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CASE LAW ON AMERICAN INDIANS

Thomas P. Schlosser

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* THOMAS P. SCHLOSSER. Mr. Schlosser represents Tribes in fisheries, timber, water, energy, cultural resources, contracting, tax and federal breach of trust. He is a director of Morisset, Schlosser, Jozwiak & Somerville, where he specializes in federal litigation, natural resources, and Indian tribal property issues. He is also frequently involved in tribal economic development and environmental regulation. In 1970s, Tom represented tribes in the Stevens’ Treaty Puget Sound fishing rights proceedings. Tom has a B.A. from the University of Washington and a J.D. from the University of Virginia Law School. Tom is a founding member of the Indian Law Section of the Washington State Bar Association and also served on the WSBA Bar Examiners Committee. Tom is a frequent CLE speaker and moderates an American Indian Law discussion group for lawyers at http://forums.delphiforums.com/IndianLaw/messages.

He is a part-time lecturer at the Seattle University School of Law.

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I. UNITED STATES SUPREME COURT

   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.

   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.

   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


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 noting 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.


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.


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.


Residents of town near land at issue sought judicial review under Administrative Procedure Act (APA) of decision of Secretary of the Interior to take into trust 321 acres of land in Massachusetts for the benefit of the Mashpee Wampanoag Tribe to establish a reservation. The Tribe intervened as defendant. The parties brought cross-motions for summary judgment. The District Court, A. Kelley, J., held that: [1] memorandum opinion of Department of Interior was reasonable interpretation of phrase “under Federal jurisdiction”; [2] Secretary's conclusion that federal government subjected Tribe to its jurisdiction, and, thus, that Tribe met definition of “Indian” under IRA, was not arbitrary and capricious; [3] Secretary was not arbitrary or capricious in reading historic sources, in conjunction with other evidence, to establish that Tribe was under federal jurisdiction, and, thus, that Tribe met definition of “Indian” under IRA; [4] Secretary was not arbitrary or capricious in interpreting historic sources, differently from how Department interpreted same sources in prior draft and published decisions, in concluding that Tribe was under federal jurisdiction, and, thus, that Tribe met definition of “Indian” under IRA; [5] Secretary's decision to proclaim reservation consisting of two noncontiguous parcels of land on behalf of Tribe was not arbitrary and capricious. Defendants' motions granted, and plaintiffs' motions denied. Plaintiffs argue that the M-Opinion creates “a standardless test that practically any tribe can meet,” and that it is irreconcilable with the Supreme Court's decision in Carcieri. They view the M-Opinion's two-part inquiry into whether the federal government had conferred jurisdiction on a tribe before 1934 and, if so, whether that jurisdiction remained extant in 1934, as contrary to Carcieri’s requirement that the jurisdiction-conferring event be in effect in 1934. The M-Opinion withstands scrutiny under both Carcieri and the Chevron framework. Plaintiffs raise no
meaningful challenge to the validity of the M-Opinion under the Chevron framework. The first step of this framework is to determine whether there is ambiguity to the term at issue—here, “under Federal jurisdiction.” Justice Breyer strongly suggested that this term was ambiguous in his concurrence to Carceri, id. at 398, 129 S.Ct. 1058 (Breyer, J., concurring), and each of the three appellate courts to have considered the term have agreed. Turning to the second Chevron step, this Court agrees with the D.C. Circuit's conclusion in Grand Ronde that the M-Opinion's construction of “under Federal jurisdiction” is reasonable. 830 F.3d at 564–65. The historical record indicates that the Mashpee have had a robust connection to the Designated Lands for over four centuries. Upon review of the 2021 ROD, the Court concludes that the Secretary was not arbitrary and capricious in determining that the Tribe was under federal jurisdiction in 1934 within the meaning of the IRA, nor was she arbitrary and capricious in proclaiming the Designated Lands as the Tribe's initial reservation. Accordingly, Defendants’ motions for summary judgment is granted and Plaintiffs’ motion is denied.

The Navajo–Hopi 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 Harrison Ben is an enrolled member of the Navajo Nation. Plaintiff filed an Application for Relocation Benefits, which was denied by ONHIR based on a finding that he was not a head of household when he moved off the HPL. Plaintiff appealed, and a hearing was held before an Independent Hearing Officer who denied Plaintiff's appeal and upheld ONHIR's denial of benefits, finding that at the time Plaintiff became a head of household in 1980, he was no longer an HPL resident. Here, the IHO's “Credibility Findings” as to Plaintiff's testimony were as follows: Except for applicant's testimony about his return visits to Tolani Lake [on the HPL] after 1977 which the undersigned finds to be exaggerated, applicant is a credible witness. Nowhere in the decision does the IHO explain why he found Plaintiff's testimony regarding his return visits to Tolani Lake to be exaggerated and not credible. But merely stating a conclusion contrary to Plaintiff's testimony is not a specific or cogent reason for discrediting the testimony—as emphasized by the case law cited by Plaintiff. Here, as noted, Plaintiff's testimony was confusing at times, and this Court reaches no conclusions from the record regarding when Plaintiff relocated from the HPL or became a head of household. The Court thus remands this matter for a properly supported decision giving due consideration to the evidence. Plaintiff's Motion for Summary Judgment is granted;

9. Alturas Indian Rancheria; Wendy Del Rosa, v. David Bernhardt, 2023 WL 385176, No. 19-16885 (9th Cir. February 25, 2023). Plaintiff Wendy Del Rosa, purporting to represent the federally recognized Alturas Indian Rancheria tribe (Tribe) and herself (collectively, plaintiffs), filed a complaint for declaratory and injunctive relief against members of the Department of the Interior (DOI). During intratribal disputes regarding governance and membership, DOI chose to
recognize the last undisputed governing body of the Tribe in 2012, which consisted of Wendy Del Rosa, Darren Rose, and Phillip Del Rosa, for purposes of maintaining government-to-government relations in contracting with the Tribe. Plaintiff Wendy Del Rosa, who is part of one tribal faction, asks the court to order DOI to recognize a 2013 decision by the Tribe’s governing body removing Phillip Del Rosa, who is part of the other faction, from holding voting and leadership positions in the Tribe. The 2013 decision was subsequently reversed by a different tribal governing body in 2014 led by the Phillip Del Rosa–Darren Rose tribal faction. The district court found it lacked jurisdiction because adjudicating this case would necessitate engaging in the intratribal faction dispute and essentially choosing sides among the factions. “[T]he Supreme Court has uniformly recognized that one of the fundamental aspects of tribal existence is the right to self-government.” Wheeler v. U.S. Dep’t of Interior, Bureau of Indian Affs., 811 F.2d 549, 551 (10th Cir. 1987). The federal government and federal courts have also encouraged tribal self-governance, and “[federal courts] have stated that when a dispute is an intratribal matter, the Federal Government should not interfere.” Id. Additionally, “[a] tribe’s right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community,” Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n.32 (1978), thus placing “issues of tribal membership ... generally beyond our review.” Cahto Tribe of Laytonville Rancheria v. Dutschke, 715 F.3d 1225, 1226 (9th Cir. 2013). Claims are therefore nonjusticiable where litigants seek “a form of relief that the federal courts cannot provide, namely, the resolution of the internal tribal leadership dispute.” In re Sac & Fox Tribe of Mississippi in Iowa/Meskwaki Casino Litig., 340 F.3d 749, 763 (8th Cir. 2003). Although DOI may sometimes need to determine what tribal government to recognize in order to interact and contract with tribal governments, “even these special situations should be resolved in favor of tribal self-determination and against Federal Government interference.” Wheeler, 811 F.2d at 552. Against the backdrop of these intratribal governance and membership disputes, the district court correctly found that it lacked subject matter jurisdiction over plaintiffs’ claims. Affirmed.


Certain descendants of enrolled members of the San Pasqual Band (collectively, Plaintiffs) appeal the district court’s grant of summary judgment in favor of the Bureau of Indian Affairs (BIA). The district court held that Plaintiffs’ claims were barred by the statute of limitations. 28 U.S.C. § 2401(a). We have jurisdiction under 28 U.S.C. § 1291. The parties disagree as to when Plaintiffs’ claims accrued. The BIA argues that the blood-degree decision issued on April 7, 2006, was final and judicially reviewable when issued, and that Plaintiffs reasonably should have discovered that the decision made them ineligible for enrollment at some date well before September 28, 2010. Therefore, the BIA argues that Plaintiffs’ claims accrued well before September 28, 2010, and the limitations period expired well before Plaintiffs filed their complaint. Plaintiffs disagree, arguing that the limitations period did not expire before they filed their complaint for a wide range of reasons, including because their claims did not accrue until mid-2015, after they first received notice of the status of their enrollment applications in 2014, and had an opportunity to exhaust administrative remedies. Alternatively, Plaintiffs argue that the
limitations period should be tolled for various equitable reasons. The district court did not make adequate findings regarding when Plaintiffs’ claims accrued. Moreover, the district court considered only the denial of the request to correct the blood degree on April 7, 2006, and failed to clarify whether the BIA’s “final agency action” or actions included the subsequent return of Plaintiffs’ enrollment applications to the enrollment committee on April 21, 2006. This distinction could be significant, because unlike the Olsen letter, which was made on behalf of the Secretary and thus not subject to appeal, see 25 C.F.R. § 2.6(c), it is less certain whether Plaintiffs needed opportunities to exhaust administrative remedies before the return of their enrollment applications was considered a final agency action, see Darby v. Cisneros, 509 U.S. 137, 146 (1993); see also 25 C.F.R. §§ 2.6 (Finality of decisions), 2.7 (Notice of administrative decision or action). Because the district court did not clearly identify a final agency action or actions, and also failed to make a finding as to when Plaintiffs discovered, or in the exercise of reasonable diligence should have discovered, that they had been injured, we are unable to determine when any of Plaintiffs’ causes of action accrued. Therefore, we vacate the district court’s judgment and remand for further proceedings consistent with this disposition.


Plaintiff Arthur David LaRose, an enrolled member of the Leech Lake Band of the Minnesota Chippewa Tribe (“MCT” or “Tribe”), served as Secretary-Treasurer of the Leech Lake Band's Reservation Business Committee (“LLRBC”). LaRose intended to seek reelection in the 2022 MCT election. In February 2022, however, the MCT Election Court of Appeals (“Election Court”) found that LaRose was ineligible to run for tribal office because he had previously been convicted of a felony. After unsuccessfully challenging the Election Court's decision before tribal authorities, LaRose filed this action. LaRose argues that the Election Court's decision was based on an invalid amendment to the tribal constitution and an unlawful application of that amendment to his candidacy. LaRose's complaint sets forth two claims. He first alleges that defendants violated the IRA and MCT Constitution by certifying the results of the 2005 Secretarial election because the election lacked a “Tribal quorum of 30 percent (%) to amend a Tribal constitution.” Second, he alleges that defendants violated the Indian Civil Rights Act (“ICRA”) by retroactively applying the 2006 constitutional amendment to LaRose's 1992 conviction and barring him from running for tribal office. As best as the Court can tell, then, not a single federal court has held that being barred from running for tribal office—in and of itself—constitutes “detention” for purposes of 25 U.S.C. § 1303. See also Lewis v. White Mountain Apache Tribe, No. CV-12-8073-PCT-SRB, 2013 WL 510111, at *6 (D. Ariz. Jan. 24, 2013) (“[T]he refusal to certify Petitioner as a candidate for the Tribal Council election is simply not equivalent to a detention under § 1303. Here, even if LaRose had standing to pursue his federal claims, the Court would dismiss those claims because LaRose did not exhaust his administrative remedies.

The Sault Ste. Marie Indian tribe filed suit challenging the decision of Department of Interior's (DOI), denying the tribe's request to take parcel of land into trust, under Michigan Indian Land Claims Settlement Act, for use as casino. Following intervention by three commercial casinos and two other tribes as defendant-intervenors, the United States District Court for the District of Columbia, Trevor N. McFadden, J., 442 F.Supp.3d 53, granted the tribe summary judgment. Defendants appealed. The United States Court of Appeals for the District of Columbia Circuit, Rao, Circuit Judge, 25 F.4th 12, reversed and remanded. On remand, parties cross-moved for summary judgment. The District Court, Trevor N. McFadden, J., held that: [1] DOI's refusal to take land into trust was not contrary to Act; [2] DOI's refusal to take land into trust was not arbitrary or capricious; and [3] DOI adequately explained refusal to take land into trust. Defendants' motions granted. Section 108 of the Michigan Indian Land Claims Settlement Act directs the Secretary of the Interior to transfer the Sault's monetary share into a “Self-Sufficiency Fund.” The Fund contains principal and may also generate income through investment or interest. The Act delineates different uses for Fund principal and Fund investment income and interest. Whether land is purchased with Fund principal or income matters. According to the Michigan Act, land acquired using Fund income “shall be held in trust by the Secretary for the benefit of the tribe.” Id. § 108(f). And the Sault can build a casino on the land only if the parcel is held in trust, because trust status helps the Tribe qualify for an exception to the federal law governing gaming. See Sault Ste. Marie Tribe of Chippewa Indians v. Haaland, 25 F.4th 12, 18 & n.3 (D.C. Cir. 2022). Interior explained that the Sault failed to show its purchase was for “educational, social welfare, health, cultural, or charitable purposes” under § 108(c)(4). The Tribe pledged to build a casino on the land and devote five percent of its income “to address the unmet social welfare, health and cultural needs” of tribe members living nearby. AR2160. Three percent would benefit tribal elders and two percent would create a college scholarship program. But Interior found these proposals “too attenuated” to satisfy the Michigan Act. Interior concluded that the Tribe could not satisfy the Michigan Act's requirements by using Fund income “to start an economic enterprise, which may generate its own profits, which ... might then be spent on social welfare purposes.” Interior also informed the Tribe that it lacked sufficient evidence to conclude that the Sibley parcel constitutes an “enhancement of tribal lands” under § 108(c)(5). Interior's refusal to take the land into trust was not contrary to law. The Michigan Act permits Fund income to be used “for educational, social welfare, health, cultural, or charitable purposes which benefit the members of the Sault Ste. Marie Tribe.” Pub. L. No. 105-143, § 108(c)(4). The Court declines to construe “for” and “purpose”—two extremely broad terms—in isolation. Instead, the Court interprets the phrases “for ... social welfare ... purposes” and “social welfare” in context. For these reasons, the Court will grant Interior and Defendant-Intervenors summary judgment.

The Alaska Department of Fish and Game brought an action alleging that Federal Subsistence Board's (FSB) approval of tribe's special action request to open emergency hunt on federal public lands in Alaska and Alaska resident's special action request to institute partial, temporary closure of public lands in game management unit to
nonsubsistence users violated Alaska National Interest Lands Conservation Act (ANILCA) and Administrative Procedure Act (APA). Tribe intervened. The United States District Court for the District of Alaska, Sharon L. Gleason, J., 574 F.Supp.3d 710, dismissed hunt challenge as moot, and denied state's motions for temporary restraining order and preliminary injunction. State appealed. The Court of Appeals, Bough, District Judge, sitting by designation, held that: [1] state's challenge to FSB's approval of tribe's special action request fell within mootness exception for cases capable of repetition, yet evading review, and [2] state's appeal of district court's denial of its motions for temporary restraining order and preliminary injunction was moot. In 2020, the Federal Subsistence Board (“FSB”) approved two short-term changes to hunting practices on federal public lands in Alaska. First, the FSB opened an emergency hunt for Intervenor, the Organized Village of Kake (“Kake hunt”). Second, the FSB instituted a partial, temporary closure of public lands in game management Unit 13 to nonsubsistence users (“partial Unit 13 closure”). Plaintiff-Appellant State of Alaska Department of Fish and Game (“Alaska”) brought this action against Defendants-Appellees, the FSB, and several federal officials, alleging that the changes violated the Alaska National Interest Lands Conservation Act (“ANILCA”) and the Administrative Procedure Act (“APA”). We have jurisdiction under 28 U.S.C. § 1291. Under ANILCA, the federal government, through the FSB, manages subsistence uses of fish and wildlife on federal public lands in Alaska. See Ninilchik Traditional Council v. United States, 227 F.3d 1186, 1189 (9th Cir. 2000); see also 50 C.F.R. § 100.10(a). The FSB has regulatory authority to enact special actions to open and close hunting on public lands. See 50 C.F.R. § 100.19; 36 C.F.R. § 242.19. In emergency situations, the FSB may immediately open or close hunting on public lands for up to 60 days, if necessary for certain permissible reasons. See 50 C.F.R. § 100.19(a); 36 C.F.R. § 242.19(a). The FSB may also temporarily open or close hunting on public lands for longer periods, not to exceed the current regulatory cycle. However, those temporary special actions require adequate notice and public hearing. See 50 C.F.R. § 100.19(b); 36 C.F.R. § 242.19(b). “Generally, an action is mooted when the issues presented are no longer live and therefore the parties lack a legally cognizable interest for which the courts can grant a remedy.” Alaska Ctr. For Env't v. U.S. Forest Serv., 189 F.3d 851, 854 (9th Cir. 1999). However, we may decline to dismiss an otherwise moot action if the challenged conduct is “capable of repetition, yet evading review.” This exception to the mootness doctrine is met when “(1) the duration of the challenged action is too short to allow full litigation before it ceases or expires, and (2) there is a reasonable expectation that the plaintiffs will be subjected to the challenged action again.” Karuk Tribe of Cal. v. U.S. Forest Serv., 681 F.3d 1006, 1018 (9th Cir. 2012). The plaintiff has the burden of showing that the exception applies. See Native Vill. of Nuiqsut v. Bureau of Land Mgmt., 9 F.4th 1201, 1209 (9th Cir. 2021) (explaining that unlike the initial mootness question, where the defendants have the burden, the plaintiff has the burden of showing that there is a reasonable expectation that they will once again be subjected to the challenged activity). An issue evades review if the underlying action will almost certainly run its course before full litigation can be completed. See Biodiversity Legal Found. v. Badgley, 309 F.3d 1166, 1173 (9th Cir. 2002). The FSB’s authorization for the emergency hunt was limited to the 60 days permitted under the regulations. See 50 C.F.R. § 100.19(a); 36 C.F.R. § 242.19(a). We have determined that actions of longer duration evade review. See e.g., Native Vill. of
Nuiqsut, 9 F.4th at 1209 (winter exploration program lasting five months evaded review); Nat. Res. Def. Council, Inc. v. Evans, 316 F.3d 904, 910 (9th Cir. 2003) (one-year time span for challenged specifications too short to allow for full litigation). Neither the government nor the Organized Village of Kake challenge this conclusion. The first prong of the mootness exception is satisfied. In its complaint, Alaska broadly asserted that ANILCA does not confer statutory authority on the federal government, including the FSB, to open emergency hunting seasons. That claim is not based on the particular circumstances of the Kake hunt, including the status of the COVID-19 pandemic. Rather, it challenges the FSB's general action of opening an emergency hunt. Based on the evidence provided by Alaska, we conclude that there is a reasonable expectation that this challenged action will recur. First, there is evidence that the FSB has opened emergency hunts in the past. In addition, the regulation under which the FSB authorized the Kake hunt remains in effect, and the FSB has made no commitment not to rely on the regulation in the future. Alaska's claim that the FSB violated ANILCA by opening the Kake hunt without statutory authority fits within the mootness exception. The district court did not reach the merits of this claim. In general, an appellate court does not decide issues that the trial court did not decide. Assuming we have discretion here, we decline to exercise it. Alaska's claim raises a question of first impression in this circuit and requires resolution of complicated issues of statutory interpretation. From the regulations and record it is clear that the FSB will rely on new facts and analysis in responding to any future temporary closure request. Indeed, if the FSB does consider a request to temporarily close all or part of Unit 13 in the future, it is clear that one entirely new and significant part of its deliberations will concern the effects of the partial Unit 13 closure in 2020 through 2022. Our conclusion does not change simply because the FSB may consider data from its deliberations regarding prior Unit 13 temporary closure requests. Accordingly, the challenge to the FSB decision to partially close Unit 13 is moot. We reverse the district court's dismissal of Alaska's claim that the FSB did not have authority to open the Kake hunt and remand that claim to the district court for further proceedings consistent with this opinion. With regard to Alaska's partial Unit 13 closure claim, we vacate the part of the district court's order that addresses the claim and remand with instructions to dismiss that claim as moot. Each party shall bear its own costs.

The Miccosukee Tribe of Indians of Florida, the Prairie Band Potawatomi Nation, and the Shawnee Tribe brought separate actions against the Secretary of the Treasury Department, the Secretary of the Department of the Interior, and the United States, alleging the methodology for allocating Coronavirus Aid, Relief, and Economic Security (CARES) Act funding to the Tribes was arbitrary and capricious in violation of the Administrative Procedure Act (APA). After the Potawatomi Nation voluntarily dismissed its action, the United States District Court for the District of Columbia, Amit P. Mehta, J., 480 F. Supp. 3d 230, denied the Shawnee Tribe's motion for a preliminary injunction and dismissed its action, and the Tribe appealed. The Court of Appeals, Tatel, Circuit Judge, 984 F.3d 94, reversed and remanded for the entry of a preliminary injunction enjoining the Secretary of the Treasury from disbursing remaining CARES Act funds. Following remand and the entry of the preliminary injunction, the Potawatomi Nation refiled its
Subsequently, the District Court, Mehta, J., 583 F.Supp.3d 36, granted summary judgment to the government defendants, and the Tribes appealed. The Court of Appeals, Rogers, Senior Circuit Judge, held that: [1] action brought by Miccosukee Tribe was moot, but [2] remand was warranted for further explanation of decision to allocate undistributed funds based on a “phaseout” instead of awarding Tribes entirety of shortfall from initial distribution. On remand, the Secretary must explain the decision. The court dismisses Miccosukee's challenge as moot and reverses the district court's grant of summary judgment to the Secretary with instructions to remand Prairie Band's challenge to the 2021 Distribution to the Secretary for further explanation.


This case involves a challenge to the Blackrock Land Exchange between the United States and Defendant-Intervenor J.R. Simplot Company in southeast Idaho. Plaintiffs Shoshone-Bannock Tribes allege that BLM's decision and analysis approving the exchange is arbitrary and capricious in violation of the National Environmental Protection Act, the Federal Land Policy Management Act, the 1900 Act, and the Administrative Procedures Act. Before the Court are the parties’ cross-motions for summary judgment. For the reasons set forth below, the Court grants in part and denies in part the motions. In 1868, the Fort Bridger Treaty established the Fort Hall Reservation as the permanent home of the Shoshone-Bannock Tribes, a federally recognized Indian Tribe. AR0055983. Thirty years later, the Tribes agreed to cede a significant portion of the Reservation to the federal government. Act of June 6, 1900, 31 Stat. 672, 672–76. Congress subsequently ratified the 1898 Cession Agreement in the 1900 Act, which incorporates the Agreement in its entirety. Id. As part of the 1898 Agreement, the Tribes retain rights to cut timber, pasture livestock, hunt, and fish on ceded lands that “remain part of the public domain.” Act of June 6, 1900, 31 Stat. 672, 674. Moreover, Section 5 of the 1900 Act delineates specific, limited processes by which the federal government can remove the ceded lands from the public domain. For example, the Act provides that the ceded lands “shall be subject to disposal under the homestead, townsite, stone and timber, and mining laws of the United States only ....” Id. at 676 (emphasis added). In addition, “no purchaser shall be permitted in any manner to purchase more than one hundred and sixty acres” of ceded lands. Finally, ceded lands within five miles of Pocatello “shall be sold at public auction.” In the 1940s, two phosphate processing facilities—Simplot's Don Plant and the neighboring FMC plant—opened next to and on the Fort Hall Reservation. AR0029561. The Don Plant manufactures phosphoric acid through a process that creates a phosphogypsum byproduct containing radioactive materials. AR0029570. At the Don Plant, phosphogypsum waste is mixed with water and pumped into a storage-disposal facility called a gypstack. Id. The phosphogypsum solids settle in ponds at the top of the gypstack and the slurry water is then pumped back into the processing facility. Gradually, the gypsum deposits accrue, filling the gypstack. Over the years, the gypstacks released contaminates such as arsenic, cadmium, lead, mercury, nickel, and nitrate into the groundwater. The contaminated groundwater discharged into the Portneuf River, which flowed past the Don Plant and onto the Fort Hall Reservation. Id; *Shoshone-Bannock Tribes of the Fort Hall Reservation v. U.S. Dep't of Interior*, No. 4:10-cv-004-BLW,
EPA detected pollution from the phosphate plants in the late 1980s. Because EPA found contaminants of concern in the groundwater, soil, and vegetation, it ultimately made 2,530 acres of land—including the Simplot and FMC phosphate facilities—part of a superfund site under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). In 1990, the Eastern Michaud Flats (EMF) superfund site was listed on the National Priority List. In 1998, the agency finalized its decision designating the superfund site. AR0029561. In 2016, IDEQ and Simplot agreed to a consent order to address excess fluoride found in forage within a 1-to-2-mile radius of the Don Plant. Simplot has to reduce its fluoride emissions by 2026. It can either replace the existing reclaim cooling towers with a low-emission alternative or incorporate other measures that reduce fluoride emissions by more than 50 percent from the cooling towers. For a quarter century, Simplot has tried to extend the Don Plant's operational life by acquiring adjacent BLM land and building new gypstacks. Critically, the suitable land now belongs to the Federal Government because it was ceded by the Tribes in the 1898 Agreement. In December 2020, Simplot and BLM finalized the exchange and transferred the deeds. Simplot acquired federal land that is adjacent to the Don Plant and which the Tribes ceded in the 1898 Agreement. In exchange, the federal government acquired land near the Chinese Peak-Blackrock Canyon area. That same month, the Tribes filed this suit. To survive APA review, BLM's decision to approve the Blackrock Land Exchange must comply with the 1900 Act. Because it does not, it is “not in accordance with law” in violation of the APA and is a breach of the federal government's trust responsibility to the Tribes. BLM argues that interpretation of the FLPMA statute is wrong because the outcome conflicts with the congressional intent of FLPMA. The agency's argument goes something like this. In 1976, Congress replaced prior disposal laws with FLPMA. Therefore, Congress implicitly intended to add FLPMA to 1900 Act's lawful means of disposal. FLPMA thus “supplan[t] the means of disposal listed in that Act.” Not so. Congressional intent does not change the 1900 Act's text. At the end of the day, BLM had to comply with both the 1900 Act and FLPMA. The laws are not in conflict. Given the stakes of the matter for all parties, the Court will invite full briefing on the issue of remedy. It is hereby ordered that (1) Summary judgment is granted in favor of Plaintiffs on their Trust Responsibility and APA claims that BLM violated the 1900 Act. (2) Summary judgement is granted in favor of Defendants and Intervenor on all of Plaintiffs' remaining NEPA claims.

B. Child Welfare Law And ICWA

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.


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.


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). 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.

Shortly after A.K. gave birth to A.W., the Department of Children, Youth, and Families (Department) filed a dependency petition and sought an ex parte order allowing the Department to take A.W. into custody (“pick-up order”) based on the mother's drug use during pregnancy and evidence of an inability to care for the infant. The mother's attorney contacted the court, requesting a hearing before the court signed the pick-up order. The trial court denied that request and signed the order without first holding a hearing. At the subsequent shelter care hearing, the trial court denied the mother's motion to vacate the pick-up order but nonetheless found that shelter care was no longer necessary because of the steps she had taken to obtain drug treatment and parenting support, and it returned the child to A.K. The court subsequently dismissed the dependency proceeding. We conclude that entering a pick-up order without first holding a hearing did not violate A.K.’s due process rights. We also conclude that when the Department has reason to believe that a child is an Indian child under ICWA and WICWA, the heightened removal standard in those statutes applies to ex parte pick-up order requests. Because the Department had reason to know that A.W. is an Indian child—information not shared with the trial court—and the trial court applied an incorrect legal standard in assessing the Department's evidence at that stage of the proceeding, the trial court erred in not vacating the pick-up order. While the dependency statute allows the Department to request, and the court to order, the removal of children from their parents without a hearing, it provides numerous safeguards to ensure that the Department's request is based in fact and law and provides the parents with a prompt opportunity to address the Department's allegations, all designed to avoid an erroneous
deprivation of parental rights. First, the Department must meet a high evidentiary burden before a court can issue an ex parte pick-up order. The Department must file a petition with the court alleging that the child is dependent and that the child's health, safety, and welfare will be “seriously endangered” if not taken into custody. RCW 13.34.050(1)(a). The Department must also file an affidavit or declaration in support of the petition, setting out the “specific factual information evidencing reasonable grounds that the child's health, safety, and welfare will be seriously endangered if not taken into custody and at least one of the grounds set forth demonstrates a risk of imminent harm to the child.” RCW 13.34.050(1)(b). The court may enter the order only if, based on the Department's evidence, it finds reasonable grounds to believe that the child is dependent and that the child's health, safety, and welfare will be seriously endangered if not taken into custody. RCW 13.34.050(1)(c). In Z.J.G., 196 Wash.2d at 174, 471 P.3d 853, our Supreme Court explicitly stated that “ICWA provides a heightened standard for removal [of an Indian child] during emergency proceedings,” comparing the “imminent physical damage or harm” language in 25 U.S.C. § 1922 to the standard for removing a child at a shelter care hearing under RCW 13.34.065(5)(a)(ii)(B). It went on to hold that when a court has “reason to know” a child is or may be an Indian child, “it must apply ICWA and WICWA standards.” Id.

The trial court here erred in concluding that A.W.’s status as an Indian child was immaterial at the pick-up order stage. Reversed.


Plaintiffs challenge a rule issued by the Department of Health and Human Services (“HHS”) on May 12, 2020, concerning a data collection system known as the “Adoption and Foster Care Analysis and Reporting System” (“AFCARS”). Specifically, plaintiffs challenge the decision to remove from AFCARS various questions HHS had added by the 2016 Rule, namely, questions pertaining to the states' application of the Indian Child Welfare Act (“ICWA”) and questions pertaining to the sexual orientation of youth, foster and adoptive parents, and legal guardians. With ICWA and the BIA regulations in mind, HHS, prior to its issuance of the 2016 Rule, provided public notice that it intended to “collect data elements in AFCARS related to ICWA's statutory standards for removal, foster care placement, and adoption proceedings.” See 81 Fed. Reg. at 20,284. Thereafter, in the 2016 Rule, HHS added a number of ICWA-related data elements to AFCARS, which elements can be summarized as follows: (1) whether the title IV-E agency conducted research to determine if a child is an “Indian child” as defined in ICWA and knows or has reason to know the child is an Indian child, see 81 Fed. Reg. at 90,535-36; (2) whether the child is a member of a tribe as well as whether the parents, the foster parent(s), and/or adoptive parent(s)/guardian(s) are members of a tribe, and (3) whether, during the course of any child custody, foster care, termination of parental rights, and/or adoption proceeding in which the child is or may be an Indian child, the procedures required by ICWA and BIA regulations were followed. In the 2020 Rule, HHS retained in AFCARS the ICWA-related data elements pertaining to the title IV-E agency's own actions, namely, data elements bearing on whether such agency has “[r]eason to know a child is an ‘Indian Child’ as defined in [ICWA]” and “made inquiries whether the child is an Indian child,” see 85 Fed. Reg. at 28,424, along with data elements pertaining to
whether the child, parents of the child, foster parent(s), and/or adoptive parent(s)/guardian(s) are members of a tribe, as well as whether notice of the pendency of a state court proceeding had been given to the tribe or tribes in the manner required by ICWA, see id. at 28,424-25; see also 25 U.S.C. § 1912(a) (providing “party seeking the foster care placement of, or termination of parental rights to, an Indian child” must give notice of proceeding to “the Indian child's tribe”). The ICWA-related data elements removed from AFCARS by the 2020 Rule were those pertaining to actions required to be reported by the agencies but taken by the state courts rather than the agencies themselves, namely, data elements bearing on whether state court proceedings were conducted in accordance with the procedures required under ICWA, i.e., proceedings, as summarized by HHS, comprising “request[s] to transfer to tribal court, denial[s] of transfer, court findings related to involuntary and voluntary termination of parental rights, including good cause findings, qualified expert witness testimony, whether active efforts were made prior to the termination/modification, removals under ICWA, available ICWA foster care/pre-adoptive placement preferences, adoption/guardianship placement preferences under ICWA, good cause and basis for good cause under ICWA, and information on active efforts.” Although a court may find the issuance of a rule arbitrary and capricious where the administrative agency “only [takes] into account the costs to the [regulated entities] and completely ignore[s] the benefits that would result from compliance,” see California v United States Bureau of Land Mgmt., 277 F. Supp. 3d 1106, 1122 (N.D. Cal. 2017), the record in the instant case, as set forth above, shows HHS did not ignore the benefits identified in comments, but, rather, stated why it concluded those benefits, when weighed against the burdens identified, did not warrant retention of all ICWA-related data elements in AFCARS. Defendants' motion for summary judgment is hereby granted.


Plaintiff alleges in her complaint as follows: on June 11, 2019, Defendant filed a Juvenile Dependency Petition concerning Plaintiff's three children. This was the third such petition filed against Plaintiff. The petition followed an incident at a graduation ceremony for one of Plaintiff's children, an assessment of Plaintiff's home, and Plaintiff's testing positive for methamphetamine. Fresno County Superior Court held a detention hearing on June 13, 2019, and ordered Plaintiff's children to be temporarily placed in Defendant's care, custody, and control. For the following reasons, the Court concludes that Plaintiff lacks standing because, based on facts alleged in the complaint and subject to judicial notice, she is not the parent of an “Indian child” as defined by the relevant statute. Accordingly, this Court lacks subject matter jurisdiction over this action.

Any parent or Indian custodian from whose custody such child was removed may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.” 25 U.S.C. § 1914. Thus, Plaintiff must be a parent of an Indian child within the meaning of ICWA to bring a petition under § 1914. Plaintiff either alleges, or documents subject to judicial notice establish, the minor children are not Indian children. For example, the Eastern Band of Cherokee Indians, The Cherokee Nation, and the Pascua Yaqui Tribe each responded to Defendant's ICWA notice indicating that Plaintiff's children do not meet the
definition of an Indian child. Notwithstanding the tribes’ responses, Plaintiff argues in her complaint that the Fifth District Court of Appeal's conclusion, “[I]t is unlikely that information about [Plaintiff's] father's “aunts” or “sisters” would establish Indian ancestry for [Plaintiff's] children when the information on [Plaintiff's] father did not[,]” is inconsistent with the statutory language of ICWA. However, Plaintiff does not allege that information about these family members would show that her children could qualify as Indian children under the statute. The facts alleged do not show that the minors are, or could possibly be, Indian children under the terms of the statute, and thus Plaintiff is not a parent of an Indian child. No amount of further investigation could show otherwise. Accordingly, as Plaintiff lacks standing, the Court lacks subject matter jurisdiction over this action. It is hereby ordered that Defendant's motion to dismiss is granted.

Mother appeals from the November 8, 2021 findings and orders denying her petition to change court orders under Welfare and Institutions Code 1 section 388, placing her four children (minors) under the legal guardianship of their paternal grandmother, and terminating dependency jurisdiction. Mother’s sole contention on appeal is that the juvenile court and the Los Angeles County Department of Children and Family Services (Department) failed to comply with the inquiry and notice requirements of the Indian Child Welfare Act of 1978 (ICWA; 25 U.S.C. § 1901 et seq.) and related California statutes (Welf. & Inst. Code, § 224 et seq.). We conditionally reverse and remand solely for the court to ensure compliance with ICWA and related California statutes. Petitions made allegations of risk as to all four children based on mother’s mental illness, physical abuse, and father’s failure to protect. The court found no reason to know that the two younger children were Indian children. Both ICWA and California law define an “Indian child” as a child who is either a member of an Indian tribe or is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe. (25 U.S.C. § 1903(4); § 224.1, subds. (a) & (b); see In re Elizabeth M. (2018) 19 Cal.App.5th 768, 783.) California statutory law incorporates the requirements of ICWA, and imposes some additional requirements as well. (In re Abigail A. (2016) 1 Cal.5th 83, 91; In re Benjamin M. (2021) 70 Cal.App.5th 735, 741–742.) State and federal law require the court to ask parties and participants at the outset of an involuntary child custody proceeding whether they have reason to know a minor is an Indian child, and to “instruct the parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child.” (25 C.F.R. § 23.107(a); § 224.2, subd. (c); see Benjamin M., at p. 741.) Initial inquiry also includes requiring each party to complete the parental notification of Indian status (ICWA-020) form. (Cal. Rules of Court, rule 5.481(a)(2)(C).) State law imposes on the Department a first-step inquiry duty to “interview, among others, extended family members and others who had an interest in the child.” (In re H.V. (2022) 75 Cal.App.5th 433, 438; see § 224.2, subd. (b).) Federal regulations explain that the term “extended family member is defined by the law or custom of the Indian child’s Tribe or, in the absence of such law or custom, is a person who has reached age 18 and who is the Indian child’s grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent.” (25 C.F.R. § 23.2 (2017).) When there is “reason to believe that an Indian
child is involved in a proceeding,” further inquiry is also required. (§ 224.2, subd. (e); In re T.G. (2020) 58 Cal.App.5th 275, 290, fn. 14.) “We review claims of inadequate inquiry into a child’s Indian ancestry for substantial evidence.” (In re H.V., at p. 438.) The Department concedes on appeal that the initial inquiry requirements of ICWA and related state law were not met in this case, and asks us to either conditionally affirm or reverse the juvenile court’s order terminating dependency jurisdiction, with instructions limiting remand of the matter to ordering the juvenile court to ensure compliance with ICWA’s requirements. We agree that the court erred in finding ICWA inapplicable, as there is no evidence in the record that the Department asked available extended family members about the possibility that minor has Indian ancestry. (See, e.g., In re H.V., supra, 75 Cal.App.5th at p. 438 [prejudicial error when Department fails to discharge its first step duty of inquiry]; In re Benjamin M., supra, 70 Cal.App.5th at p. 741 [court must ask each participant in child custody proceeding].) The juvenile court’s November 8, 2021 orders terminating dependency jurisdiction under Welfare and Institutions Code section 366.26 are conditionally reversed and remanded for proceedings required by this opinion. The court shall also order the Department to make reasonable efforts to interview available extended relatives, including maternal grandmother, maternal aunt, and paternal grandmother about the possibility that minors have Indian ancestry and to report on the results of the Department’s investigation. Nothing in this disposition precludes the court from ordering additional inquiry of others having an interest in the children. Based on the information reported, if the court determines that no additional inquiry or notice to tribes is necessary, the orders terminating dependency jurisdiction are to be reinstated. If additional inquiry or notice is warranted, the court shall make all necessary orders to ensure compliance with ICWA and related California law.

L.A. (mother) and T.B. (father) are the parents of S.B. (born December 2019). Father appeals the juvenile court’s order terminating his parental rights pursuant to Welfare and Institutions Code section 366.26.1 Father’s sole contention on appeal is that the Madera County Department of Social Services (the department) and the juvenile court failed to comply with the inquiry requirements of the Indian Child Welfare Act (25 U.S.C. § 1901 et seq.) (ICWA) and related California law because extended family members were not asked about S.B.’s possible Indian ancestry and the department did not conduct a further inquiry after mother claimed membership in a tribe.2 The department concedes that remand for further inquiry is necessary. Consistent with our recent decisions in In re K.H. (2022) 84 Cal.App.5th 566 (K.H.) and In re E.C. (2022) 85 Cal.App.5th 123 (E.C.), we conclude “the error is prejudicial because neither the [department] nor the court gathered information sufficient to ensure a reliable finding that ICWA does not apply and remanding for an adequate inquiry in the first instance is the only meaningful way to safeguard the rights at issue. ([In re A.R. (2021)] 11 Cal.5th [234,] 252–254 [(A.R.)].) Accordingly, we conditionally reverse the juvenile court’s finding that ICWA does not apply and remand for further proceedings consistent with this opinion, as set forth herein.” (K.H., at p. 591; accord, E.C., at pp. 157–158.)

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After obtaining a protective custody warrant for child's removal, county department of social services filed dependency petition against father and mother alleging child was at substantial risk of serious physical harm or illness, at substantial risk of sexual abuse, and that parents were unwilling or unable to provide care or support for him. Following review hearings at which it was found the Indian Child Welfare Act (ICWA) did not apply, the Superior Court, Riverside County, No. CWJ1900756, Michael Rushton, J., found child was likely to be adopted and terminated parental rights of father and mother. Mother appealed. The Court of Appeal, Menetrez, J., held that since department took child into protective custody without a warrant, neither department nor trial court were required to inquire with extended family members about child's “Indian status” as part of duty of initial inquiry. California law implementing the Indian Child Welfare Act of 1978 (ICWA) (25 U.S.C. § 1901 et seq.) requires a county welfare department to ask extended family members about a child's Indian status under certain circumstances. In particular, subdivision (b) of Welfare and Institutions Code section 224.2 requires the department to interview extended family members “[i]f a child is placed into the temporary custody of a county welfare department pursuant to Section 306.” [1]Section 306 authorizes county welfare departments to take children into temporary custody “without a warrant” in certain circumstances. (§ 306, subd. (a)(2).) A department that takes a child into protective custody pursuant to a warrant does so under section 340, not section 306. Thus, because subdivision (b) of section 224.2 applies only when a child is placed in temporary custody under section 306, it does not apply when a county welfare department takes a child into protective custody pursuant to a warrant. Here, DPSS took Robert into protective custody pursuant to a warrant, so DPSS did not take Robert into temporary custody under section 306. Accordingly, DPSS had no obligation to ask Robert's extended family members about his potential Indian status under section 224.2, subdivision (b). We therefore affirm the order terminating parental rights.

C. Contracting


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. 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. 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 Court lacks jurisdiction over Plaintiffs’ claims or, alternatively, that Plaintiffs have failed to state a claim upon which relief could be granted. 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.


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. 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. 25 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 declaration 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. 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, 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, 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.

27. 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.


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.


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.

30. San Carlos Apache Tribe v. Xavier Becerra, 53 F.4th 1236, No. 21-15641 (9th Cir. November 21, 2022)
Apache Tribe filed suit against United States Department of Health and Human Services (DHHS), Secretary of DHHS, Indian Health Service (IHS), principal deputy director of IHS, and United States, alleging, inter alia, that Secretary violated Indian Self-Determination and Education Assistance Act (ISDA) by failing to cover contract support costs (CSC) for portions of Tribe's healthcare program that were funded by revenue from third-party payors. Defendants moved to dismiss for failure to state a claim. The United States District Court for the District of Arizona, Neil V. Wake, Senior District Judge, 482 F.Supp.3d 932, granted motion. Tribe appealed. The Court of Appeals, Paez, Circuit Judge, held that under ambiguous ISDA provision, IHS was required to reimburse Tribe for CSC for healthcare activities funded by third-party revenues. Reversed and remanded. The parties agree that the CSC funding under this Funding Agreement (FA) will be calculated and paid in accordance with Section 106(a) of the [ISDA]. Defendants contend that the Tribe's claims are meritless because the Tribe received the amount of CSC specified by the Contract, a properly calculated amount that 25 U.S.C. § 5325(a) does not override. This argument ignores the flexibility written into the Contract, which allows those amounts to be adjusted in the event of changes to “program bases, Tribal CSC need, [or] available CSC appropriations.” A determination that the Tribe is owed CSC by statute for third-party-revenue-funded portions of its health-care program would fall under this umbrella. Additionally, because the Contract incorporates the provisions of the ISDA, if that statute requires payment of the disputed funds, it controls. We proceed to determine whether the Tribe is owed those additional CSC by statute. Our conclusion departs from the only other circuit court to have considered this issue. In Swinomish Indian Tribal Cmty. v. Becerra, the D.C. Circuit concluded that § 5325(a) does not comport with the reading that the Tribe advocates because “reimbursements for contract support costs cover activities that ‘ensure compliance with the terms of the contract’ conducted by the tribe ‘as a contractor.’ ” 993 F.3d 917, 920 (D.C. Cir. 2021) (citing 25 U.S.C. § 5325(a)(2)) (emphasis in original). This ignores the plain language of the
As explained above, the contract and the statute both require tribes to spend their third-party revenue on healthcare services. Thus, the “cost of complying” with a contract between IHS and a tribe includes the cost of conducting those additional activities, because but for conducting those activities, the Tribe would not be in compliance with the Contract. Put differently, § (a)(2) does not limit CSC to activities “described in the contract” or “funded by the signatories to the contract,” each of which would favor Swinomish's reading. Rather, it authorizes payment of CSC for all activities—regardless of funding source—that are required for compliance with the Contract. This includes the third-party-revenue-funded portions of the program. Are CSC for the third-party-revenue-funded extensions of the Tribe's healthcare program “directly attributable” to the Contract? Or are they “associated with [a] contract” between the Tribe and another “entity”? The Tribe argues that the CSC associated with third-party revenue are “directly attributable” to the Contract because but for that Contract, the Tribe would not be required to bill Medicare and Medicaid—nor would it have the right to. Defendants urge us to agree with the district court, which reasoned that, although the third-party revenue at issue here was “undoubtedly ‘attributable’ to [the Tribe's] contract with IHS,” it was not “directly attributable” to that contract. The district court reasoned that this language precluded the Tribe from collecting additional CSC. We are sensitive to the district court's careful analysis, but we disagree. We cannot conclude that the statute unambiguously follows Defendants' interpretation. Consider how insurance billing works in practice: a healthcare provider performs a procedure. The office then bills the patient’s insurance. The Contract requires the Tribe to do so. If insurance turns out to cover the procedure, the Tribe can keep the money. Otherwise, it's on the hook. Either way, the procedure has already been performed as required by the Contract. If the Tribe keeps the money, it may spend it on further program services. This spending occurs only because the Contract allows the Tribe to recover the insurance money and requires the Tribe to spend it. It is therefore not clear that this section unambiguously means that this spending is not “directly attributable” to the Contract. Reversed and remanded.


Plaintiff-Appellants/Cross-Appellees Merit Energy Co., LLC and Merit Energy Operations I, LLC (collectively “Merit”) own two oil leases on tribal land.1 Merit appeals from the district court’s finding that the Department of the Interior’s Indian oil major portion regulation, 30 C.F.R. § 1206.54 (2015), which contains a formula to calculate royalties due for oil leases on tribal land, is consistent with the royalty payment provisions in two of their oil leases. We affirm. This appeal concerns two of Merit’s oil leases, the “Steamboat Butte” and “Circle Ridge” leases, located on the Wind River Reservation in Wyoming. Merit pays royalties on the oil it produces, saves, or sells based on a percentage of the oil’s value to the ONRR pursuant to its lease terms and subject to governing regulations. Each lease contains a “major portion provision” which gives the Secretary discretion to calculate a “value” for royalty purposes to ensure the Tribes receive royalties consistent with market prices. The ONRR promulgated regulations to calculate “value,” as referred to in Merit’s lease provisions. The district court determined that the case was ripe and the IBMP calculation was consistent with Merit’s leases, but the 10% cap on adjustments to the monthly LCTD was arbitrary and capricious.
Reviewing the district court’s decision de novo, we apply the arbitrary and capricious standard to the part of the royalty payment formula which provides a 10% cap on adjustments to the monthly LCTD. The Agency argues that including a 10% cap is not inconsistent with “at the time of production” in Merit’s leases because Interior receives a complete set of prices two months after production and then calculates the prices for the upcoming month, with no way to use real-time data. The administrative record does not show a reason for why the Agency chose a 10% cap as opposed to another number, nor indicate how a cap is consistent with the parameters of the Secretary’s discretion to calculate value under the lease terms. Moreover, the Agency’s April 2019 report on Wind River, before notifying Merit it was subject to the new Regulation in May 2019, showed that the months where WCS and NYMEX moved separately resulted in the largest additional royalties even when the LCTD was adjusted by 10%. Although the Agency is entitled to deference and has discretion to calculate “value” under Merit’s leases, the decision to cap the adjustment to the monthly LCTD at 10% was not considered in the administrative record and is arbitrary. See 80 Fed. Reg. 24,794, 24,796–97 (May 1, 2015) (reiterating, in response to public comment that the 10% cap is arbitrary, that the committee’s limitation was to “prevent drastic swings in the LCTD from month to month.”). The 10% cap is inconsistent with the term “time of production” in Merit’s two leases. The Agency’s royalty payment formula itself is consistent with Merit’s leases and within the Secretary’s discretion as explicitly provided by the lease terms. However, the 10% cap on adjustments to the monthly LCTD within the formula is arbitrary and capricious and inconsistent with Merit’s lease provisions. To the extent of the inconsistency, Merit’s lease provisions control. 30 C.F.R. § 1206.50(c)(4). Affirmed.


The challenges of living on the Chukchi Sea cannot be overstated. Aside from extreme isolation, climate affects everything in native villages adjacent to the Chukchi’s shallow waters between northwest Alaska and the eastern Siberian coastline. Relentless weather hampers the delivery of subsistent materials, accelerates the decay of manmade structures, and limits financial opportunities for residents. Each challenge is an indirect factor in this takings case involving the Native Village of Point Lay, Alaska. Subsequent to an Amended Summary Judgment Opinion finding that Plaintiff, Cully Corporation (“Cully”), possessed an interest in the properties at issue and that a temporary taking had indeed occurred, the remaining triable issues were limited: (1) what, if any, compensation was owed to Cully; and (2) whether Cully was entitled to relief under a quantum meruit theory. The United States’ behavior toward Cully is bewildering, radiating a cavalier attitude that also seems to have shaped its behavior during the events inciting this litigation. While reasonable individuals could not help but be sympathetic to Cully’s plight, sympathy provides no basis for judgment. Cully’s claims are tethered to some finding of wrongdoing on the part of the United States; damages stemming from wrongdoing are generally not redressable by a takings claim. Despite its misgivings about the United States’ conduct, the Court concludes that the United States is entitled to judgment. Further, the United States moves for the Court to reconsider its Amended Summary Judgment Opinion from June 2022. The Court declines to do so. Under several public land orders, the United States withdrew public lands in and near Point Lay for
military purposes in support of national defense requirements. The Point Lay LRRS was previously used as a Distant Early Warning (“DEW”) location, which is a network of radar and communication installations in, among other places, Alaska; it lies immediately adjacent to the Native Village of Point Lay. Since the 1980s, the Air Force and NSB have executed multiple agreements for the Borough’s use of the LRRS facilities at Point Lay. Under the Lease, the Borough is required to maintain insurance on the Buildings. Amid litigation at the Alaskan Superior Court, Cully began to shoulder insurance on the Buildings beginning on or about June 7, 2014. Apparently still trying to maintain the condition of the buildings, Cully repaired the garage by replacing an exterior door and fixing entryway steps in 2016. On June 29, 2022, the Court determined that Cully established a valid, reversionary interest in the property at issue and that interest was temporarily taken by the United States. To carry its burden as the plaintiff, Cully is tasked with “proving the amount of loss with sufficient certainty so that the determination of the amount of damages will be more than mere speculation.” Lisbon Contractors, Inc. v. United States, 828 F.2d 759, 767 (Fed. Cir. 1987) (citation omitted). At trial, Cully failed to offer affirmative evidence proving that it suffered actual monetary loss compensable under the Fifth Amendment. Likewise, Cully failed to satisfy its burden of proving damages under its quantum meruit claim. Even if Cully had produced some affirmative evidence, it failed to demonstrate the existence of an implied in fact contract. See United States v. Amdahl Corp., 786 F.2d 387, 393 (Fed. Cir. 1986). While not affecting the outcome, the record is replete with surprising instances in which the people of this Native Village Corporation were afforded little consideration by officials of the United States. From the outset, others benefited from Cully’s efforts—the Air Force avoided the costs associated with remediation, the NSB obtained a long-term lease of uncontaminated property after Cully labored to redress the tainted soil left by the federal government, and the government permitted AECOM to utilize buildings otherwise promised to Cully. Cully was rewarded for its efforts with the failure of their government to abide by its assurances, ultimately resulting in more than a decade of uncertainty and asymmetrical litigation. In any event, the losses suffered by Cully are simply not redressable by the claims it asserted before this Court. The Court finds and concludes that Cully has failed to prove damages compensable under the Fifth Amendment, as well as damages directly related to its quantum meruit claim. Therefore, the Court finds and concludes that the United States is entitled to judgment. The Clerk is directed to enter final judgment in favor of the United States pursuant to RCFC 58

33. Washington State Health Care Authority v. Center for Medicare Services, No. 21-70338 (9th Cir. Jan. 12, 2023).

The panel granted a petition of review brought by the Washington State Health Care Authority (“HCA”) and the Swinomish Indian Tribal Community challenging the Center of Medicare and Medicaid Services (“CMS”)’s decision denying Washington’s request to amend Apple Health, the Washington State Medicaid plan. HCA petitioned CMS to amend the State Plan to include dental health aide therapists (“DHATs”) on the list of licensed providers who can be reimbursed through Medicaid. CMS rejected the Amended State Plan on the basis that it violated the Medicaid free choice of providers statute and regulation guaranteeing all Medicaid beneficiaries equal access to qualified healthcare professionals willing to treat them. The panel rejected CMS’s reasoning on the ground
that the underlying Washington statute—Wash. Rev. Code §70.350.020—did not violate Section 1396(a)(23) because it merely authorized where and how DHATs can practice and did not in any way restrict Medicaid recipients’ ability to obtain service from DHATs relative to non-Medicaid recipients. CMS’s rejection of the Amended State Plan was “not in accordance with law.” 5 U.S.C.§706(2)(A). Accordingly, the panel granted the petition for review and remanded to the agency with instructions to approve the Amended State Plan.

The Navajo Nation filed six separate lawsuits against Department of Interior (DOI) to enforce annual funding requests for tribe's judicial system over six-year span, under series of self-determination contracts authorized by Indian Self-Determination and Education Assistance Act (ISDEAA). Following consolidation of suits, the United States District Court for the District of Columbia, Tanya S. Chutkan, J., 2022 WL 834143, granted Navajo Nation summary judgment as to requests for two years and granted DOI summary judgment as to requests for remaining four years. Navajo Nation appealed: The Court of Appeals, Henderson, Circuit Judge, held that: [1] ISDEAA did not require DOI to approve four funding proposals, but [2] regulations did require DOI to approve four funding proposals. The Navajo Nation contends that 25 C.F.R. §§ 900.32 and 900.33, taken together, require the DOI to grant the Tribe's funding requests from 2017 through 2020. The two regulations relevant here prohibit the Department of Interior from considering the declination criteria listed in 25 U.S.C. § 5321(a)(2) when evaluating certain proposals made by an Indian tribe. See 25 C.F.R. § 900.33 (applying prohibition to “proposals to renew term contracts”); id. § 900.32 (applying prohibition to “proposed successor annual funding agreement[s]”). So long as the DOI has tied its own hands with regulations like sections 900.32 and 900.33, only the Congress, not the DOI, wields the authority to reduce a self-determination contract's funding level without the tribe's agreement. See 25 U.S.C. § 5368(g)(3)(B)(ii) (prohibiting the Secretary from reducing “the amount of funds required under this subchapter” “except as necessary as a result of,” inter alia, “a congressional directive in legislation or an accompanying report”); S. REP. NO. 100-247, at 17 (describing the Congress's intent “to prevent tribal contract funding amounts from being unilaterally reduced by the Secretary”); Ramah Navajo Sch. Bd. v. Babbitt, 87 F.3d 1338, 1344 (D.C. Cir. 1996) (the ISDEAA “circumscribe[s] as tightly as possible the discretion of the Secretary”). The DOI's failure to decline in a timely manner the Tribe's proposal in 2014 proved to be costly. For the foregoing reasons, we reverse the district court's order granting summary judgment to the Department of the Interior and remand to the district court for proceedings consistent with this opinion.

The Northern Arapaho Indian tribe brought an action alleging that Indian Health Service (IHS) breached contract under Indian Self-Determination and Education Assistance Act (ISDEAA) for the tribe to operate a federal healthcare program by failing to reimburse it for overhead costs associated with setting up and administering third-party billing infrastructure, as well as administrative costs associated with recirculating third-party revenue it received. The United States District Court for the District of Wyoming, Nancy
D. Freudenthal, J., 548 F.Supp.3d 1134, dismissed complaint, and tribe appealed. The Court of Appeals, Moritz, Circuit Judge, held that: [1] tribe's administrative expenditures associated with collecting and expending revenue obtained from third-party insurers qualified as reimbursable contract support costs, and [2] ISDEAA provision requiring that funds available to tribal health programs be expended “only for costs directly attributable to contracts, grants and compacts” did not bar tribe's claim. Two members of the panel vote to reverse, albeit for different reasons. Judge Mortiz does so because the relevant statutory provisions are ambiguous, and the Indian canon of statutory construction resolves the ambiguity in the Tribe's favor. That is, because the Tribe presents a reasonable interpretation of the ambiguous statutes, the canon dictates that the statutes “must be construed that way.” Ramah Navajo Chapter v. Salazar, 644 F.3d 1054, 1062 (10th Cir. 2011) (quoting Ramah Navajo Chapter v. Lujan, 112 F.3d 1455, 1462 (10th Cir. 1997)), aff'd, 567 U.S. 182, 132 S.Ct. 2181, 183 L.Ed.2d 186 (2012). Judge Eid would instead reverse because the relevant statutes unambiguously support the Tribe's interpretation, making it unnecessary to resort to the Indian canon of construction. Under either of our interpretations, however, the administrative expenditures associated with collecting and expending revenue obtained from third-party insurers qualify as reimbursable contract support costs. Accordingly, we reverse and remand to the district court for further proceedings. One aspect of the Tribe's argument, which the government does not dispute, is well-founded: Once a statute is determined to be ambiguous, the rule of liberal construction is more than an “ambiguity tiebreaker.” Instead, when faced with ambiguity, the Tribe need not advance the best interpretation of the statute at issue, only a reasonable one. See Ramah Navajo Chapter, 644 F.3d at 1057; Lujan, 112 F.3d at 1462 (observing that “the canon of construction favoring [tribes] necessarily ‘constrain[s] the possible number of reasonable ways to read an ambiguity in [the] statute’ ” (alterations in original) (quoting Massachusetts v. U.S. Dep’t. of Transp., 93 F.3d 890, 893 (D.C. Cir. 1996))). Reversed.

D. Employment


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.


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.

Defendant is a Tribal organization under Title V of the Indian Self-Determination and Education Assistance Act (ISDEAA). A Tribal organization under the ISDEAA includes “any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body....” 25 U.S.C. § 5304(l). Defendant has been designated by the Cook Inlet Region, Inc. (CIRI) and eleven federally recognized tribes,
including the Takotna Village, to carry out federal health care programs for Alaska Natives and Native Americans. Defendant receives the federal funds that CIRI and the tribes would receive directly if they had chosen to operate their own health care programs. Plaintiff is employed as a Community Health Aide at defendant's health clinic in Takotna, Alaska. Plaintiff has worked as a Community Health Aide in Takotna for more than ten years and lives in housing provided by defendant. The Community Health Aide position “is a non-professional position.” Plaintiff alleges that “[d]uring the last three years of his employment with” defendant, he “worked over 15,000 hours of on-call responsibilities, for which he only received $4.00 per hour, rather than one and one half his normal rate, as is required under Federal Wage and Hour law.” Plaintiff asserts a single cause of action, alleging that defendant violated the Fair Labor Standards Act (“FLSA”) by failing to properly pay him overtime for the on-call hours he worked. This case involves the first exception, whether “the law ‘-touches exclusive rights of self-governance in purely intramural matters[.]’ ” Id. (quoting Farris, 624 F.2d at 893). This exception applies “only in those rare circumstances where the immediate ramifications of the conduct are felt primarily within the reservation by members of the tribe and where self-government is clearly implicated. Defendant too is providing a core tribal government function, the provision of health care to Alaska Natives and Native Americans. That defendant receives payment from Medicare, Medicaid, and private insurance companies does not mean that the self-governance exception cannot apply to it. The court concludes, as a matter of law, that the FLSA, although a statute of general applicability, does not apply to defendant's employment of plaintiff. Defendant's motion for summary judgment is therefore granted.


On March 4, 2022, Defendant Deb Haaland, Secretary of the United States Department of the Interior, filed a Motion for Summary Judgment on Plaintiff’s claims for retaliation and race, color, and age discrimination. The Court concludes that Defendant’s motion should be granted, and judgment will be entered in favor of Defendant on all counts. Plaintiff Elvira Bitsoi (“Plaintiff” or “Bitsoi”) is a Navajo Native American woman with brown skin tone who was born in 1963. The Bureau of Indian Education (“BIE”) hired Plaintiff as an Education Program Specialist, GS 13, Step 1, subject to completion of a one-year probationary period. The position required implementing, developing, coordinating, and evaluating the curriculum and instruction of Language and Culture programs, and establishing and maintaining collaborative and cooperative working relationships with various entities inside and outside the BIE. Charlotte Garcia, a Native American and member of the Acoma Pueblo, was an Education Program Administrator and Plaintiff’s first-level supervisor. Plaintiff did not receive a formal orientation; instead, she had to wait for Human Resources (“HR”) and received no help from them. During her employment, several co-workers “made derogatory comments and insults about her race, Navajo.” In or around April 2017, someone left a derogatory note on Ms. Bitsoi’s truck. On May 11, 2017, Ms. Garcia issued Ms. Bitsoi a letter notifying her of the termination of her employment, effective May 27, 2017. To state a hostile work environment claim based on race or age discrimination, the plaintiff must show under the totality of the circumstances that (1) the harassment was pervasive or severe enough to
alter the terms, conditions, or privilege of employment, and (2) the harassment was racial or age-based or stemmed from racial or age animus. See Witt v. Roadway Exp., 136 F.3d 1424, 1432 (10th Cir. 1998). A plaintiff must show that the work environment was both objectively and subjectively hostile or abusive. Morris v. City of Colorado Springs, 666 F.3d 654, 664 (10th Cir. 2012). A court should consider all the circumstances, including “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” The Court cannot rely on Ms. Bitsoi’s conclusory assertions in her affidavit. Ms. Garcia’s comment that she did not choose Ms. Bitsoi for the position does not suggest racial animus nor is it physically threatening or humiliating. The lone specific allegation of a negative comment tied to race was that Mr. Longie made a negative comment about Ms. Bitsoi’s presentation that it was too focused on Navajo culture. That comment, alone, does not amount to a discriminatory negative comment against Ms. Bitsoi for being Navajo. Finally, turning to the note left on Ms. Bitsoi’s car, a jury could conclude it was rude and disrespectful. However, there is nothing in the record from which a juror could draw the conclusion that the note was placed on her car because of Ms. Bitsoi’s race, color, or age. A plaintiff may survive summary judgment by proving a violation of Title VII or the ADEA either by direct or circumstantial evidence of discrimination. See Crowe v. ADT Sec. Servs. Inc., 649 F.3d 1189, 1194 (10th Cir. 2011). If the plaintiff establishes a prima facie case, the burden shifts to the defendant to produce a legitimate, nondiscriminatory reason for its actions. Here, the only adverse action that Plaintiff has established is her termination from employment. Neither the lack of an orientation, denial of leave when she had just begun work, nor moving her to a cubicle along with all other Education Specialists amounts to a significant change in employment status. Moreover, even if Plaintiff set forth enough facts to establish a prima facie inference of discrimination, Defendant articulated a non-discriminatory reason for her termination from employment. According to Ms. Garcia’s Notice of Termination letter, Ms. Garcia fired Plaintiff during her probationary period for failing to complete work assignments in a timely manner and for failing to carry out the assignments required of her position, specifically failing to perform onsite visits to Grant/Pueblo schools, failing to provide resources for those schools, and failing to develop a Native Language Assessment for those schools. Defendant thus satisfied the burden to explain the actions against the plaintiff in terms that are not facially prohibited by Title VII. See Jones v. Barnhart, 349 F.3d 1260, 1266 (10th Cir. 2003). Defendant’s Motion for Summary Judgment is granted and all Plaintiff’s claims are dismissed with prejudice.


This matter comes before the Court on Defendants’ Motion to Dismiss Petition. Plaintiff alleges that he was an employee of Defendant Housing Authority of the Cherokee Nation (“HACN”) for twenty years prior to his termination. Plaintiff further alleges that on January 30, 2020, a committee of the Cherokee Nation Tribal Council held a meeting to discuss a potential amendment of the Cherokee Nation’s implementation of the Indian Child Welfare Act.. Plaintiff states that his “schedule allowed for him to attend the meeting of the committee of the Cherokee Nation....” on January 30, 2020 during his
lunch break. After several members of the Tribal Council voted to table action on the amendments indefinitely, Plaintiff states that he posted to social media the next morning concerning the meeting. He alleges that he “expressed his frustration” at the Tribal Council’s actions which resulted in Tribal Council members receiving “significant public criticism. “Plaintiff alleges that he was actually terminated “for engaging in Constitutionally protected speech in his personal capacity by speaking publicly about matters of great public concern, involving action taken by certain members of the Tribal Council of the Cherokee Nation....” He alleges that the policy violations cited for his termination “were simply pretext for this retaliation.” To prevail on a free speech claim as Plaintiff asserts in this action, he must demonstrate (1) whether the speech was made pursuant to an employee’s official duties; (2) whether the speech was on a matter of public concern; (3) whether the government’s interests, as employer, in promoting the efficiency of the public service are sufficient to outweigh the plaintiff’s free speech interests; (4) whether the protected speech was a motivating factor in the adverse employment action; and (5) whether the defendant would have reached the same employment decision in the absence of the protected conduct. At the very least, in order to state a plausible free speech claim, Plaintiff must set out the speech that he made. He has not done so in the Petition, only stating that he posted on social media. This level of vagueness does not meet the Twombly/Iqbal standards. Plaintiff will be required to file an Amended Complaint to set out the facts that support the elements referenced in Leverington for the constitutional claims in Counts Three and Four. The Counts Five and Six – Burk and Constitutional Torts against Cooper and Tyner, Count Seven – Intentional Infliction of Emotional Distress against Defendants Cooper and Tyner, and Count Eight – Civil Conspiracy against Cooper and Tyner are hereby dismissed. Further, Plaintiff shall file an Amended Complaint providing further factual support for Counts Three and Four – against all Defendants pursuant to 42 U.S.C. § 1983

E. Environmental Regulations

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.

42. In re Gold King Mine Release in San Juan County, Colorado, 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.


For decades, Oklahoma has regulated surface coal mining and reclamation operations within its borders, including on land that was previously understood—for more than a hundred years—to lie within the former boundaries of disestablished Indian reservations. That understanding was upended when the Supreme Court ruled that the Creek Reservation in eastern Oklahoma had never been disestablished. *McGirt v. Oklahoma*, — U.S. ——, 140 S.Ct. 2452, 207 L.Ed.2d 985 (2020). Applying the same reasoning, the Oklahoma Court of Criminal Appeals subsequently recognized the continued existence of the Choctaw Reservation and the Cherokee Reservation. *Hogner v. State*, 500 P.3d 629 (Okla. Crim. App. 2021); *Sizemore v. State*, 485 P.3d 867 (Okla. Crim. App. 2021). The question presented in this case is whether Oklahoma may continue to regulate surface coal mining and reclamation operations within these reservations. The Office of Surface Mining Reclamation and Enforcement, a subdivision of the Department of Interior, answered that question in the negative, concluding that the Surface Mining Control and Reclamation Act prohibited Oklahoma from regulating surface mining and reclamation operations on Indian land. The court concludes that Oklahoma was not likely to succeed on the merits of its claims because the Surface Mining Control and Reclamation Act precludes state regulation of surface mining and reclamation operations on Indian lands. The result the court reaches today is compelled primarily by a straight-forward application of the federal surface mining legislation to Indian lands—a situation contemplated by the express provisions of that federal law. SMCRA expressly prohibits inconsistent regulations, but not those that are more stringent than its minimum standards. SMCRA provides that a State “which wishes to assume exclusive jurisdiction” over surface coal mining and reclamation operations “shall” submit a state program to the Secretary for approval. 30 U.S.C. § 1253(a). This is the only mechanism by which a State may assume regulatory jurisdiction; the procedures are mandatory. Oklahoma contends that, given its long-exercised regulatory authority over surface mining on the reservations, these same equitable principles should preclude OSMRE from stripping Oklahoma of its regulatory control over the lands involved here. The court is not the least bit critical of the State for advancing this argument, given that the ancient land transfers underlying the claims in *Sherrill, Cayuga*, and *Oneida* violated the Nonintercourse Act and equity still worked to bar those claims. But the relief sought in those cases was different than the relief requested here. Sherrill and its progeny concerned attempts to
rekindle tribal sovereignty or obtain relief based on a tribe's right to possess the land. This case does not involve those types of disruptive remedies but is instead about the interpretation and application of a federal statute. Oklahoma seeks to continue regulating surface coal mining and reclamation operations on land within the exterior boundaries of the Creek Reservation, Choctaw Reservation and Cherokee Reservation, as it has done for several decades. However, State regulation of these activities on Indian land is now precluded by SMCRA. Accordingly, Federal Defendants' Cross-Motion for Summary Judgment is granted.

F. Fisheries, Water, FERC, BOR


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.

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 Kuskoikwim 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.


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.

47. 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.

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.


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.

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.


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.


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.


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.

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 Department 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.


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.

This matter comes before the Court on Upper Skagit Indian Tribe’s Motion for Judgment on Partial Findings under Rule 52(c). Intervenor Tulalip Tribe has filed a partial joinder in this Motion. Petitioner Stillaguamish Tribe (“Stillaguamish”) clearly opposes this Motion. An eight-day bench trial was held in this subproceeding, No. 17-3 starting on March 21, 2022, and eventually ending on June 7. The only legal issue at trial was whether the historical evidence and expert testimony, and all reasonable inferences drawn therefrom, demonstrate by a preponderance of the evidence that Stillaguamish customarily fished the Claimed Waters (including the waters of Deception Pass, Skagit Bay, Penn Cove, Saratoga Passage, Holmes Harbor, Possession Sound, and Port Susan) at and before treaty times. The instant Motion argues the Stillaguamish failed to present any evidence during its case-in-chief from which the Court can conclude that Stillaguamish customarily fished from time to time at and before treaty times in any of the marine waters at issue. “Customarily fished” means something very specific in this case, as the parties well know. It means more than may have fished, could have fished, or even definitely fished on a rare occasion. Furthermore, “at and before treaty times” clearly requires evidence of fishing at treaty times. Evidence of fishing in the hundreds of years prior to treaty times, alone, is insufficient. The Court deferred ruling on this Motion and proceeded with trial, hearing from several witnesses and requesting the parties answer a list of questions with supplemental briefing. Ultimately, however, the Court has found it can grant the instant Motion without addressing the various tangential questions or evidence presented after Stillaguamish’s case-in-chief. Moreover, the Court is firmly convinced that this subproceeding needs to be focused on the singular issue above, and that it would be procedurally inappropriate to even attempt to reach legitimate conclusions on every possible question raised at trial based on the scant historical evidence that is available. The Court is convinced that this subproceeding, and future subproceedings, should not serve as an invitation to continually re-analyze issues that have been decided over the past 50 years. The findings of fact and conclusions of law below are not intended to overturn any previously decided fact or law in this case. Absent a new and truly significant anthropological discovery, the Court will be disinclined to reassess U&A issues going forward on this limited record. The Court finds that it need not rule on the credibility of witnesses given the reliance on expert testimony in this case. Although the Court disagrees with certain conclusions of the expert witnesses, there were no credibility issues with their testimony. The existing record in this case, prior to trial, included substantial evidence of Stillaguamish river fishing but did not include any substantial evidence of fishing activity in the marine waters now at issue. The report and testimony of Dr. Friday did not provide any direct evidence, indirect evidence, nor any reasonable inference of marine fishing activity by the Stillaguamish at treaty time. Evidence was presented about the distinction between the Stillaguamish and the Qwadsak people, or the Qwadsak area. Ultimately this evidence was inconclusive and insufficient to establish, by a preponderance of the evidence, marine fishing activity by the Stillaguamish in Port Susan. Evidence was presented of shell middens located in the Qwadsak area by Harlan Smith. There was not sufficient evidence in the record to establish when the shell middens were created or who created them. Evidence was
presented of Stillaguamish people intermarrying with neighboring tribal groups, and it seems every other Salish tribe did the same. This did not include direct evidence, indirect evidence, nor any reasonable inference of usual and accustomed marine fishing activity by the Stillaguamish. Evidence was presented that Stillaguamish tribal members traveled north to Victoria, B.C. and south to Olympia, Washington. This did not include direct evidence, indirect evidence, nor any reasonable inference of marine fishing activity by the Stillaguamish. The Court has carefully considered the testimony of Dr. Friday and the other evidence presented and concludes that, although there is ample evidence that the Stillaguamish were a river fishing people during treaty times, the evidence is insufficient to demonstrate by a preponderance of the evidence that they fished “customarily...from time to time” in saltwater, or that the marine areas at issue were their “usual and accustomed” grounds and stations. That is the standard that was not met here. The Court agrees with Upper Skagit Tribe that “[i]n order to prove U&A in the marine waters of Saratoga Pass, Penn Cove, Holmes Harbor, Skagit Bay, Port Susan, and Deception Pass, the law of the case requires that Stillaguamish do more than proffer evidence of (potential) village locations, (infrequent) travel, or (possible) presence in an area.” The strongest evidence presented by Dr. Friday was that Stillaguamish traveled over the marine area between Olympia, Washington and Victoria, British Columbia. But travel alone does not satisfy the requirement of evidence of marine fishing under the law of the case. To permit evidence of travel alone to prove U&A could readily unravel all that has been established previously in the lengthy history of this case. Efforts by Dr. Friday and counsel for Stillaguamish to interpret this travel as an opportunity for fishing relies too heavily on speculation. The non-travel evidence presented by Stillaguamish, including the presence of villages, is ultimately insufficient to satisfy the above standards. Given all of the above, the Court will grant this Motion and deny Stillaguamish’s request to expand its U&A. The Upper Skagit Indian Tribe’s Motion for Judgment on Partial Findings under Rule 52(c), is granted

56. Sauk Suiattle Indian Tribe v. City of Seattle, 2022 WL 17999429, No. 22-35000 (9th Cir. December 30, 2022).

Sauk-Suiattle Indian Tribe brought action in state court against city seeking declaration that city’s operation of dam without fish passage facilities violated federal constitution, state constitution, and state common law, and seeking injunction either prohibiting city from operating dam or requiring city to provide fishway. Following removal, the United States District Court for the Western District of Washington, Barbara Jacobs Rothstein, J., 2021 WL 5200173, denied Tribe’s motion to remand, and, 2021 WL 5712163, granted city’s motion to dismiss for lack of subject matter jurisdiction. Tribe appealed. The Court of Appeals held that: [1] complaint raised substantial question of federal law, as required for removal based on federal question jurisdiction; [2] exercise of supplemental jurisdiction over state-law claims was proper; [3] complaint was subject to Federal Power Act (FPA) section vesting exclusive jurisdiction in federal courts of appeals over all objections to Federal Energy Regulatory Commission (FERC) orders; and [4] dismissal, rather than remand, was warranted under futility exception to remand requirement. In 1995, almost twenty years after Seattle submitted its application for a renewed license, FERC issued an order granting Seattle a new thirty-year license to operate the Project. The Order explained that both the Department of Commerce and the Department of the
Interior were parties to the Settlement Agreement in which they had agreed “that all issues concerning environmental impacts from relicensing of the Project, as currently constructed, are satisfactorily resolved by [the Settlement Agreement].” Thus, the FERC Order contained no fishway requirement. FERC did however reserve its authority to require fish passage in the future, should circumstances warrant. The Tribe did not seek rehearing or appeal the FERC Order. In July 2021, the Tribe filed the operative amended complaint against Seattle in Washington state court, seeking only declaratory and injunctive relief under Washington’s Declaratory Judgments Act. The complaint alleged that the Gorge Dam “blocks the passage of migrating fish” and thus its “presence and operation” without fishways violates several laws: the 1848 Act establishing the Oregon Territory and the 1853 Act establishing the Washington Territory (“Congressional Acts”); the Supremacy Clause of the United States Constitution; the Washington State Constitution, which purportedly incorporates the Congressional Acts; and Washington nuisance and common law. Section 1447(c) states that a district court shall remand a removed case when it concludes that it lacks subject matter jurisdiction. But our precedent recognizes a futility exception to that requirement. “A narrow ‘futility’ exception to this general [remand] rule permits the district court to dismiss an action rather than remand it if there is ‘absolute certainty’ that the state court would dismiss the action following remand.” As a three-judge panel we are compelled to apply the futility exception unless it is “clearly irreconcilable with the reasoning or theory of intervening higher authority.” Miller v. Gammie, 335 F.3d 889, 893 (9th Cir. 2003) (en banc). But the Tribe has not argued that the futility exception has been overruled, and we decline to consider the issue sua sponte. The district court correctly declined to remand because the complaint raises substantial federal questions. It also properly determined that it lacked subject matter jurisdiction under section 313(b) of the FPA, which vests exclusive jurisdiction in the federal courts of appeals. Finally, it was proper for the district court to dismiss the case under the futility exception to § 1447(c)’s remand requirement. While there may be valid policy reasons for the futility exception, “it is not our role to choose what we think is the best policy outcome and to override the plain meaning of a statute, apparent anomalies or not.” We therefore encourage our court to reconsider and abandon the futility exception in an appropriate case. Affirmed.


The Yurok Indian tribe and fisheries associations filed suit against Bureau of Reclamation, challenging river project plan and biological opinion (BiOp) assessing plan's impacts on threatened and endangered species, under Endangered Species Act (ESA). The court granted relief and stayed the matter. After the Oregon Water Resources Department (OWRD) issued an order prohibiting Bureau from releasing water classified as stored in Upper Klamath Lake and issued notices to the Bureau for violation of order, the United States filed a cross-claim against OWRD and water users association, seeking declaratory relief that order and notices were invalid, contrary to ESA, and preempted under Supremacy Clause, and seeking permanent injunction against enforcement of OWRD order. OWRD and water users association counterclaimed, and OWRD sought an injunction requiring the Bureau to provide OWRD with information about project's operations. Irrigation district intervened, all parties moved for summary judgment, and
intervenor Klamath Irrigation District moved to stay, pursuant to five abstention doctrines, any decisions on summary judgment motions until Oregon court completed its decades-pending review of surface water rights for river project. The District Court, William H. Orrick, J., held that: [1] stay under abstention doctrines was not warranted; [2] Bureau was required to comply with ESA in operating river project; [3] OWRD’s order was preempted by ESA and thus violated Supremacy Clause; and [4] OWRD lacked standing to pursue injunction requiring Bureau to provide information about water releases. Tribal and U.S. motions granted in part and denied in part. The arguments boil down to three primary issues: (1) whether the OWRD Order is preempted by the Endangered Species Act (“ESA”); (2) whether OWRD violated the intergovernmental immunity doctrine in issuing the Order; and, relatedly, (3) whether OWRD exceeded its authority in doing so. Answering the first question is ultimately all that is needed. The OWRD Order is preempted by the ESA because it stands as an obstacle to the accomplishment and execution of Congress's purpose and objective in enacting in ESA: protecting and restoring endangered species. Summary judgment is granted in favor of the United States and plaintiffs on the first cause of action in the United States’ crossclaim.


Indian tribe brought action against city, alleging that city's promotional campaign alleging that hydroelectric project produced green power was deceptive and violated the Consumer Protection Act (CPA) and created a private and public nuisance interfering with tribe's use and enjoyment of its property right to fish on river. The Superior Court, King County, Adrienne McCoy, J., dismissed. Tribe appealed. The Court of Appeals, Mann, J., held that: [1] city was exempt from the CPA; [2] city's statements were mere puffery that could not give rise to nuisance per se; and [3] tribe's allegations were sufficient to state a claim for private and public nuisance. The Tribe explained that the harm is not limited to animus from local persons, but also that its brand and reputation associated with the fishery resource is broadly connected to public perception and reputation of the Skagit for sustainable fisheries: “Plaintiff Sauk-Suiattle Indian Tribe participates in commercial fishery, as well as hunting and gathering in the Skagit ecosystem, with its tribal reputation and brand inherently connected to public perception and reputation of the health, environmental responsibility and sustainability of the Skagit ecosystem, including the viability of its species and the management of the river system by major actors such as Defendant Seattle.” The Tribe is arguing that the City's greenwashing statements undermine the Tribe's valuable property interest in the fishery resources and their right to its quiet enjoyment by misrepresentations that cause animus in the form of harassment, and diminished support of the Tribe through public opinion.6 While it is true that proximate cause can be severed by the intervening acts of third parties, that is a factual question not fit for dismissal under CR 12(b)(6). The Tribe sufficiently alleged a causal connection between the City's statements and its own harm. Assuming the facts alleged in the complaint are true, the Tribe sufficiently alleged a claim for private and public nuisance. Affirmed in part and reversed and remanded in part.
The Truckee Canal runs for thirty-one miles through western Nevada, from the Derby Diversion Dam on the Truckee River to the Lahontan Reservoir. Nearly twenty-seven miles of the Canal are unlined, allowing water to seep through the Canal and recharge the underlying aquifer. After the Canal breached in 2008, the Bureau of Reclamation (“Reclamation”) conducted studies to identify repairs that would ensure the long-term structural safety of the Canal. Reclamation selected an alternative that involves adding an impermeable lining to more than twelve miles of the Canal. The City of Fernley alleges that it will be harmed by the chosen alternative because the lining will reduce recharge of the aquifer, on which the City relies for its municipal water. Intervenors David Stix and Deena Edmonston, who own private wells and a permitted groundwater right of use, raise similar allegations. The district court dismissed all claims on jurisdictional grounds. The City of Fernley and Intervenors (collectively, “Plaintiffs”) timely appeal. The district court correctly dismissed Plaintiffs’ claims for violation of the National Environmental Policy Act (“NEPA”). Because NEPA does not include a private right of action, the Administrative Procedure Act (“APA”) provides Plaintiffs' cause of action, if any. Here, Plaintiffs allege only interests in the use of the aquifer as a water source. We have previously held that a statutory claim under NEPA existed where municipalities alleged environmental harms, including harm to water quality. See City of Davis v. Coleman, 521 F.2d 661, 671 (9th Cir. 1975) (relying on the plaintiff's allegations that development facilitated by a new freeway interchange “may adversely affect the quality and quantity of the city water supply because of increased use and the danger of contamination by industrial wastes” (emphasis added)); Churchill County v. Babbitt, 150 F.3d 1072, 1076, 1079 (9th Cir.) amended and superseded on denial of reh’g, 158 F.3d 491 (1998) (referencing the plaintiff's allegations of “fire hazards, airborne particles, erosion, unknown changes to the underground water supply system, and reduced quality of local drinking water,” and adverse effects on “groundwater levels and quality” (emphasis added)). But Plaintiffs' complaints allege only diminution of the water supply, that is, quantity alone. The loss of the ability to consume natural resources is an economic injury, not an environmental injury. The scope of Plaintiffs' water rights is, as noted above, a question of state law. Plaintiffs' complaint extends to a right to continued seepage. Additionally, Plaintiffs' request for a declaratory judgment of their water rights in this forum is inconsistent with Nevada's system of water rights adjudication. Nevada law requires comprehensive adjudication of water rights involving all users. Nev. Rev. Stat. § 533.240(1). Although we lack jurisdiction over Plaintiffs' declaratory judgment claims, our holding does not prevent them from asserting their water rights claims in other proceedings, consistent with state law. Affirmed in part and reversed in part.

Before the Court for decision is a motion for preliminary injunction that addresses only one aspect of this action: the adoption and implementation by Federal Defendants of a set of measures known as the Winter Flow Variability Project (“WFV Project”) that modify the daily flow regime for the Trinity River set forth in the 2000 Record of Decision on
Trinity River Mainstem Fishery Restoration (“TRROD”). In its first amended complaint, Hoopa alleged that Reclamation violated the “delegated sovereignty” set forth in Section 3406(b)(23) of the Central Valley Project Improvement Act (“CVPIA”), Public Law 102-575 (1992), by taking steps to implement the WFV Project without Hoopa's concurrence (hereinafter referenced as the “CVPIA Concurrence” claim). The Court denied the initial motion for preliminary injunction, finding that Plaintiff had failed to establish likelihood of success on its claim that Federal Defendants could not proceed with the WFV Project in the absence of Hoopa concurrence. Plaintiff’s renewed motion (“Renewed PI”) argues that Hoopa is likely to succeed on its NEPA claim and that it will suffer irreparable harm if the WFV Project is not enjoined. Here, it is undisputed that the WFV Project changes the timing of releases for a substantial fraction of the annual flow of the Trinity River when compared to the timing of those flows under the TRROD flow regime without the WFV Project. It is also undisputed that it does so in ways that are unprecedented, namely, by increasing releases before the water year can be definitively determined in early April. Given these facts, the Court finds that the WFV Project is not “mere implementation” of the TRROD for purposes of the APA's final agency action requirement. The Court finds it unnecessary to delve deeper into NEPA analysis, however, because even assuming Plaintiff has established likelihood of success, they have not established that the balance of harms warrants an injunction. For the reasons set forth, the motion for preliminary injunction is denied.


Pending before the Court are motions for summary judgment filed by Plaintiff Gila River Indian Community and Defendants Gilligan Bowman, Blanca Bowman, Samuel Lunt, and Julee Lunt. For the following reasons, the Court grants the Community's Motion and denies Defendants’ Motion. This matter is related to nearly a century of litigation concerning water rights subject to the Globe Equity Decree No. 59 (“Decree”) entered by this Court in 1935 to govern the distribution of Gila River water among the Gila River Indian Community (the “Community”), the San Carlos Apache Tribe, and various other landowners. United States v. Gila Valley Irrigation Dist., 859 F.3d 789, 794 (9th Cir. 2017). Parties to the Decree are entitled to divert water from the River for the ‘beneficial use’ and ‘irrigation’ of land in accordance with the specified priorities.” Id. The Arizona Supreme Court has explained: T]he Decree was intended to resolve all claims to the Gila River mainstem. The United States included as defendants in the Globe Equity litigation all those with claims to the mainstem of the Gila River, and the Decree includes all water rights theories that the parties could have asserted. Thus, as to the mainstem of the Gila River, the Decree is comprehensive. In re Gen. Adjudication of All Rts. to Use Water In Gila River Sys. & Source, 212 Ariz. 64, 127 P.3d 882, 902 (2006). Here, the Community filed suit against a variety of landowners in March 2020, alleging their Decree rights are forfeited pursuant to A.R.S. § 45-141(C) because they failed to use the water for a period of five years or longer. Since 2017, Gilligan and Blanca Bowman have owned three parcels near the Gila River known as the “Bowman Parcels,” which have Decree rights. The last time the Bowman Parcels were irrigated to grow a crop of any kind was in 1983 or earlier, and the only reason the Bowmans have not been farming on or irrigating the parcels is because the Gila River washed them out in 1983, rendering the land unsuitable

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for farming. Since 2018, Samuel and Julee Lunt have owned parcels near the Gila River known as the “Lunt Parcels,” which have Decree rights. A series of floods in 1993 and 1994 moved the Gila River channel onto the Lunt Parcels, cutting a deep gully through the field and damaging the Lunt Parcels extensively. When the Complaint in this case was filed in 2020, Arizona law provided specified reasons that were “sufficient cause for nonuse. “The issue here is simply whether this Court deems Defendants’ reasons for not using the water are sufficient to “warrant nonuse” under the catchall exception. The Court concludes the Bowmans’ reasons for not using their water for almost forty years at the time of this Order do not warrant nonuse under § 45-189(E)(8). Although the 1983 flood was certainly beyond their control, the Bowmans have not provided sufficient evidence showing their nonuse is temporary, nor have they provided a reason that warrants nonuse under § 45-189(E)(8). The Court concludes the Lunts’ nonuse is not warranted under § 45-189(E)(8) because their reasons are not consistent with beneficial use. Like the Bowmans, the Lunts’ parcels were rendered unfarmable through no fault of their own. Unlike the Bowmans who are waiting for an unpredictable, speculative flood, the Lunt Parcels have sat for over fifteen years unirrigated because the Lunts and their predecessor did not rehabilitate them and put them back into production sooner. Accordingly, the Community’s motion for summary judgment is granted and defendants’ motion is denied.

G. Gaming


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.


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.


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.


Plaintiffs are four Native American tribes who each operate casinos in Oklahoma under a tribal-gaming compact with Oklahoma under the Indian Gaming Regulatory Act. In their operative complaint, they seek to have set aside four tribal-gaming compacts for casino operations that four other Native American tribes in Oklahoma submitted to the Secretary of the Department of the Interior for approval and which were approved by inaction by operation of law. Oklahoma's model tribal gaming compact contained a term specifying that it expired automatically on January 1, 2020, though that term also specified that any such compact would “automatically renew” for successive fifteen-year terms under certain conditions. Plaintiffs allege that the Secretary's failure to consider whether the compacts were not legally “entered into” or were otherwise contrary to IGRA before no-action approving them violated IGRA under § 706(2). Both Federal Defendants and
Chairman Woommavovah move to dismiss Plaintiffs' claims against them—for Federal Defendants, counts one through seven; and for Chairman Woommavovah, counts one through eight to the extent they challenge the Comanche Nation's compact—for lack of standing. Federal Defendants facially challenge Plaintiffs' standing. Chairman Woommavovah mainly facially challenges Plaintiffs' standing, but he also tries to challenge it factually. Federal Defendants' facial challenge partly succeeds—Plaintiffs have failed to plausibly allege that they have standing to challenge the no-action approvals of the United Keetoowah Band's and Kialegee Tribal Town's compacts. But that challenge comes up short in part because Plaintiffs have plausibly alleged that they have standing to challenge the no-action approvals of the Comanche Nation's and the Otoe-Missouria Tribe's compacts. To repeat, in counts one, two, three, and eight, Plaintiffs allege that the compacts are entirely illegal and invalid because they were not legally “entered into” as required by IGRA. To pursue these claims, Plaintiffs must plausibly allege that at least one of them suffered an injury in fact that is fairly traceable to the challenged action—the Secretary's no-action approval, in counts one through three; and Defendant Tribal Leaders' actions under the allegedly invalid compacts, in count eight—and that is likely redressable, assuming Plaintiffs prevail on each of these counts. Plaintiffs allege that a portion of Oklahoma in which the Kialegee Tribal Town might be able to obtain land under its compact for class III gaming through the trust-acquisition process is in the Citizen Potawatomi Nation's territory. And they allege that this possibility “threatens” the Citizen Potawatomi Nation's “jurisdictional integrity and sovereignty.” Granted, an “actual infringement[ ]” of a tribe's “sovereignty” can constitute a “concrete injury sufficient to confer standing.” But an “abstract injury” to such sovereignty “is not sufficient to confer standing.” See West Virginia v. U.S. Dep't of Health & Human Servs., 145 F. Supp. 3d 94, 102 (D.D.C. 2015). Further, any state-law dispute between the Governor and others about whether the compacts were validly “entered into” was resolved—at least for the time being and for the Secretary's purposes—during the forty-five-day review period. For all these reasons, it is hereby ordered that: Federal Defendants' Motion to Dismiss is granted in part and denied in part.

H. Jurisdiction, Federal


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,
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. 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.

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 1738B 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.


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. LCO-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. 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. 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. 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. 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 formally 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. 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.

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.

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 in which the Defendants assert, principally, that the court lacks subject matter jurisdiction to hear this case. For the reasons set forth in 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.


Defendant Johnny Ellery Smith, an enrolled member of the Confederated Tribes of Warm Springs, appeals the district court’s denial of his 28 U.S.C. § 2255 motion. We previously affirmed Smith’s convictions on direct appeal, holding that the federal government had jurisdiction to prosecute him for violations of Oregon law committed on the Warm Springs Reservation because the Assimilative Crimes Act (“ACA”) applies to Indian country. United States v. Smith, 925 F.3d 410 (9th Cir. 2019). Smith now seeks to vacate his convictions on the ground that the Supreme Court’s subsequent decisions in McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) and Oklahoma v. Castro-Huerta, 142 S. Ct. 2486 (2022) are “clearly irreconcilable” with our prior holding. See Miller v. Gammie, 335 F.3d 889, 900 (9th Cir. 2003). We have jurisdiction and we affirm. In Smith, we held that the ACA applies to Indian country via the Indian Country Crimes Act (“ICCA”). 925 F.3d at 418. The ICCA extends to Indian country the “general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States.” 18 U.S.C. § 1152. We reasoned in Smith that the “general laws” referred to in the ICCA are the laws governing federal enclaves. 925 F.3d at 418. Therefore, “[t]he ACA, as a federal enclave law, ... applies to Indian country by operation of the ICCA.” Id. Castro-Huerta is not clearly irreconcilable with that holding. Smith does not dispute that the “general laws” extended to Indian country by the ICCA are the “federal laws that apply in federal enclaves.” Castro-Huerta, 142 S. Ct. at 2495. Rather, he contends that the ACA is not among such “general laws” because “the ACA is not a federal criminal law.” That question, however, was not decided in Castro-Huerta, which made no mention of the ACA. The relevant portion of Castro-Huerta focused instead on whether the text of the ICCA rendered Indian country the equivalent of a federal enclave such that the federal government had exclusive jurisdiction to prosecute criminal offenses committed there. Id. Finally, we also reject as unpersuasive Smith’s contention that McGirt is clearly irreconcilable with our prior holding that his prosecution was not prohibited by the third exception to the ICCA’s scope, which applies when a treaty stipulation reserves for a tribe “exclusive jurisdiction over [the relevant] offenses.” See Smith, 925 F.3d at 420 (quoting 18 U.S.C. § 1152).1 McGirt does not address the ICCA exceptions, and its reasoning does not undermine Smith’s analysis of them. See id. at 420–21. Affirmed


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.


James Nguyen appeals following the district court's dismissal of his civil rights action. Upon careful de novo review, see Montin v. Moore, 846 F.3d 289, 292 (8th Cir. 2017) (standard of review), we affirm. We agree with the district court that Nguyen's 42 U.S.C. § 1983 claims failed, as he alleged defendants acted under color of tribal, not state, law. See Stanko v. Oglala Sioux Tribe, 916 F.3d 694, 698 (8th Cir. 2019) (plaintiff's § 1983 claim was properly dismissed where he alleged defendants acted under color of tribal or federal, not state, law). We also agree that his claims under the Indian Civil Rights Act (ICRA) failed, as only habeas corpus relief is available under that statute, and habeas relief was unavailable to challenge a tribal court's custody order. See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 70-72 (1978) (ICRA does not authorize actions for injunctive relief against tribe or its officers; only available remedy is habeas corpus); Azure-Lone Fight v. Cain, 317 F. Supp. 2d 1148, 1151 (D. N.D. 2004) (habeas relief under ICRA is not available to challenge propriety of tribal judge's decision in custody matter). 2 We dismiss defendants’ cross-appeal for lack of standing, as they were the prevailing parties below. See Cutcliff v. Reuter, 791 F.3d 875, 880 (8th Cir. 2015) (party may be aggrieved by district court decision that adversely affects its legal rights or position as to other parties in case or other potential litigants, but desire for better precedent does not by itself confer standing to appeal); United States v. Northshore Mining Co., 576 F.3d 840, 847 (8th Cir. 2009) (dismissing appeal, as prevailing party could not appeal from district court's order; allegedly adverse collateral ruling was not necessary to district court's judgment, and prevailing party did not challenge judgment itself). We grant defendants’ motion to seal; the clerk's office is directed to seal Nguyen's reply brief. The judgment is affirmed.


Murray Dines has filed suit against the Governor and the Attorney General of the State of Kansas in their official capacities. Pursuant to 42 U.S.C. § 1983, plaintiff alleges that defendants are violating federal laws which regulate hemp production and seeks injunctive and declaratory relief. Specifically, plaintiff asks the Court to declare that federal law preempts portions of the Kansas Commercial Industrial Hemp Act (“Kansas Hemp Act”), K.S.A. § 2-3901 et seq., and the Kansas Controlled Substance Act, K.S.A. § 65-4101 et seq., which purport to criminalize the sale and possession of certain hemp products. Until recently, federal law prohibited the growth and cultivation of hemp. In 2014, however, President Barack Obama signed into law the Agricultural Act of 2014 (“2014 Farm Act”), which allowed states and research institutions to cultivate industrial hemp for research purposes without approval from the Drug Enforcement Administration. Pub L. No. 113-79, § 7606. In 2018, President Donald Trump signed a new farm bill—the Agriculture Improvement Act of 2018 (“2018 Farm Act”)—which repealed and replaced the 2014 Farm Act. Subtitle G of the 2018 Farm Act permits and regulates hemp production by licensed hemp producers. To the extent a state or tribal
The plan is not approved, the Secretary establishes a plan for the production of hemp in that state or territory. Id. § 1639q(a)(1). The Kansas CSA regulates the manufacture, importation, exportation, possession, use and distribution of certain substances in Kansas. The 2018 Farm Act focuses on power and methods reserved to the Secretary of Agriculture for enforcement and regulation of state, Indian and Department of Agriculture plans for production of hemp. Such a delegation of authority is evidence that no private right of action was intended. The 2018 Farm Act does not create a private right for plaintiff to possess and sell hemp and hemp products, either under Section 1983 or as an implied cause of action under the 2018 Farm Act itself. Therefore defendants' Motion To Dismiss is sustained.


In January of 2019, on the Rosebud Indian Reservation, Jacob Archambault Spotted Tail was shot and killed during an encounter with two Rosebud Sioux Tribe police officers. Jacob's mother, Charlee Archambault, alleges that the officers violated her son's constitutional rights, and that she and Jacob's estate are entitled to damages. For the reasons set forth below, this Court grants the motions to dismiss all § 1983 claims as well as any claims against the United States and “Unknown Supervisory Personnel” of the United States. This Court stays the remaining Bivens-based claim against the named tribal police officers pending exhaustion of any available tribal court remedy. Resolution depends on three issues: (1) Whether Plaintiff's suit against the Officers is in fact against the Rosebud Sioux Tribe as a sovereign entity and consequently barred by tribal sovereign immunity; (2) Whether Bivens or 42 U.S.C § 1983 extends a cause of action against the Officers on the alleged facts; and (3) Whether this Court should require Plaintiff to exhaust any remedies in Rosebud Sioux Tribal Court before exercising jurisdiction. When a lawsuit is brought against tribal employees in their individual capacities, courts are instructed to “look to whether the sovereign is the real party in interest to determine whether sovereign immunity bars the suit.” Lewis v. Clarke, — U.S. ——, 137 S. Ct. 1285, 1290, 197 L.Ed.2d 631 (2017). Given the overlapping claims alleged here and guided in part by the Eighth Circuit's approach in Stanko, this Court considers it appropriate to address whether Plaintiff has plausibly alleged a claim upon which relief can be granted against the Officers under Bivens or § 1983 without fully deciding the tribal sovereign immunity question. See Stanko, 916 F.3d at 698 (focusing on whether plaintiff stated a plausible claim). Plaintiff rests her claims on 42 U.S.C. § 1983 and Bivens. Tribes and in turn their tribal officers thus are as a general rule not state actors. There is no action under color of state law when Tribal law enforcement officers employed by a tribe under a 638 contract respond to a dispatch call on the reservation about a tribal member having caused a disturbance and then pursue the tribal member on the reservation leading to a confrontation and use of deadly force. “[T]o state an actionable Bivens claim, a plaintiff must show7 (1) a violation of a constitutional right, (2) committed by a Federal actor, (3) who acted with the requisite culpability and causation to violate the constitutional right.” This is not the first time a plaintiff has invoked Bivens to sue a tribal officer working under a 638 contract. See Boney v. Valline, 597 F. Supp. 2d 1167, 1183–1186 (D. Nev. 2009) (after initially denying motion to dismiss, granting summary judgment refusing to allow Bivens action against a tribal law
enforcement officer based on 638 contract where tribal law enforcement officer was enforcing tribal law against a tribe member on tribal territory); Ten Eyck, 463 F. Supp. 3d at 989 (allowing Bivens claim to proceed against tribal officer because tribal officer was assisting state law enforcement off tribal land, and absent the 638 contract tribal police did not otherwise have authority to so assist). The Supreme Court has quite recently reemphasized that “recognizing a cause of action under Bivens is a disfavored judicial activity.” Egbert, 142 S. Ct. at 1803 (cleaned up and citations omitted). In general, whether a court should recognize a Bivens action is at least a two-step inquiry: A Bivens cause of action may be defeated in a particular case, however, in two situations. The first is when defendants demonstrate special factors counselling hesitation in the absence of affirmative action by Congress. The second is when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective. Here, Archambault is a tribal member, involved in an incident on tribal land, with tribal police responding, pursuing, and shooting him on the Reservation. In a case that so deeply touches the sovereign interests of the Rosebud Sioux Tribe, the “[p]romotion of tribal self-government and self-determination” presents the question of whether this Court should stay the case to allow the Rosebud Tribal Court to “evaluate the factual and legal bases” underpinning Plaintiff’s claims before this Court proceeds to determine whether any Bivens claims can proceed to trial against the Officers. The Officers both contend that Plaintiff could have brought a claim in Rosebud Sioux Tribal Court but failed to do so. Perhaps the tribal court case will obviate any Bivens claim or case here. Counts Two, Three, and Four alleging § 1983 violations are dismissed without prejudice to filing claims in the Rosebud Sioux Tribal Court. Even taking all of Plaintiff’s allegations as true, there is nothing to suggest that any government officials other than Officer Romero and Officer Antman were involved in what led to Jacob Archambault’s death. Ordered that this case is stayed to allow Plaintiff to exhaust tribal court remedies, which this Court expects Plaintiff to promptly do.


Borrowers who took out small-dollar high-interest loans from payday lenders formed under tribal laws of Lac Vieux Band of Lake Superior Chippewa Indians (LVD) brought a putative class action against lenders created by tribe and non-Native American individual who was allegedly both de facto head and primary beneficiary of LVD’s lending operations as part of alleged “Rent-a-Tribe” scheme. Borrowers sought declaratory judgment that loan contracts were void and unenforceable under Virginia law and public policy and alleged violation of Racketeer Influenced and Corrupt Organizations Act (RICO), violation of Virginia's usury statute, and unjust enrichment. The United States District Court for the Eastern District of Virginia, Robert E. Payne, Senior District Judge, 329 F.Supp.3d 248, denied motion to dismiss for lack of subject matter jurisdiction. Defendants filed interlocutory appeal. The Court of Appeals, Gregory, Chief Judge, 929 F.3d 170, reversed and remanded. After remand, the District Court, Payne, Senior District Judge, dismissed tribal entities for lack of subject matter jurisdiction, found material misrepresentation by individual defendant, 2020 WL 6784352, determined that borrowers did not waive right to participate in a class action
against individual defendant, 2021 WL 2930976, and certified class, 339 F.R.D. 46. Defendant's petition for permission to appeal was granted. The Court of Appeals, Agee, Circuit Judge, held that: [1] District Court permissibly reconsidered previous factual findings and found misrepresentation by defendant; [2] individual defendant was not affiliated entity under loan agreement waiving right to bring class action against affiliated entities; [3] as a matter of first impression, prospective waiver doctrine rendered unenforceable borrowers' waiver of right to bring class action; and [4] District Court did not clearly err in determining that common questions of law or fact predominated over questions affecting only individual members. Affirmed.


Plaintiff Stimson Lumber Company (“Stimson”) and Defendant Coeur d'Alene Tribe (the “Tribe”) are parties to a lease agreement (“Lease”). That Lease permitted Stimson to operate a sawmill on the Tribe’s land in Benewah County, Idaho. It also granted Stimson an option to purchase the mill at the end of the full lease term for no extra cost—the past rent payments were to constitute the sale price. The Lease contains a dispute resolution clause, including a forum selection clause by which the parties “submit” to the jurisdiction of this Court and forego all other tribunals: “The Parties agree that any disputes concerning, relating to or arising out of this Agreement present a federal question. With respect to any Proceeding each Party irrevocably submits to the exclusive jurisdiction of the United States District Court for the District of Idaho. Each Party hereby irrevocably waives any objection which it may have at any time to the venue of any Proceedings brought in the United States District Court for the District of Idaho, waives any claim that such Proceedings have been brought in an inconvenient forum and further waives the right to object, with respect to such Proceedings, that such court should not exercise its jurisdiction or should defer to some other judicial or administrative tribunal, whether federal, state, or tribal.” Stimson sued the Tribe before this Court, claiming diversity jurisdiction and alleging breach of contract, unjust enrichment, and conversion. Stimson moved for a preliminary injunction to prevent the Tribe from harassing the mill workers or beginning eviction proceedings. The Court granted the motion and issued an injunction. Later, however, when the Tribe raised subject matter jurisdiction, the Court found that there was no diversity between the parties and dismissed the case. Stimson Lumber Co. v. Coeur d'Alene Tribe, 2022 WL 3446084 (D. Idaho Aug. 16, 2022). Stimson now files a second iteration of the same suit.. This time it claims federal question jurisdiction and seeks a declaratory judgment that, “Section 19.3.2. [the Lease’s forum selection clause] is enforceable against the Tribe; therefore, the Tribe's court does not have jurisdiction to resolve the disputes regarding the Parties rights and duties under the Agreement.” The mere fact that an Indian tribe or individual is party to a case does not create federal question jurisdiction. Newtok Vill. v. Patrick, 21 F.4th 608, 616 (9th Cir. 2021). “Nor is there any general federal common law of Indian affairs.” Id. In fact, the Ninth Circuit has held that “federal common law does not cover all contracts entered into by Indian tribes because that might open the doors to the federal courts becoming ‘a small claims court for all such disputes.’ “ Id. (quoting Gila River Indian Cnty. v. Henningson, Durham & Richardson, 626 F.2d 708, 714–15 (9th Cir. 1980)). Suits for breach of contract do not, as a rule, entail a federal question. Kokkonen,
511 U.S. at 381. Parties cannot contractually oust courts of jurisdiction they would otherwise have. See M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12 (1972). Nor can they contractually consent to subject matter jurisdiction that would not otherwise exist. Kolbe v. Trudel, 945 F. Supp. 1268, 1270 (D. Ariz. 1996). The Lease—not a tribal court judgment—creates Stimson's cause of action. And a substantial question of federal law is not a necessary element of Stimson's complaint. Stimson seeks a declaration that “Section 19.3.2. is enforceable against the Tribe; therefore, the Tribe's court does not have jurisdiction to resolve the disputes regarding the Parties rights and duties under the Agreement.” It asks the Court to decide whether tribal court is an appropriate forum, not under federal law, but under the dispute resolution clause of the Lease. Because federal law does not create the cause of action, and because a substantial question of federal law is not a necessary element of Stimson's well-pleaded complaint, the Court lacks subject matter jurisdiction over the case and must dismiss.

I. Religious Freedom

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.
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 (“BGEP”) (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. 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. 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. 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. 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 Naabeho Binahásdzó, 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).


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. 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. 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). 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.

Graduating public high school student, who was an enrolled member of the Sisseton Wahpeton Oyate Native American tribe, brought §1983 action against school district alleging violations of Free Exercise Clause, Free Speech Clause, and Equal Protection Clause, arising from district's purportedly selective enforcement of dress-code policy prohibiting students from decorating their graduation gown or cap. The United States District Court for the District of Arizona granted district's motion to dismiss for failure to state a claim. Student appealed. The Court of Appeals held: 1 student stated claim for violation of Free Exercise Clause; 2 student permissibly made allegations as to enforcement of policy at other graduation ceremonies on information and belief; 3 student stated claim for violation of Free Speech Clause; and 4 school district's asserted compelling interest was insufficient to satisfy strict scrutiny at the pleading stage. Reversed and remanded. The Dysart School District, located in Phoenix, Arizona, has a graduation policy that prohibits students from decorating their graduation caps. Plaintiff Larissa Waln—an enrolled member of the Sisseton Wahpeton Oyate, a Native American tribe—asked the District to accommodate her religious practice by allowing her to wear
an eagle feather on her cap during high-school graduation. The District declined Plaintiff's request on the ground that the policy permits no exceptions. Plaintiff arrived at graduation wearing an eagle feather, and District officials prohibited her from attending. But that same day, the District permitted other students to wear secular messages on their graduation caps. Plaintiff long has participated in traditional and cultural practices of her Native American heritage and often participates in Native American religious ceremonies. An important part of her religious beliefs is the sacred nature of eagle feathers. In her religion, eagles have a special connection with God, and their feathers are considered sacred objects. Plaintiff's “eagle plume was blessed in a religious ceremony.” “Whether one views the case through the lens of the Free Exercise or Free Speech Clause, at this point the burden shifts to the District.” Kennedy, 142 S. Ct. at 2426. As noted, the District must satisfy “strict scrutiny,” showing that “its restrictions on the plaintiff’s protected rights serve a compelling interest and are narrowly tailored to that end.” Id. Taking the allegations in the complaint as true, as we must, Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), the District cannot meet its burden. Reversed and remanded.

J. Sovereign Immunity

82. 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.

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.


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.


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.

86. *Backcountry Against Dumps v. Bureau of Indian Affairs*, 2022 WL 15523095, No. 21-55869 (9th Cir. October 27, 2022).

Backcountry Against Dumps asserts that the approval of a lease between the Campo Band of Diegueno Mission Indians and Terra-Gen Development Company by the Bureau of Indian Affairs violated various environmental statutes. The Band intervened for the limited purpose of moving to dismiss, and the district court dismissed the complaint for failure to join a required party under Federal Rule of Civil Procedure 19. We affirm. A party is “required” and “must be joined” in an action if “that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may [] as a practical matter impair or impede the person's ability to protect the interest.” Fed. R. Civ. P. 19(a)(1)(B)(i). Backcountry does not challenge the district court's determination that the Band cannot be joined because of its sovereign immunity. And, the district court correctly concluded that disposing of this action could implicate the Band's economic and sovereign interests. The complaint seeks to vacate the BIA's decision approving the lease agreement, and a successful outcome for the plaintiffs would affect not only the Band's rights under the agreement, but also investments made in reliance on the agreement and expected jobs and revenue. See *Diné*, 932 F.3d at 853. The suit also implicates the Band's sovereignty, which “is tied to its very ability to govern itself, sustain itself financially, and make decisions about its own natural resources.” Id. at 856. That interest is implicated even though the lawsuit only facially challenges the federal defendants' environmental-review processes. See id. at 852–53; *Klamath Irrigation Dist. v. U.S. Bureau of Reclamation*, 48 F.4th 934, 945 n.2 (9th Cir. 2022). Backcountry argues that the Band's interests are adequately represented by the federal defendants and Terra-Gen. However, “while Federal Defendants have an interest in defending their own analyses that formed the basis of the approvals at issue, here they do not share an interest in the outcome of the approvals.” *Diné*, 932 F.3d at 855; see also *Klamath*, 48 F.4th at 945. Even assuming that Terra-Gen shares the same interest as the Band in defending the lease, it does not share the Band's sovereign interest in self-governance and use of its natural resources. See *Diné*, 932 F.3d at 856. The district court
also did not err in declining to apply the public rights exception, which allows certain actions that “transcend the private interests of the litigants and seek to vindicate a public right” to proceed without all required parties. *Kesccoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996). “[T]he question at this stage must be whether the litigation threatens to destroy an absent party's legal entitlements.” *Diné*, 932 F.3d at 860. Because this action seeks to vacate approval of the lease, it plainly threatens the Band's legal entitlements. Affirmed.

NUMA Corporation and Cedarville Rancheria of Northern Paiute Indians (“Tribe”), a federally recognized Indian tribe, appeal the bankruptcy court's order imposing sanctions under 11 U.S.C. § 362(k)(1) for violation of the automatic stay in the chapter 13 bankruptcy proceedings of debtor Jason Diven. We review de novo whether a Native American tribe possesses sovereign immunity, *Deschutes River All. v. Portland Gen. Elec. Co.*, 1 F.4th 1153, 1158 (9th Cir. 2021), and whether Congress has abrogated a tribe's sovereign immunity, *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1056 (9th Cir. 2004). We also review de novo the bankruptcy court's conclusions of law. See *In re Brace*, 979 F.3d 1228, 1232 (9th Cir. 2020). We affirm. Indian tribes are “separate sovereigns pre-existing the Constitution” and possess common-law sovereign immunity. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56–58 (1978). “[A]n Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.” *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998). Congressional abrogation must be “unequivocally expressed.” *Santa Clara Pueblo*, 436 U.S. at 58 (citation omitted). Section 106(a) of the Bankruptcy Code abrogates the sovereign immunity of a “governmental unit” with respect to, as relevant here, the Code's automatic stay provision. 11 U.S.C. § 106(a). The statute's definition of “governmental unit” includes any “foreign or domestic government.” 11 U.S.C. § 101(27). In *Krystal Energy*, we held squarely that the definition of “governmental unit” includes tribes and that section 106(a) of the Bankruptcy Code unequivocally abrogates tribal sovereign immunity. 357 F.3d at 1057–58. *Krystal Energy* controls here. Because Congress abrogated tribal sovereign immunity with respect to the automatic stay provision, the Tribe cannot assert sovereign immunity to avoid sanctions for violation of the automatic stay. We need not and do not decide whether the Tribe waived its sovereign immunity by filing a proof of claim in this instance. Affirmed.

Plaintiffs James Acres and Acres Bonusing, Inc. entered into a contract with the Blue Lake Casino & Hotel—a tribally owned entity of the Blue Lake Rancheria (“Blue Lake”), a federally recognized tribe—to provide a gaming platform for Blue Lake's casino. The deal allegedly went south and the Blue Lake Casino & Hotel brought suit against the plaintiffs in tribal court. The plaintiffs allege that the prosecution of the tribal suit and related actions gave rise to claims for misuse of process, breach of fiduciary duty, fraud, and racketeering activity. Of the seventeen defendants originally named in plaintiffs' complaint, all but two have been dismissed with prejudice. The final two defendants, Arla
Ramsey and Thomas Frank, now move to dismiss the First Amended Complaint for failure to state a claim and several different immunities. It is not plausible that the alleged acts of these defendants (such as paying the tribal court judge who also was an attorney for Blue Lake for services rendered or verifying discovery responses) constitute bribery or state any of the four claims asserted. And both defendants are shielded by personal immunity defenses: Ramsey is entitled to qualified immunity and discretionary act immunity, and Frank is entitled to qualified immunity and the protection of the litigation privilege under California law. As a result, all claims against both defendants are dismissed. Plaintiffs assert that tribal officials acting under color of tribal law are not entitled to the protection of qualified immunity. However, “Tribal officials, like federal and state officials, can invoke personal immunity defenses.” Ninth Circuit Op., 17 F.4th at 915; cf. State Court Case, 72 Cal. App. 5th at 431 (“Although tribal officials sued in their individual capacities cannot seek protection under the tribe's sovereign immunity, they may nonetheless be immune from suit under the distinct defense of official (or personal) immunity.”). The Supreme Court has made clear that personal immunity defenses may protect tribal governmental officials. See Lewis v. Clarke, 137 S. Ct. 1285, 1292 n.2 (2017) (acknowledging tribal defendant's personal immunity defense but finding that the “defense [was] not properly before [the Court]” given the procedural posture of the case). Many courts have applied qualified immunity to tribal officials in Section 1983 cases. See, e.g., Maxwell v. Cnty. of San Diego, 714 F. App'x 641, 644 (9th Cir. 2017) (affirming grant of summary judgment to tribal paramedics based on qualified immunity); Bressi v. Ford, 575 F.3d 891, 899 (9th Cir. 2009) (affirming grant of summary judgment to tribal police officers based on qualified immunity). Both caselaw and policy instruct that tribal officials may be entitled to assert a qualified immunity defense. Ramsey is entitled to qualified immunity for her discretionary payments of Marston's legal and judicial bills on behalf of Blue Lake. Frank is also entitled to qualified immunity for his discretionary actions. Although there is sparse precedent regarding tribal officials, courts have considered questions of immunity for government employees under state and federal common law for decades. As a result, the Court guided by the general principles regarding immunity for government employees undertaking discretionary acts set forth under the state and federal common law discussed below. Because all of the allegations concerning Frank involve his work in the Tribal Court Case, they fall within the protection of the litigation privilege. Silberg, 50 Cal. 3d at 212. Plaintiffs allege that Frank: verified written discovery and executed supporting declarations in Tribal Court Case; was copied on a demand letter sent to ABI; and “arranged to bring Blue Tribal Court Case before the tribal court.” These prelitigation and litigation activities are squarely encompassed by the litigation privilege. I find that both defendants are shielded by personal immunity defenses: Ramsey is entitled to qualified immunity and discretionary act immunity, and Frank is entitled to qualified immunity and the protection of the litigation privilege under California law. As a result, all claims against both defendants are dismissed without leave to amend.

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. 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. (Id. ¶ 2). Defendants are alleged to have committed a pattern of racketeering activities under § 1961(1), including trafficking in contraband cigarettes (18 U.S.C. §§ 2341–2346), money laundering (18 U.S.C. § 1956), engaging in monetary transactions in property derived from specified unlawful activity (18 U.S.C. § 1957), and distributing or possessing a controlled substance (21 U.S.C. § 841). The Court permitted Plaintiff’s investment of racketeering income claim under § 1962(a) to move forward. Cayuga Nation v. Parker (“Cayuga Nation I”), No. 22-cv-128, 2022 WL 3347327, at *12, 2022 U.S. Dist. LEXIS 144120, at *35 (N.D.N.Y. Aug. 12, 2022). All Defendants have answered the Complaint. (Dkt. Nos. 57, 60, 61). Parker, Weber, and Hernandez (the “Parker Defendants”), and Meyer, Justice for Native First People, LLC, and C.B. Brooks LLC (the “Meyer Defendants”), have filed counterclaims against Cayuga Nation alleging: breach of sublease; breach of commercial lease; specific performance; trespass; tortious interference with contract; conversion; trespass to chattels; and violation of the Computer Fraud and Abuse Act, 18 U.S.C. § 1030. In addition, the Parker Defendants and Meyer Defendants have filed Third-Party Complaints against third-party defendant Clint Halftown, alleging: tortious interference with contract; conversion; trespass to chattels; and violation of the Computer Fraud and Abuse Act. As a sovereign nation, the Cayuga Nation is free to conduct “certain economic activity on [its] own reservations free from interference by the State, including with regard to the application of state tax obligations.” One of these economic activities is the manufacture and sale of “Cayuga brand” and “other ‘native brand’ ” cigarettes on the reservation. The Cayuga Nation “is engaged in several business enterprises, including owning and operating convenience stores called Lakeside Trading on the Nation’s land.” Lakeside Trading stores “sell tobacco related products, such as unstamped cigarettes and marijuana.” “Shortly after seizing certain personal property, Halftown, using the Cayuga Nation as a cover, opened a new Lakeside Trading convenience store at the East Bayard Property and began selling the Pipekeepers’ inventory.” The Cayuga Nation moves to dismiss the Parker and Meyer Defendants’ counterclaims on the ground that they are barred by the doctrine of sovereign immunity. Defendants respond that the Cayuga Nation waived its immunity when it initiated the present action and that the counterclaims are permissible under the “immovable property” and “recoupment” exceptions to sovereign immunity. “As ’domestic dependent nations,’ federally recognized tribes possess ‘the common-law immunity from suit traditionally enjoyed by sovereign powers.’ ” Cayuga Indian Nation of New York v. Seneca Cnty., New York, 978 F.3d 829, 835 (2d Cir. 2020) (“Cayuga III”) (quoting Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 788 (2014)). The Meyer Defendants argue that the “immovable property exception” to sovereign immunity applies. “Generally speaking, [the immovable property] exception refers to a common law doctrine that curtails sovereign immunity in legal actions contesting a sovereign’s rights or interests in real property located within another sovereign’s territory.” Cayuga III, 978 F.3d at 834. The Supreme Court has yet to determine whether the immovable
property exception applies to tribal sovereign immunity. See Upper Skagit Indian Tribe v. Lundgren, 138 S. Ct. 1649, 1654 (2018). Further, even if applicable, the parties have not addressed how the immovable property exception would apply where, as here, it appears that 126 East Bayard Street is located within the bounds of the Cayuga Nation reservation. See Phillips, 981 F.3d at 170 (finding that “[e]ven if the exception applied to tribal sovereign immunity generally, it would not apply here, where it is undisputed that the Nation did not purchase the 19.6 Acre Parcel in ‘the character of a private individual’ buying lands in another sovereign’s territory”). Finally, Defendants argue that their counterclaims fall within the recoupment exception to sovereign immunity, arguing that the counterclaims “arise out the same transaction or occurrence and can be limited to a set-off against the Cayuga Nation’s claimed RICO damages,” and are therefore permissible claims for recoupment for which sovereign immunity has been waived. The Cayuga Nation replies that because the counterclaims do not rise from the same transaction or occurrence as its RICO claim and because Defendants seek affirmative relief, “Defendants’ attempt to recast them as recoupment claims in an effort to get around the Nation’s sovereign immunity” fails. The Court agrees in part. The Second Circuit has “construed the transaction or occurrence standard liberally, generally not requiring an absolute identity of factual backgrounds ... but only a logical relationship between them. “The Defendants’ counterclaims arise from the same time period as plaintiff’s claims: their allegations revolve around the Cayuga Nation’s enforcement action against the alleged racketeering enterprise at 126 Bayard Street. The Defendants challenge, inter alia: “the forcible entry onto the real property, forcible eviction of the sub-tenant (Dustin Parker) and forcible ouster of the leaseholder (Meyer Defendants).” At this stage of the proceedings, absent further briefing regarding damages recoverable by Cayuga Nation under § 1962(a), the Court cannot find, as a matter of law, that the trespass to chattels and conversion claims fail to state valid claims for recoupment. The Parker Defendants argue that their trespass to chattels claim concerns the Cayuga Nation’s alleged possession of their computers and accessing of “the computers to obtain key personal and financial data against the Parker Defendants.” While a “claim for trespass to chattels overlaps with a claim for conversion,” that does not appear to be a basis for dismissal at this stage. Lavazza Premium Coffees Corp. v. Prime Line Distribs. Inc., 575 F. Supp. 3d 445, 475 (S.D.N.Y. 2021) (explaining that there is a cause of action for trespass when a defendant “merely interfered with plaintiff’s property” and a cause of action for conversion when the plaintiff’s “dominion, rights, or possession” is the basis for the action) (citation omitted). This Court has not found any decisions dismissing claims for trespass to chattels as duplicative of claims for conversion at the motion to dismiss stage. The Court has, by contrast, found decisions permitting both types of claims to proceed. See, e.g., DeAngelis v. Corzine, 17 F. Supp. 3d 270, 283 (S.D.N.Y. 2014) Accordingly, the Cayuga Nation’s motion to dismiss for failure to state a trespass to chattels or conversion claim is denied. Clint Halftown moves to dismiss the Third-Party Complaints on the ground that, as a governmental official, all claims against him are barred by sovereign immunity. (Defendants oppose dismissal, arguing that Halftown “cannot seek shelter within tribal immunity” where, as here, he acted “outside the scope of his delegated authority.” A litigant “cannot circumvent tribal immunity by merely naming officers or employees of the Tribe when the complaint concerns actions taken in defendants’ official or representative capacities and the complaint does not allege they
acted outside the scope of their authority.” *Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir. 2004); *Sun v. Mashantucket Pequot Gaming Enter.*, 309 F.R.D. 157, 162 (D. Conn. 2015) (“Tribal sovereign immunity also ‘extends to all tribal employees acting within their representative capacity and within the scope of their official authority.’” (quoting *Bassett v. Mashantucket Pequot Museum & Research Ctr. Inc.*, 221 F. Supp. 2d 271, 278 (D. Conn. 2002)). Here, Defendants offer no allegations that would allow a plausible inference that Halftown was acting in his individual capacity with respect to the eviction of Defendants from 126 East Bayard Street and seizure of property. Therefore it is ordered that Plaintiff’s motion to dismiss the counterclaims is denied as to Defendants’ claims of conversion and trespass to chattels, to the extent their claims seek recoupment, and is otherwise granted in its entirety and all counterclaims, except the claims of conversion and trespass to chattels to the extent they seek recoupment, are dismissed.


The plaintiff appeals from a Superior Court judge's order dismissing his amended complaint. The central issue in this case is whether tribal sovereign immunity precludes the plaintiff from bringing his claims against the defendants in the Superior Court. Concluding that the defendants did not waive their sovereign immunity, the “immovable property doctrine” does not apply, and the plaintiff has no private right of action to enforce the State conservation regulations at issue here, the Court affirms the dismissal of the complaint. The defendants, Mashpee Wampanoag Indian Tribal Council, Inc., and Mashpee Wampanoag Tribe, operated a commercial shellfishing business off the shore of Cape Cod in Popponesset Bay. Their “aquaculture” was authorized by a shellfish propagation license pursuant to G. L. c. 130, § 57. The defendants’ fishing racks and cages regularly were located on the private tidelands of nearby Gooseberry Island, which is owned by the plaintiff. The defendants also left piles of shells, trash, and other debris on Gooseberry Island and its private tidelands. The plaintiff filed an action in the Superior Court alleging trespass, private nuisance, and public nuisance, and requesting a declaratory judgment defining the parties’ rights related to the defendant's use of the shellfish propagation license on the private tidelands. A Superior Court judge dismissed the complaint with prejudice, on the ground that the plaintiff's claims were barred by tribal sovereign immunity. We disagree with the plaintiff's argument that the defendants waived sovereign immunity by applying for the shellfish propagation license and accepting the grant of rights to use Commonwealth lands and waters because “a waiver of sovereign immunity cannot be implied but must be unequivocally expressed” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Nor are we persuaded by the contention that the tribe implicitly waived sovereign immunity by participating in previous lawsuits with the plaintiff and other parties. The plaintiff also contends that the defendants waived sovereign immunity by “hold[ing] property in the territory of another sovereign.” Historically, under the immovable property exception, courts have treated land acquired by a sovereign State outside its territory as privately owned in the context of suits over various real property rights. *See Georgia v. Chattanooga*, 264 U.S. 472, 479-480 (1924) (sovereign immunity not extended to State that acquired and held land within borders of another State in suit involving property rights and eminent domain). However, the dispute in this case did not pertain to rights stemming from an ownership or
other interest in real property. Instead, the plaintiff sought relief regarding the defendants’ use of the property within the area covered by the shellfish propagation license. We thus are not persuaded by the plaintiff’s argument that we should extend the immovable property exception to the defendants’ tribal sovereign immunity, even if we could do so. Moreover, the Supreme Court has declined to create a rule broadly extending the immovable property exception to tribal immunity. See Upper Skagit Indian Tribe v. Lundgren, 138 S. Ct. 1649, 1654 (2018) (in context of expanding immovable property exception, determination of limits on tribal sovereign immunity is “a grave question” on which “restraint is the best use of discretion”). We agree with the defendants that the issue is not ours to decide in the first instance but must be left to Congress. See Building Inspector & Zoning Officer of Aquinnah, 443 Mass. at 12. Even if the defendants are subject to the regulatory authority of the State regarding its natural resources, the plaintiff cites no legal authority for the proposition that a private citizen is permitted to file a civil lawsuit to enforce compliance. See Shepard v. Attorney Gen., 409 Mass. 398, 400 (1991) (“[T]he rights asserted by the [plaintiff] are not private but are in fact lodged in the Commonwealth as it may proceed to enforce its laws.” Affirmed.


Oil and gas company brought action against tribal mineral limited liability company (LLC) and oil and gas well operator, seeking to quiet title and to invalidate LLC’s interests in oil and gas leases operated within Indian reservation. The District Court of the Seventeenth Judicial District, County of Valley, Yvonne G. Laird, J., granted motion to dismiss for lack of jurisdiction, failure to join necessary and indispensable parties, and failure to state a claim on which relief could be granted after determining that LLC had sovereign immunity, and oil and gas company appealed. The Supreme Court, Baker, J., held that LLC was not immune from suit as an arm of the tribe. The District Court found A&S Mineral Development Company, LLC to be an arm of the Assiniboine and Sioux Tribes entitled to sovereign immunity. Lustre Oil argues in the alternative: (1) that the District Court “failed to utilize well-established law from the Tenth Circuit” when it found that A&S could be an arm of the Tribes despite its incorporation under Delaware law; (2) that the District Court improperly applied the Ninth Circuit’s balancing test to determine that A&S was an arm of the Tribes; and (3) that the District Court erred when it found that the Tribes did not waive A&S’s sovereign immunity. We decline to adopt a firm rule that would automatically bar an entity incorporated under state law from claiming tribal sovereign immunity, but we agree with Lustre Oil that the District Court did not properly weigh the relevant jurisdictional factors when it concluded that A&S was an arm of the Assiniboine and Sioux Tribes. On March 9, 2009, through their Tribal Executive Board, the Tribes authorized the formation of the A&S Mineral Development Company, LLC (“A&S”), incorporating it under the laws of Delaware. The Tribes formed A&S to develop oil and gas resources on the Tribes’ behalf. One such endeavor by A&S was to act as a holding company for the Tribes’ interest in the Fort Peck Energy Company, LLC. Anadarko Minerals, Inc., a private company, operated oil and gas well leases on privately owned land within the exterior boundaries of the Reservation. In 2018, after spilling approximately 600 barrels of oil and 90,000 barrels of produced water within the Reservation, Anadarko assigned those oil and gas leases to the Tribes as part
of a settlement agreement with the Tribes and the United States Environmental Protection Agency. The Tribal Executive Board revived A&S in 2020 to develop the leases the Tribes acquired from this settlement agreement. Lustre Oil filed an action against A&S seeking to quiet title and to invalidate A&S’s interests in forty-one of the fifty-seven oil and gas leases A&S operates within the Reservation. Lustre Oil alleged that it obtained valid interests to those leases from a third-party lease broker after Anadarko let the leases expire prior to transferring the lease interests to A&S. Lustre Oil urges this Court to follow the Tenth Circuit's decision in Somerlott v. Cherokee Nation Distributors Inc., 686 F.3d 1144 (10th Cir. 2012), and categorically bar an entity from claiming tribal sovereign immunity if incorporated under state law. However, state incorporation alone does not abrogate an entity's immunity. In this case, the Tribes’ choice to incorporate A&S under Delaware law—thereby subjecting it to state laws allowing limited liability companies to sue and be sued—to coupled with the Tribes’ stated intent to keep A&S a separate and distinct entity for liability purposes, including for the management of the leases at issue, convines us on de novo review that the District Court erred in its legal conclusions when it weighed and balanced the factors and determined that A&S is immune from suit in this case as an arm of the Tribe. We reverse and remand the case for further proceedings.

K. Sovereignty, Tribal Inherent


South Dakota resident Rudy Stanko appeals the district court's 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.


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.


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, devastating 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.


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. 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. 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 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 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. 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). 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.) 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.

96. *Mille Lacs Band of Ojibwe v. County of Mille Lacs, Minnesota, 2023 WL 146834, Case No. 17-cv-05155(SRN/LIB) (D. Minnesota, January 10, 2023).*

The Mille Lacs Band of Ojibwe, a federally recognized Indian tribe, and its law-enforcement officials brought action under the Declaratory Judgment Act for declaratory and injunctive relief against county, county attorney, and county sheriff, alleging that county's policies purporting to limit tribe's law-enforcement authority in county violated federal law. Tribe and its officials moved for summary judgment, and county attorney and sheriff moved to dismiss claims against them in their individual capacity. The District Court, Susan Richard Nelson, J., held that the tribe's federally delegated law-enforcement authority applied within tribe's Indian country, which consisted of all lands within the boundaries of the Mille Lacs Indian Reservation, as established by an 1855 treaty between the Minnesota Chippewa Tribe and the United States. With respect to non-Indian suspects, except as otherwise authorized by federal law, tribe's inherent sovereign law-enforcement authority included the authority to temporarily detain and investigate a suspect for a reasonable period of time until the suspect could be turned over to a jurisdiction with prosecutorial authority, but did not include the authority to arrest the suspect, and was also subject to the provisions of the Indian Civil Rights Act. This matter is before the Court on the Plaintiffs' Motion for Summary Judgment Awarding Declaratory and Injunctive Relief and Defendants Joseph Walsh and Donald Lorge's Motion for Summary Judgment. The Court grants in part and denies in part Plaintiffs' motion, and grants in part, denies in part, and denies as moot in part Defendants Walsh and Lorge's Motion. As to the geographic scope of the Band's federally delegated law enforcement authority, the Deputation Agreement between the Band and the federal government makes clear that Band officers who are deputized as SLECs possess the authority “to enforce federal laws in Indian country,” and are “authorized to assist the BIA in its duties to provide law enforcement services and to make lawful arrests in Indian country within the jurisdiction of the Tribe or as described in section 5.” Turning to the geographic scope of the Band's inherent law enforcement authority, the Band argues that such authority encompasses the entire Reservation, and Cooley’s recognition of tribal law enforcement authority is not specifically limited to “public rights-of-way within a reservation patrolled by tribal police.” The Court recognizes that in *Cooley*, 141 S. Ct. at 1642–45, the Supreme Court held that a tribal police officer has the inherent authority, when the tribe's health or welfare is threatened, “to detain temporarily and to search non-Indians traveling on public rights-of-way running through a reservation for potential violations of state or federal law.” Pursuant to Supreme Court and other judicial authority, the Band asserts that it maintains inherent law enforcement authority to investigate violations of tribal, state, and federal law within the Reservation. However, with respect to non-Indians, it limits such authority to temporarily detaining and investigating a suspect for a reasonable time prior to conveying the suspect to the appropriate prosecutorial authority. The Band appears to assert that its general authority over Indians may include, among other things: (1) carrying and using a gun; (2)
patrolling roads within the Reservation; (3) making traffic and investigative stops; (4) taking statements; (5) conducting searches and gathering and retaining evidence; and (6) detaining, investigating, and arresting suspects. The Court finds that the Band is entitled to declaratory relief as follows: (1) the Band's inherent and federally delegated law enforcement authority extends to all lands within the Mille Lacs Reservation; (2) such authority includes the authority to investigate violations of federal and state criminal law, consistent with Cooley, 141 S. Ct. at 1643–45, Terry, 400 F.3d at 579–80, and (3) with respect to non-Indians, in addition to the authority to detain and turn over violators to jurisdictions with prosecutorial authority, the Band has the authority to investigate violations of federal and state criminal law. Defendants’ actions were unlawful. Among other things, the geographic scope of the Opinion and Protocol improperly limited the Band's inherent law enforcement authority to trust lands, having defined “Indian country” as such, (Opinion at 14), when Indian country is comprised of all land within the Reservation. 18 U.S.C. § 1151; Cabazon Band, 480 U.S. at 208 n.5, 107 S.Ct. 1083. This Court has ruled that the Reservation's boundaries remain as they were under Article 2 of the Treaty of 1855. Defendants also acted unlawfully in prohibiting band officers from investigating violations of state law, even on trust lands. To the extent the temporary cooperative agreement currently in place limits the geographic scope of the Band's inherent law enforcement authority to only trust lands, it is also unlawful. Further, to the extent the temporary cooperative agreement limits the Band's inherent law enforcement authority inconsistent with this ruling, such limitations are also unlawful. Accordingly, the Court grants in part, and denies in part Plaintiffs’ Motion for Summary Judgment as it relates to declaratory relief.

L. Tax

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.

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.

The Ute Mountain Ute Tribe and the Weeminuche Construction Authority (WCA), a federal contractor owned by the Ute Mountain Ute Tribe, sought review of a determination from the Department of Revenue, which assessed Arizona's transaction privilege tax against taxpayer for earnings from three construction projects on Navajo and Hopi reservations. The Arizona Tax Court, No. TX2021-000365, Danielle Viola, J., granted Department's motion to dismiss for failure to state a claim. Ute Mountain Ute tribe and taxpayer appealed. The Court of Appeals, Campbell, J., held that: [1] federal law did not preempt Department's assessment of Arizona's transaction privilege tax; [2] proceeds from construction projects performed on Native American reservations were not exempt from Arizona's transaction privilege tax; and [3] any reliance taxpayer had on Department's tax ruling was unreasonable, as to preclude its claim for equitable estoppel. Nearly 20 years after White Mountain Apache v. Bracker, in Blaze, the United States Supreme Court revisited the scope of state taxing authority over business conducted on tribal land and held that a state may impose taxes on the proceeds derived from a nontribal contractor's federal contract for construction work on a Native American reservation. 526 U.S. at 34. Distinguishing Bracker, the Supreme Court held that applying a balancing test is proper only when the proceeds at issue derive from a nontribal entity's direct transaction with the tribe or tribal members. Stated differently, the Supreme Court clarified that Bracker's balancing test is inapplicable when a state seeks to tax a transaction between the federal government and a nontribal contractor. Blaze expressly and unambiguously sets out a bright-line standard upholding state taxing authority over the proceeds derived from all federal contracts. The Appellants argue that Blaze is inapplicable here because the Bureau, in contracting with WCA, was not “acting in the interest of the federal government” but “as and for” the Navajo and Hopi tribes. As such, the Appellants assert that there is no meaningful distinction between these facts and those of a “direct contractor-to-tribe arrangement,” unquestionably governed by Bracker’s balancing test. While pronouncing the bright-line rule, the Supreme Court in Blaze acknowledged that tribes may choose “to advance their interests” under the Indian Self-Determination and Education Assistance Act by entering into a self-determination contract ‘to plan, conduct, and administer programs or portions thereof, including construction programs. Like Blaze, here, the Navajo and Hopi tribes did not enter into self-determination contracts to plan, conduct, and administer their own construction programs. Because the federal government retained contracting responsibility, the bright-line standard favoring taxation of federal contracts applies. Affirmed.

Members of Choctaw Nation filed action against Chairperson and members of the Oklahoma Tax Commission, in their official capacities, seeking declaratory and injunctive relief prohibiting defendants from assessing, levying, and collecting Oklahoma state taxes upon members' income, and seeking recovery of state incomes taxes paid under protest. Defendants moved to dismiss. The District Court, Eric F. Melgren, J., held that: [1] Tax Injunction Act (TIA) barred members' claim for injunctive relief; [2] assessment of interest and penalties on delinquent taxes were part of “tax” for purposes of TIA; [3] members did not have standing to seek injunctive relief regarding imposition of non-monetary penalties; [4] the TIA applied to claim for declaratory judgment that Choctaw Nation was Indian country, for purposes of preempting Oklahoma's state taxation; [5] the TIA applied to members' refund claim; and [6] the TIA deprived federal district court of jurisdiction over subject matter of members' suit. Plaintiffs, as enrolled members of the Choctaw Nation, seek declaratory and injunctive relief prohibiting the Defendants from assessing, levying, and collecting Oklahoma state taxes (including penalties and interest) upon their income. They rely primarily on the Supreme Court decision in McGirt v. Oklahoma and its progeny from the Oklahoma courts, under which much of eastern Oklahoma constitutes “Indian County” for the purposes of the federal Major Crimes Act. Based on this, they argue that their income should be exempt from taxation under the rule that, without Congressional authorization or a cession of jurisdiction, the State is generally without power to tax reservation lands or reservation Indians. Defendants argue that the federal Tax Injunction Act (“TIA”) deprives this Court of subject matter jurisdiction to grant any of the relief requested by Plaintiff, including with respect to interest and penalties. Plaintiffs’ request for injunctive relief barring the OTC from assessing state taxes on income earned by Plaintiffs within the Choctaw reservation, as it is now recognized for the purposes of federal criminal law, is exactly the type of relief the TIA forbids this Court from awarding. “[A]n injunction is clearly a form of equitable relief barred by the TIA.” The Court considers Plaintiffs request for declaratory relief to fall within the purview of the TIA as well. Dismissed.

M. Trust Breach & Claims

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.

102. 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. 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. 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. 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.


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. 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. 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.


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. Plaintiffs’ motion is denied, and the government's cross-motion is granted in part and denied in part. Plaintiffs assert that mineral 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 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 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 ... protect 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 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.” The Court 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. 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. 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 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].” 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. 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).


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. 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. Here 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. 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 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. 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, 513 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.


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
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 fully 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 relocatees,” 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 “Unreasonable 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 “compel 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.


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. 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.


Personal representative of estate of the minor child of former slaves of Native American tribe, and company that was formed for the vindication of the rights and interests of emancipated slaves, brought putative class action against the Secretary of the United States Department of the Interior and the Assistant Secretary for Indian Affairs at the Interior Department, in their official capacities, seeking an accounting relating to alleged breaches of fiduciary duties concerning land allotted to the minor children of former slaves of Native American tribes. The District Court granted defendants' motion to dismiss for lack of Article III standing. Section of 1908 act setting forth duties owed by Secretary of Interior to minor allottees of tribes did not impose duty on Secretary to provide minor allottees an accounting, and the act did not create a trust relationship between representatives of minor allottees and Secretary, and thus Secretary's failure to conduct an accounting did not give rise to injury that could support Article III standing.

In 1898, the United States enacted The Curtis Act, 30 Stat. 495, which allotted the land of the Five Civilized Tribes (i.e., the Seminole, Cherokee, Choctaw, Creek, and Chickasaw Tribes). On May 27, 1908, the United States enacted the law that is central to this case. Section 1 of the 1908 Act removed all restrictions on land allotted to certain members of the Tribes, including allottees enrolled “as freedmen.” The heart of Plaintiffs’ claim in this action lies with Section 6 of the 1908 Act, which provides in relevant part cited by Plaintiffs: That the persons and property of minor allottees of the Five Civilized Tribes shall, except as otherwise specifically provided by law, be subject to the jurisdiction of the probate courts of the State of Oklahoma. The Secretary of the Interior is hereby empowered, under rules and regulations to be prescribed by him, to appoint such local representatives within the State of Oklahoma who shall be citizens of that State or now domiciled therein as he may deem necessary to inquire into and investigate the conduct of guardians or curators having in charge the estate of such minors, and whenever such representative or representatives of the Secretary of the Interior shall be of [the] opinion that the estate of any minor is not being properly cared for by the guardian or curator, or that the same is in any manner being dissipated or wasted or being permitted to deteriorate in value by reason of negligence or carelessness or incompetency of the guardian or curator, said representative or representatives of the Secretary of the Interior shall have power and it shall be their duty to report said matter in full to the proper probate court and take the necessary steps to have such matter fully investigated, and go to the further extent of prosecuting any necessary remedy, either civil or criminal, or both, to preserve the property and protect the interests of said minor allottees; and it shall be the further duty of such representative or representatives to make full and complete reports to the Secretary of the Interior. Plaintiffs’ claim is premised on their argument that Section 6 imposed a specific fiduciary duty on the Secretary of the Interior to account for any royalties derived from leases on land allotted to minor Freedmen. On September 15, 2021, Defendants filed a Motion to Dismiss, arguing that, among other things, Plaintiffs lacked Article III standing. The Court agreed and dismissed the case. See Tanner-Brown, 2022 WL 2643556, at *1. On August 5, 2022, Plaintiffs filed their
Motion to Alter or Amend Judgment that is at issue here. According to Plaintiffs, the injury that gives rise to their standing in this case is not the Secretary's “alleged mismanagement of the trust,” but “the [Secretary's] failure to provide the requested accounting.” Here, the 1908 Act makes no reference to any “trust” or “beneficiary,” but instead refers to “guardians or curators” of the minors’ estates. Because Plaintiffs “cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated,” their theory of injury must fail. Jicarilla, 564 U.S. at 177, 131 S.Ct. 2313 (quoting Navajo II, 556 U.S. at 302, 129 S.Ct. 1547). Because the Court has issued a final judgment on Plaintiffs’ claims, Plaintiffs’ Motion for Leave to File Class Action Motion is also denied as moot.

Plaintiff brought an action against United States pursuant to the Federal Tort Claims Act (FTCA), alleging that employee of hospital operated by Indian Health Service (IHS) suffered a seizure while driving and struck plaintiff with his vehicle, that employee was negligent by driving despite his prior seizures, that employee's supervisor was negligent for not preventing employee from driving, and that physician, who provided telemedicine services to employee through contract executed between hospital and third party, was negligent for releasing employee to drive. United States moved to dismiss for lack of subject-matter jurisdiction. The United States District Court for the District of South Dakota, Veronica L. Duffy, United States Magistrate Judge, 2022 WL 1243883, recommended granting motion. The District Court, Jeffrey Viken, J., 2022 WL 612082, adopted report and recommendation and granted motion. Plaintiff appealed. The Court of Appeals, Brian C. Buescher, District Judge, sitting by designation, held that: [1] under South Dakota's going-and-coming rule, employee was not acting within scope of his employment when he suffered seizure while driving and struck plaintiff with his vehicle; [2] under South Dakota law, premises exception to going-and-coming rule did not apply; [3] discretionary-function exception to FTCA's waiver of sovereign immunity applied to plaintiff's claims that employee's supervisor should have ensured employee was not driving before being cleared by his doctors; and [4] physician was independent contractor rather than government employee. The FTCA's waiver of sovereign immunity does not extend to the torts of government contractors. See Knudsen v. United States, 254 F.3d 747, 750 (8th Cir. 2001); 28 U.S.C. § 2671. Distinguishing between a federal employee and a contractor requires analyzing “the extent to which the government has the power to supervise the individual's day-to-day operations.” Dr. Smith provided telemedicine services at Rosebud Health through a telemedicine contract executed between Rosebud Health and Avera. In 2019, Rosebud Health and Avera entered into a Distant Site Provider Credentialing and Privileging Agreement (Privileging Agreement), in which Rosebud Health agreed to rely on Avera's credentialing and privileging decisions for physicians providing telemedicine services under the telemedicine contract. The agreement also states that Avera furnishes telemedicine services as an independent contractor. In arguing that Dr. Smith is a federal employee, Two Eagle focuses on a provision in a funding agreement for a self-determination contract3 for solid-waste disposal executed between Rosebud Health and the Department of Health and Human Services. The provision states that a health care practitioner who has been granted clinical
privileges in a health facility operated by the Rosebud Sioux Tribe “shall be considered an employee of the Federal Government for the purposes of the [FTCA].” The provision highlighted by Two Eagle refers to physicians with privileges at a facility operated by the Rosebud Sioux Tribe. Rosebud Health is operated by the IHS, not the Rosebud Sioux Tribe. Therefore, nothing in the agreement shows that it intended to make physicians provided by Avera to Rosebud Health through the telemedicine contract federal employees rather than contractors. Affirmed.

Participant in the Conservation Reserve Program (CRP), an enrolled member of the Blackfeet tribe, brought action against the Government under the Tucker Act for breach of trust and fiduciary duties, and violation of its duties under the Administrative Procedure Act (APA), alleging the Bureau of Indian Affairs' (BIA) failed to help participant perform maintenance on Indian trust land pursuant to CRP contracts. Government filed motion to dismiss for lack of subject-matter jurisdiction. The Court of Federal Claims, Richard A. Hertling, J., held that: [1] court lacked jurisdiction over claim for violation of APA; [2] participant failed to plausibly allege that regulatory or statutory source existed to establish BIA's duty to fulfill terms of CRP contracts, as required for claim for breach of trust; [3] claim for violation of APA accrued when participant's CRP contracts were terminated; and [4] claim for breach of trust accrued when participant's CRP contracts were terminated. The plaintiff, Monti Pavatea Gilham, is an enrolled member of the Blackfeet Indian Tribe. The plaintiff leased Indian trust land on the Blackfeet Reservation in Montana. The plaintiff enrolled her leased trust land under two contracts in the Conservation Reserve Program (“CRP”), a program administered by the Farm Service Agency (“FSA”) within the United States Department of Agriculture (“USDA”). The CRP contracts were co-signed by the Bureau of Indian Affairs (“BIA”) in its capacity as trustee of the tribal land. In the CRP, participants like the plaintiff are paid to maintain their land according to mutually-agreed conservation plans. After placing her leased tribal land in the CRP, the plaintiff became a victim of severe physical domestic abuse. As a result of this abuse, the plaintiff alleges she was unable to perform the maintenance required by the CRP contracts. The plaintiff's CRP contracts were therefore terminated prematurely. After the termination of her CRP contracts, the plaintiff sought and received equitable relief from the USDA from certain early-termination penalties. She was absolved from having to repay CRP fees previously paid to her under the CRP contracts. The BIA did not assist the plaintiff either in performing the required maintenance under the CRP contracts or in obtaining equitable relief from the USDA. Plaintiff sued the United States both for the BIA's failure to help the plaintiff perform the maintenance required under the CRP contracts and for its failure to help her obtain equitable relief from the USDA. The plaintiff alleges that the defendant's failures to assist her violated the Administrative Procedure Act (“APA”). The plaintiff also alleges that the defendant's failure to help perform the required maintenance breached the trust and fiduciary duties owed to the plaintiff, as a member of an enrolled tribe, pursuant to the CRP contracts co-signed by the BIA. The plaintiff's APA claim must be dismissed because it is not based on a money-mandating statute. Recognizing the inability to rest a money-mandating claim on the APA, the plaintiff argues that under the “Trust Doctrine,”
damages may be presumed in this case because the plaintiff is an Indian. The trust doctrine affords the plaintiff no relief for two reasons. First, as the name implies, the trust doctrine does not apply to an APA claim because a claim for a breach of trust is itself a claim for money damages. See Gregory C. Sisk, “Yesterday and Today: Of Indians, Breach of Trust, Money, and Sovereign Immunity,” 39 Tulsa L. Rev. 313, 316–17 (2003). Even if the trust doctrine applied to an APA claim, the trust doctrine cited by the plaintiff only applies if a statute or regulation establishes the fiduciary responsibility on which the breach-of-trust claim is premised. United States v. Navajo Nation ("Navajo II"), 556 U.S. 287, 301, 129 S.Ct. 1547, 173 L.Ed.2d 429 (2009) (noting that trust principles are only relevant if a plaintiff identifies “rights-creating or duty-imposing statutory or regulatory prescriptions ... and if that prescription bears the hallmarks of a conventional fiduciary relationship”) (cleaned up). There is also no jurisdiction over the plaintiff's Indian trust claim because the plaintiff fails to invoke a statute or regulation as the source of the alleged trust responsibilities. Brown v. United States is instructive on the jurisdictional requirement to allege a statutory or regulatory basis for a breach-of-trust claim. 86 F.3d 1554 (Fed. Cir. 1996). In Brown, the Secretary, while not a signatory of the lease, had the authority under federal law to negotiate or dictate lease terms, or even direct that payment be made to the BIA. The Federal Circuit described this authority as so wide as to cause the Indian lessors to have been “[d]ispossessed of the [sic] all the conventional incidents of ownership touching the power to lease their land ....” Id. at 1562. Here, the plaintiff has not alleged that she was in any way “dispossessed” of her land by a comprehensive regulatory scheme, as the plaintiffs in Brown were when trying to engage in commercial leasing. Instead, the plaintiff chose to enroll her land in the CRP, a voluntary government program, and chose to forgo any non-conforming activity that she and her family may have otherwise engaged in on this land. Crucially, unlike in Brown, the plaintiff has not identified any regulatory or statutory source for any alleged duty. Specifically, the plaintiff has not identified a regulatory or statutory source for the BIA's alleged duty to fulfill the terms of the CRP contracts when the plaintiff was unable to do so, despite the alleged failure to fulfill this duty being the crux of her breach-of-trust claim. Even if a contract could create fiduciary duties enforceable under an Indian breach-of-trust claim, the plaintiff has failed to state a claim on which relief can be granted because on their face the CRP contracts do not create such duties. Plaintiff has not identified any contract provision as the source of the trust duties that she alleges were violated. The defendant's motion to dismiss is granted because the plaintiff has not invoked appropriate money-mandating substantive law to support jurisdiction under the Tucker Act. The Court of Federal Claims has no jurisdiction over the plaintiff's APA claim. The plaintiff's claim for breach of trust also must be dismissed because the plaintiff has not identified a statute or regulation as the source of the alleged fiduciary responsibilities.


The Seneca Nation brought an action against New York State officers and New York State Thruway Authority, seeking an injunction requiring defendants to obtain valid easement for portion of thruway with toll road situated on tribal land or, in the alternative, an order enjoining defendants from collecting tolls on subject portion of
The United States District Court for the Western District of New York, Lawrence J. Vilardo, J., 484 F.Supp.3d 65, rejecting report and recommendation of Hugh B. Scott, United States Magistrate Judge, 2018 WL 6682265, denied motion to dismiss. Defendants applied for interlocutory appeal. The Court of Appeals, Walker, Circuit Judge, held that: [1] collateral estoppel did not bar Nation's action; [2] action fell within Ex parte Young exception to Eleventh Amendment immunity; and [3] exception to Ex parte Young doctrine for actions that were functional equivalent of a quiet title action did not apply. Defendants argue that the lawsuit does not allege an ongoing violation of federal law but only that the 1954 grant of the easement violated federal law. We disagree. To be sure, the invalidity of the easement is critical to plaintiff's case, but this suit is concerned with the ongoing effect of the invalidity. The complaint alleges that the Nation is suffering and will continue to suffer irreparable harm because its property will continue to be invaded without authorization. It contends that Defendants’ continuing operation of the Thruway without a valid easement violates the federal treaties and laws establishing the Reservation and, in particular, the Canandaigua Treaty of 1794, which states that the land of the Seneca Nation is to be the property of the Seneca Nation which shall not be disturbed. Defendants also argue that the lawsuit falls within an exception to the Ex parte Young doctrine outlined by the Supreme Court in Idaho v. Coeur d'Alene Tribe of Idaho. We disagree. In Coeur d'Alene Tribe, a tribe sought to bring an Ex parte Young lawsuit to establish its entitlement to the exclusive use, occupancy, and right to quiet enjoyment of certain submerged lands that, while within the boundaries of the tribe's reservation, had been claimed and governed by Idaho for centuries. The tribe also sought declaratory relief that all Idaho laws and regulations were invalid as applied to that land. The Court concluded that the tribe's suit was “the functional equivalent of a quiet title action ... in that substantially all benefits of ownership and control would shift from the State to the Tribe,” and that the Eleventh Amendment bars such an action by a tribe against a state. It then held that “if the Tribe were to prevail, Idaho's sovereign interest in its lands and waters would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury.” The “particular and special circumstances” that led the Court to conclude that the tribe could not proceed in Coeur d'Alene Tribe are not present here. This case is not the functional equivalent of a quiet title action. Here, the Nation holds fee title to the land in question, and New York State's only interest is a possessory one granted by the permanent easement. There is a difference between possession of property and title to property, and a court may properly find under Ex parte Young that an official has no legal right to remain in possession of property, thus conveying all the incidents of ownership to the plaintiff, but without ‘formally divesting the State of its title. In addition, here the Nation does not contend that the State's laws and regulations do not apply to the land in question. The present action is thus even further removed from Coeur d'Alene Tribe, in which the tribe sought relief ... extinguishing state regulatory control over a vast reach of lands and waters long deemed by the State to be an integral part of its territory. Therefore, the quiet title exception to Ex parte Young outlined by the Court in Coeur d'Alene Tribe has no application here. Accordingly, the lawsuit falls under the Ex parte Young exception to the Eleventh Amendment. Thus, neither collateral estoppel nor the Eleventh Amendment bars the Nation from proceeding in this case. Affirmed.
Defendant Debra Anne Haaland (“Defendant” or “the United States”) moves to dismiss this matter. Defendant argues that the United States has not waived sovereign immunity, so the Court does not have subject matter jurisdiction, and that Plaintiff James Halverson, as personal representative for the fee estate of Jack Halverson, failed to join a necessary party. Plaintiff disagrees, contending that the Court has jurisdiction under the Mandamus Act. For the following reasons, the Court denies Defendant's motion. Jack Halverson was an enrolled member of the Crow Tribe. Jack's mother, Dalia, was an original allottee to trust land adjacent to Allotment 1809, located in Yellowstone County, Montana. Jack inherited his mother's land and purchased fractional interests in Allotment 1809. Eventually, Jack came to hold an 86.42% interest in Allotment 1809. The other interest holders in Allotment 1809 are the Crow Tribe, Estate of Michelle Walking Bear, and Estate of Penny Powers. In 2015, Jack filed with the Bureau of Indian Affairs (“BIA”) a Petition for Partition of Allotment 1809 pursuant to 25 U.S.C. § 378, which grants the BIA the authority to partition allotments and issue patents or deeds for the portions of the allotment set aside for the petitioner. In reviewing Jack's petition, the BIA required him to obtain a federally-approved surveyor's Certificate of Survey (“COS”), which generated the legal descriptions and boundaries for Jack's interest after partition, consistent with the BIA Title Records. The BIA denied Jack's petition multiple times on the grounds that Jack purchased his interest in Allotment 1809 from other trust holders, rather than acquiring them as an heir. However, a 1981 U.S. Solicitor's Directive actually allowed partition for allotments acquired by purchase, not just by heirs. Jack, and subsequently his estate after he died in 2019, did not receive the 1981 directive until 2021 when his estate appealed the partition denials to the Interior Board of Indian Appeals and received the BIA's administrative record. Shortly thereafter, the BIA reversed course and entered a Verified Settlement Agreement (“VSA”) granting partition. Under the VSA, the BIA was to deliver all documents needed to complete partition and conveyances of title to counsel for Jack's estate for review and approval by January 15, 2022. On or before January 17, 2022, the BIA was required to execute deeds to “convey title for the majority interest in Allotment 1809[A] to the Estate of Jack Halverson,” and, on or before January 20, 2022, complete all documents necessary to convey and/or distribute title from Jack's estate to his heir. On January 18, 2022, the BIA recorded trust deeds supposedly in furtherance of the VSA and grant of partition. Plaintiff alleges that the BIA did not provide the deeds to Plaintiff for approval prior to their recording and that errors exist in the deeds, including the legal description and the identity of the grantor. Effectively, Plaintiff argues, the deeds did not actually partition Plaintiff's property. Here, an actionable fiduciary duty exists for analogous reasons as found in White Mountain Apache. First, it is uncontroverted that the United States holds Plaintiff's land in trust for the benefit of Plaintiff, who is an Indian. (Doc. 18-1 at 6-17; Doc. 1-5 at 2). “[T]he law is ‘well established that the Government in its dealings with Indian tribal property acts in a fiduciary capacity.’” Lincoln v. Vigil, 508 U.S. 182 (1993) (quoting United States v. Cherokee Nation of Okla., 480 U.S. 700, 707 (1987)). Further, Defendant has the exclusive power to partition Plaintiff's land because of its status as trust land, further conferring onto Defendant “pervasive control” over both the resource and the specific disposition requested here. Marceau, 540 F.3d at 922 (citing Mitchell I and Mitchell II).
Defendant argues that the partition statute's discretionary language governs the mandamus analysis, preventing the Court from finding that the statute confers a nondiscretionary duty on Defendant. However, Defendant's analysis overlooks the fact that Defendant affirmatively exercised that discretion to grant partition, so the procedural posture that the plain language of the statute contemplates is not the procedural posture here. Defendant's contentions also ignore the unique layer added to the mandamus analysis by Plaintiff's status as an Indian and the land's status as held in trust. Considering both these facts, the Court finds Plaintiff alleged an actionable breach of trust claim under the Mandamus Act, which provides the Court with the requisite jurisdiction to hear Plaintiff's case. Ordered that Defendant Debra Anne Haaland's Motion to Dismiss is denied.

The Pueblo of Jemez, an Indian tribe, brought action against United States under Quiet Title Act (QTA) alleging that it had aboriginal title to lands comprising Valles Caldera National Preserve, which United States had purchased from private landowners. The United States District Court for the District of New Mexico, Robert C. Brack, Senior District Judge, 2013 WL 11325229, dismissed complaint, and tribe appealed. The Court of Appeals, 790 F.3d 1143, reversed and remanded. On remand bench trial was held. The District Court, James O. Browning, Jr., entered judgment in United States' favor, 430 F.Supp.3d 943, and, on reconsideration, ruled that tribe had lost title to subareas, 483 F.Supp.3d 1024. Tribe appealed. The Court of Appeals, Phillips, Circuit Judge, held that: [1] tribe did not lose its established aboriginal title to land by not using area to exclusion of other Indian groups; [2] tribe continued to hold aboriginal title to subarea; and district court did not abuse its discretion in denying tribe's motion for reconsideration. Affirmed in part, reversed in part, and remanded. After a twenty-one-day trial, the district court ruled that the Jemez Pueblo failed to establish ever having aboriginal title to the entire lands of the Valles Caldera. It concluded that the Jemez Pueblo had failed to show that it ever used the entire claimed land to the exclusion of other Indian groups. The Jemez Pueblo moved for reconsideration under Federal Rule of Civil Procedure 59(e). But rather than seek reconsideration of its complaint's QTA claim to the entire Valles Caldera, the Jemez Pueblo shrunk its QTA claim into claims of title to four discrete subareas within the Valles Caldera: (1) Banco Bonito, (2) the Paramount Shrine Lands, (3) Valle San Antonio, and (4) the Redondo Meadows. The district court declined to reconsider all but Banco Bonito, on grounds that the Jemez Pueblo hadn't earlier provided the government notice of these claims. Even so, being thorough, the court later considered and rejected those three claims on the merits. On appeal, the Jemez Pueblo has abandoned its claim to the entire Valles Caldera and contests the reconsideration ruling for just two of the subareas—Banco Bonito and the Paramount Shrine Lands. The Jemez Pueblo first argues that the district court abused its discretion in ruling that after 1650 the Jemez Pueblo lost its established aboriginal title to Banco Bonito by not using the area to the exclusion of other Indian groups. We agree that the district court's ruling was legal error and thus an abuse of discretion. Because the district court found (1) that the Jemez Pueblo established aboriginal title to Banco Bonito by 1650 and (2) that its aboriginal title hasn't been abandoned by the Jemez Pueblo or extinguished by the United
States, the Jemez Pueblo continues to hold aboriginal title to Banco Bonito. Jemez Pueblo also argues that the district court abused its discretion in denying its Rule 59(e) motion for reconsideration as to its claim to the Paramount Shrine Lands. This argument is meritless. We therefore reverse the district court on the Banco Bonito issue and remand with instructions to enter judgment consistent with this opinion.

The only issue to be determined in this phase of the proceedings is whether BNSF's admitted trespass over the Swinomish Reservation between September 2012 and May 2021 was willful, conscious, and knowing. By a preponderance of the evidence, the Court finds that BNSF and the Tribe continued to discuss the potential for amending the Easement Agreement to allow more cars and trains to cross the Reservation. At no point did the Tribe approve BNSF's unilateral decision to transport unit trains across the Reservation, agree to increase the train or car limitations, or waive its contractual right of approval. BNSF clearly wanted an agreement that would increase shipping volumes across the easement, but it knew that it did not have such an agreement at the time and was affirmatively seeking the Tribe's approval. In September 2015, this Court denied BNSF's motion to dismiss or stay on the ground that the Tribe's claims implicate BNSF's common carrier obligations and were subject to the primary jurisdiction of the STB. In 2017, the Court issued rulings regarding BNSF's preemption arguments, finding that state law claims would be preempted, but the Tribe's federal claims were not. An interlocutory appeal followed, and the Ninth Circuit affirmed in March 2020. It is undisputed that BNSF's intentional crossings of the Reservation exceeded the conditions and restrictions imposed by the Easement Agreement. It has, therefore, trespassed on Indian lands and is liable for the damages caused by its overburdening of the easement. Restatement (Second) of Torts § 163 comment b and § 164. If a defendant is a willful trespasser, the owner is entitled to recover from him the value of any profits made by the entry. Restatement (Second) of Torts § 929, comment c. (1979). The parties agree that the burden is on BNSF to establish that it acted in good faith and that its trespass, while intentional, was not conscious, willful, and knowing. 87 C.J.S. Trespass § 81. BNSF has taken the position that there were “mistakes, misunderstandings, questionable legal judgment and bad luck, but no bad faith.” Having reviewed the exhibits, heard the testimony of the witnesses, and considered the arguments of counsel, the Court disagrees. Thus, the Tribe is entitled to equitable remedies, including the recovery from BNSF of profits made by the unlawful entry. Restatement (Second) of Torts § 929, comment c.; U.S. v. Santa Fe Pac. R. Co., 314 U.S. 339 (1941). The extent to which equity supports disgorgement will be determined in the next phase of the trial.

N. Miscellaneous

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. The data underscores how racially polarized voting in Lyman County is. 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. Bone Shirt, 461 F.3d at 1021–22.

Plaintiffs also claim that the Commission was not responsive to the Tribe during the redistricting process. 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. 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 Plaintiff's’ position on it stated: “The Plaintiff's, for purposes of the injunctive relief, are willing to accept Defendants’ contention that the time now is too short to tinker with the election.” And Plaintiff’s’ 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 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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