistrate Judge, 2020 WL 3451344, recommended that summary judgment be granted in favor of DEC and DEC officials, and Sandra J. Feuerstein, Senior District Judge, 2021 WL 613092, adopted report and recommendation. Members appealed. The Court of Appeals, Menashi, Circuit Judge, held that: Ex parte Young exception to state sovereign immunity applied to members' claims for declaratory and injunctive relief against DEC officials; threat of enforcement of state fishing laws amounted to injury in fact, as required for members to have standing to pursue claims against DEC officials for declaratory and injunctive relief; Younger abstention did not require dismissal of member's claim seeking injunction to prevent DEC officials from interfering with member's use of waters; but DEC officials did not intentionally discriminate against members based on race, and, thus, members could not prevail on their discrimination claims against DEC and officials. Affirmed in part, vacated in part, and remanded.

***66. Clark v. Halaand,* 2022 WL 4536239, Civ. No. 21-1091 KG (D.N.M. September 28, 2022).**

Plaintiffs are residential users of water in Bernalillo, Sandoval, and San Juan Counties. One Plaintiff relies on a domestic well, while the others rely on municipal water sources or water supplied by various tributaries. The Plaintiffs claim that the Defendants, all sued in their official capacity only, "have not complied with or enforced" myriad federal laws. The USA MTD asserts that none of the statutes cited by Plaintiffs expressly waive the sovereign immunity of the United States for this case, and the McCarran Amendment does not apply because this case does not constitute a "comprehensive adjudication of water rights[.]" The Navajo MTD also seeks dismissal pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction, based on tribal sovereign immunity. With respect to the USA MTD, Plaintiffs assert that this case falls within the McCarran Amendment's waiver of immunity as a case involving the "administration of water rights." The McCarran Amendment does not provide a waiver of sovereign immunity applicable to this case. Because Plaintiffs failed to allege an applicable basis upon which to waive sovereign immunity, the Court grants the USA MTD and dismisses all claims against the federal Defendants for lack of subject matter jurisdiction based on sovereign immunity. The

Court also grants the Navajo MTD and dismisses all claims brought against Defendants Shebala and Zeller on the basis of tribal sovereign immunity.
Here, the requested remedy is declaratory judgment stating the meaning of federal water law. Such a remedy does not necessitate prospective action by or restraint of the individual officials named as Defendants. Instead, any plausible remedy would operate directly on the Navajo Nation and would be an affront to its sovereign interests and water rights. Thus, Ex parte Young is an unavailable route around tribal sovereign immunity. For the reasons explained above, the Court grants each of the Motions to Dismiss based on sovereign immunity and dismisses all claims against the Defendants for lack of subject matter jurisdiction.

67. United States v. Washington, 2022 WL 4968882, Case No. C70-9213RSM (W.D. Wash. October 4, 2022).

This matter comes before the Court on a Motion to Intervene filed by nonparty Fish Northwest on October 5, 2020. Fish Northwest is a non-profit organization representing individual salmon harvesters. Its purpose is to "ensure responsible fair, and equal fishing with the treaty tribes," which it says is "being significantly harmed by the Washington State Department of Fish and Wildlife's failure to ensure equitable sharing [of] the harvestable salmon resource per the 'Boldt Decision' set forth in United States v. Washington." Dissatisfied with recent salmon fishing seasons provided by Washington State's regulations, FNW seeks to become a party to this case. Once a party, FNW intends to invoke the Court's continuing jurisdiction and initiate a new subproceeding challenging the current parties' salmon management and allocation activities, with the stated objective of ensuring that "non-treaty fishers of Washington are ... allowed to harvest their fair share of the salmon and steelhead resources of Washington." The State of Washington argues this Motion must be denied under the law of the case. The Court agrees. This Court has repeatedly concluded that individual fishermen do not have a legal interest in the fish and shellfish they desire to harvest, and thus have no ability to intervene. Management of fisheries that are the subject of United States v. Washington lies with the co-managers—the tribes and the State. The facts presented in this Motion to intervene do not alter the Court's prior analysis. The Court need not restate legal arguments from its prior Orders on this subject. The Motion to Intervene filed by nonparty Fish Northwest is denied.

68. In re Klamath River Basin Litigation, F.Supp3d., 2022 WL 5409032, *MDL No. 3048 (U.S. J.P.M.L. October 4, 2022).*

Plaintiff in the District of Oregon Klamath Irrigation District action moves under 28 U.S.C. § 1407 to centralize this litigation in the District of Oregon or, alternatively, in the District of Nevada or the District of New Mexico. This litigation consists of two actions pending in the Northern District of California and five actions pending in the District of Oregon, as listed on Schedule A. The Federal Parties, the Yurok Tribe, the Klamath Tribes, and the Oregon Water Resources Department4 oppose centralization. Alternatively, they variously suggest either the Northern District of California or the District of Oregon as the transferee district. We conclude that centralization is not necessary for the convenience of the parties and witnesses or to further the just and efficient conduct of the litigation. These seven actions involve different aspects of the

operation of the Klamath Project, a federal reclamation project that provides water for irrigation in southern Oregon and northern California, and in particular releases of water from Upper Klamath Lake in Oregon to the Klamath River downstream of the Project. While these actions involve the same bodies of water and many of the same parties, the differences are striking. More importantly, these actions will not entail significant discovery or particularly complex pretrial proceedings. These actions primarily involve legal questions, in particular the determination of the Bureau of Reclamation's obligations under the Endangered Species Act to protect certain species of fish in Upper Klamath Lake and the Klamath River; the Bureau's obligations to release water for tribal religious ceremonies; and the Bureau's obligation under the Reclamation Act, 43 U.S.C. § 383, to abide by the OWRD's declaration of water rights in the Klamath Basin Adjudication. In short, these actions already are being conducted in a coordinated fashion, such that many of the most important legal questions will be resolved in short order. Centralization at this juncture would only delay these adjudications and increase the procedural complexity of an already complex litigation. In this instance, therefore, it seems to us that these cases can be more effectively and efficiently advanced, and resolution achieved more quickly, without centralization. The motion for centralization of these actions is denied.

***69. Red Lake Band of Chippewa Indians v. U.S. Army Corps of Engineers,* F.Supp.3d., 2022 WL 5434208 (D.C. October 7, 2022).**

This consolidated action arises from the United Army Corps of Engineers' (the "Corps") issuance of a permit to Intervenor-Defendant Enbridge Energy, Limited Partnership ("Enbridge"), authorizing Enbridge to discharge dredged and fill material into waters of the United States under Section 404 of the Clean Water Act and to cross waters protected by the Rivers and Harbors Act in its replacement of sections of the Line 3 oil pipeline in Minnesota. Plaintiffs Red Lake Band of Chippewa Indians, White Earth Band of Ojibwe, Honor the Earth, Sierra Club, and Friends of the Headwaters (collectively, "Plaintiffs") allege that the Corps' decision to issue these permits violated the National Environmental Policy Act, the Clean Water Act, the Rivers and Harbors Act, and the Corps' permitting regulations. Presently before the Court are the parties' cross-motions for summary judgment. Upon consideration, the Court concludes that the Corps complied with its obligations to assess the environmental consequences associated with its permits to Enbridge. To determine whether a federal action will "significantly" affect the quality of the environment, the agency must consider the "context and intensity" of the proposed action and must address both "direct" and "indirect" caused by the proposed action. 40 C.F.R. §§ 1508.8, 1508.27. Indirect effects include those "caused by the actions and are later in time or farther removed in distance but are still reasonably foreseeable." Before the Corps issues a Section 404 permit, it must determine that there is "no practicable alternative" to the proposed activity "which would have less adverse impact on the aquatic ecosystem." 40 C.F.R. § 230.10(a). Intervenor-Defendant Enbridge sought the permits challenged by Plaintiffs in this action to replace portions of its "Line 3" oil pipeline, which transports crude oil from Edmonton, Alberta to Superior, Wisconsin, traversing portions of North Dakota and Minnesota. Originally constructed in the 1960s, "Existing Line 3" suffers from corrosion and integrity issues, including a "large number of identified pipe defects and anomalies." Replacement Line 3 would also enable Enbridge to transport a higher capacity of crude oil than Existing Line 3 was transporting

once Enbridge reduced its capacity. Red Lake Band Plaintiffs argued that preliminary injunctive relief was appropriate based on claims that the Corps had failed to adequately address the effects of potential oil spills, alternative construction routes, and alternative construction methods in granting Enbridge necessary permits to proceed with the construction of Replacement Line 3. Concluding that Red Lake Band Plaintiffs failed to carry their burden of demonstrating a likelihood of success on the merits and irreparable harm, the Court denied their Motion for Preliminary Injunction. Many of the NEPA deficiencies identified by Plaintiffs hinge on two overarching arguments: first, that the Corps improperly limited the scope of its NEPA review to effects connected to the construction-related activities authorized by its permits (as opposed to effects connected with the construction and operation of the entire pipeline); and second, that the Corps improperly relied on the State EIS. The Corps' implementing regulations direct that its NEPA review must "address the impacts of the specific activity requiring a [Department of the Army] permit and those portions of the entire project over which the district engineer has sufficient control and responsibility to warrant Federal review." 33 C.F.R. pt. 325, App. B, § 7(b)(1) (2020) (emphasis added). The Court is satisfied that the scope identified by the Corps was appropriate in light of the activities authorized by its permit. The Corps' EA explained that its consideration of the "range of alternatives" was limited to the "route corridor designated by MPUC" because the Corps "does not regulate the siting of pipelines." Otherwise put, the route approved by the state agency was "the corridor in which Enbridge [was] legally obligated to construct the project under Minnesota law." Where, as here, a federal agency is "not the sponsor of a project," its "consideration of alternatives may accord substantial weight to the preferences of the applicant and/or sponsor in the siting ... of the project." City of Grapevine, Tex. v. Dep't of Transp., 17 F.3d 1502, 1506 (D.C. Cir. 1994). Plaintiffs argue that the Corps' analysis of alternatives, potential "degradation" of waters of the United States, and its public interest review was insufficient. For the reasons discussed, the Court disagrees, and finds that the Corps' discussion satisfies CWA and the associated implementing regulations. The Court concludes that the Corps complied with its obligations under the CWA to consider practicable alternatives, address whether discharged dredged or fill material would cause significant degradation to the waters of the United States, and to evaluate appropriate public interest factors. Accordingly, the Corps is entitled to summary judgment as to Plaintiffs' CWA claims. The court denies Plaintiffs' Motions for Summary Judgment.

***70. Simmons v. State,* 515 P.3d 564 (Ct. App. Wash. August 16, 2022).**

Defendants, members of the Cowlitz Indian Tribe who lived on the Quinault Reservation, were convicted in a bench trial in the Superior Court, Grays Harbor County, David L. Edwards, J., of first and second-degree unlawful fishing. Defendants appealed. The Court of Appeals, Price, J., held that Cowlitz Tribe's off-reservation aboriginal rights to fish were extinguished by 1863 Lincoln Proclamation, and thus defendants, who were convicted of unlawful fishing, had no tribal rights to harvest shellfish on State's coast without a license.

Affirmed.

G. Gaming

71. Native Village of Eklutna v. U.S. Department of the Interior, No. 19-cv-2388 (DLF), 2021 WL 4306110 (D.D.C. September 22, 2021).

One problem has always plagued most Alaska Native governments—the lack of a clearly defined territory subject to their jurisdiction. The complexity of this problem—and what sets it apart from federal-Indian relations in the Lower 48—is due in no small part to Alaska-specific federal statutes and the lack of treaties between Alaska Natives and the federal government. As a result, when it comes to federal-Indian relations, "Alaska is often the exception, not the rule." Yellen v. Confederated Tribes of the Chehalis Rsrv., 141 S. Ct. 2434, 2438 (2021). In this action, the Native Village of Eklutna ("Tribe" or "Eklutna") challenges the Department of the Interior's ("Interior") rejection of its application for an "Indian lands" determination under the Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. § 2701 et seq.), as arbitrary and capricious and contrary to law under the Administrative Procedure Act (APA). Before the Court is Plaintiff's Partial Motion for Summary Judgment Interior's Cross-Motion for Summary Judgment and Alaska's Cross-Motion for Summary Judgment. For the reasons that follow, the Court will grant summary judgment in favor of Interior and Alaska and deny the plaintiff's motion. Eklutna is a federally recognized Indian tribe of the Dena'ina people whose traditional homeland is the upper Cook Inlet region of Alaska. A tribal council exercises the Tribe's inherent sovereign powers under a constitution enacted in 1996. In June 2016, the Tribe requested that the Bureau of Indian Affairs permit the Tribe to use a parcel of land known as the Ondola Allotment for gambling under Indian Gaming Regulatory Act. Eklutna submitted its request—known as an "Indian lands determination"—along with a proposed commercial lease of the Allotment for Department approval. The Ondola Allotment is an 8.05-acre parcel of land that the Bureau of Land Management issued to Olga Ondola in November 1963 under the Alaska Native Allotment Act, Pub. L. No. 59-171, ch. 2469, 34 Stat. 197 (1906), amended by Pub. L. No. 84-931, ch. 891, 70 Stat. 954 (1956). Ondola lived there until her death in 1964, and her son, George Ondola, inherited an interest in the land and lived there from 1985 until his death. In 2018, John Tahsuda, the Acting Assistant Secretary of Interior, issued a determination that the Ondola Allotment is not Indian lands under Indian Gaming Regulatory Act and thus is ineligible for an Indian gaming facility. In his letter, the Assistant Secretary explained that his analysis was governed by a 1993 opinion by then-Solicitor of Interior, Thomas Sansonetti and he rejected the Tribe's argument that the Sansonetti Opinion had been superseded by intervening changes in law. The Tribe argues that Interior's determination that the Ondola Allotment is not Indian lands under Indian Gaming Regulatory Act and thus ineligible for an Indian gaming facility is incorrect for two reasons: First, Interior applied the wrong legal standard for determining whether the Ondola Allotment is Indian lands; and second, Interior's application of the Sansonetti Opinion was arbitrary and capricious. The Court disagrees. The Sansonetti Opinion was valid in the first instance and remains so today. In 1993, the Secretary of Interior commissioned Solicitor Sansonetti "to develop the legal position of the United States on 'the nature and scope of so-called governmental powers over lands and nonmembers that a Native village can exercise after the Alaska Claims Settlement Act.' " In a 133-page opinion that Sansonetti described as "one of the most difficult to prepare during [his] tenure," he extensively reviewed the history of Alaska, its acquisition from Russia, the status of the native groups from the time of acquisition to the present, the

legislation dealing with Alaska Natives, and the various actions Interior had taken with respect to Alaska Native groups. In the case of the Alaska Native Allotments (of which the Ondola Allotment is one), Congress created "an exception to the general rule that the territorial basis for tribal authority coincides with the federal Indian country status of lands." The Alaska Native Allotments differed from allotments in the Lower 48 because (1) the Alaska Native Allotment Act "d[id] not make tribal membership a criteria for receiving an allotment," and (2) these allotments "were not carved out of any reservation," The text of the Act also provided that the allotment "shall be deemed the homestead of the allotee and its heirs." For these reasons, Sansonetti concluded that the Alaska Native Allotments were "more similar to homestead act allotments rather than tribal affiliation public domain allotments." Although the two factors Sansonetti identified—tribal membership and reservation carve-out status—may not make a difference in every comparison of Alaska and Lower 48 allotments, the Tribe is incorrect that these factors are irrelevant in determining tribal territorial sovereignty over a parcel of land. For example, there would be no "tribal jurisdiction over an Indian homestead allotment obtained by an Indian who had abandoned tribal relations" because there would be neither "indication of congressional intent to permit such jurisdiction" nor "original tribal nexus to support such jurisdiction." And the Supreme Court has long held that tribal-membership status is relevant to sovereignty analyses. See, e.g., Montana v. United States, 450 U.S. 544, 557–67 (1981). Similarly, the fact that an allotment was not carved out of a reservation also may not be dispositive of tribal jurisdiction in every case, but it too is informative: When an allotment has been carved out of a reservation, one is certain that the tribe at least once exercised sovereignty over the parcel; otherwise, not. For the foregoing reasons, the defendants' Cross-Motions for Summary Judgment are granted and the plaintiff's Motion for Summary Judgment is denied

***72. West Flagler Associates v. Haaland*, No. 21-cv-2192 (DLF), No. 21-cv-2513 (DLF), 2021 WL 5492996 (D.C. November 22, 2021).**

In August 2021, the Secretary of the Interior approved a gaming compact between the State of Florida and the Seminole Tribe of Florida. The Compact authorizes the Tribe to offer online sports betting throughout the State, including to bettors located off tribal lands. In these related cases, the plaintiffs argue that the Compact violates the Indian Gaming Regulatory Act, the Unlawful Internet Gambling Enforcement Act, the Wire Act, and the Equal Protection Clause. They accordingly ask this Court to "set aside" the Secretary's approval of the Compact pursuant to the Administrative Procedure Act. 5 U.S.C. § 706(2)(A). Before the Court are the plaintiffs' Motions for Summary Judgment in both the West Flagler case and the Monterra case the Tribe's respective Motions to Intervene and the Secretary's respective Motions to Dismiss. For the reasons that follow, the Court will hold that the Compact violates IGRA and grant the West Flagler plaintiffs' motion for summary judgment. Additionally, the Court will deny the Monterra plaintiffs' motion as moot, deny the Tribe's motions, and deny the Secretary's motions. This case concerns a class III gaming compact between the State of Florida and the Seminole Tribe of Florida. Before the Compact took effect, Florida law prohibited wagering on "any trial or contest of skill, speed[,] power or endurance." The compact in this case expanded the Tribe's ability to host sports betting throughout the State. On June 21, 2021, the Secretary of the Interior received a copy of the Compact. Because the Secretary took no action on it

within forty-five days, see id., she approved the Compact by default on August 5, see 25 U.S.C § 2710(d)(8)(C). The next day, the Secretary explained her no-action decision in a letter to the Tribe. Plaintiffs West Flagler Associates and Bonita-Fort Myers Corporation brought a civil action to challenge the Secretary's approval of the Compact. Both entities own brick-and-mortar casinos in Florida. The Tribe moved to intervene for the limited purpose of filing a motion to dismiss. The Tribe further argues that it is an indispensable party to this litigation, see Fed. R. Civ. P. 19, but that its sovereign immunity prevents its joinder. To determine whether this action "should be dismissed," the Court must determine whether "equity and good conscience" permit the action to proceed in the Tribe's absence. Fed. R. Civ. P. 19(b). Federal Rule 19(b) lists four factors that bear on whether a party is indispensable. See Fed. R. Civ. P. 19(b). Unlike in Republic of Philippines v. Pimentel, this case does not resolve the ownership of any asset to which the Tribe has a "nonfrivolous, substantive claim," which would indirectly violate the Tribe's immunity. In these circumstances, where there is "no conflict ... between the Secretary's interest and the interest of the nonparty Tribe[ ]," the D.C. Circuit has held that the Secretary may "adequately represent" the Tribe's interests. For the reasons above, the Court finds that "equity and good conscience" permit this action to continue in the Tribe's absence. Fed. R. Civ. P. 19(b). On the merits, it is well-settled that IGRA authorizes sports betting only on Indian lands. This requirement stems from IGRA § 2710(d)(8)(A), which authorizes the Secretary to approve compacts "governing gaming on Indian lands." 25 U.S.C. § 2710(d)(8)(A). The Court concludes that the Compact authorizes gaming both on and off Indian lands. The Compact accordingly violates IGRA's "Indian lands" requirement, which means that the Secretary had an affirmative duty to reject it. This disposition warrants granting the West Flagler plaintiffs' motion for summary judgment and eliminates any need to address their other arguments on the merits. The West Flagler plaintiffs' Motion for Summary Judgment is granted, the Monterra plaintiffs' Motion for Summary Judgment is denied as moot, the Tribes' Motions to Intervene are denied, and the Secretary's Motions to Dismiss are denied.

73. Sipp v. Buffalo Thunder, Inc., P.3d., No. A-1-CA-36924, 2021 WL 5823820 (N.M. Ct. App. December 8, 2021).

Plaintiff Jeremiah Sipp sued the Pueblo of Pojoaque and several Pueblo-owned entities in New Mexico state district court after he was injured at the Buffalo Thunder Resort and Casino. The district court dismissed the case for lack of subject matter jurisdiction, ruling that Sipp did not fall within the limited waiver of sovereign immunity contained in the Pueblo's Tribal-State Class III Gaming Compact. We reverse. Sipp (also known as Sage Rader) was an employee of Dial Electric, a vendor that sold lights to Buffalo Thunder for the facility's parking lot. Sipp delivered the lights and alleged that while he was moving in and out of a receiving area, a Buffalo Thunder employee abruptly lowered a garage door, causing Sipp to hit his head. Sipp claimed that he was knocked unconscious and suffered severe injuries, including a cervical spine injury that required major surgery. Buffalo Thunder is operated by the Pueblo of Pojoaque pursuant to a Tribal-State Class III Gaming Compact with the State of New Mexico, as required by the federal Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701 to 2721. Section 8(A) of the Compact addresses subject matter jurisdiction over claims for "bodily injury or property damage proximately caused by the conduct of the Gaming Enterprise" and contains both

a waiver of sovereign immunity for such claims and an express agreement to state court jurisdiction. Sipp and his wife, Hella Rader, filed a complaint for damages in state district court. Defendants filed a motion to dismiss for lack of subject matter jurisdiction under Rule 1-012(B)(1) NMRA, arguing that the Pueblo's sovereign immunity precluded the district court from hearing the suit and that the limited waiver of sovereign immunity in Section 8(A) of the Compact was inapplicable in the present case. The district court held a hearing and issued a brief order finding that Plaintiffs' allegations did not fall within Section 8(A)'s immunity waiver. The court dismissed the case. In Dalley, the Tenth Circuit Court of Appeals considered whether a tort claim occurring within a Navajo Nation casino could be heard in New Mexico state court under Section 8(A) of the Compact. Dalley, 896 F.3d at 1200. The Tenth Circuit addressed the same substantive question raised in Nash—whether IGRA permitted the Pueblo of Santa Ana to shift jurisdiction for personal injury claims not directly related to gambling activity. Dalley, 896 F.3d at 1203. The Tenth Circuit reasoned that IGRA authorized tribes to shift jurisdiction for tort claims to state court only when the claims arose from gaming activity—i.e. "the stuff involved in playing class III games." Dalley, 896 F.3d at 1207 (quoting Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 792, 134 S.Ct. 2024, 188 L.Ed.2d 1071 (2014)). Accordingly, under the plain language of the Compact, the jurisdiction-shifting provision has not terminated by its own terms, and the district court in this case was not stripped of subject matter jurisdiction on these grounds. We turn now to whether Sipp sufficiently alleged claims that fall within the Compact's immunity-waiver for visitors to a gaming facility. Defendants focus on the business purpose of Sipp's visit to Buffalo Thunder, arguing that the immunity-waiver only applies to casino patrons and not persons on the premises for other purposes. Defendants also assert that the waiver is inapplicable because Sipp was not injured in a gaming facility. We hold that Sipp's status as a visitor was sufficiently pleaded For the foregoing reasons, we reverse the district court's dismissal of Plaintiffs' lawsuit and remand for further proceedings consistent with this opinion.

74. Cal-Pac Rancho Cordova, LLC v. United States Department of the Interior, No. 2:16-cv-02982-TLN-AC, 2021 WL 5826776 (E.D. Cal. December 8, 2021).

This matter is before the Court on Plaintiffs Cal-Pac Rancho Cordova LLC, Capitol Casino, Inc., Lodi Cardroom, Inc., and Rogelio's Inc.'s (collectively, "Plaintiffs") Motion for Summary Judgment. Also before the Court is Defendants United States Department of the Interior, Secretary of the Interior Deb Haaland, and Assistant Secretary — Indian Affairs Bryan Newland's1 (collectively, "Defendants") Cross-Motion for Summary Judgment. For the reasons set forth below, the Court DENIES Plaintiffs' motion and GRANTS Defendants' motion. This case involves a challenge under the Administrative Procedure Act ("APA") to Defendants' issuance of Secretarial Procedures, which allow the Estom Yumeka Maidu Tribe of the Enterprise Rancheria (the "Tribe") — a federally recognized Indian tribe — to conduct casino gambling on a parcel of newly acquired off-reservation land in Yuba County, California (the "Yuba Parcel"). Plaintiffs make two main arguments: (1) the Secretarial Procedures were issued in violation of IGRA, as the Tribe purportedly never acquired jurisdiction or exercised governmental power over the Yuba Parcel; and (2) assuming the Tribe acquired jurisdiction and exercised governmental power, IRA violates the Tenth Amendment by reducing the State's

jurisdiction over land within its territory without its agreement. Defendant notified the Court of the Ninth Circuit's May 27, 2020 decision in Club One Casino, Inc. v. Bernhardt ("Club One II"), 959 F.3d 1142, 1145 (9th Cir. 2020), cert. denied sub nom. Club One Casino, Inc. v. Haaland, 141 S. Ct. 2792 (2021). As in the instant case, the plaintiffs in Club One II were cardrooms challenging a casino project on a parcel of off-reservation land taken into trust for a federally recognized Indian tribe. Id. at 1145. The plaintiffs in Club One II raised the same arguments Plaintiffs raise here, and the Ninth Circuit addressed those arguments in depth. In sum, the Secretary's issuance of Secretarial Procedures was not arbitrary, capricious, or otherwise not in accordance with law for any of the reasons identified by Plaintiffs. Based on the foregoing, the Clerk of Court is directed to enter judgment in Defendants' favor and close the case.

75. Kiowa Tribe v. US Department of Interior, 2022 WL 1913436 (W.D. Okla. June 3, 2022).

This matter is before the Court on the Motion for Temporary Restraining Order and Supporting Brief filed by Plaintiffs Kiowa Tribe and Comanche Nation. Plaintiffs filed this action raising three claims "to prevent an illegal casino from conducting unlawful gaming within Plaintiffs' reservation": (1) against the Federal Defendants, a declaration under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, that the Tsalote Allotment (also referred to as "Apache Wye") is not owned by FSAT; (2) against the FSA Defendants, "a declaration that [FSAT] may not conduct gaming on the Tsalote Allotment" because such gaming would violate the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701 et seq.; and (3) against the FSA Defendants, a declaration that gaming on the Tsalote Allotment by FSAT will violate RICO, 18 U.S.C. §§ 1961-1968. The Tsalote Allotment consists of 160 acres of land that lies within the boundaries of the former Kiowa-Comanche-Apache ("KCA") Reservation in present-day Caddo County in southwestern Oklahoma. In 1892, the United States "acquired a substantial portion of the KCA Reservation and allotted individual tracts of land to the individual members of the three tribes." Comanche Nation v. United States, 393 F. Supp. 2d 1196, 1200-01 (W.D. Okla. 2005). In 1901, the disputed 160 acres in this matter was allotted to George Tsalote, a Kiowa Tribe member. On June 26, 2001, the Tsalote Allotment was deeded by an unidentified "Apache, Oklahoma Indian" man and his wife to the "United States of America in trust for the Fort Sill Apache Tribe of Oklahoma." In April of 2005, DOI approved FSAT's Class III Tribal Gaming Compact with the State of Oklahoma. See 72 Fed. Reg. 15720-01 (Apr. 2, 2007). The record before the Court does not include any express correspondence or opinion from BIA or NIGC regarding FSAT's plan to open the casino facility. The Kiowa Comanche Apache Intertribal Land Use Committee ("KCA Committee") sent a letter to the NIGC objecting to the Casino and requesting agency action. Plaintiffs argue that pursuant to the 1867 Treaties of Medicine Lodge and 25 C.F.R. § 151.8, the consent of the Kiowa Tribe, Comanche Nation, and Apache Tribe was required for the Tsalote Allotment to be acquired in trust for FSAT. Plaintiffs contend that because these three tribes were not notified and did not provide consent, the Federal Defendants "lacked authority to approve" the transaction, and their actions should be set aside as arbitrary and capricious, an abuse of discretion, and contrary to law. The Federal Defendants, however, have supplied documents reflecting that all three tribes were notified in June 2001 of the United States' application to acquire the Tsalote

Allotment in trust for FSAT. Indian tribes are not exempt from § 2401(a)'s application. Sisseton-Wahpeton Sioux Tribe v. United States, 895 F.2d 588, 592 (9th Cir.), cert. denied, 498 U.S. 824 (1990). Courts have concluded that a cause of action "first accrues" for purposes of § 2401(a) " 'when all the events have occurred which fix the alleged liability of the United States and entitle the claimant to institute an action.' Plaintiffs' Complaint plausibly asserts claims against the FSA Defendants in their official capacities—i.e., it seeks a "decree" that "would operate against" "the sovereign" (FSAT), through a suit that would enable the FSAT officials "to grant [Plaintiffs] relief on behalf of [FSAT]" "because [of] the powers they possess" in their official capacities. To determine whether the Ex parte Young exception applies, [courts] need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." Muscogee (Creek) Nation v. Pruitt, 669 F.3d 1159, 1167 (10th Cir. 2012) (internal quotation marks omitted). Plaintiffs also argue that gaming on the Tsalote Allotment would violate IGRA because the land was placed in trust for FSAT in 2001, and 25 U.S.C. § 2719(a) prescribes that—subject to some inapplicable exceptions—"gaming ... shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988." 25 U.S.C. § 2719(a). Plaintiffs have not shown a clear and unequivocal right to extraordinary relief that necessitates preventing the Casino from opening as currently scheduled. For the reasons outlined herein, the Motion for a Temporary Restraining Order filed by Plaintiffs Kiowa Tribe and Comanche Nation is denied.

76. Pueblo of Pojoaque v. Wilson, 2022 WL 3139089, Civ. No. 1:21-cv-00373 MIS/JHR (D.N.M. August 5, 2022).

This matter comes before the Court on Plaintiffs Pueblo of Pojoaque, Pojoaque Pueblo Gaming Commission, and Pojoaque Gaming, Inc.'s (collectively, "the Pueblo") Motion for Summary Judgment. On May 25, 2018, Defendant Henry Martinez was visiting the Cities of Gold Casino in Santa Fe County when he slipped and fell while walking across the casino floor. The Cities of Gold Casino sits on Pueblo land and is operated by Plaintiff Pojoaque Gaming, Inc., which in turn is owned by Plaintiff Pueblo of Pojoaque, a federally recognized Indian tribe. Mr. Martinez filed suit in the First Judicial District Court of New Mexico on December 9, 2020, alleging negligence claims against defendants Cities of Gold Casino, The Pueblo of Pojoaque, Pojoaque Pueblo Gaming Commission, and Pojoaque Gaming, Inc. The Pueblo moved for dismissal on the basis that the state court lacked subject matter jurisdiction. The motion was denied on April 5, 2021. On April 23, 2021, with the state court suit ongoing, the Pueblo filed the present action in federal court seeking a declaration that the state court lacks jurisdiction over Mr. Martinez's claims. The federal complaint names Mr. Martinez and the Honorable Matthew J. Wilson, who is the presiding state court judge, as Defendants. The Compact between the Pueblo and the State of New Mexico provides, in relevant part, that visitors to the Pueblo's gaming facilities may bring a claim for bodily injury: in state district court, including claims arising on tribal land, unless it is finally determined by a state or federal court that the IGRA does not permit the shifting of jurisdiction over visitors' personal injury suits to state court. State courts may exercise jurisdiction over claims arising on Indian land "only with clear congressional authorization." Ute Indian Tribe of the Uintah & Ouray Reservation v. Lawrence, 22 F.4th 892, 903 (10th Cir. 2022)

(quotation omitted). Therefore, Mr. Martinez's state court claims against the Pueblo are only viable if the IGRA permits the shifting of jurisdiction over his claims. The difficulty in this case arises from contradictory rulings by the Tenth Circuit Court of Appeals and the New Mexico Supreme Court. First, in Doe v. Santa Clara Pueblo, the New Mexico Supreme Court held that "state courts have jurisdiction over personal injury actions filed against Pueblos arising from negligent acts alleged against casinos owned and operated by the Pueblos and occurring on pueblo lands." 154 P.3d 644, 646 (N.M. 2007). Under this interpretation, New Mexico's courts clearly have jurisdiction over Mr. Martinez's claims. Subsequently, however, in Navajo Nation v. Dalley, the Tenth Circuit held that the IGRA does not authorize tribes to shift jurisdiction over slip-and-fall tort claims to state courts unless those claims arise from "the actual playing of Class III games." 896 F.3d 1196, 1216 (10th Cir. 2018). Quoting Supreme Court precedent, the Tenth Circuit concluded this was limited to "the stuff involved in playing class III games," i.e., "each roll of the dice and spin of the wheel." Dalley, 896 F.3d at 1207 (emphasis in original) (quoting Bay Mills, 572 U.S. at 792). Under this construction, the Pueblo contends, New Mexico's courts have no jurisdiction over Mr. Martinez's claims. There is no question that this Court is bound by the Tenth Circuit's holding in Dalley. But New Mexico state courts, including the First Judicial District Court in the case at bar, have continued to apply the rule of Doe. See, e.g., Sipp v. Buffalo Thunder, Inc., 505 P.3d 897, 901 n.2 (N.M. Ct. App. 2021). The Pueblo requests only a declaration of its rights. The Court therefore concludes it likely has discretion under Brillhart to withhold its exercise of jurisdiction. In deciding whether to hear claims for declaratory relief where duplicative state proceedings exist, the court considers the following factors: [1] whether a declaratory action would settle the controversy; [2] whether it would serve a useful purpose in clarifying the legal relations at issue; [3] whether the declaratory remedy is being used merely for the purpose of "procedural fencing" or "to provide an arena for a race to res judicata"; [4] whether use of a declaratory action would increase friction between our federal and state courts and improperly encroach upon state jurisdiction; and [5] whether there is an alternative remedy which is better or more effective. State Farm Fire & Casualty Co. v. Mhoon, 31 F.3d 979, 983 (10th Cir. 1994). The Court is reluctant, as a general matter, to interfere with judicial action of the state courts. However, the Court is also cognizant that the Tenth Circuit has repeatedly interceded in cases where state courts lack jurisdiction over claims arising on Indian land—including, notably, in Dalley. 896 F.3d at 1218. It is precisely because the state court lacks jurisdiction that the interference, in this context, is minimal. For the reasons stated above, the declaratory judgment requested in the Complaint appears consistent with Tenth Circuit precedent, tailored to the needs of the case, and warranted by the underlying facts. Plaintiffs' Motion for Summary Judgment is granted.

77. Maverick Gaming LLC v. U.S., 2022 WL 4547082, Case No. 3:22-cv-05325 (W.D. Wash. September 29, 2022).

This matter comes before the Court on Shoalwater Bay Tribe's Motion for Limited Intervention. Shoalwater Bay Tribe ("the Tribe") seeks to intervene in this action for the limited purpose of moving to dismiss under Federal Rules of Civil Procedure 12(b)(7) and 19. Plaintiff Maverick Gaming LLC ("Maverick") opposes the Tribe's motion. The Court GRANTS the Tribe's motion and directs the Tribe to file its motion to dismiss no

later than September 30, 2022. This litigation concerns compacts between twenty-nine federally recognized tribes ("Washington Tribes") and the state of Washington entered under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721, and the Revised Code of Washington § 9.46.360 ("the Compacts"). The Compacts permit Washington Tribes to offer most forms of "casino-style gaming (known as 'class III' gaming under the IGRA)," most of which are legally prohibited for other non-tribal entities. Recent amendments to several of these Compacts ("the Compact Amendments") also allow multiple Washington Tribes to offer sports betting at their casinos, although it remains illegal for other casinos throughout the state. Maverick sued the United States as well as associated federal and Washington state officials under the Administrative Procedures Act and 42 U.S.C. § 1983 alleging that the Compacts and Compact Amendments create a "gaming monopoly," in violation of the IGRA, the Constitution's guarantee of equal protection, and the Constitution's anti-commandeering doctrine. Maverick filed its Complaint with the United States District Court for the District of Columbia; however, on April 28, 2022, the court transferred the case to the Western District of Washington. Common questions of fact clearly exist in this case given that the Tribe argues it is an indispensable party to litigation that implicates its interests in gaming compacts with the State of Washington to which it is a party. Moreover, Plaintiff does not rebut the Tribe's assertions that its motion to dismiss shares common questions of law and fact to Plaintiff's claims. Plaintiff fails to show intervention will cause undue prejudice or delay. The Court finds and orders that Shoalwater Bay's Motion to Intervene is granted.

H. Jurisdiction, Federal

78. Roth v. State, P.3d, Case No. F-2017-702, 2021 OK CR 27, 2021 WL 4258981 (Okla. Crim. App. September 16, 2021).

Richard Ray Roth was tried by jury and convicted of Count 1: First Degree Manslaughter, in violation of 21 O.S.2011, § 711; and Count 2: Leaving the Scene of a Fatality Accident, in violation of 47 O.S.2011, § 10-102.1, in Wagoner County District Court, Case No. CF-2013-592. Appellant must serve 85% of the sentence imposed on Count 1 before becoming eligible for parole. Appellant now appeals from these convictions and sentences. The record in this case shows twelve-year-old Billy Jack Chuculate Lord died from injuries he sustained after being struck from behind by a Chevy Tahoe driven by Appellant. Appellant drove away from the scene of the accident but later returned with his wife. Police at the scene detected a strong smell of alcohol on Appellant's breath and he admitted drinking two beers prior to the collision. Subsequent laboratory analysis of a blood sample revealed Appellant's BAC was 0.291 grams, well past the legal limit for driving. In McGirt v. Oklahoma, —— U.S. ——, 140 S. Ct. 2452, 207 L.Ed.2d 985 (2020), the Supreme Court held that the Creek Reservation in eastern Oklahoma was never disestablished by Congress and, thus, constitutes Indian Country for purposes of federal criminal jurisdiction. The parties in the present case have stipulated during remanded proceedings before the District Court that the victim was Indian and the crimes in this case occurred on the Creek Reservation. In today's decision, we uphold the District Court's adoption of these stipulations and address whether the State of Oklahoma

has concurrent jurisdiction along with the United States to prosecute crimes committed on the Creek Reservation by non-Indian defendants against Indian victims. Based on the overwhelming weight of authority governing this issue, we conclude the State has no jurisdiction to prosecute the crimes charged here due to the victim's Indian status and the occurrence of the crimes in Indian Country. We therefore reverse and remand Appellant's convictions with instructions to dismiss. We herein reject the State's concurrent jurisdiction argument. Federal law broadly preempts state criminal jurisdiction over crimes committed by, or against, Indians in Indian Country. 18 U.S.C. §§ 1151-1153. Title 18 U.S.C. § 1152, the Indian Country Crimes Act, specifically governs Appellant's case. Under Section 1152, the United States has jurisdiction in Indian Country over crimes that non-Indians commit against Indians. McGirt, 140 S. Ct. at 2479; Williams v. United States, 327 U.S. 711, 714 & n.10, 66 S.Ct. 778, 90 L.Ed. 962 (1946). Section 1152 "extends the general criminal laws of federal maritime and enclave jurisdiction to Indian country, except for those offenses committed by one Indian against the person or property of another Indian." Negonsott v. Samuels, 507 U.S. 99, 102, 113 S.Ct. 1119, 122 L.Ed.2d 457 (1993) (internal quotation omitted). Congress's authority to regulate Indian affairs in this manner is well-established and remains exclusive. The State of Oklahoma has never asserted its right under federal law to assume jurisdiction over any portion of Indian Country within its borders. McGirt, 140 S. Ct. at 2478. McGirt specifically held that federal law applied in Oklahoma "according to its usual terms" because the State had never complied with the requirements to assume jurisdiction over the Creek Reservation and Congress had never expressly conferred jurisdiction on Oklahoma. Pursuant to McGirt, the State therefore has no jurisdiction over the crimes committed in this case. We cannot ignore, or attempt to bypass, any aspect of McGirt based on the State's simple assertion of concurrent jurisdiction.

79. Blackcrow v. Confederated Salish and Kootenai Police Department, Cause No. CV 21-118-M-DLC, 2021 WL 4804359 (D. Mont. October 14, 2021).

Plaintiff Aloysius Blackcrow moves to proceed in forma pauperis with this action under 42 U.S.C. § 1983 alleging violation of his civil rights. He also asks the Court to appoint counsel to represent him. Blackcrow contends that two tribal officers, Defendants Plouff and Gray, unlawfully participated in the investigation and prosecution of the State of Montana's criminal case against him. These events began in approximately June 1996. Blackcrow is currently incarcerated in the Lake County jail, evidently on an allegation that he violated the conditions of his parole from his prison sentence for that conviction. He contends that the tribal officers lacked jurisdiction to investigate felony offenses, handle evidence, or testify in state court, see Compl. at 3, because the Confederated Salish and Kootenai Tribe has " 'misdemeanor' jurisdiction 'only,' " id. at 5. Blackcrow contends that the officers should be charged with various offenses under Montana law. Blackcrow's complaint is squarely controlled by Heck v. Humphrey, 512 U.S. 477 (1994). Before a plaintiff may recover damages or obtain any other relief under 42 U.S.C. § 1983 for an allegedly unlawful conviction or sentence, he "must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." Id. at 486–87. If a plaintiff's success in a § 1983 action would necessarily imply that his conviction or

sentence is invalid, he cannot proceed. See Edwards v. Balisok, 520 U.S. 641, 646–48 (1997). The complaint must be dismissed, not because Blackcrow does not present it clearly, but because no one may obtain relief under 42 U.S.C. § 1983 if his success would imply the invalidity of an outstanding criminal judgment.

***80. Berry v. Olsen*, Case No. 3:16-cv-00470-MMD-WGC, 2021 WL 5043984 (D. Nev. October 29, 2021).**

Petitioner Robert Logan Berry, Jr., who pleaded no contest to attempted robbery and was sentenced as a habitual criminal to ten years to life in Nevada state prison, filed a petition for writ of habeas corpus under 28 U.S.C. § 2254. This matter is before this Court for adjudication of the merits of Berry's counseled, amended petition, which alleges a single ground for relief: his judgment of conviction is void because the State of Nevada did not have jurisdiction over his crime. For the reasons discussed below, the Court denies the Petition and grants a Certificate of Appealability. Fox Peak Station, a gas station in Churchill County, Nevada, is owned by the Fallon Paiute-Shoshone Indian Tribe through its Fallon Tribal Development Corporation. Berry, a non-Indian, was charged with "attempt[ing] to rob Fox Peak by telling the clerk, Danny Luft Jr., to give him money or he would kill him and at the same time putting his hand in his coat pocket simulating a hand gun and pointing it at the clerk." Berry was arrested by the Fallon Tribal Police after Luft, who was wielding a knife, chased Berry and tackled him in the parking lot. Officer Richard Babcock of the Fallon Paiute Shoshone Tribal Police filed the criminal complaint against Berry in the Justice Court of New River Township. Before sentencing, Berry's trial counsel challenged the State's jurisdiction over his crime, arguing that it fell within federal jurisdiction. The state district court disagreed, finding that "Berry is not a Native American ... and the victim in this case," who the state district court identified as being Luft, was not a Native American. Berry's challenge to his conviction was denied on direct appeal. 28 U.S.C. § 2254(d)3 sets forth the standard of review generally applicable in habeas corpus cases under the Antiterrorism and Effective Death Penalty Act ("AEDPA"): An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. The United States has jurisdiction over public offenses committed in Indian country unless an exception applies. See 18 U.S.C. § 1152. Consent exception for state jurisdiction under Public Law 280 In 1953, Congress passed Public Law 280 ("Public Law 280"), which gave "[t]he consent of the United States" to States, including Nevada, "not having jurisdiction with respect to criminal offenses [by or against Indians in Indian country,] ... to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative jurisdiction action, obligate and bind the State to assumption thereof." Pub. L. No. 280, 67 Stat. 590 (1953). In 1955, Nevada enacted its first version of NRS § 41.430, in which it assumed "jurisdiction over public offenses committed by or against Indians in the area of Indian country in Nevada" except for areas of Indian country that the Nevada governor excluded by proclamation. See 1955 Nev. Stat., ch.

198, §§ 1, 2, 3, at 297. In 1968, Congress enacted 25 U.S.C. § 1321. See Pub. L. No. 90-284, 82 Stat. 78 (1968). This statute did not affect Public Law 280 jurisdiction for states that had already assumed jurisdiction. However, from that date forward, the law required Indian tribes to consent, through a special election, before a state could assume jurisdiction over crimes committed by and against Indians in Indian country. See 25 U.S.C. § 1321(a)(1). In 1973, Nevada amended NRS § 41.430 to its current form. See 1973 Nev. Stat., ch. 601, § 1, at 1051. NRS § 41.430(1) provides that "the State of Nevada ... assume[s] jurisdiction over public offenses committed by or against Indians in the area of Indian country in Nevada ... subject only to the conditions of subsection 3 and 4." Importantly, NRS § 41.430(4) provides that "the State of Nevada ... recedes from and relinquishes jurisdiction over any" area "within th[e] state wherein the Indian tribe occupying any such area has failed or refused to consent to the continuation of state jurisdiction." The parties do not appear to dispute that the Fallon Paiute-Shoshone Tribe did not give prior consent to Nevada assuming jurisdiction over its territory. Consequently, by its terms, this consent exception for state jurisdiction does not apply. Nevada has jurisdiction over state-law crimes that non-Indians commit in Indian country against non-Indians within the State of Nevada. See United States v. McBratney, 104 U.S. 621, 624 (1882); see also McGirt v. Oklahoma, 140 S.Ct. 2452, 2460 (2020). Based on the state law's implementation of federal law, the Court determines that Berry has not rebutted the strong presumption that the Nevada Supreme Court adjudicated the federal claim on the merits. The parties do not dispute that Berry is a non-Indian and do not appear to dispute that Fox Peak Station is part of Indian country. Thus, the applicable question under McBratney is whether Berry's crime was committed against an Indian or a non-Indian. Respondents argue that Luft, a non-Indian, was the victim of the attempted robbery. Berry, however, contends that the McBratney exception should be construed narrowly, allowing the State to exercise jurisdiction over an offense in Indian country only if the offense does not involve or affect Indians. Looking at the language of the crime, under either 18 U.S.C. § 2111 or NRS § 200.380(1), the Fallon Paiute-Shoshone Tribe, through its Corporation, was not directly involved in or affected by the attempted robbery. Attempted robbery requires that Berry use force, violence, and/or intimidation in an attempt to take property. Berry cannot be said to have used force, violence, and/or intimidation against the Corporation, an incorporeal entity. Instead, due to the nature of the crime of attempted robbery—as compared to a crime against property, e.g., theft or burglary—it is apparent that Berry committed attempted robbery by use of force, violence, and/or intimidation only against Luft. This is a final order adverse to Berry. Rule 11 of the Rules Governing Section 2254 Cases requires the Court to issue or deny a certificate of appealability ("COA"). Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner "has made a substantial showing of the denial of a constitutional right." With respect to claims rejected on the merits, a petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." For procedural rulings, a COA will issue only if reasonable jurists could debate (1) whether the petition states a valid claim of the denial of a constitutional right and (2) whether the court's procedural ruling was correct. See id. Applying these standards, the Court finds that a certificate of appealability is warranted for ground 1. Reasonable jurists could debate whether the Fallon Paiute-Shoshone Tribe, through its Corporation, was involved in or affected by Berry's attempted robbery. It is

therefore ordered that the petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is denied. It is further ordered that a certificate of appealability is granted.

***81. United States v. Jackson*, 8:19-CR-348, 2021 WL 5868278 (D. Neb. December 10, 2021).**

This matter is before the Court for initial review of Defendant's, Bernard Jackson's, Motions under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody ("§ 2255 Motion"). The Court denies Defendant's motions. The Indictment charged Defendant with one count of strangulation in violation of 18 U.S.C. §§ 113(a)(8) and 1153 and one count of domestic assault by a habitual offender in violation of 18 U.S.C. § 117(a). At trial, Defendant stipulated that he "had a final conviction on at least two separate prior occasions in Federal, State, or Indian tribal court proceedings for offenses that would be, if subject to Federal jurisdiction, an assault against a spouse or intimate partner." The language of the Stipulation tracks one of the elements of § 117(a) as charged in Count II. The jury convicted Defendant on both counts. Defendant asserts his conviction on Count II must be vacated. Defendant's first three grounds are inappropriate for consideration under § 2255. Although the wording of § 2255 may appear comprehensive and broad, the Supreme Court has specifically instructed that § 2255 "does not encompass all claimed errors in conviction and sentencing." United States v. Addonizio, 442 U.S. 178, 185 (1979). Rather, the "permissible scope of a § 2255 collateral attack on a final conviction or sentence is severely limited." Sun Bear v. United States, 644 F.3d 700, 704 (8th Cir. 2011). Section 2255 is reserved for (1) remedying constitutional or jurisdictional errors, or (2) correcting errors of law only when the "claimed error constituted 'a fundamental defect which inherently results in a complete miscarriage of justice.' " Id. To the extent Defendant argues federal statutes applying to criminal behavior in "Indian country" are unconstitutional, the Supreme Court rejected this argument in United States v. Antelope, 430 U.S. 641 (1977). The Court reasoned that "federal regulation of Indian affairs is not based upon impermissible classifications. Rather, such regulation is rooted in the unique status of Indians as 'a separate people' with their own political institutions." Id. at 646. Accordingly, federal criminal statutes such as the Major Crimes Act, 18 U.S.C. § 1153, "are based neither in whole nor in part upon impermissible racial classifications." Id. at 647. The Supreme Court in Antelope also rejected Defendant's apparent equal-protection argument. The court in Antelope specifically held that a disparity between state law and federal law "does not violate equal protection when [the federal government's] own body of law is evenhanded, regardless of the laws of States with respect to the same subject matter." Id. A Judgment will be entered, denying the § 2255 Motion.

***82. Newtok Village v. Patrick*, F.4th, No. 21-35230, 2021 WL 6061565 (9th Cir. December 22, 2021).**

Severe coastline erosion caused by the rapidly shifting Ninglick River has forced Newtok to relocate its coastal village inland to a new village site. Throughout this historic, challenging, and ongoing relocation, two factions of Newtok Village leaders—the Newtok Village Council (New Council)1 and the former Newtok Traditional Council (Old Council) —have engaged in an internecine dispute. At issue is who speaks for the Tribe in accomplishing the move and beyond. The Department of Interior Bureau of

Indian Affairs (BIA) chose to recognize the New Council as Newtok's governing body. But the BIA strictly limited this recognition to Indian Self-Determination and Education Assistance Act (ISDEAA) contract-related purposes addressing relocation and other tribal services underwritten by federal funds. In 2015, the New Council sued the Old Council in the United States District Court for the District of Alaska, seeking an injunction to prohibit former Old Council members and tribal administrators from misrepresenting themselves as the Tribe's legitimate governing body to federal, state, and private agencies and persons. The district court concluded it had subject matter jurisdiction to hear the case, entered a default judgment after the Old Council did not defend the lawsuit, and awarded the injunctive relief the New Council sought. Five years later, the Old Council filed a motion to set aside the default judgment and vacate the permanent injunction as void and lacking any federal jurisdictional basis. In March 2013, the BIA advised both Councils of BIA policies regarding resolution of internal tribal disputes. The BIA informed them that for purposes of self-determination contracts it "has a duty to determine the authorized representatives of the governing body of Newtok" by soliciting information from both Councils to support their respective positions about their authority to govern. On July 13, 2013, after considering documentation submitted by the New Council, the BIA declared the New Council to be the governing body of Newtok Village "for the limited purposes of taking [ISDEAA] contract-related actions ... for services to Newtok and its members." On December 29, 2020, over five years after the district court had entered the default judgment and permanent injunction, the Old Council finally retained legal counsel and filed its motion to set aside both decrees under Federal Rules of Civil Procedure 55(c) and 60(b)(4). The court ultimately left standing the default judgment and permanent injunction. The district court also granted the New Council's second attorney fees motion. Appeals followed. The New Council's claims as pleaded simply do not arise under the Constitution, laws, or treaties of the United States. We look in part to our decision in Littell v. Nakai for support. See Peabody Coal Co., 373 F.3d at 949, 951 (citing 344 F.2d 486, 487–90 (9th Cir. 1965)). Littell concerned a tortious interference with contract claim by the Navajo Nation's General Counsel against the Chairman of the Navajo Tribal Council. 344 F.2d at 487. We held the complaint did not present a federal question because the claim required interpreting the contract itself. The only reference here to any federal law in the complaint lies in the facts section: As a federally recognized Indian tribe, Newtok Village ... entered into contracts with the Bureau of Indian Affairs ("BIA") pursuant to the Indian Self-Determination Act, (P.L. 93-638, as amended; 25 USC § 450 et. seq.) ("638"), as well as other state and federal contracts and grants. This citation alone, however, cannot convert the New Council's claims into a federal cause of action. We therefore conclude that as currently pleaded federal law does not create the New Council's causes of action. See id. at 949; Chilkat, 870 F.2d at 1472–74. The tribe in Chilkat brought claims against members and nonmembers regarding the removal of tribal artifacts, alleging violations of the tribal ordinances and 18 U.S.C. § 1163, a federal embezzlement statute relating to Indian tribes. Id. at 1471. We held that § 1163 did not create a private right of action and that no "federal foundation" underlay what amounted to conversion claims. Id. at 1472. The default judgment, permanent injunction, and the March 26, 2021, order awarding attorney fees are vacated. Further, we remand this case and direct the district court to enter an

order of dismissal without prejudice to repleading the complaint if the plaintiffs can establish a federal foundation for their claims.

83. Accohannock Indian Tribe v. Tyler, 2021 WL 5909102, Civil Case No. SAG-21-02550 (D. Maryland December 14, 2021).

Plaintiffs sought declaratory, injunctive, and monetary relief for alleged constitutional and statutory violations. For the reasons stated herein, this Court shall abstain from exercising jurisdiction over this case. Furthermore, even if abstention were not warranted, Counts I-II of Plaintiffs' Complaint would remain subject to dismissal because they ask this Court to review the actions of a state court, contrary to the *Rooker-Feldman* doctrine. In 2020, Baldwin, Tyler, and Wimbrow (hereinafter referred to as "State Court Plaintiffs") filed suit against Hinman in Somerset County, Maryland Circuit Court individually and on behalf of the Tribal Corporation. As relevant here, State Court Plaintiffs alleged that Hinman had served as chair of the Tribe since 2015, during which time he committed numerous *ultra vires* acts in violation of his fiduciary duties, including by unilaterally disposing of tribal assets. Hinman subsequently refused to recognize the results of a tribal election, or to acknowledge the legitimacy of the new tribal leadership in which State Court Plaintiffs served. This Court concluded that resolution of whether the Accohannock is a "tribe" pursuant to federal law, such that it enjoys sovereign immunity, was necessarily precedent to this Court's determination as to its own subject matter jurisdiction and the appropriateness of its exercise of such jurisdiction. To enjoy immunity from suit, an Indian tribe must be recognized as such under federal law. Plaintiffs here cannot demonstrate continuity between the Tribe and the historic Accohannock. Put differently, Plaintiffs fail to carry their burden of showing that the Tribe is a modern-day successor to, rather than a recreation of, a historic sovereign entity. This Court has determined that the Tribe did not meet its burden of showing its status as a federal common law tribe entitled to sovereign immunity. Nor is the Tribe otherwise federally recognized. The State Case does not, therefore, implicate weighty national interests such as the regulation of Indian affairs or the safeguarding of Indian tribal sovereignty, which may otherwise counsel against abstention. Rather, the State Case turns on the application of Maryland law to a domestic entity. Put differently, this Court discerns no countervailing federal interest sufficient to interfere with the enforcement of an order issued by a state court of competent jurisdiction in furtherance of its core judicial functions in an ongoing proceeding. Plaintiffs' Complaint is dismissed as to Counts I-II. Further proceedings as to Counts III-IV are stayed pending the resolution of the State Case.

84. Grondal v. United States, 2021 WL 6141485, No. 20-35694 (9th Cir. December 30, 2021).

Decades ago, a group of recreational vehicle ("RV") owners purchased fifty-year memberships to the RV park on a plot of land in Eastern Washington known as the Moses Allotment Number 8 ("MA-8"). However, the park's management had validly leased the park's land from its landowners for only twenty-five years. The panel affirmed the district court's grant of the Bureau of Indian Affairs' motion for summary judgment and ejectment order in an action brought by the RV owners seeking to retain their rights to remain on a lakeside RV park located on American Indian land held in trust by the

Bureau. The panel first held that the MA-8 land remains held in trust by the United States, and the BIA, as holder of legal title to the land has standing to bring its claim for trespass and ejectment against Mill Bay. The panel held that transactions and trust extensions in MA-8's history that appellants challenged were not legally deficient. The panel rejected the assertion that the MA-8 allotments vested legal title in the IAs in fee simple rather than in trust. The panel noted that the Supreme Court in *Starr v. Long Jim*, 227 U.S. 613, 621–22 (1913), held that the 1883 Moses Agreement and its implementing legislation, the Act of July 4, 1884, did not guarantee title in fee but instead permitted the United States to hold the allotments in trust. The panel held that the Act of June 21, 1906, gave President Wilson the lawful authority to extend the trust period of the Moses Allotments through his 1914 executive order. The panel also rejected appellants' argument that MA-8's trust period was not properly extended in 1936 after the passage of the 1934 Indian Reorganization Act ("IRA"). Based on the well-reasoned conclusion of the district court and the weight of the evidence, the panel rejected the argument that the Moses Allotments were non-reservation land outside of the scope of the 1934 IRA and its 1935 Amendment. The district court concluded the equitable estoppel defense was not available under *United States v. City of Tacoma*, 332 F.3d 574 (9th Cir. 2003), which holds that the United States is not subject to equitable estoppel when it acts in its sovereign capacity as trustee for Indian land. The panel concluded that *City of Tacoma* was not distinguishable, and that Mill Bay was barred from asserting its defense of equitable estoppel against the BIA. Affirmed.

***85. Berry Creek Rancheria of Maidu Indians of California v. Howard*, No. 2:20-CV-2109-JAM-DMC-P, 2022 WL 43696 (E.D. Cal. January 5, 2022).**

Pending before the Court is Plaintiff's motion for entry of a default judgment. This action proceeds on Plaintiff's original complaint. Plaintiff names the following as defendants: (1) Deborah Howard, aka Deborah Brown; and (2) Jessie Brown. Plaintiff offers the following summary of the case: ... This action concerns a continuing pattern of fraud and money laundering at the federally-recognized Berry Creek Rancheria of Maidu Indians of California ("Berry Creek" or "Tribe") by two former in-house professionals who were entrusted to look after its financial and business affairs. As to that, Berry Creek separately hired a woman named Deborah Howard ("Ms. Howard") to serve as its Chief Financial Officer and a man named Jesse Brown ("Mr. Brown") to act as its Tribal Administrator. However, at some point in time on or before the start of 2011, these two individuals who have since married entered a discreet personal relationship and used their resultant joint power to supervise both the finances and business affairs of the Tribe to carry out a scheme centered around misappropriating tribal assets on a grand scale. Ms. Howard and Ms. Brown did this in four unique ways that the General Allegations section of this Complaint will discuss in significant detail: by (1) issuing a secret credit card to Mr. Brown on which they would make more than $1.3 million in personal expenditures; (2) misappropriating over $200,000 in cash withdrawals over the course of five Holiday seasons that were meant to provide Christmas gifts to tribal youth; (3) skimming more than $1.1 million of cash receipts from the Smoke Shop operated by Berry Creek before depositing the remainder of the funds into the Tribe's bank account; and (4) giving themselves upwards of $250,000 in unauthorized payroll distributions by manipulating the system managed by Ms. Howard. This course of conduct went on for years, involved

thousands of individual transactions, and was only discovered long after Ms. Howard and Mr. Brown's departures from the Tribe in 2017 when the bank finally disclosed the existence of the aforesaid credit card. None of this activity was authorized, and all of it should serve as a basis for Berry Creek obtaining treble damages or more under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 et seq., and assorted California tort claims. Plaintiff filed its complaint on October 22, 2020. Process was returned executed on both named defendants. On January 7, 2021, Plaintiff requested entry of default as to both defendants. The Clerk of the Court entered Defendants' defaults. Plaintiff's motion for default judgment has been served on Defendants at their personal addresses. To date, Defendants have not appeared in the action or otherwise responded to Plaintiff's motion. Following an initial hearing on June 2, 2021, before the undersigned in Redding, California, the matter was taken under submission. Whether to grant or deny default judgment is within the discretion of the Court. Where a defendant has failed to respond to the complaint, the Court presumes that all well-pleaded factual allegations relating to liability are true. Applying the foregoing, the Court finds that Plaintiff has established at least a de minimis nexus to interstate commerce. First, there is evidence of a direct effect on interstate commerce to the extent Defendants, or either of them, used misappropriated tribal funds to travel to Las Vegas, as alleged and established by the evidence submitted in support of the current motion. Second, there is evidence of an aggregate impact on interstate commerce from the various in-state activities alleged and shown by the evidence, such as purchasing a business in Oroville, California. Based on the foregoing, the undersigned recommends that: Plaintiff's motion for a default judgment be granted. Plaintiff are awarded $8,816,976.81 in damages; Plaintiff be awarded an additional $1,612.64 in costs; and Plaintiff be awarded pre- and post-judgment interest at a rate of 7% in an amount to be determined following submission of a declaration by Plaintiff. These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l).

***86. Cross v. Fox,* No. 20-3424, 23 F.4th 797 (8th Cir. January 14, 2022).**
Members of Indian tribe brought action alleging that provisions in tribal constitution requiring nonresidents to return to reservation to vote in tribal elections and prohibiting nonresidents from holding tribal office violated Voting Rights Act (VRA) and Indian Civil Rights Act (ICRA). The United States District Court for the District of North Dakota, Daniel M. Traynor, J., 497 F.Supp.3d 432, dismissed complaint, and plaintiffs appealed. The Court of Appeals, Gruender, Circuit Judge, held that: 1 plaintiff lacked standing to challenge provision of tribal constitution prohibiting nonresidents from holding tribal office; 2 claim that tribal constitution violated VRA was patently meritless; and 3 ICRA did not provide private right of action. Affirmed. On Appeal; Motion to Dismiss for Lack of Subject Matter Jurisdiction.

***87. Mitchell v. Kirchmeier,* No. 20-1339, 18 F.4th 888 (8th Cir. March 14, 2022).**
Native American arrestee brought § 1983 action against various county and state officials, alleging violations of his First, Fourth, and Fourteenth Amendment rights in connection with his arrest while protesting against construction of oil pipeline across tribal land. The United States District Court for the District of North Dakota, Daniel M.

Traynor, J., granted defendants' motion to dismiss for failure to state claim. Arrestee appealed. The Court of Appeals, Gruender, Circuit Judge, held that: 1 Heck did not bar arrestee's First Amendment claims; 2 neither officers' alleged initiation of "pushes" in effort to move protesters off bridge, nor arrestee's announcement in Lakota that "water is life" shortly before officers shot him with bean bags and arrested him, gave rise to plausible inference that officers acted out of retaliatory animus; 3 officers' alleged use of force in shooting arrestee with bean bags that shattered his eye socket was excessive in violation of Fourth Amendment; 4 arrestee stated § 1983 municipal liability claim based on alleged Fourth Amendment violations; 5 arrestee stated § 1983 claim against state highway patrol sergeant for failure to intervene; 6 arrestee failed to state § 1983 equal protection claim; and 7 district court did not abuse its discretion in dismissing complaint with prejudice. Affirmed in part, reversed in part, and remanded.

***88. Hawk v. Burr and Baker*, Case No. 21-C-1301, 2022 WL 889385 (D.C. E.D. Wisc. Case No. 21-C-1301 March 25, 2022).**

Plaintiff Daniel Hawk has filed a complaint against Defendants Rebecca Burr and Diane Baker in response to a Notice of Trespass issued against him by Baker. Baker is the Superintendent of the United States Department of the Interior Bureau of Indian Affairs (BIA), and both Hawk and Burr are apparently members of the Stockbridge-Munsee Tribe of Indians. Defendant Baker filed a motion to dismiss the complaint, asserting that Hawk's claims are not ripe for adjudication and that the complaint fails to state a claim upon which relief can be granted. Hawk filed a motion to stay the case. For the following reasons, Hawk's motion for a stay will be denied and Baker's motion to dismiss will be granted. At the request of the Stockbridge-Munsee Tribe, the BIA issued a "Notice of Trespass—Order to Cease and Desist" to Hawk. The Notice states that Hawk is occupying property on a parcel of land in trust status; that Hawk is not a co-owner, nor is there a lease to you, and thus you do not have the authority to place or maintain any personal property on the trust allotment. The Notice advised Hawk that the unauthorized possession or use of trust land is a trespass and that the BIA "may take action to recover possession, including eviction, on behalf of Indian landowners . . . ." *Id.* However, the BIA does not have the authority to remove Hawk from the property until it institutes an administrative or judicial proceeding against him, and it has not initiated such proceedings. In short, Hawk's claims are speculative, are contingent on the occurrence of future events, and are not ripe for judicial review. Hawk has filed a motion to stay this action to allow him to apply for a lease from his great aunt and submit it to the BIA for approval. Because Hawk's claims are not ripe for adjudication, the Court lacks subject matter jurisdiction over his claims against Baker. Dismissed.

***89. Justin Hooper, v. City of Tulsa*, Case No. 21-cv-165-WPJ1-JFJ, 2022 WL 1105674, (D. Okla. No. 21-cv-165 April 13, 2022).**

Plaintiff, as a member of the federally recognized Choctaw Tribe, is an Indian by law. In 2018, he received a speeding ticket from the City of Tulsa within the boundaries of the Creek Reservation. He was found guilty by Tulsa's municipal criminal court and was ordered to pay a $150 fine, which was paid. The Curtis Act, 30 Stat. 495, became federal law in 1898. The section of the law at issue in this case, however, is Section Fourteen, which deals with Indian Territory state and municipal law and ordinances. On a

municipal law level, this provision allowed for incorporation of cities and towns with two hundred or more residents. It stated that once incorporated, the city or town government "shall possess all the powers and exercise all the rights of similar municipalities in said State of Arkansas." *Id.* Additionally, Section Fourteen granted city or town councils the authority to pass ordinances and gave the mayors of such towns "the same jurisdiction in all civil and criminal cases arising within the corporate limits of such cities and towns as, and coextensive with, United States Commissioners in the Indian Territory[.]" *Id.* And most importantly, the law provided that "all inhabitants of such cities and towns, without regard to race, shall be subject to all laws and ordinances of such city or town governments, and shall have equal rights, privileges, and protections therein." *Id.* Plaintiff contends that because of *McGirt's* holding, "the state of Oklahoma and its political sub-divisions are without subject matter jurisdiction to try criminal cases against defendants that are classified as 'Indian' under federal law" and that because of this, the municipal court lacked subject matter jurisdiction over his conviction. This characterization of *McGirt's* holding is incorrect. *McGirt* makes no mention of municipal jurisdiction and only briefly mentions the Curtis Act in the dissent. The Court grants the motion to dismiss this request for declaratory judgment and finds that the Curtis Act grants the municipalities in its scope jurisdiction over violations of municipal ordinances by any inhabitant of those municipalities, including Indians.

90. Southcentral Foundation, v. Alaska Native Tribal Health Consortium,
2022 WL 1194149, Case No. 3:17-cv-00018-TMB (D. Alaska April 21, 2022).

This matter comes before the Court on Defendant Alaska Native Tribal Health Consortium's ("ANTHC") Motion for Judgment on the Pleadings for Failure to Join Parties under Federal Rule of Civil Procedure 19. ANTHC argues the Tribal participants represented on its Board of Directors ("Board") are required parties to this case and because the Tribal participants cannot be joined, the Court must dismiss this lawsuit. ANTHC is an intertribal consortium created by Congress to provide statewide health services at the Alaska Native Medical Center ("ANMC") in accordance with section 325 of the Department of the Interior and Related Agencies Appropriation Act of 1998, Pub. L. No. 105-83, 111 Stat. 1543, ANTHC is empowered to "enter into contracts, compacts, or funding agreements ... to provide all statewide health services provided by the Indian Health Services of the Department of Health and Human Services through the [ANMC] and the Alaska Area Office." A 15-member Board of Directors ("Board") governs ANTHC. Thirteen of the Board's directors ("Directors") represent specific regional health entities ("RHEs"). The remaining two Directors represent the "Indian tribes, as defined in 25 U.S.C. 450b(e), and sub-regional tribal organizations which operate health programs not affiliated with the [RHEs] listed above and Indian tribes not receiving health services from any tribal, regional or sub-regional health provider." The Board maintains the power to amend its bylaws ("Bylaws"), code of conduct policy ("Code of Conduct Policy"), and disclosure of records and information policy ("Disclosure Policy"). In an interlocutory appeal, the Ninth Circuit found that Section 325 "endowed each specified [RHE] with the right to have a 'representative' on the Board that stands in the shoes of the designating entity by acting on its behalf." The Ninth Circuit concluded that because SCF is an RHE with a representative on the Board, "Section 325 conferred governance and participation rights to SCF, which necessarily includes an entitlement to

information necessary to effectively exercise those rights." This suit will not impair a party's contractual rights. Even if governance documents share some similarities to contracts, a prospective court order is unlikely to "cause the entire tapestry of the agreement to unravel." Here SCF asks the Court only to determine whether ANTHC's Board has violated federal law and declare what Section 325 requires. As SCF argues, the absent Tribal participants will remain empowered to negotiate ANTHC's governance documents and the only hypothetical limitation this Court may impose would be that any future policies, procedures, and practices must comply with Section 325. In light of the nature of the relief sought; the fact ANTHC is more than capable and willing to defend its policies, practices, and procedures; and that no party has pointed to arguments that would be raised but for the Tribal participants' absence, the Court finds that the absent Tribal participants' interests are adequately represented by the existing parties.

***91. Heuvelink v. Cruz*, Civil Action No. H-22-1228, 2022 WL 1762931 (D. Texas May 20, 2022).**

This case was removed from the 312th District Court of Harris County, Texas, based on diversity jurisdiction and federal question jurisdiction. Pending before the court is Plaintiff's First Amended Motion for Remand and Defendant's Response to Dismiss With Prejudice to Plaintiff's Remand. Plaintiff, Danielle Heuvelink ("Plaintiff"), sued defendant, Santiago Cruz ("Defendant"), in the 312th District Court of Harris County, Texas, seeking enforcement of a divorce decree entered by that court on November 6, 2018.2 No federal claims are asserted in the petition. Under 28 U.S.C. § 1441(a), any state court civil action over which a federal court would have original jurisdiction may be removed from state to federal court. Diversity jurisdiction requires complete diversity, that is, "a district court cannot exercise diversity jurisdiction if one of the plaintiffs shares the same state citizenship as one of the defendants." Whalen v. Carter, 954 F.2d 1087, 1094 (5th Cir. 1992). Diversity of citizenship does not exist between a citizen of a State and citizens of a foreign state who are lawfully admitted for permanent residence in the United States and domiciled in the same state. 28 U.S.C. § 1332(a)(2). The Motion to Remand states that Plaintiff is a lawful permanent resident of the United States and is domiciled in Texas. Plaintiff's residence is supported by her driver's license and resident alien card. The Motion to Remand further states that Defendant is a citizen of Texas. Defendant does not dispute that he is a Texas citizen. Instead, Defendant contends that diversity exists because he is a Native American and a member of the Apache Tribe.6 Defendant has submitted an email that appears to show that he was appointed as "an ex-officio (E.O.) Council member serving in the post of 'Aide/Adviser.' " The court concludes that the parties are not diverse, and therefore it cannot exercise diversity jurisdiction over this action. See 28 U.S.C. § 1332(a); Whalen, 954 F.2d at 1094. Federal district courts have original jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. "[A] suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution." Louisville & Nashville Railroad Co. v. Mottley, 29 S. Ct. 42, 43 (1908). Generally, "[t]he presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint."

Caterpillar Inc. v. Williams, 107 S. Ct. 2425, 2429 (1987). Defendant's Response mentions the Constitution of the United States, but it does not explain how enforcement of a divorce decree is a cause of action "arising under the Constitution, laws, or treaties of the United States." See 28 U.S.C. § 1331. Plaintiff seeks reimbursement of attorney's fees incurred due to Defendant's improper removal. Motions for remand are governed by 28 U.S.C. § 1447(c), which states in pertinent part that [i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. "Absent unusual circumstances, courts may award attorney's fees under § 1447 (c) only where the removing party lacked an objectively reasonable basis for seeking removal." Martin v. Franklin Capital Corp., 126 S. Ct. 704, 711 (2005). The court concludes that Defendant had no objectively reasonable basis for seeking removal, and thus Plaintiff's request for reimbursement of attorney's fees will be granted. For the reasons explained above, the court concludes that Defendant has failed to meet his burden of establishing that federal jurisdiction exists and that removal was proper. Accordingly, Plaintiff's First Amended Motion for Remand is granted, and defendant Santiago Cruz, Jr. is ordered to pay to plaintiff Danielle Heuvelink $1,750.00 in attorney's fees.

***92. Nygaard v. Taylor,* 2022 WL 1487455, 3:19-cv-03016-RAL (D.S.D. May 11, 2022).** The central issue in this case is whether the Parental Kidnapping Prevention Act (the PKPA), 28 U.S.C. § 1738A, applies to Indian tribes. There is a split of authority on that question. After reviewing the text of the statute, its purpose, and the authority on point, this Court determines that the PKPA does not apply to Indian tribes. As such, this Court grants Defendants Brenda Claymore, the Cheyenne River Sioux Tribal Court of Appeals, and Franklin Ducheneaux's Motion for Summary Judgment. Defendants South Dakota Department of Social Services, Jenny Farlee, and Todd Waldo's Motion to Dismiss for Failure to State a Claim is granted as well. Plaintiff Aarin Nygaard is the father of C.S.N., and Plaintiff Terrence Stanley is the father of T.R.S. Tricia Taylor (Tricia) is the mother of both children and is an enrolled member of the Cheyenne River Sioux Tribe. Custody of C.S.N. and T.R.S. has been the subject of multiple court proceedings in North Dakota state court and Tribal Court, dating back to early 2014. Nygaard and Tricia were in a relationship, though they were never married and lived together in North Dakota. Nygaard initiated a custody proceeding in the state district court for Cass County, North Dakota. Nygaard requested that the court award him primary residential responsibility of C.S.N. Tricia filed an answer and counterclaim, requesting primary residential responsibility of C.S.N. Nygaard and Tricia subsequently agreed to equally share decision-making and residential responsibility over C.S.N. while the custody proceedings remained pending. Without giving advance notice to Nygaard or obtaining court approval, Tricia took C.S.N. to the Cheyenne River Indian Reservation in South Dakota. Nygaard and Tricia had arranged to exchange C.S.N. on September 1, 2014, but Tricia failed to do so. Tricia filed a Petition for Domestic Violence Protection Order against Nygaard in Cheyenne River Sioux Tribal Court and included in her petition a request for full custody of C.S.N. On that same day, the Tribal Court issued a Temporary Protection Order against Nygaard. Meanwhile in North Dakota state court, Nygaard filed an application for an ex parte order and a motion asking the court to hold Tricia in contempt

for failing to comply with the July 25 interim order. The North Dakota state court on September 12, 2014, issued an ex parte order determining that Nygaard and C.S.N.'s home state was North Dakota, ordering Tricia to return C.S.N. to North Dakota and into the custody of Nygaard, and placing immediate temporary care, custody and control with Nygaard until the court ordered otherwise. Nygaard filed in Tribal Court a Petition to Enforce Foreign Judgment of Custody and Visitation, attaching the North Dakota court's September 12 ex parte order granting Nygaard full temporary custody and ordering Tricia to return C.S.N. When Tricia still had not returned C.S.N. to North Dakota, the North Dakota court on October 20, 2014, issued a bench warrant for Tricia's arrest. The Cass County Attorney also brought criminal charges against Tricia for parental kidnapping, and a warrant for her arrest on those charges issued. Nygaard filed the Amended Interim Order, the Bench Warrant, and other North Dakota case materials in the Tribal Court case where he was seeking to enforce the North Dakota custody decision. On November 26, 2014, Tricia was arrested by the Federal Bureau of Investigation (FBI) on the Cheyenne River Sioux Indian Reservation. The FBI agent enlisted the help of a criminal investigator of the Cheyenne River Sioux Tribe Law Enforcement Services, and someone in law enforcement asked the South Dakota Department of Social Services (DSS) to have social workers present at the time of Tricia's arrest for the children's welfare. Tricia then was transported to Cass County, North Dakota, to face state charges of parental kidnapping. In 2015, Chief Judge Claymore issued a temporary custody order granting custody of the children to Ducheneaux until further order of the Tribal Court. In that order, Chief Judge Claymore declared that the Tribal Court had both subject matter and personal jurisdiction to hear the case. On December 22, 2015, the Tribal Court issued an order denying Nygaard and Stanley's motion to dismiss. The Tribal Court explained that there were two federal enactments relevant to whether the Tribal Court had jurisdiction: the PKPA and ICWA. The Tribal Court believed that ICWA took precedence over the PKPA, and therefore, the Tribal Court need not decide whether the PKPA applied to impede the Tribal Court's jurisdiction. As recognized by the Cheyenne River Sioux Tribal Council and cited by the Tribal Defendants, a number of state and tribal courts have concluded that the PKPA does not apply to Indian tribes. These decisions turn on the absence of mention of Indian tribes in the PKPA. For instance, the Supreme Court of New Mexico noted that the "PKPA nowhere states that tribes are to be treated as states, and in fact, the words 'tribe' and 'Indian' are entirely absent." Garcia, 217 P.3d at 604. Other courts simply reject that Indian tribes are encompassed by the PKPA's definition of "state." Several of these courts have inferred that Congress deliberately omitted Indian tribes from the PKPA because Congress expressly stated that full faith and credit applies to a "territory or possession of the United States" and "Indian tribes" in other statutes. While it might have better served Congress's purposes to extend the PKPA to tribes, Congress did not write a definition of "state" in the PKPA broadly enough to apply to Indian Tribes. See 28 U.S.C. § 1738A. Fathers' claim that "a territory or possession of the United States" includes Indian tribes is belied by the common and longstanding use of these terms in statutes and case law. As one court put it: [T]he view of tribes as "territories" for the purposes of full faith and credit statutes appears to have fallen out of favor with most contemporary courts.... [R]eading "territories" to mean "tribes" would render superfluous the explicit inclusion of "Indian tribes" in Section 1738[B governing child support orders] and other statutes that on their terms apply to "territories" and also

to "tribes." Garcia, 217 P.3d at 605–06. See also Marchington, 127 F.3d at 809 (concluding that 28 U.S.C. § 1738, which applies full faith and credit to "records and judicial proceedings of any court of any such State, Territory or Possession," "did not extend full faith and credit to the tribes" by its plain language) (emphasis added). This Court recognizes that this interpretation of the PKPA does not prevent "jurisdictional competition and conflict between [s]tate" and tribal courts over child custody orders. While it might be futile at this point, Fathers still may seek enforcement of the North Dakota state custody orders from the Cheyenne River Sioux Tribal Court through comity principles. For the reasons discussed, it is hereby ordered that the State Defendants' Motion to Dismiss for Failure to State a Claim is granted. It is further ordered that the Tribal Defendants' Motion for Summary Judgment is granted, and the Plaintiffs' Motion for Summary Judgment, is denied.

93. Mestek v. Lac Court Orielles Community Health Center, 2022 WL 1568881, 21-cv-541-wmc (W.D.W. May 18, 2022).

Plaintiff Teresa Mestek brings this action under the federal False Claims Act (FCA), 31 U.S.C. § 3730(h), and Wisconsin common law, claiming that defendants wrongfully retaliated against her by terminating her employment at the Lac Courte Oreilles Community Health Center ("LCO-CHC") as a result of her efforts to prevent health care coding and billing fraud. Before the court is defendants' motion to dismiss for lack of subject-matter jurisdiction and failure to state a claim upon which relief can be granted. Specifically, defendants argue that the FCA does not allow claims against an arm of a federally-recognized, Native American tribe like the LCO-CHC under the doctrine of sovereign immunity. For the reasons stated below, the court will grant defendants' motion to dismiss Defendant LCO-CHC is a health care clinic associated with the Lac Courte Oreilles Tribe Band of Lake Superior Chippewa Indians ("the Tribe"). While employed by the LCO-CHC, plaintiff Teresa Mestek served as its Director of Health Information. In 2016, LCO-CHC purchased the rights to use "Intergy," an electronic health record software system developed and sold by Greenway Health, LLC. LSO-CHC planned to implement the Intergy software to handle billing and coding starting in 2017, with Michael Popp, an independent consultant liaising with Greenway Health and using Intergy software system files from the Peter Christensen Health Center as a template for LCO-CHC's upcoming transition to Intergy. However, the software files from Christensen Health allegedly contained outdated diagnostic codes, causing the new LCO-CHC Intergy system to contain incorrect codes and creating severe issues with client billing and documentation. As the Director of Health Information, Mestek worked with another coding consultant, James Walker, to attempt to fix these issues and bring them to the attention of LCO-CHC management, as well as train its healthcare providers on the new system. However, management was slow to respond to the resulting coding and billing errors found by Mestek and Walker. When Walker's contract was terminated by LCO-CHC in May of 2018, Popp was asked to assume Walker's coding responsibilities. Around 2 months later, however, LCO-CHC received an audit report that had been authored by Walker in 2017, which noted serious flaws with the Intergy program and identified plaintiff Mestek's role in investigating those problems. Plaintiff advances two, basic arguments against dismissal: (1) even if the Tribe itself were directly implicated in this suit, sovereign immunity would not apply; and (2) if sovereign immunity does apply

to the Tribe, it does not extend to defendants LCO-CHC and its employees or to defendant Popp as an independent contractor. For the reasons explained below, the LCO-CHC (and by extension its employees) is plainly an arm of the Tribe for purposes of sovereign immunity, and this court has no further basis to exercise subject matter jurisdiction over the remainder of this lawsuit, including the claim against Popp for common law negligence. To begin, any "persons" who violate the FCA may be held liable under 31 U.S.C. § 3729(a)(1). However, the Supreme Court has found that states, as sovereigns, are not "persons," and thus, cannot be sued under the FCA's qui tam provision. Vermont Agency of Natural Resources v. U.S. ex rel. Stevens, 529 U.S. 765, 781 (2000). Other federal courts have since extended the reasoning in Vermont to federally recognized tribes, finding that they, too, as sovereigns, are not "persons." E.g., United States ex rel. Cain v. Salish Kootenai Coll., Inc., 862 F.3d 939 (9th Cir. 2017); U.S. v. Menominee Tribal Enterprises, 601 F.Supp. 1061, 1068 (E.D. Wis. 2009). As such, these tribes cannot be liable under 31 U.S.C. § 3729(a)(1) either. Id. The closer question is whether a federally recognized tribe can be held liable under the FCA anti-retaliation provision, 31 U.S.C. § 3730(h), which does not limit liability to "persons". This is because other courts have found the distinction between the language of these two statutory provisions important. For instance, while the Eighth Circuit avoided the question of whether a municipal entity is a "person" immune under 3729(a)(1), that court held that an "employer" could be subject to the FCA anti-retaliation claim under § 3730(h), even if it were a "person." Wilkins v. St. Louis Hous. Auth., 314 F.3d 927, 928 (8th Cir. 2002). Drawing on this same logic, plaintiff here suggests that even if a tribal arm were not a "person," it is still liable under § 3730(h) due to the anti-retaliation provision's broader scope. In support of this argument, plaintiff turns to a decision of the D.C. Circuit Court of Appeals in Slack v. Wash. Metro. Area Transit Auth., 325 F.Supp.3d 146, 155 (D.D.C. 2018). In Slack, the D.C. Circuit agreed with the plaintiff that "[u]nlike the text of the qui tam provision, nothing in the text of the whistleblower provision at issue here limits liability to legal persons." 325 F. Supp. 3d at 152–53. However, plaintiff conveniently fails to cite that circuit's other ruling in Slack, which went on to find that this distinction was not sufficient alone to allow a suit against a sovereign's arm to move forward. Id. at 153. This holding in Slack relies in part on the Supreme Court's mandate that sovereign immunity applies unless the relevant statutory language "evince[s] an unmistakably clear intention to abrogate the States' constitutionally secured immunity from suit." Dellmuth v. Muth, 491 U.S. 223, 232 (1989). Ultimately, therefore, the D.C. Circuit held that Congress would have to "clearly declare its intent to abrogate the states' sovereign immunity when it passed the FCA" in order to confer jurisdiction to the court. Slack, 325 F. Supp. 3d 146 at 153; see also Monroe v. Fort Valley State Univ., Civil Action 5:21-CV-89 (MTT) (M.D. Ga. Nov. 22, 2021) (holding that despite plaintiff's persuasive legislative history and statutory interpretation arguments, the FCA's anti-retaliation provision does not abrogate a state's sovereign immunity because that provision lacked Congress's unequivocal intent to do so). With no evidence that Congress intended to remove sovereign immunity to a tribal arm under the FCA's anti-retaliation provision, therefore, a simple ambiguity in language is insufficient to hold the Tribe or its arms liable. Given all of these factors, the LCO-CHC has established itself as an arm of the Tribe, and as such, it is covered by the Tribe's sovereign immunity. Whether employees, too, are covered by the LCO-CHC's sovereign

immunity is a more difficult question. Mestek sued defendants Taylor, Bae, Starr, Klecan, and Franz in both their official and individual capacities. For tribal employees acting in their official capacity, "the relief sought is only nominally against the official and in fact is against the official's office and thus the sovereign itself." Lewis v. Clarke, 137 S. Ct. 1285, 1291 (2017). However, the Supreme Court has noted that, for personal capacity suits, "the real party in interest is the individual, not the sovereign." Id. Under this holding, individual defendants may assert sovereign immunity in their official capacity as employees of LCO-CHC, but not their personal capacities. Since the Supreme Court decided Lewis, however, federal circuit courts have held that the distinction between official and personal capacity should not be resolved simply on the fact that the caption of the case identifies defendants in their personal capacity. "Such a misinterpretation collapses the distinction between genuine and nominal personal-capacity suits and, rather conveniently for [plaintiff's] case, begs the question at issue in favor of the very formalism that the Court's well-established jurisprudence has long disavowed." Cunningham v. Lester, 990 F.3d 361, 366–67 (4th Cir. 2021). The Seventh Circuit took a similar approach in finding that sovereign immunity applied to tribal police officers even though the plaintiff sued the individual officers in their personal capacities. Genskow v. Prevost, 825 F. App'x 388, 391 (7th Cir. 2020). This is because the tribe was "the real party in interest," and the claims against the officers were "essentially a claim against the tribe and therefore barred by its sovereign immunity." Id.To determine whether the Tribe or its arm, the LCO-CHC, is the true party in interest, therefore, courts must look for the party "against whom the judgment would operate and on whom its burden would fall." Cunningham v. Lester, 990 F.3d 361, 367 (4th Cir. 2021). Here, defendants argue that plaintiff's requested relief is actually against the LCO-CHC, not the individual defendants. Specifically, plaintiff Mestek's amended complaint requests front pay, back pay, damages, reinstatement, and injunctive relief prohibiting defendants from blacklisting or retaliating against her. Besides other unspecified damages, therefore, Mestek is seeking relief that would have to come from LCO-CHC, putting the burden of any judgment on the Tribe's health center and suggesting it is the true party at interest. Given the unambiguous pleadings in the amended complaint, the relevant caselaw and the briefing provided by the parties, Mestek may have formalistically sued Taylor, Bae, Starr, Klecan, and Franz in both their individual and official capacities, but her claims and requested relief establish that the real party in interest is LCO-CHC, an arm of the Tribe. Thus, defendants Taylor, Bae, Starr, Klecan, and Franz are entitled to assert the LCO-CHC's sovereign immunity. This just leaves the last individual defendant standing: Popp, who is an independent contractor and sued solely sued in his personal capacity. However, plaintiff only alleges a Wisconsin state law claim against him. While the court could exercise supplemental jurisdiction over this remaining state law claim, there is a presumption against doing so when all federal claims have been dismissed. Al's Serv. Ctr. v. BP Prod. N. Am., Inc., 599 F.3d 720, 727 (7th Cir. 2010) ("[w]hen all federal claims in a suit in federal court are dismissed before trial, the presumption is that the court will relinquish federal jurisdiction over any supplemental state-law claims"). Accordingly, plaintiff may not proceed against any of the defendants under the FCA, and this court loses its jurisdiction over those federal claims, as well as plaintiff's supplemental state law claims. It is ordered that defendants' motion to dismiss for failure to state a claim and lack of subject-matter jurisdiction is granted.

94. Consumer Financial Protection Bureau v. CashCall, 35 F.4th 734, 18-55407, (9th Cir. May 23, 2022).

Consumer Financial Protection Bureau (CFPB) brought action against lender, its chief executive officer (CEO) and several affiliated companies, alleging they violated Consumer Financial Protection Act (CFPA) by issuing unsecured, high-interest loans to consumers, and sought to avoid state usury and licensing laws by using entity operating on Native American reservation. The United States District Court for the Central District of California, No. CV 15-07522-JFW, John F. Walter, J., 2018 WL 485963, entered summary judgment for CFPB and, after bench trial, imposed civil penalty, but declined to order restitution. All parties appealed. The Court of Appeals, Miller, Circuit Judge, held that: 1 actions taken by CFPB when it was headed by a single Director who could be removed by the President only for cause were not void; 2 state laws of consumers, rather than law of Cheyenne River Sioux Tribe, applied to loan agreements; 3 District Court clearly erred by determining lender did not act "recklessly," as was required for imposition of tier-two civil penalty under CFPA, at point when its counsel recommended termination of program; 4 District Court did not err by holding lender's CEO personally liable for lender's violations of CFPA; and 5 District Court abused its discretion by denying restitution. Affirmed.

95. Hyman v. Mashantucket Pequot Indian Tribe of Connecticut, 3:21-cv-00459, 2022 WL 2078187 (D. Conn. June 9, 2022).

This case arises out of a years' long custody dispute between Plaintiff Vanessa Hyman and Defendant Michael Thomas ("Thomas"), who is a member of the Mashantucket Pequot Tribal Nation ("MPTN"). Plaintiff brings claims against Thomas and MPTN, as well as several "Tribal Defendants" seeking monetary, declaratory, and injunctive relief for, inter alia, violations of her due process rights and for the intentional infliction of emotional distress. Pending before the court are two motions to dismiss, one filed by Defendant Thomas and the second filed by the remaining Defendants in which the Defendants assert, principally, that the court lacks subject matter jurisdiction to hear this case. For the reasons set for the below, the Motions to Dismiss are granted. Plaintiff is the mother of Defendant Thomas's daughter, and in July 2004 Defendant Thomas commenced a custody action in a court of the MPTN. Other than the MPTN itself—which is a federally recognized Indian tribe with a reservation located in the state of Connecticut—the remaining defendants fill various roles in the MPTN and the MPTN family court system. None of the claims in the Complaint meet the requirements for federal question jurisdiction. The Plaintiff's primary claim is brought pursuant to 42 U.S.C. § 1983. But all the Defendants are alleged to be either an Indian tribe, tribal officials, or tribal employees: None are alleged to be states, state employees, or state actors. In other words, because the Complaint seeks to apply § 1983 to tribal actors engaged in tribal action under color of tribal law, this claim is patently without merit and so does not provide this Court with subject matter jurisdiction. See Perpetual Securities, Inc., 290 F.3d at 137. The Complaint's remaining claims are also patently without merit because they too invoke federal laws that are inapplicable to the facts alleged or do not invoke any federal law or even state a cognizable cause of action. For the forgoing

reasons, the Court is without subject matter jurisdiction to hear this case, and the pending motions to dismiss are granted.

***96. Stronghold v. US,* F.4th, 2022 WL 2284927, 22 Cal. Daily Op. Serv. 6658, 2022 Daily Journal D.A.R. 6525, No. 21-15295 (9th Cir. June 24, 2022).**

Nonprofit organization, which sought to prevent land used by Apache from being conveyed from United States to mining company to facilitate mineral exploration activities, as authorized by National Defense Authorization Act (NDAA), brought action against United States Department of Agriculture (USDA), alleging that land was held in trust by United States for Apaches by way of 1852 Treaty and that mine would desecrate ceremonial ground in violation of Apaches' religious liberties, constituting breach of trust. The United States District Court for the District of Arizona, Steven P. Logan, J., 519 F.Supp.3d 591, denied organization's motion for preliminary injunction to prevent USDA from publishing final environmental impact statement, which described potential environmental effects of mine and included detailed mitigation measures to minimize impacts, but entered stay pending appeal, 2021 WL 689906. Organization appealed. The Court of Appeals, Bea, Senior Circuit Judge, held that: 1 Apache had not been deprived of government benefit or coerced into violating religious beliefs, and thus organization was unlikely to succeed on substantial burden claims under Religious Freedom Restoration Act (RFRA); 2 definition of a "substantial burden" under RFRA, rather than Religious Land Use and Institutionalized Persons Act (RLUIPA), governed exchange of sacred land used by Apache with land held by mining company; 3 exchange of sacred land used by Apache with land held by mining company did not force Apache to choose between following their religion and losing benefit, and therefore Apache were not entitled to relief under RFRA; 4 organization did not show sufficiently realistic fear of future criminal liability from trespass from continued use of sacred land, and thus was unlikely to succeed on substantial burden claims under RFRA; 5 factual uncertainties prevented organization from showing likelihood that mining company would subject its members to trespass liability for using that land; 6 exchange of sacred land likely would not violate Constitution's Free Exercise Clause; and 7 organization could not rely on Treaty to prevent conveyance to facilitate mineral exploration activities. Affirmed. Berzon, Circuit Judge, filed dissenting opinion. Procedural Posture(s): On Appeal; Motion for Preliminary Injunction.

***97. Queens, LLC v. Seneca-Cayuga Nation,* F.Supp.3d, 2022 WL 7074271 (N.D. Okla. October 12, 2022).**

Vendors brought action against purchaser, which was tribe, for breach of contract arising from failure to make payments on purchase price for multiple lakefront businesses. Vendors brought motion for determination of whether federal court subject matter jurisdiction existed. Holdings: The District Court, William P. Johnson, J., held that: 1 vendors' attempt to file case for breach of contract in federal court despite vendors' belief that jurisdiction was not proper was not Rule 11 violation; 2 federal question jurisdiction did not exist over vendors' claim against purchaser; and 3 diversity jurisdiction did not exist over vendors' claim against purchaser. Ordered accordingly. Other.

I. Religious Freedom

98. Corey Lee Dove v. Patuxent Facility, 2021 WL 5053095, Civil Action No. DKC 18-1847 (D. Maryland November 1, 2021).

Corey Lee Dove is a member of the Lakota Sioux tribe and practices Lakota religious traditions. The Lakota "system of spirituality center[s] on Wakan Tanka, often translated as the Great Spirit or Great Mystery." Two rituals "central to practicing Lakota religious traditions" are at issue here: conveying prayers through a sacred pipe known as Chanupa Wakan and conducting the sacred rite known as the Keeping of the Soul when a loved one dies. The Chanupa Wakan serves as the principal bridge between worshippers and Wakan Tanka. (*Id.*, ¶ 20). The Keeping of the Soul is necessary to "purify the souls of [the] dead" and allow them to return to Wakan Tanka, rather than wander the earth. Involvement in these rituals is "fundamental" to Lakota followers. Both must be performed in a "specific setting" involving "a pike carrier who knows the customary prayers; instruments and felt cloths of particular colors; sacred herbs, such as sweetgrass, sage, and tobacco; and a group of worshippers encircling a small fire." Mr. Dove alleges that Defendants—Warden Laura Armstead and former Property Room Sergeant Jason Anderson, and two unidentified corrections officers ("Defendants Doe")—denied him "the ability to meaningfully engage" in the rituals, including by preventing him from performing the Keeping of the Soul rite when his mother and sister died in February and March 2018, and retaliated against him when he complained. Mr. Dove's lack of access continues to chill his religious exercise. Mr. Dove's case is different from *Krieger v. Brown*, which held that a prisoner failed to demonstrate at summary judgment that a prison's denial of requested sacred items substantially burdened his religious exercise. 496 F.App'x 322, 326 (4th Cir. 2012). Unlike *Krieger*, Mr. Dove identified the rituals at issue and explained how at least some of the sacred items are incorporated into those rituals. Tobacco, for example, is necessary to smoke the sacred pipe, Chanupa Wakan. Mr. Dove's RLUIPA claim will not be dismissed for failure to state a claim. Warden Armstead endorsed her supervisees' retaliation against Mr. Dove. Warden Armstead acknowledged her awareness and tacit support for their prior retaliation by telling them to "refrain" going forward so she could handle things. Mr. Dove's Section 1983 free-speech retaliation claim will not be dismissed for failure to state a claim. Mr. Dove also plausibly alleges that any security or administrative rationales were pretext for improper discriminatory animus. Mr. Dove alleges that all four Defendants engaged in a deliberate and coordinated campaign to make it difficult or impossible for Native American worshippers to practice their faith because of their race or religion. His amended complaint also makes clear that Patuxent would not be unduly burdened or otherwise find it impossible to accommodate the Native American worshippers because it already accommodated all other religious observers. Mr. Dove's Section 1983 equal protection claim will not be dismissed for failure to state a claim. Motions to dismiss denied.

99. Cayuga Nation v. Parker, 2022 WL 1813882, 5:22-cv-00128 (N.D. N.Y. June 2, 2022).

Plaintiff Cayuga Nation, through its governing body, the Cayuga Nation Council, brings this action under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961–1968. (Dkt. No. 1). The Cayuga Nation generally alleges that Defendants

Dustin Parker, Nora Weber, Jose Verdugo, Jr., Andrew Hernandez, Paul Meyer, Iroquois Energy Group, Inc., Justice for Native First People, LLC, C.B. Brooks LLC, and John Does 1–10, are engaged in an unlawful scheme to co-opt the Nation's sovereign rights, erode its business and customer base, and steal its revenues "through the illegal sale of untaxed and unstamped cigarettes and marijuana, and various other merchandise" on the reservation. Presently before the Court is the Cayuga Nation's motion for a preliminary injunction under Federal Rule of Civil Procedure 65 enjoining Defendants from opening or operating any business from the property located at 7153 State Route 90N in Montezuma, New York, and Defendants' motions to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) and for failure to state a claim under Rule 12(b)(6). For the reasons that follow, Defendants' motions to dismiss under Rule 12(b)(1) are denied, and this action is stayed pending the parties' notification of the exhaustion of proceedings in Cayuga Nation Civil Court. The Cayuga Nation maintains that to the extent it sells the Cayuga and other "native-brand cigarettes" "unstamped or untaxed," "it does so in compliance with the law and under the unique privilege afforded to it as an Indian nation." It is undisputed, however, that while premium brand cigarettes sold to members of an Indian Nation for their own personal use are tax-exempt, New York's excise tax scheme requires that all premium brand cigarettes, even those sold on the Cayuga Nation reservation, have tax stamps. As relevant here, the Nation's Ordinance provides that "[n]o license shall issue to, or be held by, any person who... is engaging, or seeks to engage, in any business that, directly or indirectly, competes in whole or in part with any business conducted by the Nation or an entity or enterprise owned or controlled by the Nation." Defendant Paul Meyer, the sole member of Justice for Native First People, LLC, signed a four-year commercial lease agreement on behalf of the LLC for a commercial property, owned by the Seneca-Cayuga Nation of Oklahoma but within the boundaries of the Cayuga Nation reservation, located at 126 E. Bayard Street in Seneca Falls, New York. In June 2021, Defendant Dustin Parker, "an enrolled member of the Cayuga Nation," approached Meyer and "expressed interest in subletting the space ... to operate a smoke shop and gas station." However, Parker did not obtain a business license as required by the Cayuga Nation Ordinance. The Complaint alleges that Defendants "shipped, transported, received, possessed, sold, distributed, or purchased contraband cigarettes or contraband smokeless tobacco in violation of the Contraband Cigarette Trafficking Act, 18 U.S.C. §§ 2341–46." (Id.). While the Cayuga Nation appears to acknowledge that it would violate federal or state law by selling unstamped premium brand cigarettes or rollies, it contends that it is its sovereign right to sell, on its reservation, untaxed and unstamped Native brand cigarettes, untaxed (but stamped) premium brand cigarettes, and marijuana but that Defendants violate the CCTA and federal drug laws by engaging in the same conduct because they are not operating under the cloak of tribal sovereignty. Accordingly, as neither party has identified a dispute of tribal law, the Court concludes it has jurisdiction to decide the present RICO action and turns to the issue of tribal exhaustion. See Miccosukee Tribe, 814 F.3d at 1210 (finding that "jurisdiction over an otherwise justiciable RICO claim does not fail merely due to the suggestion that an issue of tribal law may arise"). The Parker Defendants raised the issue of "tribal exhaustion" in their reply memorandum of law. Defendants submitted a copy of a March 11, 2022 order by a Cayuga Nation Civil Court Judge permanently enjoining Parker and Parker d/b/a Pipekeepers from "the operation of" the Montezuma Pipekeepers

and assessing a fine of $1,000 per day for their violation of the Ordinance. The Cayuga Nation stated in the Complaint that "the Nation sought relief against Defendant Parker in the Cayuga Nation Civil Court. The Cayuga Nation, however, argues that the Nation Court injunction applies "only to Defendant Parker – it does not apply to any of ... the other eight named Defendants in these RICO proceedings"; that the Nation Court injunction "does not actually shutter the New Pipekeepers Store"; and that "neither Defendant Parker nor any of the other Defendants actively operating the New Pipekeepers Store have recognized the Nation Court Order, and the store continues to operate to this day." (Dkt. No. 47, at 2). In any event, the scope of the Nation Court order is disputed by the parties and the interpretation of that order is critical to this Court's assessment of whether the request for injunctive relief is moot. In general terms, when there is a proceeding in both tribal and federal court, the doctrine of tribal exhaustion requires that federal courts abstain from hearing certain claims relating to Indian tribes until those claims have been exhausted in tribal court. Garcia v. Akwesasne Hous. Auth., 268 F.3d 76, 79 (2d Cir. 2001); see Basil Cook Enters., Inc. v. St. Regis Mohawk Tribe, 117 F.3d 61, 65 (2d Cir. 1997. While it is true that the Cayuga Nation has not challenged the permanent injunction issued by the Nation Court, the Cayuga Nation does not appear to have sought enforcement of the Nation Court order, and a determination regarding the scope of that order is necessary to decide whether the Cayuga Nation's request for preliminary injunctive relief is moot. For these reasons, it is ordered that Defendants' motions to dismiss are DENIED, in part and the motions are otherwise stayed; and it is further ordered that this case is stayed pending the parties' notification of the exhaustion of proceedings in Cayuga Nation Civil Court.

***100. U.S. v. Skeet,* 2022 WL 3701593, No. 21-CR-00591 MV (D.N.M. August 26, 2022).**

This matter is before the Court on George Skeet's Motion to Dismiss. The Court finds that Mr. Skeet's Motion is well-taken and will be granted in part. On April 23, 2021, Mr. Skeet was charged by a two-count Indictment. In Count 1, Mr. Skeet was charged with selling and offering to sell red-tailed hawk feathers, in violation of the Migratory Bird Treaty Act ("MBTA"). Id. (citing 16 U.S.C. §§ 703 and 707(b)(2)). In Count 2, Mr. Skeet was charged with selling and offering to sell golden eagle feathers and bald eagle feathers, in violation of the Bald and Golden Eagle Protection Act ("BGEPA") (a Class A Misdemeanor). Id. (citing 16 U.S.C. § 668(a)). Mr. Skeet is Diné (Navajo) and an enrolled member of the Navajo Nation, a federally recognized Indian tribe. See Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 87 FR 4636, 4636-4641 (Jan. 28, 2022). He allegedly sold and offered to sell feathers to Special Agent Adrienne Ruiz, an undercover officer posing as a member of the Pascua Yaqui Tribe, which is also a federally recognized Indian tribe. Mr. Skeet filed the instant motion to dismiss, arguing that the charges "violate long-standing treaty rights and are an unlawful burden on his religious freedoms." First, Mr. Skeet moves to dismiss Count 1, arguing that he has a treaty right to sell migratory bird feathers obtained from land ceded by the Diné in the treaty of 1868. Second, Mr. Skeet moves to dismiss Counts 1 and 2, arguing that both the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act impermissibly infringe on his free exercise of religion, in violation of the Religious Freedom Restoration Act. On August 9, 2022—six days before

the motion hearing—the government lodged a seven-count Superseding Indictment. In addition to the counts charged in the original Indictment, the Superseding Indictment charges Mr. Skeet with offering to sell red-tailed hawk feathers, crested caracara feathers, golden eagle feathers, bald eagle feathers, Harris's hawk feathers, and Cooper's hawk feathers on various dates between January and April 2019, in violation of the MBTA. Id. (citing 16 U.S.C. §§ 703 and 707(b)(2)). Prior to the hearing, the Court informed parties that it would limit the scope of the hearing to Mr. Skeet's first argument regarding treaty rights. The Court informed parties that it would not hear evidence on Mr. Skeet's second argument regarding religious freedom because, as a primarily factual rather than legal issue, the defense is "territory reserved to the jury as the ultimate finder of fact in our criminal justice system." United States v. Pope, 613 F.3d 1255, 1259 (10th Cir. 2010). The Court will address this finding further in the Religious Freedom section infra. At the motion hearing, parties stipulated that every feather that Mr. Skeet was charged with selling or offering to sell in the Superseding Indictment originated from within the boundaries of the Naabeehó Bináhásdzo (the Navajo reservation). Additionally, in light of the late filing of the Superseding Indictment, the Court asked parties whether they objected to the Court ruling on the additional counts charged under the MBTA in the Superseding Indictment on the basis of Mr. Skeet's treaty-rights argument. Parties had no objection. First, Mr. Skeet contends that his case presents legal issues akin to those decided in United States v. Bresette. Id. (citing 761 F. Supp. 658 (D. Minn. 1991)). Drawing on Bresette, Mr. Skeet argues that the Treaty with the Navajo Indians of 1868 preserved the usufructuary rights of the Navajo Nation—including the right to sell migratory bird feathers. Next, Mr. Skeet argues that these treaty rights were not abrogated by the MBTA. Finally, he concludes that the MBTA does not involve a permissible, nondiscriminatory regulation of treaty rights. The government argues that although the 1868 Navajo Treaty creates a right to hunt, it does not create "a right to commercialization of wildlife obtained on Navajo land," unlike the "much broader" Chippewa treaties. The government argues that "[t]here is no historical evidence of a Navajo practice of commercializing eagle or other bird parts," and that contemporary Navajo Nation laws and policies prohibit the commercialization of wildlife, including migratory birds such as eagles and hawks. Thus, the government argues that Diné treaty rights do not extend to the sale of migratory bird parts and that the "Navajo's treaty rights are therefore subject to the MBTA's prohibitions on commercial activities with respect to bird parts." Id. at 11. Finally, the government argues that the MBTA is "nondiscriminatory, reasonable, and necessary." As explained infra, the Court concludes that the 1868 Navajo Treaty reserves a usufructuary right to sell migratory bird feathers obtained within the boundaries of the Naabeehó Bináhásdzo. Courts have generally found that the usufructuary rights established by M'Intosh have survived treaty-making processes. For example, a circuit court interpreting the Treaty with the Osage determined that the treaty granted the Osages "a usufructuary right" in the land, even though the treaty makes no explicit mention of usufructuary rights, but only provides that "there shall be reserved [a specific tract of land], to, and for, the Great and Little Osage Tribes or Nations, aforesaid, so long as they may choose to occupy the same." United States v. Leavenworth, L. & G.R. Co., 26 F. Cas. 901, 904 (C.C.D. Kan. 1874), aff'd, 92 U.S. 733 (1875); Treaty with the Osage, 1825, art. 1–2, June 2, 1825, 7 Stat. 240. Similarly, the Supreme Court has explained that "[a]s a general rule, Indians enjoy exclusive treaty

rights to hunt and fish on lands reserved to them, unless such rights were clearly relinquished by treaty or have been modified by Congress. These rights need not be expressly mentioned in the treaty." United States v. Dion, 476 U.S. 734, 738 (1986). Because the government's evidence appears to date back to no later than 1974, the Court finds that it has no relation to "how the parties to the Treaty understood the terms of the agreement" signed in 1868. Mille Lacs Band of Chippewa Indians, 526 U.S. at 196. The treaty negotiations demonstrate that the Diné understood the 1868 Navajo Treaty to grant them the right to commercialize the fruits of the land. Indeed, the primary Diné negotiator, Chief Barboncito, discussed trade with General Sherman multiple times over the course of the three-day negotiations. Finally, the customary practices of the Diné at the time of the treaty's signing demonstrate that their usufructuary rights extend to commercial activity. Historical evidence shows that the Diné had a rich history of trading "with the Pueblos, Utes, Comanches, the Mescalero, Chiricahua, San Carlos, Jicarilla and White Mountain Apaches, the Hualapais, Yavapais, and Havasupais, Spanish Americans, and later on, the Anglo-Americans." In United States v. Dion, 752 F.2d 1261, 1264 (8th Cir. 1985), the record revealed "that the sale of eagle parts is deplored as a matter of tribal custom and religion" by the Yankton Sioux). Here, however, there is no evidence before the Court that it would have been anathema to the Diné to sell migratory bird feathers at the time of the treaty's signing in 1868. In Dion, the Supreme Court found that Congress "believed that it was abrogating the [treaty] rights of Indians to take eagles," when it amended what is now the Bald and Golden Eagle Protection Act to cover both golden and bald eagles. Id. at 743. This finding was based on the extensive legislative history discussing the use of eagle feathers in Native religious ceremonies. Id. It was also based on the language of the BGEPA, which carved out a narrow religious exemption by putting "in place a regime in which the Secretary of the Interior had control over Indian hunting, rather than one in which Indian on-reservation hunting was unrestricted." In contrast, neither the MBTA's legislative history nor its plain language balance "the special cultural and religious interests of Indians" against "the conservation purposes of the statute." Id. at 743. As the Bresette court explains, the MBTA's legislative history reveals that Congress never specifically considered Native treaty rights. Bresette, 761 F. Supp. at 663. Given the plain language and legislative history of the MBTA, the Court finds that the MBTA did not abrogate Mr. Skeet's treaty right to possess or sell migratory bird parts. In Puyallup, the Supreme Court determined that Natives' treaty-based usufructuary rights are "subject to reasonable regulation by the State pursuant to its power to conserve an important natural resource." Puyallup III, 433 U.S. at 175. Critically, the Supreme Court was careful to explain that the Puyallup and Nisqually Tribes' usufructuary right to fish could be regulated—but not abrogated—by the State. Id.; Puyallup I, 391 U.S. at 398. "In other words, the 'right' to fish ... was a treaty 'right' that could not be qualified or conditioned by the State." Puyallup I, 391 U.S. at 399. "But the manner of fishing, the size of the take, the restriction of commercial fishing, and the like ... not being defined or established by the treaty, were within the reach of state power." Id. at 398–99. Unlike in Puyallup, the policy at issue here abrogates, rather than regulates, the Diné's usufructuary rights as to migratory birds. As such, the MBTA is properly analyzed under Dion, which relates to the abrogation of treaty rights, as discussed supra, rather than under Puyallup, which relates only to the "reasonable regulation" of treaty rights. Puyallup III, 433 U.S. at 175. Finally, even if Puyallup

applied, the Court cannot find that the MBTA's prohibitions are nondiscriminatory. The Court outlines its essential findings here. First, the Court finds that it has the authority to rule on Mr. Skeet's treaty-rights argument because its ruling rests exclusively on "agreed extra-indictment facts" and facts that are "entirely segregable from the evidence to be presented at trial." Pope, 613 F.3d at 1260–61. Namely, the motion rests on facts related to how the Navajo Nation would have understood the 1868 Navajo Treaty at the time of its signing—an issue entirely segregable from the evidence to be presented at trial. Id. Additionally, the motion rests on the origin of the feathers charged in the Superseding Indictment—an extra-indictment fact to which parties stipulated. Mot. Finally, the government makes no objection to the Court's consideration of these facts. Pope, 613 F.3d at 1260. Thus, the Court can rule on the ultimate question of law, which is whether the government failed to state an offense in the indictment. See Fed. R. Crim. P. 12(b)(3)(B)(v). As discussed supra, the Court finds that Mr. Skeet has a usufructuary right to sell and offer to sell migratory birds and bird feathers pursuant to the 1868 Navajo Treaty. The Court additionally finds that because Mr. Skeet is an enrolled member of the Navajo Nation and the migratory bird feathers which he is alleged to have sold or offered to sell are from within the boundaries of the Naabeehó Bináhásdzo, he is entitled to assert this treaty right as an affirmative defense. Finally, having found this treaty right, the Court finds that it was neither abrogated nor otherwise permissibly regulated by the Migratory Bird Treaty Act. Mr. Skeet also moves to dismiss Counts 1 and 2 of the original Indictment (now Counts 1 and 4 in the Superseding Indictment), arguing that both the MBTA and the BGEPA constitute impermissible infringements on his free exercise of religion under the Religious Freedom Restoration Act ("RFRA"). The RFRA provides that the "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a). Given the plain language of Rule 12(b), the controlling case law in Pope, as well as the bedrock Sixth Amendment right to trial by a jury of one's peers, the Court finds that Mr. Skeet's RFRA defense cannot be resolved on a pretrial motion. First, because Mr. Skeet's RFRA defense implicates primarily factual rather than legal issues, the Court finds that this defense is "territory reserved to the jury as the ultimate finder of fact in our criminal justice system." Pope, 613 F.3d at 1259. Additionally, because the RFRA defense goes to the ultimate issue of Mr. Skeet's guilt, it would require a trial on the merits of the case—a prospect that is proscribed by Rule 12(b)(1) and that disserves judicial economy. Id.; Rule 12(b)(1). Nevertheless, Mr. Skeet is welcome to assert a RFRA defense at trial. For the reasons stated above, Mr. Skeet's Motion to Dismiss is hereby granted in part. The Court hereby dismisses Counts 1, 2, 3, 5, 6, and 7 of the Superseding Indictment for failure to state an offense, pursuant to Federal Rule of Criminal Procedure 12(b)(3)(B)(v).

101. Baltas v. Erfe, **2022 WL 4260672, Civil Action No. 3:19-cv-1820 (MPS) (D. Conn. September 15, 2022).**

The plaintiff, Joe Baltas, has commenced a civil rights action asserting claims related to time spent incarcerated at Connecticut Department of Correction ("DOC") prisons between 2016 and 2019. Plaintiff's complaint included eighteen causes of action. However, many of these claims have already been dismissed or severed from this case. The plaintiff's claim asserts that Warden Mulligan, Captain Robles, Commissioner

Semple, Deputy Commissioner Rinaldi, and DA Quiros violated his First Amendment right to the free exercise of religion by not permitting him to attend congregational religious services, or otherwise engage in the meaningful practice of his Native American religion, while placed in AS. In responding to defendants' motion for summary judgment, plaintiff concedes that he was able to practice his Native American faith while placed in AS in some (in his view insufficient) respects. For example, plaintiff was able to participate in smudging rituals, and keep a "medicine bag" in his cell. Plaintiff also concedes that he was permitted to keep religious texts in his cell but claims that unreasonable size and weight restrictions on books effectively precluded him from possessing religious literature. Id. The parties disagree about whether plaintiff ever notified prison officials at Northern that he adhered to the Native American religion. Based on plaintiff's opposition to summary judgment, it appears that his free exercise claim principally relates to his inability to participate in congregational "Native American Circle" services and sweat lodge ceremonies. By defendants' admission, no inmates placed in AS may participate in such joint worship. To the extent that plaintiff takes issue with his inability to participate in sweat lodge ceremonies while placed in AS, the current group of defendants enjoy qualified immunity for much the same reason that Warden Falcone and DA Quiros have qualified immunity protecting them against plaintiff's claim that he was wrongly deprived of sweat lodge access while at Garner. Second Circuit precedent does not clearly establish a constitutional right to inmate sweat lodge access to accommodate the practice of the Native American religion. And to the extent such a right does exist, it likely does not extend to inmates placed in AS. See Fowler v. Crawford, 534 F.3d 931, 939 (8th Cir. 2008) ("[N]o reasonable jurist, affording due deference to prison officials, can dispute that serious safety and security concerns arise when inmates at a maximum security prison are provided ready access to [ ] burning embers and hot coals, [ ] blunt instruments such as split wood and large scalding rocks, [...] and [ ] an enclosed area inaccessible to outside view.") At the very least, Second Circuit decisions do not clearly establish this right for such inmates. In arguing that such a right does exist, plaintiff cites Yellowbear v. Lampert, 741 F.3d 49 (10th Cir. 2014) for the proposition that inmates possess a right to sweat lodge access even when housed in a segregated unit. But this characterization of Yellowbear's holding is misleading, since the plaintiff, in that case, was housed in a special protective unit not because of any disciplinary infractions on his part, but, rather, because of threats from other inmates against him. Yellowbear, 741 F.3d at 53. Moreover, Yellowbear wasn't decided on First Amendment grounds. Yellowbear, 741 F.3d at 64. And, as a Tenth Circuit opinion, Yellowbear is not clearly established law within the Second Circuit. See Terbesi, 764 F.3d at 231 (Sister circuit precedent may be treated as clearly established law, but only to the extent that it "clearly foreshadow[s]" a particular ruling on an issue within the Second Circuit). In support of his argument that he should have been permitted to participate in group religious activities while placed in AS, plaintiff cites Mawhinney v. Henderson, 542 F.2d 1 (2d Cir. 1976). There, the Second Circuit held that "not every prisoner in segregation can be excluded from [group worship]; because not all segregated prisoners are potential troublemakers; the prison authorities must make some discrimination among them." Mawhinney, 542 F.2d at 3. The Court in Mawhinney reversed the district court's dismissal of the plaintiff's free exercise claim and noted that "an evidentiary hearing will establish what policies concerning religious practices exist [ ] and whether officials had a

reasonable basis for limiting [the plaintiff's] participation at group services." Id. It is not clear what sort of administrative findings prison officials needed to have made to place the Mawhinney plaintiff on segregated status, which in Mawhinney's case was "punitive segregation," not administrative segregation. In this case, we know that plaintiff's AS placement necessarily reflected a judgment by DOC officials—following a hearing—that his "behavior or management factors pose[d] a threat to the security of [a] facility or a risk to the safety of staff or other inmates and that [he could] no longer be safely managed in general population." Administrative Directive 9.4(3)(B). So, one could reasonably argue that DOC officials made an individualized determination that plaintiff was a "potential troublemaker." And, in LeReau v. MacDougall, the Second Circuit held that it did not violate the First Amendment's Free Exercise Clause to prohibit inmates deemed "unruly" from attending group worship. LeReau v. MacDougall, 473 F.2d 974, 979 (1972); see also Matiyn v. Henderson, 841 F.2d 31, 37 (2d Cir. 1988) (rejecting free exercise claim of inmate in administrative segregation who asserted that his confinement prevented him from engaging in congregational religious services because the confinement was "for reasons related to legitimate penological objectives.") The Court is not suggesting that defendants have a free hand to impose a blanket ban on group worship on all inmates placed in AS. Such a ruling might rub against Second Circuit precedent requiring particularized findings of necessity before New York State Department of Correctional Services (DOCS) officials may prohibit inmates placed in "keeplock" from attending congregational services. See Salahuddin v. Goord, 467 F.3d 263, 277 (2d Cir. 2006) (Inmate's placement in keeplock for conspiring to assault another inmate who was housed at a different prison did not support prohibition from participation in congregational religious services); but see Salahuddin v. Jones, 992 F.2d 447, 449 (1993) (Inmate's placement in keeplock for fighting with another inmate sufficient to support prohibition from participation in congregational religious services). The Court is making the more limited point that the Second Circuit has not considered whether the particular findings supporting each inmate's placement in DOC's AS—specifically, that an inmate cannot be safely managed in general population, A.D. 9.4(3)(B)—would suffice to bar that inmate from participating in congregational religious services.

Because existing Supreme Court and Second Circuit precedent does not clearly bar prison officials from prohibiting all inmates placed in AS (who have, by definition, been deemed dangerous or disruptive) from attending group worship, defendants are entitled to qualified immunity on plaintiff's AS free exercise claim. The following claims are dismissed in their entirety: (1) the First Amendment retaliation claims relating to the placement of Inmate Blair in a recreation cage beside plaintiff's cage; (2) the First Amendment Free Exercise of religion claims relating to the plaintiff's confinement both at Garner and in AS; (3) the Eighth Amendment deliberate indifference to medical needs claims; (4) the Eighth Amendment excessive force claim; and (5) the Fourteenth Amendment due process claims. The following claims will proceed as specified: (1) the First Amendment retaliation claims relating to plaintiff's transfer to MacDougall will proceed against Warden Erfe and DA Quiros; (2) the Eighth Amendment deliberate indifference to mental health needs claims will proceed against Warden Mulligan and Captain Robles; and (3) the Eighth Amendment conditions of confinement claims related to plaintiff's placement in AS will proceed against Commissioner Semple, Deputy

Commissioner Rinaldi, Warden Mulligan, and Captain Robles; this claim will also proceed against DA Quiros but only to the extent that it implicates the nutritional adequacy of plaintiff's food.

102. Weiss v. Perez, 2022 WL 11337461, Case No. 22-cv-00641 (N.D. Cal. October 19, 2022).

In this case, Elizabeth Weiss, a tenured professor of physical anthropology at San Jose State University, alleges that the University has retaliated against her for her speech expressing opposition to repatriation of Native American remains. Weiss brings two claims under 42 U.S.C. § 1983 for violation of her First Amendment rights.

Weiss specializes in osteology, the study of human skeletal remains. Weiss is a critic of repatriation, which is a process through which Native American remains and cultural items are returned to tribes. In 2020, she published a book titled "Repatriation and Erasing the Past," which criticizes federal and state laws that require universities and museums to return Native American remains to tribes. She argues in the book that these laws "undermine objective scientific inquiry and violate the Establishment Clause of the United States Constitution by favoring religion over science." The book generated significant criticism, with about a thousand professors and graduate students signing an open letter calling the book "anti-indigenous" and "racist." Weiss also authored an op-ed and tweet that received criticism. On August 31, 2021, she published an op-ed in The Mercury News and The East Bay Times outlining her critique of AB 275, which amended CalNAGPRA. After the op-ed was published, the University received "vitriolic emails" from academics and the public demanding discipline. Id. On September 18, 2021, Weiss posted a tweet to her Twitter account stating, "So happy to be back with some old friends" and including a photo of her holding a skull from the University's collection. In 2022, the University adopted an updated interim directive that allegedly indicates that research on the NAGPRA collection is not permitted. Weiss alleges that she is the University's only faculty member who regularly accesses skeletal remains for research. She claims that the Directive "cuts [her] out of her contractually assigned leadership responsibilities for the collection and impedes her research." First, Defendants argue the case must be dismissed under Rule 12(b)(7) for failure to join a required party. Second, they argue the case should be dismissed under Rule 12(b)(1) because Weiss lacks standing for her requested relief. Third, Defendants argue Weiss fails to state a claim under Rule 12(b)(6). Id. at 18-24. Fourth, Defendants argue that all claims should be dismissed as to Defendants Sunseri and Ragland. Here, the proximity in time between Plaintiffs' book publication, op-ed, and tweet, among other things, and the alleged adverse employment actions is sufficient to plead that the speech was a "substantial or motivating factor" in the University taking those actions. There may ultimately be other, justifiable explanations for the University's actions, such as the requirement to comply with NAGPRA and CalNAGPRA, but at the motion to dismiss, the Court looks only at whether there is a plausible inference that the actions were the result of Weiss's speech and, given the proximity in time, it finds that there is. Weiss has thus adequately alleged that her speech was a "substantial or motivating factor" in the University's actions. Defendants focus their arguments on specific adverse employment actions alleged by Weiss. Ordered that Defendants' motion to dismiss is granted as to Defendants Sunseri and Ragland and denied as to all other Defendants.

J. Sovereign Immunity

***103. Minnesota Department of Natural Resources v. The White Earth Band of Ojibwe, 2021 WL 4034582,* Case No. 20-cv-1869 (WMW/LIB)(D. Minn. September 3, 2021).**

Plaintiffs are the Minnesota Department of Natural Resources (DNR) and its officials. Defendants are the White Earth Band of Ojibwe and Hon. David A. DeGroat, Chief Judge of the White Earth Band of Ojibwe Tribal Court. On August 5, 2021, the Band and several other parties1 (collectively Band Parties) filed suit against the DNR and its officials in the Tribal Court. In the Tribal Court matter, the Band Parties allege that, by granting water-use permits to a company in conjunction with that company's operation of an oil pipeline in northern Minnesota, the DNR violated the Band Parties' rights. In particular, the Band Parties allege that the DNR's conduct violates the First, Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, the American Indian Religious Freedom Act (AIRFA) and treaties between the United States of America and the Chippewa and other tribes, among other claims. In their lawsuit in the Tribal Court, the Band Parties seek declaratory and injunctive relief. The DNR moved to dismiss the Band Parties' tribal lawsuit, arguing that the Tribal Court lacks subject-matter jurisdiction due to the non-member status of the DNR and its officers, the DNR's sovereign immunity and the fact that the contested actions did not take place on reservation land. Chief Judge DeGroat of the Tribal Court denied the DNR's motion to dismiss, holding that the DNR's arguments regarding sovereign immunity and subject-matter jurisdiction "must give way" to the Band's "vital" interests. On August 19, 2021, Plaintiffs commenced this action, seeking declaratory and injunctive relief against the Band and Chief Judge DeGroat. Plaintiffs argue that the Tribal Court lacks subject-matter jurisdiction over the dispute currently pending in the Tribal Court. Plaintiffs also contend that sovereign immunity protects them from the Band Parties' lawsuit. Plaintiffs request that this Court preliminarily enjoin the Band and Chief Judge DeGroat from proceeding with the matter currently pending in the Tribal Court. Plaintiffs are not entitled to injunctive relief because this Court lacks the authority to enjoin the Defendants in this case. Moreover, in light of Defendants' tribal sovereign immunity, the Court also concludes that it lacks subject-matter jurisdiction over this case and must dismiss the complaint without prejudice.

***104. Holguin v. Ysleta del Sur Pueblo*, 2021 WL 4126908, EP-21-CV-67-DB (W.D. Texas September 9, 2021).**

Before this Court is Defendants Ysleta Del Sur Pueblo, Tigua Tribal Police Department, Erika Avila, Raul Candelaria, and Officers John and Jane Doe's Motion to Dismiss Plaintiff's Original Petition. After due consideration, the Court will grant the Motion to Dismiss. Mr. Holguin was "pulled over by the Tiguan Tribal Police Department ... for an alleged traffic violation" on November 28, 2018. Upon being asked to identify himself, Mr. Holguin "with some colorful language ... refused the TTPD [Tigua Tribal Police Department] demand" and stated "that [the TPPD] had no authority to perform a pretextual investigatory stop outside the reservation." Officers followed Mr. Holguin to

his house, where they left a "Civil Infraction Citation.". In subsequent weeks, Mr. Holguin received a summons for the Tribal Court of the Ysleta Del Sur Pueblo and, a few weeks later, notification that the Tribal Court had entered an order finding him "liable of violating a code or law of the [Ysleta Del Sur Pueblo]." On February 1, 2021, Mr. Holguin filed a suit in state court asserting that the actions of the Ysleta Del Sur Pueblo, its Tribal Court, its police department, and individual police officers involved in the traffic stop constituted multiple violations of 42 U.S.C. §1983. Defendants removed the case from state court to federal court. This Court, finding that it had subject-matter jurisdiction under 28 U.S.C. § 1331, denied Mr. Holguin's Motion to Remand. Defendants offer myriad arguments for dismissal. They argue that the Court cannot hear the case as it lacks subject-matter jurisdiction based on the sovereign immunity of the Ysleta Del Sur Pueblo, and they argue that the Court should not hear the case until Mr. Holguin exhausts tribal remedies. They also argue that § 1983 provides a remedy for violations of rights committed under color of *state* rather that *tribal* law. They argue that the suit is barred by the applicable statute of limitations. Finally, they argue that Mr. Holguin's constitutional rights were not in fact violated. The Court first examines Defendants' arguments for dismissal pursuant to Rule 12(b)(1). *See Ramming*, 281 F.3d at 161. It finds that Defendants have waived their sovereign-immunity defense. The Court will, however, abstain from exercising its jurisdiction over claims against Defendants Ysleta Del Sur Pueblo and the Tigua Tribal Police Department because of the tribal exhaustion doctrine, and it will dismiss claims against those Defendants. Since Defendants have removed this case from state to federal court, the *Meyers* case compels the conclusion that they have waived any sovereign-immunity defense. The Fifth Circuit did allow in *Meyers* that "the Constitution permits a state whose law provides that it possesses an immunity from liability separate from its immunity from suit to show that its waiver of one does not affect its enjoyment of the other." *Id.* at 253. However, Defendants do not indicate, and the Court does not find, that the laws of Ysleta Del Sur Pueblo provide for such immunity from liability. Thus, *Meyers's* conclusion about the "voluntary invocation principle" determines the Court's conclusion: Defendants cannot claim the defense of sovereign immunity. *Meyers*, 410 F.3d at 248. All claims against Ysleta Del Sur Pueblo and the Tigua Tribal Police Department will be dismissed under Rule 12(b)(1) pursuant to the tribal exhaustion doctrine. Claims against all individual officers will be dismissed pursuant to Rule 12(b)(6), as § 1983 is inapplicable to actions taken under color of tribal law. Mr. Holguin's claim of gross negligence is also dismissed pursuant to Rule 12(b)(6) as having insufficient factual support. Thus, all of Mr. Holguin's claims will be dismissed, and Defendants' Motion will be granted in full.

105. Evans Energy Partners, LLC v. Seminole Tribe of Florida, 2021 WL 4244128, Case No. 2:20-cv-978, (M.D. Florida September 17, 2021).

Defendant Seminole Tribe of Florida, Inc. ("STOFI") is a tribal corporation organized under section 17 of the Indian Reorganization Act, 25 U.S.C. § 5124 (formerly § 477). In 2013, STOFI contracted with Plaintiff Evans Energy Partners, LLC ("EEP") to operate a petroleum distribution business. The contract entitled EEP to a termination fee equal to fifty percent of the business's fair market value if STOFI terminated the contract. Any disputes regarding the termination fee were subject to arbitration under the American Arbitration Association's rules. Three years later, amid mutual accusations of default,

STOFI terminated the agreement and obtained a default judgment against EEP in tribal court for breach of contract. EEP attempted to compel STOFI to arbitrate the termination fee, but the AAA panel dismissed EEP's demand. EEP now sues STOFI in this Court and seeks: (1) a declaratory judgment that the tribal court had no jurisdiction to enter its final default judgment against EEP, and (2) an order compelling arbitration. STOFI moves to dismiss on several grounds, including tribal sovereign immunity. After careful review, the Court holds that the parties' agreement does not contain a clear waiver of STOFI's tribal sovereign immunity. Accordingly, STOFI's motion to dismiss is granted.

106. Whalen v. Oglala Sioux Tribe Executive Officers, 2021 WL 4267654, CIV. 20-5070-JLV(D. S. Dakota. September 20, 2021).

Ms. Whalen alleges the defendants failed to conduct the Oglala Sioux Tribe's 2020 primary and general elections in accordance with the Constitution of the Oglala Sioux Tribe and the tribe's Election Code. She alleges she was improperly denied candidacy for the vice presidency when the Election Commission denied her nomination packet based on her failure to include a receipt of a completed drug test, as required by tribal law. She seeks, among other things, to have this court declare the tribe's 2020 election null and void, grant a new election and appoint the superintendent of the Bureau of Indian Affairs Pine Ridge Agency to oversee the day-to-day affairs of the tribe until a new election is held. On December 4, 2020, counsel for the Executive Committee and its officers and the Tribal Council and its members filed a motion to dismiss for lack of subject matter jurisdiction, insufficient process, insufficient service of process and failure to state a claim upon which relief can be granted. At all times relevant to Ms. Whalen's allegations, the named defendants were acting in their official capacities as members, officers or commissioners of the Tribal Council, Executive Committee and Election Commission, respectively. The OST has not waived its immunity from suit, and therefore the court may not exercise jurisdiction over this case. Dismissed.

107. Treasure v. Bureau of Indian Affairs, 2021 WL 4820255, CV-20-75-GF-BMM (D. Mont. October 15, 2021).

Defendants seek dismissal on the basis that tribal sovereignty deprives the Court of subject-matter jurisdiction or, in the alternative, that Plaintiffs have failed to allege a claim upon which relief can be granted. The Assiniboine and Sioux Tribes (the "Tribes") have established the Turtle Mound Buffalo Ranch to cultivate a buffalo herd for the benefit of tribal members. The Ranch is located entirely within the Fort Peck Indian Reservation and is run by the Tribes' Fish and Game Department. Plaintiffs Lanny and Kris Treasure own and lease property (the "Treasure Property") in Poplar, Montana, north of the Ranch. Treasures use their land to grow crops and to maintain a residence. The Treasure Property is located entirely within the exterior boundaries of the Fort Peck Indian Reservation. The Tribes supplement the buffalo herd's food supply with hay grown on tribal trust properties. The Tribes' Fish and Game Department engaged in a crop sharing arrangement with Dale Grandchamp and Defendant Doug Grandchamp. A fire broke out while Forsness, a third crop-sharer, was swathing a parcel. Forsness contacted Doug Grandchamp and Fish and Game Director Robbie Magnan, both of whom responded to the fire to assist in putting it out. The BIA Fire Service also responded and directed fire response. Treasures became concerned that the fire would

spread to their land and offered aid in fighting the fire. The BIA Incident Commander refused the offer and later told Treasures that the fire had been extinguished. However, by September 1, 2018, the fire spread and engulfed 3,100 acres of the Treasure Property with an additional 700 acres lost due to collateral damage from the fire. Tribal sovereign immunity protects tribal employees where a tribe's employees are sued in their official capacities. *See Maxwell*, 708 F.3d at 1086. Tribal sovereign immunity does not bar individual capacity suits against tribal employees when the plaintiff seeks damages from the individuals personally. This exception applies even if the plaintiff's claims involve actions that employees allegedly took in their official capacities and within their employment authority. *Maxwell* has articulated a "remedy-focused" analysis to determine whether tribal employees enjoy immunity from suit when sued in their individual capacity. Sovereign immunity shields a tribal employee when recovery against the individual, in reality, would run against the tribe. Plaintiffs may not circumvent tribal sovereign immunity by identifying individual defendants when the tribe remains the "real, substantial party in interest." The remedy sought and the scope of authority are coextensive when a party sues a tribal employee in his official capacity. Treasures claim that they have sued Grandchamp in his individual capacity. None of the allegations in the Complaint identify Grandchamp individually. Rather, all allegations pertaining to Grandchamp lump him in with the Tribes themselves as "Tribal Defendants." It is difficult to find which of these claims *could* be targeted toward Grandchamp individually, given that he neither operated, nor owned, the swather that allegedly started the fire. Treasures filed suit on August 26, 2020, against the Bureau of Indian Affairs ("BIA"), the Tribes, Doug and Dale Grandchamp, and others who were believed to be responsible in some part for the damage to the Treasure Property. The Court finds that Treasures sue Grandchamp in his official capacity as a tribal employee, as reflected by the allegations in the Complaint. The Complaint alleges that "Tribal Defendants," were negligent in "undertak[ing] any and all of their swathing and haying activities" without proper fire precautions and that "Tribal Defendants' swather caused the Buffalo Pasture fire." Nowhere do Treasures distinguish Grandchamp's actions from those of the Tribe. Grandchamp is entitled to tribal sovereign immunity and Treasures' complaints against him and against the tribe should be dismissed. Dismissed.

108. Acres Bonusing, Inc. v. Marston, 17 F.4th 901, No. 20-15959 (9th Cir. November 5, 2021).

Blue Lake Rancheria, a federally recognized Tribal Nation, sued Acres and his company in Blue Lake Tribal Court over a business dispute involving a casino gaming system. Acres and Acres Bonusing prevailed in tribal court but sued in federal court against the tribal court judge and others. The defendants fell into two general groups. The Blue Lake Defendants consisted of tribal officials, employees, and casino executives and lawyers who assisted the tribal court. The second group consisted of Blue Lake's outside law firms and lawyers. The district court concluded that tribal sovereign immunity shielded all defendants from suit. Reversing in part, and following the framework set forth in *Lewis v. Clarke*, 137 S. Ct. 1285 (2017), the panel held that tribal sovereign immunity did not apply because Acres sought money damages from the defendants in their individual capacities, and the Tribe therefore was not the real party in interest. The panel held that *Lewis* and similar Ninth Circuit case law were not distinguishable on the ground that the alleged tortious conduct occurred in the tribal court, which is part of the Tribe's inherently sovereign functions. As to the Blue Lake

Defendants, the panel held that the judge, his law clerks, and the tribal court clerk were entitled to absolute judicial or quasi-judicial immunity. The panel affirmed in part and reversed in part the district court's dismissal. The panel remanded for further proceedings as to the remaining defendants not entitled to absolute personal immunity.

109. Spivey v. Chitimacha Tribe of Louisiana, 2022 WL 558026 (W.D. La. February 2, 2022).

The instant lawsuit arises out of a dispute between the plaintiff, a former Chief Financial Officer of the CBC, and the Tribe over payment of a bonus to O'Neil Darden, the Tribal Chairman. In his Complaint, Spivey alleges that in 2015, he was the CFO of CBC, a casino which is owned by the Chitimacha Tribe of Louisiana. See Complaint ¶3. Spivey alleges that in November 2015, O'Neil Darden was elected as the Tribal Council Chairman, but that prior to his election, Darden worked as an employee of the CBC as the Event/Catering Director. Spivey alleges that in 2015, the targeted revenue for the casino was attained, which meant that employee bonuses would be paid out. Spivey alleges that Anthony Patrone, CEO of CBC, was in charge of formulating the incentive plan and determining which employees would be paid bonuses and how much the bonus would be for each employee. Chitimacha Tribal laws prohibit a council member from working in the Casino or receiving any funds in the form of payments from the casino. Spivey alleges that in November 2019, Anthony Patrone attended a meeting with the Tribal Council, and one topic of discussion was whether O'Neil Darden should receive a bonus. Spivey alleges that the rationale for giving Darden a bonus was "based solely upon his employment as a director" with the casino. The amount to be paid to Darden was determined to be approximately $3,900.00. Spivey alleges that there was no objection to Darden receiving this bonus at this initial meeting. He contends that he was instructed by Anthony Patrone to add Darden back into the payroll system – from which he had been removed when he became Tribal Chairman – solely for the purpose of paying him his prorated bonus. The Tribal Council referred the matter to the District Attorney for the 16th Judicial District Court for the Parish of St. Mary, and Spivey was terminated from his position as CFO of CBC. On July 30, 2020, the District Attorney informed Spivey by letter that he would not be indicted and no further charges would be sought. Id. at ¶18-20. On July 30, 2021, Spivey filed the instant lawsuit, naming as defendants the Chitimacha Tribe, CBC, and all Tribal Council members at the time of his termination except O'Neil Darden. Spivey's lawsuit seeks damages against the individual Tribal Council members for violations of his civil rights under 42 U.S.C. 1983 and 1985 in causing him to be criminally charged in connection with the actions set forth herein. He seeks punitive damages against the Tribal Council members under 42 U.S.C. 1988. The plaintiff also alleges state law claims of negligent and intentional tort against the Tribe and the CBC for the actions of the Tribal Council in bringing a frivolous criminal complaint against him. The Tribe, CBC, and the individual Tribal Council members filed the instant motion to dismiss on October 1, 2021, seeking dismissal of all claims against them on grounds this Court lacks subject matter jurisdiction over the plaintiff's claims and on grounds the plaintiff fails to state any cause of action against any defendant. For the purposes of this motion and the issue of sovereign immunity, the question before the Court is whether the referral by the Tribal Council of the incident to the district attorney for the 16th Judicial District Court for the Parish of St. Mary was an action taken by the Tribal Council

members in their individual or official capacities. It seems clear to the undersigned that these were official capacity actions. The Tribal Council members sued herein were vested with the investigatory power -- as a Tribe -- to refer the matter to the state district attorney for prosecution, and this power is set forth clearly in the Compact. Under the express language of the Compact, the "Tribe may prosecute the matter within its Criminal Justice system or refer the matter for State prosecution." See Compact at Section 4(a) (emphasis added). Here, the Tribal Council members decided -- on behalf of the Tribe -- to refer the matter to the St. Mary Parish district attorney. Accordingly, the plaintiff's allegations relate solely to the actions and decisions that the Tribal Council defendants made as a Council on the Tribe's behalf. It is clear to the undersigned that the Tribe and/or the Tribal Council – the sovereign -- is the real party in interest under these facts and circumstances. Tribal sovereign immunity applies to Tribal officials and thus bars the plaintiff's claims against the Tribal Council defendants. A claim against Tribal officials in their official capacity is "another way of pleading an action against an entity of which an officer is an agent" -- in this case, the Tribe -- and is thus "barred by sovereign immunity," just like the claims against the Tribe. Lewis, 137 S. Ct. at 1290-91 (2017), citing Kentucky v. Graham, 473 U.S. 159, 165–166 (1985). Accordingly, unless a sovereign expressly waives its immunity or Congress abrogates it, a suit brought for damages against an official acting in their official capacity is barred by the sovereign's immunity. Corn v. Mississippi Dep't of Pub. Safety, 954 F.3d 268, 275 (5th Cir.), cert. denied, 141 S. Ct. 672 (2020); see also Thomas v. City of New Orleans, 883 F. Supp. 2d 669, 680 (E.D. La. 2012) ("Sovereign immunity also extends to state officials sued in their official capacity for monetary relief"). The plaintiff's characterization of his claims against the Tribal Council members in their "individual" capacities does not control the Court's analysis. If the "the relief sought is only nominally against the official and in fact is against the official's office," then it is an official-capacity claim, and thus barred by sovereign immunity. Lewis, 137 S. Ct. at 1291, citing Will v. Michigan Dept. of State Police, 491 U.S. 58, 71 (1989); Dugan v. Rank, 372 U.S. 609, 611, 620–622 (1963); Corn, 954 F.3d at 275 (sovereign immunity bars suit brought against state official named in his individual capacity because "there are no allegations that [the official] acted outside of his [official] duties"). Here, regardless of how the plaintiff characterizes his claims in his Complaint, the undersigned finds that the Tribal Council members acted on behalf of the Tribe in referring the matter to the State District Attorney. The Motion to Dismiss for Lack of Subject Matter Jurisdiction should be granted, and all claims against all defendants should be dismissed without prejudice.

***110. Adams v. Dodge*, 2022 WL 458394, No. 21-35490 (9th Cir. February 10, 2022).** Petitioner Elile Adams appeals the district court's order dismissing, for failure to exhaust tribal remedies, her 25 U.S.C. § 1303 habeas petition seeking relief from a Nooksack Tribal Court warrant. Reviewing "questions of tribal court jurisdiction and exhaustion of tribal court remedies de novo and factual findings for clear error," Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa Inc., 715 F.3d 1196, 1200 (9th Cir. 2013), we affirm. Adams first argues that she was not required to exhaust her tribal court remedies because Nooksack Tribal Court Chief Judge Dodge and the Nooksack Tribal Court acted in bad faith by: (1) sua sponte initiating a parenting action against her; (2) ignoring a 2015 state court parenting order and its jurisdictional impact; (3) harassing her by

requiring her to appear before Dodge at least twenty times in two years; (4) issuing a warrant for her arrest and causing her to be imprisoned because of her failure to appear at a July 11, 2019 hearing despite her public defender's appearance on her behalf; (5) rejecting her habeas corpus counsel's appearance before the Tribal Court; and (6) refusing to consider her pro se habeas corpus petition upon the ex parte advice of one of Respondents' counsel. Adams has not met her burden of demonstrating that due to bad faith she need not exhaust tribal remedies. Although Judge Dodge did not recuse himself from Adams's ongoing criminal matter until after Adams filed a motion for his disqualification, the fact remains that Judge Dodge appointed Pro Tem Judge Majumdar to preside over her criminal proceedings and Adams has not explained why she cannot receive a fair hearing from Judge Majumdar. Adams also argues that she was not required to exhaust her tribal court remedies because she was arrested on off-reservation allotted land, and the Nooksack Tribal Court lacked criminal jurisdiction to arrest her. Specifically, she asserts the Nooksack Tribal Court plainly lacks criminal jurisdiction because, consistent with Congress's passage of Public Law 280 in 1953, Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified as amended at 25 U.S.C. § 1321), Washington state assumed exclusive criminal jurisdiction over tribal lands by passing Revised Code of Washington (RCW) section 37.12.010. We disagree. As an initial matter, it is well established that, although "Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess," Indian tribes "have power to make their own substantive law in internal matters and to enforce that law in their own forums." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55–56 (1978). The decisions that Adams cites likewise establish only that Washington state has jurisdiction over off-reservation allotted lands; they do not address whether Washington state has exclusive jurisdiction or whether tribes have concurrent jurisdiction over such lands.

***111. Ulizio v. MMMG, LLC*, 333 So.3d 1148, 47 Fla.L.Weekly D598Nos. 4D21-2600, 4D21-2601 (Fla. Dist. Ct. App. March 9, 2022).**

Mike Ulizio petitions for certiorari review of an order in two consolidated cases denying his motion for summary judgment, which claimed tribal sovereign immunity. Ulizio argues that he is entitled to tribal sovereign immunity because the claims against him stemmed from actions he took in his capacity as chief financial officer ("CFO") for the Seminole Tribe of Florida, Inc. ("STOFI"), a corporate entity of the Seminole Tribe (the "Tribe"). We reverse because there are no disputed issues of material fact that create a reasonable inference that Ulizio acted beyond the scope of his authority as CFO and because the application of tribal sovereign immunity does not depend on whether a Tribe employee is a tribe member. In 1995, the Tribe enacted an ordinance addressing the Tribe's sovereign immunity and how it may be waived. Id. Ordinance C-01-95 recognizes that sovereign immunity extends to tribal officials, employees, and authorized agents unless the Tribe unequivocally consents to suit. Here, plaintiffs generally allege that Ulizio participated with Howard and others in a scheme to divert MMMG's business to Redline by refusing to honor the terms of the MMMG operating agreement. MMMG already provided advertising services for Seminole Gaming when the Tribe decided to request bids through a request for proposal. Plaintiffs allege that Ulizio artificially and deceptively increased MMMG's bid to make Redline's bid look more desirable. Plaintiffs have not pointed to any evidence that could show that Ulizio's conduct was not

authorized or directed by STOFI as a function of his job as CFO. Contrary to their arguments on appeal, plaintiffs did not identify any evidence that Ulizio had an ulterior motive to harm STOFI. As in Howard, the Wax affidavit failed to create a disputed issue of material fact as to Ulizio, and there is no evidence that he acted outside the scope of his authority. See Howard, 299 So. 3d at 45. The trial court erred in denying Ulizio summary judgment and depriving him of immunity from suit. Accordingly, we reverse the order denying summary judgment and remand for the court to enter summary judgment for Ulizio. Reversed and remanded.

***112. Oertwich v. Traditional Village of Togiak,* F.4th, 22 Cal. Daily Op. Serv. 3332, 2022 Daily Journal D.A.R. 3103, 2022 WL 951272 No. 19-36029 (9th Cir. March 30, 2022).**

Non-Native American brought action against Alaskan Indian tribe and individual officers and employees of tribe, seeking declaratory and injunctive relief, as well as compensatory and punitive damages, asserting various claims based on tribe's decision to ban plaintiff from its village after plaintiff brought alcohol into village. The United States District Court for the District of Alaska, John W. Sedwick, Senior District Judge, 413 F.Supp.3d 963, dismissed the action. Plaintiff appealed. The Court of Appeals, Rawlinson, Circuit Judge, held that: 1 tribal sovereign immunity deprived federal district court of subject matter jurisdiction over claims alleged exclusively against Traditional Village of Togiak; 2 judges of Village were entitled to judicial immunity in ordering banishment of non-Native American, non-Native Alaskan from tribe's lands; 3 claim against Village and individuals acting in their official capacities was barred by tribal sovereign immunity; and 4 plaintiff sufficiently alleged denial of federally guaranteed right to be free from unreasonable seizure in violation of Fourth Amendment and deprivation of his non-contraband property in violation of substantive due process clause of Fourteenth Amendment. Affirmed in part, reversed in part, and remanded.

113. In re Coughlin, 33 F.4th 600, No.21-1153 (1st Cir. May 6, 2022).

Chapter 13 debtor filed motion to recover for alleged violations of automatic stay, and creditors, an Indian tribe and its admitted arms, moved to dismiss for lack of subject matter jurisdiction. The United States Bankruptcy Court for the District of Massachusetts, Frank J. Bailey, J., 622 B.R. 491, granted motion. Debtor appealed, and direct appeal to the Court of Appeals was permitted. Addressing a question of first impression for the court, the Court of Appeals, Lynch, Circuit Judge, held that the Bankruptcy Code unequivocally abrogates tribal sovereign immunity, even though it never expressly mentions Indian tribes. Reversed and remanded.

***114. Weiss v. Perez,* 2022 WL 1471453, No. 22-cv-00641-BLF (N.D. Cal. May 10, 2022).**

In this case, Elizabeth Weiss, a tenured professor of physical anthropology at San Jose State University, alleges that the University enacted Interim Presidential Directive PD 2021-03, which restricted access to and use of Native American remains housed at the University. The University claims the provisions in the Directive are required by recently amended state law and enacted as part of a process to prepare for repatriation of remains to a local Native American tribe, but Professor Weiss asserts that the policy was in fact

promulgated in retaliation for her speech expressing opposition to repatriation of Native American remains. Now before the Court are two motions: Professor Weiss's motion for a preliminary injunction and Defendants' motion to dismiss The Court finds that the Muwekma Ohlone Tribe is a required party under Rule 19 to adjudication of Professor Weiss's claims about the Directive. Because the Tribe has sovereign immunity from suit and thus cannot be joined, Professor Weiss's claims regarding the Directive must be dismissed with prejudice. The Court will, however, give Professor Weiss leave to amend her complaint as to her allegations about retaliation in the form of restricting access to and use of non-Native American remains and retaliation for her protected speech as it may pertain to her teaching and curational responsibilities. Accordingly, Defendants' motion to dismiss is granted with leave to amend in part and Professor Weiss's motion for a preliminary injunction is denied. Defendants argue that Professor Weiss's Complaint must be dismissed with prejudice because of the absence of a required party—the Muwekma Ohlone Tribe. Defendants argue that the Tribe is a "necessary" party under Rule 19(a) because the Tribe's ability to protect its interest in the remains of the ancestors of its members would be impaired if this lawsuit proceeds without it, and the University can't represent its interests and may face inconsistent obligations if the suit is adjudicated. The Court concludes that the Tribe is a required party under Rule 19(a) to claims regarding the Directive. Having concluded that the Tribe is a required party under Rule 19(a), the Court next considers whether the Tribe can be joined to this lawsuit. Salt River Project, 672 F.3d at 1178–79. The answer is clearly no. Because the Court has already found that claims regarding the Directive must be dismissed with prejudice under Rule 12(b)(7), it will only consider whether Professor Weiss's other claims are plausibly pled as to (1) alleged retaliation in the form of restricting access to or use of non-Native American remains, and (2) alleged retaliation for her protected speech as it may pertain to her teaching and curational responsibilities. The Court finds that Professor Weiss has not adequately alleged a false or pretextual explanation for the University's actions unrelated to the Directive. The Court will now consider whether to grant Professor Weiss leave to amend. The factors considered when determining whether to grant leave to amend include: (1) bad faith on the part of the movant; (2) undue delay; (3) prejudice to the opposing party; and (4) futility of the proposed amendment. The Court finds that Professor Weiss has not engaged in bad faith or undue delay, and that an opportunity to amend within a certain scope will not prejudice Defendants. Nor does the Court find that amendment on certain types of allegations would be futile. As the Court has already stated, the Tribe is an indispensable party to any claims regarding the adoption or implementation of the Directive insofar as it applies to Native American remains. Amendment of the claims challenging those courses of action would be futile, and so leave to amend those types of allegations will be denied. Leave to amend her allegations regarding (1) retaliation in the form of restricting access to or use of non-Native American remains, and (2) retaliation for her protected speech as it may pertain to her teaching and curational responsibilities, however, would not be futile. Defendants' motion to dismiss is granted in part for failure to join a required party and in part for failure to state a claim upon which relief can be granted pursuant to Rules 12(b)(7) and 12(b)(6); and• Professor Weiss's motion for a preliminary injunction is denied. Professor Weiss is granted leave to amend her complaint as to her allegations about retaliation in the form of restricting access to or use of non-Native American remains and cultural

items and retaliation for her protected speech as it may pertain to her teaching and curational responsibilities unrelated to Native American items subject to NAGPRA and CalNAGPRA.

115. Thunderhawk v. Morton County, 2022 WL 2441323, No 20-3052 (8th Cir. July 5, 2022).

This putative class action arises from the highly publicized protests against construction of the Dakota Access Pipeline (DAPL) across an area of North Dakota near the boundary of the Standing Rock Indian Reservation. Between April 2016 and February 2017, members of the Standing Rock Sioux Tribe, along with tens of thousands of self-identified "Water Protectors," engaged in protests near where State Highway 1806 crosses the Cannonball River. Following a significant skirmish between protestors and law enforcement officials, law enforcement erected a barricade across the Backwater Bridge, blocking through access on State Highway 1806. Plaintiffs, a group of tribal members and supporters, filed suit against various state and county officials, alleging that the closure of Backwater Bridge and a nine-mile section of road violated their constitutional rights. Defendants filed a motion to dismiss, which the district court granted in part and denied in part. As relevant to this appeal, the district court denied the motion as it relates to defendants' entitlement to qualified immunity, concluding that the qualified immunity analysis would be more properly decided at the summary judgment stage. Defendants filed this interlocutory appeal, asserting that the district court erroneously denied the motion to dismiss based on qualified immunity. This Court " 'review[s] de novo the denial of a motion to dismiss on the basis of qualified immunity,' and must consider 'whether the plaintiff has stated a plausible claim for violation of a constitutional or statutory right and whether the right was clearly established at the time of the alleged infraction.' " Dadd v. Anoka Cnty., 827 F.3d 749, 754-55 (8th Cir. 2016) (citation omitted). "[Q]ualified immunity is 'an immunity from suit rather than a mere defense to liability.' " Watson v. Boyd, 2 F.4th 1106, 1110 (8th Cir. 2021) (citation omitted). Accordingly, it " 'is effectively lost if a case is erroneously permitted to go to trial,' [and] law enforcement officers are at least 'entitled to a thorough determination of their claim of qualified immunity if that immunity is to mean anything at all.' " Id. The district court devoted less than 3 pages to the qualified immunity analysis. As to the first prong, the district court determined that "the Plaintiffs have alleged facts showing violations of their constitutional right to speech," and, as to the second prong, the district court stated that "whether the law was clearly established so that a reasonable official would know he or she was violating the constitutional rights of another ... appears to be the biggest contention between the parties." Instead of deciding the clearly established prong, however, the district court stated that this case is an example of why "qualified immunity is often best decided on a motion for summary judgment when the details of the alleged deprivations are more fully developed." As the United States Supreme Court has noted, "when qualified immunity is asserted at the pleading stage, the precise factual basis for the plaintiff's claim or claims may be hard to identify" and "the answer [to] whether there was a violation may depend on a kaleidoscope of facts not yet fully developed." Pearson v. Callahan, 555 U.S. 223, 238-39 (2009). "While a district court may address the prongs in any order, it 'may not deny qualified immunity without answering both questions in the plaintiff's favor.' " Watson, 2 F.4th at 1112 (citation

omitted). The district court's failure to answer the clearly established inquiry was thus erroneous. We therefore remand to the district court with instructions to conduct the requisite clearly established analysis. For the foregoing reasons, we reverse and remand for proceedings consistent with this opinion.

116. Stinson Lumber Company v. Coeur D'Alene Tribe, 2022 WL 3027029, Case No. 2:22-cv-00089-DCN (D. Idaho July 28, 2022).

Pending before the Court is Plaintiff Stimson Lumber Company's Motion for Preliminary Injunction. Upon review, and for the reasons set forth below, the Court grants the Motion for Preliminary Injunction. On May 31, 2000, a third party, TOBD, Inc., entered into an Agreement with the Defendant, Coeur D'Alene Tribe (the "Tribe"),under which TOBD, Inc. would lease certain land and assets from the Tribe and construct and operate a sawmill. TOBD, Inc. subsequently made the required investment and began operating the Mill. TOBD's rights under the Agreement were later acquired by Plummer Forest Products, which were then acquired in 2006 by the Plaintiff, Stimson Lumber Company. Notably, the Agreement contained a Purchase Option under which Stimson could, after a certain period of time, purchase the Mill and certain other assets. To exercise this Purchase Option, Stimson was required to give sixty days written notice. The full term of the Agreement did not officially expire until June 1, 2020. A few days before the expiration, Dan McFall, the Chief Operating Officer of Stimson Lumber Company, emailed the Tribe, claiming that Stimson had been unsuccessfully trying to contact the Tribe for a few months to extend the Agreement for a year. McFall also submitted notice that Stimson was exercising its Purchase Option. Eric Van Orden, legal counsel for the Tribe, responded the next day. Van Orden indicated that the May 27th letter was the first written communication he had received regarding the expiration of the Agreement. Van Orden explained that the terms of the Agreement renewal could not be discussed until after June 8, 2020, when the new Tribal Council would be sworn in. Van Orden stated: "I understand this may create a holdover situation under the Lease so the Tribe will not expect a rent payment for the month of June 2020, until we can meet and discuss the terms of a new lease agreement. As such, beginning on June 1, 2020, Stimson is a holdover tenant of the Property." After offering to negotiate the new lease agreement, Smith requested that Stimson pay the excused June rent and send payment for July's rent. However, the negotiations broke down. Stimson brought this action against the Tribe, raising claims for breach of contract, unjust enrichment, and conversion. Stimson seeks specific performance, damages, and declaratory and injunctive relief. On March 2, 2022, Stimson filed a Motion for Temporary Restraining Order and Motion for Preliminary Injunction asking that the Court enjoin the Tribe from terminating the Agreement and evicting Stimson. The Court denied the Motion for Temporary Restraining Order on March 3, 2022. As a threshold matter, the Court will first address the issue of sovereign immunity raised by the Tribe. Stimson claims the Court has subject matter jurisdiction because the requirements for diversity jurisdiction have been met. The Tribe contends that the Court cannot hear the case because "the Tribe has not expressly waived its sovereign immunity for Stimson's claims." Tribes and Tribal governmental entities enjoy common-law sovereign immunity from suit. Stock West Corp. v. Lujan, 982 F.2d 1389, 1398 (9th Cir. 1993). Here, the Agreement does contain a limited waiver of immunity. The Tribe argues that because the Agreement is no longer in effect, and "does not provide

that this waiver survives," the aforementioned waiver "is inoperable." The Tribe's argument is somewhat circular. In essence, the Tribe is arguing that because the Agreement is inoperable, the Court has no jurisdiction to determine whether the Agreement is inoperable. Further, based on the plain language of the waiver, it is clear that the Tribe has waived its immunity for the purposes of this lawsuit. Thus, under the plain language of the Agreement, the parties agreed to this Court's jurisdiction, and even agreed to construe the lawsuit as a federal question in order to submit to this Court's jurisdiction. While the case was brought pursuant to 28 U.S.C. § 1332, and not 28 U.S.C. § 1331, the Tribe's explicit agreement to submit to the jurisdiction of this Court reinforces the Court's conclusion that the Tribe waived its sovereign immunity. The issue before the Court is whether Stimson could prevail on a claim that the Purchase Option was properly exercised. The holdover tenancy by Stimson, whose status as a holdover tenant was explicitly acknowledged by the Tribe, which accepted payment for almost two years for the holdover tenancy, extended the term of the Agreement, meaning the Purchase Option was likely properly exercised. While the Tribe did signal that it believed the Purchase Option was no longer valid, the Tribe nevertheless created a holdover tenancy and prolonged the Agreement. At this stage of the proceedings, the Agreement's language clearly supports Stimson's claim that the Purchase Option survived into the holdover tenancy and was thus timely exercised. Now, therefore, it is hereby ordered: Stimson's Motion for Preliminary Injunction is granted.

K. Sovereignty, Tribal Inherent

117. Becker v. Ute Indian Tribe, F.4th, 2021 WL 3361545 Nos. 18-4030 & 18-4072 (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.

118. Eagle Bear, Inc. v. Blackfeet Indian Nation, CV-21-88-GF-BMM, 2021 WL 5360601 (D. Mont. November 17, 2021).

Eagle Bear, Inc. ("Eagle Bear") and William Brooke (collectively, "Plaintiffs") brought this action against the Blackfeet Tribal Court and the Blackfeet Indian Nation ("Blackfeet Nation"). Plaintiffs seek declaratory and injunctive relief to prevent the Blackfeet Tribal Court from exercising jurisdiction over their dispute with the Blackfeet Nation. The Blackfeet Nation's complaint against Eagle Bear in the Blackfeet Tribal Court alleges the following claims: 1) illegal trespass seeking eviction; 2) accounting of Plaintiffs' rents and profits since June 10, 2008; 3) unauthorized use of Blackfeet Nation lands seeking illegally gained profits; 4) fraudulent misrepresentation seeking illegally gained profits; and 5) failure to follow the laws of the Blackfeet Nation seeking damages. Plaintiffs

allege that the Blackfeet Tribal Court lacks jurisdiction over the Blackfeet Nation's complaint for the following reasons: 1) the complaint raises issues of federal law; 2) William Brooke is not a member of the Blackfeet Tribe; 3) the Blackfeet Nation's claims are subject to BIA administrative proceedings; 4) The BIA is an indispensable party; 5) the lease requires arbitration; 6) this Court has exclusive jurisdiction under the lease. Plaintiffs' arguments rely primarily upon the continued existence of the lease between Eagle Bear and the Blackfeet Nation. Whether Plaintiffs are likely to succeed on the merits thus depends largely upon whether the lease was ultimately cancelled by the BIA in 2008. The record at this stage appears to indicate that the BIA cancelled the lease.In light of the facts in the record pointing to the lease having been cancelled by the BIA in 2008, the analysis for Blackfeet Tribal Court jurisdiction in this instance closely resembles the tribal court jurisdictional question in Water Wheel Camp Recreational Area, Inc. v. LaRance, 642 F.3d 802 (9th Cir. 2011). The Montana limits on a tribe's power to exclude do not apply on tribal land. Id. The CRIT's power to exclude non-Indians necessarily included the accompanying power to regulate the activities of non-Indians on tribal land. Water Wheel, 642 F.3d at 812. The Ninth Circuit made this point clear: "where the non-Indian activity in question occurred on tribal land, the activity interfered directly with the tribe's inherent powers to exclude and manage its own lands, and there are no competing state interests at play, the tribe's status as landowner is enough to support regulatory jurisdiction without considering Montana." Id. at 814. Even if Montana were the correct analysis to apply to this case, the first exception still would indicate tribal court jurisdiction appropriate. The first Montana exception exists where non-Indians "enter consensual relationships with the tribe or its members." See Montana, 450 U.S. at 566. William Brooke and Eagle Bear operated the KOA campground on tribal land. William Brooke and Eagle Bear voluntarily entered into a consensual relationship with the Blackfeet Nation to operate that business on tribal land. Accordingly, Plaintiffs' Motion for Preliminary Injunction is denied.

119. Howard v. Weidemann, 2021 WL 6063630, No. 20-cv-1004 (D. Minn. Dec. 22, 2021).

In this case brought under 42 U.S.C. § 1983, Plaintiff Robert Francis Howard seeks damages stemming from an allegedly unlawful seizure and excessive use of force that occurred during a traffic stop on the White Earth Reservation. Defendants Ben Weidemann and Brandon Meyer were White Earth Tribal Police Department officers. Weidemann initiated the at-issue traffic stop, and Meyer arrived and participated mid-stop. Defendants have moved for summary judgment, and the motion will be granted. There is no genuine dispute that Weidemann and Meyer acted under color of tribal law when they carried out the stop—but not under color of state law, as § 1983 requires. If that weren't so, the officers would be entitled to qualified immunity. Howard has not created a trial-worthy dispute that Defendants acted under color of state law. Defendants were tribal police officers vested with authority to enforce the tribal code, and that's what they did here. Weidemann attempted a traffic stop after forming a belief that Howard, an enrolled member of the White Earth Band of Ojibwe, was driving above the posted speed limit. Citing a cooperative law enforcement agreement between the White Earth Reservation of Chippewa Indians and Becker County, Howard argues that some doubt exists as to whether Defendants acted under color of state law. This is not persuasive. Howard is correct that Weidemann and Meyer were capable of wearing multiple hats: they could enforce tribal law, but they were also authorized to enforce state

criminal law on the reservation. Here, the evidence establishes beyond genuine dispute that Defendants acted only as tribal—and not as state—officers. Defendants' Motion for Summary Judgment is granted.

***120. United States v. Cooley,* 2022 WL, 74001 CR 16-42-BLG-SPW ,(D. Mont. January 7, 2022).**

Before the Court is Defendant Joshua James Cooley's Motion to Suppress. The Motion comes to the Court on remand from the Ninth Circuit and United States Supreme Court for the Court to determine the following question: "If—as the Supreme Court held—the tribal officer otherwise possessed the relevant authority, 'whether the officer had probable cause for a search or arrest, or reasonable suspicion for an investigatory detention.'" The Court ordered supplemental briefing on the matter. For the following reasons, the Court denies Cooley's Motion to Suppress. The facts of this case have been previously determined by this Court without issue. A search or seizure is reasonable if the investigating officer conducts the search or seizure after obtaining reasonable suspicion of criminal activity. Arvizu, 534 U.S. at 273. Reasonable suspicion of criminal activity exists if the investigating officer can articulate particularized and objective facts supporting their inference. A court must review the totality of the circumstances present to determine whether reasonable suspicion existed including the officer's experience and training. The Ninth Circuit has identified five factors to review when determining whether a seizure occurred: (1) the number of police officers present; (2) whether any weapons were displayed during the encounter; (3) whether the encounter occurred in a public or private place; (4) whether the police officer's manner would imply that compliance would be compelled; and (5) whether the officer informed the individual that he could terminate the encounter and walk away. Cooley argues he was illegally seized at three different points throughout his encounter with Officer Saylor. Officer Saylor legally seized Cooley, placed him in the patrol unit to further mitigate any risk of danger due to Saylor conducting the stop alone, and conducted a Terry search of Cooley and the passenger compartment of the vehicle. During this search, Officer Saylor observed a glass pipe and a plastic bag containing a white substance later positively identified as methamphetamine. Because Officer Saylor had sufficient grounds to conduct the Terry search, the contraband discovered need not be suppressed. Michigan, 463 U.S. at 1050 ("If, while conducting a legitimate Terry search of the interior of the automobile, the officer should, as here, discover contraband other than weapons, he clearly cannot be required to ignore the contraband, and the Fourth Amendment does not require its suppression in such circumstances."). The evidence Officer Saylor discovered during the vehicle search established probable cause of violations of federal and state law for an arrest. that the Defendant's Motion to Suppress (Doc. 33) is denied.

***121. Rincon Mushroom Corporation v. Mazetti et al*., Case No.: 3:09-cv-02330-WQH-JLB, 2022 WL 10143451 (S.D. Cal. March 15, 2022).**

The matters before the Court are the Motion for Summary Judgment filed by Plaintiffs/Counter-Defendants Rincon Mushroom Corporation of America ("RMCA") and Marvin Donius (ECF No. 166) and the Motion for Summary Judgment filed by Defendants/Counter-Claimants Rincon Band of Luiseño Indians (the "Tribe"), Bo Mazzetti, et al. (the "Tribal Officials") (ECF No. 170). On October 20, 2009, Plaintiff

RMCA initiated this action by filing a Complaint bringing twelve causes of action against Defendants. The Complaint alleged that Defendants and the Tribe conspired to regulate activity on a five-acre parcel of land owned by Plaintiffs (the "Property") located within the outer boundaries of the Tribe's reservation, with the goal of devaluing the Property so that the Tribe could purchase it at a discount. The Complaint sought damages, costs and attorneys' fees, and declaratory and injunctive relief denying the Tribe regulatory and adjudicative authority over RMCA and the Property. On July 19, 2012, the Court of Appeals affirmed this Court's determination that RMCA was required to exhaust tribal remedies, holding that "the [T]ribe's assertion of jurisdiction is 'colorable' or 'plausible.' " On August 25, 2015, Plaintiffs filed a complaint in the Rincon Trial Court (the "Tribal Complaint") against the Tribe and tribal officials challenging the Tribe's regulatory jurisdiction over Plaintiffs' activities on the Property. The Rincon Trial Court found the following facts: (1) that Plaintiffs failed to maintain the Property; (2) that the Property constitutes a fire hazard that endangers the Tribe's casino and resort, which is located across the street from the Property and is the Tribe's primary source of income; (3) that Plaintiffs' actions and inactions have contributed to a threat of contamination to the pristine character of the Tribe's drinking water supply; and (4) that Plaintiffs' assertion of immunity from tribal jurisdiction, together with local government's demurrer, creates a lawless enclave within the reservation. The Rincon Trial Court concluded that the Tribe has the authority to enforce the NOVs issued to Plaintiffs under the 2014 REEO. On April 22, 2019, the Rincon Trial Court concluded the second, substantive, phase of the bifurcated trial and entered Judgment in favor of Defendants. On April 20, 2020, the Rincon Appellate Court issued an Opinion affirming the Rincon Trial Court's conclusion that the Tribe had jurisdiction under the second Montana exception and reversing and remanding the injunction granted by the Rincon Trial Court on the grounds that it was overbroad. On July 17, 2020, Plaintiffs filed the operative First Amended Complaint against the Tribe and the Tribal Officials in their personal and official capacities. The existence of regulatory jurisdiction in this case depends on whether the Tribe has established that Plaintiffs' conduct on the Property "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the [T]ribe." Montana, 450 U.S. at 566. "To establish jurisdiction under Montana's second exception, the nonmember's activities 'must do more than injure the [Tribe]' " or its members. FMC, 942 F.3d at 935 (quoting Plains Com. Bank, 554 U.S. at 341). "The activities must 'imperil the subsistence or welfare' of the tribal community," id. (quoting Montana, 450 U.S. at 566), such that "tribal power [is] necessary to avoid catastrophic consequences," Plains Com. Bank, 554 U.S. at 341. The impact of the nonmember's conduct must be "demonstrably serious," Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 492 U.S. 408, 431 (1989) (White, J.) (plurality opinion), and not "speculative," Evans v. Shoshone-Bannock Land Use Pol'y Comm'n, 736 F.3d 1298, 1306 (9th Cir. 2013). The Rincon Trial Court made the following four core factual findings in its Jurisdictional Order in support of its conclusion that the Tribe had jurisdiction under Montana's second exception: (1) that Plaintiffs failed to maintain the Property; (2) that the Property constitutes a fire hazard that endangers the Tribe's casino and resort, which is located across the street from the Property and is the Tribe's primary source of income; (3) that Plaintiffs' actions and inactions have contributed to a threat of contamination to the pristine character of the Tribe's drinking water supply; and (4) that Plaintiffs' assertion

of immunity from tribal jurisdiction, together with local government's demurrer, creates a lawless enclave within the reservation. The Court concludes that the Rincon Trial Court's factual findings are supported by evidence in the record and are not clearly erroneous. The Court concludes that the Rincon tribal courts have adjudicatory jurisdiction over the claims at issue, based on the nature of the tribal sovereign interests, long-standing principles of Indian law, and congressional interest in tribal self-government. The Motion for Summary Judgment filed by Defendants is granted. Defendants are entitled to prevail on their counterclaim regarding the recognition and enforcement of the June 26, 2020 Amended Judgment of the Rincon Trial Court.

***122. Chegup v. Ute Indian Tribe of the Uintah and Ouray Reservation*, Nos. 19-4178 & 20-4015, 2022 WL 815681 (10th Cir., March 18, 2022).**

The Ute Indian Tribe of the Uintah and Ouray Reservation temporarily banished Angelita M. Chegup, Tara J. Amboh, Mary Carol Jenkins, and Lynda M. Kozlowicz. The banished members did not challenge their temporary banishment in a tribal forum, but instead sought relief in federal court by filing a petition for habeas corpus. The banished members contended that, because they were excluded from the reservation by virtue of their banishment, they were "detained" within the meaning of the Indian Civil Rights Act of 1968 ("ICRA"). The district court disagreed and dismissed the suit without considering the Tribe's alternative position: that the court could not consider the claims at all because the banished members failed to exhaust their tribal remedies. On appeal, we do not consider the substantive question whether tribal banishment is detention for purposes of habeas. Respect for tribal sovereignty required that, before the court below decided this complex and difficult question about the scope of ICRA habeas, the banished members must have either exhausted their tribal remedies or met the heavy burden of demonstrating why they had not. Even though tribal exhaustion is non-jurisdictional, and courts may often choose between threshold grounds for denying relief. Because the district court neither began its analysis with tribal exhaustion nor reached that issue in the alternative, we remand for it to be decided in the first instance. For now, it is enough to note that because this ICRA case presents difficult and important questions about the scope of the right to habeas corpus, the crucial comity concerns that motivate tribal exhaustion doctrine are at their peak. That summit must be reached before the district court may properly turn to the substance of the claims—including the determination whether temporary banishment constitutes detention. Reversed and remanded.

***123. Big Horn Co. Electric Cooperative v. Big Man*, 2022 WL 738623, No. 21-35223 (9th Cir. Mar. 11, 2022).**

Big Horn County Electric Cooperative (BHCEC) appeals the district court's grant of summary judgment for all defendants, holding that the Crow Tribe has regulatory and adjudicatory authority over BHCEC's activities on the land where Big Man resides. The district court determined that Big Man resides on tribal trust land and that BHCEC had not met its burden of showing that Congress intended to divest Crow of its tribal jurisdiction over BHCEC's actions on that land. In the alternative, the district court concluded that both exceptions detailed in Montana v. United States, 450 U.S. 544 (1981), apply: 1) BHCEC formed a consensual relationship with the Tribe and there is a sufficient nexus between the regulation and that relationship, and 2) BHCEC's conduct

has a direct effect on the health and welfare of a tribal member. The court concludes that the first Montana exception is sufficient to sustain tribal jurisdiction over the dispute. *Big Horn County Electric Cooperative, Inc. v. Adams*, 219 F.3d 944 (9th Cir. 2000), determined that the BHCEC's "voluntary provision of electrical services" on the Tribe's reservation and its contracts with tribal members to provide electrical services created a consensual relationship, within the meaning of Montana. 219 F.3d at 951. In Adams, the court did not limit the tribal court's jurisdiction to suits on the contract, but merely reaffirmed that the regulation/suit must arise out of the activity that is the subject of the contracts/consensual relationship—the provision of electric services. Id. Affirmed.

***124. Ute Indian Tribe of the Uintah and Ouray Reservation, v. McKee*, 2022 WL 1231677, No. 20-4098 (10th Cir. April 27, 2022).**

This case arises from a long-running irrigation-water dispute between Plaintiff Ute Indian Tribe of the Uintah and Ouray Reservation and Defendant Gregory McKee, who is not a member of the Tribe.1 Defendant owns non-Indian fee land within the Ute reservation's exterior boundaries and uses water from two irrigation canals flowing through his property. Plaintiff claims the water belongs to the United States in trust for the Tribe. Plaintiff sued Defendant in the Ute tribal court, alleging that Defendant had been diverting the Tribe's water for years, and won. Plaintiff then petitioned the district court to recognize and enforce the tribal-court judgment. But the district court dismissed the case after holding that the tribal court lacked jurisdiction to enter its judgment. Because we too conclude that the tribal court lacked jurisdiction over Plaintiff's dispute with a nonmember of the Tribe arising on non-Indian fee lands, we exercise jurisdiction under 28 U.S.C. § 1291 and affirm. Plaintiff argues that it need not resort to the Montana exceptions to establish tribal-court jurisdiction because an Indian tribe has inherent sovereign authority to exclude nonmembers from its territory. Plaintiff argues that because it is the beneficial owner of the exclusive right to use the water in the Deep Creek Canal and Lateral No. 9, its inherent authority to exclude others from its territory includes the authority to exclude others from using its water. And although Defendant, a nonmember of the Tribe, allegedly misappropriated Plaintiff's water on non-Indian fee land, Plaintiff argues that "no rational basis in law or logic" supports treating water differently than territory. Thus, Plaintiff argues that we must determine the merits of its claim to exclusive rights in the water to know whether the tribal court had jurisdiction. The district court, however, determined that the merits of Plaintiff's claim to the water are inapplicable to the jurisdictional question because regardless of the extent of Plaintiff's water rights, the tribal court lacked jurisdiction over a nonmember's water use on nontribal land. We agree with the district court; we need not wade into the merits of Plaintiff's claim to exclusive rights in the disputed water because the tribal court lacked jurisdiction. Because Defendant is not a member of the Tribe and allegedly misappropriated tribal water on non-Indian fee land, the tribal court could have jurisdiction only if Defendant entered "consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements" or if Defendant's conduct "threaten[ed] or ha[d] some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Id. at 565–66, 101 S.Ct. 1245 (citations omitted). The tribal court held, and Plaintiff argues, that the tribal court had jurisdiction under both Montana exceptions. As to the first exception, Plaintiff asserts that

Defendant has agricultural leases on Plaintiff's lands and a farming partnership with a tribe member. Plaintiff argues that Defendant's consensual agreements with both the Tribe and one of its members subject Defendant to the tribal court's jurisdiction under the first Montana exception. But an Indian tribe does not gain plenary jurisdiction over all activities of a nonmember simply by having some contractual relationship with him—the exercise of jurisdiction must have a nexus to the parties' relationship. See Atkinson Trading Co. v. Shirley, 532 U.S. 645, 656, 121 S.Ct. 1825, 149 L.Ed.2d 889 (2001).

125. Stanko v. Oglala Sioux Tribe, 2022 WL 1499817, No. 22-1266 (8th Cir. May 12, 2022).

South Dakota resident Rudy Stanko appeals the district court's1 dismissal of his civil rights action against a tribal agency and individual tribal officials. Stanko alleged that defendants violated his constitutional rights; violated the Indian Civil Rights Act, and engaged in assault, battery, and theft following a traffic stop on a federally-maintained highway on the reservation. After de novo review, we affirm for the reasons stated by the district court.

126. McKinsey & Company, Inc. v. Boyd, 2022 WL 1978735 (W.D. Wisc. June 6, 2022).

McKinsey & Company, Inc., ("McKinsey") brought this action for injunctive relief on the basis that defendants do not have tribal jurisdiction over the underlying case in the Red Cliff Tribal Court. Given the high likelihood that the tribe lacks jurisdiction and the burden on all parties, as well as the unnecessary expenditure of resources by the Tribal Court and needless delay in final resolution of the parties' dispute in a court with actual jurisdiction, the court finds that entry of an injunction is appropriate. McKinsey is a New York management consulting firm, which, among other things, provides marketing advice to pharmaceutical clients, including those that sold opioids. The Red Cliff Band of Lake Superior Chippewa Indians ("Red Cliff") is a federally recognized tribe with its reservation located in Bayfield County, Wisconsin. Red Cliff sued McKinsey on January 27, 2022, in the Red Cliff Tribal Court, seeking to hold it accountable for consulting work with opioid companies and the ensuing, devasting opioid epidemic on the Red Cliff Reservation. McKinsey has no offices on the Red Cliff Reservation nor anywhere else in Wisconsin; none of its opioid-related engagements originated within the Reservation or this state; and none of its consultants could have been based in an office there. McKinsey also does not have any commercial dealings with the Tribe. As a general rule, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation. Strate v. A-1 Contractors, 520 U.S. 438, 446 (1997). The strong general rule against the exercise of tribal jurisdiction over non-tribe members plainly applies here. With neither party offering a convincing argument as to harm, the facts, law, and public policy strongly favors McKinsey and warrants this court's imposition of a preliminary injunction. It is ordered that defendants are enjoined from proceeding with Tribal Court Case No. 22-CV-02 or taking any steps in furtherance of the Tribal Action until the final completion of this lawsuit.

***127. Klamath Irrigation District v. U.S. Bureau of Reclamation,* F.4th, 2022 Daily Journal D.A.R. 9638, 2022 WL 4101175, No. 20-36020 (9th Cir. September 8, 2022).**

Irrigation districts brought action against Bureau of Reclamation seeking declaratory judgment that Bureau's operating procedures for federal irrigation project, which Bureau adopted to fulfill obligations arising under Endangered Species Act (ESA) and tribal treaties, violated Administrative Procedure Act (APA) and Reclamation Act. The Hoopa Valley and Klamath Tribes intervened as of right, but then moved to dismiss. The United States District Court for the District of Oregon, Michael J. McShane, J., 489 F.Supp.3d 1168, dismissed for failure to join required parties. Irrigation districts appealed. The Court of Appeals, Wardlaw, Circuit Judge, held that: Tribes were required parties; Tribes could not be joined due to tribal sovereign immunity; and case could not proceed in equity and good conscience in the Tribes' absence. Affirmed.

***128. . Metlakatkla Indian Community v. Dunleavy,* F.4th, 2022 Daily Journal D.A.R. 9661, 2022 WL 410799, No. 21-35185 (9th Cir. September 8, 2022).**

Metlakatlan Indian Community who were descendants of the Tsimshian people indigenous to the Pacific Northwest brought action against state of Alaska and Alaskan officials, alleging that Alaska's limited entry program for commercial fishing illegally restricted Community members' right to fish outside the reservation boundaries, and seeking declaratory and injunctive relief. The United States District Court for the District of Alaska, John W. Sedwick, Senior District Judge, 2021 WL 960648, granted defendants' motion to dismiss for failure to state a claim. Community appealed. The Court of Appeals, Fletcher, Circuit Judge, held that: as a matter of first impression, statute creating reservation preserved for the Community and its members an implied right to non-exclusive off-reservation fishing for personal consumption and ceremonial purposes, as well as for commercial purposes, and Alaska's limited entry program for commercial fisheries violated Community's implied off-reservation fishing rights. Reversed and remanded.

***129. Lexington Insurance Company v. Smith,* 2022 WL 4131593, Case No. 3:21-cv-05930-DGE (W.D. Wash. September 12, 2022).**

Plaintiffs' insurance policies were issued for the benefit of tribal owned businesses and properties operating on tribal land. There is a present dispute as to whether those insurance policies provide coverage for losses alleged to have occurred at the insured businesses and property. Because the issuance of the insurance policies arose out of activities occurring on tribal land—namely, tribal owned business activities on tribal owned lands—a tribe's sovereign right to exclude as well as the consensual relationship between the parties confers tribal adjudicative authority. Accordingly, and as further explained herein, the Court grants Defendant-Intervenor's Motion for Summary Judgment denies Plaintiffs' Motion for Summary Judgment and declines to take judicial notice of certain disputed aspects of the Suquamish Tribal Code. Defendant-Intervenor, the Suquamish Tribe ("the Tribe"), is a federally recognized Indian tribe located in Suquamish, Washington, and situated on tribal trust lands within the Port Madison Indian Reservation ("the Reservation"). The Tribe owns and operates several businesses on the Reservation, including the Suquamish Museum and Suquamish Seafood Enterprise

("SSE"). (Id.) Port Madison Enterprises ("PME") is the Tribe's wholly owned economic development arm. Defendants Cindy Smith, Eric Nielsen, Bruce Didesch, and Steve Aycock are judges of the Suquamish Tribal Court and the Suquamish Tribal Court of Appeals. Plaintiffs are insurance companies ("the Insurers") from whom the Tribe and PME purchased, on their own behalf and on behalf of various tribal entities, "All Risk" property insurance coverage. The Tribe and PME purchased their "All Risk" property insurance policies through the Tribal Property Insurance Program ("TPIP"), which is administered by Tribal First, a moniker used by Alliant Specialty Services, Inc. ("Alliant"). On March 9, 2020, in response to the outbreak of COVID-19 in Washington State, the Suquamish Tribal Council passed Resolution 2020-048, declaring a public health emergency, and activating comprehensive emergency management within the Tribal Government. On March 16, 2020, the Tribal Council passed Resolution 2020-051, restricting access to certain public facilities operated by PME and suspending operations at the Suquamish Clearwater Casino Resort. On March 27, 2020, the Tribal Council extended the suspension of operations at the Suquamish Clearwater Casino Resort and suspended operations at other tribal businesses, including the Kiana Lodge, the White Horse Golf Club, and the Longhouse Texaco outlets. The Tribe and PME allege that the COVID-19 pandemic damaged the buildings housing tribal businesses, caused tribal businesses to suspend or restrict operations, and further caused tribal businesses to experience loss of use, extended business income loss, and tax revenue interruption even after businesses were allowed to re-open. The Tribe and PME further contend that they have incurred other expenses related to the pandemic, including costs associated with disinfecting and sanitizing their businesses premises. The relevant insurance policies purchased by the Tribe and PME were in effect from July 1, 2019 through July 1, 2020. During this period, the Tribe paid $231,963.00 and PME paid $1,336,007.00 for coverage under their respective policies. The Tribe and PME contend that the "All Risk" policies issued by the Insurers provide "broad coverage for losses caused by any cause unless the cause is explicitly excluded in the policy." The Tribe and PME argue that the policies issued to them by the Insurers do not exclude losses incurred due to communicable diseases or viruses. After the Insurers responded to their claims, the Tribe and PME filed a complaint against the Insurers in the Suquamish Tribal Court. The Tribe and PME sued the Insurers for breach of contract and sought a declaratory judgment that the Insurers were obligated to compensate them for the full amount of their COVID related losses. Insurers filed a motion to dismiss the Tribe and PME's complaint, arguing that the Tribal Court did not have personal or subject matter jurisdiction. The Tribal Court found that it did have jurisdiction, and the Tribal Court of Appeals affirmed. On December 22, 2021, Insurers, having exhausted their tribal remedies, filed a complaint in this Court seeking a judgment that the Suquamish Tribal Court lacks jurisdiction over Insurers and the claims brought against them in the Tribal Court. Plaintiffs filed a motion for summary judgment arguing argue that the Tribal Court is not the proper forum for the Tribe and PME's claims. Plaintiffs contend that tribal courts presumptively lack jurisdiction over non-members and may only exercise jurisdiction over non-members in exceptional circumstances. The Suquamish Tribe filed a motion for summary judgment asking the Court to adopt the reasoning of the Tribal Court of Appeals, which found that the Tribal Court had subject matter jurisdiction over this claim based on the Tribe's inherent right to exclude non-members from tribal land and the decision of the non-member Insurers to

engage in a consensual commercial relationship with the Tribe and PME by issuing them insurance policies. There is no simple test for determining whether tribal court jurisdiction exists. Stock West, Inc. v. Confederated Tribes of the Colville Reservation, 873 F.2d 1221, 1228 (9th Cir. 1989). Questions involving tribal jurisdiction remain a complex patchwork of federal, state, and tribal law, which are "better explained by history than by logic." Smith v. Salish Kootenai College, 434 F.3d 1127, 1130 (9th Cir. 2006) (internal citations omitted.) Despite this, there are "two distinct frameworks for determining whether a tribe has jurisdiction over a case involving a non-tribal member defendant: (1) the right to exclude, which generally applies to nonmember conduct on tribal land; and (2) the exceptions articulated in Montana v. United States[.]" Window Rock Unified Sch. Dist. v. Reeves, 861 F.3d 894, 898 (9th Cir. 2017). In Montana v. United States, 450 U.S. 544 (1981), the Supreme Court noted that while tribes retain certain inherent sovereign powers, such as the ability to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members, the inherent sovereign powers of a tribe do not, as a general proposition, "extend to the activities of nonmembers of the tribe." 450 U.S. at 565. "To be sure, Indian tribes do retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." Id. First, a tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. Id. Second, a tribe may also exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. Id. at 566. The applicability of the Supreme Court's rationale in Montana is contingent, to a significant extent, on whether the dispute arose on tribal land. Therefore, before considering the applicability of the Montana exceptions, the Court must determine whether the dispute involves conduct or activities on tribal land such that the Tribe's right to exclude confers tribal adjudicative jurisdiction over the dispute. The parties dispute whether the contractual relationship arising out of the activity of providing insurance to the Tribe and PME triggers tribal jurisdiction pursuant to the Tribe's right to exclude. Despite acknowledging awareness of providing insurance to the Tribe and PME which means awareness of the business and properties subject of the insurance policies being operated and located on tribal land—the Insurers assert the right to exclude is inapplicable because the Insurers and their employees never physically set foot on tribal land. The Ninth Circuit affirmed one court's analysis by concluding, "[b]ecause it is not contested that [the insurer's] relevant conduct—negotiating and issuing general liability insurance contracts to [non-tribe] entities—occurred entirely outside of tribal land, tribal court jurisdiction cannot be premised on the [tribe's] right to exclude." McPaul, 804 F. App'x at 757. Here, unlike Branch and McPaul where the insurer had no dealings with the tribe and was sued only because its insureds performed work on tribal land, the Insurers in this case maintain a direct contractual relationship with the Tribe and PME to insure tribal businesses and property located on tribal land. The Ninth Circuit has previously held that nonmembers may reasonably anticipate being subject to a tribe's jurisdiction when language in an agreement between the tribe and the non-member implies the possibility of tribal jurisdiction over disputes between the parties. Grand Canyon, 715 F.3d at 1206 (finding

that when a nonmember signed an agreement to act in compliance with all applicable tribal laws, the necessary corollary of this would be that if the non-member operated in violation of the tribe's laws, it could be subjected to its jurisdiction.) Tribal courts have repeatedly been recognized as competent law applying bodies and appropriate forums for the "exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 66 (1978). By insuring tribal businesses located on tribal land, and in doing business with the Suquamish Tribe, an entity with its own legal system and courts of competent jurisdiction, the Insurers should reasonably have anticipated the possibility that any disputes arising under the polices between the Tribe, PME and Insurers would fall within the jurisdiction of the tribal courts. In State Farm Insurance Co. v. Turtle Mountain Fleet Farm LLC, the United States District Court for the District of North Dakota evaluated whether a tribe had jurisdiction under the first Montana exception in a case where an insurance company, State Farm, issued a property insurance policy to tribal members for a home on tribal land. The court found this was a sufficient consensual relationship with respect to an activity or matter occurring on the reservation to invoke the first Montana exception and created a sufficient nexus between the claims of the tribal members and the consensual relationship arising out of the property insurance contract to provide for tribal court jurisdiction. Here, the Court similarly finds that the underlying insurance policies evidence a consensual relationship between the Tribe and the Insurers. The Insurers were aware they were contracting with, and receiving payments from, the Tribe and PME. Defendant-Intervenor's motion for summary judgment is granted. Plaintiff's motions for summary judgment are denied. This case is dismissed with prejudice and shall proceed under the jurisdiction of the Suquamish Tribal Court.

L. Tax

***130. In re Affordable Patios & Sunrooms*, BAP No. NV-21-1085-TFL, 2022 WL 1115413 (Bankr. 9th Cir. April 13, 2022).**

order overruling his objection to the unsecured priority tax claim of appellee Reno-Sparks Indian Colony ("RSIC") and allowing the claim in full. We AFFIRM in part, but we REVERSE the determination that the tax penalties were entitled to priority status under § 507(a)(8). Prepetition, Richard Taylor controlled and operated Affordable Patios & Sunrooms (the "Debtor"), a licensed contractor located at 910 Glendale Avenue, Sparks, Nevada and doing business as Reno Patio and Fireplaces. Taylor's company rented the Sunshine Lane property from RSIC.RSIC is a federally recognized Indian colony organized pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. § 5123.Because Mill Street Auto sold cars on land held in trust for RSIC, it was obligated to pay RSIC 8.265% of the gross receipts of its sales, pursuant to § 11-20-200 of Ordinance No. 31 ("Ordinance 31") of RSIC's Sales and Use Tax Code (Title 11, Chapter 2 of the RSIC Law and Order Code (the "RSIC Code")). The Trustee filed an objection to the claim, arguing that: (1) Mill Street Auto's sales tax liabilities arose out of its lease with RSIC and thus must be capped under § 502(b)(6); (2) RSIC's claim was not entitled to priority status because RSIC is not a "governmental unit" under § 507(a)(8); and (3) RSIC did not meet its burden to prove that it was entitled to the Estimated Taxes and

Estimated Tax Penalties because the amounts are estimates of taxes owed rather than calculations based on actual gross sales receipts. Here, nothing in the record indicates that RSIC's automatic percentage-based Late Penalties and Estimated Tax Penalties are tethered to any specific costs incurred by RSIC. Further, they were assessed in addition to the Interest. Thus, the penalties are punitive in nature and not in compensation for actual pecuniary loss. We conclude that the bankruptcy court erred in determining that the penalties merited priority status under § 507(a)(8)(G). In that limited regard, we reverse. Based on the foregoing, we REVERSE the bankruptcy court's determination that the Tax Penalties were entitled to priority status under § 507(a)(8). In all other respects, we affirm.

***131. South Point Energy Center LLC v. Arizona Department of Revenue,* P.3d. 2022 WL 1218639 (Ariz. April 26, 2022).**

Non-Indian lessee of land owned by the federal government in trust for Indians initiated lawsuits seeking refund of payments for county property taxes imposed on power plant it operated on the land. Whitten, J., consolidated the lawsuits and granted summary judgment for the county. The Court of Appeals, Division One, reversed and remanded. County's petition for review was granted. Holdings: The Supreme Court, Scott Timmer, J., held that:1 as a matter of first impression, the Indian Reorganization Act does not expressly exempt state and local taxes imposed on permanent improvements affixed by non-Indian lessees to land owned by the federal government in trust for Indians when the parties agree that the lessee owns those improvements, and ad valorem tax imposed on power plant was not preempted by the Act. Court of Appeals' opinion vacated in part and remanded.

***132. Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. Evers,* F.4th, 2022 WL 3355076, No. 21-1817 (7th Cir. August 15, 2022).**

Ojibwe tribes brought action for declaratory and injunctive relief in regard to the ability of Wisconsin and municipalities to tax particular allotted reservation land. The United States District Court for the Western District of Wisconsin, James D. Peterson, Chief Judge, 533 F.Supp.3d 701, granted tribe's motion to dismiss particular municipality and its assessor as defendants, which was construed as one to amend the complaint, granted in part and denied in part tribe's motions in limine to exclude certain expert testimony, denied municipalities' motion to dismiss, and granted in part and denied in part cross-motions for summary-judgment. The Court of Appeals, Scudder, Circuit Judge, held that as a matter of first impression, treaty promised tribe immunity from tax on Ojibwe reservation land, including land that had been alienated to a non-Indian and later reacquired by tribal members, thus precluding taxation of land. Reversed.

***133. Flandreau Santee Sioux Tribe v. Houdyshell,* 2022 WL 4870417, No. 20-3441 (8th Cir. October 4, 2022).**

Indian tribe brought action against state officials for declaration that federal law preempted imposition of statewide excise tax on gross receipts of non-tribal contractor for services performed in renovating and expanding tribe's gaming casino located on reservation. The United States District Court for the District of South Dakota, Karen E. Schreier, J., 325 F.Supp.3d 995, entered summary judgment for tribe, and state appealed.

The Court of Appeals, 938 F.3d 941, reversed and remanded. Following bench trial, the District Court, Schreier, J., 496 F.Supp.3d 1307, entered judgment in tribe's favor, and state appealed. The Court of Appeals, Shepherd, Circuit Judge, held that: 1 Indian Gaming Regulatory Act (IGRA) did not impliedly preempt tax, and 2 Indian Trader Statutes did not preempt tax. Reversed and remanded with instructions. Kelly, Circuit Judge, dissented and filed opinion. On Appeal; Judgment.

M. Trust Breach & Claims

***134. Shade v. United States Department of the Interior,* No. 3:20-cv-0198-HRH, 2021 WL 4234928 (D. Alaska September 16, 2021).**

The United States moves to dismiss plaintiff's first amended complaint. Plaintiff alleges that he is "an Alaska Native" and that he is "the devisee of a portion of a restricted Native allotment ('Shade allotment') from his father, Henry Shade, who died testate on March 28, 2009."5 Plaintiff alleges that "[t]he Shade allotment is located within the boundaries of the City of Dillingham, Alaska[.]"6 Plaintiff alleges that "[t]he Shade allotment was conveyed by BLM to Henry Shade on September 23, 1976."7 Plaintiff alleges that "[t]o gain access to what would be his allotment, in the 1960s Henry Shade built and maintained a dirt road approximately one mile in length from Aleknagik Lake Road to his allotment ('Shade access road'), which access road is now informally called Shannon Lake Road." Plaintiff alleges that "[i]n the course of subdividing the Shade allotment for conveyance to each brother, ... [the] surveyor learned that BLM had mistakenly forgotten to include an express reservation of a right-of-way for the Shade access road where it crossed the land" that was conveyed to defendant Chaney in 1992. The United States contends that "the only means to have a right of way recognized across lands in which the United States holds an interest is the Quiet Title Act (QTA)."23 "The QTA waives the United States' immunity with respect to claims covered by that statute, but the statute excludes from its coverage claims involving 'trust or restricted Indian lands.' " Alaska Dep't of Natural Resources v. United States, 816 F.3d 580, 585 (9th Cir. 2016) (Purdy) (quoting 28 U.S.C. § 2409a(a)). "This exclusion, known as the Indian lands exception, preserves the United States' immunity from suit 'when the United States claims an interest in real property based on that property's status as trust or restricted Indian lands.' " Id. (quoting United States v. Mottaz, 476 U.S. 834, 843 (1986)). There can be no dispute that the Chaney Native allotment is restricted Indian land. Chaney received her allotment under the Alaska Native Allotment Act24 and such an allotment is "considered 'restricted' by virtue of the restraint on alienation contained in the allotment certificate[ ]." Id. The dispute here focuses on whether plaintiff's claims against the United States fall within the purview of the QTA. If they do, then there has been no waiver of sovereign immunity and the claims are subject to dismissal. The QTA, "[f]rom its title to its jurisdictional grant to its venue provision, ... speaks specifically and repeatedly of 'quiet title' actions." Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 567 U.S. 209, 217 (2012). "That term is universally understood to refer to suits in which a plaintiff not only challenges someone else's claim, but also asserts his own right to disputed property." Id. The Ninth Circuit "has repeatedly held that both disputes over the right to an easement and suits seeking a declaration as to the scope of an easement fall

within the purview of the QTA." Robinson v. United States, 586 F.3d 683, 686 (9th Cir. 2009). Because Counts II(a) and (d) do not seek recognition of plaintiff's easement as relief for his APA claims, the APA serves as a waiver of sovereign immunity for these claims for judicial review of an administrative decision. Thus, the court has jurisdiction as to Counts II(a) and (d). Counts II(a) and (d) are not dismissed. Plaintiff may amend his claims against Chaney as it is possible that plaintiff may be able to assert plausible claims against Chaney that are not foreclosed by the Indian lands exception to the QTA. The United States' motion to dismiss, in which Chaney joins, is granted in part and denied in part. The motion is denied as to Counts II(a) and (d). The motion is otherwise granted. Counts I, II(b) and (c), III, IV, and V of plaintiff's first amended complaint are dismissed. Plaintiff is given leave to amend his complaint.

***135. Minnie Taylor v. U.S.*, Civ. No. 21-613 GJF/JFR, 2021 WL 6112622 (D. N. M. December 27, 2021).**

This matter is before the Court upon the United States of America's, "Partial Motion to Dismiss and Memorandum in Support," which seeks dismissal of Count II of Plaintiffs' Complaint. The Court grants the Motion. Plaintiffs' decedent, Louie Taylor, ingested methamphetamine, became agitated, and then left the home of his mother. On March 1, 2020, Minnie Taylor learned that her son had died in custody at the SPDF. Because of these events, Plaintiffs allege that the Navajo Nation negligently failed to "allow [Louie Taylor] access to medical care, negligently interfered with [his] attempts to secure medical care, negligently failed to screen [him] prior to his admission to jail, negligently failed to monitor [him] upon admission to the jail, and negligent[ly] failed to transport [him] for medical assessment and treatment." Count II alleges that the Navajo Nation failed to: (1) adequately train its law enforcement employees on the dangers of "acute drug use;" (2) adequately supervise its employees to avoid drug overdose deaths; and (3) develop, adopt, and enforce adequate policies on drug use and overdose. Under the Federal Tort Claims Act ("FTCA"), the United States has waived sovereign immunity for certain torts, unless (as relevant here) the tort at issue implicates a "discretionary function." 28 U.S.C. §§ 1346(b)(1), 2674, 2680(a). Government action falls within the discretionary function exception if the action was (1) "a matter of choice for the acting employee" and (2) "based on considerations of public policy." Berkovitz, 486 U.S. at 536–37. Plaintiffs insist that the Contract dictates "non-discretionary requirements and standards of its contractor, the Navajo Nation, in the operation of a jail." In addition, Plaintiffs contend that the Consent Decree sets forth "very specific standards." Id. at 9. At step one, the Berkovitz analysis turns on whether the challenged government action was "a matter of choice." Hardcrabble Ranch, L.L.C., 840 F.3d at 1220 (quoting Berkovitz, 486 U.S. at 536–37). An action is not a matter of choice if there exists mandatory authority, such as a regulation or policy, that "specifically prescribes a course of action." Id. (quoting Berkovitz, 486 U.S. at 536–37) (emphasis added). Neither the Contract nor the Consent Decree specifically prescribes (1) how the Navajo Nation must train its corrections employees on inmate drug use; (2) how the Navajo Nation must supervise its employees to avoid drug overdose deaths; or (3) what policies the Navajo Nation must develop, adopt, and enforce with regard to inmate drug use. The Court holds that Plaintiffs have failed—both in their Complaint and in their subsequent briefing—to set forth facts that, if true, plausibly suggest that the Navajo Nation did not have discretion in

developing, implementing, and adopting its inmate drug use and overdose prevention regime. In short, neither the Contract nor the Consent Decree prescribes a specific course of action for the Navajo Nation to take in terms of adopting, implementing, and enforcing inmate drug use policies and training. Thus, even though Plaintiffs' Complaint incorporates these documents, the Complaint still lacks any factual allegation plausibly suggesting that the challenged actions in Count II were anything other than discretionary. Because Plaintiffs' Complaint lacks any factual allegations that plausibly suggest that the challenged actions in Count II were not discretionary, the Court moves to the second Berkovitz step to address whether those actions implicated policy considerations. At the second step of Berkovitz, the Court must determine whether the challenged conduct is the type of activity the discretionary function exception was designed to shield. Ball v. United States, 967 F.3d 1072, 1075 (10th Cir. 2020). The exception is intended to guard against judicial second-guessing of agency decision making " 'grounded in social, economic, and political policy through the medium of an action in tort.' " Id. at 1076 (quoting Berkovitz, 486 U.S. at 536–37). In sum, the Court holds that the discretionary function exception deprives it of subject matter jurisdiction over Count II of the Complaint. Differently said, the Court concludes that Count II does not state a claim on which relief can be granted and is dismissed without prejudice.

136. White Mountain Apache Tribe v. United States, 2021 WL 5983806. No. 17-359C (Fed. Cl. December 16, 2021).

Before the Court is the Government's Motion to Dismiss or for Summary Judgment on Plaintiff White Mountain Apache Tribe's Phase I claim under the Indian Lands Open Dump Cleanup Act of 1994, 25 U.S.C. §§ 3901–3908 (1994)(the "Act"). The Government's Motion to Dismiss is granted. The Tribe resides on and is the beneficial owner of the Fort Apache Indian Reservation in eastern Arizona. Through its Tribal Public Works Department ("Public Works") it regulates solid waste disposal on the Reservation. In the early 1990s, the Indian Health Service ("IHS"), the Bureau of Indian Affairs ("BIA"), and the Tribe began closing open dumps on the Reservation, some containing BIA waste. On March 15, 2017, the Tribe filed its Complaint, alleging the United States, as trustee of the Tribe's "funds, land, timber and other assets," had breached its fiduciary duties to the Tribe. The bulk of the Complaint's allegations relate broadly to mismanagement of trust funds and timber resources. The Tribe's allegations relevant to open dumps are contained in its one-paragraph environmental contamination claim, which alleges that "[s]ome Reservation trust lands have been contaminated by non-Tribal entities with hazardous waste, pollution, and other harmful substances." *Id.* ¶ 15. The Complaint also cites the Act, amongst a slew of other statutes, as supporting the Tribe's claims. The Government premises its jurisdictional argument on the contention that the Tribe has not identified any statute or regulation that imposes a specific, enforceable, money-mandating duty to clean up or provide compensation for open dumps on the Tribe's land. The Tribe argues that the Act "easily satisfies the two-part test for money-mandating claims," stating that the presence of 45 open dumps on the Reservation with no existing plan to fund closure of those dumps shows that the Government is out of compliance with the Act in violation of its fiduciary duties. Based on binding Supreme Court and Federal Circuit precedent, the Court concludes that the Tribe has not identified a trust-creating source of law sufficient to demonstrate jurisdiction under the Indian

Tucker Act. The Tribe identifies the Act, with a focus on § 3904,3 as the substantive source of law creating the alleged fiduciary duty and entitlement to monetary compensation at issue in its Phase I claim. ECF No. 66-47 at 3. As pertinent to the Court's analysis, the Act directs IHS, "[u]pon request by an Indian tribal government," to inventory and evaluate open dumps on Indian lands, determine the relative threat of each dump to public health and the environment, and develop cost estimates for closure and post-closure maintenance of the dumps. the Court first looks to whether the Act contains trust-creating language and concludes that it does not impose any specific trust duties on the Government.5 To be sure, the Act begins with Congress's finding, among others, that "the United States holds most Indian lands in trust for the benefit of Indian tribes and Indian individuals." 25 U.S.C. § 3901(a)(5). More than a statement of a general trust relationship is needed, however, to conclude that the Act imposes fiduciary duties on the Government. *El Paso Nat. Gas Co. v. United States*, 750 F.3d 863, 894 (D.C. Cir. 2014); *see Mitchell I*, 445 U.S. at 542. Even if the Act creates a duty for the Director to provide assistance upon the satisfaction of the prerequisites and subject to certain conditions, there is no indication that the Government has "undertaken full fiduciary responsibilities as to the management" of open dumps on the Tribe's land. Having concluded that the Act does not establish any specific fiduciary obligations on the part of the Government necessary to confer jurisdiction on this Court under the Indian Tucker Act, the Tribe's Phase I open dump claim is hereby dismissed.

***137. Wellman v. Orcutt,* CV-21-30-GF-BMM, 2022 WL 169696 (D. Mont. January 19, 2022).**

Defendants Lacey Orcutt, Acting Director of Glacier County Farm Service Agency, and Thomas Vilsack, Acting Secretary of the United States Department of Agriculture, (collectively, "Defendants"), have filed a Motion to Dismiss for Lack of Jurisdiction and for Failure to State a Claim. The Court held a hearing on the matter on September 20, 2021. For the following reasons, the Motion is granted in part, and denied in part. Plaintiffs are farmers and ranchers within the exterior boundaries of the Blackfeet Reservation and are members of the Blackfeet Tribe. They own their properties ("farms") in both fee simple and trust. Id. Defendants appear on behalf of the Glacier County Farm Service Agency ("FSA") and the United States Department of Agriculture ("USDA"). The FSA distributes financial assistance for the USDA. Plaintiffs historically have received financial assistance from the FSA and USDA. The FSA discovered in 2018 that lease information on "numerous records in its Glacier County office contained errors." The FSA took steps to identify current farm operators and their leases. Id. The FSA required operators in Glacier County to update their lease information and to confirm the amount of acreage under operation to remain eligible for FSA benefits. Plaintiffs discovered that the "farms" they originally owned had been recast by Defendants in the spring of 2019. The Wellmans allege the 36 farms they originally owned were recast into over 300 farms. The recasting caused significant disruption to the farm assistance that Plaintiffs routinely had received from Defendants. Much confusion arose about the location, acreage, and modification process regarding the recast farms. Plaintiffs allege that the confusion resulted in obstacles that made them miss their deadline to receive financial assistance from Defendants. Id. Wellmans and Barcuses claim that the Defendants currently have withheld $600,000 and $250,000, respectively, in loans and

other farm payments because of Plaintiffs' race as Native Americans. Defendants are also demanding back pay from Plaintiffs for their previous years of financial support. Wellmans and Barcuses filed their Complaint against Defendants on March 11, 2021. (Doc. 1). Plaintiffs raise three causes of action: Violation of Equal Credit Opportunity Act ("ECOA") (Count I); Declaratory Judgment Requiring Defendant to Disburse Financial Assistance (Count II); and Injunctive Relief (Count III). Plaintiffs have sufficiently pled their ECOA claims and survive Defendants' 12(b)(6) Motion to Dismiss Defendants ask this Court to dismiss the claims against them for Plaintiffs' failure to adequately state a claim, or, in the alternative, to order the Plaintiffs to make a more definite statement in the Complaint. For purposes of credit discrimination, interpretations of terms under the ECOA should be construed "broad[ly]," Moore v. USDA, 55 F.3d 991, 993 n.2 (5th Cir. 1995), and "expansive[ly]," Wilson v. Toussie, 260 F.Supp.2d 530, 541 (E.D.N.Y. 2003). The alleged discriminatory conduct by the FSA that resulted in obstacles to Plaintiffs' ability to obtain financial assistance and further allegations that the FSA withheld "loans and financial assistance" falls within Wilson's broad interpretation of "adverse action." Accordingly, Plaintiffs have pled sufficient facts to establish a claim under the ECOA. Based on the allegations in Plaintiffs' Complaint, Plaintiffs plead sufficient facts to support plausible claims against Defendants under the ECOA. Accordingly, it is ordered that the Motion to Dismiss for Lack of Jurisdiction and for Failure to State a Claim, is granted in part and denied in part.

***138. Bourassa v. United States,* 4:20-CV-4210-LLP, 2022 WL 204644 (D.S.D. January 24, 2022).**

Pending before the Court is Defendant, Robert Neuenfeldt's ("Neuenfeldt"), Motion to Dismiss. (Doc. 9). For the following reasons, Neuenfeldt's Motion to Dismiss is granted as to Plaintiff's Bivens claim and denied as to Plaintiff's negligence claim. The following facts are a summary of the allegations in the Complaint filed by Plaintiff, Verna Bourassa, Guardian of Tahlen Aaron Bourassa ("Bourassa"). On June 18, 2017, Bourassa was driving a vehicle in the early morning hours on a rural road with two passengers, Michael Roemen ("Roemen") and Morgan Ten Eyck ("Ten Eyck"). (Doc. 1, ¶ 11). The Court takes judicial notice of the fact that neither Tahlen Bourassa, Roemen, nor Ten Eyck are Indians or members of the Flandreau Santee Sioux Tribe. Near the driveway of the rural residence in Moody County, outside the reservation, it is alleged that Neuenfeldt, Chief of Police for Flandreau Santee Sioux Tribe, contacted Bourassa and threatened to take him to jail. Bourassa drove away and was pursued by Neuenfeldt and Logan Baldini, an uncertified deputy for the Moody County Sheriff's Office in Neuenfeldt's police cruiser. A high-speed pursuit of Bourassa's vehicle took place over thirty minutes reaching speeds more than 100 miles per hour on gravel roads. The entire pursuit was located outside the Tribe's reservation boundaries. It is believed that Neuenfeldt disregarded orders to terminate the pursuit. Neuenfeldt and Baldini continued the pursuit causing Bourassa's vehicle to lose control and roll several times throwing all three occupants from the vehicle. Plaintiff alleges that at all relevant times, the United States, by and through its Department of the Interior, Bureau of Indian Affairs, contracted with the Flandreau Santee Sioux Tribe and its Police Department pursuant to 25 U.S.C. § 5321, Indian Self Determination Act, to provide law enforcement services on the Flandreau Santee Sioux Indian Reservation. On or about June 11, 2019, Plaintiff

submitted an Administrative Tort Claim in the amount of $5,012,884.20 to the United States Department of the Interior pursuant to 28 U.S.C. § 2675. On July 8, 2019, the United States Department of the Interior denied Plaintiff's administrative claim. (Doc. 1, ¶ 8). On December 30, 2020, Plaintiff filed a Complaint against the United States of America; Robert Neuenfeldt, individually; and Unknown Supervisory Personnel of the United States, individually. (Doc. 1). In his Complaint, he alleged claims of negligence against Defendants; a claim against Neuenfeldt under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 288, 397 (1971); and a Bivens claim against Unknown Supervisory Personnel of the United States. (Doc. 1). On April 26, 2021, Defendant Robert Neuenfeldt filed a Motion to Dismiss the claims against him. In support of his motion, Neuenfeldt argues that the claims against him are barred by tribal sovereign immunity because the Complaint alleges that Neuenfeldt was acting as the Tribe's Chief of Police when he allegedly engaged in such conduct. To the extent the Court considers Neuenfeldt to be a federal employee for purposes of the negligence claim alleged against him in Count I of the Complaint, Neuenfeldt argues that the United States is the proper party under the Federal Tort Claims Act ("FTCA"). Regarding the Bivens claim alleged against him in Count II of the Complaint, Neuenfeldt argues that there is nothing within Bivens, or any other authority relied upon by Plaintiff, to suggest that Bivens provides Plaintiff with a cause of action against employees of a tribal government. (Doc. 10 at 58-61). Neuenfeldt also contends that Plaintiff's Bivens claim is barred by the statute of limitations. Neuenfeldt argues that because he was at all relevant times acting as the Flandreau Santee Sioux Tribe Chief of Police, Plaintiff's claims against him are barred by tribal sovereign immunity. *4 In Roemen v. United States and Ten Eyck v. United States, Civ. No. 19-4006 and 19-4007 (consolidated under Civ. No. 19-4006), this Court addressed whether tribal sovereign immunity barred claims for damages brought against Neuenfeldt by Roemen and Ten Eyck, the passengers in the car driven by Bourassa who were also seriously injured in the accident. The Court will incorporate by reference the analysis it conducted in its Memorandum Opinion and Order as to this issue in those cases. (Civ. No. 19-4006, Doc. 31; Civ. No. 19-4007, Doc. 26). The Court concluded therein, as it does here, that "whether tribal sovereign immunity bars a claim for damages against Neuenfeldt depends on whether Neuenfeldt was exercising the inherent sovereign powers of the Tribe. If so ... permitting such a claim to proceed would have the effect of interfering with the Tribe's powers of self-government." It is undisputed that Indian tribes have the inherent power to enforce their criminal laws against Indians within the boundaries of the reservation. United States v. Lara, 541 U.S. 193, 197 (2004); United States v. Wheeler, 435 U.S. 313, 323-26 (1978), superseded in statute on other grounds as recognized in United States v. Lara, 541 U.S. 193 (2004). Tribes generally do not have criminal jurisdiction over non-Indians, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978), although tribal police have the authority to detain non-Indians who commit crimes within Indian country until they can be turned over to the appropriate state or federal authorities, Duro v. Reina, 495 U.S. 676, 696-97 (1990). It is alleged the pursuit was never on tribal land and the Court takes judicial notice of the fact that the stop occurred outside the reservation and that neither Bourassa, nor Roemen or Ten Ecyk are Indians. Although Neuenfeldt was always acting in his capacity as a police officer pertinent to this case, the Court concludes that Neuenfeldt was not exercising the inherent sovereign powers of the Tribe. Neuenfeldt's

Motion to Dismiss based on tribal sovereign immunity is thus denied. Neuenfeldt contends that at all times, he was acting pursuant to a section 638 contract with the federal government. Neuenfeldt argues that as a result, he has absolute immunity under the Federal Tort Claims Act from any common law torts claims allegedly committed within his scope of employment. "The Federal Tort Claims Act is a limited waiver of sovereign immunity, making the Federal Government liable to the same extent as a private party for certain torts of federal employees acting within the scope of their employment." Audio Odyssey, Ltd. v. United States, 255 F.3d 512, 516 (8th Cir. 2001). The Federal Tort Claims Act "accords federal employees absolute immunity from common-law tort claims arising out of acts they undertake in the course of their official duties." Osborn v. Haley, 549 U.S. 225, 229 (2007) (citing 28 U.S.C. § 2679(b)(1)). When a federal employee is sued, the Attorney General has the authority to certify that the employee "was acting within the scope of his office or employment at the time of the incident out of which the claim arose." 28 U.S.C. § 2679(d)(1). In the present case, the United States has not certified that Neuenfeldt was acting within the scope of his office or employment at the time the incident out of which Plaintiff's claims arose and Plaintiff has not alleged otherwise. Nor has Plaintiff petitioned the Court to find and certify that Neuenfeldt was acting within the scope of his employment. See 28 U.S.C. § 2679(d)(3). Accordingly, the Court finds that it has subject matter jurisdiction over Plaintiff's negligence claim against Neuenfeldt. See Harper v. United States Dep't of Interior, Civ. No. 1:21-00197, 2021 WL 5281589, at *15 (D. Idaho Nov. 12, 2021), appeal docketed, No. 22-35036 (9th Cir. Jan. 13, 2022). The Court does note that in a companion case arising out of the same incident, the United States has certified that Neuenfeldt was acting with the scope of his office or employment. See Roemen v. United States and Ten Eyck v. United States, consolidated under Civ. No. 19-4006 (D.S.D.). Neuenfeldt moves to dismiss the Bivens claim against him on the basis that it is barred by the statute of limitations. In support of his Motion to Dismiss, Neuenfeldt argues that Plaintiff's Bivens claim is barred by tribal immunity and argues that there is nothing within Bivens, or any other authority relied upon by Plaintiff, to suggest that Bivens provides Plaintiff with a cause of action against employees of a tribal government. When considering a Rule 12(b)(6) motion based on the running of the statute of limitations, the Court may only grant the motion if it is clear from the face of the complaint that the limitations period has run and the complaint contains no facts to toll that running. South Dakota's limitations period for personal injury actions is also 3 years. SDCL § 15-2-14(3). As discussed more fully below, the Court finds in applying either statute, Plaintiff's Bivens claim is barred by the statute of limitations. It is undisputed that Plaintiff's Complaint was filed more than three years after his cause of action accrued. Accordingly, it is hereby ordered that: 1) Neuenfeldt's Motion to Dismiss Plaintiffs' Bivens claims is granted because it is barred by the statute of limitations; 2) Neuenfeldt's Motion to Dismiss Plaintiffs' negligence claims is denied; and 3) Neuenfeldt's Motion to Dismiss Supervisorial claim is denied as moot.

***139. Fletcher v. United States,* 26f.4th 1314 (Fed. Cir. February 24, 2022).**
Individual "headright" owners, who held the right to receive distribution of royalties generated from mineral estate reserved to Osage tribe, brought action under the Tucker Act and Indian Tucker Act against federal government, seeking damages for

government's breach of statutorily imposed obligations for managing tribal trust fund containing the royalty income from the mineral estate. The Court of Federal Claims, Loren A. Smith, Senior Judge, 151 Fed.Cl. 487, dismissed. Owners appealed. The Court of Appeals, Chen, Circuit Judge, held that: 1 owners had trust relationship with federal government under 1906 Act, as required for owners to satisfy injury-in-fact requirement for standing, and 2 allegations of mismanagement by federal government that reduced amount in tribal trust fund ultimately disbursed to owners, such as failure to collect required interest or overpayment of taxes, established jurisdiction under the Tucker Act. Reversed, vacated, and remanded.

***140. The Canadian St. Regis Band of Mohawk Indians v. State of New York*, 2022 WL 768669, No. 82-CV-0783 U.S.D.C.N.D.N.Y.(March 14, 2022).**

This case involves a long-running dispute over ancestral land claims between three Mohawk plaintiffs1 and intervenor-plaintiff United States of America (collectively, "Plaintiffs"), and defendants State of New York and Governor of the State of New York ("State Defendants"),and several Counties and entities. The Non-Intercourse Act (NIA) explicitly provides that "[n]o purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." 25 U.S.C. § 177. Some courts also provide that "only a federal statute or treaty can affect tribal land rights." Oneida Indian Nation v. Phillips, 397 F. Supp. 3d 223, 233 (N.D.N.Y. 2019) (citing 25 U.S.C. § 177), aff'd, 981 F.3d 157 (2d Cir. 2020). This Court need not resolve whether a federal statute (but not a treaty) can satisfy this element of the NIA, because the Court finds that New York's 1824 and 1825 land transactions were not ratified by statute or treaty. There is no question that Sherrill could bar recovery, see Oneida Indian Nation of New York v. Cty. of Oneida, 617 F.3d 114, 135 (2d Cir. 2010), but this goes more to the question of remedy than of rights. In many ways, it is similar to an affirmative defense, which "does not negate the elements of the plaintiff's claim, but instead precludes liability even if all of the elements of the plaintiff's claim are proven." Roberge v. Hannah Marine Corp., No. 96-1691, 1997 WL 468330, at *3 (6th Cir. 1997). With that in mind, Plaintiffs can focus on questions of rights (i.e. whether they can establish a prima facie NIA claim or elements of a prima facie NIA claim) at the summary judgment stage without addressing questions of remedy. The Court has repeatedly found throughout this
opinion that Congress did not ratify, whether through statute or treaty, any of the land transactions between the St. Regis Indians and the State. McGirt foreclosed the possibility of implicit congressional ratification. Thus, summary judgment is granted in favor of the United States on the ratification defense. Plaintiffs have established a prima facie case under the NIA.

***141. Navajo Agricultural Products Industry v. US,* 2022 WL 2116709, 1:20-cv-01183 (D. N. M. June 13, 2022).**

This matter is before the Court on Defendant's Motion to Dismiss. Having considered the parties' submissions, the record, and the relevant law, the Court will grant the Motion in part and deny it in part as explained below. Plaintiff is an enterprise of the Navajo Nation that was created to operate a commercial farm for the benefits of the tribe. Congress

authorized the Navajo Indian Irrigation Project ("Project"), a large irrigation project south of Farmington, New Mexico. Defendant completely owns the irrigation system and siphons of the Project, including a section of the system called the Kutz Siphon. In 2016, a pipe in a section of the Kutz Siphon ruptured, blowing concrete 100 to 200 feet away, damaging an overhead powerline, and spewing water rapidly into a nearby wash. Plaintiff was able to shut off the water to stop the waste, but it and its farmers had no way to irrigate their newly planted crop. Repairs were eventually completed on the Kutz Siphon in mid-June, restoring service after about a month with no water available. The Complaint alleges three Counts: (1) negligence; (2) negligent hiring, training, supervision, and retention; and (3) vicarious liability, respondeat superior, ostensible agency and/or agency. Defendant moves to dismiss the Complaint for lack of subject matter jurisdiction and failure to state a claim. The FTCA waives the sovereign immunity of the United States and allows it to be sued for certain torts. 28 U.S.C. § 2674. However, the statute contains limitations on the government's waiver of immunity. For example, there is a statute of limitations period, a notice requirement, a discretionary function exception, and the claim must arise under state tort law. See 28 U.S.C. § 2401(b) (statute of limitations); 28 U.S.C. § 2675(a) (notice requirement); 28 U.S.C. § 2680(a) (discretionary function exception); 28 U.S.C. § 1346(b) (limited to state tort law). If any of these requirements are not met, the government's waiver of immunity does not apply, and district courts have no jurisdiction. Here, Plaintiff alleges that "[t]he irrigation system and siphons are completely owned by the Defendant, and [Plaintiff] was not permitted to do any maintenance on the Kutz Siphon other than at the direct orders of [Defendant]." At the motion to dismiss stage, the Court accepts this alleged fact as true. Plaintiff has alleged that it had no access to the Kutz Siphon. Thus, the Court finds that a "reasonably diligent plaintiff" could not immediately have known of the cause of the injury in this case, and therefore, the discovery rule applies. See Cannon, 338 F.3d at 1190. As such, the statute of limitations was tolled until Plaintiff discovered the cause of the injury in August 2017, and it follows that Plaintiff's administrative claim was timely filed in March 2019. As a general matter, for actions in negligence, New Mexico courts follow the "duty framework" of the Restatement (Third) of Torts and focus on policy considerations when determining whether a duty exists. Lopez v. Devon Energy Prod. Co., L.P., 468 P.3d 887, 892–93 (N.M. Ct. App. 2020). Moreover, analogous with the facts of this case, New Mexico recognizes a private right of action for negligence in the construction and maintenance of dams, which control the flow of water and can cause severe damage to property, including crops, if not built and maintained properly. The Court finds persuasive the interpretation of the Fifth Circuit; the statute here does nothing to undo the duty that arises under New Mexico tort law. Defendant asserts that Count II (negligent hiring, training, supervision, and retention) should be dismissed for lack of subject matter jurisdiction under the discretionary function exception to the FTCA. The FTCA waiver of sovereign immunity does not extend to employees' performance of or failure to perform a "discretionary function." 28 U.S.C. § 2680(a). If the discretionary function exception applies, then the United States retains its sovereign immunity, and district courts do not have jurisdiction over the claim(s). Franklin Sav. Corp. v. United States, 180 F.3d 1124, 1130 (10th Cir. 1999). To survive a motion to dismiss, "a plaintiff must allege facts that place its claim facially outside the exception." Id. The Court concludes that, absent more specific allegations from Plaintiff to suggest that there is

authority that removes Defendant's inherent discretion, Count II will be dismissed because the discretionary function exception applies. Defendant argues that Plaintiff has failed to state a separate claim in Count III based on vicarious liability, respondeat superior, or agency. Scope of employment is one theory of holding employers vicariously liable for the conduct of their employees. See Primeaux v. United States, 181 F.3d 876, 879 (8th Cir. 1999). The FTCA's waiver of sovereign immunity only extends to scope of employment. 28 U.S.C. § 1346(b)(1). In other words, a plaintiff cannot hold the United States liable for a tort under the FTCA on any theory of vicarious liability, other than the theory of scope of employment. Thus, Plaintiff's claims in Count III will be dismissed. Count I seeks to hold Defendant liable for negligence based on employees' actions within the scope of employment. Count III fails to state a separate claim for vicarious liability. Because the Court dismisses Counts II and III on other grounds, it need not reach Defendant's arguments regarding notice under the FTCA. Defendant's Motion to Dismiss is granted in part. Count II is dismissed without prejudice and Count III is dismissed with prejudice. Count I remains.

142. Azure v. US, 2022 WL 2158335, CV-21-112-GF-BMM (D. Mont. June 15, 2022).

Defendant United States of America ("the Government") has filed a Motion to Dismiss Plaintiff Brandy Azure's ("Azure") Second Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). The Government contends that Azure cannot maintain claims under the Federal Tort Claims Act ("FTCA"). For the following reasons, the Court grants, in part, and denies, in part, the Motion. Azure arrived at her mother's home in Poplar on July 12, 2019, after a night at a bar. Upon discovering that her daughter and granddaughter were not at the home, Azure located them at an alleged "meth house." The police were called when Azure arrived at the "meth house," and Azure was arrested by Deputy Jared Standing ("Standing"). The officers transported Azure to the Fort Peck Tribal Detention Center. Azure repeatedly refused Correctional Officer John Cook's ("Cook") requests to remove her clothing and wear an orange jumpsuit during her entry processing at the jail. The officers led Azure to a holding cell where she was placed face-down and handcuffed. Cook removed Azure's clothing and Azure remained laying on the floor. Tribal authorities dropped the charges against Azure several days later. Azure alleges the following claims in her Second Amended Complaint individual liability under 42 U.S.C. § 1983 (Count 1); entity liability under 42 U.S.C. § 1983 (Count 2); Montana Constitutional violations (Count 3); negligence (Count 4); assault and battery (Count 5); and infliction of emotional distress (Count 6). The Government argues that Azure's claims under 42 U.S.C. § 1983 and the Montana Constitution do not apply to the United States. Azure agrees. The Court dismisses Azure's claims against the Government under § 1983 and the Montana Constitution in Counts 1-3 pursuant to Rule 12(b)(6). The Government argues that Azure's claims under the Federal Tort Claims Act should be dismissed. The Government waives its sovereign immunity under the Federal Tort Claims Act. The Government remains liable for tort claims "in the same manner and to the same extent as a private individual." 28 U.S.C. § 2674. An exception to this waiver of sovereign immunity exists, however, for intentional torts. No such waiver of sovereign immunity applies, and the Government stands immune, to "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, [or] abuse of

process." 28 U.S.C. § 2680(h). A court lacks subject matter jurisdiction where an exception in § 2680(h) applies as the Government has not waived sovereign immunity. Esquivel v. U.S., 21 F.4th 565, 573 (9th Cir. 2021). Azure's claims for negligent training, supervision, and discipline in Count 4 do not qualify as claims "arising out of" an intentional tort. 28 U.S.C. § 2680(h); Senger v. U.S., 103 F.3d 1437, 1440–42 (9th Cir. 1996); Brock v. U.S., 64 F.3d 1421, 1425 (9th Cir. 1995). These claims survive. No dispute exists that Azure's remaining claims against the Government for negligence and emotional distress arise directly from assault and battery. This direct connection would defeat any waiver of sovereign immunity under § 2680(h) absent an exception. Section 2680(h) creates an exception for certain types of intentional torts. This exception means that "liability is restored" to the Government "with regard to acts or omissions of investigative or law enforcement officers of the United States Government." Tekle v. U.S., 511 F.3d 839, 851 n.9 (9th Cir. 2007) (emphasis added); 28 U.S.C. § 2680(h). As a result, the [FTCA] shall apply to any claim arising ... out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution." 28 U.S.C. § 2680(h). The statute defines "investigative or law enforcement officer" as "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." Id. The critical question remains whether Cook falls into the definition of federal "investigative or law enforcement officer" under § 2680(h). If so, Azure's claims against the Government for negligence, assault and battery, and emotional distress remain plausible if Cook qualifies as a federal officer. Tribal law enforcement officers associated with the BIA are not automatically "commissioned" as federal officers. 25 C.F.R. § 12.21(b). A court must determine the "commissioned" designation on a "case-by-case basis." Id. The Government contends that Cook does not qualify as an "investigative or law enforcement officer" because Cook never had been issued a special law enforcement commission ("SLEC"). The Government asserts that the FTCA's federal investigative or law enforcement officer exception to the intentional tort exclusion generally "does not apply to tribal officers not in possession of an SLEC." Gatling v. U.S., 2016 WL 147920, *3 (D. Ariz. Jan. 13, 2016) (citations omitted). Lenora Nioce ("Nioce"), a Special Agent for the Bureau of Indian Affairs in charge of issuing a SLEC, attests in a declaration that Cook never had been issued an SLEC as a correctional officer at Fort Peck Tribal Detention Center as of July 12, 2019. (Doc. 13-1 ¶ 3). The Court notes that Ninth Circuit precedent does not require the specific issuance of a SLEC to tribal officers to assert liability against the Government under the FTCA. The Ninth Circuit examined in Shirk v. U.S. ex rel. Dept. of Interior, 773 F.3d 999 (9th Cir. 2014), whether the Government stood liable under the FTCA for the actions of two tribal police officers. In Shirk, two tribal police officers were traveling home in a tribal police cruiser when they observed a vehicle driving erratically. Id. at 1001. The officers followed the vehicle and eventually came to a stop behind the vehicle at a red light. Id. One officer exited the cruiser and approached vehicle. Id. The driver of the vehicle saw the officer approaching and accelerated through the intersection, colliding with a motorcyclist. The Government moved to dismiss the complaint for lack of subject matter jurisdiction. The Ninth Circuit laid out a two-step test to determine whether the actions of tribal employees exist as part of the BIA for purposes of waiving sovereign immunity to claims brought against the Government under the FTCA. Id. at 1006. The Court cannot evaluate fully the definition of such

"employment," however, without review of the relevant 638 contract. Shirk, 773 F.3d at 1006. The parties have yet to produce other details that could assist this Court in its determination of whether Cook qualified as investigative or law enforcement officers of the United States Government under § 2680(h). Azure alleges that she filed a complaint with the BIA following the incident. The BIA recommended disciplinary action for Cook after the BIA Office of Justice Services-Internal Affairs Division's internal investigation on the matter. Regarding employment issues, the Second Amended Complaint indicates that the BIA maintains authority in its relationship with the Fort Peck Tribal Detention Center. The extent of such control or relationship remains unclear. Allowing the parties to engage in discovery will uncover details that will prove crucial to a determination from this Court. Accordingly, it is ordered that the Government's Motion to Dismiss Second Amended Complaint is granted in part and denied in part.

***143. Alek v. United States,* 2022 WL 3106690, Case No. 3:21-cv-00147-TMB (D. Alaska August 4, 2022).**

The United States asks the Court to dismiss Plaintiff Virginia B. Aleck's Complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) or, alternatively, to dismiss its two co-defendants, Dr. Benjamin A. Garnett and the Alaska Native Medical Center ("ANMC"), for lack of subject matter jurisdiction under Rule 12(b)(1). Aleck opposes the 12(b)(6) motion but concedes the United States is the sole proper defendant in this Federal Tort Claims Act ("FTCA") action. For the reasons stated below, the Court denies the Rule 12(b)(6) motion to dismiss the Complaint and grants the Rule 12(b)(1) motion to dismiss all defendants other than the United States. Aleck filed this FTCA action against the United States, Dr. Benjamin A. Garnett, and ANMC alleging medical malpractice.4 Specifically, Aleck alleges that medical personnel employed by ANMC were negligent in providing her medical care during several medical visits, surgeries, and a corrective surgery in 2008 and 2018. The United States argues that under the FTCA, Aleck is limited to seeking damages she claimed at the administrative level. According to the United States, Aleck did not seek noneconomic damages through the administrative process and instead "limited herself to past medical bills." The United States also claims Aleck did not pay those medical bills personally: "as an Alaska Native person, she is not required to personally pay for services received at ANMC." The United States asks the Court to dismiss the entire Complaint on this basis. In the alternative, the United States asks the Court to dismiss its co-defendants under Rule 12(b)(1) for lack of subject matter jurisdiction because the United States is the only proper defendant in an FTCA action. Taking Aleck's well-pleaded allegations as true at this stage, the Court concludes Aleck has stated a plausible claim to relief and denies the United States' Rule 12(b)(6) motion accordingly. Aleck has clearly pleaded that she suffered damages. In fact, her Complaint outlines in some detail the factual allegations underlying her damages claim.28 The Court takes these well-pleaded allegations as true at this stage. Aleck's claims against entities or individuals other than the United States are dismissed for lack of subject matter jurisdiction under Rule 12(b)(1). The United States' Rule 12(b)(6) motion to dismiss the Complaint is denied. The United States' Rule 12(b)(1) motion to dismiss all defendants other than the United States of America is granted.

144. Birdbear v. U.S., Fed.Cl., 2022 WL 4295326, No 16-75L (Fed. Cl. September 9, 2022).

Plaintiffs in this case, Nelson Birdbear, Roger Birdbear, Thomas Birdbear, Jamie Lawrence, and Rae Ann Williams, are members of the Three Affiliated Tribes of the Fort Berthold Indian Reservation ("the Reservation"). They are the beneficial owners of allotted land on the Reservation that is held in trust for them by the United States. Portions of Plaintiffs' allotted lands are subject to oil and gas leases that the Secretary of the Interior ("the Secretary") approved and manages pursuant to federal statutes and regulations. Plaintiffs claim that these statutes and regulations impose fiduciary obligations on the United States with respect to the approval and management of mineral leases on their allotted lands and that the United States has breached those obligations in numerous respects. They seek an award of damages to compensate them for the tens of millions of dollars in losses they assert they have experienced as a result of those breaches. Currently before the Court are Plaintiffs' Motion for Partial Summary Judgment as to Count 4 of their Third Amended Complaint and the government's Cross-Motion for Partial Summary Judgment as to Counts 1–4 and 6–10 of Plaintiffs' Third Amended Complaint. For the reasons set forth below, Plaintiffs' motion is DENIED, and the government's cross-motion is GRANTED-IN-PART and DENIED-IN-PART. As noted, Plaintiffs are enrolled members of the Three Affiliated Tribes of the Fort Berthold Reservation, a federally recognized Indian Tribe with its reservation in northwestern North Dakota." In the Third Amended Complaint, which is the operative pleading, Plaintiffs allege that "[t]hey are the beneficial owners of more than 2,200 acres of allotted land, held in trust by the United States, within and surrounding the exterior boundaries of the ... Fort Berthold Reservation." They assert that "[m]ineral rights in more than 1,550 acres of [their] allotted lands are leased for oil and gas mining purposes," and that the Secretary, acting as trustee, "selected and approved" the Lessees. According to Plaintiffs, "the Department of Interior, and more specifically the Bureau of Land Management [,] ... has consistently failed to collect revenue from oil and gas produced on federally managed lands and has failed to provide required oversight and management of oil and gas operations." Among other things, they allege that their leases were not "properly advertised and bid competitively so the royalties they receive are markedly less than those received by non-Indian federal and tribal lessors on the Bakken Formation and elsewhere." For the reasons set forth below, the Court holds that the government's challenge to this Court's jurisdiction over the claims set forth in Counts 3, 7, and 8 lack merit. It agrees with the government, however, that Plaintiffs have failed to establish this Court's jurisdiction over the claims in Counts 1, 9, and 10. Plaintiffs' complaint is that BIA, having decided to hold the public-bidding process, did not advertise the leases to "receive 'optimum competition' for bonus consideration," as required by 25 C.F.R. § 212.20(b) and did not determine that the leases were in Plaintiffs' "best interest," as required by the FBMLA. Because the government subjected the leases to public bidding, the requirements of 25 C.F.R. § 212.20(b) applied, notwithstanding § 1(a)(4) of the FBMLA. The Court concludes, therefore, that Plaintiffs have satisfied prong 1 of the test for establishing jurisdiction under the Indian Tucker Act with respect to this Count Plaintiffs allege in Count 3 that the government breached its fiduciary duty "to properly manage, administer and supervise" Plaintiffs' lands "to prevent the avoidable loss of oil and gas through drainage." They contend that employees of the Bureau of Land

Management ("BLM") "knew that drainage was occurring, or was likely to occur from Plaintiffs tracts," but did not inform Plaintiffs of this fact. In addition, Plaintiffs allege, BLM "failed to have guidance in place to its employees regarding how to conduct drainage analysis for nearly a decade and a half," which they claim led to "a wide variety of unapproved, unreliable, and inaccurate practices.." The government's response—that the regulations do not impose on the Secretary a specific fiduciary obligation to protect Plaintiffs' lands from drainage, Def.'s Cross-Mot. at 15–17—is unpersuasive. The regulation at 25 C.F.R. § 211.47(b), which applies to lessees of allotted lands through 25 C.F.R. § 212.47, provides that "[t]he lessee shall ... [p]rotect the lease from drainage." See also 43 C.F.R. § 3162.2-3(a)–(b) (stating that the lessee must protect the lease against drainage caused by wells that are "[p]roducing for the benefit of another mineral owner" or "the same mineral owner but with a lower royalty rate"). The regulations require the lessee to "monitor the drilling of wells in the same or adjacent spacing units and gather sufficient information to determine whether drainage is occurring." 43 C.F.R. § 3162.2-9. The Court concludes that the government has a specific fiduciary obligation to protect Plaintiffs against the uncompensated drainage of oil and gas held in trust for them. Prong 1 of the test for determining Indian Tucker Act jurisdiction is satisfied as to Count 3. The FBMLA states that the Secretary "may approve any mineral lease or agreement that affects individually owned Indian land, if ... the owners of a majority of the undivided interest in the Indian land that is the subject of the mineral lease or agreement ... consent to the lease or agreement." FBMLA § 1(a)(2)(A)(i). In Count 7, Plaintiffs contend that the Secretary has violated this provision by approving communitization and unitization agreements that affect their land on the Reservation without obtaining consent from the owners of a majority of the interest in the land Plaintiffs also allege that some of the agreements cover as many as 1,280 acres, which they contend violates the 640-acre limitation on the coverage of oil and gas leases set forth in 25 C.F.R. § 211.25. They claim that these violations constitute a breach of the Secretary's fiduciary duty to Plaintiffs, including the duty to act in their best interests. The government does not deny that the claims in Count 7 are based on regulatory and statutory provisions that impose specific obligations on the United States. The Court, likewise, finds that the FBMLA's consent requirement and the regulation's acreage limitation on mineral leases plainly prescribe the Secretary's conduct with respect to oil and gas leases on allotted land. Count 7 therefore satisfies prong 1 of the test for jurisdiction under the Indian Tucker Act. In Count 8, Plaintiffs claim that the Secretary breached what they allege was a duty imposed upon her by the governing regulations to ensure the timely drilling of oil and gas wells on Plaintiffs' leased land. They contend that the Secretary "took no action to require that drilling and completion for oil and gas actually occur on Plaintiffs' land in a proper and timely manner" and that she "allowed operators to deviate from the existing drilling schedules so that other allotments were drilled in advance of Plaintiffs[']," which "result[ed] in increased drainage from Plaintiffs' land," In short, the Court agrees with Plaintiffs that the United States has a specific fiduciary obligation to ensure that lessees exhibit reasonable diligence in their development of mineral resources. Prong 1 of the test for jurisdiction under the Indian Tucker Act is therefore met with respect to Count 8. In Count 9, Plaintiffs allege that the United States breached its fiduciary duties by failing to lease some 500 acres of allotted land held in trust for them, notwithstanding their requests that it do so. Third Am. Compl. ¶ 89–90. The government contends that the Court lacks

jurisdiction over this claim because Plaintiffs have failed to identify a substantive law that requires the United States to lease all of their allotted lands. The Court agrees with the government. Plaintiffs have not identified a statute or regulation that requires the Secretary to lease all of their lands for oil and gas development upon their request. See Pls.' Resp. at 31. They purport to rely on the same Title 43 regulations that they cite in support of Count 8, but those regulations address the duty of the Secretary to enforce the terms of leases that require lessees to exercise due diligence in developing the land for oil and gas production. See id. at 28–31; see also, e.g., 43 C.F.R. §§ 3161.2, 3162.2-1. They do not impose any specific obligation on the Secretary to enter such leases in the first instance. See generally 43 C.F.R. Subparts 3160–3162. Count 9 therefore is not within this Court's jurisdiction under the Indian Tucker Act. In Count 10, Plaintiffs allege that the United States has a fiduciary duty to lease approximately 200 acres of their unleased allotted lands for grazing purposes but that it has not done so. Plaintiffs rely exclusively on 25 U.S.C. § 3701(2), which states that "the United States has a trust responsibility to protect, conserve, utilize, and manage Indian agricultural lands consistent with its fiduciary obligation[s]." Pls.' Resp. at 32 (alteration in original) (quoting 25 U.S.C. § 3701(2)). This provision, however, does not impose any specific obligation on the United States to lease property for grazing purposes. It merely recites a general trust relationship regarding Indian agricultural lands. To the extent that the limitations period is tolled for the claims in Count 1, that tolling period would begin when the amended complaint was filed (December 21, 2010), see Cobell Am. Compl., and end when Plaintiffs opted out of the suit on or before April 20, 2011. But the specific injuries about which Plaintiffs complain in Count 1—the failure to conduct a competitive bidding process and to maximize Plaintiffs' interests—were, or should have been, apparent on the face of the lease agreements. Because Plaintiffs have not met their burden of establishing that the Secretary breached a continuing duty to remove the lessees, the statute of limitations bars the claims in Count 1, except as to leases entered on or after September 15, 2009, for the reasons set forth above. The parties filed cross-motions for summary judgment as to Count 4 of Plaintiffs' Third Amended Complaint. In their motion, Plaintiffs argue that they are entitled to judgment as a matter of law because the United States—without notice or hearings—disbursed funds to lessees from Plaintiffs' IIM accounts. The government, for its part, contends that it is entitled to summary judgment because the factual premise of Plaintiffs' claim is based on a misreading of the Statements of Performance ("SOPs") that the United States provides IIM account holders on a quarterly basis. The Court finds the government's argument persuasive and consistent with the undisputed facts. SOPs report transaction activity in IIM accounts. The transactions reflect adjustments that lessees make in the amount of the royalty payments that they put into the accounts. The government is entitled to summary judgment as to this claim. In Count 7, Plaintiffs allege that the Secretary approved communitization and unitization agreements affecting Plaintiffs' properties without obtaining consent from owners representing a majority interest in those properties, which they claim violated FBMLA § 1(a)(2)(A). That provision states that "[t]he Secretary may approve any mineral lease or agreement that affects individually owned Indian land, if ... the owners of a majority of the undivided interest in the Indian land that is the subject of the mineral lease or agreement ... consent to the lease or agreement." FBMLA § 1(a)(2)(A)(i).8 Plaintiffs allege that they were injured by the approval of the agreements, although they do not

explain how. The issue before the Court is the scope of the phrase "mineral lease or agreement." Plaintiffs read the phrase broadly to cover any agreement that "affects individually owned Indian land." See Pls.' Resp. at 43 (quoting FBMLA § 1(a)(2)(A)). This is not a reasonable reading of the statutory language because it would encompass agreements affecting the land that are unrelated to the mineral interests governed by the regulations. On the basis of the foregoing, Plaintiffs' motion for partial summary judgment as to Count 4 is denied. The government's motion for partial summary judgment is GRANTED as to Counts 4, 6, 7, 9, and 10. It is also granted as to Count 1, except as to leases entered on or after September 15, 2009, with respect to which it is denied. The government's motion is denied as to Counts 3 and 8. Count 2 is stricken from the Third Amended Complaint in accordance with RCFC 12(f).

145. Roemen v. U.S., 2022 WL 4482883, 4:19-cv-4006-LLP (D.S.D. September 27, 2022).

The Flandreau Santee Sioux Tribe ("the Tribe") and the United States, acting through the Bureau of Indian Affairs, Office of Justice Services ("BIA") entered into a contract wherein the Flandreau Santee Sioux Tribal Police Department was operated by the Tribe pursuant to an Indian Self-Determination and Education Assistance Act ("ISDEAA") Contract ("638 contract"). In this section 638 contract, the provision of law enforcement services for the Flandreau Santee Sioux Indian Reservation was transferred from the BIA to the Tribe from October 1, 2015, through September 30, 2018. During this same time, the Moody County Sheriff's Office ("Moody County") and the Tribe entered into a Law Enforcement Assist Agreement in September of 2015. The Mutual Aid Agreement provided that "[i]n the event of or the threat of an emergency, disaster, or widespread conflagration which cannot be met with the facilities of one of the parties to this agreement, the other party agrees, upon proper request, to furnish law enforcement assistance to the party requesting the assistance upon either an actual or standby basis." After a car chase, all three occupants of the pick-up were ejected in the crash and sustained serious injuries. The United States Attorney issued a certification of scope of employment for Chief Neuenfeldt as to Plaintiffs' negligence claim alleged in Count I of the Complaint and as to Plaintiffs' assault and battery claim alleged in Count III. The United States has moved to dismiss Counts I, II and V under Rule 12(b)(1) of the Federal Rules of Civil Procedure on the basis of sovereign immunity. The FTCA "was designed primarily to remove sovereign immunity of the United States from suits in tort." Levin v. United States, 568 U.S. 504, 506 (2013). The Act gives federal district courts exclusive jurisdiction over claims against the United States for money damages for "injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." This broad waiver of sovereign immunity is subject to a number of exceptions set forth in 28 U.S.C. § 2680. The United States argues that Plaintiffs' allegations are barred under the discretionary function and intentional tort exceptions of § 2680(a), (h). Both the intentional tort exception and the discretionary function exception must be strictly construed in the United States' favor. See U.S. Dep't of Energy v. Ohio, 503 U.S. 607, 615 (1992) (stating that "[w]aiver of immunity must be strictly construed

in favor of the sovereign and not enlarged beyond what the language requires.").The discretionary function exception provides that the FTCA shall not apply to claims "based upon the exercise or performance or failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). In Berkovitz v. United States, 486 U.S. 531 (1988), the Supreme Court enunciated a two-prong analysis for determining when the FTCA's discretionary function exception applies. Id. at 536. First, the acts or omissions must be "discretionary in nature, acts that 'involve an element of judgment or choice.' " United States v. Gaubert, 499 U.S. 315, 322 (1991) (quoting Berkovitz, 486 U.S. at 536). The requirement of judgment or choice is not satisfied if a "federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow," because "the employee has no rightful option but to adhere to the directive." Id. Second, the conduct must be "based on considerations of public policy." Id. at 322-23. For example, where a postal employee negligently causes an accident with a postal vehicle, his actions would not be shielded by the discretionary function exemption because the employee's discretion in how to operate the vehicle is not grounded in regulatory policy. It does not appear that Plaintiffs contest that under the BIA pursuit policy, the decisions of officers to initiate or continue pursuit are discretionary decisions if an officer is acting within his jurisdictional authority. However, it is undisputed that in this case, Officer Neuenfeldt's conduct occurred entirely outside the reservation. Pursuant to the Annual Funding Agreement, which is incorporated by reference into the Tribe's section 638 contract, the Tribe is authorized to provide law enforcement services "to all residents of, and visitors to the Flandreau Santee Sioux Tribal Reservation." The Annual Funding Agreement acknowledges, however, that "[w]hen operating within the scope of this contract, the [Tribe] may be required to leave or operate outside of Indian country." The Funding Agreement lists instances in which the Tribe may be required under the section 638 contract to operate outside the boundaries of the reservation but specifies that the list is not exclusive. In this case, the parties agree that the Tribe is operating under its section 638 contract when providing law enforcement services pursuant to the Assist Agreement with Moody County. The Court finds that under section 2-24-09(B)(3) of the Law Enforcement Handbook, Officer Neuenfeldt did not have discretion to continue the pursuit once Trooper Kurtz lost contact with Bourassa. There were no safety considerations for Trooper Kurtz. The policy provides that absent considerations of officer safety, an officer "will discontinue" a pursuit initiated by another jurisdiction. Count I is a negligence claim unlike Count III which is an assault and battery claim which is being dismissed against the United States for reasons set out elsewhere in this opinion. Plaintiffs did and are entitled to set out claims in the alternative. Under these facts as found by the Court, the Court does have jurisdiction under the FTCA over Plaintiffs' claim for negligence alleged in Count I of the Second Amended Complaint. The section 638 contract by and between the Tribe and the Federal government provides that "[t]he [Tribe] shall be responsible for managing the day-to day operations conducted under this Contract and for monitoring activities conducted under this Contract to ensure compliance with the Contract and applicable Federal requirements." In the present case, Plaintiffs have presented no statute, regulation, policy, or agency guideline that prescribes a course of action that the United States must follow should, as Plaintiffs argue, the Tribe be out of compliance with

training and background investigation requirements for tribal law enforcement officers operating under a section 638 contract. The Court finds that even liberally construing Plaintiffs' administrative complaint, they have failed to allege facts to support a negligent hiring or negligent retention claim. All of the facts presented in Plaintiffs' administrative complaints regard Officer Neuenfeldt's pursuit-related conduct and violations of pursuit policy. There are no facts in Plaintiffs' administrative claims suggesting that at the time that Officer Neuenfeldt was hired, that the Government knew or should have known that he presented a danger to persons which whom the Government would reasonably foresee Neuenfeldt coming into contact with through his employment. Here, the United States strongly contests that Neuenfeldt had legal authority to execute searches, to seize evidence, or to make arrests for violations of federal law because he did not have a SLEC card, nor was he cross-deputized. Under Iverson, in order to qualify as a federal law enforcement officer under the law enforcement proviso of the FTCA, Neuenfeldt must have statutory or regulatory authority to execute searches, to execute searches, to seize evidence, or to make arrests for violations of federal law. It is undisputed that Neuenfeldt did not have such authority in this case because there was no cross deputization agreement nor did he have an SLEC.3 Accordingly, the United States has not waived its immunity under the law enforcement proviso for Count III of Plaintiff's Second Amended Complaint alleging assault or battery." Section 2680(h) does not merely bar claims for assault or battery; in sweeping language it excludes any claim arising out of assault or battery ... to cover claims ... that sound in negligence but stem from a battery committed by a Government employee." United States v. Shearer, A13 U.S. 52, 55 (1985). The United States argues that Plaintiffs' negligence claim alleged in Count I is barred by sovereign immunity because it "arises out of" the assault and battery and thus falls within the intentional tort exception to the FTCA. Plaintiffs' negligence claim is not barred under the intentional tort exception. The United States' Motion to Dismiss is granted as to Plaintiffs' claims against the United States for assault and battery as alleged in Count III of the Second Amended Complaint and for negligent supervision, training, hiring, and retention, as alleged in Count V; and denied as to Plaintiffs' claim for negligence alleged in Count I of the Second Amended Complaint.

***146. Navajo Nation v. Office of Navajo and Hopi Indian Relocation,* 2022 WL 4548134, No. CV-21-08190-PCT-DWL (D. Ariz. September 29, 2022).**

The Ninth Circuit previously observed that the "more-than-a-century-old dispute between members of the Hopi Tribe and the Navajo Nation over the use of approximately 2.5 million acres in northern Arizona...has been the subject of extensive litigation and legislation, including at least eighteen opinions of this court." Clinton v. Babbitt, 180 F.3d 1081, 1083 (9th Cir. 1999). This lawsuit represents another instance of such litigation. In this action, Plaintiff Navajo Nation ("the Nation") has sued the Office of Navajo and Hopi Indian Relocation ("ONHIR") and the U.S. Department of the Interior ("DOI") (together, "Defendants") for failing to comply with various provisions of the Settlement Act and subsequent enactments, which the Nation refers to collectively as "the Relocation Act." The Nation seeks (1) declaratory relief that ONHIR "has failed to provide necessary community facilities for Navajo relocatees in violation of fiduciary obligations under the Relocation Act" and "injunctive relief to compel the performance of that legal obligation;" (2) declaratory relief that "ONHIR has unreasonably delayed

completion of relocation of Navajo citizens" and "injunctive relief to advance prompt, proper completion of Navajo relocation"; (3) declaratory relief "confirming that ONHIR has not fully discharged its functions, and injunctive relief to prevent ONHIR from closing before the President determines that ONHIR has full[y] discharged its functions"; and (4) declaratory relief "confirming that ONHIR must obtain and DOI must provide reasonable assistance to implement the Relocation Plan, and injunctive relief to require performance of those obligations". Defendants have, in turn, moved to dismiss the Nation's complaint for lack of subject-matter jurisdiction and/or for failure to state a claim. As for Count One, Defendants contend that, even assuming a duty to provide infrastructure exists (which Defendants dispute given the apparent removal of the infrastructure-related language via the 1988 amendments), any such duty leaves ONHIR with a great deal of discretion, and because the Nation is seeking "wholesale judicial management of ONHIR"—that is, the Nation asks the Court to compel ONHIR to comply with all provisions of the Settlement Act, set timelines, and retain jurisdiction to ensure compliance—this constitutes a broad programmatic challenge that is not permissible under the APA. To the extent Count One is a claim arising under § 706(1) of the APA, it is dismissed without leave to amend. If Count One isn't a claim under § 706(1) of the APA, what is it? The Nation provides the following description of Count One in its response: "The first claim...properly seeks a declaration under the Declaratory Judgment Act ('DJA') and a sovereign immunity waiver in the [APA] that the Relocation Act requires [ONHIR] to assure that community facilities and services, such as water, sewers, roads, schools, and health care facilities, are available for Navajo relocatees." Unfortunately, this description does not fully address the considerations that bear on whether a claim against a federal agency should survive dismissal. Accordingly, for Count One to survive dismissal, the Nation must also "identify a cause of action under some other law." Although the Nation correctly notes that § 702 of the APA creates a waiver of sovereign immunity when a plaintiff asserts a non-APA claim for non-monetary relief against a federal agency, see Navajo Nation v. Department of the Interior, 876 F.3d 1144, 1168-72 (9th Cir. 2017) ("Navajo Nation I"), which is how the Nation characterizes Count One, that observation does not address the distinct question of whether Count One, so characterized, qualifies as a valid non-APA claim. On that issue, the Nation has clarified that Count One is an "Indian breach of trust claim," predicated on "ONHIR's fiduciary duty to ensure community facilities and services for Navajo relocates," that is analogous to the breach-of-trust claim analyzed by the Ninth Circuit in Navajo Nation v. Department of Interior, 26 F.4th 794 (9th Cir. 2022) ("Navajo Nation II"). Under the circumstances, the best solution is to dismiss Count One to the extent it is a claim under § 706(1) of the APA, clarify that Count One is actually a breach-of-trust claim, and grant Defendants leave to file a second motion to dismiss with respect to Count One. In Count Two, entitled "Unreasonabl[e] Delay By ONHIR In Completing Relocation Of Navajos From Hopi-Partitioned Land," the Nation alleges that "the 35-year delay here beyond an express statutory deadline for completion of relocation...is categorically unreasonable" and contends that "[t]his Court must 'compel agency action unlawfully held or unreasonably delayed' " pursuant to 5 U.S.C. § 706(1). Defendants contend that Count Two should be dismissed under Rule 12(b)(1) because it fails to challenge a discrete agency action that is subject to judicial review under the APA. Defendants characterize Count Two as raising a "sweeping programmatic challenge"

because it seeks to compel ONHIR to "comply with all provisions of the Settlement Act and Relocation Plan" and contend that the Supreme Court has determined that such broad, programmatic attacks are impermissible. The Nation contends that there was a specific statutory command to complete relocation within five years of the relocation plan taking effect (i.e., by July 1986), prior cases have established that a delay of less than 36 years is unreasonable, there are intolerable impacts to health and welfare stemming from the delay, ONHIR has no higher competing priorities to address, and it is irrelevant that there is no evidence of impropriety on ONHIR's part in causing the delay. Although it is true that "when an agency is compelled by law to act within a certain time period, but the manner of its action is left to the agency's discretion, a court can compel the agency to act," SUWA, 542 U.S. at 65, the Nation does not simply request a declaration concerning compliance with a deadline—it also asks the Court to assume an oversight role of indefinite duration over ONHIR's multitude of relocation functions. Accordingly, Count Two is dismissed. In Count Three, entitled "Failure By ONHIR to Fully Discharge Its Functions Before Working To Close," the Nation alleges that ONHIR has stated an intention to close, has developed plans for that, and has actively worked to prepare for closure. The Nation further argues that the Relocation Act creates an implied right of action to assert a premature closure claim. Although the Settlement Act was, in general, enacted for the Nation's benefit, the specific provision underlying the Nation's claim in Count Three—the provision that ONHIR "shall cease to exist when the President determines that its functions have been fully discharged," see 25 U.S.C. § 640d-11(f)—does not include any rights-creating language and focuses not on the parties being protected but on the agency providing the protection. In Sandoval, the Supreme Court held that when statutory language "focus[es] on the person regulated rather than the individuals protected" or, as here, is "yet a step further removed" and "focuses neither on the individuals protected nor even on the funding recipients being regulated, but on the agencies that will do the regulating," there is no reason to discern "congressional intent to create a private right of action." 532 U.S. at 289. Accordingly, and again recognizing that the implied-right-of-action aspect of the analysis presents a close call, Count Three is dismissed. In Count Four, entitled "Failure By ONHIR To Obtain And DOI To Provide Reasonable Interagency Assistance In Implementing The Relocation Plan," the Nation alleges that ONHIR has "recognized the necessity for interagency assistance to complete relocation," "affirmed that [it] will call for the assistance of DOI and other agencies as necessary to implement relocation," and "called upon other agencies to assist in implementing relocation," but has otherwise "either unreasonably failed to call upon other agencies to fulfill that necessity or unreasonably failed to require that such requested reasonable assistance be provided." Ordered Counts Two, Three, and Four are dismissed without leave to amend.

147. M. Crane v. United States, 2022 WL 5150592, CV-21-86-GF-BMM (D. Mont. October 5, 2022).

Defendants United States of America ("the Government"), Dr. Jose Ortiz ("Ortiz"), Dr. Richard Foutch ("Foutch"), and AB Staffing Solutions, L.L.C. ("AB Staffing") have filed two Motions to Dismiss for Lack of Jurisdiction. Defendants seek dismissal on the basis that the statute of limitations and administrative exhaustion requirements deprive the Court of subject matter jurisdiction, or, in the alternative, that Plaintiffs have failed to

allege a claim upon which relief can be granted. Michael Running Crane ("Michael") presented to the Indian Health Services ("IHS") Blackfeet Community Hospital ("BCH") on November 6, 2019, complaining of chest pains. (Doc. 18 at 2.) Ortiz and Foutch allegedly sent Michael home without diagnosing his injuries, providing relief for symptoms, or referring him out for specialized care. (Id.) Michael returned to BCH on November 14, 2019, complaining of continued pain in his chest. (Id.) Michael died at the hospital that same day, allegedly due to a cut in his aorta that IHS providers failed to diagnose or treat. The statutory definition of "employee of the government" includes "officers or employees of any federal agency." 28 U.S.C. § 2671. The term "federal agency" excludes "any contractor with the United States." "Courts have construed the independent contractor exception to protect the United States from vicarious liability for the negligent acts of its independent contractors." Contract physicians qualify as independent contractors rather than federal government employees for FTCA claim purposes. Ortiz and Foutch worked during the relevant time period as contract employees for IHS through Defendant AB Staffing. The Court agrees that the FTCA's immunity waiver does not extend to claims against the Government arising from the conduct of Ortiz and Foutch in light of their status as contract physicians. 28 U.S.C. § 2671; Carrillo, 5 F.3d at 1304–05. Sovereign immunity thereby bars Running Crane's claims against the Government arising from the acts or omissions of Ortiz and Foutch. The MMLPA prohibits plaintiffs from filing a medical malpractice claim against a health care provider in any court before first filing an administrative claim with the Montana Medical Legal Panel ("MMLP"). Mont. Code Ann. § 27-6-701s. A plaintiff may seek judicial review only after the MMLP renders its decision. The MMLPA does not apply, however, to any claim against a full-time health care provider employed by a federal agency. Id. § 27-6-103(a)(ii). Running Crane argues that he reasonably believed that Ortiz and Foutch worked as federal government employees based on their employment during the relevant time period at BCH, a federal governmental entity. Running Crane contends that he pursued a good-faith FTCA claim under the reasonable belief that the FTCA—and not the MMLPA—applied to Ortiz and Foutch. Running Crane timely filed an FTCA claim with DHHS against the Government on behalf of his brother's estate on January 21, 2021. This filing fell comfortably within the two-year statutes of limitations imposed by both the FMLA and the MMLPA. 28 U.S.C. § 2401(b); Mont. Code Ann. § 27-2-205. DHHS responded to Running Crane's FTCA claim seven weeks later, on March 11, 2021, when it requested additional evidence. Running Crane alleges that he promptly responded to DHHS's request but did not receive any further response from the agency. DHHS's eventual determination letter makes no mention of the employment status of Ortiz or Foutch. The Court applies equitable tolling to Running Crane's claim. Defendants' Motions to Dismiss are denied. Running Crane's case is stayed pending exhaustion of his claims before the MMLP.

N. Miscellaneous

***148. Shingle Springs Band of Miwok Indians v. Caballero*, 2021 WL 4938130, No. 20-16785 (9th Cir. October 22, 2021).**

The Shingle Springs Band of Miwok Indians (the "Band") sued Cesar Caballero, alleging that he had misappropriated the Band's name for his own purposes, in violation of the

Lanham Act, 15 U.S.C. §§ 1114, 1125(a), the Anti-Cybersquatting Consumer Protection Act, 15 U.S.C. § 1125(d), and California law. The district court dismissed Caballero's counterclaims and denied a Rule 59(e) motion. We affirm. Caballero's counterclaims were premised on the contention that the Band had been improperly recognized by the federal government. The district court correctly dismissed the counterclaims as presenting a nonjusticiable political question. *See United States v. Holliday*, 70 U.S. 407, 419 (1865); *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1276 (9th Cir. 2004). The district court held Caballero in civil contempt first for violating a preliminary injunction and later for violating a permanent injunction. Caballero claims that the contempt citations must fall because we later reversed the summary judgment on which the permanent injunction was based, *see Shingle Springs Band of Miwok Indians v. Caballero*, 630 F. App'x 708 (9th Cir. 2015), and the Band declined to pursue further injunctive relief on remand. But this argument does not excuse his disobedience of the preliminary injunction, which was affirmed on direct appeal. Affirmed.

***149. Powell v. Office of Navajo and Hopi Indian Relocation*, 2022 WL 3286587, No. CV-21-01848-PCT-SPL (D. Ariz. August 11, 2022).**

Before the Court are Plaintiff's Motion for Summary Judgment and Defendant's Cross-Motion for Summary Judgment. For the reasons that follow, Plaintiff's Motion will be granted, Defendant's Cross-Motion will be denied, and the matter will be remanded for further proceedings. The Navajo–Hopi Settlement Act (the "Settlement Act") authorized a court-ordered partition of land previously referred to as the Joint Use Area—which was occupied by both Navajo and Hopi residents—into the Navajo Partitioned Lands ("NPL") and the Hopi Partitioned Lands ("HPL"). See Pub. L. No. 93-531, § 12, 88 Stat. 1716 (1974); Clinton v. Babbitt, 180 F.3d 1081, 1084 (9th Cir. 1999). Plaintiff Benjamin Powell, Sr. is an enrolled member of the Navajo Nation. Plaintiff filed an Application for Relocation Benefits, which was denied by ONHIR. The ONHIR's denial letter stated that the agency found that Plaintiff was an HPL resident until May 1982 but that he had not proven he was a head of household as of his move-off date, making him ineligible for benefits. Plaintiff argues that the IHO's decision was arbitrary, capricious, and unsupported by substantial evidence because (1) the IHO erroneously found that Plaintiff was living with his mother on December 22, 1974; (2) ONHIR failed to give Plaintiff proper notice of the issues to be addressed at the hearing; and (3) the IHO lacked substantial evidence to discredit Plaintiff's testimony and residency claim. The Court need only address the first issue. ONHIR argues that "[a]ny mention of Plaintiff's 'mother,'" by the IHO "was a one-time typographical or ministerial error." Not so. First, it was a four-time error. Second, the first erroneous mention of Plaintiff's mother belies any argument that the error was merely typographical or ministerial, as the IHO refers to Plaintiff's grandmother living with Plaintiff and his mother in Holbrook. In that context, it is clear that the IHO did not mistakenly use "mother" when he meant "grandmother." Not only does the omission of Plaintiffs' grandparents' home suggest that the IHO's error as to Plaintiff's mother was harmful, but it also amounts to its own independent grounds for reversal as the IHO "entirely failed to consider an important aspect of the problem": the

site where Plaintiff claims to have maintained his legal residence. Accordingly, it is ordered that Plaintiff's Motion for Summary Judgment is granted

***150. Beam v. Office of Navajo and Hopi Indian Relocation,* 2022 WL 3716497, No. CV-21-08149-PCT-SPL (D. Ariz. August 29, 2022).**

Before the Court are Plaintiff Ina Beam's Motion for Summary Judgment and Defendant Office of Navajo and Hopi Indian Relocation's Cross-Motion for Summary Judgment. For the following reasons, Plaintiff's Motion will be granted, Defendant's Cross-Motion will be denied, and the matter will be remanded for further proceedings. The Navajo–Hopi Settlement Act (the "Settlement Act") authorized a court-ordered partition of land previously referred to as the Joint Use Area—occupied by both Navajo and Hopi residents—into the Navajo Partitioned Lands and the Hopi Partitioned Lands ("HPL"). See Pub. L. No. 93-531, § 12, 88 Stat. 1716 (1974); Clinton v. Babbitt, 180 F.3d 1081, 1084 (9th Cir. 1999). The Settlement Act created what is now the Office of Navajo and Hopi Indian Relocation ("ONHIR") to disburse benefits to assist with the relocation of Navajo and Hopi residents who then occupied land allocated to the other tribe. Bedoni v. Navajo-Hopi Indian Relocation Comm'n, 878 F.2d 1119, 1121–22 (9th Cir. 1989). Plaintiff is an enrolled member of the Navajo Nation. On January 25, 2010, Plaintiff filed an Application for Relocation Benefits, which was denied by ONHIR on December 20, 2012. The ONHIR's denial letter stated that the agency found that Plaintiff had not proven she was a head of household as of her move-off date, making her ineligible. Specifically, the denial letter stated: In response to question 9 on page 7 of your Application, you stated that you moved off the HPL in "about 1982 or 1983." As of 1982 and 1983, you were not a Head of Household. Specifically, you were not married (you first married on May 31, 1986), you were not a parent (your first child was born on January 28, 1992), and you were not self-supporting (according to your Social Security Earnings statement, you first earned $1,300.00 or more per year in 1984). On January 16, 2013, Plaintiff filed a Notice of Appeal, and a hearing was held before an Independent Hearing Officer ("IHO") on March 20, 2015. At the Hearing, the ONHIR stipulated to the fact that Plaintiff became a head of household in 1984, when she earned $1,735. The remaining issue was whether Plaintiff was a legal resident of the HPL at the time she became a head of household in 1984. After the Hearing, the IHO denied Plaintiff's appeal and upheld the ONHIR's denial of her application based on a finding that Plaintiff was no longer a legal resident of the HPL by the time she became a head of household in 1984. The Court finds that the IHO failed to provide substantial evidence to support his negative credibility determinations as to Plaintiff and her mother's testimony concerning the frequency of Plaintiff's visits to the Red Lake residence. Such testimony was material, as the frequency of Plaintiff's visits was a central factor in determining when her HPL residency was extinguished. Given the IHO's failure to satisfy the substantial evidence standard with respect to this material issue, the Court cannot uphold the IHO's Decision. Whether benefits should ultimately be awarded, however, remains with the IHO. Open questions remain as to the credibility of Plaintiff and her mother's testimony, as well as to whether Plaintiff satisfied the residency requirement at the time she became a head of household in the late summer or early fall of 1984. The Court will remand for a decision consistent with this Order. Accordingly, it is ordered that Plaintiff's Motion for Summary Judgment is granted.

***151. Tribe v. Lyman County,* 2022 WL 4008768, 3:22-cv-03008-RAL (D.S.D. September 2, 2022).**

Plaintiffs Neil Russell, Stephanie Bolman, and Ben Janis are members of the Lower Brule Sioux Tribe ("the Tribe") and registered voters in Lyman County, South Dakota. The Tribe, Russell, Bolman, and Janis (collectively "Plaintiffs") filed a motion for preliminary injunction to compel Defendants Lyman County, the Lyman County Board of Commissioners ("the Commission") and its individual members, and Lyman County Auditor Deb Halverson (collectively "Defendants") to implement a new redistricting plan for Lyman County commissioner elections. In short, this case centers on the delayed implementation of redistricting plans for Lyman County commissioner elections that the Commission adopted after the Tribe raised a Voting Rights Act ("VRA") concern; the original plan adopted by the Commission was to be fully implemented in 2026 but an amended plan adopted by the Commission after this Court's initial opinion would implement changes to address VRA concerns in 2024. Both plans leave the 2022 county commissioner elections undisturbed. Plaintiffs allege that, without relief extending to the 2022 Lyman County commissioner elections, the voting power of tribal members will be diluted in violation of § 2 of the VRA, 52 U.S.C. § 10301. Doc. 1 at 17. This Court determines that Plaintiffs are likely to succeed on the merits of their claim and grants the motion for preliminary injunction to a limited extent. The Plaintiffs have shown a likelihood of satisfying the Gingles factors. The first factor—that the Tribal members on the Reservation are sufficiently large and geographically compact to constitute a majority in a single district—is indisputable. Indeed in 2006, the United States Court of Appeals for the Eighth Circuit recognized that the Native American population of South Dakota is "geographically compact" "[b]ecause of the well-documented history of discrimination against Native-Americans and the nature of the reservation system[.]" Bone Shirt, 461 F.3d at 1016. And the redistricting plan set forth in the Ordinance drew District 1 around a population that was 92.53% Native American, easily demonstrating that Native Americans in the County are geographically compact enough "to constitute a majority in a single-member district." Bone Shirt, 461 F.3d at 1018. The second Gingles factor—that Tribal members on the Reservation are "politically cohesive"—is borne out by the data in Plaintiffs' expert report. For instance, in the 2020 elections for President, U.S. Senate, State Senate, State House of Representatives, and Public Utilities Commissioner, over 80% of Native voters in Lyman County voted for Native-preferred candidates. HE C at 15–16. The lone exception was in a U.S. House of Representatives race where the Native American-preferred candidate received about 60% of the Native American vote.17 Id. Lyman County election results in the 2018, 2016, and 2014 races are not far different in showing strong political cohesion in the Lyman County Native American vote. HE C at 12–14. The third Gingles factor—that white residents of Lyman County vote "sufficiently as a bloc to enable [them] usually to defeat the minority's preferred candidate" for the Commission—likewise is borne out by historical data. Bone Shirt, 461 F.3d at 1018. Professor Collingwood testified consistently with his expert report during the motion hearing that voting in Lyman County was highly polarized, with a voting polarization rate of 82% from 2014 to 2020. Doc. 5 at 5, 9–10. The data underscores how racially polarized voting in Lyman County is. Taking 2020 as an example here, Lyman County data shows that "[s]upport from white voters for the Native American preferred candidate

never rises above 20 percent." HE C at 11. The data shows a similar pattern in previous years where every election in Lyman County from 2016 to date shows the majority white voters preferring a different candidate than the minority Native American voters. HE C at 9–10. Plaintiffs have made a strong preliminary showing that the Gingles factors are satisfied. This Court next considers the totality of the circumstances, including the "Senate factors," to determine whether Plaintiffs are likely to succeed on the merits of their claim. Plaintiffs assert many of the Senate factors support their claim, including: (1) the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process; (2) the extent to which voting in the elections of the state or political subdivision is racially polarized; (3) the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements; ... (5) the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process; ... [and] (7) the extent to which members of the minority group have been elected to public office in the jurisdiction[.] Doc. 1 at 13–14; Bone Shirt, 461 F.3d at 1021–22. Plaintiffs also claim that the Commission was not responsive to the Tribe during the redistricting process. Doc. 1 at 8, 17; Doc. 11 at 12–14. Rather than adopt the Tribe's preferred plan, the County went to the state legislature to amend South Dakota law to allow implementation of a novel hybrid redistricting plan, causing a delay for when tribal members would likely be able to elect their preferred commissioners. Professor McCool's report provided evidence of historical discrimination against Native Americans politically and socially. However, there is no evidence of any recent discrimination by the County against the rights of Tribal members to register or vote, notwithstanding that at-large commission elections have effectively squelched the chances of electing a Native-American-preferred candidate to the Commission with the exception of defendant/independent candidate Schelske, who received majority support from Native Americans and won a seat on the Commission. The second Senate factor strongly favors the Plaintiffs. Professors Collingwood and Walker's report showed 82% voter polarization in Lyman County, leading them to conclude that Native American votes were diluted in at-large elections. There are a few things this Court simply cannot get past. First, no party seems to think, as this Court tends to believe, that the Court's proposed remedial plan is feasible. Indeed, the Plaintiff's' attorney during the August 23 hearing when asked by this Court about the Plaintiffs' position on it stated: "The Plaintiffs, for purposes of the injunctive relief, are willing to accept Defendants' contention that the time now is too short to tinker with the election." Doc. 74 at 7. And Plaintiffs' attorney later affirmed that they "are willing to accept [Defendants'] contention that any tinkering, you know, beyond just canceling the election would not be possible at this point." Second, the Commission made a material change in adopting a revised redistricting plan through the New Ordinance after this Court's prior Opinion and Order to address in part the VRA issue. Third, five of the six candidates who filed petitions to run for Lyman County commissioner on the November of 2022 ballot are parties to this case and no party supports such an option, which might signal hardship perceived by the candidates through such a revision in the election now. Fourth, this Court just cannot gauge how much of a genuine concern the remaining unverified

addresses are for assuring that the voters can be sorted properly into the Reservation-district and non-Reservation district to receive the proper ballot on election day. This Court is entirely dissatisfied with leaving the 2022 Lyman County commissioner elections unchanged and does so only because of the remedial plan adopted by the Commission to solve the VRA issue two years earlier than did its original Ordinance. This Court recognizes that this decision does not address the VRA issues with the 2022 election. This Court, however, proposed a remedy to do so that no party supported or defended, leaving this Court questioning its feasibility. A limited preliminary injunction thus will issue to ensure some VRA protection of Native American voting in future Lyman County commissioner elections. ORDERED that Plaintiffs' Motion for Preliminary Injunction, Doc. 3, is granted to the extent that Defendants are enjoined from modifying its New Ordinance adopted after this Court's prior Opinion and Order by which Defendants adopted a revised redistricting plan to resolve the VRA issues two years earlier than its original Ordinance and that, notwithstanding any interpretation of South Dakota law to the contrary, the redistricting plan in the New Ordinance shall be carried out for Lyman County commissioner elections until possible redistricting after the 2030 census.

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